Transnational Environmental Law, 12:3 (2023), pp. 537–566 © The Author(s), 2023. Published by Cambridge University Press.

doi:10.1017/S2047102523000183

ARTICLE

The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation

Margaretha Wewerinke-Singh*

Abstract

This article offers a comprehensive analysis of rights-based climate litigation aimed at addressing climate change-induced loss and damage, underlining its potential as a transformative force amid the minimal progress towards a coordinated global response on this topic. It builds on literature highlighting the potential of rights-based climate litigation to fill the gap in accountability for climate change and its consequences, noting that research to date has not systematically analyzed the remedies that plaintiffs have sought or secured. By focusing on remedy claims, this study illuminates the capacity and the limitations of such litigation to unlock redress for loss and damage while highlighting its reciprocal relationship with international negotiations. This synergy implies a promising trajectory towards a more equitable climate governance framework, despite the complexities and challenges inherent in this rapidly evolving field.

Keywords: Climate change, Loss and damage, Human rights, Climate litigation, Rights-based climate litigation, Right to a remedy

* University of Amsterdam, Faculty of Law, Amsterdam (The Netherlands); University of Fiji, Justice Devendra Pathik School of Law, Suva (Fiji); and of Counsel at Blue Ocean Law, Hagåtña (Guam).
Email: m.j.wewerinke@uva.nl.

The author would like to extend gratitude to participants in the workshop 'International Human Rights Courts and Bodies at the Edge of the Climate Tipping Point' at the Centre for Fundamental Rights, Hertie School, Berlin (Germany), 9–10 June 2021, and in particular to Benoît Mayer for helpful feedback on a first draft of this article. The author is also grateful to seven anonymous reviewers for additional feedback, and to Manasa Venkatachalam, Garvita Sethi, and Aswathy S. for excellent research assistance.
Competing interests: The author serves as Lead Counsel for Vanuatu in the advisory proceedings on climate change before the International Court of Justice (together with Julian Aguon) and as Counsel for the Commission of Small Island States on Climate Change and International Law in the advisory proceedings on climate change before the International Tribunal for the Law of the Sea. However, the views expressed in this article are personal.

1. INTRODUCTION

Around the globe, loss and damage from climate change are becoming increasingly tangible. Land is being swallowed by the sea, loved ones killed in climate-related events, and food and water scarcity worsening as a result of unpredictable weather patterns.[1] These forms of loss and damage span the spectrum from irreversible impacts, such as loss of life and ecosystems, to repairable damage, such as damage to infrastructure.[2] A growing body of scholarship and practice highlights the human rights dimensions of these diverse forms of loss and damage, giving weight to a call for global responses capable of preventing and minimizing interferences with rights and redressing violations.[3]

This intersection of climate change, loss and damage,[4] and human rights also illuminates a distinct justice dimension.[5] Those who are hit first and hardest by climate impacts have done the least to cause them. In contrast, those who have benefited most from centuries of fossil fuel exploitation now possess a disproportionate resilience and adaptive capacity, accrued largely from the wealth derived from these processes.[6] The financing of loss and damage represents a critical challenge within this justice conundrum. Currently, the financial burden of loss and damage lies with climate-vulnerable states, compounding their economic vulnerabilities and perpetuating a cycle of poverty and susceptibility to climate impacts.

Promising signs of change emerged before the 26th Conference of the Parties (COP26) to the United Nations Framework Convention on Climate Change

---

1 P. Tschakert et al., 'One Thousand Ways to Experience Loss: A Systematic Analysis of Climate-related Intangible Harm from Around the World' (2019) 55 *Global Environmental Change*, pp. 58–72. See also H.-O. Pörtner et al., 'Summary for Policymakers', in Intergovernmental Panel on Climate Change (IPCC) (H.-O. Pörtner et al. (eds)), *Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the IPCC* (IPCC, 2022), pp. 1–33, at 9 (recognizing that climate change has already caused widespread loss and damage to nature and people).

2 M. Broberg, 'The Third Pillar of International Climate Change Law: Explaining "Loss and Damage" after the Paris Agreement' (2020) 10(2) *Climate Law*, pp. 211–23, at 217. See also Paris Agreement, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, Art. 8(4)(g), available at: http://unfccc.int/paris_agreement/items/9485.php.

3 See, e.g., United Nations Human Rights Council (UNHRC) Resolution 48/14, 'Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change', 8 Oct. 2021, UN Doc. A/HRC/RES/48/14, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/285/48/PDF/G2128548.pdf?OpenElement; UNHRC Resolution 44/7, 16 July 2020, 'Human Rights and Climate Change', UN Doc. A/HRC/RES/44/7, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/189/33/PDF/G2018933.pdf?OpenElement; P. Toussaint & A.M. Blanco, 'A Human Rights-based Approach to Loss and Damage under the Climate Change Regime' (2019) 20(6) *Climate Policy*, pp. 743–57; K.E. McNamara & G. Jackson, 'Loss and Damage: A Review of the Literature and Directions for Future Research' (2018) 10(2) *WIREs Climate Change*, article e564; M. Doelle & S. Seck, 'Loss & Damage from Climate Change: From Concept to Remedy?' (2019) 20(6) *Climate Policy*, pp. 669–80.

4 'Loss and damage' is understood here as encompassing the adverse impacts and/or projected risks of climate change, economic and non-economic; see Pörtner et al., n. 1 above, n. 19.

5 This article follows the IPCC in defining 'climate justice' as comprising 'justice that links development and human rights to achieve a rights-based approach to addressing climate change': Pörtner, n. 1 above, n. 14. See also M. Pathak et al., 'Technical Summary', in IPCC (P.R. Shukla et al. (eds)), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022), pp. 51–147, at 133.

6 S. Adelman, 'Human Rights in Pursuit of Climate Justice' (2021) 38(2) *Wisconsin International Law Journal*, pp. 171–96, at 171, 176. See also Tschakert et al., n. 1 above, p. 58.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

(UNFCCC),[7] held in 2021. Scotland and Wallonia both pledged dedicated funding for loss and damage in developing countries.[8] Denmark became the first state party to the UNFCCC to make a similar pledge, and a cascade of other nations followed.[9] These commitments set the stage for COP27, which took place in 2023, where an in-principle agreement was reached to establish a new Loss and Damage Finance Facility.[10] The concept of funding loss and damage through a grant-based system aligns with the proposals of the Bridgetown Initiative, led by Barbados, which advocates comprehensive reforms to the international financial system to enable developing countries to build resilience against climate-related shocks.[11] Despite these promising developments and proposals, critical questions about the precise arrangements of the Loss and Damage Finance Facility remain unresolved.

Within this multifaceted domain of climate justice, the phenomenon of rights-based climate litigation is gaining momentum.[12] This bottom-up strategy leverages human rights to hold governments or corporations to account for their insufficient efforts to address climate change and its consequences.[13] In doing so,

---

7 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int.

8 Scottish Government, 'Scotland to Boost Climate Funding', 11 Nov. 2021, available at: https://www.gov.scot/news/scotland-to-boost-climate-funding; 'COP26: Wallonia Earmarks One Million Euros for Loss and Damages', *The Brussels Times*, 14 Nov. 2021, available at: https://www.brusselstimes.com/news/193568/cop26-wallonia-earmarks-one-million-euros-for-loss-and-damages.

9 The Loss and Damage Collaboration, 'Festival of Pledges for Loss and Damage: Are They New and Additional and Do They Meet the Needs on the Ground?', 15 Nov. 2022, available at: https://www.lossanddamagecollaboration.org/pages/festival-of-pledges-for-loss-damage-are-they-new-and-additional-and-do-they-meet-the-needs-on-the-ground.

10 UNFCCC-COP, Revised Draft Decision -/CP.27 -/CMA.4, 'Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage', UN Doc. FCCC/CP/2022/L.18–FCCC/PA/CMA/2022/L.20, 19 Nov. 2022, available at: https://unfccc.int/documents/624434.

11 Barbados Ministry of Foreign Affairs and Foreign Trade, 'The 2022 Bridgetown Initiative', 23 Sept. 2022, available at: https://www.foreign.gov.bb/the-2022-barbados-agenda (proposing grants for loss and damage that would be funded by a 2% tax on fossil fuel exports).

12 See, e.g., M. Broberg & B.M. Romera (eds), *The Third Pillar of International Climate Change Policy: On 'Loss and Damage' after the Paris Agreement* (Routledge, 2021), p. 223 (explaining that because Art. 8 of the Paris Agreement 'is without bite' because of the exclusion of liability and compensation from its scope, 'it is necessary to find a way to exploit domestic as well as international legal regimes'). See also A. Savaresi & J. Setzer, 'Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2021) 12(2) *Journal of Human Rights and the Environment*, pp. 7–34, at 8 (noting that the rise in rights-based climate litigation 'arguably results from accountability and enforcement gaps').

13 For an overview, see Climate Rights and Remedies Project (CRRP), 'Climate Litigation Database', available at: https://climaterightsdatabase.com. See further A Savaresi, 'Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation' (2021) 77 *Questions of International Law Zoom-in*, pp. 1–3, available at: http://www.qil-qdi.org/plugging-the-enforcement-gap-the-rise-and-rise-of-human-rights-in-climate-change-litigation; J. Setzer & L.C. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) *Wiley Interdisciplinary Reviews: Climate Change*, pp. 1–19; J. Setzer & M. Bangalore, 'Regulating Climate Change in the Courts', in A. Averchenkova, S. Fankhauser & M. Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017), pp. 175–92; J. Setzer & C. Higham, 'Global Trends in Climate Change Litigation: 2021 Snapshot', Policy Report, July 2021, Centre for Climate Change Economics & Policy (CCCEP), Grantham Research Institute on Climate Change and the Environment & Sabin Center for Climate Change Law; K. Yoshida & J. Setzer, 'The Trends and Challenges of Climate Change Litigation and Human Rights' (2020) 2 *European Human Rights Law Review*, pp. 140–52; K. Guruparan & H. Moynihan, *Climate Change and Human Rights-based Strategic*

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

it has emerged as an important method of resistance for those most affected by the climate crisis, with a growing number of high-profile cases filed in the global south,[14] and by Indigenous communities[15] and young persons.[16] This 'rights turn'[17] in climate litigation also holds significant promise for addressing loss and damage. By foregrounding the human impacts of climate change, the moral implications of climate-related harm and the ensuing demand for accountability become evident.[18] Crucially, this quest for accountability is anchored in the legal fabric of human rights law, with the entitlement to a remedy for harm ingrained in the very concept of human rights[19] and firmly entrenched as a distinct right in both custom[20] and treaties.[21] Hence, by holding entities – be they governments or corporations –

Litigation (Chatham House, 2021), available at: https://www.chathamhouse.org/sites/default/files/2021-11/2021-11-11-climate-change-and-human-rights-litigation-guruparan-et-al.pdf.

14 C. Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation', in J. Peel & J. Lin (eds), *Transnational Climate Litigation: The Contribution of the Global South* (Cambridge University Press, 2020), pp. 40–4.

15 See, e.g., *PSB et al.* v. *Brazil*, 24 Nov. 2020, ADPF 76, Supreme Court of Brazil; P. Velasco Herrejon & A. Savaresi, 'Wind Energy, Benefit-Sharing and Indigenous Peoples: Lessons from the Isthmus of Tehuantepec, Southern Mexico' (2020) 18(1) *Oil, Gas and Energy Law Journal*, pp. 1–16.

16 See, e.g., *Neubauer et al.* v. *Germany*, Case Nos BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 4, Mar. 2021, Bundesverfassungsgericht [Federal Constitutional Court]; *Future Generations* v. *Ministry of the Environment and Others*, 11001-22-03-000-2018-00319-01, 5 Apr. 2018, Colombia Supreme Court; ECtHR, *Greenpeace Nordic and Others* v. *Norway*, Appl. No. 34068/21, communicated on 16 Dec. 2021 (undecided).

17 J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67, at 37.

18 See also D. Magraw, 'From the Inuit Petition to the *Teitiota* Case: Human Rights and Success' (2020) 114 *Proceedings of the ASIL Annual Meeting*, available at: https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/abs/from-the-inuit-petition-to-the-teitiota-case-human-rights-and-success-in-climate-litigation/A8A0A862BCBF79861C1F3D5C0F4875AA.

19 See generally D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015).

20 UN General Assembly (UNGA) Resolution 60/147, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 16 Dec. 2005, UN Doc. A/RES/60/147, Annex, Principles 1(b), 2, 3 and (pertaining to gross violations of international human rights law and international crimes) Principle 11. See also *Moiwana Community* v. *Suriname*, 15 June 2005, Inter-American Court of Human Rights (IACtHR), (Ser. C) No. 124, para. 169 and p. 103.

21 See, e.g., International Covenant on Civil and Political Rights (ICCPR), New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, Art. 2(3), available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), New York, NY (US), 21 Dec. 1965, in force 4 Jan. 1969, Art. 6, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), New York, NY (US), 18 Dec. 1979, in force 3 Sept. 1981, Art. 2(c), available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), New York, NY (US), 10 Dec. 1984, in force 26 June 1987, Art. 14, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading; UNGA Resolution 54/263, 'Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography', 25 May 2000, UN Doc. A/RES/54/263, Arts 8 and 9; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, NY (US), 18 Dec. 1990, in force 1 July 2003, Arts 15, 16(9), 18, 83, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers; Indigenous and Tribal Peoples Convention, Geneva (Switzerland), 27 June 1989, in force 27 June 1989,

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

accountable under human rights law for their contributions to climate change, they will be impelled, at least in theory, to provide tangible remedies for the harm caused.

To fully grasp the potential of rights-based climate litigation to redress the severe implications of loss and damage, it is essential to examine the ways in which such litigation seeks to secure – or fails to secure – remedies for those most affected.[22] Current research has only tangentially explored this aspect, focusing primarily on the legal arguments presented,[23] the interplay between courts and litigants,[24] and the formation of new jurisprudential perspectives.[25] The limited focus on remedies in rights-based climate scholarship may be as a result of a general preoccupation with rights, rather than remedies, among litigators, judges, and indeed scholars,[26] leaving the topic of remedies in rights-based climate litigation in a sort of academic limbo.[27] In addition, it should be highlighted that rights-based climate change litigation encompasses a plethora of strategic approaches, often with a primary focus on mitigation and, to a lesser extent, adaptation. Further still, most rights-based climate cases that do address loss and damage are still pending. While these factors may explain the scarcity of scholarship on this theme, it leaves a considerable gap in our understanding of this evolving field, with scholars resorting to speculation about the extent to which human rights law serves 'as a gap-filler to provide remedies [for climate harm] where other areas of the law do not'.[28]

This article seeks to fill this gap by providing the first comprehensive analysis of rights-based climate litigation aimed at addressing loss and damage. Rights-based climate litigation, as defined in this article, explicitly includes human rights arguments in the plaintiff's submissions and raises material issues related to climate change.[29] Among these cases, the article focuses specifically on those that address loss and damage within the ambit of remedies pursued or granted.[30] To put this in perspective, of the

---

Arts 15(2), 16(4), 16(5), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document. See further Shelton, n. 19 above, pp. 113–20.

22 M. Burger & D.J. Metzger, *Global Climate Litigation Report: 2020 Status Review* (United Nations Environment Programme (UNEP), 2020), p. 47.

23 Ibid.

24 Setzer & Vanhala, n. 13 above.

25 Peel & Osofsky, n. 17 above.

26 See also K. Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021), p. 2 (noting that '[w]e live in a world rich with rights [but] poor in remedies').

27 P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983).

28 A. Savaresi & J. Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law*, pp. 244–62, at 244 (with references).

29 Notably, the second part of this definition corresponds to the definition that guides the collection of cases included in the US and Non-US Climate Change Litigation charts of the Sabin Center for Climate Change Law, as well as the Climate Change Laws of the World database, maintained jointly by the Sabin Center for Climate Change Law and the Grantham Research Institute at the London School of Economics; see CRRP, n. 13 above. For further information about the approach of the databases to case selection, see Climate Change Litigation Databases, available at: https://climate-laws.org/methodology-litigation. For a similar definition of rights-based climate litigation, see Savaresi & Setzer, n. 12 above, pp. 7–8.

30 'Remedies' is understood as encompassing both procedural and substantive dimensions, with the latter broadly encompassing cessation and reparations. 'Reparations', in turn, is used in the broad sense employed by the International Law Commission (ILC) in its Articles on State Responsibility, with

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

160 rights-based climate change cases (31 international and 129 domestic), 24 (10 international and 14 domestic) can be classified as addressing loss and damage in remedies sought or granted. Therefore, 15% of all rights-based cases (32.2% of international and 10.8% of domestic) can be considered as addressing loss and damage in connection with remedies.[31]

By focusing on remedies sought and awarded or denied in rights-based climate cases, the article provides empirical insight into the actual and potential efficacy of this emerging litigation stream as a mechanism for redressing loss and damage. Throughout the article, attention is paid to the array of challenges identified by previous research[32] – ranging from procedural hurdles such as standing,[33] to intricate legal and evidentiary challenges like causation,[34] and issues of extraterritoriality.[35]

It should be noted that most rights-based climate cases to date have been brought against states rather than corporations,[36] with some notable exceptions.[37] In the loss and damage cases considered in this study, four out of the 14 domestic cases named a company as a defendant. This number may be expected to rise as laws establishing a due diligence standard for private actors are being enacted at domestic and regional levels in several parts of the world, requiring compliance with human rights in global supply chain operations,[38] and opening the door to litigation.[39]

'restitution', 'compensation', and 'satisfaction' understood as subcategories. See Arts 31, 34, 38–39, ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts', 26 July 2001, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (ARSIWA). 'Redress' is broadly interpreted to mean the correction of a wrong.

31 As calculated from the Sabin Center for Climate Change Law database and this author's own documentation of cases.

32 E.g., A. Savaresi & J. Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry', in J. Lin & D. Kyser (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, 2020), pp. 77–81.

33 See, e.g., *PUSH Sweden, Nature and Youth Sweden and Others* v. *Government of Sweden*, Case T 11594-16 et al., 30 June 2017, Stockholm District Court. See also S. Beck & E. Burleson, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations' (2014) 3(1) *Transnational Environmental Law*, pp. 17–29, at 17, 24.

34 R.A. James et al., 'Attribution: How is it Relevant for Loss and Damage Policy and Practice?', in R. Mechler et al. (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Springer, 2019), pp. 113–54, at 140.

35 International Bar Association (IBA), *Achieving Justice and Human Rights in an Era of Climate Disruption* (IBA, 2014), p. 68.

36 Savaresi & Setzer, n. 12 above, p. 30.

37 See *Milieudefensie et al.* v. *Royal Dutch Shell Plc*, C/09/571932, 26 May 2021, District Court of The Hague (The Netherlands) (*Milieudefensie*). As at 2021, in 93 of the 112 rights-based climate cases, the defendants were states and public authorities; see Savaresi & Setzer, n. 12 above, p. 14.

38 A.E. González et al. (eds), *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check* (European Coalition for Corporate Justice (ECCJ) & Corporate Responsibility (CORE) Coalition, 2020), available at: http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf; Loi de Vigilance, Law No. 2017-39, 27 Mar. 2017, Relating to the Duty of Vigilance of Parent Companies and Ordering Companies (France); Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz, LkSG), 1 Jan. 2023 (Germany); European Commission, Corporate Sustainability Due Diligence Directive (negotiations ongoing), available at: https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

39 *Notre Affaire à Tous and Others* v. *France*, Decision, 3 Feb. 2021, Administrative Court of Paris (France), unofficial English translation available at: http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france; *Envol Vert et al.* v. *Casino* (pending), Saint-Étienne Judicial Court, complaint

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

More generally, the question of apportionment of responsibility between states and private actors remains unanswered.[40]

The remainder of this article unfolds as follows. Section 2 delves into domestic rights-based climate cases, taking the remedy claims as a starting point. This granular exploration of claims is followed by an evaluation of the outcomes of those cases that have progressed to decisions, and reflections on discernible trends and their potential implications. Section 3 mirrors this approach for an analysis of the international cases. Section 4 serves as a synthesis, weaving together the threads of insights drawn from both domestic and international cases.

This exhaustive inquiry illuminates the potential of rights-based climate litigation as a transformative force in redressing climate-related loss and damage while also acknowledging the complexities and challenges inherent in this rapidly evolving field. Furthermore, it underscores the synergistic relationship between courtroom battles and international negotiations, illustrating how insights from the courtroom can inform and enrich the discussions at negotiation tables and vice versa. It posits that, navigated judiciously, this synergy could steer us towards a more equitable climate governance framework, one that is deeply anchored in human rights and principles of justice.

2. LOSS AND DAMAGE CLAIMS IN RIGHTS-BASED CLIMATE CASES: DOMESTIC LITIGATION

This section examines the various loss and damage claims pursued in domestic rights-based climate cases and situates their implications within the broader context of climate litigation. Examining these claims provides valuable insights into the evolving landscape of climate litigation and the strategies employed by plaintiffs in seeking to address loss and damage. Assessing outcomes obtained thus far sheds light on the extent to which courts and human rights bodies have started to contribute to the provision of redress for loss and damage under their respective mandates. Further, it offers insights into the promises and limitations of specific avenues, arguments, strategies, and fora for addressing loss and damage through the lens of human rights.

2.1. *An Overview*

To date, 14 domestic rights-based climate cases have sought some form of redress for loss and damage. Broadly speaking, these cases have sought redress for both economic

available at: https://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino; *ClientEarth* v. *Belgian National Bank* (withdrawn), case history available at: http://climatecasechart.com/non-us-case/clientearth-v-belgian-national-bank.

[40] Partial answers could emerge, however, from proceedings that are currently pending; see, e.g., UNGA Resolution A/77/L.58, 'Request for an Advisory Opinion [of the International Court of Justice] on the Obligations of States with respect to Climate Change', 29 Mar. 2023, available at: https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-obligations-of-states-with-respect-to-climate-change (ICJ Advisory Opinion).

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

and non-economic loss. Table 1 (in the Appendix at the end of the article) provides an overview of the cases and their corresponding loss and damage claims.

Among the 14 cases are five involving domestic plaintiffs who seek redress from their own government. These include two lawsuits pending in Uganda, where the plaintiffs sought monetary compensation for loss and damage from the government.[41] While claiming compensation in very generic terms, the articulation of these claims underscores the tangible damage suffered by the affected communities and the need for compensation to recognize and rectify these impacts.[42] Significantly, one of the cases puts forth an additional request for an order mandating the government to cover the costs of resettlement from disaster-prone areas.[43] This claim reflects the growing attention to the need for compensation to address the costs associated with climate displacement, which represents a form of non-economic loss.

In two other cases against a national government, *Notre Affaire à Tous and Others* v. *France*,[44] and *PUSH Sweden, Nature and Youth Sweden and Others* v. *Government of Sweden* (*Swedish Magnolia* case),[45] the plaintiffs sought a symbolic amount of one euro for damages suffered as a result of climate change. In *Notre Affaire à Tous*, the one euro claimed in compensation from the French government was intended to emphasize the illegality of the government's failure to implement adequate mitigation measures. In a similar vein, the Swedish plaintiffs' claim for damages of one Swedish crown per person served to highlight the illegality of the sale by state-owned energy company Vattenfall of German coal assets to a Czech company, a sale expected to result in increased emissions of greenhouse gases (GHGs).[46] Used in this way, compensation affirms, reinforces, and concretizes fundamental values in the face of the climate crisis, fostering public awareness and potentially catalyzing policy changes.[47]

Last in this subgroup is *Anton Foley and Others* v. *Sweden* (*Aurora* case),[48] a class action suit filed by a group of over 600 young people, currently pending before the Swedish courts. The case challenges the adequacy of Sweden's climate change

[41] Complaint filed in *Mbabazi and Others* v. *The Attorney General and National Environmental Management Authority*, Civil Suit No. 283 of 2012, 28 Aug. 2015, High Court of Uganda, available at: http://climatecasechart.com/non-us-case/mbabazi-et-al-v-attorney-general-et-al; Application filed in *Tsama William and Others* v. *Uganda's Attorney General and Others*, Miscellaneous Cause No. 024 of 2020, 3 May 2021, High Court of Uganda, available at: http://climatecasechart.com/non-us-case/tsama-william-and-others-v-ugandas-attorney-general-and-others.

[42] See, e.g., Tschakert, n. 1 above.

[43] *Tsama William and Others*, n. 41 above.

[44] *Notre Affaire à Tous and Others* v. *France*, n. 39 above.

[45] *PUSH Sweden, Nature and Youth Sweden and Others* v. *Government of Sweden*, Case T 11594-16 et al., 30 June 2017, Stockholm District Court.

[46] L.E. Burgers, 'Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-Making in European Private Law Cases on Climate Change', 11 Nov. 2020 (Doctoral thesis, University of Amsterdam (The Netherlands)), p. 121, paras 38–54 available at: https://pure.uva.nl/ws/files/52346654/Chapter_3.pdf.

[47] D. Shelton, 'The Right to Reparations for Acts of Torture: What Right, What Remedies?' (2007) 17(2) *Torture*, pp. 96–116, at 96. See also N. Gunningham & D. Sinclair, *Environmental Law and Policy: Nature, Law and Society* (Cambridge University Press, 2019).

[48] *Anton Foley and Others* v. *Sweden*, Case No. T 8304–22 (pending), Nacka District Court (Sweden); for more see 'Anton Foley and Others v. Sweden (Aurora Case)' available at: http://climatecasechart.com/non-us-case/anton-foley-and-others-v-sweden-aurora-case (*Aurora* case).

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

mitigation policy by relying on the European Convention on Human Rights.[49] The case is significant from a loss and damage perspective because it explicitly asks the Court to determine that the alleged violation entails an obligation to grant reasonable compensation.[50] Further, the case stands out because of its strong focus on the accountability of historical emitters for their disproportionate contributions to the climate crisis,[51] drawing attention to the 'historical debts' of developed countries[52] and thus aligning itself with a more global south-friendly stance.[53]

Along the same lines but in different parts of the world, cases led by plaintiffs from vulnerable or marginalized communities in the global south are taking on major historical polluters as defendants. These cases are marked by their transnational dimension, enabling plaintiffs in the global south to accentuate the historical responsibility of developed states and corporations for causing climate change. This, in turn, could potentially lead to a rebalancing of the skewed power dynamics and directly tackle the unequal burden of climate change impacts. Owing to their transnational character, these cases are well positioned to create global 'ripple effects' and serve as catalysts in the ongoing international negotiations on climate loss and damage.[54]

One prominent example is the *Carbon Majors* petition filed before the Philippines Commission on Human Rights,[55] and similar petitions filed before national human rights institutions in Indonesia[56] and Malaysia.[57] Rather than seeking direct compensation from national governments, these cases call for recommendations urging policymakers and legislators to develop effective mechanisms for holding private polluters, including businesses, accountable for human rights violations resulting from climate

[49] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG. See Claim in *Aurora* case, ibid., para. 10, available at: https://docs.google.com/document/d/e/2PACX-1vTKMNnfYLRm2WTXK0q9H-vRkPz3tVBhL33-txQdRHMe4kqVugPIDy4L4B5bZCxoi1B_5VCzLmiqKHqJ/pub#h.o8wx54qloaun (in Swedish).

[50] *Aurora* case, ibid., para. 40.

[51] Ibid., para. 142.

[52] Ibid.

[53] E.g., the case relies on the models put forward by S. Kartha et al., 'Cascading Biases Against Poorer Countries (2018) 8(5) *Nature Climate Change*, pp. 348–9; and L. Rajamani et al., 'National "Fair Shares" in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law' (2021) 21(8) *Climate Policy*, pp. 983–1004.

[54] J. Peel & H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015), p. 13; M. Hulme, 'Attributing Weather Extremes to "Climate Change": A Review' (2014) 38(4) *SAGE Journal*, pp. 499–511; J. Setzer & R. Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot*, Policy Report, July 2019, Grantham Research Institute on Climate Change and the Environment, CCCEP & London School of Economics and Political Science, available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf.

[55] *In re Greenpeace Southeast Asia & Others*, Case No. CHRNI-2016-0001, 9 Dec. 2019, Commission on Human Rights (The Philippines), available at: https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al (*Carbon Majors*).

[56] Complaint filed in *Indonesian Youths and Others* v. *Indonesia*, 14 July 2022, National Human Rights Commission (Indonesia), available at: http://climatecasechart.com/non-us-case/indonesian-youths-and-others-v-indonesia.

[57] Complaint filed before SUHAKAM (Malaysian Human Rights Commission), 7 Dec. 2021, available at: https://www.greenpeace.org/static/planet4-malaysia-stateless/2021/12/1f962ee1-complaint-20211207-signed-to-print-2.pdf.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

change.[58] These petitions, particularly those in the Philippines and Malaysia, focus specifically on corporate accountability, seeking legislative changes that enable climate change victims to recover damages from fossil fuel companies based on their contributions to climate change.[59] By highlighting the role of transnational corporations in perpetuating climate change impacts and demanding accountability based on existing legal doctrines, petitions like these signal how the costs of loss and damage may be shifted away from victims towards historical polluters.[60]

Another three rights-based cases seek redress for loss and damage directly from corporations. The case of *Baihua Caiga et al.* v. *PetroOriental S.A.* stands out for its innovative approach, demanding reparations from an oil company for the impacts of climate change on an Indigenous community.[61] The reparations sought, in this case, extend beyond violations of the constitutional rights of Indigenous peoples (notably the right to a healthy and ecologically balanced environment) to include violations of nature's right to have its life cycles respected, as protected under Ecuadorian law. This multifaceted approach aligns with the emerging field of 'earth jurisprudence' or 'wild law',[62] and demonstrates the integration of environmental and human rights principles in seeking remedies for loss and damage caused by corporate activities. Importantly, as the defendant company is a subsidiary of two Chinese transnational corporations, this is also a case with a transnational dimension.

Similarly, *Four Islanders of Pari* v. *Holcim*, another transnational rights-based climate case, highlights the responsibility of corporations for climate change-related damage. The compensation sought in this instance involves a financial contribution to adaptation measures based on projected climate impacts attributable, in part, to the Swiss cement company's historical contributions to atmospheric emissions.[63] This approach likewise seeks to shift the financial burden of addressing climate impacts onto the entities most responsible for exacerbating the problem. As discussed below, it advocates an approach of quantifying responsibility for reparations based on entities' respective contributions to global emissions, an approach that holds significant promise for loss and damage litigation.

The most recent case in this category, *Municipalities of Puerto Rico* v. *Exxon Mobil Corp.* – in which cities are claiming punitive and compensatory damages from fossil fuel companies for losses incurred as a result of the 'apocalyptic' 2017 hurricanes –

[58] Ibid., pp. 19–20.

[59] Ibid.; *Carbon Majors*, n. 55 above, p. 31.

[60] On corporate liability for climate harm, see also H.M. Osofsky, 'Fossil Fuel Companies and Climate Change: The Case for Strict Liability' (2018) 42(2) *Harvard Environmental Law Review*, pp. 365–411; M. Grasso & R. Heede, 'Time To Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages' (2023) 6(5) *One Earth*, pp. 459–63

[61] See Complaint filed in *Baihua Caiga et al.* v. *PetroOriental S.A.*, 10 Dec. 2020, Family, Women, and Children Judicial Unit, Francisco de Orellana canton (Ecuador), available at: http://climatecasechart.com/non-us-case/baihua-caiga-et-al-v-petrooriental-sa.

[62] See, e.g., A. Boyle, 'Wild Law and Climate Change Litigation: A Transformative Approach to Climate Justice' (2017) 29(3) *Journal of Environmental Law*, pp. 471–96.

[63] See Complaint filed in *Four Islanders of Pari* v. *Holcim*, July 2022, Justice of the Peace of the Canton of Zug (Switzerland), available at: http://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim (*Four Islanders*).

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

further illustrates the growing attention to corporate responsibility for climate-related human rights harm.[64] Notably, this is the first case in which cities (as a class of plaintiff) claim damages from fossil fuel companies for climate harm. Here, the damages sought are for both costs already incurred and costs that the plaintiffs are likely to incur as a result of climate impacts.[65]

Finally, three domestic cases have sought remedies related to cross-border climate displacement. The earliest of these was a claim before the Australian Refugee Review Tribunal filed by a citizen of Kiribati who sought protection from Australia under the Refugee Convention.[66] Citizens of Tuvalu[67] and Kiribati[68] have filed similar protection claims before courts and tribunals in New Zealand. These cases demonstrate the creative utilization of available legal avenues by individuals seeking recognition as 'protected persons' under relevant domestic migration laws based on the threats posed by climate change.[69] They may also be understood as transnational, with plaintiffs from the most climate-vulnerable states seeking to hold high-income states accountable for protecting their rights from climate impacts manifesting in their home states. However, as discussed in the following section, the lack of success in these cases highlights the challenges in addressing such cases within existing legal frameworks.[70]

In sum, the diverse range of loss and damage claims in domestic rights-based climate cases illustrates evolving strategies employed by plaintiffs to seek redress for the adverse effects of climate change, recognizing the need for legal remedies, including monetary compensation, corporate accountability, and addressing climate-induced displacement. Collectively, these claims signal a shift towards holding responsible parties accountable and demanding systemic changes to address climate-related harm. The following section of this article will analyze the outcomes of cases that have resulted in decisions, providing insights into the effectiveness of legal strategies employed and the potential impact of these claims within the broader framework of climate litigation.

2.2. *Assessing Results and Emerging Trends*

The outcomes obtained thus far in domestic rights-based cases related to loss and damage have been varied, with some remarkable successes and some notable failures.

The *Notre Affaire à Tous* case in France is an example of a partial success. The Administrative Court of Paris acknowledged the moral prejudice suffered by the

---

[64] See Complaint filed in *The Municipalities of Bayamon et al.* v. *Exxon Mobil Corp. et al.*, Case No. 3:22-cv-01550, 22 Nov. 2022, US District Court for the District of Puerto Rico, available at: http://climatecasechart.com/case/municipalities-of-puerto-rico-v-exxon-mobil-corp (*Exxon*).

[65] Ibid.

[66] *Case 0907346*, 10 Dec. 2009 (Australian Refugee Review Tribunal) [2009] RRTA 1168.

[67] *In re AD (Tuvalu)*, 4 June 2014, Immigration and Protection Tribunal (New Zealand) [2014] NZIPT 501370-371.

[68] *Ioane Teitiota* v. *Chief Executive of the Ministry of Business, Innovation and Employment*, 20 July 2015, Supreme Court of New Zealand [2015] NZSC 107 (*Teitiota* v. *Chief Executive*).

[69] Ibid.; K. Warner, *Climate Change, Environmental Risk and Migration: Perspectives, Policies and Practices* (Cambridge University Press, 2016).

[70] See, e.g., J. McAdam, 'The Future of Climate-Induced Displacement: Conceptual Challenges and Pathways Forward' (2018) 9(3) *Journal of International Dispute Settlement*, pp. 510–33.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

plaintiffs caused by France's climate inaction, awarding a symbolic euro as compensation.[71] However, it stopped short of awarding monetary compensation for ecological damage, finding that the plaintiffs had not demonstrated the state's inability to repair the harm caused.[72] Instead, the court issued an order for the state to rectify the damage caused by its inaction.[73] The Court did not specify what reparation means, reflecting what Roach terms 'remedial modesty'.[74] It is also interesting to note that the hurdle of establishing standing was overcome in large part by the design of French law, which lays down a lower admissibility threshold for environmental claims filed by non-profit environmental protection associations.[75]

In contrast, the *Carbon Majors* case offered a pioneering outcome. The Commission on Human Rights of the Philippines inquiry stands out for its inclusive process that brought together victims, scientists, forensic experts, legal and human rights experts, and representatives of fossil fuel companies.[76] This culminated in the world's largest and most comprehensive collection of formal testimonies, expert analysis, and documentary evidence regarding the responsibility of fossil fuel companies for climate change and related loss and damage. The Commission's final report, spanning 160 pages, exposes the deceptive practices of these companies, including their intentional misleading of investors, regulators, and the public about climate science.[77] It recommends that states devise new mechanisms for loss and damage, and compensate victims, recognizing the duty of the Carbon Majors to remediate their impacts.[78] Of significance is how the *Carbon Majors* petition approached the issue of causation. It recognized that the Carbon Majors collectively contribute to global climate change and that emissions by one company are not distinguishable in their effects from emissions by other companies.[79] However, it referenced research that detailed the respective contributions of Carbon Majors to global emissions, and argued that this research should serve as a basis for the Carbon Majors' responsibility, jointly and severally, for contributing predominately to climate change and its resulting impacts that are interfering with the enjoyment of human rights.[80] Although the Commission's report is not legally binding, its implications for global power dynamics are significant. It sets a precedent for addressing responsibility for loss and damage from a human rights perspective while emphasizing the possibility of prosecuting

[71] *Notre Affaire à Tous*, n. 39 above.

[72] Ibid.

[73] Ibid.; *Notre Affaire à Tous*, 14 Oct. 2021, Final Decision by Administrative Court of Paris (France).

[74] K. Roach, 'Judicial Remedies for Climate Change' (2021) 17(1) *Journal of Law & Equality*, pp. 105–50, at 109–10.

[75] Dentons, 'Litigating Climate Change in France', 3 Nov. 2022, available at: https://www.dentons.com/en/insights/articles/2022/november/3/litigating-climate-change-in-france.

[76] Savaresi & Hartmann, n. 32 above, pp. 73–93.

[77] *Carbon Majors*, n. 55 above, pp. 108–9.

[78] Ibid.

[79] See petition filed in *Carbon Majors*, n. 55 above, p. 23, available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20150512_Case-No.-CHR-NI-2016-0001_petition.pdf.

[80] Ibid., p. 23.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

corporations for climate-linked human rights violations anywhere in the world.[81] As such, it signifies a shift in the legal landscape towards holding those who have contributed most to climate change accountable for the harm they have caused.[82]

However, not all cases have been successful. The *Baihua Caiga et al.* v. *PetroOriental S.A.* case in Ecuador was dismissed for lack of evidence.[83] Still, Ecuadorian courts have recognized violations of human rights and rights of nature in other environmental cases, reflecting an evolving judicial landscape.[84] For instance, another Ecuadorian case involving the malpractices of an oil company that initially was dismissed for lack of evidence was subsequently won on appeal.[85] The potential of this case in demanding accountability from polluters thus remains alive, especially given the plaintiffs' intent to appeal.[86]

In contrast, *PUSH Sweden* v. *Government of Sweden*, dismissed on the ground of no damage being established, appears to signal the limitations of the chosen litigation strategy. The courts found there to be no injury experienced by the plaintiff from the relevant conduct, classifying the claim as one based on a hypothetical risk assessment of future environmental and health effects of the sale of the power plant, as opposed to actual economic loss,[87] thereby indicating the pitfalls of Swedish tort law. The case also relied on little case law and international agreements, thus attracting criticism of its strategy.[88]

---

[81] See S. Schonhardt & L. Clark, 'How a Philippine Inquiry Could Shape Global Climate Litigation', *Climate Wire*, 16 May 2022, available at: https://www.eenews.net/articles/how-a-philippine-inquiry-could-shape-global-climate-litigation (quoting Carroll Muffett). See further 'Fighting Climate Change in Court: Reporting on Cases against Companies', *Clean Energy Wire*, 15 Mar. 2022, available at: https://www.cleanenergywire.org/events/postponed-fighting-climate-change-court-reporting-cases-against-companies; S. Kerschner, C. Connellan & S. Knijnenburg, 'Philippines Climate Change Report: Implications for Carbon Majors', *White & Case*, 27 Jan. 2023, available at: https://www.whitecase.com/insight-our-thinking/philippines-climate-change-report-implications-carbon-majors.

[82] Also G. Ganguly, J. Setzer & V. Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies*, pp. 841–68.

[83] *Baihua Caiga*, n. 61 above.

[84] C.M. Kauffman & P.L. Martin, 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail', paper presented at the International Studies Association Annual Convention, Atlanta, GA (US), 18 Mar. 2016, pp. 1–20.

[85] *Herrera Carrion et al.* v. *Ministry of the Environment et al.*, Juicio No: 21201202000170, 29 July 2021, Corte Provincial de Justicia de Sucumbíos (Ecuador), p. 66. Observers suggest that the lower courts' limited access to resources for soliciting scientific data hinders their ability to apply constitutionally anchored rights of nature. For this and other reasons, these courts are leaving it to the higher courts to develop and apply these rights; see L. Koehn & J. Nassl, 'Judicial Backlash Against the Rights of Nature in Ecuador', *Verfassungsblog*, 27 Apr. 2023, available at: https://verfassungsblog.de/judicial-backlash-against-the-rights-of-nature-in-ecuador.

[86] International Federation for Human Rights (FIDH), 'Ecuador: Plaintiffs to Appeal Ruling in Favour of Oil Company PetroOriental, Pursuing Fight Against Climate Change', 20 Apr. 2021, available at: https://www.fidh.org/en/region/americas/ecuador/ecuador-plaintiffs-to-appeal-ruling-in-favour-of-oil-company.

[87] See complaint filed in *PUSH Sweden*, n. 33 above, para. 140 of summons, available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20160915_3649_summons.pdf; see also A.-S. Valderas, 'Climate Change Law and Litigation in Sweden with Scenarios from Europe' (Master's thesis, Uppsala University (Sweden), June 2019), p. 49, available at: http://www.diva-portal.org/smash/get/diva2:1322298/FULLTEXT01.pdf.

[88] P.D. Morgaues, 'Extraterritoriality and Judicial Review of State's Policies on Global Warming: Some Reflections Following the 2016 Scandinavian Climate Lawsuits' (2017) 34 *Revista Electronica de*

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

An alternative approach more firmly grounded in human rights arguments is currently being pursued in the *Aurora* case.[89] This case benefits from the Swedish Climate Act,[90] which came into effect in 2018, and relies on a plethora of case law. Thus, its outcome could pave the way for future rights-based climate cases in the Swedish courts. These developments also signal a potential for hybrid cases with claims for redress for human rights violations and related torts involving tangible loss and damage from climate change.

The *Teitiota* v. *Chief Executive* case, like all other cases brought thus far seeking remedies related to cross-border climate displacement, failed to succeed owing mainly to the narrow definition of a 'refugee' according to international refugee law.[91] Consequently, courts and tribunals find no 'serious harm' suffered by the plaintiffs,[92] though their fear of the devastation that rising sea levels will bring to their home countries is backed by substantial scientific evidence.[93]

Nonetheless, a spark of hope was provided by the Supreme Court of New Zealand in *obiter dictum* in *Teitiota*: it recognized that climate change impacts could potentially create a pathway for refugee protection or protected person jurisdiction in future cases.[94] At a broader level, this case underscores the need for comprehensive remedies for non-economic losses, such as the recognition of rights, protection and material support for those affected by climate displacement.[95] As scholars have highlighted, realizing such remedies requires international cooperation and the development of equitable law and governance frameworks, taking into account the different responsibilities and capacities of states.[96]

It is worth recalling in this context that domestic courts have already made pronouncements that can provide stepping stones for apportioning responsibility for climate loss and damage. A relevant example is *Urgenda Foundation* v. *The State of the Netherlands*. The Supreme Court of the Netherlands interpreted the principle of common but differentiated responsibilities (CBDR-RC) as indicating that 'partial

Estudios Internacionales, pp. 1–34, at 19–21, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102153.

89 *Aurora Case*, n. 48 above.

90 Climate Act, 2017 SFS 720 (Sweden).

91 Convention relating to the Status of Refugees, Geneva (Switzerland), 28 July 1951, in effect 22 Apr. 1954, Art. 1(A)(2), available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees.

92 *Teitiota* v. *Chief Executive*, n. 68 above, para. 12; *Case 0907346*, n. 66 above, paras 47–48, 51. See also *In re AD (Tuvalu)*, n. 67 above, para. 32.

93 Ibid., para. 2.

94 *Teitiota* v. *Chief Executive*, n. 68 above, para. 13.

95 The case was subsequently brought before the UN Human Rights Committee (HRCttee), and will be discussed further in the next part on emerging trends in international litigation.

96 A. Betts & H. Jones, 'Climate-Induced Displacement: Developing a Coherent Approach' (2018) 94(5) *International Affairs*, pp. 1039–59; J. McAdam, 'Seeking Asylum from Climate Change: Maximizing State Responsibility under International Human Rights Law' (2016) 39(4) *University of New South Wales Law Journal*, pp. 1343–80; K. Scott & L. Long, 'Climate Change and Displacement: Developing a Framework for Effective Governance' (2017) 17(6) *Climate Policy*, pp. 766–86; K. Scott & C. Farbotko, 'The Role of Litigation in Governing Climate-Induced Displacement: Insights from Two Pacific Island Cases' (2018) 9(1) *Journal of Human Rights and the Environment*, pp. 71–95.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

fault means partial responsibility'.[97] This interpretation might be applied *mutatis mutandis* to reparations in loss and damage cases, highlighting the potential of CBDR-RC as a guiding principle for addressing questions of equity and fairness in allocating reparations for loss and damage.

The *Four Islanders of Pari* v. *Holcim* case (referred to formally as *Asmania et al*. v. *Holcim*), the first rights-based claim to seek 'proportional compensation',[98] presents an innovative approach to equity and fairness in climate litigation. To succeed in such claims, plaintiffs would need to present compelling evidence of the defendant's contributions to historic GHG emissions, coupled with attribution studies demonstrating the probability that certain climate impacts were the result of climate change.[99] In claims against certain fossil fuel companies, evidence of their efforts to mislead the public on the subject of climate change may also be relevant.[100] The wealth of evidence collected as part of the *Carbon Majors* inquiry could assist plaintiffs in these cases.[101] Interestingly, the case seems to rely on contributory causation,[102] referencing Holcim's production of 7 million tons of carbon dioxide (CO_2), 0.42% of all global industrial CO_2,[103] to argue that Holcim bears a significant and quantifiable share of the responsibility for the climate crisis and for the situation on Pari Island.[104] If this argument is accepted by the Swiss courts, it will have a tremendous impact on how injury is established in loss and damage litigation.

Zooming out again, it is difficult to generalize and map the hurdles faced in such domestic litigation given how case-specific some of these challenges are. For example, in the *PUSH Sweden* case, the plaintiffs' reliance on the future injury that would be caused by the sale of the lignite operations resulted in the case being dismissed owing to the specific requirement of Swedish tort law to establish actual injury.[105] A variation of the same argument succeeded before the Dutch courts in the

[97] *The State of the Netherlands* v. *Urgenda Foundation*, 20 Dec. 2019, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007 (*Urgenda*).

[98] See also Complaint filed in *Lliuya* v. *RWE A.G.*, Case No. 2 O 285/15, 23 Nov. 2015, Essen Regional Court (Germany), available at: http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag.

[99] See also S. Marjanac & L. Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36(3) *Journal of Energy & Natural Resources Law*, pp. 265–98; S. Marjanac, L. Patton & J. Thornton, 'Acts of God, Human Influence and Litigation' (2017) 10(9) *Nature Geoscience*, pp. 616–19; R. Verheyen & J. Franke, 'Loss and Damage in European Litigation', in M. Doelle & S.L. Seck (eds), *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar, 2021), pp. 331–48.

[100] C. Muffett & S. Feit, *Smoke and Fumes: The Legal and Evidentiary Basis for Holding Big Oil Accountable for the Climate Crisis* (Center for International Environmental Law, 2017), pp. 17, 24.

[101] See also Schonhardt & Clark, n. 81 above.

[102] These conclusions are drawn from the two press releases (at n. 104 below) of the NGO supporting the plaintiff as there are no case comments publicly available.

[103] R. Heede, 'Carbon History of Holcim Ltd: Carbon Dioxide Emissions 1950–2021', *Climate Accountability Institute*, 7 July 2022, p. 23, available at: https://callforclimatejustice.org/wp-content/uploads/Heede-Report.pdf.

[104] 'Four Indonesians File Climate Litigation against Holcim', 1 Feb. 2023, p. 2, available at: https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim; 'An Island Demands Justice: Dossier for the Press Conference on 12 July 2022', available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220712_17478_press-release.pdf.

[105] *PUSH Sweden*, n. 33 above, Complaint.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

Urgenda case,[106] owing primarily to Dutch law allowing non-governmental organizations (NGOs) to initiate public interest actions without an identifiable group of persons needing protection.[107] Similarly, the plaintiff in *Notre Affaire à Tous and Others* v. *France* was not required by French law to show injury arising from the defendant's conduct,[108] indicating just how forum-specific challenges are to loss and damage and, more broadly, rights-based climate litigation. Still, a common challenge that seems to trip such litigation is establishing a causal link between the injury cited and the conduct of the defendant.[109] What is required to overcome this is a radical shift in judicial attitudes akin to that assumed in *Carbon Majors* and *Notre Affaire à Tous and Others* v. *France*.

Overall, the cases discussed here reflect a promising move in climate litigation. Nevertheless, though loss and damage claims are still riddled with numerous challenges, together these cases reflect a move in climate litigation towards holding historical polluters accountable for loss and damage based on human rights. The *Carbon Majors* case, in particular, exemplifies the potential of quasi-judicial mechanisms in confronting the human rights implications of loss and damage in a holistic fashion, based on principles of equity and climate justice. However, it is crucial to temper optimism with recognition of the challenges ahead. While these early outcomes represent significant normative advancements and institutional breakthroughs, they have, so far, fallen short of providing tangible redress for victims. This shortfall can be interpreted as reflective of the still-maturing state of rights-based climate litigation, or as symptomatic of the difficulties in translating legal principles into effective remedies in a complex, multi-jurisdictional and politically charged context.[110] As this burgeoning field continues to evolve, the outcomes of pending and future cases will play a critical role in shaping its trajectory. These cases will offer further insights into the potential of this innovative branch of litigation to bridge the persistent gaps in accountability and protection. By doing so, they will enhance our understanding of the evolving landscape of rights-based climate litigation, potentially illuminating new pathways towards redress.

Important lessons emerge also from loss and damage claims pursued in international rights-based climate cases, which are discussed in the next section. Integrating the insights gained from these cases results in a comprehensive assessment of the evolving landscape of rights-based climate litigation in addressing loss and damage.

---

[106] *Urgenda*, n. 97 above.

[107] Ibid., paras 4(6)–4(8). For more on this see B. Broek & L. Enneking, 'Public Interest Litigation in the Netherlands: A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts' (2014) 10(3) *Utrecht Law Review* p. 77–90.

[108] See Dentons, n. 75 above.

[109] *Baihua Caiga*, n. 61 above; *PUSH Sweden*, n. 33 above.

[110] For scholarly scepticism of rights-based climate litigation see G. Dwyer, 'Climate Litigation: A Red Herring among Climate Mitigation Tools', in B. Mayer & A. Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2021), pp. 128–44; E.A. Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155(6) *University of Pennsylvania Law Review*, pp. 1925–45.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

3. LOSS AND DAMAGE CLAIMS IN RIGHTS-BASED CLIMATE CASES: INTERNATIONAL LITIGATION

3.1. *An Overview*

Rights-based climate litigation is no longer confined to domestic courts; international judicial and quasi-judicial bodies are increasingly being called upon to adjudicate on human rights infringements linked to climate change. This global trend is observed across various international bodies, including UN Human Rights Committee (HRCttee),[111] UN Committee on the Rights of the Child,[112] Inter-American Commission on Human Rights (IACHR),[113] European Court of Human Rights (ECtHR),[114] and European Commission on Social Rights (ECSR).[115] Each of these bodies has received individual or collective complaints about human rights violations resulting from climate change. In addition, one climate case was filed by five United States (US) Indian tribes and the NGO Alaska Institute for Justice to ten UN Special

[111] UNHRCttee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 2728/2016', 24 Oct. 2019, UN Doc. CCPR/C/127/D/2728/2016, available at: https://digitallibrary.un.org/record/3979204?ln=en (*Teitiota* v. *New Zealand*); UNHRCttee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 3624/2019', 21 July 2022, UN Doc. CCPR/C/135/D/3624/2019, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F135%2FD%2F3624%2F2019&Lang=en (*Billy et al.* v. *Australia*). See also Complaint filed in *Rights of Indigenous People in Addressing Climate-Forced Displacement*, UN, USA 16/2020, 15 Jan. 2020, available at: https://climatecasechart.com/non-us-case/rights-of-indigenous-people-in-addressing-climate-forced-displacement (*Rights of Indigenous People*).

[112] UN Committee on the Rights of the Child, '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', 22 Sept. 2021, UN Doc. CRC/C/88/D/104/2019 (*Chiara Sacchi et al.* v. *Argentina et al.*).

[113] See *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*, IACHR, No. P-1413-05, 8 Dec. 2005 (*Inuit Petition*); *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*, IACHR, 23 Apr. 2013, available at: http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf (*Athabaskan Petition*); *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti*, IACHR, 4 Feb. 2021, available at: https://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-to-redress-violations-of-the-rights-of-children-in-cite-soleil-haiti (*Rights of Children in Cité Soleil, Haiti*).

[114] See Application filed in *Union of Swiss Senior Women for Climate Protection* v. *Swiss Federal Council and Others*, ECtHR, Appl. No. 53600/20, 26 Nov. 2020, available at: https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others; Application filed in *Greenpeace Nordic Ass'n* v. *Ministry of Petroleum and Energy*, ECtHR, 15 June 2021, available at: https://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy; Complaint filed in *Mex M* v. *Austria*, ECtHR, 25 Mar. 2021, available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210325_13412_complaint.pdf; Complaint in *Duarte Agostinho and Others* v. *Portugal and 32 Other States*, ECtHR, 2 Sept. 2020, available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf (*Duarte Agostinho*).

[115] See *Marangopoulos Foundation for Human Rights (MFHR)* v. *Greece*, ECSR, Case T-141/19, 10 Oct. 2005, Complaint No. 30/2005.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

Rapporteurs of the UN Human Rights Council against the US.[116] Complementing these cases are two recent requests for an advisory opinion. The request by the UN General Assembly for an advisory opinion from the International Court of Justice (ICJ) seeks clarity on state obligations regarding climate change and human rights, and the legal consequences for states that have failed to meet them.[117] A parallel advisory opinion has been requested from the Inter-American Court of Human Rights (IACtHR), focusing on the scope of state obligations in responding to the climate emergency.[118] Additionally, two youth groups have recently submitted a request to the Prosecutor of the International Criminal Court to open an investigation against the Senior Executives of British Petroleum into their alleged crimes against humanity.[119] The claim seeks reparations for victims of climate change using the loss and damage mechanism under Article 8 of the Paris Agreement.[120]

Among the international rights-based climate cases, there are four cases where remedies related to loss and damage have been sought or granted. Each of these cases (detailed in Table 2 of the Appendix) plays a distinct role in the evolution of rights-based climate litigation. Among the four cases, the petition to the IACHR on behalf of children in Cité Soleil (Haiti) is noteworthy for its explicit reparations claim. It calls upon the IACHR to recommend that Haiti make reparation for the harm caused by waste disposal, with the petition highlighting the exacerbating role of climate change.[121] It is worth noting that the focus on damage caused by the specific tangible act of dumping waste (as opposed to focusing on climate loss and damage exclusively) should make causation, injury, and reparations easier to establish. Moreover, while the petitioners primarily assign responsibility for reparations to the territorial state, the IACHR could potentially place these obligations within the broader context of international cooperation and assistance. This perspective aligns with the ongoing efforts within the Inter-American system to confront climate change, in particular the above-mentioned request for an advisory opinion from the IACtHR on the climate emergency.[122] This request notes explicitly the common but differentiated responsibilities of states, asking the IACtHR to clarify how states should act 'both individually and collectively to guarantee the right to reparation for damages generated by their acts or omissions in the face of the climate emergency, taking into account considerations of equity, justice and

[116] See *Rights of Indigenous People*, n. 111 above.

[117] ICJ Advisory Opinion, n. 40 above.

[118] Petition filed by Colombia and Chile in *Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency*, IACtHR, 9 Jan. 2023, available at: http://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency.

[119] New Zealand Students for Climate Solutions & UK Youth Climate Coalition, *Request to Open Investigations & Request for Reparations regarding the Crimes Against Humanity of Climate Change*, 12 Aug. 2022, p. 3, available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221208_19343_points-of-claim.pdf.

[120] Ibid.

[121] See *Rights of Children in Cité Soleil, Haiti*, n. 113 above.

[122] *Request for an Advisory Opinion on Climate Emergency*, n. 118 above.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

sustainability'.[123] Further, it asks how the obligations of cooperation between states should be interpreted, taking into account that the climate crisis is having a greater impact on some regions and populations, including the Caribbean, island and coastal countries and territories and their inhabitants.[124] By considering and operationalizing these obligations, both the IACHR and the IACtHR can contribute to the broader understanding of responsibilities, and promote a more comprehensive and cooperative approach to addressing loss and damage associated with climate change at the regional level.[125]

Following this, *Rights of Indigenous People*, filed with the UN Special Rapporteurs, stands out as a significant claim for climate loss and damage suffered by Indigenous peoples, representing a comprehensive and transformative approach to reparations. The complaint demands action against the ongoing extraction of oil and gas, and emphasizes the need for material resources to safeguard against worsening climate impacts.[126] Furthermore, it seeks the establishment of a 'relocation institutional framework' to ensure adequate resources for accelerated adaptation efforts, protecting essential rights such as culture, health, safe drinking water, and adequate housing.[127] It also urges the Special Rapporteurs to recommend that the Louisiana state government hold oil and gas corporations responsible for damage to the Louisiana coast and compensate the victims.[128] However, this case goes beyond immediate concerns and addresses the historical injustice of unrecognized sovereign rights, calling for restoration and recognition of these rights.[129] By confronting power structures intertwined with the root causes of climate change and historical injustices perpetrated against Indigenous peoples, the case uses human rights to highlight the interconnectedness of various forms of oppression and the additional injustices perpetuated by climate change. It illustrates how human rights can be invoked to challenge the status quo of extractivism and demands transformative remedies that rectify systemic issues. At the same time, the case focuses less on linking the conduct of the US to climate change-induced harm and more on the inaction of the federal and the state governments to mitigate this harm.[130]

[123] Ibid., p. 13.

[124] Ibid., p. 14.

[125] See also J. Auz, 'Two Reputed Allies Reconciling Climate Justice and Litigation in the Global South', in C. Rodríguez-Garavito (ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press, 2022), pp. 145–56.

[126] Specifically, the request demands that the US federal government provide funding for the following purposes: restoration of tribal lands and protection of sacred sites, village sites and subsistence hunting and fishing areas; and the tribal-led relocation processes for the native village of Kivalina and Isle de Jean Charles: *Rights of Indigenous People*, n. 111 above, pp. 10–11.

[127] Ibid.

[128] Ibid.

[129] Among other demands, the tribal communities ask that the US federal government respect and recognize their sovereignty, which would 'make it easier for them to defend their own interests and fight the oil and gas companies despoiling their lands': Unitarian Universalist Service Committee (UUSC), 'Tribal Nations Hold US Government Accountable for Committing Human Rights Violations by Failing to Address Climate Change', 15 Jan. 2020, available at: https://www.uusc.org/press/tribal-nations-hold-u-s-government-accountable-for-committing-human-rights-violations-by-failing-to-address-climate-change.

[130] See *Rights of Indigenous People*, n. 111 above, pp. 10–11.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

The case of *Teitiota* v. *New Zealand*[131] further pushes the boundaries of climate litigation, casting light on the human rights implications of cross-border climate displacement. Following the rejection of his claim for asylum in New Zealand, the author of this petition sought a declaration that his right to life under the International Covenant on Civil and Political Rights (ICCPR)[132] was violated as a result of his deportation to Kiribati, a state the land territory of which may become submerged within 10 to 15 years as a result of sea-level rise.[133] The petition highlighted the scarcity of habitable space, violent land disputes, and environmental degradation, including saltwater contamination of freshwater supplies, caused by climate change-induced sea-level rise in Kiribati. As the next section will emphasise, the case illustrates the urgent need to address the complex challenges posed by cross-border climate displacement to prevent and redress human rights violations. Irrespective of the outcome, framing the issue as a matter of rights and remedies rather than humanitarian assistance is significant in shifting the discourse, demanding greater accountability from states for protecting the rights of climate-displaced persons.[134]

Finally, *Billy et al.* v. *Australia*, lodged by the Indigenous Torres Strait Islanders, alleged that Australia violated the islanders' rights to life, family life, and culture by failing to take adequate action to reduce GHG emissions and assist the islanders in adapting to the adverse effects of climate change.[135] Of note, it was the first case filed before a UN body by inhabitants of low-lying islands against a state party on this basis. While the authors did not explicitly request any remedies relating to loss and damage, the Human Rights Committee addressed the question of reparations on its own initiative, recognizing the harm suffered by the Torres Strait Islanders as a result of Australia's inaction on climate change. Like the case presented by the Native American tribes, it highlights the need to rectify historical injustices and address the enduring impacts of colonization of Indigenous land. This case will be discussed in more detail in the following section, which examines the Committee's engagement with the issue of reparations and its implications for addressing loss and damage in rights-based climate cases.

In sum, this small but significant body of international rights-based climate cases showcases an evolving trend in climate litigation, aiming to hold states accountable under international law for their contributions to climate change and resulting loss and damage. The next section considers the results obtained thus far and their broader implications for climate justice.

---

[131] *Teitiota* v. *New Zealand*, n. 111 above.

[132] N. 21 above.

[133] *Teitiota* v. *New Zealand*, n. 111 above.

[134] See further S. Atapattu, 'Climate Change and Displacement: Protecting "Climate Refugees" Within a Framework of Justice and Human Rights' (2020) 11(1) *Journal of Human Rights and the Environment*, pp. 86–113; T.T. Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law' (2009) 31 *University of Pennsylvania Journal of International Law*, pp. 1239–66; K. Wanner, 'Climate Refugees and Accountability' (2022) 1 *Catalyst*, pp. 1–10; M. Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) 38 *Georgia Journal of International & Comparative Law*, pp. 543–92.

[135] *Billy et al.* v. *Australia*, n. 111 above.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

3.2. *Assessing Results and Emerging Trends*

This section delves into the implications of the engagement of international human rights bodies with climate litigation involving loss and damage claims. Of the cases explored in the preceding section, only three have culminated in an outcome. As Luporini and Savaresi have pointed out, while the remedies that international human rights bodies can provide are limited, they do deliver guidance that can be used in domestic judicial proceedings and can help to bridge the accountability gap plaguing global climate governance.[136]

The first of the cases is *Rights of Indigenous Peoples*, submitted to the ten UN Special Rapporteurs. Special Rapporteurs are not mandated to deliver binding or even quasi-judicial decisions; instead, they exert influence through softer mechanisms such as dialogue and fact-finding missions.[137] In this case the Special Rapporteurs submitted a formal communication to the US expressing concerns about the reported displacement of Indigenous people as a result of climate events and environmental impacts of oil and gas exploration in the US.[138] This outcome highlights how international human rights mechanisms can apply political pressure and draw attention to human rights violations related to climate change,[139] potentially laying the groundwork for more targeted legal action.

The second case resulting in an outcome is *Teitiota* v. *New Zealand*.[140] The author sought to rely on the wider protection of the ICCPR: specifically, protection against involuntary return to his state of origin where this return would result in a violation of his right to life.[141] In its views, the Human Rights Committee found that the timeline, of 10 to 15 years, before Kiribati would be uninhabitable allowed for 'intervening acts' to prevent the adverse effects of climate change from violating this right.[142] Like the Supreme Court of New Zealand, it coupled its dismissal of the claim with some remarks that seem encouraging for future cases: it recognized that states could, in principle, incur international responsibility for returning individuals to states where they face life-threatening conditions caused by the impacts of climate change.[143] This, as observed by Committee member Laki, reflects 'a significant step … toward the recognition of

[136] R. Luporini & A. Savaresi, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' (2023) 32(2) *Review of European, Comparative and International Environmental Law*, pp. 267–78.

[137] See also M. Wewerinke-Singh & M. Antoniadis, 'Vessel for Drowning Persons? The Standard-Setting Potential of International Human Rights Litigation in Addressing Climate Displacement' (2022) *Yearbook of International Disaster Law Online*, pp. 238–73.

[138] UN Office of the High Commissioner for Human Rights (OHCHR), 'Communication to the United States of America', 15 Sept. 2021, USA 16/2020.

[139] See also generally I. Cismas, 'The Role of the UN Special Rapporteur in the Development of the Right to Food: Legitimation through Clarification of Soft Law', in M. Gestri (ed.), *Cibo e Diritto: Dalla Dichiarazione Universale alla Carta di Milano* (Muchi editore, 2015), pp. 45–55; See generally A. Nolan, R. Freedman & T. Murphy (eds), *The United Nations Special Procedures System* (Brill, 2017), pp. 183, 196, 316, 354.

[140] *Teitiota* v. *New Zealand*, n. 111 above.

[141] ICCPR, n. 21 above, Art. 6; *Teitiota* v. *New Zealand*, n. 111 above, para. 9(3). Notably, Art. 7 ICCPR provides similar protection but was not invoked in this claim.

[142] *Teitiota* v. *New Zealand*, n. 111 above, para. 9(12).

[143] Ibid., paras 9(4), 9(14).

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

climate refugees, especially as regards *non-refoulement* obligations under human rights law and the ICCPR'.[144] Furthermore, it highlights the importance of international assistance to states that are adversely affected by climate change.[145] The decision therefore could serve as a stepping stone for more comprehensive remedy claims on behalf of those who have already suffered climate losses.[146] It also signals the need for judges and decision makers at the national level to consider climate change as a risk factor for the personal dignity of asylum seekers in their country of origin, as recognized by the Italian Court of Cassation in a recent judgment.[147]

The third case, *Billy et al.* v. *Australia*, produced a significant normative breakthrough. While the majority did not establish a violation of the right to life,[148] the Committee unequivocally determined that Australia had violated the authors' rights to family life and culture under the ICCPR, creating an obligation to provide 'full reparation' to the victims. The Committee also clarified the content of this obligation, stating that it involved, among other things, adequate compensation, needs assessments and meaningful consultations, measures necessary to secure the communities' continued safe existence on their islands, monitoring the effectiveness of these measures, and measures of non-repetition.[149] The Committee requested Australia to report on the measures taken within 180 days.[150]

This decision is a milestone. For the first time, an international human rights body established state responsibility for human rights violations resulting from climate change impacts, and directed the state to make 'full reparations' to the victims. As a caveat, it should be noted that the violation concerned Australia's failure to implement timely and adequate adaptation measures rather than its contributions to the causes of climate change as such. As Voigt has noted, this was a missed opportunity to clarify the content of states' mitigation obligations in the light of the provisions of the Paris Agreement, including its long-term temperature goal.[151] Clarification of these obligations may occur, however, through the advisory proceedings pending before the ICJ and the

[144] D.M. Laki, 'The Case of *Ioane Teitiota v. New Zealand* at the Human Rights Committee: A Common-Sense Approach', *Proceedings of the 116th ASIL Annual Meeting*, 6–9 Apr. 2022, p. 162, available at: https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/abs/case-of-ioane-teitiota-v-new-zealand-at-the-human-rights-committee-a-common-sense-approach/0D96A574F8D222AFFD1C62E8AD3A26C6.

[145] Ibid.

[146] See further UN OHCHR, 'Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims', 21 Jan. 2020, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482 (quoting Human Rights Committee expert Yuval Shany as saying 'this ruling sets forth new standards that could facilitate the success of future climate change-related asylum claims').

[147] See *I.L.* v. *Italian Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*, Corte di Cassazione (Sez. II Civile) No 5022, Judgment, 24 Feb. 2021 (citing *Teitiota*).

[148] See opinions in Joint Opinion by Committee Members Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin in *Billy et al.* v. *Australia*, n. 111 above, p. 22.

[149] Ibid.

[150] Ibid.

[151] C. Voigt, 'UNHRC Is Turning Up the Heat: Human Rights Violations due to Inadequate Adaptation Action to Climate Change', *EJIL:Talk!*, 26 Sept. 2022, available at: https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change; Luporini & Savaresi, n. 136 above.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

IACtHR. Significantly, these requests not only focus on state obligations to address immediate and future climate risks but also ask for elucidation of the legal consequences of past or ongoing conduct that has caused significant harm to the climate system and other parts of the environment. Consequently, the advisory opinions could serve as a stepping stone for loss and damage cases in which states are held responsible for the consequences of their failure to reduce GHG emissions over time.[152]

One important question on which the advisory opinions could provide valuable guidance concerns the apportionment of responsibility for rectifying the harm caused by climate change.[153] International law itself provides limited guidance on this question, other than the general principle that a state's contribution to the injury affects how much it owes in terms of compensation.[154] None of the adjudicated cases in this study shines light on this issue. However, two of the pending domestic cases seek compensation for historical emissions[155] and the way in which the respective courts approach this claim could potentially inspire international claims for climate reparations, or influence the way in which courts and quasi-judicial bodies grapple with these claims.

On the whole, several factors signal the potential of international law and litigation to combat climate change and inspire jurisprudence. For example, a 2021 study shows that 29 out of 93 climate change cases featured arguments that relied on international obligations.[156] Thus, emerging case law highlights the important role of international human rights bodies in shaping international norms on climate justice and elucidating states' obligations under international law.[157] At the same time, it should be recalled that the broader legal landscape for loss and damage is still rapidly evolving, and the litigation trends are not isolated incidents but part of a dynamic system of international climate governance and legal interpretation.[158] The decisions reached in courts, from national to international levels, can inform and influence the trajectory of diplomatic negotiations, and vice versa. The acknowledgement of states' obligations towards climate-displaced persons in *Teitiota* v. *New Zealand*, for instance, may encourage states to discuss concrete mechanisms for their protection during climate talks. Similarly, the recognition of state responsibility in *Billy et al.* may put pressure on states to strengthen their commitments to mitigation and adaptation efforts. Conversely, the agreements reached in climate negotiations can shape the discourse and interpretation of climate-related rights within judicial settings. The recognition of loss and damage in

[152] J. Wise, 'Climate Change Loss and Damage Litigation: Infeasible or Useful Shadow' (2021) 38(3) *Wisconsin International Law Journal*, pp. 687–712; V. Pekkarinen, P. Toussaint & H. van Asselt, 'Loss and Damage after Paris: Moving Beyond Rhetoric' (2019) 13(1) *Carbon & Climate Law Review*, pp. 31–49.

[153] On this see J. Rudall, *Compensation for Environmental Damage under International Law* (Routledge, 2020), pp. 24–45, 63, 104.

[154] ARSIWA, n. 30 above, Art. 39.

[155] *Four Islanders*, n. 63 above; *Aurora* case, n. 48 above.

[156] Setzer & Higham, n. 13 above, p. 6. See, e.g., *Milieudefensie*, n. 37 above, para. 4(4)(9); *Earthlife Africa Johannesburg* v. *Minister of Environmental Affairs and Others* (65662/16) (2017) (South Africa).

[157] See also Wewerinke-Singh & Antoniadis, n. 137 above.

[158] P. Toussaint, 'Loss and Damage and Climate Litigation: The Case for Greater Interlinkage' (2021) 30(1) *Review of European, Comparative and International Environmental Law*, pp. 16–33.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

the Paris Agreement, for instance, could influence future jurisprudence on reparations for climate change-related human rights violations.[159] In the light of the complexity of these dynamic interactions, there is an imperative for continued scholarly scrutiny, further illuminating the evolution of this legal frontier and assessing its normative and real-world impact.

4. CONCLUDING REMARKS

As the world grapples with the escalating consequences of climate change, rights-based climate litigation has emerged as a crucial avenue for those seeking remedies. This comprehensive analysis has unveiled that this litigation trend has indeed started to fulfil its promise of addressing loss and damage. The use of human rights arguments proves to be a critical component in this evolution. By adopting a rights-based perspective, loss and damage are reframed as a human rights issue, emphasizing the urgent need to safeguard climate-vulnerable populations and redress violations of their rights.[160] The human rights dimensions of these cases also assist in bridging the gap between domestic and international legal systems, fostering integrated legal arguments around redress for loss and damage and facilitating their replication.

At a more granular level, each of the cases provides valuable lessons regarding the kinds of evidence and argument that can substantiate rights-based loss and damage claims. This is true even for cases that were unsuccessful. For instance, the *Baihua Caiga* case in Ecuador initially made headlines for its innovative integration of the rights of nature, underlining the criticality of safeguarding ecosystems for their own intrinsic worth and their interconnectedness with human rights. Its dismissal for lack of evidence illustrates the challenges inherent in pursuing such novel legal pathways, particularly when jurisdiction-specific laws and regulations come into play. Still, the case presents a valuable lesson in leveraging domestic legal provisions to protect Indigenous lands and seek compensation for loss and damage, a strategy that is likely to find echoes in other jurisdictions. Other pioneering initiatives, like the Philippines *Carbon Majors* case, have provided important sites for learning on a range of technical issues, such as the presentation of scientific evidence and dealing with causation,[161] contributing to the further development of future loss and damage cases. Again, while the specifics of these strategies might not be universally applicable, they contribute to a growing body of knowledge and experience that can inform the design and implementation of rights-based litigation strategies to pursue redress for loss and damage in different jurisdictions.

[159] Ibid.; M. Wewerinke-Singh & D. Hinge Salili, 'Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change' (2020) 20(6) *Climate Policy*, pp. 681–92.

[160] Peel & Osofsky, n. 54 above, p. 340. See also A. Wonneberger & R. Vliegenthart, '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(5) *Environmental Communication*, pp. 699–714.

[161] Peel & Osofsky, n. 54 above, p. 320; See also Center for International Environmental Law, 'Ground-Breaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability', 9 Dec. 2019, available at: https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

This process of learning is also about understanding and overcoming the significant challenges that persist for those bringing rights-based loss and damage claims. As seen above, establishing the value of loss and damage suffered, proving causality, attributing specific harm to polluters, and finding a suitable forum to hear the claim all present considerable hurdles.[162]

Yet, these obstacles are not as insurmountable as they may appear. Reliance on probabilistic approaches to causation and advanced attribution science, for example, can help in overcoming obstacles related to causality and attribution.[163] Furthermore, courts can draw upon their experience in assessing damages for conventional claims and develop new methods for assessing various forms of capital, ecosystems, and human rights affected by climate impacts.[164] Creative remedies aimed at restoring victims' rights can be designed, drawing upon a rich body of human rights jurisprudence on remedies for both individual and collective forms of harm.[165] The importance of the principle of CBDR-RC also becomes clear in this landscape. This principle, as highlighted in *Urgenda*, could potentially underpin the apportionment of responsibility for loss and damage in future cases.

Looking forward, the interaction between climate litigation and international negotiations is likely to become even more salient. As scholars have noted, the proliferation of climate lawsuits globally, coupled with escalating climatic impacts, will inevitably affect the dynamic between these dual paths to climate action.[166] Guiding this progression must be an unwavering adherence to a rights-based approach, rooted in principles of equity and fairness, and laser-focused on safeguarding the most vulnerable from the escalating ramifications of climate change.[167] Pending and future cases, including the advisory proceedings before the ICJ and IACtHR, could play a significant role in achieving this focus. By using their respective mandates effectively and providing meaningful redress for victims, courts and human rights bodies are guiding decision makers on the imperative of rights-based climate action, signalling that accountability and justice are fundamental in addressing the climate crisis and its consequences.[168] While rights-based climate litigation alone cannot reorder the globe,[169] it is providing vital steers in the direction of climate justice.

---

[162] Toussaint, n. 158 above.

[163] See R.F. Stuart-Smith et al., 'Filling the Evidentiary Gap in Climate Litigation' (2021) 11 *Nature Climate Change*, pp. 651–5.

[164] J. Brunnée et al., 'Overview of Legal Issues Relevant to Climate Change', in R. Lord et al. (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2011), pp. 23–49, at 45.

[165] See generally Shelton, n. 19 above; see also C. Grossman, A. del Campo & M.A. Trudeau, *International Law and Reparations: The Inter-American System* (Clarity Press, 2018).

[166] M. Burger, J. Wentz & R. Horton, 'The Law and Science of Climate Change Attribution' (2020) 45(1) *Columbia Journal of Environmental Law*, pp. 57–240; M. Hulme, *Climate Change* (Taylor & Francis, 2021).

[167] UN OHCHR, 'Framework Principles on Human Rights and the Environment', 2018, available at: https://www.ohchr.org/sites/default/files/FrameworkPrinciplesUserFriendlyVersion.pdf.

[168] S. Adelman, 'Climate Justice, Loss and Damage and Compensation for Small Island Developing States' (2016) 7(1) *Journal of Human Rights and the Environment*, pp. 32–53.

[169] On climate reparations as a forward-looking global project see O. Taiwo, *Reconsidering Reparations* (Oxford University Press, 2022), pp. 149–90.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

APPENDIX

Table 1 Domestic Litigation on Loss and Damage: Status and Claims

	Name of case	Date filed	Date decided	Jurisdiction and status	Loss and damage component
1.	*Ioane Teitiota* v. *The Chief Executive of the Ministry of Business, Innovation and Employment*	N/A	20 July 2015	Supreme Court of New Zealand (New Zealand) *Denied*	Distinct from compensation for loss and damage, this case sought recognition of claimants as 'protected persons' under domestic migration laws based on the life-threatening impacts of climate change.
2.	*0907346 [2009] RRTA 1168*	May 2009 (visa application)	10 Dec. 2009	Refugee Review Tribunal (Australia) *Denied*	Sought a protection visa under the Migration Act 1958 because of the threat caused by climate change and sea-level rise.
3.	*Mbabazi and Others* v. *The Attorney General and National Environmental Management Authority*	20 Sept. 2012	Pending	High Court at Kampala (Uganda) *Pending*	Seeks monetary compensation from the government for loss and damage as a result of climate change.
4.	*In re: AD (Tuvalu)* [[2014] Cases 501370-371]	Nov. 2012 (claim for refugee status)	4 June 2014	Immigration and Protection Tribunal (New Zealand) *Granted, but not based on climate impacts*	Family sought resident visas under the New Zealand Immigration Act 2009 on account of harmful effects of climate change if they were deported to Tuvalu.
5.	*In re Greenpeace Southeast Asia and Others*	12 May 2015	6 May 2022	Philippines Commission on Human Rights (The Philippines) *Decided; granted*	Sought recommendations for legislative changes that enable victims of climate change to recover damages from fossil fuel companies [based on their respective contributions to climate change].
6.	*PUSH Sweden, Nature and Youth Sweden and Others* v. *Government of Sweden*	15 Sept. 2016		Stockholm District Court/Court of Appeal (Sweden) *Denied*	Sought to prevent sale by Vattenfall (an energy firm in which the Swedish government owns a controlling stake) of coal-fired power plants and associated mining assets in Germany to a Czech risk capitalist company.

(*Continued*)

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

Table 1 Domestic Litigation on Loss and Damage: Status and Claims (*Continued*)

	Name of case	Date filed	Date decided	Jurisdiction and status	Loss and damage component
7.	*Notre Affaire à Tous and Others* v. *France*	17 Dec. 2018 (letter of formal notice filed)	3 Feb. 2021	Administrative Court of Paris (France) *Decided; partly granted*	Claim: Sought symbolic monetary compensation of one euro for the state's failure to implement measures to reduce GHG emissions, violating its statutory duty to act, and compensation for ecological damage. Outcome: Symbolic compensation granted; compensation for ecological damage denied.
8.	*Tsama William and Others* v. *Uganda's Attorney General and Others*	14 Oct. 2020	Pending	High Court of Uganda at Mbale (Uganda) *Pending*	Seeks damages and compensation for loss and threats to life, destruction of property and infringement of other fundamental human rights as well as the costs of resettlement from disaster-prone areas.
9.	*Waorani Indigenous Community* v. *PetroOriental SA*	10 Dec. 2020	15 July 2021	Judicial Unit in the canton of Francisco de Orellana (Ecuador) *Inadmissible*	Reparations claimed for violations of the constitutional rights of the Indigenous peoples and of nature's right to have its life cycles respected.
10.	*Complaint filed before SUHAKAM*	7 Dec. 2021	Pending	National Human Rights Commission (Malaysia) *Pending*	To examine existing Malaysian legislation, regulations etc. and make recommendations to protect people's human rights to a safe, clean, healthy and sustainable environment in line with the polluter-pays principle, no-harm principle and precautionary principle.
11.	*Indonesian Youths and Others* v. *Indonesia*	14 July 2022	Pending	National Human Rights Commission (Indonesia) *Pending*	Requests the government to amend its laws and policies to protect the youth from adverse climate impacts.
12.	*Municipalities of Puerto Rico* v. *Exxon Mobil Corp*	22 Nov. 2022	Pending	District Court of Puerto Rico (Puerto Rico, US) *Pending*	Cities claims punitive and compensatory damages from fossil fuel companies for losses incurred as a result of the 'apocalyptic' 2017 hurricanes.

(*Continued*)

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

Table 1 Domestic Litigation on Loss and Damage: Status and Claims (*Continued*)

	Name of case	Date filed	Date decided	Jurisdiction and status	Loss and damage component
13.	*Anton Foley and Others* v. *Sweden (Aurora case)*	25 Nov. 2022	Pending	Stockholm District Court (Sweden) *Pending*	Class action seeking damages from the Swedish government's inadequate mitigation of climate change resulting in violation of human rights.
14.	*Four Islanders of Pari* v. *Holcim*	1 Feb. 2023	Pending	Justice of the Peace of the Canton of Zug (Switzerland) *Pending*	Compensation sought for implementing adaptation measures on Pari islands of Indonesia owing to a Swiss cement company's historical contributions to emissions.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

Table 2 International Litigation on Loss and Damage: Status and Claims

	Name of case	Date filed	Date decided	Jurisdiction and status	Loss and damage component
1.	*Ioane Teitiota* v. *New Zealand*	15 Sept. 2015	7 Jan. 2020	UN Human Rights Committee *Denied*	The author sought a declaration that his right to life had been violated as a result of New Zealand's denial of asylum and his subsequent deportation to Kiribati based on climate impacts.
2.	*Billy et al.* v. *Australia*	13 May 2019	23 Sept. 2022	UN Human Rights Committee *Granted*	Holding Australia responsible for violating the human rights of Indigenous Torres Strait Islanders under the ICCPR by failing to take action to reduce GHG emissions and adapting to climate change. No explicit request for remedies relating to loss and damage, but recommended at Committee's own initiative.
3.	*Rights of Indigenous People in Addressing Climate-Forced Displacement*	16 Jan. 2020	Pending	UN Special Rapporteurs *Pending*	Claim that the state government should require mitigation measures as well as compensation from oil and gas corporations for damage caused to the Louisiana coast, and to pay compensation to the victims of such damage.
4.	*Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti*	4 Feb. 2021	Pending	IACHR *Pending*	Requests that Haiti make reparations for the 'harm caused' from waste disposal, which is exacerbated by climate change.
5.	*NZ Students for Climate Solutions and UK Youth Climate Coalition* v. *Board of BP*	8 Dec. 2022	Pending	ICC *Pending*	Seeks damages from BP senior executives, pursuant to Art. 8 of the Paris Agreement, for committing a crime against humanity by knowingly causing and perpetuating climate change
6.	*Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency*	9 Jan. 2023	Pending	IACtHR *Pending*	Requests clarification of the principles that should guide state actions regarding adaptation, mitigation, and loss and damage.

(*Continued*)

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press

Table 2 International Litigation on Loss and Damage: Status and Claims (*Continued*)

	Name of case	Date filed	Date decided	Jurisdiction and status	Loss and damage component
7.	*Request for an Advisory Opinion on the Obligations of States with Respect to Climate Change*	1 Mar. 2023 (UNGA Res. adopted)		ICJ *Pending*	Emphasizes the urgency of minimizing and addressing loss and damage; requests clarification of legal consequences for states that have caused significant harm to the climate system and other parts of the environment.

https://doi.org/10.1017/S2047102523000183 Published online by Cambridge University Press