8

Extraterritoriality

*Mark Gibney**

8.1 INTRODUCTION

There are at least two ways in which 'territory' plays an essential role in issues related to climate change. The first involves the *Trail Smelter* principle,[1] reaffirmed in Principle 21 of the Stockholm Declaration,[2] which requires states to ensure that activities within their territory and control do not cause damage to those who are outside their borders. This case revolved around smelter factories in Canada that were emitting pollutants which landed in the United States (US). In response, the US brought a case against Canada and was successful in an arbitration hearing. According to the Tribunal:

> under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[3]

At first glance, applying the reasoning presented in Trail Smelter to greenhouse gas (GHG) emissions might seem a natural extension of the principle. There are, however, key differences between the localised pollution in Trail Smelter and GHG emissions that complicate the step. Not only does every country produce GHG, albeit at vastly different levels, but all states have already been

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1 *Trail Smelter (US v Canada)* (1938) 3 RIAA 1905.

2 UNEP 'Declaration of the United Nations Conference on the Human Environment' (1972) UN Doc A/CONF/48/14 (Stockholm Declaration) principle 21 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.

3 *Trail Smelter* (n 1).

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negatively affected by ever-increasing levels of carbon dioxide and methane in the atmosphere. Furthermore, while the pollutants in *Trail Smelter* could be traced back to the operation of the smelter plants in Canada, there is much less certainty with GHG emissions. Or to use a concrete example, and as a reversal of the *Trail Smelter* situation, the GHG emissions now harming Canadian citizens are not only produced within Canada but from any number of other countries, including the US.[4]

The second way in which 'territory' plays an important role in relation to climate litigation is with respect to the scope of human rights obligations. Although human rights are declared to be 'universal', the dominant interpretation of international human rights law has been 'territorial' in scope, which is to say that a state's obligations extend only as far as its own national borders. There are two main reasons for this reading of international human rights law. The first is the international law principle that states are to honour the sovereignty of other states. In that way, a state that seeks to protect the human rights of the citizens of another state might be viewed as interfering with the sovereignty of that other state.

The second reason for the predominance of the 'territorial' interpretation of international human rights law comes from the language of the law itself. Nearly all human rights instruments make reference to either 'territory' or 'jurisdiction', and oftentimes both. One example is the International Covenant on Civil and Political Rights (ICCPR), which provides: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its *territory* and subject to its *jurisdiction* the rights recognized in the present Covenant ….'.[5] Yet, even human rights treaties that make no mention of either 'territory' or 'jurisdiction' – for example, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[6] – are commonly interpreted in a 'territorial' manner.

One of the biggest hurdles facing courts is that while climate change is extraterritorial in the sense that GHG emissions do not respect national borders, both domestic and international law are generally tethered to national territory. As John Knox, the first Independent Expert (and later Special Rapporteur) on Human Rights and the Environment, has pointed out:

> The more fundamental problem with applying environmental human rights principles to climate change is that the principles were developed primarily to address environmental harm that does not cross international borders. Almost all

[4] Among her list of transboundary cases, Maria Banda makes reference to a report that over 50 percent of the air pollution in the Province of Ontario – and more than 90 percent in some municipalities – originates in the United States. Maria L. Banda, 'Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm' (2019) 103 Minnesota Law Review 1879.

[5] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(1).

[6] International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

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> of the regional jurisprudence, in particular, arises from cases in which the benefits and costs of the environmental harm are felt within the domestic jurisdiction of one State.[7]

Perhaps not surprisingly, a substantial portion of the climate change cases to date have been 'domestic' or 'internal' in the sense that they involve citizens of one state bringing a suit against their own government seeking a judicial order to reduce GHG emissions. *Urgenda* is typical of this approach.[8] In this case a group of Dutch citizens and civil society organisations brought a suit against the government of the Netherlands, and in a landmark ruling the Supreme Court ordered the Dutch government to reduce its GHG emissions. Thus, for all its novelty and the important role it has played as a legal precedent, *Urgenda* is consistent with a 'territorial' reading of international human rights law.

The present chapter explores how, based on emerging best practice, courts may be able to go beyond the traditional, territorial understanding and grapple with the 'extraterritorial' aspects of climate change that have arisen in litigation to date. Noting the 'grave threats' to the enjoyment of human rights due to transboundary environmental harm, Knox acknowledges the necessity of addressing climate change from a transnational perspective, but also the uncertainty that may arise in this context. 'There is no obvious reason why a State should not bear responsibility for actions that otherwise would violate its human rights obligations, merely because the harm was felt beyond its borders. Nevertheless, the application of human rights obligations to transboundary environmental harm is not always clear.'[9] Judicial practice can play a critical role in reducing this uncertainty and clarify states' obligations in the context of advisory proceedings or dispute settlements.

8.2 THE EXTRATERRITORIAL DIMENSION

Section 8.2 is divided into three sub-sections broken down by geographic scope. The first sub-section (Section 8.2.1) provides examples of how *domestic* courts have addressed various extraterritorial issues. The second sub-section (Section 8.2.2) focuses on *regional* human rights institutions, with a particular focus on the 2017 Advisory Opinion of the Inter-American Court of Human Rights (IACtHR). The third and final sub-section (Section 8.2.3) moves the analysis to the *international* plane by examining how the International Court of Justice (ICJ) has approached transnational environmental claims.

[7] John Knox, 'Human Rights Principles and Climate Change' (2014) Wake Forest University Legal Studies Paper No 2523599, 9.

[8] *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR: 2019:2007 (Supreme Court of the Netherlands) (*Urgenda Supreme Court*).

[9] UN Human Rights Council, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (30 December 2013) UN Doc A/HRC/25/53 [63].

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8.2.1 *Domestic*

As the term indicates, 'extraterritorial' refers to something that occurs outside of a state's own national borders. Yet, extraterritorial issues can arise in a number of ways. The present section provides examples of how domestic courts in three countries – Germany, the Netherlands, and Norway – have addressed different kinds of extraterritorial issues. *Neubauer et al v Germany* involves a situation where foreign nationals brought a claim against a state other than their own. In *Milieudefensie and Others v Royal Dutch Shell*, while the claimants are all citizens of one state, the judicial order applies domestically as well as internationally. Finally, *People v Arctic Oil* addresses the issue of whether a state's responsibility to protect the environment is to be limited to the GHG emissions produced domestically or if it should include extraterritorial emissions as well.

8.2.1.1 Foreign Plaintiffs

Neubauer[10] is a case brought by a group of German citizens, joined by claimants from Bangladesh and Nepal, against the German state on the grounds that the government's reduction target of 55 per cent by the year 2030 will be insufficient to stay within the country's carbon budget, thereby necessitating the adoption of drastic measures that would violate the fundamental freedoms of all Germans alive in 2030 and thereafter. Taking an intergenerational approach, the Federal Constitutional Court held that: 'one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom'.[11] The Court ordered the legislature to set clear reduction targets from 2031 onward to the end of 2022. And in response to the ruling, federal lawmakers passed new legislation that requires, at a minimum, a reduction of 65 per cent in GHG emissions from 1990 levels by 2030.

Aside from the result itself, the most noteworthy aspect of *Neubauer* is that the Nepalese and Bangladeshi plaintiffs were given standing. The Court did draw a distinction, however, between the German and foreign claimants. Because the state's breach stemmed from the restrictive measures that would be needed to drastically reduce Germany's GHG emissions, as opposed to the impacts of climate change generally, the Court concluded that the complainants living in Bangladesh and Nepal would not be affected in their own freedoms in the same way as German citizens. According to the Court:

[10] *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court) (*Neubauer*).

[11] ibid [192].

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> The situation is different with regard to the complainants … who live in Bangladesh and in Nepal. They are not individually affected in this respect. In their case, it can be ruled out from the outset that a violation of their fundamental freedoms might arise from potentially being exposed someday to extremely onerous climate action measures because the German legislator [sic] is presently allowing excessive amounts of greenhouse gas emissions with the result that even stricter measures would then have to be taken in Germany in the future. The complainants … live in Bangladesh and Nepal and are thus not subject to such measures.[12]

In addition, the Court drew a distinction between adaptation measures undertaken in Germany as opposed to those the German government might attempt to take elsewhere:

> With regard to people living abroad, the German state would not have the same options at its disposal for taking any additional protective action. Given the limits of German sovereignty under international law, it is practically impossible for the German state to afford protection to people living abroad by implementing adaptation measures there. Rather it is the task of the states concerned to select and implement the necessary measures.[13]

While this reading of international law is certainly correct, it leaves the question open as to whether, if Nepal, Bangladesh, and other states harmed by German GHG emissions were to demand assistance in the form of adaptation measures or otherwise, Germany would have a legal obligation to provide it.[14]

8.2.1.2 Extraterritorial Judicial Orders

Milieudefensie,[15] handed down by the Hague District Court in 2021, illustrates a different kind of extraterritorial issue. In the aftermath of *Urgenda*, a group of civil society organisations filed suit against Royal Dutch Shell (RDS), a Dutch-based multinational corporation. The District Court ruled in favour of the plaintiffs and ordered a 45 per cent reduction of the company's GHG emissions by 2030 against 2019 levels.

In some respects, *Milieudefensie* is a classic 'domestic' case. The plaintiffs consisted of several Dutch civil society organisations, while the court excluded ActionAid (an international non-governmental organisation) from the proceedings on the grounds that its activities were not wholly geared toward Dutch citizens and interests. The court explained its position:

[12] ibid [132].
[13] ibid [178].
[14] This obligation exists in principle under Article 4(4) of the United Nations Framework Convention on Climate Change. See United Nations Framework Convention on Climate Change (entered into force 19 June 1993) 1771 UNTS 107 (UNFCCC) art 4(4).
[15] *Milieudefensie v Royal Dutch Shell* [2021] ECLR:NL: RBDHA: 2021:5339 (District Court of the Hague).

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> The court is of the opinion that the interests of current and future generations of the world's population, as served principally with the class actions, is not suitable for bundling. Although the entire world population is served by curbing dangerous climate change, there are huge differences in the time and manner in which the global population at various locations will be affected by global warming caused by CO_2 emissions. Therefore, this principal interest does not meet the requirement of 'similar interest' under [Dutch law].[16]

In addition to the Dutch claimants, the defendant, RDS, is a Dutch-based multinational corporation. Thus, all of the parties involved are Dutch. This raises the question of whether the court would have arrived at a similar result if suit had also been brought against a foreign corporation, such as Total (France) or Exxon (US), two oil companies that conduct a considerable amount of business in the Netherlands and elsewhere.

Leaving this issue aside, for the purposes of our present discussion, the most noteworthy aspect of this case is that the court's order applied not only to RDS's operations within the Netherlands but the company's entire worldwide operations. Furthermore, the order applied not only to RDS's own emissions, but the emissions from the use by other entities of the oil RDS produces. The ruling therefore raises the additional question of whether the Dutch District Court – or any domestic court for that matter – can monitor and enforce a decree with such extraterritorial applications.

8.2.1.3 Extraterritorial GHG Emissions

Arctic Oil,[17] decided by the Norwegian Supreme Court in late December 2020, presents yet another type of extraterritorial issue. The plaintiffs consisted of various environmental groups challenging oil drilling licences that had been issued by the Norwegian government in 2013 on the grounds that such actions violated Article 112(1) of the Norwegian Constitution, which provides: 'Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.' By way of background, Norway's GHG emissions, at least domestically, are relatively small.[18] In addition, under the Norwegian Climate Act of 2017, the government is legally obligated to achieve a 40 per cent reduction of GHG emissions by the year 2030. On the other hand, as the third largest exporter of

[16] ibid [4.2.3].

[17] *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020) Case no 20-051052SIV-HRET (Norwegian Supreme Court) (*People v Arctic Oil*).

[18] See generally Christina Voigt, 'The First Climate Change Judgment before the Norwegian Supreme Court: Aligning Law with *Politics*' (2021) 33 JEL 697.

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natural gas and the fifteenth largest oil exporter, Norway's GHG emission footprint is enormous, and it is estimated that emissions resulting from exported petroleum are 95 *per cent higher* than territorial emissions in Norway.[19]

The Oslo District Court sided with the government Ministry on the grounds that the national Parliament had considered, but rejected, several proposals to review the previous licensing decision in light of Norway's accession to the 2015 Paris Agreement.[20] According to the District Court, the involvement of the Parliament was sufficient to indicate that the constitutional duty to protect environmental rights had been fulfilled, holding that '[e]missions of CO_2 abroad from oil and gas exported from Norway are irrelevant when assessing whether the Decision entails a violation of Article 112'.[21]

The plaintiffs appealed the decision to the Court of Appeals, arguing that the District Court had interpreted Article 112 of the Constitution too narrowly. Finding that Norway is only responsible for GHG emissions emitted on Norwegian territory, they argued, wrongly limits the territorial scope of the government's duty to guarantee the right to a healthy environment. The Court of Appeals upheld the District Court's ruling,[22] although it interpreted Article 112 as requiring that environmental damage from exported petroleum products be considered. However, the Court of Appeals held that the granting of exploration licences, by itself, will not necessarily lead to an increase of GHG emissions.

This ruling was appealed to the Norwegian Supreme Court where the plaintiffs added to their previous complaint that the granting of these licences would also violate the right to life (Article 2) and the right to respect for private and family life (Article 8) of the European Convention on Human Rights (ECHR), which had been the basis of the Dutch Supreme Court's ruling in *Urgenda*. Although the Norwegian Supreme Court readily recognised the severe nature of climate change and acknowledged that Article 112 protects citizens from environmental and climate harms, it also viewed the role of the judiciary as being quite limited.

In terms of the geographic scope of Article 112, the Supreme Court took what might best be described as a 'quasi-territorial' approach:

> A final question is whether it is relevant to consider greenhouse gas emissions and effects outside Norway. Is it only emissions and effects on Norwegian territories that are relevant under Article 112 of the Constitution, or must the assessment also include emissions and effects in other countries? Article 112 does not provide general protection against actions and effects outside the realm. However, if Norway is

[19] *People v Arctic Oil* (n 17) [155].

[20] *Greenpeace Nordic Association v Ministry of Petroleum and Energy* Case (2018) Case no 16-166674TVI-OTIR/06 (Oslo District Court) (*People v Arctic Oil District Court*).

[21] ibid [20].

[22] *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020) Case no 18-060499ASD-BORG/03 (Borgarting Court of Appeal) (*People v Arctic Oil Court of Appeal*).

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> affected by activities taking place abroad that Norwegian authorities may influence directly on or take measures against, this must also be relevant to the application of Article 112. An example is combustion of Norwegian-produced oil or gas abroad, when this causes harm also in Norway.[23]

And later: 'When it comes to greenhouse gas emissions from combustion abroad after Norwegian petroleum export, I believe one must accept that the Storting and the Government build their Norwegian climate policy on the division of responsibilities between states in accordance with international agreements. Here, the clear principle is that each state is responsible for combustion on its own territory.'[24] The Norwegian Supreme Court's narrow interpretation of their extraterritorial obligations is a setback for climate litigation in Norway, but jurisprudence from other European states has shown the possibilities for a more global approach to emissions, even on the national level. This section has presented examples of cases in which domestic courts addressed various extraterritorial issues related to climate change. *Neubauer* dealt with the inclusion of foreign plaintiffs and *Milieudefensie* with the extraterritorial application of the judicial order. Finally, *Arctic Oil* addressed the issue of whether a government was obligated to protect against environmental harms from oil and gas produced domestically but which would be burned in other lands. Although the rulings differ in their interpretations, the courts, particularly in *Milieudefensie*, have opened the door to more inclusive consideration of what constitutes a state's extraterritorial obligations.

8.2.2 *Regional*

The 2017 Advisory Opinion by the IACtHR has already achieved landmark status.[25] The Advisory Opinion resulted from a case concerning various construction projects in wetland areas across Colombia that would have posed a serious environmental impact on the Wider Caribbean Region. Colombia, in its request for the opinion, suggested that 'this problem is of interest not only to the States of the Wider Caribbean Region whose coastal and insular population may be directly affected by the environmental damage suffered by this region, but also to the international community'.[26] The Court responded by noting that 'this Opinion constitutes one of the first opportunities that the Court has had to refer extensively to the State obligations arising from the need to protect the environment under the American Convention'.[27]

[23] *People v Arctic Oil* (n 17) [149].
[24] ibid [159].
[25] *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (IACtHR OC-23/17).
[26] ibid [9].
[27] ibid [46].

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The essential issue addressed by the Court is the geographic scope of states' human rights obligations. Article 1 of the American Convention on Human Rights provides:

> The States Parties to this Convention 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, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[28]

Unlike the European Court of Human Rights (ECtHR), which has equated 'jurisdiction' with 'territory', the IACtHR unequivocally took the position that the two are not coterminous.

> 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.[29]

Applying this principle to environmental harm, the Court ruled that:

> In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage. That said, not every negative impact gives rise to this responsibility…[30]

The Court then outlined an approach to jurisdiction that is not purely based on geographic boundaries:

> Accordingly, it can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority. It is important to stress that this obligation

[28] American Convention on Human Rights (entered into force 18 July 1978) 1144 UNTS 123 (emphasis added).
[29] IACtHR OC-23/17 (n 25) [74].
[30] ibid [102].

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> does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction, even if the action which caused this damage is not prohibited by international law. That said, there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control.[31]

Thus, rather than defining the limits of a state's jurisdiction by its physical borders, the IACtHR allows a state's actions to determine the extent of jurisdiction. If a state's actions or omissions cause harm that impedes the enjoyment of human rights of people in another territory, that original state is found to have effective control over those people and is therefore considered to exercise jurisdiction over them.

The importance of such an extraterritorial interpretation of jurisdiction cannot be overstated with regard to climate litigation. It should be noted that the IACtHR's Advisory Opinion comes in contrast to the approach taken by the ECtHR. As the Committee on the Rights of the Child (CRC) noted in *Sacchi et al v Argentina et al*, discussed later, the approaches may not be compatible, and the IACtHR's approach to jurisdiction seems the most suitable for addressing climate-related human rights harm.[32] Similar to the American Convention, the ECHR references 'jurisdiction' but not 'territory'. Article 1 of the ECHR provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [the Convention]'.[33] The original draft of Article 1 did include the term 'territory', but this was removed from the final draft.

Prior to 2001, both the European Commission for Human Rights and the ECtHR had interpreted the Convention in an extraterritorial fashion.[34] However, beginning with the ECtHR's ruling in *Bankovic et al v Belgium et al*,[35] the European Court has given the Convention a 'territorial'– or what it has described as a 'primarily'[36] or 'essentially'[37] territorial – interpretation. Under this approach, the Convention is intended to only protect those within the territorial borders of the contracting states. At the same time, the ECtHR has extended the protections of the Convention to

[31] ibid [103].

[32] UN Committee on the Rights of the Child, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning Communication No 104/2019', UN Doc CRC/C/88/D/104/2019 (*Sacchi*) [10.7].

[33] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 4 Nov 1950) 213 UNTS 222 (European Convention on Human Rights).

[34] For an extensive history see generally Erik Roxstrom and others, 'The NATO Bombing Case (Bankovic et al v Belgium et al) and the Limits of Western Human Rights Protection' (2005) 23 Boston University International Law Journal 55.

[35] *Bankovic et al v Belgium et al* App no 52207/99 (ECtHR, 21 December 2001).

[36] ibid [59].

[37] ibid [61], [63], and [67].

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non-contracting states in two circumstances. First, when agents of a European state operating outside of the territorial borders of that state exercise some degree of personal control over a foreign national. Second, when one of the European powers is exercising 'effective control' over some portion of the land mass of a foreign state. The ECtHR's territorial interpretation in *Bankovic* and in subsequent cases faced a great deal of criticism, including from within the court's own ranks, denouncing the rulings as unprogressive and inconsistent.[38] Although the court has begun returning to their pre-*Bankovic* interpretation, the IACtHR remains ahead of the European court in clearly outlining extraterritorial obligations.

The IACtHR explained its divergence in interpretation from ECtHR case law by underscoring how climate change litigation differs from the kinds of extraterritorial cases taken up by its European counterpart. Cases before the ECtHR tend to involve 'military action or actions by State security forces that indicate "control", "power" or "authority" in the execution of the extraterritorial conduct'.[39] Contrasting these cases with the environmental issue before it, the IACtHR stated 'these are not the situations described by the requesting State and do not correspond to the specific context of environmental obligations referred to in the request for an advisory opinion'.[40]

The IACtHR Advisory Opinion already has played an important role in the climate change debate as evidenced by the *Sacchi* decision issued by the United Nations (UN) CRC, which will be discussed later. Whether it will also serve as a guiding precedent if and when other regional adjudicatory bodies take this issue up remains to be seen.

8.2.3 *International*

To date, the ICJ has not issued a ruling on climate change specifically. However, in dealing with transnational environmental cases it has reinforced the customary law principle that one state is not to use its territory to bring about harm to some other state. An example of the Court's jurisprudence on this matter was *Pulp Mills*,[41] which involved a dispute between Argentina and Uruguay over Uruguay's decision to build a pulp-processing plant on the river Uruguay. Citing two of its landmark decisions, the ICJ held that:

> …the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom v Albania)*). A State is thus obliged to use all the

[38] *Al-Skeini and Others v UK* App no 55721/07 (ECtHR, 7 July 2011) (Concurring opinion of Judge Bonello).
[39] IACtHR OC-23/17 (n 25) [80].
[40] ibid.
[41] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14.

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> means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment' (*Legality of the Threat or Use of nuclear weapons*, Advisory Opinion).[42]

In 2018, the ICJ reaffirmed the principle of transboundary harm in its first environmental compensation claim, *Costa Rica v Nicaragua*.[43] The case originated from a territorial dispute involving a three-kilometre area of wetlands in the border area between the two countries. In 2015, the Court had decided the sovereignty question in favour of Costa Rica, thereby rendering Nicaragua's presence on this land unlawful, giving rise to Costa Rica's claims to reparations. When the two countries were not able to reach agreement on this matter, the issue was brought before the Court.

Two aspects of this case are particularly noteworthy with regard to climate change litigation. One involves the lack of certainty in determining damages, although this did not deter the ICJ: 'In respect of the valuation of damage, the Court recalls that the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage'.[44]

The second issue involves causation. The Court reaffirmed the principle that there must be a causal link between the wrongful act and the injury suffered,[45] and it also acknowledged the inherent problems in environmental damage claims due to the myriad of concurrent causes as well as the lack of scientific certainty in establishing the necessary causal link.[46] These caveats notwithstanding, the ICJ proceeded to issue a series of rulings in favour of Costa Rica, thus reaffirming the principle that a state is violating international law when it causes environmental harm in some other state.

8.3 EMERGING BEST PRACTICES

As noted earlier, one of the biggest hurdles facing judges in this area is the disjuncture between climate change, which on one hand is widely recognised as a global phenomenon, and law that so often has been interpreted and applied in a territorial fashion, on the other. This chapter, however, identifies four emerging best practices that could serve to reconcile law with the global reality of climate change: 1) the growing recognition of extraterritorial obligations; 2) the issue of standing,

[42] ibid [101].
[43] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica) [2018] ICJ Rep 15.
[44] ibid [35].
[45] ibid [32].
[46] ibid [34].

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especially the inclusion of more victims' voices; 3) holding multinational corporations responsible; and 4) establishing greater accountability for the production of GHG emissions.

8.3.1 *The Growing Recognition of Extraterritorial Obligations*

Although human rights are declared to be 'universal', the obligation to protect and enforce these rights has in large part been territorially based. One of the more telling examples of this was a country study of Sweden conducted by Paul Hunt in his capacity as the Special Rapporteur on the Right to Health.[47] Sweden has long been recognised as one of the most 'generous' countries in the world in terms of the amount of foreign aid it provides per capita. However, when Hunt asked government officials whether Sweden, as a state party to the International Covenant on Economic, Social and Cultural Rights, particularly in light of the 'international assistance and cooperation' language in the treaty, was legally obligated to provide foreign aid, government officials demurred. In his report, Hunt took strong exception to this reading of human rights law: 'If there is no legal obligation underpinning the human rights responsibility of international assistance and cooperation, inescapably all international assistance and cooperation is based fundamentally upon charity. While such a position might have been tenable 100 years ago, it is unacceptable in the twenty-first century.'[48] Despite the resistance of states to acknowledge their human rights obligations outside their own national borders, the 'territorial' interpretation of international human rights law is increasingly being challenged, if not discarded altogether. The 2017 IACtHR Advisory Opinion is a particularly salient example, where the Court held that a state that brings about harm to individuals in other lands is thereby exercising 'jurisdiction' over these individuals.

Similarly, the African Commission on Human and People's Rights has interpreted the provision relating to the right to life in the African Charter on Human and People's 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 reasonability be foreseen to result in an unlawful deprivation of life.[49]

[47] OHCHR, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (2015) UN Doc A/HRC/29/33.

[48] ibid [28].

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

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The UN treaty bodies have added their own authoritative interpretation of international human rights law as well.[50] The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 24 states 'The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories'.[51] More recently, in October 2018, the CESCR released a statement on climate change affirming that states parties are required to respect, protect, and fulfil all human rights for all people and that '[t]hey owe such duties not only to their own populations, but also to populations outside their territories, consistent with … the [UN] Charter'.[52]

Similarly, the Human Rights Committee (HRC) it its General Comment 36 (Right to Life) interpreted the term 'jurisdiction' in Article 2 of the ICCPR 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 [right to life] of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment 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.[53]

In terms of climate change more specifically, in 2019 five UN human rights treaty bodies – responsible for, respectively, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the ICESCR – issued the following joint statement: 'State parties have obligations, including extra-territorial obligations, to respect, protect and fulfill 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

[50] This, of course, is not meant to slight the significant contributions made by a host of UN Special Rapporteurs regarding the geographic scope of international human rights law.

[51] UN Committee on Economic, Social and Cultural Rights, 'General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24 (CESCR General Comment No 24) [29].

[52] UN Committee on Economic, Social and Cultural Rights, 'Climate Change and the International Covenant on Economic, Social and Cultural Rights' (8 October 2018) <www.ohchr.org/en/statements/2018/10/committee-releases-statement-climate-change-and-covenant> accessed 24 February 2024.

[53] UN Human Rights Committee, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 (CCPR General Comment No 36) [63].

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to such harm, could constitute a violation of States' human rights obligations.'[54] Finally, special mention should be made of the CRC's extensive analysis of the scope of states' human rights obligations in its communication in *Sacchi*. The case involved sixteen children from five different states claiming that the respondents were responsible for perpetuating climate change through their own inaction and in so doing had acted in violation of the Convention on the Rights of the Child. Of particular note, the CRC adopted wholesale the IACtHR's interpretation of the term 'jurisdiction':

> Having considered the above, the Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights in its Advisory Opinion of the Environment and Human Rights. This implies that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question. The Committee further considers that […] the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction.[55]

Despite the CRC's expansive view of states' human rights obligations, the Committee ultimately ruled that the communication was inadmissible on the grounds that the children had not exhausted domestic remedies in the relevant countries.

8.3.2 *Standing*

It is commonplace to refer to climate change as a global phenomenon in the sense that, in one manner or another, all states contribute to this problem. Yet, as noted by the UN Special Rapporteur on Human Rights and the Environment, three-quarters of global emissions are produced in only twenty states.[56] Unfortunately, those states that produce the lowest amounts of GHG emissions, while oftentimes bearing the brunt of the harms caused by climate change, typically have no seat at the table, both in political negotiations and in the judicial treatment of the issue.

In that vein, one of the emerging best practices is that standing requirements are being loosened, at least to some degree. Because of this, new voices (and new

[54] OHCHR, 'Joint Statement on "Human Rights and Climate Change"' (16 September 2019) <www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and> accessed 24 February 2024.

[55] *Sacchi* (n 32) [10.7].

[56] OHCHR, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2019) UN Doc A/74/161, 14.

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generations) are beginning to be heard, and even more importantly, more avenues for redress are being opened up as well. In the *Neubauer* case, the German plaintiffs were joined by litigants from Nepal and Bangladesh, and although the nature of the claim presented allowed the court to differentiate between these two groups, the more important consideration is that foreign nationals from the Global South were granted standing to pursue a claim against a state from the Global North.

Sacchi is another case in point. This communication to the CRC was made by sixteen children from somewhat geographically dispersed countries: Argentina, Brazil, France, Germany, and Turkey. In their communication, the children all claimed to be within the 'jurisdiction' of each of the other four states, which was not contested by the CRC. This raises the question that if these children were within the 'jurisdiction' of each of the other four states, there would be no reason why each one would not also be within the 'jurisdiction' of every country that produces GHG emissions – which is to say every country in the world.

The IACtHR's expansive reading of the term 'jurisdiction' in its 2017 Advisory Opinion should also allow more voices to be heard and more states to be held accountable. Although the biggest shortcoming is that such claims can currently only be filed against other state parties to the American Convention, the trend of emerging case law suggests that more courts will be adopting similarly expansive views of jurisdiction.

8.3.3 *Private Actors*

Under international human rights law, states have three different sets of obligations. One is the obligation to *respect* human rights, which means that a state is not to violate human rights principles itself. The second is an obligation to *protect* human rights, which means that a state also has an obligation to ensure that private actors, such as multinational corporations, do not violate human rights standards. Finally, states have an obligation to *fulfil* human rights, which means that if individuals cannot protect their own human rights, the state has an obligation to offer such protection.

Within a state's domestic realm, such obligations largely go unquestioned. However, the same is not true outside a state's national borders. An issue that has been especially contentious is whether a state's duty to protect extends beyond its territorial borders. This issue has commonly been raised in the context of harms caused by the actions or omissions of multinational corporations. In a situation where the 'host' state is either unable or unwilling to regulate the harmful behaviour of the corporation, does the 'home' state have a legal obligation to do so in its stead?

The UN Guiding Principles on Business and Human Rights (UNGP)[57] has taken the position that 'States are not generally required under international human rights

[57] OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04.

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law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'.

The Maastricht ETO Principles,[58] however, have a much different interpretation of existing international law. According to these principles, not only does the 'home' state have a duty to act in such situations, but so do other states that can exert a 'decisive influence' over egregious corporate behaviour.

Although it is not possible to establish which of these two presents a sounder reading of international law, the UN treaty bodies – including the ICESCR,[59] the Committee interpreting the International Convention on the Elimination of All forms of Racial Discrimination (CERD),[60] and the CRC[61] – are increasingly willing to recognise that a state's obligation to protect extends outside its national borders. For example, in General Comment 36, the HRC determined that states' obligations include regulation of activities by private actors, noting:

> States 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 [right to life], taking due account of related international standards of corporate responsibility, and of the right of victims to obtain an effective remedy.[62]

A slightly different question is whether multinational corporations have human rights obligations that are separate and distinct from the obligations of states. In *Milieudefensie*, the District Court relied extensively on the UNGP, particularly the second pillar: the obligation of corporations to 'respect' human rights. The Court explained the difference between state and non-state responsibilities:

> The differences between states and businesses RDS emphasizes are expressed in the UNGP in the different responsibilities for states and businesses, between which no inevitable tension needs to exist – as follows from the quotation given

[58] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (28 September 2011) <www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf> accessed 24 February 2024.

[59] CESCR General Comment No 24 (n 51) [29]; UN Committee on Economic, Social and Cultural Rights, 'General Comment No 15 (2003) on The Right to Water (Arts 11 and 12 of the Covenant)' (20 January 2003) UN Doc E/C.12/2002/11 (CESCR General Comment No 15) [31].

[60] CERD Committee, 'Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America' (2008) UN Doc CERD/C/USA/CO/6 [30]; CERD Committee, Concluding Observations on the Combined Nineteenth and Twentieth Reports of Norway' (2011) UN Doc CERD/C/NOR/CO/19-20 [17].

[61] Committee on the Rights of the Child, 'General Comment No 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (17 April 2013) UN Doc CRC/C/GC/16 [43].

[62] CCPR General Comment No 36 (n 53) [22].

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> by RDS. The responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfill their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Therefore, it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility.[63]

The Court then underscored what a global standard of conduct for businesses looks like:

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts. It is a global standard of expected conduct for all businesses wherever they operate…. [T]his responsibility of businesses exists independently of states' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. It is not an optional responsibility for companies. It applies everywhere, regardless of the local legal context …[64]

The importance of *Milieudefensie* in the context of addressing climate change cannot be overstated. One of the major shortcomings of climate change litigation to date has been its piecemeal approach. As important as 'domestic' cases such as *Urgenda* happen to be, ultimately, they only address the climate change problem in one state. In contrast, the judicial order in a case like *Milieudefensie* applies not only to RDS's domestic operations but to the entirety of its worldwide operations, and not only its own emissions but those from the use of its product by other entities.

The final point relates to the National Inquiry on Climate Change, a report issued by the Commission on Human Rights of the Philippines (CHRP) in 2022.[65] Not only did the Commission address the contributions to climate change of both state and non-state actors, it also included in the scope of its work foreign corporations that did not operate within the territorial boundaries of the Philippines, but whose overseas operations were nevertheless having a harmful effect on Filipino nationals. To quote at some length from the Commission report:

> Many of the respondent oil companies also raised the issue of *territoriality* – they questioned the power of our Commission to inquire into their activities, since they did not operate within the territory of the Philippines. Stripped of legal

[63] *Milieudefensie* (n 15) [4.4.13].
[64] ibid [4.4.15].
[65] Commission on Human Rights of the Philippines, 'National Inquiry on Climate Change Report' (CHRP December 2022).

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> niceties, the contention was that our Commission, or, indeed, the Philippine State, in general, may only inquire into the conduct of corporate entities operating within Philippine territory, even if the corporations' operations outside our territory were negatively impacting the rights and lives of our people. We cannot accept such a proposition.[66]

The report is particularly notable for the extraterritorial perspective that the CHRP champions. Under this progressive approach, protecting the human rights of Philippine citizens would take priority over rigid 'technicalities' and eventually become international law:

> The CHRP is mandated by the Philippine Constitution with the duty to investigate and inquire into allegations of human rights violations suffering by our people. Our Commission decides on how it must perform its constitutional duty. And the performance of this duty is neither constrained by nor anchored on the principle of territoriality alone. The challenge of NHRIs [National Human Rights Institutions] is to test boundaries and create new paths; to be bold and creative, instead of timid and docile; to be more idealistic, or less pragmatic; to promote soft laws into becoming hard laws; to see beyond technicalities and establish guiding principles that can later become binding treaties; in sum, to set the bar of human rights protection to higher standards.[67]

8.3.4 *Establishing Greater Accountability for the Production of GHG Emissions*

The final emerging practice is the growing understanding that a purely 'domestic' approach to climate change will only address a small segment of what truly is a global problem. One issue involves how contributions to GHG emissions are to be measured. Is it simply the GHG emissions that are produced within a state? Or, instead, should courts take a much broader approach?

This issue was raised directly in the *Arctic Oil* litigation, bringing forth a variety of judicial responses, none of which are satisfactory. The Oslo District Court took a 'territorial' approach, holding that although GHG emissions from exported oil and gas are some ninety-five times greater than that which are produced domestically, the government's only responsibility relates to emissions produced within Norway's territorial borders. The Court of Appeals took the opposite position. However, it ruled that it would be premature to consider extraterritorial GHG emissions from the granting of a drilling licence alone.

The Supreme Court attempted to split the difference by holding that the Norwegian government's obligations generally only extend to the national borders

[66] ibid [4].
[67] ibid [4]–[5].

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of that country, but that it also had obligations regarding extraterritorial emissions that would have a negative effect on Norwegian citizens. One problem with this is that it would be difficult, if not impossible, to determine when this would arise. However, there is an even bigger problem, which is that *all* GHG emissions will have a negative effect on Norwegian citizens – and the citizens of all other states as well. The larger point is that Norway's domestic GHG emissions do not come anywhere close to capturing the extent to which that country is contributing to climate change, and any judicial treatment of this issue must recognise and deal with this.

Fortunately, other institutions have begun to take a broader perspective. The Human Rights Commission of the Philippines not only concerned itself with GHG emissions from corporations operating abroad, but it has also underscored the importance of considering the role that a host of actors, including financiers and insurance companies, play in supporting environmentally harmful projects.[68]

As mentioned earlier, the judicial decree in *Milieudefensie* was extraordinarily sweeping in that it applied not only to RDS's domestic operations, but those it was engaged in outside the Netherlands as well. This approach challenges the unstated assumption that RDS's domestic GHG emissions are somehow different than those it produces outside the Netherlands. But it also challenges the assumption that the Dutch government can only regulate RDS's domestic operations.[69]

Finally, in *Duarte Agostinho and Others v Portugal and Others*, which is currently before the ECtHR, the children bringing the case against their own state (Portugal) as well as thirty-two states parties to the European Convention argue that there are four aspects of GHG emissions and each needs to be considered: 1) domestic production; 2) GHG emissions from exports as well as 3) imports, and finally, 4) GHG emissions due to overseas financial investments. Cases like these can serve as a starting point for future litigation emphasising the need for governments and national courts to consider all emissions that may result from an action, even if those emissions are not produced within the state's borders.

8.4 REPLICABILITY

The best emerging practices are certainly replicable. For example, the ECtHR (as well as other regional adjudicatory bodies) could easily recognise the unique nature of climate change and interpret the term 'jurisdiction' in Article 1 of the European Convention as applying extraterritorially, thereby allowing individuals in one state to pursue an action against one of the other state parties. Yet, even if the Court were

[68] ibid [132].

[69] For a compelling argument that 'home' states have a legal obligation to regulate the foreign operations of its multinational corporations, see Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Cambridge University Press 2019).

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to adopt such a reading in *Agostinho*, it is essential to note that the case was only brought against other state parties to the Convention. What is equally important is understanding that if children in Portugal are within the 'jurisdiction' of the other parties to the European Convention due to the GHG emissions from these states, children living in other parts of the globe are likely to be as well. The same is true of the Inter-American Court. While its Advisory Opinion is certainly a landmark ruling, there is no reason why extraterritorial jurisdiction should only be limited to the state parties to the American Convention.

It is already clear that a case like *Urgenda* is replicable, as similar judgments have now been issued by courts in other countries. While such rulings serve as important precedents, it is also essential to understand the inherent limitation of 'domestic' cases, where citizens of a state are seeking a judicial order limiting GHG emissions by that one country. Although the inclusion of foreign nationals in *Neubauer* is encouraging, what is unclear is how willing other domestic courts will be in entertaining claims brought by foreign nationals. The key is in recognising that the GHG emissions produced in one state can (and will) have a decidedly negative effect on the enjoyment of human rights in other states.

A case like *Milieudefensie* is also replicable. There is nothing that would prevent a French court from hearing a case against Total, a French-based multinational corporation, or a Norwegian court from hearing a case brought against Statoil, and so on. Yet, there is also no reason why domestic courts should only take up cases against domestic corporations. That is, there is no reason why a Dutch court should not also take up a case against 'foreign' corporations such as Total and Exxon as well. These multinational corporations not only produce GHG emissions that are harming Dutch citizens, but both corporations do extensive business in the Netherlands, thus providing a direct jurisdictional link.

One last scenario involves an offshoot of the *Trail Smelter* situation mentioned earlier. However, in this scenario Canada is not bringing a case against the US for the harmful GHG emissions produced in the US (although it could), nor are Canadian citizens bringing a case against the US. Rather, Canadian citizens could bring a case against their own government due to its failure to take action against the US as a way of preventing GHG emissions from entering Canadian airspace.[70]

It should be clear that not only are many of the emerging best practices replicable, but the more important point is that extraterritorial climate change litigation has only started to scratch the surface. The key to all this is to act both efficiently, expeditiously, and fairly. This will only be achieved if as many voices can be heard as possible – while all those responsible for the earth's rapid warming are held to account.

[70] Banda (n 4) lays out various extraterritorial scenarios such as this.

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8.5 CONCLUSION

One of the more noteworthy aspects of the surge in climate change cases over just the past few years is that judges the world over have shown a great willingness to fill the vacuum left by the inadequate policies and practices of domestic and international political actors. On the other hand, as shown in this chapter, courts have struggled with the various extraterritorial elements that raise questions of culpability and responsibility. Given the long history of territorial grounding of law, perhaps climate change litigation will proceed down the same path. It is clear, however, that not only is this an inefficient way of addressing what is inherently a global problem, but one of the biggest shortcomings of such an approach is the great likelihood of creating enormous gaps in protection.

As we have seen here, some courts have recognised the extraterritorial dimension of climate change and issued rulings that reflect it. There is no question that the IACtHR's 2017 Advisory Opinion is a landmark ruling. Much like the call of the various UN treaty bodies, the Court has given an extraterritorial reading to the term 'jurisdiction' in Article 1 of the American Convention. The legal force of the opinion remains limited, however, to the state parties to the Convention, which does not include the US, the second-largest emitter in the world. Likewise, even if the ECtHR rules in favour of the Portuguese children in *Agostinho*, this ruling would only allow a citizen of one European state to proceed with a claim against one of the other states parties to the European Convention. These children could still not bring an action against China or the US, the two largest producers of GHG. The larger lesson, perhaps, is that even regional human rights institutions can be hampered by territorial limitations.

In recognition of this, what would make an enormous difference would be an Advisory Opinion by the International Court of Justice detailing the responsibilities and obligations of all states – and not simply those of a fairly limited number of states.[71] Yet, there are also things that states could do themselves – immediately. The most obvious, of course, is for states to meet their nationally determined contributions under the Paris Agreement. Some governments might do this on their own, but many more will need some form of judicial guidance. Notwithstanding historic rulings such as *Urgenda*, to paraphrase the district court ruling in *Juliana*,[72]

[71] Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 CJIL 639 (arguing that the ICJ is uniquely positioned to address extraterritorial claims).

[72] *Juliana v United States* 947 F.3d 1159 (9th Cir 2020). *Juliana* was a suit brought by Our Children's Trust based on the grounds that the US government's failure to protect present and future generations from climate change resulted in a violation of the United States Constitution. While the district court sided with the plaintiffs, this ruling was overturned on appeal. The plaintiffs have since amended their complaint and the district court has ruled that their case can proceed. *Juliana v United States* No 6:15-cv-01517-AA (District Court of Oregon 2023) (Opinion and Order).

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judges have tended to be much too conservative in climate change cases and the earth has suffered for this. Given the amorphous nature of climate change itself – but also what is at stake – courts should provide a liberal interpretation of both procedural (i.e. standing, exhaustion of domestic remedies) as well as substantive (i.e. causation) requirements. Above all else, it is imperative to acknowledge that climate change is an extraterritorial problem affecting all states and all people in all states. Attempting to deal with this by a 'territorial' interpretation of the law will simply not work.

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