What future for litigation on climate change adaptation? The potential of a human rights approach

Riccardo Luporini*
Sant'Anna School of Advanced Studies, Pisa
ORCID: 0000-0002-9248-0763
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Climate change litigation is rising on a global scale. In most cases, especially the high-profile or 'strategic' ones, litigants are focusing on mitigation, i.e., reducing sources or enhancing sinks of greenhouse gases, rather than on adaptation. In this context, the present contribution aims to investigate how and to what extent litigation on climate change adaptation can progress in the future. Adaptation obligations are less developed than those on mitigation, and this may explain, at least in part, why litigation on adaptation is less advanced. However, the contribution points out that human rights arguments can complement the paucity of binding obligations on climate change adaptation and serve as a basis for adaptation cases. To this end, the chapter surveys the extant rights-based cases aimed to advance adaptation action, distinguishing between cases brought before domestic courts and complaints filed with international judicial or quasi-judicial bodies. The chapter discusses these cases and concludes with some reflections on the future of litigation on climate change adaptation.

Keywords: Climate change; climate change adaptation; climate change law; climate change litigation; international law; human rights law; environmental law; environmental litigation.

1. Introduction

Driven by the necessity to bridge the accountability and enforcement gap that affects climate change law, climate litigation is rising on a global scale.[1]

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1 See J. Setzer and C. Higham, *Global trends in climate change litigation: 2022 snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022.

Litigants are currently focusing their efforts on "climate change mitigation", i.e., reducing sources or enhancing sinks of greenhouse gases (GHG),[2] which is widely recognised as the climate policy priority. However, besides mitigating climate change, human society must take all appropriate measures to adapt to its adverse effects. The Intergovernmental Panel on Climate Change (IPCC) defines "climate change adaptation" as "the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities".[3] Adaptation thus includes a variety of measures, ranging from building flood defences to developing drought-tolerant crops. Compared to mitigation cases, litigation on climate change adaptation is far less developed.[4] Similarly, adaptation cases are a minority even in the Global South, where one would expect adaptation to be the first action to take, as countries are generally small emitters and already heavily affected by climate impacts.[5] Adaptation is far less involved in high-profile or high-impact cases, also known as "strategic litigation",[6] especially in that set of lawsuits that seek to replicate the "Urgenda success" before other European domestic courts.[7] However, given that the impacts of climate change are being increasingly felt worldwide and adaptation gaps are widening, litigation could serve as a strategic tool to advance this climate policy in the future. Among other legal grounds, human rights arguments may well play a crucial role in this type of lawsuit, because the link between adaptation action and human rights protection is direct and straightforward.

Against this background, the present contribution aims to investigate how and to what extent litigation on climate change adaptation may develop in the future, with a focus on cases that aim to advance adaptation action on the basis of human rights arguments. Section 2 deals with the law on adaptation, outlining how adaptation has unfolded in the international climate change regime. The Section shows that adaptation obligations are less developed than those on mitigation, which may be one of the reasons why litigation on adaptation is less advanced. Section 3 explains how and to what extent the human rights

2 See IPCC [O. Edenhofer, R. Pichs-Madruga et al. (eds)], *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2014, 4.

3 See IPCC [C B Field, V Barros, et al. (eds)], *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2012, 5.

4 See J. Setzer, C. Higham (n 1).

5 See J. Peel and J. Lin, *Transnational Climate Litigation: The Contribution of the Global South*, in *American Journal of International Law*, vol.113, 2019.

6 Strategic litigation has been defined as "cases, where the claimants' motives for bringing the cases go beyond the concerns of the individual litigant and aim to bring about some broader societal shift", see J. Setzer and C. Higham (n 1).

7 See R. Luporini, *Strategic litigation at the domestic and international levels as a tool to advance climate change adaptation? Challenges and prospects*, in *Yearbook of International Disaster Law*, vol.4, 2023. On the *Urgenda* case, see also the contribution to the present volume by G. Pane.

approach can complement the lack of binding obligations on climate change adaptation and serve as a basis for adaptation cases. Section 4 discusses some extant rights-based cases concerning climate change adaptation, distinguishing between cases brought before domestic courts and complaints filed with international human rights bodies. Building on the previous sections and the case survey, Section 5 concludes the paper with some reflections on the future of litigation on climate change adaptation.

2. The law on climate change adaptation

The United Nations Framework Convention on Climate Change (UNFCCC) is focused on mitigation, as reflected first and foremost in the objective of the Convention, enshrined in Article 2, namely to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[8] Actually, Article 2 mentions adaptation, stating that "[s]uch a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change". However, the wording seems to suggest that adaptation only concerns ecosystems (and not human society) and that it should occur "naturally".

In the whole international climate change regime, mitigation has always taken priority over adaptation.[9] This is because mitigation and adaptation were initially understood as two alternative strategies and because adaptation has long been viewed as an issue of concern only for those developing and least developed countries that are particularly vulnerable to the adverse effects of climate change.[10] On the contrary, developed States have normally resisted the development of adaptation law, because they feared that they would have been compelled to financially assist less developed and most vulnerable countries.[11]

That being said, Article 4 on "Commitments" binds all Parties to "formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to…facilitate adequate adaptation to climate change" and cooperate "in preparing for adaptation to the impacts of

8 The UNFCCC was agreed upon and adopted at the 1992 Earth Summit in Rio de Janeiro, entered into force in 1994 and today it has 197 Parties. See United Nations, in *Treaty Series*, vol.1771, p.107.

9 See in general D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law*, Oxford University Press, 2017; C. P. Carlarne, K. R. Gray, and R. Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law*, Oxford University Press, 2016; B. Mayer, *The International Law on Climate Change*, Cambridge University Press, 2018.

10 D. Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, in *Yale Journal of International Law*, vol. 18, 1993; P. Sands, *The United Nations Framework Convention on Climate Change*, in *Review of European Community & International Environmental Law*, vol.1, 1992.

11 See D. Bodansky, J. Brunnée, L. Rajamani (n 9).

climate change".[12] At the same time, in the UNFCCC, adaptation has a strong international assistance component. This is outlined in Article 4.4, according to which "[t]he developed country Parties…*shall* also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation" (emphasis added).[13] The provision, however, does not define what adaptation costs are, nor does it set a level or minimum threshold of funding. In addition, it establishes a general obligation for developed country parties as a whole, and not for "each Party".

If the 1997 Kyoto Protocol confirmed the primacy of mitigation over adaptation,[14] under the Cancun Adaptation Framework (CAF) adopted in 2010, the Parties agreed for the first time that "adaptation must be addressed with the same priority as mitigation".[15]

The adoption of the Paris Agreement in 2015 marked an important step forward for adaptation.[16] First, adaptation is included in the objectives of the Agreement. According to Article 2, "[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience" is one of the ways in which the Agreement aims to "strengthen the global response to the threat of climate change".[17] Second, Article 7 establishes "the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change".[18] This is, however, a qualitative and long-term goal and the Agreement itself does not provide any requirements regarding its operationalisation. At the Glasgow Climate Change Conference

12 UNFCCC, Art. 4.1 (b), (e).

13 See also UNFCCC, Preamble, para 19; and Arts 3.2 and 4.8.

14 Kyoto Protocol to the United Nations Framework on Climate Change, entered into force on 16 February 2005, see UNITED NATIONS, *Treaty Series*, vol. 2303, p.162.

15 UNFCCC COP, 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*, FCCC/CP/2010/7/Add.1, March 2011, para 13. See also J. Verschuuren (ed.), *Research Handbook on Climate Change Adaptation Law*, Edward Elgar Publishing, 2013.

16 Paris Agreement, adopted 12 December 2015 and entered into force 4 November 2016, United Nations, *Treaty Series*, vol.3156. On the Paris Agreement, see D. Bodansky, *The Legal Character of the Paris Agreement*, in *Review of European, Comparative & International Environmental Law*, vol.25, 2016; D. Bodansky, *The Paris Climate Change Agreement: A new hope?*, in *American Journal of International Law*, vol.110, 2016; L. Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, in *Journal of Environmental Law*, vol.28, 2016; M.-C. Cordonier Segger, *Advancing the Paris Agreement on Climate Change for sustainable development*, in *Cambridge Journal of International and Comparative Law*, vol.5, 2016; C. Voigt, *The Paris Agreement: What is the standard of conduct for parties?*, in *Questions of International Law*, vol. 26, 2016; J. E. Viñuales, *The Paris Climate Agreement: An Initial Examination*, in *C-EENRG Working Papers*, vol.3, 2015; A. Savaresi, *The Paris Agreement: Reflections on an International Law Odyssey*, in *ESIL Annual Conference Paper Series*, vol.13, 2016; A. Savaresi, *The Paris Agreement: A New Beginning?*, in *Journal of Energy & Natural Resources Law*, vol.34, 2016.

17 Paris Agreement, Art. 2.1 (b).

18 Paris Agreement, Art. 7.1.

in October-November 2021, the "Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation" was established and launched with the overall aim of enhancing the understanding and facilitating the implementation of the global goal.[19]

In the following paragraphs of Article 7, the Parties acknowledge that adaptation action should adopt a "country-driven, gender-responsive, participatory and fully transparent approach", taking into specific account vulnerable groups, communities and ecosystems, indigenous peoples and their traditional know edge, under the guidance of the "best available science".[20] As some observers have already noted, the importance of this and similar provisions "lies less in their legal character but in their ability to provide a political dimension that raises adaptation as a cornerstone of action under the Paris Agreement and a context for adaptation efforts".[21]

Arguably, the lack of development of international norms on adaptation has brought a similar paucity of norms at the national (or regional) level, where most of the laws concern GHG emissions reduction and adaptation provisions are often included only in administrative plans or are procedural in nature.[22]

The limited development of adaptation-specific laws could be due to the very nature of adaptation, which is inherently multi-sectorial, i.e., it cuts across different sectors, such as disaster risk reduction, agriculture, and water management. On these bases, Mayer argued that "climate change adaptation should not be conceived of as a separate policy or legal field, but rather as a consideration to be mainstreamed in various policy and legal regimes".[23] While this is reasonable to a certain extent, one may counterargue that climate change mitigation is also multi-sectoral, as emissions reduction efforts span different domains such as energy production, transport, and agriculture; this, however, does not prevent the existence of climate change mitigation laws that set specific targets and emissions reduction pathways. What certainly characterises adaptation is its very place- and context-specific dimension. Adaptation measures differ locally, involving a diverse set of local administrative and legal instruments and actors. Moreover, measuring and evaluating adaptation action is much more complex than mitigation. The key challenge is that for adaptation there is "no common reference metrics in the same way that tonnes of GHGs or radiative forcing

19 See UNFCCC Decision 7/CMA.3 "Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation", 8 March 2022.

20 See Paris Agreement, Arts. 7.2, 7.4, 7.5, and 7.6.

21 I. Suárez Pérez, A. Churie Kallhauge, *Adaptation (Article 7)*, in D. R. Klein et al., *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford University Press, 2017, p.202.

22 National laws and plans on adaptation can be found in the Climate Change Laws of the World database at the Grantham Research Institute on Climate Change and the Environment.

23 B. Mayer, *Climate Change Adaptation and the Law*, in *Virginia Environmental Law Journal*, vol.39, 2021 and B. Mayer, Climate Change Adaptation Law: Is There Such a Thing?, in B. Mayer, A. Zahar, *Debating Climate Law*, Cambridge University Press, 2021.

values are for mitigation".[24] The field of adaptation monitoring and evaluation or "adaptation tracking" is still under development.[25]

The scarcity of legal obligations at both international and national levels and difficulties in tracking adaptation progress (or lack thereof) are certainly major obstacles to litigation strategies on adaptation. On this basis, the next section addresses the question of whether, how and to what extent a human rights approach can complement the dearth of adaptation-specific norms and substantiate claims on adaptation.

3. The human rights approach to climate change adaptation

The human rights approach to climate action first emerged as a useful tool to address the underlying questions of (in-)justice related to climate change. In his 2009 seminal work, Humphreys suggested that "human rights occupy much of the space of justice discourse and therefore represent an 'essential term of reference' to address justice and equity questions in the context of climate change".[26] Not surprisingly, the most vulnerable to the adverse effects of climate change were the first to bring the link between human rights and climate change onto the international stage. The Inuit people decided to use a 'confrontational strategy' and launched the first complaint about climate change based on international human rights law.[27] On the other hand, the Maldives and other Small Islands Developing States (SIDS) embarked on a different strategy, aimed to influence the international law-making process on climate change.[28] In November 2007, the SIDS adopted the "Male Declaration on the Human Dimension of Global Climate Change", which is the first international instrument to explicitly acknowledge and express concern that climate change has "clear and

24 See IPCC [C. B. Field, V. Barros, et al. (eds.)] (n 3), p.853.

25 See United Nations Climate Change, *Monitoring and evaluation of adaptation at the national and subnational levels: Technical paper by the Adaptation Committee*,2023; UNEP, *The Adaptation Gap Report 2014. A Preliminary Assessment*, 2014; J. D. Ford et al., *Adaptation tracking for a post-2015 climate agreement*, in *Nature Climate Change*, vol.5, 2015.

26 S. Humphreys (ed.), *Human rights and climate change*, Cambridge University Press, 2009. Similarly, in 2008, he wrote: "human rights today occupy much of the space of justice discourse, to the extent that injustices that cannot be easily articulated in human rights terms can appear exotic or abstruse". See International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008.

27 See *infra* Section 4.2.

28 SIDS are recognised as being among the States most seriously affected by climate change, see UN Office of the High Representative for the Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States*. See also J. H. Knox, *Linking Human Rights and Climate Change at the United Nations*, in *Harvard Environmental Law Review*, vol.33, 2009.

immediate implications for the full enjoyment of human rights".[29] With the Male Declaration, the SIDS "solemnly requested" the international community to devote due attention to the link between human rights and climate change.[30] Following the Declaration, the Human Rights Council (HRC) adopted its first resolution on the topic and invited the Office of the High Commissioner on Human Rights (OHCHR) to conduct a study, which will serve as the incipit of the UN human rights system's activities on climate change.[31]

Today, a wide array of authoritative documents adopted by different UN human rights bodies have recognised that climate change affects the enjoyment of virtually all human rights.[32] States have also acknowledged this situation, with the preamble of the Paris Agreement specifying that parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights".[33]

While the human rights discourse has been linked to climate action as a whole, some difference exists between the applicability of human rights obligations to mitigation and adaptation respectively. Hall and Weiss were among the first to point out this distinction in 2012.[34] They stressed that the human rights approach is "far more able" to address adaptation than mitigation, because, among other things, "adaptation more easily fulfills human rights' rigid state-actor and causation requirements than does mitigation".[35] This difference was also highlighted by the former Special Rapporteur on Human Rights and the Environment in his 2016 report.[36] In outlining human rights obligations at the national level, the Rapporteur states that these are "relatively straightforward with respect to the establishment and implementation of effective adaptation measures". Accordingly, "States must adopt a legal and institutional framework that assists those within their jurisdiction to adapt to the unavoidable effects

29 *Male Declaration on the Human Dimension of Global Climate Change*, adopted on 14 November 2007, preamble recital 12.

30 Ibid.

31 HRC, Resolution 7/23, *Human rights and climate change*, March 2008; OHCHR, *Report on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61, January 2009.

32 See, among others, OHCHR, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/31/52, 1 February 2016; OHCHR, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/74/161, 1 October 2019; and OHCHR, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change*, UN Doc. A/77/226, 26 July 2022.

33 *Paris Agreement,* preamble.

34 M. J. Hall, D. C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, in *Yale Journal of International Law*, vol.37, 2012.

35 Ibid., p.313-315.

36 OHCHR, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (n. 32).

of climate change".[37] Among the measures to take – which vary depending on the specific context – the Special Rapporteur mentions early warning systems, physical infrastructure to reduce the risk of floods, and emergency response plans. The Rapporteur recognizes that with respect to mitigation "the situation is more complicated".[38] The Rapporteur emphasises that no State can prevent climate change impacts only by reducing its own GHG emissions, if emissions of other States continue to grow. While this in no way means that human rights law does not cover mitigation, the international cooperation component is certainly crucial in defining human rights obligations in this specific area.

Mayer has also recently pointed this out. In particular, he stressed that "the benefits of a state's mitigation action for the enjoyment of human rights are not as direct, immediate, and predictable as those of adaptation action".[39]

In addition, one should consider that mitigation action might severely impact the enjoyment of human rights, due, for example, to the collateral effects of decarbonization and energy transition policies and projects on labour rights and to the impacts of large renewable energy projects on local communities.[40]

On the other hand, however, it is important to recall that adaptation also has an important international cooperation component. The least developed and most vulnerable states need financial and technological support to advance adaptation on their territory. It would be unfair to place the entire burden of protecting the rights of the most affected individuals and communities on their shoulders, when the impacts of climate change are mainly due to the activities of developed states. International climate change law recognises this state of affairs.[41]

Curiously, this different applicability of human rights obligations to mitigation and adaptation has so far not been reflected in human rights-based climate litigation, which has mainly targeted mitigation.[42] This situation has also been at the centre of a heated debate in the specialised legal doctrine. When Heri contended that the European Court of Human Rights (ECtHR) examining climate

37 Ibid, paras 68–71.

38 Ibid.

39 B. Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, in *American Journal of International Law*, vol.115, 2021.

40 Incidentally, it is worth noting that a new trend of litigation on these issues is emerging, which has been recently categorized as "just transition litigation". See: A. Savaresi and J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers,* in *Journal of Human Rights and the Environment*, vol.13, 2022; M.A. Tigre, et al., *Just Transition Litigation in Latin America: An initial categorization of climate litigation cases amid the energy transition*, in *Sabin Center for Climate Change Law*, January 2023.

41 See *supra* Section 2, and in particular: UNFCCC, Arts. 4.3, 4.4, 4.5, 4.7, 4.8, 4.9 and Paris Agreement, Arts. 2.1 (c), 4.5, 7.6, 7.7 (d), 9.1, 9.3, 9.4, 10.6, 11.1. See also: J. Auz, *Global South climate litigation versus climate justice: duty of international cooperation as a remedy?*, in *Völkerrechtsblog*, 2020.

42 A. Savaresi, J, Setzer (n 40).

cases "is not only possible but also normatively desirable", Zahar replied by arguing that she conflated adaptation and mitigation issues, and if human rights bodies might well adjudicate the former, this does not apply to the latter. [43]

To be clear, the present author does not endorse the view that human rights obligations do not cover mitigation action or that mitigation cannot be adjudicated by human rights bodies. What is argued here is that adaptation is easier to 'fit into' the human rights framework than mitigation, and, as a result, human rights-based litigation might more easily and effectively address adaptation than mitigation. The typical obstacles of causation and attribution are softened in relation to adaptation. Once established that the impacts of climate change interfere with the enjoyment of human rights and that adaptation measures are useful to prevent or reduce these impacts, States have to take action in this direction, even regardless of the causes of climate change. The responsibility to advance adaptation lies principally with the territorial State. Establishing the extent to which the given State is contributing to climate change is not a determining factor for adaptation obligations, and there is no need of envisaging complex shared responsibility patterns and 'fair share' quotas. [44]

In this way, a more effective role of human rights law can complement the weaker legal strength of adaptation law and foster rights-based cases on climate change adaptation.

4. Rights-based cases on climate change adaptation

The human rights approach can complement the shortage of legal obligations on climate change adaptation, and, on this basis, rights-based cases can serve as a useful tool to address adaptation gaps. This section includes a survey and discussion of the extant cases concerning adaptation, distinguishing between cases brought before domestic courts and complaints filed with international judicial or quasi-judicial bodies.

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43 C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *European Journal of International Law*, vol.33, 2022; A. Zahar, *The Limits of Human Rights Law: A Reply to Corina Heri*, in *European Journal of International Law*, vol.33, 2022. See also C. Heri, *Legal Imagination, and the Turn to Rights in Climate Litigation: A Rejoinder to Zahar*, in *EJIL:Talk*, October 2022; B. Mayer, *Climate litigation and the Limits of Legal Imagination: A Reply to Corina Heri*, in *Center for International Law, National University of Singapore*, 4 November 2022.

44 On the 'fair share' issue, see: L. Rajamani, et al., *National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law*, in *Climate Policy*, vol.21, 2021; G. Liston, *Enhancing the efficacy of climate change litigation: how to resolve the "fair share question" in the context of international human rights law*, in *Cambridge International Law Journal*, vol.9, 2020.

4.1 The domestic level

Climate change litigation is mainly taking place before national courts.[45] This is also true for rights-based cases.[46] As explained above, most of these cases address mitigation. However, some prominent cases concerning adaptation have been litigated in different jurisdictions.[47]

A leading example is *Leghari v Pakistan*.[48] Mr Leghari sued the Pakistani government with a public interest lawsuit for its failure to implement the 2012 National Climate Change Policy and the Framework for Implementation of Climate Change Policy (2014–2030). In the complaint, he contends that climate change affects the constitutional rights to life and human dignity and to a healthy and clean environment. The Lahore High Court decided the case in favour of the applicant in 2015. Along with constitutional rights arguments, the Court based the ruling on "the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, and inter and intra-generational equity".[49] The ruling states that "Pakistan is not a major contributor to global warming, it is actually a victim of climate change and requires immediate remedial adaptation measures to cope with the disruptive climatic patterns".[50] The Court established a Climate Change Commission tasked with the implementation of the climate change legal frameworks. In a subsequent ruling in 2018, the Court took note that the Commission successfully implemented a significant number of priority adaptation actions in different sectors, such as "coastal and marine areas", "agriculture and livestock", "forestry", "biodiversity", "wetlands", "energy", "disaster management and water".[51]

Leghari v Pakistan can serve as a model of public interest and adaptation-focused litigation. This type of case is easier to be brought in jurisdictions that grant easy access to justice for public interest purposes. Different jurisdictions in the South Asian region are relatively open to this type of complaint with regard to environmental matters.[52]

Latin America is another region at the forefront of rights-based climate change litigation.[53] Among others, a set of complaints targeted deforestation

45 J. Setzer, C. Higham (n 1).
46 A. Savaresi, J. Setzer (n 40).
47 R. Luporini (n 7); E. Donger, *Lessons on "Adaptation Litigation" from the Global South*, in *Verfassungsblog*, 2022.
48 Lahore High Court, 25501/2015, *Leghari v Pakistan*, 2015.
49 Ibid., para 7.
50 Ibid., para 3.
51 Lahore High Court, 25501/2015, *Leghari v Pakistan*, January 2018.
52 Asian Development Bank, *Climate Change, Coming Soon to a Court Near You, Climate Litigation in Asia and the Pacific and Beyond*, December 2020.
53 J. Auz, *Human rights-based climate litigation: a Latin American cartography*, in *Journal of Human Rights and the Environment*, vol.13, 2022.

activities in the Amazon.[54] Some of these complaints have also an adaptation component. Adaptation action is indeed key to protecting exposed ecosystems from climate change impacts, while, at the same time, ecosystems play an important role in the adaptation of human society.[55] D*emanda Generaciones Futuras v Minambiente et al* is the leading case in this context. [56] In April 2018, Colombia's Supreme Court of Justice ruled that deforestation and climate change impacts in the Colombian Amazon were threatening the fundamental rights of a group of young plaintiffs. In its ruling, where it also recognised the Colombian Amazon as a "subject of rights", the court ordered the government to develop a "*Pacto intergeneracional por la vida del amazonas colombiano*" with the active involvement of the affected communities.[57] In addition to measures to reduce deforestation and GHG emissions, the plan had to cover the "implementation of strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation".[58] However, what types of adaptation strategies are envisaged is not at all clear, also because the ruling has yet to be properly implemented.[59]

In the Global North, adaptation litigation is well developed in Australia, where, however, cases are generally less politically charged, and are not based on rights arguments. These cases are normally taking place before specialised environment and land management courts. They deal with diverse sectoral aspects, such as land use, water management and coastal protection, and climate change is often only indirectly, peripherally, or incidentally discussed in the proceedings.[60]

On the contrary, to the best of the author's knowledge, there are no successful strategic cases based on human rights arguments concerning adaptation in the Global North, yet. In Europe, *Urgenda* and 'replica cases' do not

54 J. Setzer, D. Winter de Carvalho, *Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate*, in *RECIEL*, vol.30, 2021; C. Garfalo, *As the Lung of the Earth Dries Out, Climate Litigation Heats Up: Can Rights-Based Strategies Become a Valid Tool for the Protection of the Amazon Forest?*, in *Völkerrechtsblog*, 2022.

55 IPCC [H.-O. Pörtner et al. (eds)], *Climate Change 2022 Impacts, Adaptation and Vulnerability*. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policy Makers, Cambridge University Press, 2022, B.1.2. "Ecosystem-based adaptation" is an emerging approach that uses ecosystem services as part of a holistic adaptation strategy. See in general: IUCN, *Ecosystem-based Adaptation*, Issues Brief, 2017; UNEP, *Ecosystem-based Adaptation*.

56 Supreme Court of Justice of Colombia, STC4360-2018, *Demanda Generaciones Futuras v Minambiente et al.*, 2018.

57 *Ibid,* 49.

58 Ibid.

59 *Dejusticia*, the NGO that promoted the case, issued two informs of "failure to comply".

60 See J. Peel and H. M. Osofsky, *Sue to adapt?*, in *Minnesota Law Review*, vol.99, 2015 and J. Peel and H. M. Osofsky, *Litigation as an adaptation tool*, in J. Peel and H. M. Osofsky (eds.), *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge University Press, 2015.

deal with adaptation.[61] Adaptation has been only marginally considered in two important climate cases before French domestic courts: *Notre Affaire à Tous and others v France* (also known as the '*Affaire du siècle*') and *Commune de Grande-Synthe v France*.[62] Both cases are focused on mitigation, and are grounded on the French Charter for the Environment and Environmental Code, the European Convention on Human Rights (ECHR) and the Paris Agreement. While both cases were successful, the (marginal) adaptation component was dismissed. The reason for these failures is likely to lie in the fact that adaptation was clearly peripheral to the cases and dealt with in a rather vague manner.

In *Notre Affaire à Tous and others v France*, the applicants argued that the French National Climate Change Adaptation Plan (PNACC): (i) was adopted in delay; (ii) does not contain binding regulatory provisions; (iii) has unclear and often incoherent goals and objectives; (iv) includes a totally inadequate estimated budget; and (v) contains several measures that have not been implemented.[63] Thus, the applicants demanded the court to bind the French Government "to take any necessary measure for the adaptation of the national territory, and especially the vulnerable zones, to the effects of climate change".[64] In its decision of February 2021, the Administrative Court of Paris declared that the French State's inaction on climate change caused an ecological damage, however, in relation to adaptation, the court declared that the inadequacy of the French adaptation plan "cannot be regarded as having directly caused the ecological damage for which the applicant associations are seeking compensation", hence the adaptation component of the claim was rejected.[65]

In *Commune de Grande-Synthe – which is a small French municipality at serious risk from sea-level rise* – the dismissal of the adaptation component seems to be due to the fact that, for the specific claim on adaptation, the applicants relied exclusively on Paris Agreement provisions. In the French internal legal system, these international law provisions have no 'direct effect'; therefore, their breach cannot

61 Supreme Court of the Netherlands, ECLI:NL:HR: 2019:2007, *The State of the Netherlands v Stichting Urgenda* December 2019, English version. For a comment: A. Nollkaemper and L. Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL: Talk!*, 2020.

62 Tribunal Administratif de Paris, 1904967, 1904968, 1904972, 1904976, *Notre Affaire à tous et al v France*, October 2021 ; Conseil d'État, 427301, *Commune de Grande Synthe v France*, November 2020. For a comment, see C Huglo, *Procès climatique en France: la grande attente Les procédures engagées par la commune de Grande-Synthe et son maire*, in *AJDA Dalloz*, 2019; B. Parance and J. Rochfeld, *Un tsunami juridique: la première décision "climatique" rendue par le Conseil d'État français le 19 novembre 2020 est historique*, in *leclubdejuristes*, 2020.

63 *Notre Affaire à Tous et al v France* (n 62), *Demande Préalable Indemnitaire*, 2018, 37–39.

64 Ibid.

65 *Notre Affaire à tous et al. v France*, (n 62), para 33 (Official French version: « *l'insuffisance de ces mesures ne peut être regardée comme ayant directement causé le préjudice écologique dont les associations requérantes demandent la réparation* »).

be invoked before the *Conseil d'État*.[66] In fact, the *Municipality of Grande-Synthe* also filed a second lawsuit, which attracted much less attention, and which was entirely devoted to adaptation.[67] The lawsuit challenged the French National Adaptation Plan on the basis of French administrative law. This case was also dismissed. It was not, however, based on the ECHR, or constitutionally recognised fundamental rights.

4.2 The international level

International human rights bodies have been called upon to hear climate change-related complaints since 2005, when the *Inuit*, an Indigenous People from the Artic, lodged a pioneering complaint against the United States (US) with the Inter-American Commission on Human Rights (IAComm).[68] The complaint, which was dismissed at an early stage, claimed that the US was responsible for human rights violations as the largest GHG emitter. The alleged human rights violations were not tied to the failure to adapt. Adaptation was only mentioned within the remedies requested. Among other things, indeed, the Inuit demanded an adaptation plan to be implemented by the US in coordination with the affected communities. However, the required adaptation plan was not properly outlined in the complaint, and the adaptation solutions envisaged remained vague.[69]

The UN human rights treaty monitoring bodies have also received three climate change-related complaints in recent years. The first complaint was brought by an asylum seeker before the Human Rights Committee (HRComm). In *Ioane Teitiota v New Zealand*, Mr Teititota claimed that his right to life had

66 *Commune de Grande Synthe v France* (n 62). The decision (unofficial English translation) reads: "If the commune of Grande-Synthe maintains that the decision it is attacking disregards the stipulations of article 2 of the Paris Agreement cited in point 9, these stipulations, as well as stated in point 12, are of *no direct effect*. Consequently, their mere ignorance cannot be usefully invoked against the contested decision" (para 18), and "the conclusions of the request of the commune of Grande-Synthe for the annulment of the decision of the court of Grande-Synthe for abuse of power of implied refusals to take any regulatory initiative action to…implement measures of immediate adaptation to climate change are rejected", (para 4 decision).

67 Conseil d'État, *Commune de Grande-Synthe v France,* 428177, 12 February 2021.

68 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. On the role of international human rights bodies in climate change litigation see R. Luporini, A. Savaresi, *International human rights bodies and climate litigation: Don't look up?*, in RECIEL,vol.32, 2023.

69 *Inuit Petition* (n 68), Request for relief, p.118. A similar request was formulated by the Athabaskan peoples, which filed a petition with the IACommHR in 2013, see 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, *Athabaskan Petition*, April 2013.

been violated due to New Zealand's refusal to grant him asylum after he was displaced from Kiribati because of the impacts of sea-level rise and extreme weather events.[70] The complaint, which was rejected on the merits, does not directly concern adaptation. Adaptation is, however, indirectly involved; in its decision, the HRComm stated that "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the '*non-refoulement'* obligations of sending states".[71] The national and international efforts called into question include international cooperation on adaptation. Accordingly, this type of complaint could prompt international support and assistance to improve adaptation in the most vulnerable countries as a way to prevent or limit displacement.

A second complaint was brought before the UN Committee on the Rights of the Child (CRC). In *Sacchi et al v Argentina et al,* a group of children of diverse nationalities filed a complaint against multiple States claiming that they had breached their rights to life, health, culture and best interest of the child, as a result of failure to adopt adequate action on climate change.[72] The CRC dismissed the complaint for non-exhaustion of domestic remedies. In this case the focus is on climate change mitigation, while increasing adaptation efforts is only briefly mentioned in the requests for relief, without much elaboration.[73]

It is only with the third complaint, namely *Daniel Billy et al v Australia*, that adaptation takes centre stage. A group of eight members of different indigenous groups from the Torres Strait Islands (Australia) filed a complaint with the HRComm in May 2019.[74] The Torres Strait Islands are exposed to heightened climate change risks, including sea level rise and rising sea temperatures, king tides and floods, erosion and land accretion, increasing storm frequency, and strong winds. According to the applicants, these risks have been insufficiently addressed by the Australian authorities, which pursued insufficient GHG mitigation targets and plans, and failed to adopt adequate adaptation measures,

70 UN HRComm, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019,* UN Doc CCPR/C/127/D/2728/2016, 7 January 2020. For a commentary: E. Sommario, *When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision,* in *Questions of International Law*, vol.77, 2021.

71 Ibid., para 9.11.

72 UN CRC, *Sacchi et al v Argentina et al*, Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning, Communication No. 104/2019*,* UN Doc CRC/C/88/D/104/2019, 11 November 2021.

73 *Sacchi et al.* (n 72), Communication, para 33.

74 UN Human Rights Committee, *Daniel Billy and others v Australia*, CCPR/C/135/D/3624/2019, 22 September 2022. See also: M. Cullen, *'Eaten by the sea': human rights claims for the impacts of climate change upon remote subnational communities*, in *Journal of Human Rights and the Environment*, vol.9, 2018.

such as building sea-walls, and other similar coastal defense and resilience measures. The applicants lamented Australia's violation of several articles under the ICCPR, namely Article 6(1) on the right to life, Article 17(1) on the right to be free from arbitrary interference with privacy, family and home, and Article 27 on the right to culture, religion and language (rights of minorities). They also claim violations of Article 24 (1) concerning children's rights. The applicants demanded that Australia implement effective adaptation measures to secure the communities' existence on the islands.

In September 2022, the HRComm adopted its Views on the case, accepting the claims of the applicants. This is the first case in which the claims of climate applicants are accepted by an international human rights body. While the complaint addressed both mitigation and adaptation, the HRComm Views focused only on the latter. The HRComm found that Australia had failed to comply with its positive obligation to adopt "timely adequate" adaptation measures to protect the applicants' home, private and family life, their collective ability to maintain a traditional way of life and to transmit their customs and culture to future generations.[75] However, the HRComm did not find a violation of the right to life, as the applicants had not shown the effects that climate change had already had on their health, or demonstrated a concrete and reasonably foreseeable risk to which their life would be exposed to. As in *Teitiota*, the HRComm emphasised that, in the 10–15-year period in which the islands would allegedly become uninhabitable, Australia could adopt preventative measures and, if necessary, relocate the applicants.[76] The HRComm did not pronounce on the alleged human rights violations associated with the state's failure to mitigate climate change.

The ECtHR has also been receiving with very strategic and high-profile climate complaints. [77] However, they all focus on mitigation, while adaptation is not addressed. This reflects the same situation described above in relation to cases before domestic courts in Europe, which did not delve into the issue of adaptation. Jurisdiction over three of these climate complaints has been relinquished to the Grand Chamber.[78] Although they do not directly concern

75 *Daniel Billy et al v Australia* (n 74), paras 8.9–8.14.

76 Ibid., para 8.7.

77 See R. Luporini, A. Savaresi (n 68); C. Heri (n 43); H. Keller, C. Heri, R. Piskóty, *Something Ventured, Nothing Gained? – Remedies before the ECtHR and Their Potential for Climate Change Cases*, in *Human Rights Law Review*, vol.22, 2022; J. Hartmann, M. Willers, *Protecting rights through climate change litigation before European courts*, in *Journal of Human Rights and the Environment*, vol.13, 2022; O. W. Pedersen, *Any Role for the ECHR When it Comes to Climate Change?*, in *European Convention on Human Rights Law Review*, vol.3, 2021.

78 ECtHR, *Verein KlimaSeniorinnen Schweiz et al v Switzerland,* App No 53600/20*,* relinquished in favour of the Grand Chamber 26 April 2022*; Carême v France,* App No 7189/21, relinquished in favour of the Grand Chamber 31 May 2022; *Duarte Agostinho et al v Portugal et al,* App No 39371/20*,* relinquished in favour of the Grand Chamber 29 June 2022.

adaptation, the ECtHR's ruling on these cases will in any case be very valuable in figuring out the opportunities for future rights-based adaptation claims in the region.

5. Conclusions

In its 2023 Report, the IPCC stated that "human-caused climate change is already affecting many weather and climate extremes in every region across the globe" and that "there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all".[79] The UNFCCC negotiation process, however, proceeds slowly and international climate change law is not able to guarantee accountability and enforcement. Climate change litigation is rising as a strategic tool to narrow these gaps. Litigants have so far mainly targeted the insufficient mitigation action by States and corporate actors. This makes sense, since reducing GHG emissions is the priority for tackling climate change. However, adaptation action also becomes crucial to alleviate the widespread adverse effects that are already felt among the most vulnerable and increasingly in the Global North, including Europe.

In this contribution it is argued that while it is true that adaptation law is less developed than mitigation law, a human rights approach can complement this disparity. Human rights obligations are more direct and straightforward in relation to adaptation than mitigation. Thus, litigants can increasingly rely on human rights arguments to foster adaptation action and bridge adaptation gaps. The contribution discussed some important rights-based adaptation cases that have already been heard by domestic courts and international human rights bodies. Among others, *Leghari v Pakistan* may be a useful model for South Asian jurisdictions, where, despite climate impacts being among the highest in the world, adaptation litigation is still "relatively novel and limited in scope".[80] Similarly, an adaptation component might be further included in lawsuits aimed at protecting vulnerable ecosystems, such as the Amazon rainforest. At the same time, the Views adopted by the HRComm in *Daniel Billy et al v. Australia* show that adaptation could also take centre stage in strategic complaints before international human rights bodies. The Views confirmed that the lack of "timely adequate" adaptation action can result in human rights violations and that States can be held internationally responsible for this failure.

On the other hand, rights-based adaptation litigation struggles to develop in Europe. Litigants are justified in their efforts to hold accountable those who have not taken sufficient action to mitigate climate change in the Old Continent.

79 IPCC, *Synthesis Report of the IPCC, Sixth Assessment Report (AR6), Summary for Policymakers*, A.2, p.5 and C.1, p.25.

80 Asian Development Bank (n 52), p. 153.

This includes both States and corporate actors that are among the world's largest emitters. Still, the growing climate-related disaster events in the region make it clear that addressing adaptation is also crucial.[81] Adaptation cases should thus be increasingly attempted in this context. Given the dearth of binding national laws on adaptation, human rights arguments can serve as a convenient "gap filler". The human rights guarantees enshrined in the ECHR, combined with fundamental rights provisions of national constitutions, can provide an appropriate ground for this type of lawsuit.

81 See, among others, W. Cornwall, *Europe's deadly floods leave scientists stunned*, in *Science*, 2021.