

Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers

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This article revisits and expands on extant scholarly inquiries into the so-called ‘rights turn’ in climate litigation, with the objective of providing a more comprehensive appreciation of the role of human rights litigation in the context of the climate emergency. We rely on well-established categories used in the literature on climate litigation and on human rights and the environment to provide the first systematic analysis of rights-based litigation that aligns with climate objectives. Building on this basis, we consider the significant data and knowledge gaps concerning human rights litigation that does not align with climate objectives. We flag the need to better understand the role of rights-based litigation in the context of the complex societal changes associated with a just transition towards net zero emissions. The article contributes to scholarly inquiry into this new and increasingly prominent area at the intersection of human rights and environmental law, highlighting knowledge gaps that deserve further investigation, both from an academic and from a policy and practice perspective.

Keywords: *climate change, climate litigation, human rights, just transition*

1 INTRODUCTION

Litigants around the world increasingly file lawsuits asking state and corporate actors to reduce greenhouse gas emissions and redress the harms associated with the impacts of climate change.¹ The literature commonly describes this ‘climate litigation’ as

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1. This matter has been extensively investigated in the literature, see eg Lisa Vanhala and Chris Hilson, ‘Climate Change Litigation: Symposium Introduction’ (2013) 35 Law & Policy 141; Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation* (Cambridge University

lawsuits raising questions of law or fact regarding climate science, mitigation or adaptation, which are brought before international or domestic judicial, quasi-judicial and other investigatory bodies.²

In recent years, more and more climate lawsuits have invoked human rights and/or have been brought before human rights bodies. At the end of May 2021, the world's most established climate litigation databases – those compiled by the Sabin Centre for Climate Change Law at Columbia Law School and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics³ – listed 112 (out of 1841) cases that relied in whole or in part on human rights (see Annex). These rights-based lawsuits typically seek to hold to account public authorities and private actors for not taking adequate climate action. Therefore rights-based climate lawsuits strive to fill the accountability and enforcement gaps left by international and national climate change law, which presently provide little to no means to sanction inadequate climate action by state and corporate actors.⁴

The use of rights-based litigation to target inadequate environmental laws and/or the inadequate enforcement of environmental laws is not new. Human rights have long been invoked to protect environmental interests and provide remedies where environmental law does not.⁵ This practice has been amply documented in the literature,⁶ and has been thoroughly mapped by the UN Special Rapporteur on Human Rights and the Environment.⁷ As climate laws are adopted all over the world, it is

Press 2015); Joana Setzer and Lisa C Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* e580; Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16 *Annual Review of Law and Social Science* 21.

2. David Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64 *Florida Law Review* 15.

3. See <<http://climatecasechart.com/>> and <<http://www.climate-laws.org>> accessed 1 June 2021.

4. A Gupta and Harro van Asselt, 'Transparency in Multilateral Climate Politics: Furthering (or Distracting from) Accountability?' (2019) 13 *Regulation & Governance* 18; Aarti Gupta and others, 'Performing Accountability: Face-to-Face Account-Giving in Multilateral Climate Transparency Processes' (2021) 21 *Climate Policy* 616; Annalisa Savaresi, 'Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation' (*QIL QDI*, 31 January 2021) <<http://www.qil-qdi.org/plugging-the-enforcement-gap-the-rise-and-rise-of-human-rights-in-climate-change-litigation/>> accessed 10 February 2021.

5. See eg UNEP, 'Environmental Rule of Law: First Global Report' (2019) <<http://www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>> accessed 21 January 2021, chapter 4.

6. D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford Journal of International Law*; Alan Boyle and Michael R Anderson, *Human Rights Approaches to Environmental Protection* (Oxford University Press 1998); Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 *Fordham Environmental Law Review* 471; David R Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54 *Environment: Science and Policy for Sustainable Development* 3; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Donald K Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2012).

7. See the mapping studies prepared by the UN Special Rapporteur on Human Rights and the Environment, available at: <<http://www.srenvironment.org/report/mapping-report-2014>> accessed 15 June 2021.

therefore hardly a surprise that rights-based litigation has also started to target climate change concerns.

Scholars promptly noticed this new trend, describing it as a ‘rights-turn’ in climate litigation.⁸ The literature has however taken a largely piecemeal approach to the analysis of this litigation, focusing on the details of individual cases, rather than systematically mapping main trends and patterns in this burgeoning case law.⁹ There are, in other words, gaps in our knowledge of how rights-based litigation is used to pursue climate objectives, and how it compares with general trends in climate litigation, as well with general trends in rights-based litigation concerning other environmental interests.

There is furthermore a significant gap in our understanding of rights-based litigation that does not align with climate objectives, whereby human rights law and/or remedies are used to challenge measures and projects designed to deliver climate change adaptation and/or mitigation. This phenomenon – which other scholars¹⁰ and databases¹¹ have already identified, without analysing it systematically – is also hardly surprising. While fossil-fuel-based economies have undoubtedly created winners and losers, changing the status quo entails striking new equilibria between competing societal interests.¹² So, as measures to address the climate emergency are adopted and implemented all over the world, numerous groups will be negatively affected by these new laws and policies – for example, restricting land uses or enabling the development of dams and windfarms. In this connection, the notion of a ‘just transition’ has been invoked to highlight that the benefits of decarbonization should be shared, and that those who stand to lose should be supported.¹³ In this article we define as ‘just transition litigation’ cases that rely in whole or in part on

8. See eg: Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7 *Transnational Environmental Law* 37; Annalisa Savaresi and Juan Auz, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 *Climate Law* 244; Annalisa Savaresi, ‘Human Rights and the Impacts of Climate Change: Revisiting the Assumptions’ (2021) 11 *Oñati Socio-Legal Series* 231; Keina Yoshida and Joana Setzer, ‘The Trends and Challenges of Climate Change Litigation and Human Rights’ (2020) *European Human Rights Law Review* 140.

9. With the sole exception of César Rodríguez-Garavito, ‘Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action’ (Social Science Research Network 2021) SSRN Scholarly Paper ID 3860420 <<https://papers.ssrn.com/abstract=3860420>> accessed 15 August 2021. This paper, however, identifies a smaller set of rights-based cases and does not propose and apply a typology to analyse these cases.

10. See eg Ole W Pedersen, ‘The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation’ (2011) 80 *Nordic Journal of International Law* 403; Marjan Peeters and Sandra Nóbrega, ‘Climate Change-Related Aarhus Conflicts: How Successful Are Procedural Rights in EU Climate Law?’ (2014) 23 *RECIEL* 354; Leslie-Ann Duvic-Paoli, ‘Public Participation in the Context of Energy Activities: The Role of the Aarhus Convention Compliance Committee’ in Marc Ozawa and others (eds), *In Search of Good Energy Policy* (Cambridge University Press 2019).

11. See the Corporate Legal Accountability database curated by the Business & Human Rights Resource Centre: <<https://old.business-humanrights.org/en/case-studies-renewable-energy>> accessed 17 June 2021.

12. Ioan Fazey and others, ‘Transformation in a Changing Climate: A Research Agenda’ (2017) 9 *Climate and Development* 1, 10.

13. Adrien Thomas, ‘Framing the Just Transition: How International Trade Unions Engage with UN Climate Negotiations’ (2021) 70 *Global Environmental Change* 102347; Fergus Green and Ajay Gambhir, ‘Transitional Assistance Policies for Just, Equitable and Smooth Low-Carbon Transitions: Who, What and How?’ (2020) 20 *Climate Policy* 902.

human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net zero emissions. While we know that this litigation is happening, at present there are no comprehensive data collections of these cases.

This article therefore sets out to address two significant gaps in the literature. First, we provide a systematic scholarly analysis of rights-based litigation that aligns with climate objectives. In section 2, we analyse the 112 cases listed in the world's largest climate litigation databases on 31 May 2021 that rely in whole or in part on human rights (see Annex), with the aid of well-established categories developed by the literature on climate litigation. We consider who has brought these rights-based climate cases, against whom and where. The objective is to identify main trends in rights-based climate cases, and to understand how they compare with climate litigation that does not rely on human rights. In section 3 we analyse the same 112 rights-based climate cases, using standard categorizations deployed in the literature on human rights and the environment. The objective is to identify the human rights most invoked in rights-based climate cases, and to compare these with common trends in rights-based litigation concerning other environmental interests.¹⁴

Second, we rely on the limited evidence available to identify knowledge gaps concerning rights-based litigation that does not align with climate objectives. Specifically, section 4 relies on the analysis carried out in section 3 to identify knowns and unknowns about what we describe above as 'just transition litigation'. The objective is to understand rights-based opposition to action taken to address climate change and its consequences. The conclusion brings together the salient points resulting from these analyses and invites greater and deeper scholarly reflection over rights-based litigation, in order to develop a rights-based approach to climate decision-making.¹⁵

2 MAIN TRENDS IN RIGHTS-BASED LITIGATION THAT PURSUES CLIMATE OBJECTIVES

When compared with general climate litigation, rights-based climate cases display a few peculiarities.¹⁶

First, geographically, rights-based climate cases have been predominantly filed in Europe, followed by North America, Latin America, the Asia-Pacific and Africa. Roughly 13 per cent of rights-based complaints have been lodged before international and regional human rights bodies (Figure 1). This geographical distribution broadly aligns with the main trends detected in litigation involving environmental rights,

14. Alan E Boyle and Michael R Anderson, *Human Rights Approaches to Environmental Protection* (Oxford University Press 1998); Shelton (n 6); Anton and Shelton (n 6); Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (OHCHR 2015) A/HRC/28/61.

15. See eg the call for greater scholarly inquiry into rights-based approaches to climate decision-making in: Sébastien Jodoin, Annalisa Savaresi and Margaretha Wewerinke-Singh, 'Rights-Based Approaches to Climate Decision-Making' (2021) 52 *Current Opinion in Environmental Sustainability* 45.

16. Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot' (London School of Economics 2020); Joana Setzer and Catherine Higham, 'Global Trends in Climate Litigation: 2021 Snapshot' (London School of Economics and Political Science School of Economics 2021).

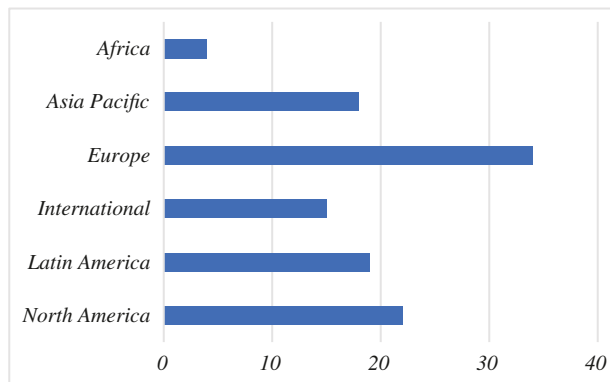


Figure 1 Geographical distribution of rights-based climate cases

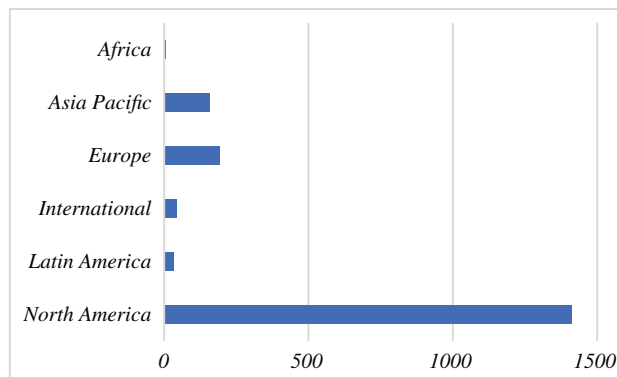


Figure 2 Geographical distribution of overall climate cases

which has been particularly prominent in Europe and Latin America.¹⁷ These regions are endowed with regional human rights bodies that have historically been sympathetic towards the use of human rights complaints to pursue environmental objectives.¹⁸ However, this geographical distribution significantly differs from trends observed in general climate litigation, where the vast majority of cases have been brought in the US, followed by Europe and the Asia Pacific, with a comparatively small number of cases filed in Africa, Latin America and before international bodies (Figure 2).¹⁹

Second, chronologically, rights-based climate litigation is a comparatively recent phenomenon. Human rights arguments started to feature more prominently in climate

17. See eg David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011).

18. Council of Europe, 'Manual on Human Rights and the Environment. Principles Emerging from the Case-Law of the European Court of Human Rights' (2012); InterAmerican Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System' (2010) 35 *American Indian Law Review*.

19. Setzer and Higham (n 16).

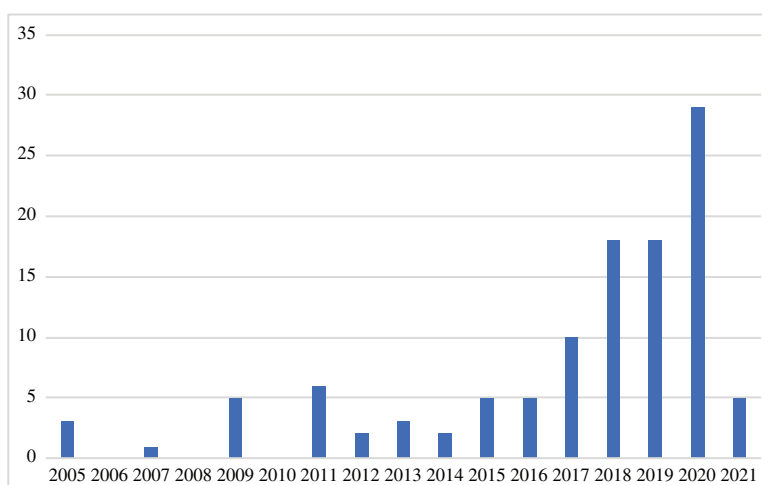


Figure 3 Chronological distribution of rights-based climate cases

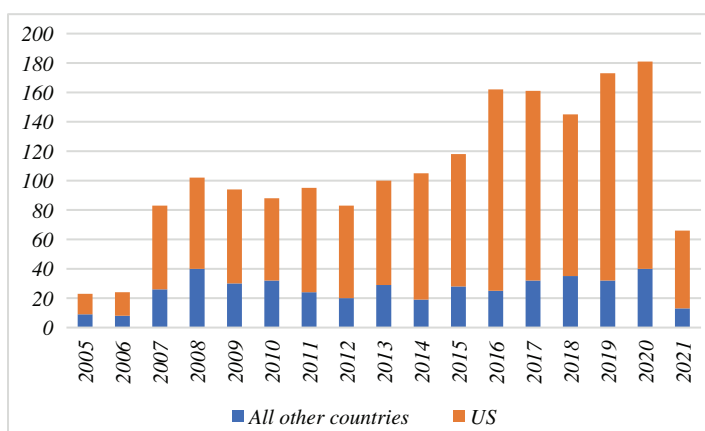


Figure 4 Chronological distribution of overall climate cases

litigation after the parties to the climate regime²⁰ and international organizations²¹ explicitly recognized the links between climate change and human rights law. Rights-based climate lawsuits were lodged with increasing frequency after the adoption of the Paris Agreement in 2015 and over two-thirds of these have been filed since 2018 (Figure 3). Conversely, general climate litigation has steadily risen since 2005 (Figure 4).

20. UNFCCC, 'Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) preamble, recital 7; Paris Agreement, preamble.

21. The Human Rights Council adopted 11 resolutions on human rights and climate change between 2008 and 2021. A summary of the activities of the Office of the UN High Commissioner for Human Rights is available at <<https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx>>.

As we noted, this rise in rights-based litigation arguably is a result of efforts to bridge the accountability and enforcement gaps affecting climate change law, both at the international and the national level. Climate law is still in its infancy and, even where it exists, it typically does not provide for measures to hold public and private actors to account for failing to meet climate targets. Climate litigants therefore increasingly rely on various sources of law, including human rights law and remedies, in order to bridge these accountability and enforcement gaps.

In this section, we analyse rights-based climate cases, distinguishing between the type of defendant and applicant; the type of climate action under dispute; the role of climate change and human rights in litigation; and the outcomes of the litigation.²²

2.1 The type of applicant and defendant

The literature typically distinguishes climate lawsuits on the basis of the type of *applicants* (individuals and/or groups, corporations, governments, NGOs) and *defendants* (state, public authorities and corporations).²³

In general climate litigation, the vast majority of cases have been brought against states and public authorities by corporations, followed by individuals, governments and NGOs, or both acting together.²⁴

Rights-based climate litigation only partially aligns with this general trend. The *applicants* in rights-based climate cases typically are individuals (48) and groups (51) or a combination of individuals and groups (4). Only very few cases have been brought by industry groups (3),²⁵ subnational governments (2)²⁶ or indigenous peoples' self-government bodies on behalf of their members (3).²⁷ In one instance courts have considered human rights grievances *proprio motu* (1).²⁸ This constellation of applicants in rights-based litigation is to be expected, given that individuals and groups are the main, if not the sole, rights-bearers under human rights law. It is therefore rather unusual for corporate actors to bring a complaint on the basis of human rights law. This stands in contrast with general climate litigation, which has frequently seen corporate actors initiating cases to challenge new climate law measures or the withdrawal of licences and permits.

22. Joana Setzer and Mook Bangalore, 'Regulating Climate Change in the Courts' in Alina Averchenkova, Sam Fankhauser and Michal Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar 2017); Setzer and Byrnes (n 16).

23. Markell and Ruhl (n 2); 'Global Climate Litigation Report: 2020 Status Review' (UNEP 2020) <<https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review>> accessed 26 August 2021.

24. An updated analysis of parties involved in climate litigation in the US is yet to be undertaken, but earlier studies confirm that also in the US the majority of cases have been brought against the federal or state governments. US applicants are largely NGOs, and, less frequently, business and subnational governments. See: Korey Silverman-Roati, 'US Climate Litigation in the Age of Trump: Full Term' (Sabin Centre for Climate Change Law 2021).

25. *Korean Biomass Plaintiffs v South Korea*; *Trans Mountain Pipeline ULC v Misavair*; and *D.G. Khan Cement Company v Government of Punjab*.

26. *Commune de Grande Synthe v France and City of Lyon v French Deposits and Consignments Fund*.

27. See eg *Lho'inggin et al. v Her Majesty the Queen*.

28. *Court on its own motion v State of Himachal Pradesh and others*.

The *defendants* in rights-based climate cases typically are states and public authorities (93 out of 112 cases). This is also to be expected, as in human rights law states are the primary entities with duties. This ratio of cases is not too different from that observed in general climate litigation.²⁹ In recent years, however, the growing recognition of corporate actors' human rights responsibilities at the international,³⁰ regional³¹ and national³² level has been associated with a rise in litigation concerning corporate human rights abuses.³³ Relatedly, there is a small but rapidly rising number of rights-based climate cases specifically targeting corporations, asking domestic courts and non-judicial bodies to interpret corporate due diligence obligations in light of human rights law and of the temperature goal enshrined in the Paris Agreement. At the time of writing, 16 such cases have been recorded, with 12 cases filed by NGOs and four by individuals. Despite being relatively rare, these cases have attracted considerable attention, due to their groundbreaking nature and potentially revolutionary impacts.³⁴

2.2 The types of climate action: adaptation, mitigation and/or compensation

The literature typically distinguishes lawsuits on the basis of the type of climate action pursued, that is, whether the applicants complain about measures concerning climate change mitigation, adaptation or both.³⁵

29. Outside the US, 54 out of 454 climate cases have been brought against corporations. See Setzer and Higham (n 16). In the US, 95 out of 873 climate cases filed between 1990 and 2016 were brought against corporations. See Sabrina McCormick et al., 'Strategies in and Outcomes of Climate Change Litigation in the United States' (2018) 8 *Nature Climate Change* 829.

30. See UNHRC Res 26/9 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) UN Doc A/HRC/RES/26/9, establishing the mandate of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

31. Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Text with EEA relevance) [2014] OJ L330/1. See also ongoing negotiations on due diligence legislation in the EU: European Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence and Annex' COM(2022) 71 final.

32. See the repository of legislation at: 'Mandatory Due Diligence' (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/>> accessed 22 July 2021.

33. See eg Jacques Hartmann and Annalisa Savaresi, 'Corporate Actors, Environmental Harms and the Draft UN Treaty on Business and Human Rights: History in the Making?' [2021] QIL QDI <<http://www.qil-qdi.org/corporate-actors-environmental-harms-and-the-draft-un-treaty-on-business-and-human-rights-history-in-the-making/>> accessed 15 August 2021.

34. See eg Annalisa Savaresi and Margaretha Wewerinke-Singh, 'Friends of the Earth (Netherlands) v Royal Dutch Shell: Human Rights and the Obligations of Corporations in the Hague District Court Decision' (31 May 2021) <<https://gnhre.org/2021/05/31/friends-of-the-earth-netherlands-v-royal-dutch-shell-human-rights-and-the-obligations-of-corporations-in-the-hague-district-court-decision/>> accessed 4 June 2021; Chiara Macchi and Josephine van Zeben, 'Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al. v Royal Dutch Shell' (2021) 30(3) *Review of European, Comparative & International Environmental Law* 409.

35. Markell and Ruhl (n 2); Setzer and Higham (n 16); 'Global Climate Litigation Report: 2020 Status Review' (n 23).

The vast majority of climate litigation concerns either mitigation or a combination of mitigation and adaptation. Only 180 cases concern adaptation alone.³⁶ Although adaptation is commonly viewed as a responsibility of state authorities,³⁷ 23 adaptation cases have been filed against corporations, with the aim of establishing corporate liability for past contributions to climate change.³⁸ These include a series of cases brought by states and municipalities in the US, seeking billions of dollars in damages for climate change adaptation infrastructure, such as sea walls to protect coastal properties.³⁹

Rights-based litigation broadly reflects these trends: 83 of 112 concern mitigation, 9 concern adaptation and 20 both mitigation and adaptation. Rights-based cases dealing with adaptation argue that human rights law imposes obligations on states to act to address climate impacts, and/or to refrain from activities that cause climate change. Instead, we have identified only one rights-based climate case dealing with adaptation and brought against a corporation.⁴⁰

Rights-based complaints concerning climate mitigation typically argue that human rights law imposes on states/corporations the obligations to reduce greenhouse gas emissions and to adopt measures to fight climate change. In the famous case *Urgenda Foundation v The State of the Netherlands*,⁴¹ for example, a group of individuals and NGOs relied in part on human rights law arguments to challenge the Dutch government's inadequate action on climate mitigation. Another 37 cases have since built on similar strategies,⁴² which van Berkel et al. describe as 'systemic mitigation' litigation.⁴³

At least in principle, litigants in rights-based cases can also seek compensation for harms associated with the impact of climate change. But while the use of human rights to seek redress for loss and damage has been the subject of much scholarly speculation,⁴⁴

36. Of these, 100 were filed in the US and 80 outside the US, the majority of which (61) were brought before the Australian courts, and many relate to the application of principles and standards relating to climate change adaptation in planning and environmental impact assessments.

37. Emily Williams, 'Attributing Blame? – Climate Accountability and the Uneven Landscape of Impacts, Emissions, and Finances' (2020) 161 *Climatic Change* 273.

38. Setzer and Higham (n 16).

39. Robin Kundis Craig, 'California Climate Change Lawsuits: Can the Courts Help with Sea-Level Rise, and Who Knew What When?' (2018) 3 *Asia-Pacific Journal of Ocean Law and Policy* 306; Albert C Lin and Michael Burger, 'State Public Nuisance Claims and Climate Change Adaptation' (2018) 36 *Pace Environmental Law Review* 49; 'Legal Interventions: How Cities Can Drive Climate Action' (C40 Knowledge Hub 2021).

40. *Animal Legal Defense Fund v Foster Poultry Farms* consists of a lawsuit filed in 2020 before the California Superior Court, alleging that a chicken slaughterhouse's use of groundwater was unconstitutional, particularly as California's drought is being exacerbated by the effects of climate change.

41. *Urgenda Foundation v The State of the Netherlands* C/09/456689 / HA ZA 13-1396 (2015) ('*Urgenda*').

42. Setzer and Higham (n 16).

43. See Lucy Maxwell et al., 'Standards for Adjudicating the Next Generation of *Urgenda*-Style Climate Cases' in this issue.

44. Richard SJ Tol and Roda Verheyen, 'State Responsibility and Compensation for Climate Change Damages – A Legal and Economic Assessment' (2004) 32 *Energy Policy* 1109; Roda Verheyen, *Climate Change Damage and International Law: Prevention, Duties and State Responsibility* (Martinus Nijhoff 2005); Tim Stephens, 'See You in Court? A Rising Tide of International Climate Litigation' (*The Interpreter*, 30 October 2019); Alan Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 *The International Journal of Marine*

rights-based cases specifically seeking redress for the impacts of climate change are yet to materialize in a significant way.⁴⁵

2.3 The role of climate change and of human rights: central or peripheral

The literature typically categorizes climate litigation according to the role that climate concerns play in applicants' pleadings or in courts' judgments.⁴⁶ Climate concerns are therefore 'central' whenever climate law or policy is at the core of the applicants' complaint. Climate concerns are considered 'peripheral' in litigation that only broadly deals with climate change policy and law, but largely focuses on other matters. Finally, the literature suggests that climate concerns are 'incidental' in cases that do not explicitly mention climate law or policy, but that nevertheless still have a clear impact on emissions. For example, climate change concerns are incidental in complaints concerning deforestation or the operation of coal power plants, which do not mention climate change explicitly. Climate litigation databases generally do not include cases where climate concerns are only incidental.

Analyses of global litigation trends reveal that climate concerns tend to be peripheral in most climate cases.⁴⁷ This trend contrasts with rights-based climate litigation, where climate concerns are central in most (76 out of 112) and peripheral in fewer cases (36 out of 112). For example, climate change is central in *Juliana v US*,⁴⁸ whereby 21 young people alleged that the government's 'affirmative actions' causing climate change had violated their constitutional rights to life, liberty and property. Conversely, climate change is peripheral in *PSB et al. v Brazil (on Amazon Fund)*,⁴⁹ whereby four political parties asked a Brazilian court to order the Ministry of the Environment to resume activities to protect the Amazon and avoid deforestation, which is the main source of greenhouse gas emissions in the country.

We used a similar approach to understand whether human rights concerns play a central or peripheral role in rights-based climate litigation. Human rights concerns are 'central' whenever human rights are at the core of the applicants' climate case. Human rights concerns are instead considered 'peripheral' in climate litigation that relies on human rights, alongside other sources of law. Applying these categories, we found that human rights played a central role in 75 out of 112 rights-based cases, where

and Coastal Law 458; Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019); Annalisa Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in Ivano Alogna, Christine Bakker and Jean-Pierre Gaucchi (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021).

45. In *Notre Affaire à Tous et al. v France*, n. 1904967, 1904968, 1904972, 1904976/4-1, Tribunal Administratif de Paris, 3 February 2021, the plaintiffs requested symbolic monetary compensation for the moral and ecological damages they allegedly suffered.

46. See eg Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?' (n 8); Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 483.

47. An assessment of climate litigation outside of the US suggests that climate change is peripheral to 242 cases and central to 211 cases, with the number of cases where climate change is a central issue increasing over time. An equivalent analysis of centrality for US litigation is yet to be undertaken. See Setzer and Higham (n 16).

48. *Juliana v United States*, Case No 6:15-cv-01517-TC, 2016 WL 6661146 (10 November 2016).

49. *PSB et al. v Brazil (on Amazon Fund)*, Federal Supreme Court of Brazil, 5 June 2020.

applicants relied solely on human rights law to formulate their grievances. For example, in *Sacchi et al. v Argentina et al.* a group of children asked an international human rights body – the UN Committee on the Rights of the Child – to investigate multiple alleged human rights violations perpetrated by states as a result of the actual and projected impacts of climate change.⁵⁰ Similarly, in the so-called *Carbon Majors inquiry*, a group of Filipino citizens and civil society organizations asked a national human rights body – the Philippines Human Rights Commission – to consider alleged human rights violations associated with corporate greenhouse gas emissions.⁵¹

Conversely, human rights played a peripheral role in 37 cases, where they were used to corroborate and support complaints largely based on administrative or private law obligations. In these cases, applicants typically argued that state or corporate actors' duties under administrative law or tort law must be interpreted in light of human rights obligations. Some of the most celebrated climate cases have relied on this approach. For example, in both *Urgenda*⁵² and *Milieudefensie et al. v Royal Dutch Shell plc*,⁵³ the applicants invoked human rights duties enshrined in international and EU law to define the scope of state and corporate duty of care and due diligence obligations under national tort law. In both cases, human rights considerations were peripheral in the applicants' arguments, but turned out to be decisive to the outcome of litigation, as the courts largely relied on human rights law to justify their decisions.⁵⁴

2.4 The outcomes of litigation

The literature on climate litigation identifies different ways to categorize the outcomes of lawsuits. A narrow approach considers the 'direct outcome' of a case, looking at the final decision of the adjudicating body, vis-à-vis the requests of the applicants to determine whether that outcome advances or undermines climate action.⁵⁵ A broader approach focuses on the 'overall impact' of the case, both inside and outside of, as well as before, during and after, the legal proceedings. Such impact might include (but is not limited to) changes to the behaviour of the parties, and/or to public opinion, as well as financial and reputational consequences for a variety of actors, and further litigation.⁵⁶

In this article we follow the narrow approach and only consider the direct outcomes of climate litigation. As such, we consider cases to be 'successful' where the adjudicating body found in favour of climate action. We consider cases to be

50. *Sacchi et al. v Argentina et al.*, filed under the *Convention of the Rights of the Child* (23 September 2019). See Larissa Parker et al., 'When the Kids Put Climate Change On Trial: Youth-Focused Rights-Based Climate Litigation around the World' in this issue.

51. *Petition Requesting Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Case No: CHR-NI-2016-0001 (Quezon City 2016).

52. *Urgenda* (n 41). See Lucy Maxwell et al., 'Standards for Adjudicating the Next Generation of *Urgenda*-Style Climate Cases' in this issue.

53. See eg *Milieudefensie et al. v Royal Dutch Shell plc*, Hague District Court, C/09/571932 / HA ZA 19-379, 2021.

54. Margaretha Wewerinke-Singh and Ashleigh McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation' (2021) 30 *Review of European, Comparative & International Environmental Law* 275; Savaresi and Wewerinke-Singh (n 34).

55. Setzer and Higham (n 16).

56. Setzer and Vanhala (n 1) 12.

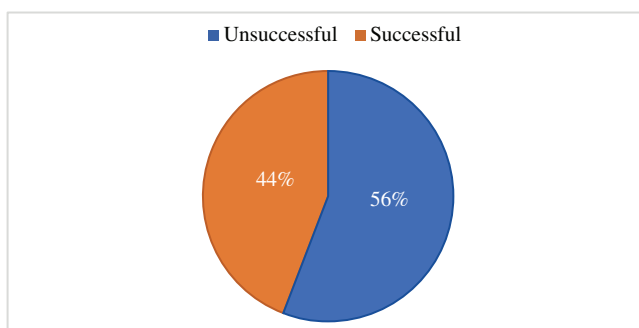


Figure 5 Outcome of human-rights-based climate litigation

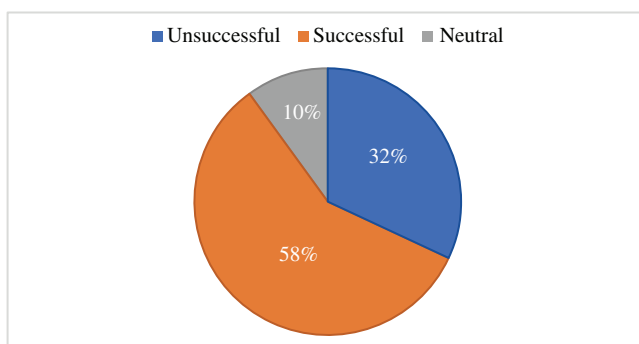


Figure 6 Outcome of climate litigation outside the US

‘unsuccessful’ where the judge ruled against climate action. Based on this definition, of 57 rights-based climate cases that have been decided to date, 25 were successful and 32 were unsuccessful (Figure 5).

Compared with overall trends in climate litigation outside the US, rights-based cases so far have been comparatively less successful than other climate litigation, where over half of the decided cases delivered outcomes that are supportive of climate change action (Figure 6).⁵⁷

However, not all ‘wins’ are due to successful human rights arguments. For example, in *Friends of the Irish Environment v the Government of Ireland* the Irish Supreme Court quashed the government’s climate change plan because it was deemed to be inadequate vis-à-vis national climate law, not because it was inconsistent with the protection of human rights.⁵⁸ Therefore, the success of climate cases cannot be

57. Setzer and Higham (n 16). The ‘neutral’ category in climate litigation outside of the US refers to cases that had no impact over climate action and cases that were dismissed as the order became unnecessary. For the US, McCormick et al. analysed the outcomes of 873 climate cases between 1990 and 2016. Their study suggests there were more outcomes that favoured anti-regulatory (309) compared to pro-regulatory positions (224), with a ratio of about 1.4 to 1. McCormick et al. (n 29).

58. *Friends of the Irish Environment v the Government of Ireland*, Supreme Court, Appeal No: 205/19, Judgment of 31 July 2020, 7.2–7.22.

unequivocally attributed to human rights arguments. Further research should explore in a more granular way the extent to which human rights determine the success of climate cases.

2.5 Main trends – analysis and assessment

In 2018 Jacqueline Peel and Hari Osofsky identified a ‘rights turn’ in climate litigation.⁵⁹ The turn they first detected has since significantly intensified. Our analysis of rights-based litigation that aligns with climate objectives has revealed that the vast majority of cases concern *mitigation*, target *states*, and are brought by *citizens* and *NGOs*. Rights-based cases targeting corporations are still relatively rare and are typically constrained by the limited development of human rights law concerning corporate actors. Ongoing international and regional law-making processes on corporate due diligence may soon change this state of affairs.

In the meantime, the picture of rights-based climate litigation is rapidly evolving, with most cases pending, but with a few important milestone victories. Many of these cases deal with fundamental questions and values and frequently have high visibility. Therefore, their wider impacts can already be felt, even if cases remain ongoing.⁶⁰

There seems to be scope for rights-based climate litigation to continue expanding in the foreseeable future. With growing international consensus on the causes of climate change and increased evidence of its impacts, more litigation concerning climate change adaptation and climate-forced displacement seems likely. Lessons on how to use climate litigation most effectively and strategically are already being learned and shared.⁶¹ This knowledge will be precious, as more countries around the world adopt and implement dedicated climate legislation. Future climate litigation is likely to focus more and more on the enforcement of legislation, and on state or corporate failure to meet climate targets.

3 HUMAN RIGHTS STRATEGIES IN CLIMATE LITIGATION

The literature on human rights and the environment typically characterizes rights-based litigation according to the types of rights invoked, which in turn require states to take different kinds of action. These distinctions entail a degree of arbitrariness associated with the fact that typically human rights complaints do not invoke only one human right, and/or a single type of obligation. Nevertheless, this approach to case law analysis is routinely applied by the literature,⁶² in reports commissioned

59. Peel and Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (n 8).

60. Anke Wonneberger and Rens Vliegthart, ‘Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government’ (2021) 15 Environmental Communication 699.

61. See eg Ben Batros and Tessa Khan, ‘Thinking Strategically about Climate Litigation’ (Social Science Research Network 2020) SSRN Scholarly Paper ID 3564313 <<https://papers.ssrn.com/abstract=3564313>> accessed 26 August 2021; and see Lucy Maxwell et al., ‘Standards for Adjudicating the Next Generation of *Urgenda*-Style Climate Cases’ in this issue.

62. See eg Shelton (n 6); MR Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’ in A Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1998); Dinah L Shelton, ‘Human Rights and the Environment: Substantive Rights’ in Malgosia Fitzmaurice, David M Ong and Panos

by international organizations⁶³ and human rights bodies⁶⁴ when investigating how rights-based litigation is used in the pursuit of environmental interests. This literature also distinguishes between substantive and procedural obligations associated with the protection of environmental interests.⁶⁵

In extreme synthesis, *substantive* obligations – such as those associated with the right to life, adequate housing, food and the highest attainable standard of health – require preventative measures to avert human rights violations associated with environmental harm, as well as remedial measures to redress such violations, once they have occurred. *Procedural* obligations, instead, require access to remedies for human rights violations associated with environmental harms, which might include monetary compensation and injunctive relief. The right to take part in the conduct of public affairs also requires public participation in environmental decision-making, especially by those likely to be affected, as well as adequate access to environmental information.⁶⁶

As noted above, so far the literature has made no systematic effort to ascertain what specific human rights are invoked and what strategies are deployed in rights-based climate litigation. This section bridges this gap, applying standard human rights categorizations to analyse the 112 rights-based climate cases included in the Annex. We analysed these cases examining applicants' pleadings and adjudicatory bodies' decisions, as well as decisions at the appeals stage, where available. We report below the result of our analysis, distinguishing between the defendants (state/corporate) and the types of human rights obligations (substantive/procedural) invoked.

3.1 State actors

According to the UN Special Rapporteur on Human Rights and the Environment (UNSR), states' *substantive* human rights obligations in relation to climate change may be divided into three main categories. First, states have *positive* duties to adopt adequate measures, including legislation, concerning climate change adaptation and/or mitigation. Second, states have *positive* duties to enforce legislation, and to provide redress to those suffering from the impacts of climate change. Third, states have *negative* duties to refrain from authorizing activities (such as, for example, oil concessions) and from themselves undertaking activities that contribute to human rights violations.⁶⁷

Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010); Donald K Anton and Dinah L Shelton, 'Procedural Human Rights and the Environment' in Donald K Anton and Dinah L Shelton (eds), *Environmental Protection and Human Rights* (Cambridge University Press 2011); Boyle, 'Human Rights or Environmental Rights' (n 6); Boyle, 'Human Rights and the Environment' (n 6).

63. See eg Council of Europe (n 18).

64. See eg Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (OHCHR 2013) A/HRC/25/53; and A/HRC/28/61 (n 16).

65. See sources listed in notes 62–63.

66. Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (OHCHR 2018) A/HRC/37/59, especially paras 16–18.

67. See Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (OHCHR 2016)

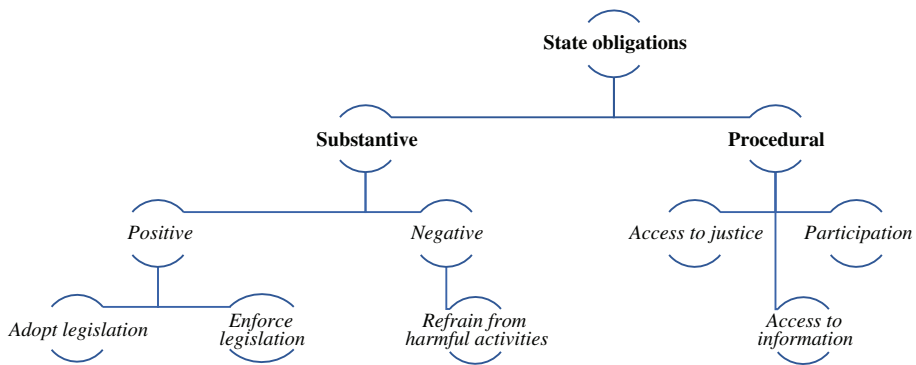


Figure 7 States' human rights obligations associated with climate change

States' *procedural* obligations require them to assess the impacts both of climate change and of measures to tackle climate change, and that they make such information public. They furthermore must provide access to remedies for climate-related human rights violations. Finally, states must facilitate public participation in decision-making over action to tackle climate change, especially by those likely to be affected. States must furthermore protect individuals and groups against abuse by third parties, including business enterprises, by taking steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication (Figure 7).⁶⁸

In this section, we use these categories to analyse the way in which obligations have been invoked in rights-based litigation.

3.1.1 Substantive obligations

A total of 79 rights-based climate cases relied in whole or in part on states' substantive human rights obligations; 60 of these were filed since the adoption of the Paris Agreement in 2015. Most of these cases rely on states' positive duty to adopt adequate climate legislation, and on their negative duty to refrain from adopting measures and authorizing projects that have negative climate impacts.

3.1.1.1 Positive duty to adopt legislation In 34 cases, climate applicants pursued a classic strategy in rights-based litigation: to demand that states take positive legislative/executive action to tackle environmental degradation that affects the enjoyment of human rights.⁶⁹ In *Urgenda*,⁷⁰ for example, the applicants argued that substantive

A/HRC/31/52, especially pp. 16–18; Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (2019) A/74/161, pp. 17–18.

68. UN Special Rapporteur on Human Rights and the Environment, A/HRC/31/52 (n 67) pp. 13–15.

69. Council of Europe (n 18).

70. *Urgenda* (n 41).

obligations associated with human rights enshrined in international law – namely, the rights to life and to respect for family life – impose upon states a *positive* duty to adopt legislation and other measures to *mitigate* climate change. The Dutch courts heavily relied on these substantive obligations as formulated and interpreted under the European Convention of Human Rights to set the contours of the Dutch state's duty of care standards, finding that it had fallen short. As noted above, although human rights arguments were peripheral to the applicants' pleadings, they gained prominence in the court proceedings and ended up being decisive on appeal and before the Dutch Supreme Court.⁷¹

Similar strategies have been attempted in relation to *adaptation*. For example, in the *Torres Strait Islanders* complaint pending before the UN Human Rights Committee,⁷² the applicants relied on Australia's positive duties associated with the protection of the rights to life, culture, to be free from arbitrary interference with privacy, to argue for the adoption of legislation and other measures to *adapt* to the impacts of climate change and to lament the lack of adequate action to deal with climate-related internal *displacement*. In this, as in the other climate-change-related complaints before human rights bodies, human rights play a central role.

3.1.1.2 Positive duty to enforce legislation In 15 cases, applicants relied on another classic strategy in rights-based environmental litigation, arguing that states cannot respect, protect and fulfil human rights while breaching environmental legislation they have themselves adopted.⁷³ In these climate cases, therefore, applicants typically rely on states' human rights obligations to enforce extant laws concerning mitigation, adaptation, or both. For example, in *PSB et al. v Brazil*, four political parties alleged that failure to implement Brazil's Action Plan for the Prevention and Control of Deforestation in the Legal Amazon had violated the right to a healthy environment of Indigenous peoples and future generations.⁷⁴ Similarly, in *Leghari*, the applicant successfully argued that the Pakistani authorities had failed to properly implement extant plans and policies concerning both climate mitigation and adaptation, leading to a breach of his right to life, and, implicitly, of the right to a healthy environment.⁷⁵

In some of these cases applicants have not only requested the enforcement of extant laws, but also the recognition of new human rights.⁷⁶ For example, in *IEA v Brazil* the applicants asked the court to order the government to control deforestation

71. *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal (9 October 2018), case 200.178.245/01; and *The State of the Netherlands v Urgenda Foundation*, The Supreme Court of the Netherlands (20 December 2019), case 19/00135.

72. *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change* (2019).

73. See eg Council of Europe (n 18) ch 1.

74. *PSB et al. v Brazil*, Supreme Court of Brazil, ADPF 760 (2020).

75. *Ashgar Leghari v Federation of Pakistan et al.*, Lahore High Court, W.P. No. 25501/2015, Order of 4 September 2015.

76. Pau de Vilchez Moragues and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation?' (Social Science Research Network 2021) SSRN Scholarly Paper ID 3829114 <<https://papers.ssrn.com/abstract=3829114>> accessed 20 July 2021.

in the Amazon, calling for the recognition of the right to a stable climate system capable of sustaining human life as a new and autonomous dimension of the right to a healthy environment, which is already protected by the Brazilian constitution.⁷⁷

3.1.1.3 Negative duty to prevent human rights violations In 30 climate cases, applicants deployed another consolidated strategy in environmental litigation: they argued that states should refrain from authorizing activities or adopting policies leading to environmental impacts that in turn affect the enjoyment of human rights, such as those to life, family life, property or to enjoy an environment of a certain quality.⁷⁸ For example, in *Nature and Youth and Greenpeace Norway v The Government of Norway*,⁷⁹ the applicants unsuccessfully invoked, among others, the right to a healthy environment to challenge the Norwegian authorities' decision to issue new production licences for oil and gas in the Arctic. Here human rights concerns were only peripheral in the line of argumentation pursued by the applicants, and, rather controversially,⁸⁰ did not significantly influence the thinking of the Norwegian courts.

3.1.2 Procedural obligations

Only 14 rights-based climate cases were filed against governments, relying in whole or in part on procedural human rights obligations. Nine of these were filed since the adoption of the Paris Agreement in 2015. The vast majority of these cases rely on the state's positive duty to provide access to information, but lately cases have started to rely also on the state's duty to provide access to justice.

3.1.2.1 Access to information The right to access to environmental information is frequently deployed in rights-based litigation.⁸¹ So far, 12 rights-based climate cases have specifically relied on this right, arguing that states have a duty to assess the impacts of both climate change and of measures to tackle climate change, and to make such information public. For example, in *Greenpeace Luxembourg v Schneider*, the applicants complained that the public authorities had failed to respond to a request for information concerning how the national sovereign pension fund

77. Joana Setzer and Délton Winter de Carvalho, 'Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate' (2021) 30 *Review of European, Comparative & International Environmental Law* 197.

78. Council of Europe (n 18) ch 1.

79. *Nature and Youth and Greenpeace Norway v The Government of Norway*, Oslo District Court, Summons, 18 October 2016.

80. Christina Voigt, 'The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics' *Journal of Environmental Law* (forthcoming, 2021).

81. See eg Marianne Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law' (2012) 23 *Colorado Journal of International Environmental Law and Policy* 309; Jonas Ebbesson, 'Principle 10: Public Participation' in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015).

planned to align investments with the objectives of the Paris Agreement, and concerning the climate-related risks associated with said investments.⁸²

3.1.2.2 Participation The right to participation in environmental decision-making is frequently deployed in rights-based litigation, particularly in Europe.⁸³ We could identify only two climate cases that relied solely on this right.⁸⁴ In other cases, applicants relied on the right to participation alongside other rights. For example, in *Friends of the Irish Environment CLG v Fingal County Council* the applicants unsuccessfully tried to rely on the right to participate in decision-making to challenge a decision to grant a planning permission extension to construct a new runway at Dublin airport.⁸⁵

3.1.2.3 Access to justice We could not identify any rights-based climate lawsuits that relied solely on the right to access to justice. In other cases, applicants relied on this right alongside other rights. As lawsuits fail, however, applicants are more likely to resort to higher courts or to international human rights bodies to complain about lack of access to justice. For example, in *Klimaseniorinnen*, after national courts' refused to hear on the merits their complaints over Switzerland's inadequate climate policy, a group of elderly Swiss applicants complained to the European Court of Human Rights for alleged breaches of the rights to access to justice and to an effective remedy.⁸⁶ Similarly, in *Armando Carvalho and Others v The EU Parliament and Council*⁸⁷ the applicants unsuccessfully argued that the refusal of the Court of Justice of the EU to consider the merits of their complaint against EU climate legislation had breached their right to access to justice.⁸⁸

3.2 Corporate actors

As noted above, in recent years there has been a growing recognition of corporate actors' human rights responsibilities,⁸⁹ which has been accompanied by a rise in human-rights-based litigation against corporations.⁹⁰ In this context, some

82. *Greenpeace Luxembourg v Schneider* (2016).

83. Council of Europe (n 63).

84. Namely, *Ruling on Modification to Ethanol Fuel Rule* and *Greenpeace Canada v Ministry of Environment*.

85. *Friends of the Irish Environment et al. v. Fingal County Council et al.*, High Court of Ireland, Judgment, 2017 No. 201 JR, 21 November 2017.

86. *Klimaseniorinnen* Application to the European Court of Human Rights, November 2020 (Unreported).

87. *Armando Carvalho and Others v The EU Parliament and Council* Case T-330/18 (8 May 2019).

88. *Armando Carvalho and Others v The EU Parliament and Council*. Appeal submitted to the European Court of Justice (2019) – dismissed.

89. See the repository compiled by the Business and Human Rights centre 'Mandatory Due Diligence' (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/>> accessed 27 July 2021.

90. See the repository compiled by the Bonavero Institute of Human Rights, Oxford University <<https://www.law.ox.ac.uk/content/civil-liability-gross-human-rights-abuses>> accessed 27 July 2021. See also Hartmann and Savaresi (n 33).

national⁹¹ and international⁹² adjudicating bodies have maintained that businesses ‘must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities’.⁹³

According to the UNSR, corporate human rights responsibilities in relation to climate change have two main facets. On the one hand, corporate actors have a responsibility to reduce greenhouse gas emissions – including those produced by their own activities and by their subsidiaries, their products and services – and to minimize emissions from their suppliers – as well as to support, rather than oppose, public policies intended to effectively address climate change.⁹⁴ On the other hand, at a procedural level, corporate actors also have a responsibility to publicly disclose their emissions, climate vulnerability and the risk of stranded assets; and to ensure that people affected by business-related human rights violations have access to effective remedies⁹⁵ (Figure 8).

As we also noted above, however, rights-based climate litigation against corporate actors remains rare. Only 16 rights-based climate cases target corporate actors. The sample of cases is therefore significantly smaller, when compared with litigation targeting states.

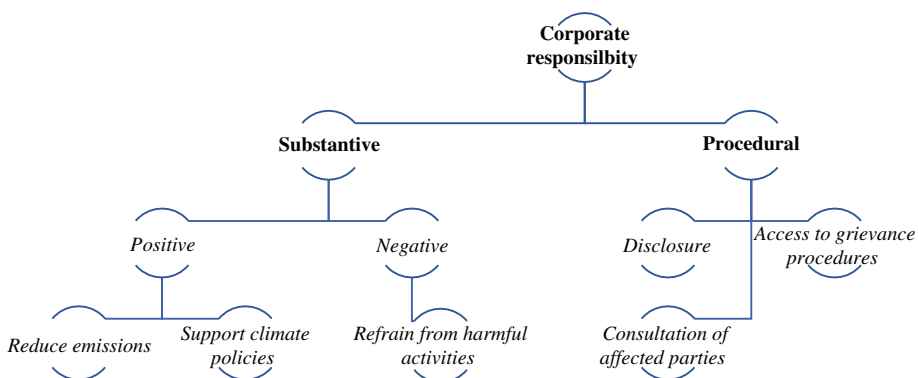


Figure 8 Corporate human rights responsibilities associated with climate change

91. See eg the decision of the Canadian Supreme Court in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (CanLII) (28 February 2020). This case is part of a growing global trend of civil liability litigation against businesses for their alleged involvement in rights abuses. For other cases, see <<https://www.law.ox.ac.uk/content/civil-liability-gross-human-rights-abuses>> accessed 27 July 2021.

92. See eg the decision of the International Centre for Settlement of Investment Disputes in *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, 2016, at 1993–6.

93. See eg the judgment of the Inter-American Court of Human Rights in *Kaliña and Lokono Peoples v Suriname*, 2015, at 224.

94. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment A/74/161(OHCHR 2019), at 71–2.

95. *ibid.*

3.2.1 Substantive duties

3.2.1.1 Positive duty to reduce emissions In the 16 rights-based climate cases brought against corporations, applicants typically argued that corporate actors have a *positive* duty to reduce emissions, and thus to contribute to climate change mitigation.⁹⁶ For example, in *Milieudefensie*, a group of activists and NGOs successfully argued that Shell should reduce its emissions and align with the temperature goal enshrined in the Paris Agreement,⁹⁷ construing the corporate duty of care and due diligence under Dutch tort law on the basis of human rights obligations associated with the protection of the right to life and the right to privacy. The applicants furthermore successfully alleged that Shell has a specific duty to prevent the serious risks caused by the emissions they generate.⁹⁸ The Court specifically cited ‘the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that corporations must respect human rights’.⁹⁹ The Court went as far as saying that the responsibility of business enterprises to respect human rights ‘is a global standard of expected conduct for all business enterprises wherever they operate’.¹⁰⁰ These findings are pathbreaking, given that Shell does not have formal obligations under international human rights law.¹⁰¹

3.2.1.2 Positive duty to support climate policy Four rights-based climate complaints relied on human rights recognized in national and international law to argue that corporate actors have a *positive* duty to support, rather than oppose, climate policies and their enforcement. In the landmark *Carbon Majors inquiry* carried out by the Philippines Human Rights Commission,¹⁰² civil society organizations lamented human rights violations associated with the impacts of climate change, and the responsibility of the so-called Carbon Majors for causing these. The applicants alleged breaches of a series of human rights recognized both in national and international law, most saliently the rights to life, to the highest attainable standard of physical and mental health, to food, to water, to sanitation, to adequate housing and to self-determination.¹⁰³ They furthermore alleged that the Carbon Majors have long known that the use of their products substantially contributes to climate change, which, in turn, has a significant impact on vulnerable populations. Finally, the applicants claimed that, to pre-empt the adoption of measures reducing greenhouse gas emissions, the Carbon Majors knowingly advanced or promoted misleading information, casting doubt on the connection between fossil fuels and climate change.¹⁰⁴ As such, the applicants argued that the Carbon Majors should be held responsible for the

96. Special Rapporteur on Human Rights and the Environment (n 67) paras 71–2.

97. *Milieudefensie v Royal Dutch Shell RB* 26 May 2021, ECLI:NL:RBDHA:2021:5337, English translation ECLI:NL:RBDHA:2021:5339.

98. See eg *ibid* at 4.4.37.

99. *ibid* para 4.1.3.

100. *ibid* para 4.4.13.

101. Savaresi and Wewerinke-Singh (n 34).

102. *Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change* (‘Carbon Majors Petition’), Republic of the Philippines Commission on Human Rights, CHR-NI-2016-0001 (2016).

103. *ibid* 7.

104. *ibid* 57.

human rights violations associated with the increasingly severe impacts of climate change in the Philippines.¹⁰⁵

3.2.1.3 Negative duty to refrain from activities causing harm In ten rights-based climate cases against corporate actors, the applicants specifically relied on corporations' negative duty to refrain from activities causing harm. For example, in the Carbon Majors inquiry, the applicants highlighted the corporate *negative* duty to refrain from activities causing harm as a result of substantive obligations associated with the protection of the right to life.¹⁰⁶ Similarly, in *Notre Affaire à Tous and Others v Total* the applicants asked the court to issue an injunction ordering Total to prevent environmental damage, which they linked to corporate human right duties under French due diligence legislation.¹⁰⁷

3.2.2 Procedural duties

We found only two rights-based climate complaints relying on corporate procedural duties. Both were lodged with the National Contact Points (NCPs) established under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and alleged insufficient disclosure of emissions, climate vulnerability and stranded assets. In one of these cases, a Polish NGO complained about lack of information concerning corporate emissions and the financial impacts of insuring coal mining in Poland. In response, the Polish NCP recommended that the company disclose relevant non-financial information and adopt policies that respect human rights.¹⁰⁸ In the other case, a Japanese NGO complained that three banks had failed to require the sponsors of coal-fired power plants to disclose information about the projects' emissions and measures to mitigate these.¹⁰⁹ The applicants also lamented the banks' failure to exercise their leverage to ensure that the communities affected by the power stations were adequately consulted during the project development. So far, there seems to be no evidence of cases alleging breaches of the corporate duty to provide remedies against the adverse human rights impacts they cause or to which they contribute.¹¹⁰

3.3 Main trends – assessment

Our analysis of the rights invoked in climate litigation reveals that in most cases applicants and courts rely on states' *substantive* human rights obligations, either to take

105. *ibid* 61. For an analysis, see: Annalisa Savaresi and Jacques Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' in Jolene Lin and Douglas Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020); Savaresi, 'Human Rights and the Impacts of Climate Change' (n 8).

106. Carbon Majors Petition (n 102) 42.

107. *Notre Affaire à Tous and Others v Total*, 2.4 and 2.3.2.

108. *Development YES – Open-Pit Mines NO v Group PZU S.A.* (2016).

109. *Market Forces v Sumitomo Mitsui Banking Corporation, Mitsubishi UFJ Financial Group and Mizuho Financial Group* (2018).

110. Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (2018) A/HRC/37/59.

climate action or to avoid harmful activities. This pattern largely aligns with general trends in rights-based environmental litigation, which typically targets states on similar grounds.¹¹¹

The number of climate cases relying on the positive duty to enforce existing legislation is however rising. As we noted above, with states increasingly adopting climate laws, litigation based on the enforcement of extant laws is likely to increase in future. Similarly, litigation concerning negative duties to refrain from harmful activities, such as oil concessions and logging concessions, can also be expected to rise, as climate considerations become streamlined into public policy and corporate practice.

Conversely, to date, comparatively few rights-based climate cases concern alleged breaches of procedural obligations. Rights-based litigation based on procedural rights is generally frequent, as these rights are typically used to object to activities that are potentially harmful, as well as to react to environmental harms once they have occurred.¹¹² The small number of climate cases relying on procedural rights can be explained by the fact that traditionally complaints over breaches of procedural obligations relate to actual policies and/or projects, and not to a lack thereof. Moreover, complaints concerning access to justice typically emerge only after applicants have had their cases dismissed. So, as climate legislation expands, complaints based on procedural rights are likely to become more widespread, in line with established trends in human-rights-based litigation concerning environmental interests.

The same may be said about litigation targeting corporate actors. Human rights law and remedies are not particularly well suited to pursuing corporate actors. Their increasing use must be viewed as part and parcel of the global movement to enhance corporate accountability for environmental harms, which is at the centre of potentially path-breaking law and policy developments at the regional and international level.¹¹³ The outcome of these processes is likely to determine the extent to which human rights arguments and tools will be used in future. In the meantime, extant mechanisms, such as human rights due diligence legislation at the national level and OECD National Contact Points, are likely to continue to remain the main tools used in rights-based climate litigation against corporate actors.

4 JUST TRANSITION LITIGATION: A NEW KNOWLEDGE FRONTIER

The first studies mapping the different types of climate litigation identified the possibility for ‘anti-regulatory’, ‘defensive’ or ‘anti’ cases. Markell and Ruhl used the term ‘anti-regulatory’ to describe lawsuits that aim to delay or dismantle existing or emerging regulatory measures for climate change.¹¹⁴ Peel and Osofsky use the same term to describe litigation which reacts to regulation that promotes climate action.¹¹⁵ Ghaleigh, in turn, labelled this category ‘defensive’ climate litigation, as ‘it defends the status quo of a regulatory vacuum’.¹¹⁶ Similarly, Hilson identified as ‘anti’

111. Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (n 64).

112. *ibid.*

113. See the commentary in Hartmann and Savaresi (n 33).

114. Markell and Ruhl (n 2) 65–70.

115. Peel and Osofsky, ‘Climate Change Litigation’ (n 1) 31.

116. Navraj-Singh Ghaleigh, ‘“Six Honest Serving-Men”: Climate Change Litigation as Legal Mobilization and the Utility of Typologies’ (2010) 1 *Climate Law* 31, 44.

cases those brought against local authorities (eg contesting planning permission for wind farms) by industry (challenging new climate laws which affect its economic interests) or by climate change deniers.¹¹⁷ Little systemic knowledge exists on litigation that does not align with climate objectives.¹¹⁸ While climate litigation databases report some ‘anti’ cases,¹¹⁹ they do not report cases where climate change concerns are merely incidental.

The same may be said about rights-based cases that do not align with climate objectives, which we describe as ‘just transition litigation’. In just transition litigation, climate change concerns typically play a peripheral or even incidental role. These complaints do not object to climate action in and of itself, but rather to the way in which it is carried out and/or to its impacts on the enjoyment of human rights. In theory, just transition litigation can be brought by individuals and groups to challenge state and corporate actors, before national or international judicial, quasi-judicial or non-judicial fora.

Given the lack of systemic data, it is not possible to carry out a quantitative analysis of who brings these cases, against whom, where, and on the basis of which human rights. However, the academic and grey literature report evidence of just transition litigation targeting *corporate actors* and *states* for breaches of human rights obligations associated with the rights of Indigenous peoples.¹²⁰ For example, Indigenous peoples and civil society organizations have filed a lawsuit relying on French due diligence legislation, asking that energy company EDF be ordered to suspend the building of a wind farm in Mexico.¹²¹ Indigenous peoples have also complained of multiple violations of the right to free, prior and informed consent perpetrated by Mexico in the context of processes for the approval of wind farm projects.¹²² Similarly, Indigenous peoples have challenged the decision to approve solar energy projects in the US, alleging violations of their rights to be adequately informed and consulted under federal law.¹²³ International human rights bodies have also received complaints challenging measures to reduce forest emissions¹²⁴ and the construction of

117. Christopher James Hilson, ‘Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back In)’ in F Fracchia and M Occhiena (eds), *Climate Change: La risposta del diritto* (Editoriale Scientifica 2010).

118. This knowledge gap is also flagged in Bouwer (n 46).

119. See eg the industry lawsuits section in the Columbia University database: <<http://climatecasechart.com/climate-change-litigation/case-category/industry-lawsuits-state-law-claims/>> accessed 26 August 2021.

120. The Business & Human Rights Resource Centre collects dozens of human rights complaints against *corporate actors* engaged in renewable energy generation, the recording of which started in 2010 – see (n 11).

121. European Center for Constitutional and Human Rights, ‘Case Report – Wind Farm in Mexico: French Energy Firm EDF Disregards Indigenous Rights’ (October 2020) <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/20201013_Case_report_EDF_EN.pdf> accessed 16 February 2021.

122. See eg: Comunidad Indígena Zapoteca De Juchitán De Zaragoza: <https://prodesc.org.mx/la-comunidad-indigena-zapoteca-de-juchitan-de-zaragoza/>. Some of these complaints are reviewed in P Velasco Herrejon and A Savaresi, ‘Wind Energy, Benefit-Sharing and Indigenous Peoples: Lessons from the Isthmus of Tehuantepec, Southern Mexico’ (2020) 18 Oil, Gas & Energy Law Journal (OGEL).

123. See eg *Quechan Tribe v US Dept. of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

124. See eg Concluding Observations of the Committee on the Elimination of Racial Discrimination: Indonesia, CERD/C/IDN/CO/3, as adopted in Report of the Committee on the Elimination of Racial Discrimination Seventieth session (19 February–9 March 2007) and Seventy-first

hydroelectric dams,¹²⁵ alleging, amongst other things, breaches of human rights associated with traditional land uses and culture, as well as the rights of Indigenous peoples.

In other just transition cases, applicants have alleged breaches of the right to access to justice, associated with the adoption of climate change legislation and projects. For example, individuals and groups have filed complaints before the European Court of Human Rights, alleging that public authorities' refusal to reconsider the authorization of wind farm projects had violated, amongst others, the rights to access to justice and access to remedies.¹²⁶ Similarly, both the UK and the EU have been found to have breached their obligations under the Aarhus Convention, for having adopted renewable energy law and policy without adequate public participation.¹²⁷

This litigation emphasizes the importance of safeguarding procedural and substantive rights, and of protecting individuals and groups from the arbitrary and unjust decisions of governments and corporations. Human rights bodies have already underscored the need to give voice to vulnerable groups who are most likely to be adversely affected by climate policies or projects, and, as a result, risk becoming victims of 'climate apartheid'.¹²⁸ Going forward, there seems to be a clear need to collect and systemically analyse just transition litigation. Greater understanding of this litigation is necessary to appreciate tensions associated with the transition towards zero carbon societies, and ways in which such tensions may be resolved.

5 CONCLUSION

This article set out to provide a more comprehensive appreciation of the role of rights-based litigation in the context of the climate emergency. We carried out the first systematic analysis of rights-based litigation that aligns with climate objectives, revealing main trends and patterns in this burgeoning area of legal practice. Our analysis has delivered new knowledge over who has brought rights-based climate cases, against whom, where, and on the basis of which human rights. We show that, at least to date, the bulk of rights-based litigation on climate change has been brought by civil society organizations and individuals against states, largely before national courts, and on the basis of substantive, rather than procedural, human rights obligations. As *Urgenda* and other milestone victories have demonstrated, some of this

session (30 July–17 August 2007) General Assembly Official Records, Sixty-second session, Supplement No. 18 (A/62/18). This and similar complaints are analysed in Annalisa Savaresi, 'The Human Rights Dimension of REDD' (2012) 21 Review of European Comparative & International Environmental Law 102; Sébastien Jodoin, *Forest Preservation in a Changing Climate: REDD+ and Indigenous and Community Rights in Indonesia and Tanzania* (Cambridge University Press 2017).

125. See eg the complaint before the Inter-American Commission Consórcio Norte Energia lawsuit (re Belo Monte dam in Brazil) (2011). See the commentary in Andrea Schapper, Christine Unrau and Sarah Killoh, 'Social Mobilization Against Large Hydroelectric Dams: A Comparison of Ethiopia, Brazil, and Panama' (2020) 28 Sustainable Development 413.

126. See eg *Fägerskiöld v Sweden* ECtHR, Application no 37664/04; *Vecbaštika and Others v Latvia*, ECtHR, Application no. 52499/11.

127. *Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the United Kingdom and the European Union*.

128. Special Rapporteur on extreme poverty and human rights, 'Climate Change and Poverty' (2019) A/HRC/41/39 para 51.

litigation has already helped to engender a change in attitude by courts and law-makers. Rights-based lawsuits have contributed to the momentum towards the adoption of dedicated and more ambitious climate legislation.¹²⁹ In future, we predict that more rights-based litigation is likely to focus on the enforcement of this legislation, and on the protection of procedural rights associated with it.

As both climate legislation and litigation progressively reach maturity, there will be scope to use human rights law and remedies more widely in the quest for means to deliver the energy transition away from fossil fuels and to protect those most affected by it. This article has therefore highlighted the need to explore the new frontier of rights-based litigation that does not align with climate objectives. The tensions between the protection of rights and climate action should not be regarded as dysfunctional. Instead, there is a genuine need to better understand the tensions underlying just transition litigation and how to resolve them, in order to fully realize the transformative potential of rights-based approaches for climate decision-making.¹³⁰ Such approaches are crucial to ensure that governments and corporations take steps to address the climate emergency and its consequences in a manner that ensures the participation of civil society and addresses inequalities. The new knowledge frontier of just transition litigation therefore needs to be urgently explored, to help deliver net zero emissions and an energy transition that is just and inclusive.

ANNEX

The following lists shows the human-rights-based climate litigation analysed in the article in alphabetical order, last update: 31/05/2021.

1. *AD (Tuvalu)*
2. *Aji P. v State of Washington*
3. *Alec L v McCarthy*
4. *Ali v Pakistan*
5. *Álvarez v Peru*
6. *Animal Legal Defense Fund v Foster Poultry Farms*
7. *Armando Ferrão Carvalho v European Parliament*
8. *Aronow v Minnesota*
9. *Asociación Civil por la Justicia Ambiental v Province of Entre Ríos, et al.*
10. *Association for Protection of Democratic Rights v The State of West Bengal and Others*
11. *Bard Campaign v Secretary of State for Communities and Local Government*
12. *Barhaugh v Montana*
13. *Blades v California*
14. *Carballo et al. v MSU S.A., UGEN S.A., & General Electric*
15. *Carballo et al. v State of the Province of Buenos Aires and the Provincial Agency for Sustainable Development*
16. *Carbon Majors Inquiry*

129. See Lucy Maxwell et al., 'Standards for Adjudicating the Next Generation of *Urgenda*-Style Climate Cases' in this issue.

130. Jodoin, Savaresi and Wewerinke-Singh (n 15) 50.

17. *Center for Food and Adequate Living Rights et al. v Tanzania and Uganda*
18. *Chernaik v Brown*
19. *Citizens' Committee on the Kobe Coal-Fired Power Plant v Kobe Steel Ltd., et al.*
20. *City of Lyon v French Deposits and Consignments Fund*
21. *Clean Air Council v US*
22. *ClientEarth v European Investment Bank*
23. *Commune de Grande-Synthe v France*
24. *Corporation of the Canadian Civil Liberties Association v Attorney General of Ontario*
25. *D.G. Khan Cement Company v Government of Punjab*
26. *Development YES – Open-Pit Mines NO v Group PZU S.A.*
27. *EarthLife Africa Johannesburg v Minister of Environmental Affairs*
28. *Environment-People-Law v Cabinet of Ministers of Ukraine and National Agency of Environmental Investments*
29. *ENvironnement JEUnesse v Canada*
30. *Envol Vert et al. v Casino*
31. *EU Biomass Plaintiffs v European Union*
32. *External Contribution to the French Constitutional Council to invalidate the French Parliament's adoption of an energy and climate bill*
33. *Family Farmers and Greenpeace Germany v Germany*
34. *Farb v Kansas*
35. *Fédération environnement durable et autres (Schéma régional du climat, de l'air et de l'énergie- Schéma régional éolien)*
36. *FOMEA v MSU S.A., Rio Energy S.A., & General Electric*
37. *Friends of the Earth Germany v Germany*
38. *Friends of the Earth v Total*
39. *Friends of the Earth v UK Export Finance*
40. *Friends of the Irish Environment CLG v Fingal County Council*
41. *Friends of the Irish Environment v Ireland*
42. *Future Generations v Ministry of the Environment*
43. *Gbemre v Shell Petroleum Development Company of Nigeria*
44. *Greenpeace Canada v Minister of the Environment, Conservation, and Parks; Lieutenant Governor in Council*
45. *Greenpeace et al. v Austria*
46. *Greenpeace et al. v Spain*
47. *Greenpeace Luxembourg v Luxembourg's Minister of Social Affairs*
48. *Greenpeace Mexico v Ministry of Energy and Others (on the Energy Sector Program)*
49. *Greenpeace Mexico v Ministry of Energy and Others (on the National Electric System policies)*
50. *Greenpeace Netherlands v State of the Netherlands*
51. *Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy*
52. *Greenpeace v Secretary of State for Trade and Industry*
53. *Hahn et al. v APR Energy S.R.L.*
54. *Held et al. v State of Montana et al.*
55. *In re Court on its own motion v State of Himachal Pradesh and others*
56. *In re Vienna-Schwechat Airport Expansion*
57. *Institute of Amazonian Studies v Brazil*

58. *Instituto Socioambiental, Abrampa & Greenpeace Brasil v Ibama and the Federal Union*
59. *Ioane Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*
60. *Jóvenes v Gobierno de México*
61. *Juliana v United States*
62. *Kim Yujin et al. v South Korea*
63. *Klimatická žaloba ČR v Czech Republic*
64. *Korean Biomass Plaintiffs v South Korea*
65. *La Rose v Her Majesty the Queen*
66. *Leghari v Pakistan*
67. *Lho'inggin et al. v Her Majesty the Queen*
68. *Marangopoulos Foundation for Human Rights (MFHR) v Greece*
69. *Maria Khan et al. v Pakistan*
70. *Market Forces v SMBC, MUFG and Mizuho*
71. *Mathur et al. v Her Majesty the Queen in Right of Ontario*
72. *Mbabazi and Others v The Attorney General and National Environmental Management Authority*
73. *Mex M v Austria*
74. *Milieudefensie et al. v Royal Dutch Shell*
75. *Neubauer v Germany*
76. *Notre Affaire à Tous v France*
77. *Notre Affaire à Tous v Total*
78. *OAAA v Araucaria Energy SA.*
79. *Omissions of the United States*
80. *Pandey v India*
81. *Parents for Future Brazil v State Government of Sao Paulo ('Famílias pelo Clima v Governo do Estado de São Paulo')*
82. *Partido Socialismo e Liberdade (PSOL) v Federal Union ['Amazon Fund Case']*
83. *Partido Socialista Brasileiro (PSB) v Federal Union ['Climate Fund Case']*
84. *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change*
85. *Petition to the IACHR 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*
86. *Petition to the IACHR Seeking Relief from Violations Resulting from Global Warming*
87. *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti*
88. *Philippi Horticultural Area Food & Farming Campaign, et al. v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape, et al.*
89. *Plan B Earth v Secretary of State for Transport*
90. *Plan B Earth v The Secretary of State for Business, Energy, and Industrial Strategy*
91. *PSB et al. v Brazil (on deforestation and human rights)*
92. *PUSH et al. v Sweden*

93. *R (People & Planet) v HM Treasury (Queen's Bench Division, Administrative Court, 2009)*
94. *Reynolds et al. v State of Florida*
95. *Rights of Indigenous People in Addressing Climate-Forced Displacement*
96. *Ruling on Modification to Ethanol Fuel Rule*
97. *Sacchi v Argentina*
98. *Sanders Reed v Martinez*
99. *Sharma and others v Minister for the Environment*
100. *Sheikh Asim Farooq v Federation of Pakistan etc.*
101. *Shrestha v Office of the Prime Minister et al.*
102. *Sierra Club v U.S. Army Corps of Engineers*
103. *Sinnok, et al. v State of Alaska, et al.*
104. *Six Youths v Minister of Environment and Others*
105. *Trans Mountain Pipeline ULC v Misavair*
106. *UN Human Rights Committee Views Adopted on Teitiotia Communication*
107. *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*
108. *Urgenda Foundation v Netherlands*
109. *VZW Klimaatzaak v Belgium*
110. *Youth for Climate Justice v Austria, et al.*
111. *Youth Verdict v Waratah Coal*
112. *Zoubek et al. v Austria*

Source: All cases are available from the Grantham Research Institute on Climate Change and the Environment at the London School of Economics at <<https://climate-laws.org/>> and the US cases are available from the Sabin Centre for Climate Change Law at Columbia Law School, at <<http://climatecasechart.com/>>.