Transnational Insights for Climate Litigation at the European Court of Human Rights: A South-North Perspective in Pursuit of Climate Justice

By *Melanie Murcott, Maria Antonia Tigre* and *Nesa Zimmermann*[*]

Abstract: The global climate crisis is increasingly recognised as an issue of climate injustice, including because it is causing (and worsening) inequalities and human rights violations. Moreover, responsibility for emissions and vulnerability to climate impacts are not evenly distributed. They vary among and within states. In order to tackle these issues of justice both within and among states, litigants have taken to domestic and regional courts to engage in climate litigation. A body of transnational climate jurisprudence is emerging in which courts are increasingly looking to laws beyond their relevant state or region, engaging with the moral aims of human rights law, and solidifying international climate commitments. In adjudicating climate cases, courts have become important sites of climate justice. The European Court of Human Rights (ECtHR) is currently adjudicating several important climate cases and could become a key player in responding to the climate crisis. From the point of departure that in a time of climate crisis courts have a crucial role to play in advancing climate justice, we conceptualise climate (in)justice and its significance in climate adjudication. Then, we examine how, in addressing questions of standing and transboundary harm, looking beyond the European Convention on Human Rights legal regime to the Global South (South Africa and the Inter-American System of Human Rights, respectively) could offer valuable transnational insights as the ECtHR adjudicates climate cases. In doing so we hope to contribute to the ongoing transnationalisation of climate jurisprudence.

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A. Introduction

The climate crisis is increasingly recognised as an issue of climate injustice, including because it is causing (and worsening) inequalities and human rights violations.[1] Moreover, responsibility for emissions and vulnerability to climate impacts are not evenly distributed.[2] They vary among and within states.[3] In response, climate litigation[4] in domestic and regional tribunals – pursued primarily by non-state actors such as non-governmental organisations and youth movements – has emerged as a global phenomenon.[5] The inherent limitations of litigation notwithstanding,[6] it places courts as potentially powerful stakeholders in climate governance, with the ability to shape the obligations of states and multinational corporations towards mitigation, adaptation, and loss and damage, which can, in turn, promote equality, justice, and human rights more broadly.[7]

Given the links between human rights and the pursuit of justice,[8] when courts implement, interpret, or enforce human rights in climate cases, they are engaged with justice

1 Climate Justice Charter Movement, Climate Justice Charter, https://cjcm.org.za/the-charter/en (last accessed on 18.1.2023); Intergovernmental Panel on Climate Change (IPCC), Climate Change 2022: Impacts, Adaptation, and Vulnerability, 2022; United Nations, World faces "climate apartheid" risk, 120 more million in poverty: UN expert, https://news.un.org/en/story/2019/06/1041261 (last accessed on 18.1.2023); *Maria Antonia Tigre,* Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation, E-Publica 9 (2022), p. 214.

2 *David Eckstein / Vera Künzel / Laura Schäfer*, Global Climate Risk Index 2021, https://www.germanwatch.org/sites/default/files/Global%20Climate%20Risk%20Index%202021_2.pdf (last accessed on 18.1.2023); IPCC, note 1.

3 *Melanie Jean Murcott*, A Just COP26 Outcome for South Africa? Transnational Legal Theory 13 (2022), pp. 3–5.

4 Sabin Centre for Climate Change Law, Climate Change Litigation Databases, http://climatecasechart.com/ (last accessed on 18.1.2023).

5 United Nations Environment Programme (UNEP), Global Climate Litigation Report 2020 Status Review, https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y (last accessed on 18.1.2023); *Michael Burger* / *Maria Antonia Tigre*, Global Climate Litigation Report: 2023 Status Review, UNEP, 2023, forthcoming.

6 On the limits of litigation, see *Elizabeth Fisher / Eloise Scotford / Emily Barritt*, The Legally Disruptive Nature of Climate Change, Modern Law Review 80 (2017), pp. 197–200; *Stacy-ann Robinson / D'Arcy Carlson*, A just alternative to litigation: applying restorative justice to climate-related loss and damage, Third World Quarterly 42 (2021), pp. 1385–1386.

7 *Joana Setzer / Lisa Benjamin*, Climate Litigation in the Global South: Constraints and Innovations, Transnational Environmental Law 9 (2020), p. 85; *Jacqueline Peel / Hari M. Osofsky*, A Rights Turn in Climate Change Litigation?, Transnational Environmental Law 7 (2018), pp. 37–67; *Jacqueline Peel / Jolene Lin*, Transnational Climate Litigation: The Contribution of the Global South, 113 (2019), pp. 681, 696–700. See also *Charles Beauregard* et al., Climate justice and rights-based litigation in a post-Paris world, Climate Policy 21 (2021).

8 *Roger Normand / Sarah Zaidi*, Human Rights at the UN: The Political History of Universal Justice, Bloomington 2008, pp. 7–8.

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and equity questions that inexorably arise in the context of the climate crisis.[9] In addition, the adjudication of climate cases is increasingly viewed as transnational, including because courts are looking beyond domestic or regional legal regimes, for instance, towards universal human rights-based commitments and their applications in different contexts.[10] This transnationalisation of climate jurisprudence has the ability to enhance decision making, since it promotes comparing and contrasting legal rules in different contexts to evaluate, against other approaches, the utility thereof. Domestic and regional courts are increasingly solidifying international climate commitments and engaging with the moral aims of human rights law.[11] When doing so, we argue that courts are (wittingly or unwittingly) grappling with issues of global climate (in)justice.[12] This is because, as we explain more fully in the next part of this article, climate change is a global problem that necessarily raises issues of differentiated responsibility and differentiated vulnerability across multiple scales (such as globally and locally, as well as historically and contemporaneously) and within scales (such as within a particular state at the present moment).[13] Climate change also "brings global inequalities to the surface",[14] including in the context of adjudication.[15] Given the issues of justice that emerge in climate adjudication, and building on the growing discourse reflecting on the transnational dimensions of climate litigation around the globe, in this article we identify potential insights for the European Court of Human Rights (ECtHR) arising from aspects of law and practice in the Global South. Before identifying these potential insights, in part B, we discuss the notion of climate (in)justice and its significance for the adjudication of climate cases. Then, in part C, we describe emerging ECtHR climate

9 *Annalisa Savaresi*, Human rights and the impacts of climate change: Revisiting the assumptions, Oñati Socio-Legal Series 1 (2021), pp. 234–235.

10 *Emily Barritt*, Consciously transnational: Urgenda and the shape of climate change litigation, Environmental Law Review 22 (2020), p. 297; *Pedi Obani / Eghosa Ekhator*, Transnational Litigation and Climate Change in Nigeria, Afronomicslaw (2021); *Sudha Kavuri / Anjana Ramanathan*, Climate Change Litigation: Chronicles from the Global South, Comparative Law Review 28 (2022), pp. 170–171. On the disruptive nature of climate litigation see *Fisher / Scotford / Barritt*, note 6, pp. 196–200.

11 *Barritt*, note 10, p. 297; *Kavuri / Ramanathan*, note 10, pp. 177–190.

12 The question of whether courts have a mandate to do so is beside the point, as these issues are ever-present in climate litigation. We borrow the phrase "wittingly or unwittingly" from *Louis J. Kotzé*, Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene, German Law Journal 22 (2021), p. 1425, and acknowledge that courts may also be grappling with a range of other issues highlighted by the author, a discussion of which falls outside of the scope of this article.

13 On the multi-scalar and scale-dependent dimensions of climate change, see *Hari M. Osofsky*, The continuing importance of climate change litigation, 1 (2010), pp. 10–20.

14 *Erika Strazzante / Stéphanie Rycken / Vanessa Winkler*, Generation Climate Europe, Global North and Global South: How Climate Change Uncovers Global Inequalities, 27.10.2021, https://gceurope.org/global-north-and-global-south-how-climate-change-uncovers-global-inequalities/ (last accessed on 18.1.2023).

15 *Savaresi*, note 9, p. 244.

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litigation focusing on two climate justice-relevant issues: standing rules, and transboundary (extraterritorial) climate harm.

In part D, we reflect on two potential insights for the ECtHR from the Global South in the context of climate litigation. First, we contrast the standing requirements of the ECtHR with those of the South African legal system under its transformative constitutional regime, and illustrate the value of broadening standing rules as the ECtHR adjudicates climate cases. A second potential insight for the ECtHR relates to the recognition of extraterritorial jurisdiction by the Inter-American System of Human Rights (IASHR) given the transboundary nature of climate harm.

We conclude that adopting a South-North transnational perspective reveals valuable insights about how the ECtHR's practice could evolve to advance climate justice, which is crucial as humanity is confronted with the grave justice implications of the climate crisis. Our analysis invites critical reflection on ECtHR practice through openness and humility to valuable knowledge emerging from the Global South and the need for the law to respond effectively to contemporary justice issues.

B. Climate (in)justice and its significance in climate adjudication

While there are many definitions of, and contours to, the term climate injustice,[16] we focus on distributive (in)justice within and among states. We do so from the point of departure that:

> *Climate justice fundamentally is about paying attention to how climate change impacts people differently, unevenly, and disproportionately, as well as redressing the resultant injustices in fair and equitable ways.*[17]

We define climate injustice as the uneven and unjust distribution of climate change vulnerabilities and impacts within and among states with reference to the underlying or root causes of such maldistribution, including colonialism, patriarchy, and a lack of recognition and exclusion of people from participation in climate-related decision-making due to uneven concentrations of political and economic power.[18] This expansive understanding of climate injustice entails recognising several key realities. First, what happens in response to climate

16 *Carmen G. Gonzalez*, Global Justice in the Anthropocene, in: Louis Kotzé (ed.), Environmental Law and Governance for the Anthropocene, Oxford 2017, pp. 221–229; *Murcott*, A Just COP26, note 3, pp. 3–5.

17 *Farhana Sultana*, Critical climate justice, The Geography Journal 188 (2022), p. 120.

18 *Melanie Murcott*, Transformative Environmental Constitutionalism, Leiden 2022, pp. 19–27; *Prakash Kashwan*, Climate Justice in the Global North, Case Studies in the Environment 5 (2021), p. 2; *Carmen G. Gonzalez*, Racial capitalism, climate justice and climate displacement, Oñati Socio-Legal Series 11 (2021), pp. 112-114; *Gonzalez*, Global Justice, note 16, p. 221–229.

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change in one state has impacts for those (particularly the most vulnerable) in other states.[19] Also, the Global North is most responsible for the climate crisis, whilst people in the Global North currently experience its impacts the least, and reap the most benefits from the causes of climate change.[20] At the same time, the Global South is historically least responsible for the climate crisis, but people in the Global South are most vulnerable to its impacts and reap far less benefits from the causes of climate change.[21] Further, within countries in both the Global North and the Global South, vulnerability to climate change is differentiated.[22] Indigenous people, children, women, the elderly, and differently abled people are among the most vulnerable.[23] These realities entail intersectional thinking, recognising that issues of gender, intergenerational, racial, and disability injustice are intertwined with climate vulnerability and responsibility.[24]

In the context of adjudication, the realities we have underscored mean that when litigants in the Global North seek to enhance the climate ambition, for instance, of Switzerland,[25] for the benefit of elderly women who are particularly vulnerable to the adverse health impacts of global temperature rises in that state, courts are engaged (wittingly or unwittingly) with complex issues of climate justice across multiple scales.[26] Adjudication of the factual and legal issues raises questions (whether directly or indirectly) about Switzerland's contribution to and responsibility for climate change, including its duty to mitigate global temperature rises that affect those in Global South states most acutely. These are issues of global climate justice in a distributive sense. The adjudication also raises (whether explicitly or impliedly) localised justice questions about who, within Switzerland, is disproportionately impacted by climate change, and the extent to which the law is responsive to the plight of the most vulnerable.

According to the Intergovernmental Panel on Climate Change (IPCC), climate justice advances a human rights-based approach to addressing climate change.[27] Among other ways, courts can promote climate justice when they afford marginalised and vulnerable people access to justice (standing) in the courts to address climate vulnerabilities and

19 *Gonzalez*, Racial capitalism, note 18, pp. 113–114; *Osofsky*, Continuing importance, note 13, pp. 10–20.

20 *Gonzalez*, Racial capitalism, note 18, p. 113; *Murcott*, A Just COP26, note 3, pp. 3–5; *Strazzante / Rycken / Winkler*, note 14.

21 *Sultana*, note 17, pp. 118–119; David *Eckstein* / Vera *Künzel* / Laura *Schäfer*, note 2; Strazzante / Rycken / Winkler, note 14.

22 *Strazzante / Rycken / Winkler*, note 14.

23 *Gonzalez*, Racial Capitalism, note 18, pp. 114–116; *Sultana*, note 17, p. 120.

24 *Sultana*, note 17, pp. 119–120; *Alina Engelman / Leyla Craig / Alastair Iles*, Global Disability Justice In Climate Disasters: Mobilizing People With Disabilities As Change Agents, Health Affairs 41 (2022), pp. 1496–1500.

25 ECtHR, Verein Klimaseniorinnen Schweiz et. al v. Switzerland, App. No.. 53600/20.

26 On the question of scales see *Osofsky*, Continuing importance, note 13, pp. 10–20.

27 IPCC, note 1.

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respond to the extraterritorial impacts of climate change across jurisdictions in pursuit of distributive justice and to prevent human rights violations. Given the Global North's contribution to climate change, we argue that courts in the region have a particular responsibility in climate litigation to advance global justice.[28] Indeed, courts, including in Europe, are increasingly considering climate justice-relevant issues when adjudicating climate cases.[29] In doing so, courts have emphasised the enhanced responsibility of Global North states to respond to climate change,[30] and linked climate justice considerations to human rights violations.[31] Considering climate justice to "flesh out" human rights obligations is one way to concretise and shape human rights by way of interpretation. Next, we introduce the ECtHR as a site of contestation about environmental issues, and reflect on two important climate cases before the ECtHR. We illustrate the climate justice issues raised by these cases, and identify potential legal barriers to advancing climate justice relating to standing and transboundary harm.

C. Climate litigation before the ECtHR

The ECtHR has developed, over the last 30 years, an "environmental" strand of case law by finding that rights provided for the in European Convention on Human Rights (ECHR),[32] most notably the right to life (art. 2), the right to a fair trial (art. 6), and the right to respect for private and family life (art. 8), were relevant – and sometimes violated – in cases relating to environmental matters.[33] By "greening" existing ECHR rights,[34] the ECtHR has

28 *Murcott*, A Just COP26, note 3, pp. 1–5.

29 *Orla Kelleher*, Incorporating climate justice into legal reasoning: shifting towards a risk-based approach to causation in climate litigation, Journal of Human Rights and the Environment 13 (2022), pp. 290–317.

30 Netherlands v. Urgenda Foundation (20.12.2019) ECLI:NL:HR:2019:2006; *Neubauer v. Germany* (2021) 1 BvR 2656/18 et al. (199)-(203); see also *Kelleher*, note 29.

31 *Kelleher*, note 29, with further references.

32 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). 4 Novembre 1950, STE5.

33 Among many, see *Paul Baumann*, Le droit à un environnement sain au sens de la Convention européenne des droits de l'Homme, Paris 2021.

34 See e.g. *Alan Boyle*, Human Rights and the Environment: Where Next?, European Journal of International Law 23 (2012), p. 614; on the global level, see also the report by Special Rapporteur John Knox, A/73/188 (2018).

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participated in the global trend toward environmental constitutionalism.[35] It has done so despite the absence of an environmental right in the ECHR and its additional Protocols,[36] contrary to, for example, section 24 of the South African Constitution[37] or article 11 of the Protocol of San Salvador.[38] The possibilities within existing ECHR law to advance environmental constitutionalism remain limited, since according to long-standing case law, a general deterioration of the environment does not present a sufficiently close link with individual rights to fall within the scope of the ECHR.[39] Nevertheless, the case law shows an openness towards an integrated human rights approach[40], taking into account international environmental standards to determine the scope of positive obligations flowing from ECHR *rights*.[41]

While past ECtHR cases relating to the environment tackled issues such as noise, atmospheric pollution, urban waste or water quality,[42] in 2021, applicants started to file

35 See *Murcott*, Transformative Environmental Constitutionalism, note 18, pp. 71–73; *James R. May / Erin Daly*, Global Environmental Constitutionalism, New York 2015. On climate constitutionalism more specifically, see *Ademola Oluborode Jegede*, Climate Change and Environmental Constitutionalism: A Reflection on Domestic Challenges and Possibilities, in: Erin Daly / James R. May (eds.), Implementing Environmental Constitutionalism: Current Global Challenges, Cambridge 2018, pp. 93–98; *James R. May / Erin Daly*, Global climate constitutionalism and justice in the courts, in: Jordi Jaria-Manzano / Susana Borràs (eds.), Research Handbook on Global Climate Constitutionalism, Cheltenham 2019.

36 Note, however, that the drafting of an additional protocol on the right to a healthy environment has been suggested several times, see Parliamentary Assembly of the Council of Europe PACE, resolutions No 1614 (2003), No. 1885 (2009), Nos 2396, 2397, 2398, 2399 (2021).

37 The Constitution of the Republic of South Africa, https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1, sec. 24.

38 Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights Protocol of San Salvador, art. 11.

39 ECtHR, Guerra and Others v. Italy, App. No. 14967/89, jugement of 19.2.1998, para 5; ECtHR, di Sarno and Others v. Italy, App. No. 30765/08, jugement of 10.1.2012, para 80.

40 On the concept of an "integrated human rights approach", see *Eva Brems*, Introduction, in : Eva Brems / Ellen Desmet (eds), Integrated Human Rights in Practices : Rewriting Human Rights Decisions, Cheltenham 2017, pp. 8–11.

41 ECtHR, Fägerskiöld v. Sweden (dec.), jugement of 26.2.2008, App. No. 37664/04; ECtHR, Oluić v. Croatia, jugement of 20.5.2010, App. No. 61260/08, paras 52–62; App. No. 61260/08, 20.5.2010, paras 52–62; Kožul and Others v. Bosnia and Herzegovina, jugement of 22.20.2019, App. No. 38695/13, 22.10.2019, paras 35–38.

42 ECtHR, Guide on Caselaw: Environment, 31.8.2022, https://www.echr.coe.int/Documents/Guide_Environment_ENG.pdf (last accessed on 18.1.2023).

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cases related to climate change.[43] The first two of them, in particular, have been extensively discussed by the media[44] and legal scholars:[45] the "Portuguese Youth" case (*Duarte Agostinho*),[46] filed by six children and young adults against Portugal and 32 other states, and the case of the "Senior Women for Climate Protection" (*Klimaseniorinnen*), filed by an association and several senior women against Switzerland.[47] In both cases, the applicants argue that climate change disproportionately and adversely affects their physical and mental health and wellbeing and that the responding states violate their human rights by not tackling the phenomenon sufficiently. They thus raise issues of climate justice within and among states relating to differentiated vulnerability to and responsibility for climate change (including potential victims in the Global North), and the underlying causes thereof. These, and similar cases, present an opportunity for the ECtHR to elaborate on its integrated human rights approach taking into account other sources of international and environmental law and, possibly, even engage with caselaw from other jurisdictions, thus engaging in a "consciously transnational" judicial dialogue.[48]

In *Duarte Agostinho*, the applicants seek to hold 33 Council of Europe member states responsible for failing to reduce their emissions, including those of multinational companies based in these countries. By seeking to hold these Global North states responsible for their emissions, the applicants are raising issues of global climate justice. Further, the applicants in *Duarte Agostinho* underline that as children, they are "being made to bear the burden of climate change to a far greater extent than older generations", as the effects of climate change will unravel during their lifespan.[49] They are thus raising the issue of climate (intergenerational) justice on a global and local scale, given that they, among other children, are (i) particularly vulnerable to, (ii) disproportionately impacted by, but (iii) least

43 ECtHR, Duarte Agostinho et. al v. Portugal & 31 other States, App. No. 39371/20; ECtHR, Verein Klimaseniorinnen Schweiz et. al v. Switzerland, note 25; ECtHR, De Conto v. Italy and 32 other States, App. No. 14620/21; ECtHR, Uricchio v. Italy and 32 other States, App. No. 14615/21; ECtHR, Carême v. France, App. No. 7189/21; ECtHR, Greenpeace Nordic and Others v. Norway, App. No. 34068/21; ECtHR, Müllner v. Austria (not yet communicated). For a regularly updated overview, see Sabin Center for Climate Change Law, European Court of Human Rights in Litigation Cases, http://climatecasechart.com/non-us-jurisdiction/european-court-of-human-rights/ (last accessed on 18.1.2023).

44 *Matthew Taylor / Emily Holden / Dan Collyns / Michael Standaert / Ashifa Kassam*, The Young People Taking their countries to Court over climate inaction, The Guardian, 7.5.2021.

45 See, among many others, *Paul Clerk / Gerry Liston / Ioannis Kalpouzos*, Climate Change and the European Court of Human Rights: The Portuguese Youth Case, EJIL: Talk! – Blog of the European journal of International Law, ejiltalk.org (last accessed on 18.1.2023).

46 ECtHR, Pad and Others v. Turkey, Judgement of 28.6.2007, App. No. 60167/00, paras 52-54; ECtHR, Case of Alk-Skeini and Others v. The United Kingdom, Judgment of 7.7.2011, App. No. 55721/07, paras 130–150.

47 ECtHR, Verein Klimaseniorinnen Schweiz et al. v. Switzerland, note 25.

48 See above, note 10.

49 Duarte Agostinho v. Portugal et al., Application, https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf, para 28 (last accessed on 15.5.2023).

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responsible for, climate change. Several third-party interventions have also highlighted the fact that children tend to be physically more vulnerable to environmental harm.[50]

The *Klimaseniorinnen* case is directed against Switzerland for failing to meet its mitigation targets under the Paris Agreement.[51] In seeking to compel Switzerland to fulfil its commitments to prevent catastrophic increases in the global temperature under the Paris Agreement, the applicants are addressing issues of global climate justice, even though, on the surface, their case is based on individual rights violations.[52] The application also raises issues of climate justice within Switzerland by highlighting gendered and age-related vulnerabilities:[53] the application cites studies linking climate change to increased heatwaves and indicating how elderly women suffer disproportionately from the health-damaging risks and possibly mortal effects of heatwaves.[54]

The ECtHR has given priority to these cases, meaning they will be decided before other pending applications. With over 70,000 applications currently pending before the Court, the order in which the applications are examined is practically significant, as the cases considered to be low priority may easily take up to ten years before they are decided.[55] While cases are sorted into different categories of priorities according to a pre-established priority policy, the Court may derogate from these criteria in order to prioritise cases considered to be particularly urgent or relevant.[56] The Court's decision to prioritise these cases illustrates an appreciation of their importance and urgency. This acknowledgement is further underscored by the fact that the Chambers, composed of seven judges, have relinquished their competence in favour of the Grand Chamber, composed of seventeen of the Court's total forty-six judges,[57] a decision which is exceptional and limited to cases raising serious questions affecting the interpretation of ECHR rights or warranting a significant change in the ECtHR's case law. This step further highlights the importance

50 See e.g. *Jukka Viljanen*, Tampere University, https://youth4climatejustice.org/the-case/, pp. 5–7 (last accessed on 18.1.2023).

51 United Nations Climate Change, The Paris Agreement, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last accessed on 18.1.2023).

52 https://www.klimaseniorinnen.ch/warum-wir-klagen/ (last accessed on 15.5.2023).

53 On gendered vulnerabilities in relation to climate change, see *Elisa Fontaine*, Le droit des femmes à un environnement sain, une chimère ? Une analyse de la construction jurisprudentielle européenne, interaméricaine

et africaine du droit à un environnement sain sous le prisme du genre, Leuven 2020.

54 Verein Klimaseniorinnen Schweiz et. al v. Switzerland, Application, https://www.klimaseniorinnen.ch/dokumente/, paras 32–40 (last accessed on 18.1.2023).

55 For a more detailed explanation, see *Nesa Zimmermann*, La notion de vulnérabilité dans la jurisprudence de la Cour européenne des droits de l'homme. Contours et utilité d'un concept en vogue, Genève 2022, pp. 340–351.

56 ECtHR, Priority Policy, 2009, https://www.echr.coe.int/documents/priority_policy_eng.pdf (last accessed on 15.5.2023); ECtHR, Rules of Court, Rule 41.

57 ECHR, Cases pending before the Grand Chamber, https://www.echr.coe.int/pages/home.aspx?p=hearings/gcpending&c (last accessed on 18.1.2023).

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of these cases and can be viewed as a sign of the ECtHR's willingness to tackle climate litigation.

Despite these positive signs, there are potential legal barriers that applicants seeking to advance climate justice before the ECtHR will inevitably face.[58] Next, we focus on two of a wide range of challenges.[59] The first relates to standing. According to article 34 of the ECHR and long-standing case-law, applicants must fulfil the "victim" requirement, meaning that they must be directly and personally affected by an alleged rights violation.[60] This exclusion of any *actio popularis* or public interest litigation can be traced back to the origins of the European Convention: since early days, it was feared that doing otherwise might open the "floodgates" of public interest litigation.[61] A violation of the Convention must also have already taken place, although the Court has been prepared to accept the notion of potential victims.[62] The victim requirement represents a potential barrier to access to justice in the context of climate litigation because it is notoriously hard to prove that a particular individual has been or will be directly and personally affected by an alleged human rights violation;[63] however, as discussed below, it is not an impossible barrier to reach.

Another question concerns extraterritoriality,[64] namely whether and to what extent courts can respond to the transboundary harm created by climate change. The willingness of the ECtHR to respond to such harm, including its North-South dimensions, could advance climate justice in a distributive sense. As the ECtHR addresses these issues in the context of novel climate litigation, there is an opportunity to learn from the Global

58 Without addressing the question whether it is, in fact, the ECtHR's mandate to address climate justice, we assert that litigants are seeking access to courts with climate justice in mind. Should they successfully invoke legal rules in that endeavour, the ECtHR will have (wittingly or unwittingly) played a valuable role in advancing climate justice.

59 For a more in-depth analysis of the manyfold obstacles, see e.g. *Helen Keller / Corina Heri*, The Future is Now: Climate Cases before the ECtHR, Nordic journal of human rights 40 (2022) p. 1; *Helen Keller / Abigail Pershing*, Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases, European Convention on Human Rights Law Review 3 (2021), p. 23; *Monica Feria-Tinta*, Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions, Europe des Droits et Libertés 3 (2021), pp. 52–71.

60 Art. 34 ECHR; ECtHR, Guide on Caselaw: Admissibility, 30.4.2022, https://www.echr.coe.int/documents/d/echr/Admissibility_guide_ENG,para 18; ECtHR, Correia de Matos v. Portugal, Judgment of 4.4.2018, App. No. 56402/12, para 107; ECtHR, Lekic v. Slovenia, Judgment of 11.12.2018, App. No. 36480/07, para 107; ECtHR, Cordella and Others v. Italy, Judgment of 24.1.2019, App. Nos. 54414/13 and 54264/15, paras 100–101.

61 *Julien Marquis*, La qualité pour agir devant la Cour européenne des droits de l'homme, Genève 2017, paras 515–519, 583–587.

62 *Marquis*, note 61, paras 789–1043; see also below, D.I.

63 See e.g. *Keller / Heri*, note 59, pp. 14–15.

64 *Samantha Besson*, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to, Journal of International Law 25 (2012), pp. 857–884.

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South by adopting an approach that is "consciously transnational" and draws from the cross-fertilisation of climate decisions among courts. We, therefore, reflect on potential lessons for the ECtHR from South Africa concerning access to justice, and from the IASHR concerning extraterritorial jurisdiction.

D. Insights for the ECtHR from the Global South

I. Insights from South Africa on standing

Before the introduction of the South African Constitution, colonially imposed rules of standing (originating in Roman-Dutch and English law) were applied in the South African courts.[65] These rules (along with a multitude of unjust and racist laws)[66] limited access to justice.[67] The standing rules generally permitted only private individuals to bring claims in which they had a personal interest to defend private interests or rights.[68] They generally reinforced colonial and liberal ideologies that the law ought to prioritise the freedom of the individual,[69] and the fiction that people are separate from the broader Earth community of which they are a part.[70] The transformative post-apartheid South African Constitution recognised the need for effective enforcement of human rights to respond to the country's grossly unjust, racist, and oppressive colonial and apartheid history.[71] It is underpinned by the communitarian philosophy of *ubuntu*,[72] which entails that "humans can only become

65 *Neels Swanepoel*, The judicial application of the "interest" requirement for standing in constitutional cases: "A radical and deliberate departure from common law", De Jure 64 (2014), pp. 65–67.

66 Right to Know Campaign v City Manager of Johannesburg Metropolitan Municipality [2022] ZAGPJHC 388 (10.5.2022), para 55.

67 *Swanepoel*, note 65, pp. 65–67.

68 Ibid.

69 *Tembeka Ngcukaitobi*, The evolution of standing rules in South Africa and their significance in promoting social justice, South African Journal on Human Rights 18 (2002), pp. 591–595, 602.

70 *Murcott*, Transformative Environmental Constitutionalism, note 18, pp. 8–10. See also *Jody L. Davis / Jeffery D. Green / Allison Reed*, Interdependence with the environment: Commitment, interconnectedness, and environmental behaviour, Journal of Environmental Psychology 29 (2009), p. 174; *James C. Murombedzi*, Pre-colonial and colonial conservation practices in southern Africa and their legacy today, https://www.iccaconsortium.org/wp-content/uploads/2015/08/example-pre-colonial-and-colonial-conservation-southern-africa-murombedzi-2003-en.pdf (last accessed on 18.1.2023).

71 *Tumai Murombo*, Strengthening Locus Standi in Public Interest Environmental Litigation in South Africa, Law, Environment and Development Journal 6 (2010), p. 172; *Ngcukaitobi*, note 69, pp. 602–610.

72 Constitutional Court of South Africa, S v Makwanyane [1995] ZACC 3 (6.6.1995), paras 306–-307.

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fully human in and through community".[73] Section 38(d)[74] thus affords standing (access to justice) to anyone acting in the public interest,[75] including to protect the constitutional right to an environment not harmful to health or wellbeing.[76] The constitutional standing provision has been extended by section 32 of the National Environmental Management Act 107 of 1998 (NEMA)[77] in the context of environmental governance. Section 32 of NEMA permits any person or group to seek appropriate relief in respect of any breach or threatened breach of NEMA. Such persons can act in their own interest, on behalf of others who "for practical reasons" are "unable to institute such proceedings", in the interests of a group or class of persons whose interests are affected, in the public interest, or in the interests of protecting the environment.

In the context of climate change, given ongoing extractivism and neocolonialism in South Africa, these broad standing provisions have empowered civil society actors and organisations to bring important climate litigation before the courts without having to satisfy an onerous victim requirement.[78] A handful of climate cases have been successfully litigated in the South African courts so far, most notably: *Earthlife Africa Johannesburg v. Minister of Environmental Affairs*;[79] *Phillipi Horticultural Area Food & Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning:*

73 *Alena Rettová*, Cognates of *ubuntu*: Humanity/personhood in the Swahili philosophy of *utu*, Decolonial Subversions (2020), p. 32.

74 South African Constitution, note 37, sec. 38.

75 See *Emma Schuster*, Class actions in a changing climate, South African Journal on Human Rights 37 (2021), pp. 112–114 on the difference between class actions and public interest actions.

76 South African Constitution, note 37, sec. 24.

77 National Environmental Management Act 107 of 1998.

78 *Murcott*, A Just COP26, note 3, pp. 10–13. The litigation is important given that South Africa has become a major emitter, mainly because of coal extraction and energy production. Although South Africa has contributed only 1,24% toward global *cumulative* CO_2 emissions, its per capita emissions in 2021 were 7,35 tonnes, which is slightly higher than Europe's per capita emissions in 2021. See *Hannah Ritchie / Max Roser / Pablo Rosado*, CO_2 and Greenhouse Gas Emissions, published online at OurWorldInData.org (2020), https://ourworldindata.org/co2/country/south-africa#what-share-of-global-cumulative-co2-has-the-country-emitted (last accessed on 18.1.2023). Further, about 28% of coal extracted from South Africa by multinational corporations is exported to India, Europe, and elsewhere in the world. See Department of Minerals and Energy, Coal resources overview, https://www.energy.gov.za/files/coal_overview.html#:~:text=In%20addition%20to%20the%20extensive,exporting%20country%20in%20the%20world (last accessed on 18.1.2023); Hellenic Shipping News Worldwide, South Africa's Coal Export to the EU up 582,7% During 2022, 25.10.2022, https://www.hellenicshippingnews.com/south-africas-coal-export-to-the-eu-up-582-7-during-2022/#:~:text=India%20nevertheless%20remains%20the%20top,in%20the%20last%20two%20years (last accessed on 18.1.2023).

79 High Court of South Africa, Earthlife Africa Johannesburg v. Minister of Environmental Affairs (65662/16) [2017] ZAGPPHC 58 (8.3.2017).

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Western Cape;[80] *Sustaining the Wild Coast NPC v. Minister of Mineral Resources and Energy (Part I)*;[81] and *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy (Part II)*.[82] The small number of cases reveals that South Africa's broad standing rules support struggles for climate justice without necessarily opening the floodgates of litigation.[83] In any event, it has been acknowledged by the judiciary with reference to the breadth of the standing rules that "it may sometimes be necessary to open the floodgates 'in order to irrigate the arid ground below them'".[84] In each of these cases, climate justice was advanced through the recognition of communities' concerns about climate change impacts.[85] Importantly, applying the broad standing provisions under South African law, the diverse litigants bringing these cases were afforded access to court to advance climate justice. The courts found in their favour so as to protect their human rights, recognising their particular vulnerabilities. In doing so the courts were able to address climate injustice for the most vulnerable in South Africa: communities least responsible for climate change globally and locally, historically and presently. Moreover, in several of these cases the courts have held to account the government and multinational corporations for their role in contributing to the climate crisis through the approval of new fossil fuel developments. For example, in *Sustaining The Wild Coast (Part I)* the litigants included a non-profit company that works to promote sustainable livelihoods that construct, rehabilitate, and protect the environment along South Africa's Wild Coast, acting in the public interest, as well as a traditional healer, acting on his own behalf and on behalf of an indigenous community, a communal property association representing an indigenous community, and an indigenous fisher acting on his own behalf and on behalf of fellow Wild Coast fishers, among others.[86] They instituted an urgent interdict to halt a seismic survey from being conducted in the Wild Coast due to concerns about the impact of the seismic survey on the climate, given that the ultimate aim of the survey was the extraction of fossil fuels.[87] Standing to bring the interdict in the public interest and to protect the environment was not disputed.[88] The applicants successfully obtained an interim order (pending an administrative law judicial

80 High Court of South Africa, Phillippi Horticultural Area Food & Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape (16779/17) [2020] ZAWCHC 8 (17.2.2020).

81 High Court of South Africa, Sustaining the Wild Coast NPC v. Minister of Mineral Resources and Energy (3491/2021) [2021] ZAECGHC 118 (28.12.2021).

82 High Court of South Africa, Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy 2022 (6) SA 589 (ECMk) (1.9.2022).

83 *Ngcukaitobi*, note 69, pp. 603–604.

84 Ibid., p. 604.

85 Earthlife, note 79, paras 88, 91, 97, 101, 110, 126; Philippi, note 80, paras 95-103, 107, 130 and 135; Sustaining the Wild Coast (Part I), note 81, para 82.

86 Sustaining the Wild Coast (Part I), note 81, para 2.

87 Ibid., para 15.

88 Ibid., para 2.

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review, which was also successful)[89] halting the survey to protect their cultural rights, their right to an environment not harmful to health or wellbeing, and their right to administrative justice.[90]

South African law, post-apartheid, reveals that a broader approach to standing that prioritises access to justice is possible and important from a justice perspective, including in climate cases aimed at protecting the most vulnerable. South Africa's approach to standing was born in response to a period of crisis that caused grave social injustice for most of the population. Section 38 was introduced because human rights protections are potentially meaningless without access to justice as a means to enforce them. The current climate crisis and the pressing need to advance climate justice for vulnerable people around the globe, including within countries in the Global North, could, adopting a transnational approach, form the basis for rethinking standing provisions in the EU's human rights treaties.

Unfortunately, recent reforms of the ECHR all tend towards restricting access to the ECtHR by introducing more restrictive admissibility criteria.[91] This trend could hamper the pursuit of climate justice in the ECtHR by limiting access to justice. We appreciate that this discussion forms part of a broader debate about the proper role of the ECtHR, which we cannot delve into for reasons of scope and length.[92] However, as Bosselmann argues, we are in a time of socio-ecological crisis that warrants "*lex ferenda* ideas [that] may be perceived as radical and implausible".[93] From this perspective, we consider that the South African approach to standing as offering useful (if modest) transnational insights when thinking about standing before the ECtHR. For one, it shows that broad standing rules do not necessarily open the much-feared "floodgates"[94] of public interest litigation. Further, it can serve as a reminder of the justice implications of access to justice: effective access to courts being a prerequisite of ensuring the substantive effectiveness of rights. While these considerations are predominantly moral, they can also guide our interpretation of legal concepts. Looking at the ECHR's provisions on standing through a climate justice lens does not necessarily mean abandoning the Court's long-standing requirements: rather, it potentially catalyses several developments that are already grounded in ECHR case law,

89 Sustaining the Wild Coast (Part II), note 82.

90 Sustaining the Wild Coast (Part I), note 81, paras 9, 66.

91 For example, the deadline to introduce an application before the ECtHR has been reduced from 6 months to 4 months with the entry in force of Additional Protocol No. 15.

92 In this vein, some authors question the very existence of the right to individual petition, arguing that the Court should only adjudicate selected cases of "constitutional" value. For more details, see *Helen Keller / Daniela Kühne,* Zur Verfassungsgerichtsbarkeit des Europäischen Gerichtshofs für Menschenrechte, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 76 (2016), pp. 245–307.

93 *Klaus Bosselmann*, The Imperative of Ecological Integrity, in: Louis Kotzé (ed.), Environmental Law and Governance for the Anthropocene, Oxford 2017, pp. 247–251.

94 See e.g. *Emanuele Rebasti / Luisa Vierucci*, A Legal Status for NGOs in Contemporary International Law?, https://esil-sedi.eu/wp-content/uploads/2018/04/VierucciRebasti-1.pdf (last accessed on 15.5.2023).

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and enhances their justification, both morally and legally. In legal terms, such an approach calls for an interpretation of standing requirements that are not "rigid, mechanical and inflexible"[95], but allow for flexibility. The ECtHR has acknowledged this before, emphasising that an excessively formalistic interpretation would make rights protection ineffectual and "illusory".[96]

Indeed, according to the Court's long-standing case law, the ECHR needs to be interpreted so as to guarantee rights that are "not rights that are theoretical or illusory but rights that are practical and effective".[97] In the context of standing, the ECtHR has taken this to justify adopting, in some cases, a more expansive approach to standing, arguing that a more restrictive approach would prevent serious human rights allegations "from being examined at an international level", and thus defeat the Convention's very purpose.[98] In the past, this reasoning has allowed the ECtHR to allow applications made by NGO's on behalf of extremely vulnerable persons. Similar reasoning could be adopted in climate cases such as *Klimaseniorinnen* and *Duarte Agostinho*. Vulnerability could also inform the Court's interpretation of potential victimhood: indeed, long-standing case law accepts that potential victims have standing where a violation has not yet occurred, but where there is a sufficiently serious and real risk of a Convention violation. The existence of such a risk is context-dependent and vulnerability to climate change (a climate justice consideration) could play a major role in interpreting it.[99] In the context of environmental litigation, there is a real risk that the most vulnerable persons might not be able to bring their case in front of the courts if a narrow approach is adopted. As Murombo points out:

> *Often there is an assumption that…people in developed countries have means and are able to legally protect themselves but this masks the suffering of a huge population in those countries who also happen to disproportionately suffer from environmental injustice.*[100]

Adopting too narrow an approach to standing – as was the case, for example, of the Swiss Federal Court in the *Klimaseniorinnen* case[101] – bears the risk that no action against climate

95 ECtHR, Case of Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania, Judgment of 17.7.2014, App. No. 47848/08, paras 96, 105; ECtHR, Caselaw Guide on Admissibility, 2022, note 60, para 19.

96 ECtHR, Valentin Câmpeanu v. Romania, , note 95, paras 96, 105; ECtHR, Caselaw Guide on Admissibility, 2022, note 95, para 19.

97 ECtHR, Case of Airey v, Ireland, Judgment of 9.10.1979, App. No. 6289/73, para 24.

98 ECtHR, Valentin Câmpeanu v. Romania, note 95, para 112. Note however that the ECtHR's exceptional approach was preconditioned upon the applicant's extreme vulnerability.

99 On risk and vulnerability in the context of climate change, see *Corina Heri*, Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability, The European Journal of International Law 33 (2022), p. 936.

100 *Murombo*, note 71, p. 176.

101 Swiss Federal Court, 1C_37/2020, 5.5.2020.

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change can be undertaken through the ECtHR until it is too late. Bearing in mind the close links between the climate crisis and human rights, a narrow approach on standing not only hinders effective action against climate change, but also risks making human rights protection ineffectual and illusory.[102]

II. Insights from the Americas on extraterritorial jurisdiction

Another crucial issue in the context of global climate injustice is grappling with the scope of extraterritorial responsibility for climate harm. Our proposed expansion of responsibility draws on comparative law and applies a transnational legal methodology which aligns with an integrated human rights approach with reference to insights from the IASHR and beyond. Territorial jurisdiction reflects the fundamental principles of sovereign equality and non-intervention in matters falling within the domain of states. While territoriality was a core aspect of the international legal order until 1945, technological advances (communications, transportation, the Internet, among others) have steadily disrupted the territorial principle, challenging traditional concepts and narratives.[103] Szigeti argues that territoriality itself is a shifting concept, putting into question the legal definition of territorial jurisdiction.[104] The broad and far-reaching impacts of climate change, which are not contained within country borders, further disrupt the international legal order and traditional concepts of jurisdiction. Transboundary climate harm raises questions about global climate injustice and confronts the foundational role that territory plays in defining states' obligations under international law. "Borderless climate risks" challenge the dominant territorial framing of the international legal order. When applied to the Global South, these risks bring questions as to the responsibility for extraterritorial damage as it pertains to the costs of adaptation and compensation for loss and damage.[105] Accordingly, as has been discussed elsewhere,[106]

102 See *Victoria Adelmant / Philip Alston / Mattew Blainey*, Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court, Journal of Human Rights Practice 13 (2021), p. 7, who encourage courts to "recraft the law of standing, particularly now that myriad vitally important cases related to climate change are beginning to arise", warning that "[f]ailure to do so will leave a great many who have suffered harm without a remedy until it is too late to be meaningful".

103 *Péter D. Szigeti*, The Illusion of Territorial Jurisdiction, Texas International Law Journal 52 (2017), pp. 370–371.

104 Ibid., p. 372.

105 *Magnus Benzie / Åsa Persson*, Governing borderless climate risks: moving beyond the territorial framing of adaptation, International Environmental Agreements: Politics, Law and Economics 19 (2019), pp. 369–393.

106 See e.g. *Monica Feria-Tinta / Simon Milnes*, The Rise of Environmental law in International Dispute Resolution: Inter-American Court of Human Rights Issues Landmark Advisory Opinion on Environment and Human Rights, Yearbook of International Environmental Law 27 (2016), pp. 64–81; *Elena Carpanelli*, International Human Rights Law and Transboundary Environmental Harm: Trends and Challenges, in: Maurizio Arcari / Irini Papanicolopulu / Laura Pineschi (eds.), Trends and Challenges in International Law, Cham 2022, pp. 15–20.

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regional and international courts and tribunals are beginning to apply theories of extraterritorial applicability of international obligations when the actions of one state have negative consequences on the environmental rights of people in another state.

In a 2017 advisory opinion on human rights and the environment[107] the Inter-American Court of Human Rights (IACtHR), reflecting on transboundary environmental harm, reasoned that jurisdiction could be established in respect of such harm when a state "exercises effective control over the activities carried out [in another state] that caused the harm and consequent violation of human rights" in the other state.[108] An extraterritorial jurisdictional link can thus be established when there is a (i) factual nexus between a conduct within a state's territory and an extraterritorial human rights violation[109] due to a state's *effective control* over the activities and its ability to prevent the harm[110] and (ii) a causal link between the damage or injury and the action or omission of that state.[111]

As such, the IACtHR became the first human rights court to recognise an extraterritorial jurisdictional link based on control over domestic activities having an extraterritorial effect.[112] The link drawn is arguably broader[113] than any previously recognised nexus, as it imposes a positive obligation of states, and reflects state responsibility for failure to exercise due diligence within its territory when human rights elsewhere are at stake. For example, if a state fails to properly exercise its due diligence and precaution in authorising the exploitation of offshore oil, which then leaks and spreads to the coast of neighbouring countries, violating the right to a healthy environment, then a state can be held liable for such damage.

More recently, the IASHR has further expanded on the notion of extraterritorial responsibility in a resolution[114] focused on the climate crisis and the scope of human rights obligations within the IASHR. The resolution specifically addresses climate change and the continued emission of greenhouse gases, which in turn cumulatively cause damage to other countries due to climate change. The clarification as to the "cumulative effect" of climate

107 IACtHR, Advisory Opinion OC-23/17 Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights, Adopted on 15.11.2017.

108 Maria Antonia Tigre & Natalia Urzola, The 2017 Inter-American Court's Advisory Opinion: Changing the paradigm for international environmental law in the Anthropocene, Journal of Human Rights and the Environment 12 (2021), pp. 24–50; IACtHR, note 107, para 104(h).

109 IACtHR, note 107, paras 95, 101–102.

110 Ibid., para 102.

111 Ibid., para 101.

112 *Maria L. Banda,* Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, American Society of International Law Insights 22 (2018).

113 *Antal Berkes*, A New Extraterritorial Jurisdictional Link Recognized by the IACtHR, EJIL: Talk! – Blog of the European Journal of International Law, ejiltalk.org (last accessed on 18.1.2023).

114 IACtHR and REDESCA, Resolution No. 3/2021: Climate Emergency Scope of Inter-American Human Rights Obligations, Adopted on 31.12.2021.

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change is significant, as it addresses the "drop in the bucket" argument[115] that is often used by states who defend a refusal to reduce their emissions, based on an argument that their (individual) contribution does not significantly affect the climate crisis. Among other things, the IACtHR's resolution on the climate emergency requires the implementation of human rights obligations by states in a manner that is "intertwined with international environmental law in the context of pollution activities", including outside of the limits of their national jurisdiction.[116] The resolution further acknowledges that:

> *the rule of customary international law of 'doing no harm' would be breached as a result of greenhouse gas emissions and thus the increase in frequency and intensity of meteorological phenomena attributable to climate change, which, regardless of their origin, contribute cumulatively to the emergence of adverse effects in other States.*[117]

With the unique and unprecedented revised interpretation of extraterritorial jurisdiction and the increasing cross-sectoral influence of climate litigation decisions on courts in other jurisdictions, the relevance of the advisory opinion has already expanded beyond the Americas. In a recent decision by the United Nations Committee on the Rights of the Child (CRC) in *Sacchi v. Argentina*,[118] the CRC fully endorsed the IACtHR's advisory opinion. The CRC rejected a petition filed by sixteen children alleging that Argentina, Brazil, France, Germany, and Turkey violated their rights under the United Nations Convention on the Rights of the Child (UNCRC) by making insufficient cuts to GHG emissions. The petitions were dismissed due to a failure to exhaust domestic remedies. Nonetheless, the CRC's findings and legal reasoning provide valuable guidance on children's rights in the context of climate change. First, the CRC found that the potential harm of the states' acts or omissions regarding their carbon emissions was reasonably foreseeable to the states. Second, the CRC affirmed that states' carbon emissions actively contribute to the harmful effects of climate change and that these are not limited to emissions within these states' boundaries. And third, the CRC concluded that the petitioners had pleaded sufficient facts to establish that (i) the violation of their rights under the UNCRC as a result of the states' carbon emissions was reasonably foreseeable, and (ii) they have personally experienced significant harm.[119]

The CRC reasoned, referencing the effective control test, that a state in whose territory or under whose jurisdiction the activities are carried out has effective control over them,

115 This argument was for example used in *Urgenda* as cited in UNEP, Global Climate Litigation Report, Nairobi 2020, p. 39.

116 IACtHR and REDESCA, note 114, para 39.

117 Ibid.

118 CRC, Sacchi, et al. v. Argentina, et al., Decision of 23.9.2021, App. No. CRC/C/88/D/108/2019.

119 *Maria Antonia Tigre / Victoria Lichet*, The CRC Decision in Sacchi v. Argentina, American Society of International Law Insights 25 (2021). (13.12.2021).

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as well as the ability to prevent transboundary harm.[120] Potential victims of the adverse impacts of a state's actions are under the jurisdiction of that state regarding its potential responsibility for failing to avoid transboundary harm (para 10.5). Applying the causal nexus test, the CRC then reasoned further that "when a state's act or omission is sufficiently connected to the violation, the person suffering the violation is considered within the state's jurisdiction."[121] Thus, following the IACtHR's logic, the CRC concluded that "every state must address climate harm outside its territory and is liable for the negative impact of its emissions on the rights of children located both within and outside its territory".[122] The impact of the decision on future climate litigation is significant.[123]

What do these decisions signify for climate litigation before the ECtHR? The ECtHR's case law on extraterritorial responsibility - and, more generally, on jurisdiction - has long been criticised for its inconsistency and lack of a principled approach.[124] Generally, though, the ECtHR's approach to jurisdiction is "primarily territorial",[125] allowing for responsibility for extraterritorial acts only in "exceptional circumstances", mainly when a state or its agents exercise effective control over acts performed or producing effects outside its territory.[126] When an action takes place in a state but produces its effects in another state, the Court has applied a restrictive causality test, meaning that the act has to be the "direct and immediate cause" of the rights violation[127] – cross-border shootings being the paradigmatic example.[128] Without diving into its intricacies, we argue that the

120 *Pedro Cisterna-Gaete / Maria Antonia Tigre*, Guest Commentary: Inter-American Commission on Human Rights' First Resolution On The Climate Emergency: Implications For Climate Litigation, https://blogs.law.columbia.edu/climatechange/2022/04/11/guest-commentary-inter-american-commission-on-human-rights-first-resolution-on-the-climate-emergency-implications-for-climate-litigation/ (last accessed on 18.1.2023).

121 *Tigre / Lichet*, note 119.

122 Ibid.

123 *Maria Antonia Tigre*, Major Developments for Global Climate Litigation: The Human Rights Council Recognizes the Right to a Healthy Environment and the Committee on the Rights of the Child Publishes its decision in an International Youth Climate Case, https://blogs.law.columbia.edu/climatechange/2021/10/12/major-developments-for-global-climate-litigation-the-human-rights-council-recognizes-the-right-to-a-healthy-environment-and-the-committee-on-the-rights-of-the-child-publishes-its-decision-in-an-inter/ (last accessed on 18.1.2023).

124 *Keller / Heri*, note 59, p. 9; *Lea Raible*, Human Rights Unbound: A Theory of Extraterritoriality, Oxford 2020, p. 79.

125 ECtHR, Banković and Others v. Belgium and Others, Judgment of 12.12.2001, App. No. 52207/99, paras 59–61.

126 ECtHR, Pad and Others v. Turkey, Judgement of 28.6.2007, App. No. 60167/00, paras 52-54; ECtHR, Case of Al-Skeini and Others v. The United Kingdom, Judgment of 7.7.2011, App. No. 55721/07, paras 130–150.

127 ECtHR, Andreou v. Turkey, Judgment of 27.10.2009, App. No. 45635/99, para 25.

128 *Walter Kälin / Jörg Künzli*, The Law of International Human Rights Protection, Oxford 2019, pp. 133–134; see also *Benoit Mayer*, Climate Change Mitigation as an Obligation Under Human Rights Treaties, American Journal of International Law, 115 (2021), p. 427.

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ECtHR's case law is ill-suited to address the specific nature of climate change.[129] Indeed, the various climate cases already pending before the ECtHR share at least some element of extraterritoriality in the broad sense, although to varying degrees. For example, the applicants in the *Klimaseniorinnen* case consider that their own home state has violated their human rights by not meeting its climate targets, making it a predominantly territorial case.[130] However, the inherently transnational and multi-scalar nature of global warming signifies that even in such a case, the ECtHR should "accep[t] that a share in contributing to climate change through domestic emissions represents a share in global responsibility".[131] Doing so would advance climate justice. In contrast, in the *Portuguese Youth* case, the applicants direct their claims against 33 Council of Europe member states, arguing that all of them are responsible for the climate-induced human rights violations in their home state, Portugal. The applicants claim that the respondent states were exercising significant control over their interests – and are therefore subject to the extraterritorial jurisdiction of such states – as a result of the countries' contribution to climate change.

Whatever the specific constellation and degree of extraterritoriality, the IACtHR's case law and its subsequent elaboration by the CRC provide useful inspiration for the ECtHR that could advance climate justice. Accepting a causal link whereby a state has jurisdiction whenever it has effective control over harmful activities makes it possible to hold a state responsible for its domestic share of global emissions, as well as for failing to regulate any activities over which it exercises effective control. Such a reinterpretation of the term "jurisdiction" would mean a "subtle, but important shift" of the current[132] ECtHR practice.[133] However, such a shift would greatly enhance the ECtHR's reach for climate litigation. It could also be an important step from a climate justice standpoint, for instance highlighting a state's responsibility for controlling multinational corporations for the emissions they cause elsewhere. Drawing inspiration from the IACtHR and the CRC would also be in line with an integrated human rights approach (building upon mutual cross-fertilisation and avoiding

129 *Keller / Heri*, note 59, p. 7; *Feria-Tinta*, note 59, p. 52.

130 The applicants have insisted on this point, convincingly arguing that Switzerland's violation of its Convention obligations lies in not meeting the climate targets linked to its own share in preventing a global temperature rise. See Klimaseniorinnen, Observations, https://www.klimaseniorinnen.ch/dokumente/, para 58 (last accessed on 18.1.2023).

131 *Keller / Heri*, note 59, p. 8.

132 *Sarah Miller,* Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention, The European Journal of International Law 20 (2009), pp. 1223–1246.

133 *Feria-Tinta*, note 59, pp. 52–71; *Feria-Tinta / Milnes*, note 106, pp. 64–81.

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the fragmentation of human rights law),[134] as well as the transnationalisation of climate jurisprudence.

E. Conclusion

This article conceptualised climate injustice as the uneven and unjust distribution of climate change vulnerabilities and impacts within and among states with reference to the underlying or root causes of such maldistribution, including colonialism, patriarchy, and a lack of recognition and exclusion of people from participation in climate-related decision-making due to uneven concentrations of political and economic power. Adopting a transnational approach, we then reflected on the role of courts in responding to climate injustice in climate adjudication. We identified potential insights to be drawn from legal approaches to the climate crisis outside of the ECHR legal system as the ECtHR adjudicates climate cases. First, we illustrated that whilst broad standing rules afford access to court for vulnerable people in South Africa to advance climate justice and challenge new fossil fuel developments and troubling energy policy, the relatively restrictive ECtHR rules could problematically operate as barriers to advancing climate justice, inviting critical reflection about the content and interpretation of the ECtHR's standing rules. Our analysis was pragmatic and aimed only at offering the modest insight that another approach to standing that is arguably more conducive to climate justice exists, rather than intended to advance a detailed theory of how the ECtHR should approach pending climate cases. Secondly, given the transboundary nature of the climate crisis, we argued that the exercise of extraterritorial jurisdiction by the courts is becoming increasingly important. Adopting an integrated human rights approach that aligns with the transnationalisation of climate jurisprudence, we posited that legal developments in the IASHR could prompt a shift in the ECtHR's practice that usefully advances climate justice in cases raising transboundary issues.

Overall, we hope to have illustrated some limited practical ways to advance the transnationalisation of climate jurisprudence as the ECtHR adjudicates climate cases, and thus contribute to a broader conversation about how courts in the Global North can draw inspiration from courts in the Global South. In doing so we have built upon on decades of cross-fertilisation. The ECtHR's own case law on environmental matters has inspired UN treaty bodies and courts such as the IACtHR in the past, for instance.[135] In the interest of

134 On fragmentation, see e.g. *Payandeh Mehrdad*, Fragmentation within international human rights law, in: Mads Andenas / Eirik Bjorge (eds.), A Farewell to Fragmentation. Reassertion and Convergence in International Law, Cambridge 2015, pp. 297–319. Over the last few years, the debate on fragmentation of international law – and international human rights law in particular – has gradually given way to a discourse of judicial dialogue and interaction of systems (e.g. *Anne Peters*, The refinement of international law: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law 15 [2017], pp. 671–704).

135 See e.g. İACtHR, Advisory Opinion, supra note 107, para 51.

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decolonising methodologies,[136] this inspiration should not be a one-way street. As noted by former International Court of Justice judge, Cançado Trindade:

> *[t]he continuing jurisprudential cross-fertilization by contemporary international tribunals keeps on evidencing their essentially complementary labour, and the unity of the law, in the exercise of their common mission of the realization of justice.*[137]

Despite acting in different legal contexts and having disparate mandates, relying on decisions from judges elsewhere that have similarly addressed the same issues is useful in analysing the novel justice issues raised by the climate crisis. Through this cross-fertilisation, a critical lens that extends beyond one's limited legal context is facilitated. In the context of climate change, and the justice issues it raises, we suggest that this cross-fertilisation should be taken a step further, encouraging courts to draw inspiration not only from other international courts, but also – where useful and without neglecting regional differences and local contexts – from key domestic cases dealing with similar matters.

Acknowledging the Global North's responsibility for climate change,[138] it is vital that courts and scholars in the region reflect, with openness and humility, about the need to remove legal barriers to litigating human rights violations arising because of the climate crisis.[139] The growing recognition of Global South's role in protecting human rights,[140] including in the context of climate adjudication, illustrated with reference to broad standing laws in South Africa, and the exercise of extra-territorial jurisdiction in the Americas, brings to the fore valuable insights.

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136 On the concept of decolonising methodologies, see generally *Linda Tuhiwai Smith*, Decolonizing Methodologies, London 2022.

137 *Antônio Augusto Cançado Trindade*, The Continuing Jurisprudential Cross-Fertilization in the Case-Law of International Tribunals in Their Common Mission of Realization of Justice, in: Giuliana Ziccardi Capaldo (ed.), The Global Community Yearbook of International Law and Jurisprudence 2019, New York, 2020.

138 *Gonzalez*, Global Justice, note 16, pp. 221–223.

139 See *Romina Istratii,* The long read on decolonising knowledge: How western Euro-centrism is systemically preserved and what we can do to subvert it, Convivial thinking (2020) on how such reflection could form part of a broader undertaking to decolonise knowledge and shift away from western Euro-centrism.

140 The Global Network for Human Rights and the Environment, Climate Litigation in the Global South Project, https://gnhre.org/climate-litigation-in-the-global-south/ (last accessed on 18.1.2023).

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