

## Promises of climate litigation for climate justice

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*Abstract:* The raise of climate litigation in many parts of the world highlights how people are increasingly turning to the courts to hold governments and the private sector accountable, transforming litigation into a key mechanism for ensuring climate action. However, this contribution questions to what extent climate litigation can be a valid tool for achieving climate justice, as a response to the challenges posed by climate change for many populations in the Global South, in situations of multidimensional vulnerability, and who have contributed the least to the climate crisis. In this regard, only some cases of climate litigation prove to be promising in addressing climate injustices, through the complaints made extraterritorially by vulnerable populations from the Global South in the pursuit not only of the corresponding responsibilities of industrialized countries or their companies, but also of the necessary reparations to protect their rights against the unequal impacts of climate change. The rethinking of states' extraterritorial jurisdiction in the context of climate change, recognizing their control over the climate source, can bridge the gap between emitters and individuals affected by climate change for the achievement of climate justice.

*Keywords:* climate justice; climate litigation; multidimensional vulnerabilities; inequalities; climate responsibilities; extraterritoriality.

### (A) INTRODUCTION

The total number of climate change-related legal cases has more than doubled since 2017 and continues to grow worldwide. This is evidenced by the latest report from the Sabin Center for Climate Change, the *Global trends in climate change litigation: 2024 snapshot*, which highlights the increase in such lawsuits globally, with the U.S. having the highest number of cases recorded (1,745) in 2024, followed by the UK with 24 cases, Brazil (10) and Germany (7)<sup>1</sup>. There is also a significant increase in lawsuits against companies, particularly for lack of credibility regarding their climate commitments and investments, known as climate-washing. According to the United Nations Environment Programme report “*Global Climate Litigation Report. 2023 Status Review*”<sup>2</sup>, the number of cases recorded for this reason was 22, compared to 10 in 2020. This report also refers

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<sup>1</sup> Sabin Center for Climate Change, *Global trends in climate change litigation: 2024 snapshot* (2024). Available at: <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/>. Accessed 24 November 2024.

<sup>2</sup> United Nations Environment Programme Report *Global Climate Litigation Report. 2023 Status Review* (UNEP: Nairobi, 2023): <https://doi.org/10.5917/20.500.11822/43008>.

to litigation for a just transition as an emerging trend, where plaintiffs challenge the way climate action is implemented, demanding a balance between the measures taken and the rights of affected people and communities<sup>3</sup>. Quantitatively, these data highlight that climate litigation is becoming an essential part of pushing for climate action, improving climate governance, and emphasizing the growing importance of science and scientists in providing the necessary evidence to support legal decisions. However, it also underscores the efforts of citizens to counter the insufficient governmental action to protect those who suffer the most from the impacts of climate change.

In this regard, this contribution represents a reflection on the possibilities of climate litigation in terms of contributing to the achievement of climate justice. The analysis starts with the concepts of environmental justice and climate justice, in order to consider the existing inequalities and multidimensional vulnerabilities<sup>4</sup> in the current context of climate emergency. This is complemented by a brief analysis of some of the most relevant climate litigation cases that integrate extraterritoriality to argue how these cases have been the most promising, so far, for achieving climate justice.

## (B) FROM ENVIRONMENTAL JUSTICE TO CLIMATE JUSTICE: THE CLAIMS OF INEQUALITIES

The notion of “justice” is a fundamental part of the social contract, crucial for ensuring that no one is left behind and for fostering a virtuous connection between economic growth, social inclusion, and environmental sustainability<sup>5</sup>. The link between the concept of justice and the environment has its roots in the civil resistance movement that emerged in the United States in the 1980s, which focused its demands on protecting health and the environment<sup>6</sup> from the disposal of toxic waste in the most impoverished and racialized communities, primarily African American<sup>7</sup>.

This initial environmental justice movement, focused on environmental discrimination, has evolved to integrate not only the consequences of the unjust distribution of

<sup>3</sup> *Ibid.*

<sup>4</sup> The concept of multidimensional vulnerability has been established by the United Nations, which has proposed the development and application of a Multidimensional Vulnerability Index (MVI). The MVI is a vital tool to help less developed states access concessional finance, improve their national long-term planning, repay their debts and/or subscribe to insurance and compensation schemes for climate disasters. See Multidimensional Vulnerability Index and the Final Report of High-Level Panel on the Development of a Multidimensional Vulnerability Index. Available at: <https://www.un.org/ohrrls/mvi>. Accessed 6 November 2024.

<sup>5</sup> United Nations Development Programme (UNDP), *Justicia y Desarrollo Sostenible: El testeo del indicador global de acceso a justicia en el marco de una encuesta nacional de pobreza*, Ciudad Autónoma de Buenos Aires: Programa de las Naciones Unidas para el Desarrollo-PNUD (2023), at 20. Available at: <https://www.undp.org/es/argentina/publicaciones/justicia-y-desarrollo-sostenible>. Accessed 14 November 2024.

<sup>6</sup> D. E. Camacho (Ed.), *Environmental Injustices, Political Struggles: Race, Class and the Environment* (Duke University Press, 1998): <https://doi.org/10.2307/j.ctv1168c8g>.

<sup>7</sup> R. D. Bullard, ‘Anatomy of environmental racism and the environmental justice movement’, in *Confronting environmental racism: Voices from the grassroots* (1993) 15, 15-39. See also L. W. Cole, S. R. Foster, *From the ground up: Environmental racism and the rise of the environmental justice movement* (Vol. 34. New York: NYU Press, 2021): <https://www.jstor.org/stable/j.ctt9qg6v> and E. M. McGurty, ‘From NIMBY to civil rights: The origins of the environmental justice movement’, *Environmental History*, 2.3 (1997), at 301-323: <https://doi.org/10.2307/3985352>.

environmental harms and benefits but also to expose their underlying causes, thus connecting the three core dimensions of justice: distributive, procedural, and recognition<sup>8</sup>.

Although the distributive aspects of justice can be seen as an indication of injustice, meaning that environmental harm is disproportionately suffered by certain groups in society, Schlosberg points out that these groups or individuals must be recognized before any redistribution can take place<sup>9</sup>. This also applies to the procedural dimension of justice: if a group or individual must be protected, they must be recognized. Recognition justice refers to the existence of social structures that reinforce unjust outcomes in society, recognizing that certain cultural and institutional norms and practices can give unequal representation to certain groups, depriving them of the common good and/or protection. Distributive justice, on the other hand, considers the fair and equitable distribution of environmental goods and benefits for all people, aiming to understand how environmental harms or benefits are experienced in society<sup>10</sup>. And procedural justice focuses on the fact that participation in decision-making is not always equal, and some groups and individuals may be excluded. Along with these dimensions of environmental justice, McCauley and Heffron add restorative justice as a fourth dimension, aimed at correcting historical development trajectories that have created structural forms of injustice<sup>11</sup>. Thus, restorative justice aims to restore the dignity of those affected and serve as an alternative to litigation related to loss and damage<sup>12</sup>.

The integration of these dimensions within the context of the institutional framework makes it necessary to think about the concept of environmental justice in a broader way. In this regard, according to the United Nations Development Programme (UNDP), three pillars can be identified in relation to environmental justice: 1. normative frameworks at the international, national, and local levels that, with a human rights approach, go beyond the mere criminalization of those who commit environmental crimes; 2. strengthened institutions to monitor, control, and implement environmental regulations that have access mechanisms for all communities and sectors; and 3. effective access to justice for all stakeholders when environmental rights are violated<sup>13</sup>.

Thus, environmental justice is a concept that has evolved towards the pursuit of “fair treatment and participation of people of all races, cultures, nations, and socioeconomic

<sup>8</sup> D. Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature*, (2007) Vol. 9780199286: <https://doi.org/10.1093/acprof:oso/9780199286294.001.0001>.

<sup>9</sup> *Ibid.*

<sup>10</sup> S. Hughes, M. Hoffmann, ‘Just urban transitions: toward a research agenda’, *Wiley Interdisciplinary Reviews: Climate Change* (2020): <https://doi.org/10.1002/wcc.640>. See also V. Bellver Capella, ‘El movimiento por la justicia ambiental. Entre el ecologismo y los derechos humanos’, *Anuario de Filosofía del Derecho* (1997), no. 13-14, at 327-348: <https://revistas.mjjusticia.gob.es/index.php/AFD/article/view/1596>. Accessed 26 November 2024.

<sup>11</sup> D. McCauley, R. Heffron, ‘Just transition: integrating climate, energy and environmental justice’, in *Energy Policy* (2018), 119, at 1-7: <https://doi.org/10.1016/j.enpol.2018.04.014>.

<sup>12</sup> S. A. Robinson, D. Carlson, ‘A just alternative to litigation: applying restorative justice to climate-related loss and damage’, in *Third World Quarterly* (2021) at 1-12: <https://doi.org/10.1080/01436597.2021.1877128>.

<sup>13</sup> United Nations Development Programme (UNDP), *Environmental Justice comparative Experiences in Legal Empowerment* (2014). Available at: <https://www.undp.org/publications/environmental-justice-comparative-experiences-legal-empowerment>. Also see United Nations Development Programme (UNDP), *Environmental justice: securing our right to a clean, healthy and sustainable environment* (2022). Available at: <https://www.undp.org/publications/environmental-justice-securing-our-right-clean-healthy-and-sustainable-environment>. Accessed 21 November 2024.

backgrounds in the development, implementation, and enforcement of environmental programs, laws, and policies”<sup>14</sup>. Additionally, its implementation requires accountability in environmental matters, focusing on the respect, protection, and enforcement of environmental rights, as well as the promotion of the rule of environmental law. From these principles, the concept of “climate justice” has emerged.

### (C) CLIMATE JUSTICE AND THE MULTIDIMENSIONAL VULNERABILITIES

The term “climate justice” was first used in a 1999 report titled *Greenhouse Gangsters vs. Climate Justice*, produced by the Corporate Watch group based in San Francisco<sup>15</sup>. This report was primarily an analysis of the oil industry and its disproportionate political influence, but it also made an initial attempt to define a multifaceted approach to climate justice, which included the following aspects: analysing the causes of global warming and holding corporations accountable; opposing the destructive impacts of oil exploitation and supporting affected communities, including those most impacted by the increase in climate-related disasters; observing environmental justice movements and organized work to develop strategies that support a just transition away from fossil fuels; and reversing challenging corporate globalization and the disproportionate influence of international financial institutions such as the World Bank and the World Trade Organization. Thus, Corporate Watch understood that

“Climate justice means, first and foremost, eliminating the causes of global warming and allowing the Earth to continue to nurture our lives and the lives of all living things. This means radically reducing emissions of carbon dioxide and other greenhouse gases.

Climate justice means opposing the destruction caused by greenhouse gases at every step of the production and distribution process, from a moratorium on new oil exploration to stopping the poisoning of communities by refinery emissions, from drastic domestic reductions in automobile emissions to the promotion of efficient and effective public transport”<sup>16</sup>.

Years later, it was the International Bar Association (2014) that adopted the following definition of climate change justice:

“To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights”<sup>17</sup>.

<sup>14</sup> UNDP (2022), *ibid.*, at 13.

<sup>15</sup> K. Bruno, J. Karliner and C. Brotsky, *Greenhouse Gangsters vs. Climate Justice* (Transnational Resource & Action Center, San Francisco, 1999).

<sup>16</sup> *Ibid.*

<sup>17</sup> International Bar Association. *Achieving Justice and Human Rights in an Era of Climate Disruption*. (London: IBA, 2014). Available at: <file:///sbs2k8/RedirectedFolders/accintern/My%20Documents/Downloads/Climate%20Change%20Justice%20and%20Human%20rights%20report%20full.pdf>. Accessed 21 November 2024.

The Summary for Policy Makers of Working Group II of the Intergovernmental Panel on Climate Change stated, as part of its Sixth Assessment Report, that climate justice

“(...) generally, includes three principles: distributive justice, which refers to the allocation of burdens and benefits among people, nations and generations; procedural justice, which refers to who decides and participates in decision-making; and recognition, which entails basic respect, strong commitment and fair consideration of diverse cultures and perspectives”<sup>18</sup>.

According to a 2022 report by the Intergovernmental Panel on Climate Change, ‘climate justice encompasses justice that links development and human rights to achieve a rights-based approach to addressing climate change’<sup>19</sup>. In this regard, according to the latest update of its Sixth Assessment Report published in March 2023, it argues (i) that activities that prioritise equity, climate justice, and inclusion lead to more sustainable outcomes and promote resilient development; (ii) that scaling up climate action will mobilise high and low-cost options needed to combat climate change, especially in the energy and infrastructure sectors (high confidence); and (iii) that climate justice movements have in many cases had positive results and will have a catalytic effect on climate governance ambition (medium confidence).

Thus, age, race, gender, class, and other factors help to understand why the climate crisis is a multidimensional crisis and, above all, one of inequality. Moreover, understanding these realities of inequality that contribute to a situation of climate vulnerability is essential to articulate a legal framework sensitive to the foundation of climate justice, informing about the causes and consequences of climate change, its perpetrators and its victims, and providing mechanisms for protection and reparations for climate-related damages and losses, in order to restore justice in the context of the climate emergency. In this regard, the roots of this climate crisis are interconnected with the issue of environmental justice, encompassing a wide range of economic and social realities, making it artificial to treat them separately. Economic and social inequalities are linked to the causes of the climate emergency, as they jointly emerge from a colonial and capitalist process characterized by the concentration and domination of power. Very often, these inequalities are based on personal and social factors (race, social class, gender, ethnicity, and origin), creating a context of greater vulnerability to the risks and effects of climate change. At the same time, climate justice, like the environmental justice movement, emphasizes the importance of empowering individuals and groups who are particularly affected by environmental degradation and are at greater risk of suffering from it, including indigenous peoples, women, children, the elderly, people with disabilities, and those living in poverty<sup>20</sup>. However, climate justice also introduces

<sup>18</sup> IPCC, *Summary for Policymakers* [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. (Cambridge University Press, Cambridge, UK and New York, NY, USA, 2022), at 7, 3–33, doi:10.1017/9781009325844.001.

<sup>19</sup> *Ibid.*

<sup>20</sup> United Nations. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Resolution A/HRC/34/49 of 19 January

a somewhat novel component in environmental justice, which is the role of youth advocating for intergenerational equity, and has played a prominent role in climate litigation.

Consequently, the effects of climate change are often measured by other factors, such as poverty, existing infrastructure, and the responsiveness of political authorities, interacting with existing inequalities and vulnerabilities, producing what Leichenko and O'Brien term "double exposure"<sup>21</sup>. In addition, the extraction of fossil fuels and the industry surrounding it often directly harm the same interests (such as health and access to land) that are affected by greenhouse gas emissions.

For this reason, climate change and its effects cannot be explained and addressed from an abstract or homogeneous perspective, especially without considering justice, equity, and rights as the foundation of climate justice. However, despite the importance of determining these multidimensional vulnerabilities intersecting with climate change, they have scarcely influenced the articulation of legal obligations under the international climate regime, which has traditionally developed without acknowledging the social dimensions of climate change. This partly explains the increase in climate litigation cases. For this reason, and as discussed below, it is necessary to determine whether this judicial intervention leads to climate justice.

#### (D) IS CLIMATE LITIGATION CLIMATE JUSTICE?

Although there is no single, unified concept of "climate justice"<sup>22</sup>, it is generally understood as a concept based on the principles of equity, non-discrimination, equal participation, transparency, justice, accountability, and access to justice. This includes issues of equity and equality within a nation's populations, between nations, and among populations of different generations<sup>23</sup>.

All these elements are not integrated into the concept of "climate litigation". In fact, a sector of academic doctrine emphasizes the difference between climate litigation and climate justice<sup>24</sup>. Following the approach adopted by the Sabin Center for Climate Change Law at Columbia University, two criteria are used to identify court cases as "climate litigation" namely: i) a case must have been presented before a judicial body (although certain examples of administrative matters or research requests are included); and ii) climate change legislation, policy, or science must be a material issue of fact or law in the case<sup>25</sup>.

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2017. Available at: [www.ohchr.org/en/documents/thematic-reports/ahrc3449-report-special-rapporteur-issue-human-rights-obligations](http://www.ohchr.org/en/documents/thematic-reports/ahrc3449-report-special-rapporteur-issue-human-rights-obligations). Accessed 6 November 2024.

<sup>21</sup> R. Leichenko, K. O'Brien, *Environmental Change and Globalization: Double Exposures* (New York: Oxford University Press, 2008): <https://doi.org/10.1093/acprof:oso/9780195177329.001.0001>.

<sup>22</sup> *Ibid.*

<sup>23</sup> C. Okereke, 'Climate justice and the international regime', in *Wiley interdisciplinary reviews: climate change* (2010) 1.3, at 462-474: <https://doi.org/10.1002/wcc.52>.

<sup>24</sup> C. Beauregard, D. Carlson, S. Robinson, C. Cobb, and M. Patton, 'Climate justice and rights-based litigation in a post-Paris world', 21 *Climate Policy* (2021), at 652-665: <https://doi.org/10.1080/14693062.2020.1867047>.

<sup>25</sup> Sabin Center for Climate Change Law, *Climate Change Litigation Databases*. Available at: <https://climatecasechart.com/about/>. Accessed 12 November 2024.

Thus, climate justice does not necessarily appear to be the ultimate goal of climate litigation. In general, when considering the dimensions of climate justice, it can be observed that most climate litigations focus on mitigation (distributive dimension) by providing civil society with a possible avenue to address the inadequate responses of governments and the private sector to the climate crisis, forcing governments and corporate actors to pursue more ambitious goals for climate change mitigation and adaptation. While civil society's participation is instrumentalized as a legal-political strategy, there is little emphasis on recognizing the most vulnerable population groups (recognition justice), such as children and youth, women's groups, local communities, and Indigenous Peoples, among others. Despite taking a prominent leadership role in filing these climate litigations and driving climate governance reform in an increasing number of countries around the world, these groups lack significant participation in the decision-making process (procedural justice). Even less emphasis is placed on restorative justice as a legal approach, beyond the strategic one, to highlight equity and accountability in addressing the climate crisis.

Despite these apparent limitations, climate litigation can be a potentially relevant tool in contributing to the realization of climate justice.

#### (E) WHAT ARE THE PROMISING DEVELOPMENTS IN CLIMATE LITIGATION?

As mentioned, climate justice is often understood as justice related to responsibility for climate change and its impacts, or as justice concerning the effects of responses to climate change. Thus, climate litigation has focused, according to the Grantham Research Institute<sup>26</sup>, on the types of behaviours that the cases aim to discourage or encourage, but not necessarily on the inequalities, vulnerabilities, and/or intersectionalities regarding the effects of climate change, which are collateral. And, of course, much less on responsibilities and reparations/restorations.

Most climate litigation cases have focused on three objectives: challenging deficiencies in a national government's global climate response or the inadequate implementation of existing climate laws (government framework cases)<sup>27</sup>; challenging statements made by public and private actors about their contributions to climate action and the energy transition due to their misleading or exaggerated nature ("climate-washing" cases); and challenging the flow of funding toward projects and activities that are not aligned with climate action ("turning off the taps" cases)<sup>28</sup>.

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<sup>26</sup> For instance, see the case Federal Court of Australia Australian Securities and Investments Commission v Vanguard Investments Australia Ltd [2024] FCA 308 File number(s): VID 563 of 2023, 28 March 2024. Sabin Center for Climate Change Law, *Climate Change Litigation Databases*, *Ibid*.

<sup>27</sup> For instance, see the case Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others, "*Verein Klima.Seniorinnen Schweiz v Bundesrat*". Filing Date: 2016. Reporter Info: No. A-2992/2017. Sabin Center for Climate Change Law, *Climate Change Litigation Databases*, *Ibid*.

<sup>28</sup> For instance, see the case Jubilee v EFA and NAIF, 2023. Reporter Info: NSD724/2023. Sabin Center for Climate Change Law, *Climate Change Litigation Databases*, *Ibid*.



According to Farhana Sultana, climate justice goes beyond climate litigation, as it represents a critical perspective that challenges dominant discourses built on oppression, grounded in solidarity and collective action<sup>29</sup>, to address these climate inequalities that determine greater exposure, risk, and lower climate resilience capacity<sup>30</sup>.

However, climate litigation can be used to advance climate justice<sup>31</sup>, when the discourse of rights, vulnerabilities, and climate responsibilities is properly integrated. In this regard, some cases can be highlighted as reflections of the promises of climate litigation and those that have best integrated the dimensions of climate justice. Many of these cases are paradigmatic in that they incorporate an element of extraterritoriality, meaning cases in which human rights violations, vulnerabilities, and historical and current responsibilities are addressed, exceeding the jurisdiction of one state, by their victims and/or perpetrators<sup>32</sup>. These cases clearly reflect the inequalities and vulnerabilities borne, especially by populations in the Global South<sup>33</sup>, who are less responsible for contributing to climate change. But they also provide a view of state jurisdiction as ‘source control’ according to Principle 21 of the 1972 Stockholm Declaration<sup>34</sup> and Principle 2 of the 1992 Rio Declaration on Environment and Development<sup>35</sup>, which include the customary obligation that states may not cause environmental damage beyond their borders. In concrete, states have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction”<sup>36</sup>. The lack of control by states over activities producing greenhouse gas emissions in their territory or under their control causes significant climate harm to other states, thereby violating international law.

In this regard, and without claiming exhaustiveness, one of the first extraterritorial climate litigation cases responding to the call for climate justice is the *Inuit petition*. In 2005, the Inuit Circumpolar Conference, representing the Inuit people of the Arctic

<sup>29</sup> F. Sultana, ‘Critical climate justice’, in 188 *The Geographical Journal* (2022), at 118-124: <https://doi.org/10.1111/geoj.12417>.

<sup>30</sup> J. R. Elliot, J. Pais, ‘Race, class, and Hurricane Katrina: Social differences in human response to disaster’, in *Social Science Research* (2006), at 295-321: <https://doi.org/10.1016/j.ssresearch.2006.02.003> and Y. Park, J. Miller, ‘The social ecology of Hurricane Katrina: Re-writing the discourse of “natural” disasters’, in *Smith College Studies in Social Work* (2006), at 9-24: [https://doi.org/10.1300/J497v76no3\\_02](https://doi.org/10.1300/J497v76no3_02).

<sup>31</sup> C. Beauregard, D. Carlson, S. Robinson, C. Cobb, and M. Patton, ‘Climate justice and rights-based litigation in a post-Paris world’, *cit. supra*.

<sup>32</sup> A. Savaresi, J. Auz, ‘Climate change litigation and human rights: pushing the boundaries’, 9 *Climate Law*, n. 3 (2019), at 244-262: <https://doi.org/10.1163/18786561-00903006>.

<sup>33</sup> The ‘Global South’ is not a homogenous group of countries, as it integrates a wide variety of countries with a great diversity in terms of legal development and capacity. According to the Sabin Center for Climate Change Law, the G77 countries + China integrates the Global South countries. See Sabin Center for Climate Change Law, *Climate Change Litigation Databases*, *Ibid*.

<sup>34</sup> UN General Assembly, *United Nations Conference on the Human Environment*, A/RES/2994, UN General Assembly, 15 December 1972.

<sup>35</sup> UN General Assembly, *Report of the United Nations Conference on environment and development*, Rio de Janeiro, 3-14 June 1992, Annex I: Rio Declaration on environment and development, A/CONF.151/26 (Vol. I) 12 August 1992.

<sup>36</sup> The origin of this principle is to be found in the Trail Smelter Arbitration Case (USA/Canadá), Award of March 11, 1941. ONU. RIAA, vol. III, at 1974-1980. Also mentioned by the ICJ in the Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 25 September 1997, ICJ Rep (1997); Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Rep (2006). And in the advisory jurisdiction: Legality of the Use of nuclear weapons in Armed Conflict, Advisory Opinion of 8 July 1996, ICJ Rep (1996), at 225.



regions, filed a petition before the Inter-American Commission on Human Rights against the United States<sup>37</sup>, arguing that the carbon emissions from the United States had contributed to global warming to such an extent that climate change threatens their ancestral way of life. The petition argued that this violated the right to maintain cultural integrity, the right to a clean environment, the right to use and enjoy property without undue interference, and the rights to life, the preservation of health, physical integrity, and security, among other rights recognized by the Universal Declaration of Human Rights and the American Convention on Human Rights<sup>38</sup>. Therefore, it urged the Commission to adopt measures to address these violations suffered by the Inuit people as a result of global warming caused by the greenhouse gas emissions of the United States, as well as to recommend that the United States adopt mandatory limits on its greenhouse gas emissions and cooperate with the international community to prevent dangerous anthropogenic interference in the climate system, in accordance with Article 2 of the 1992 United Nations Framework Convention on Climate Change. The petition also requested that the Commission declare that the United States has the obligation to work with the Inuit people to develop an adaptation plan to address the inevitable impacts of climate change and to consider the impact of its emissions on the Arctic and the Inuit before approving any government actions. However, despite these arguments, the Inuit's petition was rejected by the IACHR in November 2006 for lack of sufficient evidence of the harm caused. Two months later, on February 1, the Commission decided to reopen the case, giving the opportunity to hear the Inuit representatives in a hearing in March 2007.

Another case worth mentioning was presented in 2015 before the Philippine Commission on Human Rights (CHRP) by survivors of Typhoon Haiyan and other civil society groups to establish an investigation into the responsibility of 47 “major carbon emitters” such as Shell, BP, and Chevron, for the impacts of climate change, and to determine how they could be legally held accountable for the climate damage caused through their greenhouse gas emissions, as reported by the Climate Accountability Institute study<sup>39</sup>, thus violating the human rights of Filipinos. On May 6, 2022, the Commission released its findings from the investigation into the world's largest producers of crude oil, natural gas, coal, and cement (Major Carbon Emitters)<sup>40</sup>. Among other matters, it identified key elements for climate justice, namely the responsibility of corporations in contributing to climate change and the resulting human rights violations, framing climate change as a human rights issue rather than a civil or political one. In this report, the Commission stated that “Climate justice requires fairness and equity in how people are treated, linking development and human rights to achieve a rights-

<sup>37</sup> Petition to the Inter American Commission on Human Rights seeking relief from Violations resulting from Global Warming caused by Acts and Omissions of The United States, n. P-1413-05.

<sup>38</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) y American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force, July 8th, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>39</sup> R. Heede, ‘Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010’. 122 *Climatic Change* (2013), n. 1-2, at 229-241: <https://doi.org/10.1007/s10584-013-0986-y>.

<sup>40</sup> Commission on Human Rights of the Philippines, *National Inquiry on Climate Change* (2022). See: [https://chr2bucket.storage.googleapis.com/wp-content/uploads/2022/12/08152514/CHRP\\_National-Inquiry-on-Climate-Change-Report.pdf](https://chr2bucket.storage.googleapis.com/wp-content/uploads/2022/12/08152514/CHRP_National-Inquiry-on-Climate-Change-Report.pdf). Accessed 24 November 2024.

based approach to addressing climate change”<sup>41</sup> with a commitment to achieving climate justice, particularly for those most affected but least responsible for the climate crises.

In the same vein, the still-pending case of *Saul Luciano Lliuya vs. RWE AG*<sup>42</sup> offers a promising view of climate litigation from the perspective of climate justice. The lawsuit was filed in 2015 by Peruvian farmer Saúl Lliuya against RWE, the largest electricity producer in Germany. This case was the first to bring a company to court for its involvement in climate change, based on the before mentioned “Carbon Majors” study<sup>43</sup>. Lliuya’s lawsuit, supported by the NGO Germanwatch, argued that RWE, having consciously contributed to climate change by emitting large volumes of greenhouse gases, was partly responsible for the melting of mountain glaciers near his city, Huaraz. Specifically, the melting posed an acute threat: Palcacocha, a glacial lake located above Huaraz, had experienced a substantial increase in volume since 1975, which had dramatically accelerated since 2003. Lliuya presented several legal theories in support of his claim, including one that characterized RWE’s emissions as a nuisance for which the plaintiff had incurred compensable costs to mitigate. Acknowledging that RWE was a contributor to emissions responsible for climate change and, thus, the growth of the lake, Lliuya asked the court to order RWE to reimburse a portion of the costs he and the authorities in Huaraz would have to incur to establish flood protections. The calculated portion amounted to 0.47% of the total cost, the same percentage as the estimated contribution of RWE to global industrial greenhouse gas emissions since the start of industrialization (from 1751 onward). Although the case is still pending, it is expected to be relevant in terms of recognizing the company’s historical and current responsibilities, the duty to repair damages caused by climate change, and the acknowledgment of climate vulnerabilities as key factors of climate justice. At least in this case, it has inspired the initiation of other similar cases, such as *Asmania et al. vs. Holcim*<sup>44</sup>, which is also promising in terms of climate justice. In this case, four fishermen from Indonesia filed a lawsuit in 2023 against the Swiss cement company Holcim (formerly Lafarge Holcim from 2015 to 2021), arguing that Holcim’s historical emissions, reported by the *Carbon Majors* study<sup>45</sup>, are contributing to the rise in sea levels and threatening to submerge their home, Pulau Pari, by 2050. The plaintiffs are requesting proportional compensation from Holcim for the climate change-related damages in Pari; a 43% reduction in CO<sub>2</sub> emissions by 2030 and a 69% reduction by 2040, compared to 2019 levels, along with financial contributions to adaptation measures in Pari.

Regardless of the outcome, whether favourable or not for the plaintiffs, all these cases are undoubtedly novel and unprecedented in terms of climate justice, as they raise historical, current, and extraterritorial climate responsibilities of states and corporations,

<sup>41</sup> *Ibid.*

<sup>42</sup> Case No. 2 O 285/15 Essen Regional Court and Saul Luciano Lliuya v. RWE (2017) 20171130 Case No 2-O-28515. See L. García Álvarez, ‘El caso Huaraz: David contra Goliath o “Saúl L. contra RWE AG”: Un precedente clave en la justicia climática’, 40 *Revista Aranzadi de derecho ambiental* (2018), at 63-101: <https://hdl.handle.net/10433/19522>.

<sup>43</sup> R. Heede, *cit. supra*.

<sup>44</sup> *Case Asmania et al. vs Holcim*, 2022. See Climate Case Chart at: <https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/>. Accessed 2 December 2024.

<sup>45</sup> R. Heede, *cit. supra*. Also see P. Griffin, *The Carbon Majors Database: CDP Carbon Majors Report 2017* (Londres: CPD UK, 2017).

forcing the link of attribution and causality between actions and omissions regarding climate damages, alongside the claim for compensation, in order to achieve climate justice, setting a promising trend for covering the climate damages and losses borne by populations in the Global South.

Equally promising are the cases based on damages to future generations, specifically addressing intergenerational climate justice from an extraterritorial perspective. In this sense, the *Chiara Sacci case and others v. Argentina, Brazil, France, Germany, and Turkey* (Committee on the Rights of the Child, 2019) was the first attempt to hold several State parties to an international human rights treaty accountable for human rights violations related to climate change. The lawsuit was filed by sixteen children under the third Optional Protocol to the Convention on the Rights of the Child (CRC OP3) on September 23, 2019. The child plaintiffs argued that the five defendant states – Germany, Argentina, Brazil, France, and Turkey – had failed to fulfil their obligations under the Convention on the Rights of the Child (CRC) by causing and perpetuating the climate crisis, leading to ongoing violations of their rights under the Convention. The ruling of the Committee on the Rights of the Child follows the Inter-American Court of Human Rights' approach on extraterritoriality<sup>46</sup>, emphasizing foreseeable harm as the applicable standard to determine jurisdiction in climate change cases. It also understands that the test of 'effective control' is inapplicable in the context of climate change, thus rejecting the defendant states' (particularly France's) argument that establishing jurisdiction would require the person invoking a violation of their rights to reside in a territory over which the state has effective control. Regarding the foreseeability requirement, it is based on the understanding that both 'general acceptance' and climate change science are sufficient to demonstrate that climate change has adverse effects on the enjoyment of rights both within and outside the territory of a State.

All of these cases have in common the need to highlight the climate vulnerabilities and inequalities faced by many people in different parts of the world. At the same time, they allow us to observe how the limitations inherent in climate litigation have been an obstacle to achieving climate justice, despite the promising initiatives on which they were based and despite placing a greater burden on the victims of climate change to demonstrate their vulnerabilities and the attribution of responsibilities.

Consequently, the effects-based approach proposed by these cases, in which a State has control over a situation that produces extraterritorial effects, opens the door to future, more progressive decisions in international climate change litigation and perhaps it would contribute to thus fundamentally shifting the burden of proof to the defendant (mostly the victims). The proliferation of these cases, together with the ongoing advisory proceedings on climate change before the Inter-American Court of Human Rights, the International Court of Justice, and the Tribunal on the Law of the Sea, can contribute to declare the 'extraterritorial obligations' of States, which can result in extra-contractual responsibilities, as a consequence of their acts or omissions, which impact on the enjoyment of human rights outside their own territorial limits. In this

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<sup>46</sup> Inter-American Court of Human Rights Advisory Opinion OC-23/17 of November 15, 2017 requested by the Republic of Colombia. See at: [https://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf). Accessed 6 December 2024.

sense, these cases are relevant to overcome issues of extraterritoriality, going beyond traditional legal doctrines that limit the achievement of climate justice in the courts.

(F) CONCLUSION: WHAT ELEMENTS SHOULD A CLIMATE LAWSUIT HAVE IN ORDER TO CONTRIBUTE TO CLIMATE JUSTICE?

Despite the traditionally existing limitations in climate litigation, it is an instrument that can contribute to climate justice, especially in cases characterized by extraterritoriality. While it is not yet clear what the opportunities are for this type of “extraterritorial” climate litigation, it is the most promising in terms of climate justice.

In any case, from the perspective of climate justice, climate litigation should address the so-called ‘triple injustices’ of climate change, namely, the unequal distribution of impacts, the unequal responsibility for climate change, and the unequal costs associated with mitigation and adaptation<sup>47</sup>, where those least responsible for greenhouse gas emissions are also the most vulnerable to its impacts and the most disadvantaged by responses to climate change<sup>48</sup>.

The first element is that climate change must be presented as a justice issue arising from the unequal distribution of its adverse effects between countries and generations, different contributions to greenhouse gas emissions, varying degrees of exposure to the consequences of climate change, and unequal capacities to adapt to climate impacts or access climate solutions.

The second element is that the term ‘justice’ must be considered an essential component of the concept of climate justice, meaning it should include a range of issues related to the legal protection of those in contexts of multidimensional vulnerability to the adverse effects of climate change. This would include, as some authors like Brown Weiss<sup>49</sup>, Meyer<sup>50</sup>, and Knappe and Renn<sup>51</sup> refer to, the intergenerational dimension of justice to highlight the duties of one generation toward another, particularly concerning climate change, in relation to the obligations toward the young and children who are already living (or to be born), whose current and future lives are negatively affected by rapidly changing environmental conditions.

<sup>47</sup> J. T. Roberts, T. B. C. Parks, ‘A climate of injustice: global inequality, north-south politics, and climate policy’, in 1 *Global environmental accord* (2015), The MIT Press: <https://www.jstor.org/stable/41622756>.

<sup>48</sup> D. Krause, ‘Transformative approaches to address climate change and achieve climate justice’, in *Routledge handbook of climate justice* (2018) (Routledge).

<sup>49</sup> E. Brown Weiss, ‘Climate Change, Intergenerational Equity, and International Law’, in 9 *Vermont Journal of Environmental Law* (2008), at 615-627: <https://doi.org/10.2307/vermjenvilaw.9.3.615>.

<sup>50</sup> L. H. Meyer, ‘Intergenerational justice’, in *The Stanford Encyclopedia of Philosophy*, (2021) (Summer Edition).

<sup>51</sup> H. Knappe, O. Renn, ‘Politicization of intergenerational justice: how youth actors translate sustainable futures’, in *European Journal of Futures Research* (2022) 10, 6: <https://doi.org/10.1186/s40309-022-00194-7>. See also S. Caney, ‘Justice and future generations’, in 21 *Annual Review of Political Science* (2018), at 475-493: <https://doi.org/10.1146/annurev-polisci-052715-11749>.

And, based on the principles of environmental justice mentioned above, the third element would be to determine (i) responsibility for causing climate change and its impacts, or (ii) the effects of responses to climate change<sup>52</sup>.

Therefore, climate justice specifically requires not only establishing “extraterritorial” responsibilities, but also ensuring that mitigation and adaptation strategies, to be just, must primarily aim to benefit the most threatened populations and nations with the greatest needs.

Considering these prior ideas, a climate litigation based on climate justice has transformative potential, at least in contributing to reflection on the inequalities and addressing them, focusing on their extraterritorial causes and consequences, paying particular attention to how climate change affects people and their rights in different, unequal, and disproportionate ways, as well as repairing the resulting injustices in a fair and equitable manner.

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<sup>52</sup> P. Newell, S. Srivastava, L. O. Naess, G. A. Torres Contreras, R. Price, ‘Towards transformative climate justice: An emerging research agenda’, in 12 *WIREs Climate Change* (2021), at 6: <https://doi.org/10.1002/wcc.733>.

