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Andrea Tamietti
Registrar of the Fourth Section
European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France

6 May 2021

Dear Mr Tamietti,

Third Party Written Submission in the case of *Cláudia DUARTE AGOSTINHO and Others against Portugal and 32 Other States* (Application no. 39371/20)

Further to your letter of 25 March 2021 granting leave to intervene to Amnesty International, The Center for Legal and Social Studies (Centro de Estudios Legales y Sociales), The Center for Transnational Environmental Accountability (CTEA), Economic and Social Rights Centre (Hakijamii), FIAN International, Great Lakes Initiative for Human Rights and Development (GLIHD), Prof. Dr. Mark Gibney, Dr. Gamze Erdem Türkelli, Prof. Dr. Sigrun Skogly, Dr. Nicolás Carillo-Santarelli, Dr. Jernej Letnar Černič, Tom Mulisa, Dr. Nicholas Orago, Prof. Dr. Wouter Vandenhoele and Jingjing Zhang, all members of the ETO Consortium, joined by Dr. Sara Seck and the University of Antwerp Law and Development Research Group, please find enclosed the third-party submission by the Interveners in the above-mentioned case.

Since the offices of the Interveners are currently closed, we would be most grateful if the Court could confirm receipt by post and the emails included below of Dr. Gamze Erdem Türkelli (gamze.erdemturkelli@uantwerpen.be) and Ashfaq Khalfan (ashfaq.khalfan@amnesty.org) to ensure prompt receipt.

Yours sincerely,

Prof. Dr. Mark Gibney
Belk Distinguished Professor at the University of North Carolina-Asheville
Affiliated Scholar at the Raoul Wallenberg Institute - Lund, Sweden

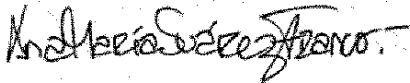
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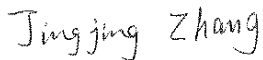
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Claudia Duarte Agostinho and Others v. Portugal and 32 Other States

Application no. 29371/20

Written Submission on Behalf of

The Extraterritorial Obligations Consortium; Amnesty International; the Center for Legal and Social Studies (CELS); the Center for Transnational Environmental Accountability (CTEA); the Economic and Social Rights Centre (Hakijamii); FIAN International; the Great Lakes Initiative for Human Rights and Development (GLIHD); the University of Antwerp Law and Development Research Group; Prof. Dr. Mark Gibney; Dr. Gamze Erdem Turkelli; Dr. Sara Seck; Prof. Dr. Sigrun Skogly; Dr. Nicolas Carrillo-Santarelli; Prof. Dr. Jernej Letnar Cernic; Tom Mulisa; Dr. Nicholas Orago; Prof. Dr. Wouter Vandenhole; and Jingjing Zhang

Pursuant to the Section Registrar's notification dated 25 March 2021 that the President of the Chamber (Fourth Section) had granted permission under Rule 44 § 5 of the Rules of the European Court of Human Rights

Duarte Agostinho and others v. Portugal and others

Introduction

1. This submission is presented on behalf of a number of organizations and human rights scholars who are members of the Extraterritorial Obligations (ETO) Consortium pursuant to the leave to intervene granted by the President of the Court under Rule 44 § 5 of the Court. Our aim is to clarify the nature of the Court's jurisdiction in the context of the urgency of addressing the transboundary issue of climate change, which has been brought into sharper focus by the nature of the claimants in this particular application.

Part I analyses the unique risks of harm faced by children in the context of the climate crisis and the obligations that States have under international law to offer protection. As stated in a study by the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and the full and effective enjoyment of the rights of the child:

The negative impacts of climate change on children trigger obligations among all duty bearers to take action to protect all children from its actual and foreseeable adverse effects. The importance of children's rights in the context of climate change is explicitly recognized in the Paris Agreement under the United Nations Framework Convention on Climate Change, in which States are called on to respect, promote and consider their respective obligations on, among other things, the rights of the child and intergenerational equity when taking action to address climate change.¹

2. Part II addresses the issue of "jurisdiction." Residents of a Contracting Party are clearly within the "jurisdiction" of that Contracting Party for purposes of Article 1 of the European Convention on Human Rights (ECHR). However, the larger question is whether greenhouse gas emissions (GHG) of other Contracting Parties place those persons within the "jurisdiction" of those Contracting Parties. This brief sets out two considerations in favour of this proposition, taking into account the object and purpose of the treaty in addressing the transboundary nature of the rights violations in question. First, the brief describes how climate change raises unique issues of transboundary harm and common concern that have not previously come before the Court, and yet represent a situation in which the rights of the claimants were under the control of each of the Contracting Parties to the extent that they permit GHG emissions [or] conduct that exacerbates emissions in other States that foreseeably causes human rights harms, domestically and across borders, on a continuous and long-term basis. If applicants are considered to be only within the jurisdiction of the respondent State within which they reside for the purpose of the Convention, the result would be a vacuum of human rights protection and denial of effective remedy for the conduct of the other respondent States and their proportionate contribution to the harms caused.
3. Second, in interpreting the Convention, the Court should take into account the interpretations of treaties in the United Nations, Inter-American and African human rights systems, which have each interpreted their respective treaties as applying to all situations in which States Parties are in a position to harm the rights of people outside their borders or to regulate a private actor whose conduct can harm the rights of people outside their borders. Several of these treaty bodies have applied this approach to the transboundary aspects of climate change. This brief provides an overview of this guidance. This Court's jurisprudence recognises that Convention rights are not applied in a vacuum² but are to be interpreted in light of and in harmony with other international law standards and obligations,³ including under treaty and customary international law.⁴

¹ United Nations High Commissioner for Human Rights (OHCHR), *Report: Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child*, 4 May 2017, A/HRC/35/13. (citation omitted).

² *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, § 163; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, 21 November 2001, § 55.

³ *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, § 67; *Al-Adsani* (cited above), § 55.

⁴ *Al-Adsani*, cited above, §§ 55 and 60; *Waite and Kennedy v. Germany*, [GC] no. 26083/94, § 54, 18 February 1999; *Taskin v. Turkey*, no. 46117/99, §§ 98-100, 10 November 2004.

4. The ECHR is universally heralded as a “living instrument” designed to effectively deal with new and challenging human rights issues facing the people of “Europe.”⁵ Climate change is the gravest human rights issue facing all humankind. Although litigation addressing climate change has gone forward against individual States, including against some of the Contracting Parties themselves,⁶ this Court is uniquely positioned to provide much needed guidance regarding the particular obligations under the Convention. Our submission is aimed at assisting the Court in clarifying the Contracting Parties’ jurisdiction in the context of climate change, not only for the present generation but those that will follow.

I. Greater Risks of Harm to Children and the Protection of Children’s Best Interests

5. When interpreting the ECHR in the context of the rights of children, the United Nations (UN) Convention on the Rights of the Child (CRC), to which all the ECHR Contracting Parties are also party, should be taken into account. Read together, these treaties place heightened obligations to protect the rights of children, particularly in relation to situations that may endanger children’s survival and development. Article 6.2 of the CRC places a strong obligation on States Parties to “ensure to the maximum extent possible the survival and development of the child.” The former UN Special Rapporteur John H. Knox’s Report to the Human Rights Council on the rights of children and the environment clearly outlines the more severe, longer-lasting and sometimes irreversible physical impacts of environmental pollution on children, particularly children who are younger.⁷ His report concluded that no group was more vulnerable to environmental harm than children.⁸ In addition, climate change can impact children’s health, wellbeing and rights, both directly through severe storms, floods and sea-level rises, and indirectly, *inter alia*, through involuntary displacement and threats to food security, shelter and access to education and healthcare. The best available climate science makes clear the extent of the threat to children.⁹ The Intergovernmental Panel on Climate Change has determined that the Paris Agreement target of limiting the increase in the global average surface temperature to between 1.5°C and 2°C above pre-industrial levels is “not considered ‘safe’” for children and future generations.¹⁰
6. Article 24.2(c) of the CRC on children’s right to health places an obligation on States Parties to pursue full implementation of the right to health and take appropriate measures: “To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”
7. In its general comment No. 15 (2013), the CRC Committee highlighted the impacts of climate change and environmental degradation on children’s right to health. It described climate change as one of the biggest threats to children’s health and urged States Parties to put children’s health concerns at the centre of climate action.¹¹

⁵ *Tyrer v. the United Kingdom*, no 5856/72, § 31, 25 April 1978.

⁶ According to the “*Global Climate Change Litigation Report: 2020 Status Review*” produced by the United Nations Environment Programme and the Sabin Center for Climate Change at Columbia University, in 2017 there were 884 climate change cases brought in 24 countries, compared with 1550 cases filed in 38 states in 2020, 2020, <https://climate.law.columbia.edu/content/climate-change-litigation>

⁷ UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Report*, 24 January 2018, A/HRC/37/58, paras. 15-19 and 27-29.

⁸ UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Report*, 24 January 2018, (previously cited), paras. 15 and 69.

⁹ Karina von Schuckmann and others, “*Heat Stored in the Earth System: Where Does the Energy Go?*”, *Earth System Science, Data*, 12, 2013-2041, 2020; James Hansen and others, “*Assessing ‘Dangerous Climate Change’: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*”, *PLoS one*, 8, e81648, 2013; James Hansen and others, “*Young People’s Burden: Requirement of Negative CO₂ Emissions*”, *Earth System Dynamics* 8, 577-616, 2017.

¹⁰ Joyashree Roy and others, “*Sustainable Development, Poverty Eradication and Reducing Inequalities*”, in Valerie Masson-Delmotte and others (eds.), *Global Warming of 1.5°C: An IPCC Special Report*, Cambridge University Press, 2018, [ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf) (stating that “[w]arming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence).”), p. 47.

¹¹ UN Committee on the Rights of the Child (CRC Committee), General comment 15: The right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, para. 50.

The Committee has stressed children's right "to have their views listened to and taken into account",¹² which supports children as active agents in campaigning and bringing legal claims on climate change. Similarly, Knox concluded that "to satisfy their obligations of special protection and care, and to ensure that the best interests of the child are taken into account, States have heightened obligations to take effective measures to protect children from environmental harm."¹³ These obligations include taking effective and proportionate precautionary measures to protect against environmental harm to children, especially when there are threats of serious or irreversible damage.¹⁴

8. The Office of the UN High Commissioner for Human Rights has stated that the CRC and other human rights instruments require States to take action to protect the rights and best interests of children from the adverse effects of climate change. It states that a child-rights-based approach requires: "Ambitious mitigation measures to minimize the future negative impacts of climate change on children to the greatest extent possible by limiting warming to no more than 1.5°C above pre-industrial levels."¹⁵ The members of the UN Human Rights Council adopted by consensus a resolution on realizing the rights of the child through a healthy environment that "Calls upon States to develop ambitious mitigation measures to minimize the future negative impacts of climate change on children to the greatest extent possible by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and by pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels."¹⁶
9. The principle of best interests of the child, contained in Article 3 of the CRC and reiterated in the Council of Europe Guidelines on child-friendly justice¹⁷ states that: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
10. According to the CRC Committee, the "expression 'primary consideration' means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked."¹⁸
11. In the same vein, this Court has held in *S.L. and J.L. v. Croatia* that:

there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance. Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Indeed, the [CRC] gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere, which expresses one of the fundamental values of that Convention [...]¹⁹
12. When read together with the Court's pronouncement in *Öneryıldız v. Turkey* that Article 2 of the ECHR imposes "a positive obligation on States [Parties] to take appropriate steps to safeguard" the right to life and that "this

¹² CRC Committee, General Comment 15 (previously cited), para. 12.

¹³ UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Report*, 24 January 2018 (previously cited), para. 58.

¹⁴ *Ibid*, para 58.

¹⁵ OHCHR *Report: Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child*, 4 May 2017 (previously cited), para. 54.

¹⁶ UN Human Rights Council (UNHRC), Resolution 45/30: Rights of the child: realizing the rights of the child through a healthy environment, adopted on 7 October 2020, A/HRC/RES/45/30, operative para. 14.

¹⁷ Council of Europe Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice. Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, 2011.

¹⁸ CRC Committee, General comment 14: The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para. 37.

¹⁹ *S.L. and J.L. v. Croatia*, no. 13712/11, § 62, 7 May 2015 (references omitted).

obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous”,²⁰ the principle of best-interests reaffirms a heightened obligation on Contracting Parties to accord paramount importance to the best interests of children in cases where foreseeable and irreversible threats of environmental harm endanger children’s right to survival and development.

13. In sum, the legal obligation placed upon States under international law to protect the wellbeing of children is clear. The nature of this legal obligation of States is both negative and positive; that is, States are not to harm the wellbeing of children and they are obligated to take active measures to protect it. Yet, although children are more likely to suffer both physical and mental harm from climate change, they also have the least amount of voice regarding their own future. In light of this, the UN High Commissioner for Human Rights has stated that “States and other responsible actors should take measures to ensure that children have access to effective remedies when they suffer harm from climate action.”²¹

II. Transboundary Harm and Jurisdiction

A. Jurisdiction Clarified

14. Climate change presents a unique context for interpreting the term “jurisdiction” under Article 1 of the ECHR. There is no question that the residents of a Contracting Party are within its “jurisdiction.” However, residents of a Contracting Party whose rights are negatively affected by climate change are being impacted by GHG emissions produced within their own State as well as from the territories of other Contracting Parties. To more fully address the totality of harm resulting from those emissions, it is essential to account and ensure remedy for the GHG emissions from other Contracting Parties that are having a harmful effect. These transboundary emissions raise issues of common concern to all States. This brief submits that “jurisdiction” must be interpreted in the light of the urgency of climate change and its foreseeable, continuous and severe impact on the enjoyment of human rights within and beyond borders.

B. The Court’s Current Approach to “Jurisdiction”

15. The Court’s interpretation of “jurisdiction” in its previous jurisprudence has not been limited to a State’s territory or to situations in which the State is entitled under international law to exercise jurisdiction. Rather, the Court has interpreted the ECHR to apply to situations in which a Contracting Party has exercised a form of power, authority or control over an individual or the territory in which that individual is present. The Court has found that jurisdiction and therefore “responsibility can be involved because of acts of their authorities producing effects outside their own territory [...]”²² and this applies to acts “whether performed within or outside national boundaries [...]”²³ The Court has noted that State responsibility may be engaged if acts have “sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.”²⁴ However, the Court later stated in *Al-Skeini* that, although the Contracting Party’s responsibility “can be involved” in such cases, it does not necessarily apply in all cases.²⁵ The Court has thus far set out only two clear categories in which jurisdiction necessarily applies, again in the *Al-Skeini* judgment. The first is under the “personal” model where an individual who is outside the territorial borders of a Contracting Party is within the control and authority of its agents.²⁶ The second is when one of the Contracting Parties has

²⁰ *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71, 30 November 2004.

²¹ OHCHR Report: *Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child*, 4 May 2017 (previously cited), para 62.

²² *Droz and Janousek v. France and Spain* [GC], no. 12747/87, § 91, 26 June 1992; repeated in *Loizidou v. Turkey (Merits)* [GC] no. 15318/89, § 52, 18 December 1996.

²³ *Loizidou v. Turkey (Preliminary Objections)* [GC] no. 15318/89, § 62, 23 March 1995.

²⁴ *Ilascu et al. v. Moldova and Russia* [GC], no. 48787/99, § 317, 8 July 2004.

²⁵ *Al-Skeini and Others v. the United Kingdom* [GC] no. 55721/07, § 133, 7 July 2011.

²⁶ *Al-Skeini*, cited above, § 133, *Ocalan v. Turkey* [GC], no. 46221/99, § 91, 12 March 2003, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 74, 23 February 2012.

exercised “effective control” over the territory of another State – whether this is another Contracting Party²⁷ or a State that is not a party to the ECHR.²⁸ However, the *Al-Skeini* judgment did not specify that these two categories were the exclusive bases for jurisdiction. Outside of these categories, whether the Court has determined that “jurisdiction” applies has been much more context-specific. In cases involving the use of force in which the State did not exert either physical control over the individuals whose rights were harmed or control over the territory in which they were present, jurisdiction has applied in certain situations²⁹ but not in others.³⁰ All these previously mentioned instances involved situations of use of force in which the interaction between the State and the affected individuals was limited in time. Indeed, to date, the Court’s interpretation of the term “jurisdiction” in an extraterritorial context has in large part been developed through a series of cases involving either overseas military action or security operations carried out abroad.

16. Contracting Parties’ conduct in relation to the production of GHGs and other conduct that impacts on GHG emissions in other States has foreseeable, continuous and long-term impacts on the right to life and right to private and family life of people both within and outside a given State Party. People whose enjoyment of these rights is negatively affected are under the power, authority or control of each of the Contracting Parties to the extent that each of those Parties permit GHG emissions, and other conduct that exacerbates emissions in other States and that foreseeably has or will cause harms on a continuous and long-term basis. Although the Contracting Parties do not have full control over the rights of people abroad, they have effective control over activities within their jurisdiction that emit GHGs, as well as the ability to regulate activities within their jurisdiction that exacerbate emissions in other States that are directly and continuously impacting on these people’s enjoyment of a number of Convention rights. The latter activities may include, for example, exports and financing of fossil fuels by State agencies and private actors.
17. According to Article 31 of the Vienna Convention on the Law of Treaties (VCLT),³¹ a treaty is to be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The object and purpose of the ECHR is clearly noted in its Preamble: the enforcement of human rights in the spirit of the Universal Declaration of Human Rights in the belief in “fundamental freedoms [as] the foundation of justice and peace in the world.” The Court has stated that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.³² The *travaux préparatoires* of the ECHR, as a supplemental means of interpretation of the Convention as per Article 32 of the VCLT, suggest that the drafters sought an expansive interpretation of the Convention’s provisions to “widen as far as possible the categories of persons who are to benefit by the guarantee contained in the Convention.”³³ As the Court underscored in *Cyprus v. Turkey*, the interpretation of jurisdiction with respect to specific cases of extraterritorial application should be done so as to not deprive rights-holders of the protections accorded and to not create vacuums in human rights protection.³⁴ If a person’s enjoyment of rights is affected by a Contracting Party’s contribution to foreseeable, continuous and long-term transboundary harms – for example, to allow contaminated factory effluent into a transboundary watercourse – and this person were not considered to be within that Party’s jurisdiction for the purpose of the Convention, there would be a vacuum of protection, and the affected Party would have no effective remedy against the State Party causing them harm. The people living within the State Party’s territory causing or contributing to the harm would be in a position to seek remedy by that Party. However, people living in other affected States would not. Yet, the harm caused to persons affected

²⁷ *Ilascu v. Moldova and Russia* [GC], no. 48787/99, § 314, 8 July 2004.

²⁸ *Al-Skeini*, cited above, §138-142; *Issa and Others v. Turkey*, no. 31821/96, § 74, 16 November 2004.

²⁹ *Pad and others v. Turkey*, no. 60167/00, § 53-55, 28 June 2007; *Solomou and others v. Turkey*, no. 36832/97, § 50-51, 24 September 2008; *Jaloud v. the Netherlands* [GC], no. 47708/08, § 152, 20 November 2014.

³⁰ *Banković and others v. Belgium and others* [GC], no. 52207/99, §§ 74-82.

³¹ UN Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, Article 31.

³² *Soering v. the United Kingdom*, no. 14038/88, § 87, 7 July 1989.

³³ Council of Europe, Preparatory work on Article 1 of the European Convention on Human Rights, Information Document Prepared by the Registry, European Court of Human Rights, 31 March 1977, p. 34.

³⁴ *Cyprus v. Turkey* [GC], no. 25781/94, § 78, 10 May 2001, par. 78.

abroad may be greater than that experienced by residents of the Contracting Party who make a claim in that State. In such an event, the remedy ordered by domestic courts may not fully address or be commensurate with the harms faced by these other affected persons.

18. First, given the transboundary nature of the harms caused, to ensure effective remedy for persons affected by the actions of a number of Contracting Parties, it is necessary for the Court to be able to assess the respondent Parties' responsibilities concurrently. If the Court finds that the respondent States have failed to comply with their obligations, this would raise the issue of their respective responsibility for the harms caused to the applicants. In line with the Court's practice, it could consider either the possibility of remedy and reparations for distinct injuries constitutive of the single injury or for proportionate shares of the same injury.³⁵ The transboundary nature of climate change means that the Court is faced with a single injury to applicants resulting from impacts to which each of the respondent States have contributed. This is a unique situation that has not arisen in the Court's previous jurisprudence. To effectively assess the respective contributions of the respondent States for the harms caused, and to ensure that all respondent States have an opportunity to make their case regarding their proportionate share for the harm, the Court would need to assess these together in a single case. Addressing each respondent State's responsibility solely through individual cases against a respondent State would limit the possibility of effectively considering each State's respective responsibility, or the possibility of joint responsibility in certain cases, for the harm caused.
19. Second, the interpretation of jurisdiction provided in this third-party intervention is also consistent with international environmental law on access to justice in the event of transboundary environmental harm, particularly in the European context, which constitutes relevant rules of international law applicable to the parties to the ECHR. Article 3(9) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters requires access to justice to be provided "without discrimination as to citizenship, nationality or domicile."³⁶
20. Third, promptness and effectiveness of a remedy is of the essence in addressing the harms resulting from GHG emissions. Principle 6(2) of the International Law Commission's Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising from Hazardous Activities, for instance, points to the importance of victims of transboundary damage outside of a State's territory to have access to remedies "that are no less prompt, adequate and effective than those available to victims that suffer damage ... within the territory of that State."³⁷ In *Dubetska and Others v. Ukraine*, this Court noted that State Party obligations linked to potentially hazardous activity included "conduct[ing] sufficient studies to evaluate the risks of a potentially hazardous activity ..., [developing] on the basis of the information available ... an adequate policy vis-à-vis polluters and [taking] all necessary measures have been taken to enforce this policy in good time" with provisions made for "individuals affected by the policy at issue [to be] able to contribute to the decision-making, including access to the relevant information and ability to challenge the authorities' decisions in an effective way."³⁸ In the case of harm resulting from transboundary pollution and related climate change, if affected persons are not permitted to seek remedy against Contracting Parties other than the one where they reside, they would effectively be denied access to necessary remedies for the harms caused to the enjoyment of their rights.

³⁵ Samantha Besson, "Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities", in Anne van Aaken and Julia Motoc (eds.) *The European Convention on Human Rights and General International Law*, Oxford University Press, 2018, pp. 155-177.

³⁶ United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, Article 3(9).

³⁷ International Law Commission, Report: Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising from Hazardous Activities, A/61/10 (2006).

³⁸ *Dubetska And Others v. Ukraine*, no. 30499/03, § 143, Final 10 February 2011.

C. *The Approach of Other International Adjudicatory Bodies*

21. This Section will show that the Inter-American Court on Human Rights (IACtHR) and various UN human rights treaty bodies have confirmed that climate change is a threat to human rights enjoyment, including the right to life and the right to respect for private and family life, and that if States fail to act to prevent such threats, they fail to comply with their obligations to prevent human rights violations. These institutions have also confirmed that the State obligations in question apply to the regulation of activities within their jurisdiction that have negative impacts on persons within their territory as well as outside their borders due to the nature of transboundary pollution. Furthermore, eight UN human rights treaty bodies for core international human rights treaties, as well as the IACtHR and the African Commission on Human and Peoples Rights, have interpreted their respective instruments to apply to situations in which States Parties are in a position to harm the rights of people outside their borders or to regulate a private actor whose conduct can harm the rights of people outside their borders, including situations in which the State does not either exercise physical control over the affected person or exercise control over the territory on which the affected person is present. For each of these bodies, the latter treaty interpretation has been taken in regard both to those treaties that explicitly state that the obligations in the treaty apply within the State Party's "jurisdiction" and to those that do not include such a stipulation.
22. The issue of transboundary environmental harm was addressed in 2017 by the IACtHR in Advisory Opinion 23 (The Environment and Human Rights), which contains a number of parallels to the present case.³⁹ Under Article 1(1) of the American Convention on Human Rights (American Convention), States Parties "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms."⁴⁰ In its analysis of the meaning of the term "jurisdiction", the IACtHR made specific reference to Article 31(1) of the VCLT. According to the Court, Article 1(1) "signifies that the State obligation to respect and to ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control."⁴¹
23. The IACtHR went on to underscore the principle that states have both territorial and transboundary obligations to protect against environmental harm in general, and climate change in particular:

The Court recalls that the fact that a person is subject to the jurisdiction of a State does not mean that he or she is in its territory. According to the rules for the interpretation of treaties, as well as the specific rules of the American Convention [...] the ordinary meaning of the word "jurisdiction," interpreted in good faith and taking into account the context, object and purpose of the American Convention, signifies that it is not limited to the concept of national territory, but covers a broader concept that includes certain ways of exercising jurisdiction beyond the territory of the State in question.⁴²
24. The IACtHR recalled the approaches that some human rights bodies have taken to analyse situations of exercise of a State's jurisdiction outside its territory, including those developed by this Court. But in the same breath, it acknowledged the unsuitability to address transboundary environmental harm in this way since "most of these situations involve military actions or actions by State security forces that indicate 'control', 'power' or 'authority' in the execution of the extraterritorial conduct."⁴³ Referring to the case before it, the IACtHR continued: "these are not the situations described by the requesting State and do not correspond to the specific context of environmental obligations referred to in this request for an advisory opinion."⁴⁴ Taking into account the American Convention's content and purpose, the IACtHR emphasized that "States have the obligation to

³⁹ Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-23/17 of 15 November 2017, requested by the Republic of Colombia.

⁴⁰ American Convention on Human Rights, "Pact of San José, Costa Rica," 22 November 1969.

⁴¹ IACtHR, Advisory Opinion OC-23/17, para. 73.

⁴² IACtHR, Advisory Opinion OC-23/17, para. 74 (citations omitted).

⁴³ IACtHR, Advisory Opinion OC-23/17, para. 80.

⁴⁴ IACtHR, Advisory Opinion OC-23/17, para. 80.

avoid transboundary environmental damage that can affect the human rights of individuals outside their territory”,⁴⁵ and regarding Article 1 (1) it established that

For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.⁴⁶

In its order, the Court confirms that:

For the purposes of Article 1(1) of the American Convention, it is understood that individuals whose rights under the Convention have been violated owing to transboundary harm are subject to the jurisdiction of the State of origin of the harm, because that State exercises effective control over the activities carried out in its territory or under its jurisdiction, in accordance with paragraphs 95 to 103 of this Opinion.⁴⁷

25. The African Commission on Human and People’s Rights (African Commission) has interpreted the provision relating to the right to life in the African Charter on Human and Peoples Rights as follows:

A State shall respect the right to life of individuals outside its territory. A State also has certain obligations to protect the right to life of such individuals. The nature of these obligations depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim’s rights) or exercises effective control over the territory on which the victim’s rights are affected, or whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life.⁴⁸

26. The UN Human Rights Committee (HRC) in its General Comment 36 on the right to life interpreted the term “jurisdiction” in Article 2 of the International Covenant on Civil and Political Rights (ICCPR)⁴⁹ in functional terms, referring to the ability of one State to affect the “enjoyment” of the right to life of a person living in another State:

[A] State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.⁵⁰

27. The HRC indicated that States’ obligations extended to control over activities by private actors, stating:

They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility, and of the right of victims to obtain an effective remedy.⁵¹

This approach has also been applied in the HRC’s practice, whereby the HRC considered that jurisdiction applied to a State Party’s failure to provide effective remedies to people abroad who have been victims of activities of business enterprises domiciled in that State’s territory and/or its jurisdiction,⁵² trial of a person who was not present in the State,⁵³ discrimination in pension rights of non-nationals resident in another State who were former members of its army,⁵⁴ targeted killings in extraterritorial counter-terrorism operations using

⁴⁵ IACtHR, Advisory Opinion OC-23/17, para. 101.

⁴⁶ IACtHR, Advisory Opinion OC-23/17, para. 101 (citations omitted).

⁴⁷ IACtHR, Advisory Opinion OC-23/17, para. 244, clause 4.

⁴⁸ African Commission, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), 18 November 2015, para. 14.

⁴⁹ International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, Article 2.

⁵⁰ UN Human Rights Committee (HRC), General Comment 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para. 63 (citations omitted).

⁵¹ HRC, General Comment 36, Article 6: Right to life (previously cited), para. 22 (citations omitted).

⁵² HRC, ‘Concluding Observations on Germany’ (2012) CCPR/C/DEU/CO/6, para. 16.

⁵³ HRC, *Mbenge v. Zaire* (1983) Communication 16/1977, CCPR/C/OP/2, para. 21.

⁵⁴ HRC, *Gueye et al v. France* (1989) Communication 196/1985, CCPR/C/35/D/196/1985, para. 9.4.

unmanned aerial vehicles in another State over which that State did not exercise effective control,⁵⁵ surveillance of communications within and outside its territory,⁵⁶ backing of military factions in another State that were carrying out human rights abuses,⁵⁷ pronouncement of a death sentence on a non-national resident in another State and general appeals made or condoned by that State for the execution of this sentence outside its territory.⁵⁸

28. The HRC has also affirmed that climate change constitutes a pressing and serious threat to the ability of present and future generations to enjoy the right to life and that “implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.”⁵⁹
29. In 2019, five UN human rights treaty bodies – responsible for, respectively, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (CMW), Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) – issued a joint statement on human rights and climate change.⁶⁰ According to the joint statement:
- State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all people. Failure to take measures to prevent foreseeable human rights harm caused by climate change or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.
30. The joint statement required that all States should seek to reduce GHG emissions, to effectively contribute to phasing out fossil fuels, to promote renewable energy and to address emissions from the land sector, including by combating deforestation.⁶¹ It further stated:
- Additionally, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructures which are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors as a mitigation measure to prevent further damage and risk.⁶²
31. In October 2018, the UN Committee on Economic, Social and Cultural Rights (CESCR) released a statement on climate change and the Covenant affirming that States Parties are required to respect, protect and fulfil all human rights for all and that: “They owe such duties not only to their own populations, but also to populations outside their territories, consistent with articles 55 and 56 of the [UN] Charter.”⁶³
32. The CESCR has also consistently indicated that States Parties must refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories.⁶⁴ It has further stated that States

⁵⁵ HRC, Concluding Observations on the United States of America (2014) CCPR/C/USA/CO/4, para. 9; Concluding observations on the fifth periodic report of France (2015) CCPR/C/FRA/CO/5, para. 12.

⁵⁶ HRC, Concluding Observations on the United States of America (2014) CCPR/C/USA/CO/4, para. 22.

⁵⁷ HRC, Concluding Observations: Croatia (1992), CCPR/C/79/Add.15, para. 7; Concluding Observations: Yugoslavia (1992) CCPR/C/79/Add.16, paras. 5, and 8.

⁵⁸ HRC, Concluding Observations on Iran (1993) UN Doc CCPR/C/79/Add.25, para. 9.

⁵⁹ HRC, General Comment 36: Article 6: Right to life, (previously cited), para. 63.

⁶⁰ Committee on the Elimination of Discrimination Against Women (CEDAW Committee), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, CRC Committee, and the Committee on the Rights of Persons with Disabilities, “Joint Statement on ‘Human Rights and Climate Change’”, 16 September 2019, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>

⁶¹ CEDAW, CESCR, CMW, CRC Committee, CRPD, “Joint Statement on Human Rights and Climate Change”, para 3.

⁶² *Ibid.*, para 3.

⁶³ CESCR, “Statement on Climate change and the International Covenant on Economic, Social and Cultural Rights”, 8 October 2018, [ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E](https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E), para. 5.

⁶⁴ CESCR, General comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, para. 29; CESCR, General Comment 15, para. 31.

Parties are obliged to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control in accordance with international law.⁶⁵

33. The CRC Committee has interpreted the CRC to stipulate that: “States also retain their obligations in the field of development cooperation and should ensure that cooperation policies and programmes are designed and implemented in compliance with the Convention and the Optional Protocols thereto.”⁶⁶ Furthermore, it stated that: “Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned.”⁶⁷ The UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has stated that the CEDAW applies to the actions of States Parties when they act beyond their territory.⁶⁸ The treaty body interpreting the International Convention on the Elimination of All Forms of Racial Discrimination, the UN Committee on Racial Discrimination (CERD Committee) has called on States Parties to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State Party that negatively impact on the enjoyment of rights of indigenous peoples in territories outside that State Party.⁶⁹
34. The treaty body responsible for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the UN Committee Against Torture, has interpreted a provision in the treaty requiring each State Party to apply the treaty to “territory under its jurisdiction” as requiring that each State Party shall not only take effective measures to prevent acts of torture within its own territory, but in “all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.”⁷⁰ The treaty itself also expressly requires each State Party to apply its jurisdiction under the treaty to conduct by its nationals, to conduct on and to alleged offenders where they are present within its territory and it is not extraditing them.
35. As a result, it is clear that the common analysis of treaties adopted in the UN, African and Inter-American human rights systems is to interpret human rights instruments as applying to all situations in which States Parties are in a position to harm the rights of people outside their borders or to regulate a private actor whose conduct can harm the rights of people outside their borders. To the knowledge of the intervenors, there is no practice by these bodies that contradicts the above-cited interpretation of their instruments.

⁶⁵ CESCR, General Comment 24, paras. 30-31.

⁶⁶ CRC Committee, General Comment 5: General Measures of Implementation for the Convention on the Rights of the Child (2008) CRC/GC/2003/5 para. 47.

⁶⁷ CRC Committee, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, para. 43.

⁶⁸ CEDAW Committee, General Recommendation 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010), CEDAW/C/GC/2 para. 12.

⁶⁹ For example, CERD Committee, Concluding Observations: United States of America (2008) CERD/C/USA/CO/6 para 30; CERD Committee, Concluding Observations: Norway (2011) CERD/C/NOR/CO/19-90 para. 17.

⁷⁰ UN Committee Against Torture (CAT Committee), General Comment 2: Implementation of article 2 by States parties, 24 January 2008, CAT/C/GC/2, para. 16.