What the ECtHR Could Learn from Courts in the Global South

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Climate change is increasingly recognized as an issue of justice, including because it is causing (and worsening) human rights violations (see here, here, and here). In response to climate injustice, climate litigation 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. It places courts as important stakeholders in climate governance. In this article, given the court's ability to address human rights violations and climate injustice when adjudicating climate cases, we briefly describe the notion of climate injustice, primarily through a global lens. Through this lens, we explore two potential lessons for the European Court of Human Rights (ECtHR) when adjudicating climate cases. These lessons arise from the expansive understanding of standing under South Africa's transformative constitutional regime, and the recognition of extraterritorial jurisdiction in the Inter-American System of Human Rights (IASHR). The lessons are thus gleaned through comparative analysis, reflecting on valuable developments in the Global South, which we argue advance climate justice.

Climate injustices: the particular responsibility of courts

Climate injustice connotes the unjust distribution of climate change vulnerabilities and impacts, and the underlying causes thereof, including a lack of recognition and the exclusion of people from participating in decision-making about these impacts and vulnerabilities. These injustices occur both within countries and at a global level, causing myriad human rights violations. From a global perspective, most climate change casualties, and consequently those most at risk, are marginalized and vulnerable people, primarily in the Global South. These marginalized and vulnerable people are suffering the consequences of climate change first and most acutely, but are essentially powerless to stop it. Meanwhile, industrialised nations predominantly in the Global North, who are largely responsible for the problem, continue to extract and burn fossil fuels, worsening the causes and impacts of climate change. Problematically, Global North nations are reluctant to contribute their fair share of the costs of addressing the causes and impacts of climate change.

According to the Intergovernmental Panel on Climate Change, climate justice advances a human rights-based approach to addressing climate change (page 5). Courts can advance climate justice by grappling with and responding to these global injustices, including by affording marginalized and vulnerable people access to justice (standing) in the courts, and addressing the extraterritorial impacts of climate change across jurisdictions in pursuit of distributive justice. Given the Global North

contribution to climate change, we argue that courts in the region have a particular responsibility in climate litigation to advance global justice. In particular, the ECtHR could be an important platform to respond to climate injustice, as climate litigation is increasingly being brought before it, as we discuss next.

Climate litigation before the ECtHR

Neither the European Convention on Human Rights (ECHR) nor its additional protocols enshrine a right to a healthy environment, contrary to, for example, section 24 of the Constitution of the Republic of South Africa, 1996 or article 11 of the Protocol of San Salvador. Despite this legal gap, the ECtHR has developed, over the last 30 years, an "environmental" strand of case law by greening existing ECHR rights such as 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). In 2021, this development entered a new stage, with a series of climate cases being filed before the ECtHR (see here, here, and here). Two of them, in particular, have been widely discussed by the media and legal scholars: the "Portuguese Youth" case, filed by six children and young adults against 33 states, and the case of the "Swiss Senior Women for Climate Protection" against Switzerland. The ECtHR has declared these priority cases and communicated them to the responding governments, which has been hailed as a sign that the ECtHR is ready to tackle climate litigation. Despite this positive sign, a key challenge to advancing climate justice before the ECtHR is the question of standing: applicants must fulfil the "victim" requirement (art. 34 ECHR), in that they must be directly affected by an alleged rights violation (para. 18). The victim requirement represents a hurdle to access to climate justice in the context of climate litigation, including because it excludes any *actio popularis* (see e.g. *Correia de Matos v. Portugal*, para. 107, *Lekic v. Slovenia*, para. 107, *Cordella and Others v. Italy*, paras. 100-101). It signifies that a person must, in principle, be directly and personally affected by the alleged violation, a feat that is notoriously hard to prove in relation to climate change. Another question concerns extraterritoriality, namely whether and to what extent courts can respond to the transboundary harm created by climate change. A willingness on the part 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 South.

Lessons from South Africa on standing

Before the introduction of the Constitution, colonially imposed rules of standing (originating in Roman-Dutch and English law) were applied in the South African courts. These rules generally permitted only private individuals to bring claims in which they had a personal interest to defend private interests or rights. The rules reinforced colonial ideologies that the law ought to prioritize the freedom of the individual, and the fiction that people are separate from the broader Earth community of which they are a part. The transformative Constitution recognized the need for effective enforcement of rights to respond to South Africa's grossly unjust, racist, and oppressive colonial and apartheid history. Section 38 thus affords standing (access

to justice) to anyone acting in the public interest, including to protect the right to an environment not harmful to health or wellbeing provided for by section 24 of the Constitution. The constitutional standing provision has been extended by section 32 of the National Environmental Management Act 107 of 1998 (NEMA) in the context of environmental governance. Section 32 of NEMA permits any person or group of persons 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.

The broad standing provisions allow civil society members and organisations to bring climate litigation before the South African courts without having to prove any direct or personal interest in the matter. There is no victim requirement. Three climate change cases have been successfully litigated in the South African courts so far: *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape*, and *Sustaining The Wild Coast NPC v Minister of Mineral Resources and Energy*. In each of these cases, climate justice was advanced through the recognition of communities' concerns about climate change impacts. Importantly, applying the broad standing provisions under South African law, the non-governmental organisations bringing these cases were afforded access to climate justice. Moreover, the courts found in their favour so as to protect their human rights, recognizing their particular vulnerabilities.

The South African context reveals that a broader approach to standing that prioritises access to justice is possible. We argue that there is room for reinterpretation of the ECHR, drawing inspiration from South Africa's transformative approach. The ECtHR has previously cautioned against a "rigid, mechanical and inflexible" application of the victim requirement, acknowledging that an "excessively formalistic" interpretation would make rights protection "ineffectual and illusory" (see e.g. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, paras. 96, 105). In this vein, the ECtHR has been prepared to bend the requirements on standing, allowing complaints over potential violations in some cases (para. 36) and accepting the petition of an NGO on behalf of a particularly vulnerable person in the absence of any formal representation. In the climate cases currently pending before the ECtHR, the applicants highlighted their heightened vulnerability as children and young persons or elderly women, respectively, placing them at a higher risk of being affected by climate change than the average population (para. 5, 28). Their particular vulnerability could justify a reinterpretation of the current ECHR rules on standing, drawing inspiration from the South African example. Indeed, South Africa's approach to standing was born out of a response to a period of crisis in the country that caused grave social injustice for the majority of the population. Section 38 was introduced because human rights protections are potentially meaningless without access to justice as a means to enforce them. In the current climate crisis, the pressing need to advance climate justice for marginalized and vulnerable people around the globe could form the basis for adopting an expansive approach to the standing provisions in the ECHR to protect human rights.

Lessons from the Americas on extraterritorial jurisdiction

Territorial jurisdiction reflects the fundamental principles of sovereign equality and non-intervention in matters falling within the domain of states. However, transboundary climate change harm raises questions about global climate injustice and challenges the foundational role that territory plays in defining states obligations under international law. Accordingly, 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 human rights of people in another state, as we discuss next.

In a 2017 advisory opinion on human rights and the environment (OC 23/17), the Inter-American Court of Human Rights (IACtHR) found that, in the context of transboundary environmental harm, jurisdiction can be established over violations occurring outside the territory of the state when the state "exercises effective control over the activities carried out that caused the harm and consequent violation of human rights" (para. 104(h)) (see an in-depth analysis of the opinion here). The IACtHR thus broadened the interpretation of extraterritorial jurisdiction. It accepted a jurisdictional link when there is a factual nexus between conduct within a state's territory and an overseas human rights violation (para. 95, 101–2) due to a state's effective control over the activities and its ability to prevent the harm (para. 102). As such, the IACtHR became the first human rights court to recognize an extraterritorial jurisdictional link based on control over domestic activities having extraterritorial effect. The link drawn is arguably broader than any previously recognized nexus, as it reflects state responsibility for failure to exercise due diligence within its territory when human rights elsewhere are at stake. More recently, the IASHR has further expanded on the notion of extraterritorial responsibility in a resolution focused on the climate crisis and the scope of human rights obligations within the IASHR.

The revised interpretation of extraterritorial jurisdiction has immediate links for climate litigation that apply beyond the context of the Americas. In a recent decision by the Committee on the Rights of the Child (CRC) in *Sacchi v. Argentina*, the CRC fully endorsed the IACtHR's advisory opinion. To establish extraterritorial jurisdiction, the CRC had to consider (i) the interpretation of "control," and (ii) the significance of directness and foreseeability. Under the effective control test, the state in whose territory or under whose jurisdiction the activities are carried out has effective control over them, as well as the ability to prevent transboundary harm. Potential victims of the adverse effects of a state's actions are under the jurisdiction of that state regarding its potential responsibility for failing to avoid transboundary damage (para. 10.5). Further, under the causal nexus test, 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. Following the IACtHR's reasoning, then, the CRC found 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 (see an analysis of the decision here and its impacts for future climate litigation here).

The ECtHR has traditionally adopted a cautious approach to extraterritorial responsibility. In relation to the question of jurisdiction, the ECtHR has held that it was "primarily territorial" in the "ordinary" sense (*Bankovic and Others v. Belgium and Others*, paras. 59–61). According to case law, this includes cases where a state has "effective control" over foreign territory. In some cases, however, the ECtHR has also accepted a state's jurisdiction outside its territory, linked to acts caused by the state itself (see, e.g., *Pad and Others v. Turkey*, paras. 52–54, *Al-Skeini v. the United Kingdom*, paras. 130–150). What about instances where a state has effective control over the activities that caused transboundary harm as in the IACtHR's case law? Such a reinterpretation of the term "jurisdiction" would mean a "subtle, but important shift" of the current ECtHR practice (Monica Feria-Tinta, p. 57). However, if the ECtHR is to respond effectively to climate injustice, such a shift is necessary. Drawing inspiration from the IACtHR and the CRC would not only be in line with an integrated approach to human rights law; it would also be coherent with the ECtHR's long-standing endeavour to grant "not rights that are theoretical or illusory but rights that are practical and effective" (*Airey v. Ireland*, para. 24).

Outlook

In this article we have asked what the ECtHR could learn from cases from the Global South with reference to the issues of standing and extraterritorial obligations. Due to word constraints, our explorations have necessarily remained partial. Our post highlights the value of comparative analysis. Such analysis, particularly a South-North conversation, seems essential when addressing a crisis that is not only transboundary, but also intrinsically linked to global relationships, context, and climate injustices. The growing recognition of the Global South's role in protecting human rights, including in the context of climate litigation, brings to the fore lessons for the Global North.
