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Workshop programme and abstracts for 2 December 2021: GNHRE Project on Climate Litigation in the Global South: A Transnational Global South Perspective taking place via Zoom

Plenary sessions in green

Breaks in blue

Parallel sessions in orange (to take place in Zoom breakout rooms)

Click on an author names to see the full abstract.

Authors each have 7 minutes to share their thoughts, with the emphasis of each session being to collaborate and develop ideas.

Session details	**Time (NY time)**
Session 1 – *Introductions, the collaborative vision, defining climate litigation, and identifying themes* **Moderators: Melanie Murcott & Maria Antonia Tigre**	8h00 to 8h45
Break	8h45 to 9h00
Session 2(a) – *Climate litigation and strategy in the Global South* Danielle de Andrade Moreira; Carolina de Figueiredo Garrido & Maria Eduarda Segovia Barbosa Neves: *Perspectives for climate litigation in Brazil: traits, strategies, and trends based on the existing legal avenues*	9h00 to 9h30

paved by the recognition of the right to a balanced environment as a fundamental human right Lisa Chamberlain & Melissa Fourie: *Using climate litigation to enable and strengthen other strategies: Examining the work of the Life After Coal campaign in South Africa* **Editors: Sarah Mead & Joana Setzer** **Moderator: Maria Antonia Tigre**	
Session 2(b) – *Climate litigation through the lens of Global South EIA cases* Lydia Omuko-Jung: *Utilizing Environmental Impact Assessment (EIA) to Advance Rights: The Case of Climate Litigation in Africa* Andri G. Wibisana; Fajri Fadhillah & Difa Shafira: *Critical Comments on the First EIA-based Climate litigation in Indonesia* **Editors: Kim Bouwer & Erin Daly** **Moderator: Melanie Murcott**	9h00 to 9h30
Break	9h30 to 9h45
Session 3(a) *Climate litigation as a means to address extraterritorial legal issues* Diogo Andreola Serraglio & Fernanda de Salles Cavedon-Capdeville: *Climate-Induced Migrants in the Spotlight: Towards recognition and Protection Through Climate Litigation* Maria Antonia Tigre: *The 'fair share' of climate mitigation in the Global South: how can climate litigation increase national ambition?* Sol Meckievi: *The Human Rights Cost of the Energy Transition: Taking Extraterritorial Implications of Pro-Climate Policies to Courts?* **Editors: Doug Kysar & Sarah Mead**	9h45 to 10h30

Moderator: Maria Antonia Tigre	
Session 3(b) ***Exploring the potential of human rights to pursue climate justice in the Global South*** Elsabe Boshoff: *The (potential) role of specialized environmental courts and tribunals in climate justice in the Global South* Conrado M. Cornelius: *Rights-Based Climate Change Litigation in Indonesia(?): Prospects and Challenges* Belen Olmos Giupponi & Andrea Lucas Garin: *A Transnational Global Perspective Charting the Effects of Climate Change Litigation in Latin America and the Caribbean: A Global South* Perspective **Editors: Annalisa Savaresi & Francesco Sindico** **Moderator: Melanie Murcott**	9h45 to 10h30
Session 4(a) ***Ecocentric perspectives on climate litigation in the Global South*** Paola Villavicencio-Calzadilla: *Human Rights and Rights of Nature in Climate Litigation: Lessons from Latin America* Fernanda S. Cavedon-Capdeville; María Valeria Berros; Humberto Filpi: *Climate Litigation from the Global South: The ecocentric approach and dialogue framed from Latin America's cases* **Editors: Emily Barritt & Jim May** **Moderator: Maria Antonia Tigre**	10h30 to 11h00
Session 4(b) – ***Feminist perspectives on climate litigation in the Global South*** Natalia Urzola: *Gendering climate change litigation in Latin America: climate justice through an intersectional lens* Dina Lupin: *Resistance, participation and climate change litigation in South Africa*	10h30 to 11h00

Editors: Kim Bouwer & Erin Daly **Moderator: Melanie Murcott**	
Break	11h00 to 11h15
Session 5(a) – *Climate litigation and constitutionalism in the Global South* Doris Uwicyeza Picard: *The South African courts' treatment of the constitutional right to environment in climate change litigation* Maria Daniela de la Rosa: *Human and Constitutional Rights as Grounds of Review for Climate Change Litigation* Lorena Cristina Zenteno Villa: *Can Latin American Courts and Tribunals effectively protect human rights in the climate change crisis?* Clive Vinti & Melanie Murcott: *The 'duty' to consider climate change in South Africa: Analyzing rights-based approaches in case law* Délton Winter de Carvalho: *Climate Constitutionalism as a foundation for climate litigation in Latin America* **Editors: Jim May & Lisa Benjamin** **Moderator: Melanie Murcott**	11h15 to 12h30
Session 5(b) – *The role of regional tribunals and regional instruments in advancing climate litigation* Juan Auz: *The Political Ecology of Climate Remedies: An Inter-American Human Rights System Prognosis* Gastón Medici-Colombo: *The Escazú Agreement contribution to climate change litigation in Latin America: the procedural path to climate justice* Ademola Oluborode Jegede: *Climate litigation under the African Human Rights System: The significance of 'Teitiota' and 'Chiara Sacchi' decisions* Yusra Suedi: *Admissibility challenges in climate change litigation in the African system of Human Rights*	11h15 to 12h30

Editors: Margaretha Wewerinke & Emily Barritt **Moderator: Maria Antonia Tigre**	
Break	12h30 to 12h45
Session 6 – *Closure, thanks, and next steps* **Moderators: Melanie Murcott and Maria Antonia Tigre**	12h45 to 13h00

Session 2(a) – *Climate litigation and strategy in the Global South*

30 minutes 9h00 to 9h30

Editors: Sarah Mead & Joana Setzer

Moderator: Maria Antonia Tigre

1. Danielle de Andrade Moreira; Carolina de Figueiredo Garrido & Maria Eduarda Segovia Barbosa Neves: *Perspectives for climate litigation in Brazil: traits, strategies, and trends based on the existing legal avenues paved by the recognition of the right to a balanced environment as a fundamental human right*

The Brazilian Constitution has a chapter dedicated to the right to an ecologically balanced environment, making it clear that it is a fundamental human right, which encompasses not only the present but also future generations. In addition to the Constitution, Brazil has had a complex legal regime framing environmental issues for more than 40 years, including laws, principles, and case law. This legal framework has supported the development of environmental litigation in the country, considering the legal possibilities for pursuing environmental protection in courts. Therefore, the climate litigation movement in Brazil may take advantage of legal avenues already paved by general environmental litigation.

Taking into account that climate stability is part of the essential core of an ecologically balanced environment, the legal approach to climate must relate to the existing rules on the environment. Even before the growth of climate litigation nationally and globally, some Brazilian cases, which can be regarded as environmental litigation, had already shown some concern about global warming, but usually in a residual or implicit way. It may be considered that these older cases integrate an initial phase of climate litigation in Brazil. Although these cases do not address climate change directly and in depth, they can contribute to fighting the climate crisis.

A new set of cases that address climate in a more explicit, direct, and central manner has increased after 2019. Due to the argumentative lines observed in several cases, it can be said that this movement followed and reacted against the scenario of a brutal dismantling of the Brazilian environmental policy, observed in the same year, as well as the centrality of the concern about the climate crisis both at the international and domestic levels. For this project, we will consider these two different moments of climate litigation in Brazil, aiming

to achieve a definition of climate litigation that suits the specificities of the Brazilian context and express the development of the movement in the country. We aim to show how this definition relates to the climate litigation concept presented by the literature of the movement in the Global South, which includes more incidental and indirect cases compared to the "traditional" definition in the Global North.

Then, we will explore the possibilities of integrating climate change, human rights, and environmental rights in Brazil, mainly due to the Brazilian Constitution and its legal framework. In this effort, advancements in the Brazilian courts and legislative power will be analyzed. We will study how the recognition of the right to a safe and stable climate as a component of the right to an ecologically balanced environment may support climate cases and protect vulnerable communities and future generations concerning climate change impacts.

In order to identify some of the climate change litigation trends in Brazil, we will examine how national climate cases are structured, highlighting the parties in dispute and the types of legal action chosen. We will focus on specificities of the Brazilian climate litigation movement, such as the involvement of political parties, as well as similarities and differences compared to traditional environmental litigation cases in Brazil, such as the centrality of the Brazilian's Public Prosecutor Office as the leading litigator, but also the rise of civil society as a relevant party.

We will briefly present the history of environmental law and environmental litigation in Brazil, stemming from a bibliographical survey of Brazilian doctrine, to understand the development of this area, focusing on its potential to boost the climate litigation movement. In order to establish the main traits, strategies, and trends, the “Brazilian docket” of climate litigation cases will be analyzed, including the aforementioned environmental cases that deal residually or implicitly with climate change – but have implications for the response to the climate crisis. We will compare them to the more recent cases that mobilize climate change more directly and centrally, being these latter cases assembled in a database designed by the research group on Law, Environment and Justice in the Anthropocene (*Direito, Ambiente e Justiça no Antropoceno* – JUMA) of Pontifical Catholic University of Rio de Janeiro Law School (PUC-Rio). We will also conduct a bibliographic survey of the most relevant doctrine on climate litigation in Brazil and in the Global South to identify similarities and differences between the movement at the national and regional levels.

In conclusion, this project aims to analyze the "Brazilian docket" of climate litigation cases and establish traits, strategies, and trends highlighting what can be observed and how it can contribute to the defense of the fundamental human right to an ecologically balanced environment and to a safe and stable climate, for present and future generations. We will emphasize how climate litigation in Brazil is exploring the legal avenues already paved by environmental litigation and the new developments to address the specificities and complexities brought by the climate emergency.

2. Lisa Chamberlain & Melissa Fourie: *Using climate litigation to enable and strengthen other strategies: Examining the work of the Life After Coal campaign in South Africa*

Activists in South Africa have a rich history of using public interest litigation to realise human rights. The use of litigation is nevertheless contested. This contestation has produced rich scholarship discussing how the impact of public interest litigation can, and should, be understood. Building on these debates around the typology of litigation impact, this article will examine the use of litigation by the Life After Coal campaign in the case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) (*Thabametsi case*, also known as *Earthlife Africa*).

With the ultimate goal of reducing greenhouse gas emissions, Life After Coal has been campaigning since 2015 to thwart investment in new coal-fired power in South Africa. They successfully used the *Thabametsi case* to enable and strengthen the use of a variety of other strategies, including protest, media advocacy, economic modelling, and pressure on investors and financial institutions. Although litigation can be painfully slow and resource intensive, in this campaign it was instrumental. Litigation delayed the regulatory approvals required for commercial 'close', which delayed the flow of funds and the start of construction of the Thabametsi project. This, in turn, created time and space for an advocacy campaign to persuade financiers and investors to reconsider and withdraw their backing for the projects (including allowing those players time to negotiate the political impacts of such decisions); to undertake the modelling and research required to back up the advocacy campaigns and litigation; and for clean renewable energy to become so cheap so as to outbid the cost of new coal. This article will document this rare success story and suggest what lessons concerning the use of multiple interweaving strategies it provides for climate activists in the Global South.

Session 2(b) – *Climate litigation through the lens of Global South EIA cases*

30 minutes 9h00 to 9h30

Editors: Kim Bouwer & Erin Daly

Moderator: Melanie Murcott

3. Lydia Omuko-Jung: *Utilizing Environmental Impact Assessment (EIA) to Advance Rights: The Case of Climate Litigation in Africa*

In recognising the need to balance environmental protection and economic development, virtually every state has mandatory environmental impact assessment (EIA) requirements for project development. In the recent past, the discussion has moved to how and to what extent the EIA process can be useful in addressing climate change and many states have gone ahead to use the process as a tool for climate change mitigation. In the African continent, EIA is playing quite an outstanding role in courts – it is prominently being invoked and used in climate litigation. Out of the 11 climate cases filed in domestic and regional courts in Africa, only two have not invoked or applied EIA as a ground for litigation.

With this background, the research aims to analyse the role played by EIA in climate litigation in Africa and its limitation in advancing climate justice. Particularly, it highlights two ways in which EIA has played out in climate litigation in the continent – firstly, by establishing a legal obligation to conduct climate impact assessment and secondly, to protect rights relating to and impacted by climate change.

Through an analysis of decided and pending climate cases, the research will, firstly, address how courts in Africa have established a legal obligation for climate impact assessment as part of EIA. While some jurisdictions have specific statutory provisions requiring climate assessment or consideration in decision-making, most countries in the continent do not have such express statutory requirements. Nevertheless, plaintiffs have argued, and the courts have held, that there exists a legal obligation to undertake climate assessment. The first part will assess the basis of such an obligation and how it has been argued in climate cases in Africa.

Secondly, the research will point out and assess how EIA has been used to promote protection of rights relating to or impacted by climate change. On the one hand, courts have recognised that the failure to (adequately) conduct EIA contributes to violation of fundamental rights. On the other hand, the EIA process has been used by courts as a tool to advance participatory

rights in climate decision-making, including access to information and public consultation on climate change aspects of projects.

Finally, the author recognises that while EIA is an important tool in advancing climate action, there are some limitations, and it raises some questions relating to climate justice. For instance, the duty to conduct climate assessment as interpreted by courts and plaintiffs adds a layer of complexity to the economic development and climate action tension within Africa, which climate litigation in the continent will have to deal with. Additionally, these EIA-based climate cases seem to mainly focus on mitigation, while leaving adaptation to the periphery, which, arguably, should be a priority for African countries. It is also unclear what a "climate assessment" consists of and what would be the basis of determining adequacy of such measures. The paper will conclude by providing some thoughts on the limitations and the climate justice questions arising from the EIA-based climate cases.

4. Andri G. Wibisana; Fajri Fadhillah & Difa Shafira: *Critical Comments on the First EIA-based Climate litigation in Indonesia*

Climate cases have been growing in numbers and identified in various jurisdictions, including Indonesia. On 24 January 2018, a group of local fishermen and Greenpeace Indonesia filed a lawsuit to the Denpasar Administrative Court over an environmental permit issued by the Governor of Bali for a coal-fired power plant in Celukan Bawang [the *environmental permit in Celukan Bawang* case]. The plaintiffs argued that the environmental permit was granted without public participation and an adequate EIA review. They also stated that EIA was not comprehensive due to the failure to study the power plant's potential GHG emissions. Apart from the common problems found in lawsuits in the Indonesian administrative courts, this lawsuit is also the first Indonesian lawsuit to include the issue of climate change in a challenge against an EIA/environmental permit. Unfortunately, the District Administrative Court in Denpasar, the Administrative Court of Appeal in Surabaya, and the Supreme Court rejected the lawsuit based on some procedural reasons, i.e., the plaintiffs' lack of legal standing and the deadline for filing a case in an administrative court. This paper argues that the court was incorrect in interpreting the legal standing by focusing on the absence of plaintiffs' actual losses. The court also took a conservative position in determining the deadline for filing the lawsuit. This paper criticizes the court's failure to look at the issue of climate change addressed by the plaintiffs and argues that by doing so, the court missed a golden opportunity to become one of the few rulings pioneering the discussion of climate change in the EIA study. The court's failure to accurately assess the plaintiffs' interests has prevented it from seriously discussing the substantive issues argued by the plaintiffs, i.e., the arguments on the plant's

potential to emit a huge amount of GHG emissions. The paper also provides comments on the possible impacts of the Indonesian Omnibus Law, which abolishes the environmental permit, to future EIA-based climate litigation in Indonesia.

15 minute break (9h30 to 9h45)

Session 3(a) – *Climate litigation as a means to address extra-territorial legal issues*

45 minutes 9h45 to 10h30

Editors: Doug Kysar & Sarah Mead

Moderator: Maria Antonia Tigre

5. Diogo Andreola Serraglio & Fernanda de Salles Cavedon-Capdeville: *Climate-Induced Migrants in the Spotlight: Towards recognition and Protection Through Climate Litigation*

Based on the linkages between human mobility, climate change and human rights, the study aims to investigate to what extent rights-based climate litigation can be applied as a strategy to enhance the recognition and protection of climate-induced migrants. Through deductive approach and desk review, a brief overview of the main aspects surrounding human mobility in the context of climate change is initially provided. The study then illustrates how the topic has been addressed by International Human Rights Law, with a special focus on the growing acknowledgement of the right to a safe climate, which has been considered a feature of litigation cases related to the human mobility – climate change nexus. Thereafter, states' obligations under human rights treaties and the economic sector's responsibilities aimed at tackling the current climate crisis are presented. These are framed both within the scope of climate-induced migration and climate litigation claims. We then analyze litigation cases linked to the subject that were filed before distinct international, regional and national jurisdictions. We propose a chronology of cases – structured in dimensions – of how population movements as a result of climatic impacts have been discussed through judicial means. The first dimension relates to cases that consider the issue from migration and/or refugee policy and legal frameworks in national courts and later in the United Nations Human Rights Committee (OHCHR). The second dimension emerges with climate litigation claims, involving commitments linked to the climate agenda. In addition to raising (forced) population movements as one of the expected adverse effects of climate change, such cases frequently call upon human rights' arguments. The third dimension – still in an early stage – encompasses

cases centered on climate-induced migrants. Finally, the strengths and limitations of rights-based climate litigation to deal with the issue are highlighted: it is to be seen that the instrument is still partly employed to argue climate-related topics, such as human mobility. To date, generic references to the risk of displacement prevail; nevertheless, strategic and rights-based litigation can facilitate greater visibility of climate-induced migrants by the international community, fostering the development of legal solutions.

6. Maria Antonia Tigre: *The 'fair share' of climate mitigation in the Global South: how can climate litigation increase national ambition?*

Despite the scientific certainty on the devastating effects of climate change on human rights, countries' nationally determined contributions (NDCs) still fall short of the 1.5◦C goal of the Paris Agreement. The target brings a global carbon budget, ideally distributed equitably amongst States. Given the Paris Agreement's "bottom-up approach," States shall establish their share of emission reductions according to their domestic political and economic priorities. NDCs shall progressively increase and reflect the highest possible ambition, respecting the common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (CBDR).

Yet, the meaning of the principle of CBDR on which the obligation to mitigate rests remains vague and heavily contested. States ultimately favor their own interests – with Global South countries often hiding behind the CBDR principle – resulting in insufficient overall mitigation. The principle is cited in 59 NDCs and implicitly in 18. Several Global South countries are at the forefront of reducing GHG emissions despite their insignificant contribution to global GHG emissions. However, the ambition of many others remains highly insufficient.

Against this background, climate litigation is increasingly becoming a powerful tool to hold States accountable for shortcomings in their mitigation efforts. While most cases have been brought in the Global North (i.e., *Urgenda*, *Neubauer,* and *Notre Affairs à Tous*), similar cases have pushed for increased ambition in the Global South. Examples include Colombia (*Future Generations v. Ministry of the Environment and Others*), Brazil (*Six Youths v. Minister of Environment and Others*), Nepal (*Shrestha v. Office of the Prime Minister et al.*), India (*In re Court on its own motion v. State of Himachal Pradesh and others*), and South Korea (*Do-Hyun Kim et al. v. South Korea*). These claims bring into question an overarching question of what constitutes a State's fair share of the global burden of mitigating climate change, especially when they have contributed the least to causing global warming.

The fair share question is at the core of any legal challenge to the adequacy of a State's mitigation efforts. Claims to increase ambition often conflict with issues of climate justice, especially as equity can be interpreted differently at the international and national levels. Diverse perspectives on fairness have resulted in a wide range of self-serving calculations and justifications of national fair shares. Compared to developed countries and their historical contributions, the Global South's role in climate mitigation may appear insignificant.

However, the "drop in the bucket" argument may no longer delay climate action. Each country can significantly contribute to mitigating GHG emissions, contributing to the overall goal. In addressing the fair share question, courts have drawn considerably on the States' international obligations when determining their responsibility under domestic law. Fair share ranges consistent with principles of international environmental law – including cooperation and equity – would offer a benchmark for NDCs to feed into the global stocktake. In addition, such fair ranges can inform climate litigation in which the adequacy of national contributions is at issue.

Through an analysis of favorable decisions and pending claims, this article will discuss how climate litigation advances mitigation efforts in the Global South. Are courts in the Global South addressing the fair share question? How does CBDR play a role in the decisions, especially when the principle is relied upon in NDCs to reduce ambition? How does equity play a role in pending claims, and is the meaning of equity different from that used at the international level? The article will discuss these questions in the context of the evolving field of climate litigation in the Global South.

7. Sol Meckievi: *The Human Rights Cost of the Energy Transition: Taking Extraterritorial Implications of Pro-Climate Policies to Courts?*

Human rights-based climate change litigation has proven important for establishing ambitious climate policy: the environmental implications of GHG emissions and their impacts on individuals have served as a basis to compel States to pursue a more ambitious emissions reduction target. However, not all pro-climate policy is consistent with human rights. The international climate change regime has long advocated for an energy transition that, considering historical responsibilities, assists developing countries in achieving sustainable development while simultaneously helping industrialized countries reduce their emissions. An important part of this effort has resulted in carbon-cutting projects in countries of the Global South. The adverse effects on human rights of some of these projects are now

becoming apparent. From land-grabbing to pollution of water resources, major infrastructure projects may encroach on the most fundamental human rights of local communities.

In contrast to weak climate policies that have attracted much attention, the human rights impacts of pro-climate policy remain under-researched. In practice, the problem is commonly addressed by non-judicial grievance mechanisms, such as the Independent Redress Mechanism of the Green Climate Fund and the Independent Evaluation Unit. However, these mechanisms have been often criticized for their lack of independence and the non-binding nature of their decisions.

The involvement of foreign States and non-state actors, including development agencies and banks, as well as private project implementers, results in a situation of double injustice: not only do those individuals that have contributed the least to climate change suffer their consequences the most, but they also bear the burden of the measures to counteract the problem. In this context, a question arises about the role of international human rights law in providing safeguards to affected individuals. Specifically, what, if any, are the implications of the extraterritorial scope of international human rights law for States obligations to protect individuals abroad from the negative impacts of pro-climate policies?

The answer to this question is not straightforward. International bodies have affirmed that States have an obligation to protect human rights abroad if they exercise 'effective control' over the victim. This 'effective control' is normally understood in terms of 'exercise of physical power and control over the person in question' This affirmation seems to suggest that, in principle, the extraterritorial scope of human rights obligation is not relevant to address transboundary environmental damage. This is because in cases of transboundary environmental damage, the State origin of the damage exercises control over a source of harm but not over the victim, who is located abroad.

However, a broader conception of control, and therefore, jurisdiction, has been recognised by international bodies. In its Advisory Opinion 23-2017, the Inter-American Court of Human Rights affirmed that State control over the source of harm may be sufficient to consider that a situation taking place abroad falls under the jurisdiction of a State. This decision has been influential in recent developments. For instance, based on this reasoning, the UN Committee on the Rights of the Child has found that States can be held responsible for the negative impact of their carbon emissions on the rights of children both within and outside its territory.

Against this backdrop, this contribution investigates the relevance of human rights law as a tool to protect individuals abroad from the negative impacts of pro-climate policies. This problem requires exploring whether financing projects abroad amounts to conduct that

extends State obligations to ensure human rights and, if so, with what implications. In order to do that, Section 1 illustrates the issue in relation to real-life examples emerging from State practice and identifies the rights that are more likely to be affected by these projects. Section 2 examines certain obligations under international human rights law, the UN Framework Convention on Climate Change and the Paris Agreement to determine whether they apply to financing emissions-cutting projects abroad. Section 3 analyses the impact of these obligations on selected issues and explores possible scenarios of responsibility. Section 4 concludes and summarizes the main findings.

Session 3(b) *Exploring the potential of human rights to pursue climate justice in the Global South*

45 minutes 9h45 to 10h30

Editors: Annalisa Savaresi & Francesco Sindico

Moderator: Melanie Murcott

8. Elsabe Boshoff: *The (potential) role of specialized environmental courts and tribunals in climate justice in the Global South*

Specialized environmental courts and tribunals (ECTs) have been established in several countries in the Global South. This paper will consider whether, and if so how, such ECTs can provide people affected by climate change with more efficient and specialized alternatives to the regular court systems. Cases concerning climate change directly and peripherally have been brought before specialized environmental tribunals in India, Kenya and South Africa.

A case before the Indian National Green Tribunal (2014) was considered by the Tribunal *suo moto*, and concerned the impact of "black carbon" from motor vehicles on the retreat of glaciers in the state of Himachal Pradesh. The Tribunal found a violation of several human rights provisions in the Indian Constitution, and issued an order for legislative reform and structural remedies within the state. In Kenya, the *Save Lamu* case (2016) before the National Environmental Tribunal concerned the construction of a coal power plant, and the Tribunal set aside the construction license based on insufficient public participation. The Tribunal found that the environmental impact assessment was incomplete and inadequate in its consideration of climate impacts. In a similar case before the South African Water Tribunal (2020), the Tribunal found in relation to the Khanyisa coal fired power plant that "the authorities had not adequately taken the water and climate related impacts into account

when they issued the water use licence to the project". In both cases, while not directly relying on human rights arguments, the South African and Kenyan Tribunals drew on the right to a clean and healthy environment and found a violation of public participation in environmental processes.

The aim of this paper is two-fold: firstly, to consider the jurisprudence from the identified ECTs, focusing on the cases highlighted above which concern climate change, and also drawing on their jurisprudence more broadly. In addition to reviewing trends regarding plaintiffs and respondents before these ECTs, the analysis will also consider the legal bases of the tribunals' reasoning, the nature of the remedies, and whether there is evidence of judicial environmentalism in the approaches of these ECTs, which are factors that could influence future climate litigation before these bodies. The analysis will include a specific focus on the role of human rights before these bodies and how rights are used to support climate arguments. The paper will consider whether the argument by Rodríguez-Garavito that "the use of human rights norms and strategies characterizes the 'Global South route' to climate litigation", is also applicable in cases before specialist ECTs. In addition to this initial doctrinal analysis, the second part concerns an institutional analysis of these ECTs, looking at the institutional capacity, funding, independence and implementation of decisions of the Kenyan, Indian and South African ECTs. The study will rely on desktop research of primary and secondary sources, including as it relates to the role and possible advantages of ECTs making determinations on environmental matters generally, and in climate justice cases specifically. This is done in order to draw not only key lessons from the specific case studies, but also to make some more generalized comments on the potential benefits of climate cases being brought before ECTs in the Global South. For example, ECTs may have more flexible procedures for hearing cases and for *in situ* investigations, specialized knowledge of climate science, and could help overcome some of the structural burdens faced by climate litigation in the Global South, such as the slow pace of litigation in many countries. Given the importance of adaptation for countries most affected by climate change, including African countries and small island states, special attention will be given to the potential for adaptation cases being heard successfully by these bodies. This study will be relevant to establishing a better grasp of the current role as well as the potential for making use of ECTs for attaining climate justice in the Global South.

9. Conrado M. Cornelius: *Rights-Based Climate Change Litigation in Indonesia(?): Prospects and Challenges*

Trends of climate change litigation in Indonesia can be divided into two types of litigation. The first type is climate change as secondary litigation. The term 'secondary' refers to cases where liability for greenhouse gas emissions is sought under the heading of wildfire and illegal logging torts. (Wibisana & Cornelius, 2020). Another type of climate change litigation that has also recently emerged in Indonesia is an administrative complaint by environmental groups against governmental bodies for issuing environmental licenses without considering climate change impacts in Environmental Impact Assessment (EIA) — which is the prerequisite underlying document for the issuance of an environmental license in Indonesia — in the license issuance process. There has only been one case of this type so far, the *Celukan Bawang* (2018) case, which was unsuccessful. The Court ruled in favor of the defendants, mainly on the lack of evidence regarding the claimed pollution and environmental damage. The lack of evidence regarding the alleged pollution led the Court to conclude that the plaintiffs had no legal interests to file a lawsuit challenging the permit.

The purpose of this article is, however, to inquire about a third potential form of climate change litigation in Indonesia, namely rights-based climate change litigation; which has yet to emerge. Although there has not been a single rights-based climate case in Indonesia, one can nevertheless draw a parallel with other rights-based environmental cases in Indonesia, where plaintiffs have argued their case drawing on the idea of right to a healthy environment, to predict the prospects and challenges for a rights-based climate change litigation in Indonesia.

Unfortunately, the success rate of rights-based arguments in environmental law cases before the Indonesian courts has been rather dismal to date. Butt & Murharjanti (2020) have categorized these unsuccessful cases into the following categories where references to the right to a healthy environment have been mentioned, and the Court has either: 1.) ignored the argument; 2.) acknowledged the right, but not necessarily applied it; 3.) decided that the right is protected through license conditions, even though many license holders have mismanaged and overexploited with apparent impunity; or 4.) used the right to justify criminal punishments towards traditional communities who have been depending on their subsistence from access to forest resources — resources which are now excluded from public access because of private concessions. The reason behind the Indonesian courts' failure to utilize rights-based arguments in environmental cases, according to Butt & Murharjanti, can be explained with reference to how problematic: 1.) the way the right to a healthy environment is expressed in the Indonesian Constitutions; 2.) the political context in which

the Court operates; 3.) the Indonesian courts' judges understanding and familiarity of environmental law; and 4.) the skills of the lawyers who have brought these constitutional claims before Indonesian courts. In light of the challenges to utilizing rights-based arguments in environmental law cases before Indonesian courts, it is expected that the same challenges will also be present to any future rights-based climate change litigation in Indonesia.

Against the reality of rights-based environmental litigation in Indonesia today, this article aims to predict the pessimistic and optimistic scenarios of using rights-based arguments in future climate change litigation cases in Indonesia. Moreover, the potential of using rights-based arguments will be examined across three different select judicial forums, namely civil Court, administrative Court, and constitutional Court.

In a pessimistic scenario, rights-based arguments are most likely to be completely ignored/absent in the Court's reasoning or, when they are present, these arguments will most likely be mere fringes of the main argument of the case. Several reasons can be proposed here to explain such pessimism. First, it is somewhat prevalent amongst Indonesian judges to limit the idea of human rights violation only to the traditional human rights violations contemplated in the Rome Statute (e.g. aggression, genocide, etc.); hence the idea that there could be a human rights violation beyond the this traditional category—for example, from not fulfilling a constitutional duty (i.e. to ensure the enjoyment of a healthy environment)—may be regarded as an alien concept. Second, there is an apparent reluctance, or perhaps obliviousness, amongst Indonesian judges to acknowledge a human rights violation where there has not been an actual injury or where such an injury is not individual and localized.

In an optimistic scenario, this article will argue that rights-based arguments may be useful in cases where plaintiffs seek a regulatory injunction. However, this potential is also, at the same time, its limitation. The range of remedies available to such a strategy is limited to only seeking a regulatory injunction. Additionally, this litigation strategy may only be successful when used against a government as the defendant.

This article is therefore structured as follows. After the introduction, this article will provide a literature review about the relevance and limits of rights-based arguments in an environmental litigation context (Hayward, 2005; May & Daly, 2015; May & Daly, 2018; Turner, et. al., 2019). Following this section, this article will proceed with setting the discussion from the preceding context in the Indonesian context to explain the prospects and challenges of litigating climate change by using rights-based arguments before Indonesian courts. The article then ends with some recommendations and concluding remarks.

10. Belen Olmos Giupponi & Andrea Lucas Garin: *A Transnational Global Perspective Charting the Effects of Climate Change Litigation in Latin America and the Caribbean: A Global South* Perspective

Due to the complexities and interdisciplinary nature of the international climate change legal framework, its effects on domestic legal systems are considerable. National courts are faced with manifold questions, such as determining causation of environmental harm originating in climate change and adopting appropriate reparations. In the absence of a comprehensive legal framework for climate change litigation (CCL), the legal scenario is fragmented, as it comprises a wide range of international and domestic law provisions.

While mainstream international legal literature has focused on the emerging (and always evolving) CCL in developed countries, few studies have addressed climate change litigation in the Global South. There is thus a gap in the literature on CCL in developing countries and, specifically, in Latin America and the Caribbean (LAC) that this article attempts to fill.

The main research questions this article addresses are as follows: What are the available channels and the distinctive features of climate change litigation in LAC? What theories underpin the conception of climate justice in Latin America? What main differences can be observed with regard to CCL in other jurisdictions, if any?

The article examines the distinctive features of CCL in LAC in the light of selected cases to draw conclusions that may be of interest to other developing countries In line with these aims, the article discusses the main barriers in the access to and, also, the opportunities that CCL 2 brings in terms of sources of climate law and, more specifically, climate justice with a focus on LAC.

Notably, the implementation of the climate change regime within the national sphere constitutes a legal conundrum and involves different government levels. Non-compliance with the norms of the international climate legal system (broadly defined) has led to an emerging litigation in several developing countries. This inobservance may be directly related to the cap on CO2 emissions, or may consist of difficulties arising out of the implementation of specific provisions (such as the production of diesel cars), the prevention of a potential environmental harm or the reparation of actual environmental damage.

Interestingly, complaints are submitted in the event of natural disasters or the threat of environmental harm. At this point, it is also worth noticing that a strand of cases in which the protection of human rights granted in national constitutions and international human rights

treaties is invoked as the main cause of action. Remarkably, the protection of the right to life and the right to a healthy environment are frequently argued to be the foundation of the claims. CCL does not operate in a vacuum and, therefore, the interplay with other areas of international law is not infrequent.

At the outset, an important distinction to draw relates to the difference between climate change litigation and climate justice. This distinction is not minor, particularly in the developing world. Whereas climate change litigation encompasses all the different procedural avenues to address climate change-related environmental damage, climate justice refers to the outcome of the process, i.e. to achieve a fair outcome.

The main goal in this article is to raise questions for the current debate and the future development of climate change law as a discipline. In this spirit, the author analyses the emergence of a transnational climate change legal regime from a bottom-up approach which 3 includes climate change litigation cases. Therefore, the arguments proceed in three parts. First, the article discusses the conceptual underpinnings and recent developments in climate change litigation. Second, it looks into the challenges climate change litigation bring for the national judge in LAC. Third, the effects of climate change litigation in LAC citing relevant cases are examined from a comparative law perspective. Finally, the article draws some conclusions from the previous analysis.

No break

Session 4(a) – *Ecocentric perspectives on climate litigation in the Global South*

30 minutes 10h30 to 11h00

Editors: Emily Barritt & Jim May

Moderator: Maria Antonia Tigre

11. Paola Villavicencio-Calzadilla: *Human Rights and Rights of Nature in Climate Litigation: Lessons from Latin America*

As in other regions of the Global South, climate litigation is beginning to take hold in Latin American jurisdictions. In fact, out of a total of 58 cases identified in different Global South countries by May 2021, the majority (32) were filed in Latin America.

In this presentation, attention will be given to those climate-related cases in Latin America that challenge traditional legal paradigms by promoting the protection of the rights of present

and future generations and of nature at the same time. These cases – some already decided and others still pending – are primarily brought before national courts by Latin American children and youths who are suffering or are expected to suffer the most severe impacts of climate change. Using human rights arguments, plaintiffs are challenging the government's inaction to address climate change and its key contributors – such as deforestation – and are requesting the protection of their fundamental rights, including the right to a healthy environment, and those of future generations that are being violated or threatened by the climate crisis. Furthermore, in these climate cases the anthropocentric orientation of rights is also confronted. Thus, on the basis of an ecocentric perspective that recognises the intrinsic value of all living organisms and their natural environment, the legal status of nature and her non-human elements as rights-holders is being invoked by both plaintiffs and courts.

For instance, in April 2018, a group of 25 Colombian children and youths filed a direct constitutional complaint (*acción de tutela*), also on behalf of future generations, against the Colombian government. The plaintiffs argued that the government's failure to control the accelerated deforestation of the Amazon rainforest – which rose by 44% between 2015 and 2016 and significantly contributes to an increase in CO2 emissions – and protect it for present and future generations jeopardises their future and constitutes a violation of their fundamental rights as well as of those of future generations. The Colombian Supreme Court agreed with the young plaintiffs. Basing its judgment on the principle of solidarity towards 'others', it recognised that deforestation and the environmental damage caused to the Colombian Amazon were affecting the rights of the claimants and of future generations. In addition, using an ecocentric reasoning, the Court granted subjective rights to the entire Colombian Amazon region and ordered the government to take significant steps to reduce deforestation and GHG emissions. This case has already inspired similar litigation in other countries of the region, including Argentina and Peru.

While these cases arise within each specific country's socio-legal and cultural context, they are raising interesting issues, such as the use of an ecocentric view in facing climate change, which may inform current debates on climate litigation in the Global South (and elsewhere).

12. Fernanda S. Cavedon-Capdeville; María Valeria Berros; Humberto Filpi: *Climate Litigation from the Global South: The ecocentric approach and dialogue framed from Latin America's cases*

Despite being a global phenomenon, in recent years, the approaches and arguments raised in climate cases from the Global South have attracted increasing attention in the study of climate litigation. In this sense, some specific and characteristic avenues based in human rights arguments, raised from Latin American context, could stand out. This region exemplifies historical issues common within the Global South, such overcoming economic inequalities, barriers towards integration and participation in a socially plural and diverse society and mitigating high rates of deforestation and other environmental damage. Latin America provides some interesting ways to confront the effects and causes of climate change combined to necessitate efforts to avert the current biodiversity loss, based on the protection of ecosystems. The central role of these areas, as huge reservoirs and carbon sinks, besides the importance of their integrity to several endangered and endemic species, as well as the existence of many and different indigenous people and traditional communities, represent a strong mark to design and to ensure the full enjoyment of human rights in this region. The emphasis on the environmental and ecological character of human rights-based arguments are very common in climate litigation emerging from the Global South, where almost all national countries recognize the fundamental right to a safe, clean or healthy environment, and have a well-developed environmental or ecological jurisprudence, mainly in Latin America. The present work, therefore, focuses on the ecocentric approach of human rights and environmental protection framed from some of Latin America's climate litigation cases, which has been emerging based on the decolonization and ecologization of human rights, and the latest advances on the 'Rights of Nature' paradigm, both very usual in different jurisdictions. As a research problem, it is questioned how climate litigation in Latin America is influenced by the region's typical experiences of Ecological Law and how it would contribute to shaping an ecocentric approach to climate governance, especially in a transnational and comparative climate litigation from the Global South. The hypothesis is that original and innovative arguments typical from Latin American's jurisdictions, which characterize a breakthrough in the anthropocentric paradigm, developed at least since the latest Ecuador Constitution (2008) and, more recently, after the landmark ecocentric interpretation of human rights placed by Inter-American Court's Advisory Opinion, among other interesting jurisprudential experiences, are influencing a new typology of climate litigation, embedded

in an ecocentric dogmatic basis. The Latin American Courts dialogue on the recognition of intrinsic values and rights of non-human natural entities precede the climate litigation phenomenon, but it has been more sharp and clear since the case *Future Generations v. Ministry of the Environment and Others*. The understanding performed by the Colombian Supreme Court in this case, combining intergenerational and interspecies arguments, framed the fundamental basis to an ecocentric dogmatic approach in other climate litigation cases, mainly in Latin America, such as *Álvarez et al v. Peru* and A*sociación Civil por la Justicia Ambiental v. Province of Entre Ríos*. This kind of dialogue is present also in other cases in the Global South — for instance, the cases related to the protection of Páramos ecosystems and the judicial demands raised by Waorani indigenous people and by children to protect the Ecuadorian amazon region. Finally, it is important to highlight the existing ecocentric dialogue not just inside Latin America, but also between different regions in the Global South, for instance, in the judgment of *D. G. Khan Cement Company v. Gobierno de Punjab*. These cases present some common characteristics: i) a focus on the protection of essential ecosystems for the balance of the climate system considering their ecological functions, their intrinsic value and their nature as a substrate of life; ii) an approach based on intergenerational and interspecies equity and solidarity, articulating human rights, future generations and nature; iii) a recognition of the legal personality and rights of ecosystems threatened by climate change; iv) a multilevel and polythematic legal argumentation, articulating international, national and local norms on different issues such as climate, human rights, childhood, among others; v) an approach to the implementation and effectiveness of standards and greater ambition in terms of climate and the protection of the ecological integrity of ecosystems, vi) a development of new structures of socio-ecological governance. Thus, this ecocentric perspective is identified as one of the emerging trends of climate litigation in the Global South, including in the community of justice ecosystems and other elements of nature, and considering the impacts of climate on their existence and its ecological functions.

Session 4(b) – *Feminist perspectives on climate litigation in the Global South*

30 minutes 10h30 to 11h00

Editors: Kim Bouwer & Erin Daly

Moderator: Melanie Murcott

13. Natalia Urzola: *Gendering climate change litigation in Latin America: climate justice through an intersectional lens*

Climate change litigation in Latin America is based on notions of environmental and climate justice. A region deeply marked by inequalities, Latin America is particularly vulnerable to the adverse effects of climate change. However, impacts vary and historically marginalized groups tend to suffer more. Particularly, climate change affects gendered beings differently as a result of pre-existing inequalities based on patriarchal ideologies. For example, patriarchal economic structures led women to experience poverty in a disproportionate way, living in precarious conditions. Similarly, in situations of resource scarcity and due to socially imposed gender roles, women are expected to travel long distances to fulfill their domestic chores and care-taking responsibilities, which exposes them to different types of violence. Moreover, women are oftentimes considered 'closer to nature' or 'biologically' inclined to protect it, which translates in an additional burden when dealing with response measures. Yet, they are largely excluded from decision-making processes.

Emerging strategic litigation in Latin America in particular, and the Global South more broadly, brings visibility to marginalized groups, and allows novel approaches to solutions. Rights-based claims have taken a center-stage in Global South climate litigation strengthening the links between human rights and the environment. However, as with the examples provided in the previous paragraph, mainstream climate studies perpetuate patriarchal notions of gender roles. By focusing on the material impacts of climate change, women are often depicted as vulnerable and silenced victims of climate consequences. Furthermore, their experiences are essentialized. Women in Latin America are treated as an homogenous group, often ignoring that middle-class women from the Global South will probably have more in common with their North counterparts than with southern rural women. This shows how an inadequate understanding of gender relations erases the experiences of women, and renders climate change response measures ineffective while obscuring gender discrimination. Numerous efforts to address climate change tend to ignore its uneven impacts. Some arguments in both climate litigation and policy-making often claim the need to first save the planet, and then worry about sexism and other forms of oppression. But this approach could end up reinforcing sexist stereotypes to climate change responses.

Climate justice narratives at the core of climate litigation must reflect the need to tackle the disproportionate gendered impacts of climate change. Climate litigation could help advance gender equality and further protect human rights. Applying a Feminist and intersectional lens to climate litigation in Latin America is, hence, crucial in understanding how notions of

femininity and masculinity are perpetuated. Drawing from the emerging body of climate litigation cases in Latin America and through a comparative perspective with the broader Global South movement, this work aims at assessing how gender is (or not) portrayed and understood by petitioners and judges in the region, and whether a Feminist theory lens could contribute to unveil underlying power dynamics and systems of oppression.

14. Dina Lupin: *Resistance, participation and climate change litigation in South Africa*

In this paper, I examine whether climate change litigation can be an effective tool of resistance and participation in climate change related policy and law-making. Increasingly, community activists and civil society organisations have become disillusioned with participatory processes that are meant to ensure engagement and inclusion in climate change decision-making, but often make little meaningful impact on decision outcomes. Activists, CSOs and CBOs have increasingly adopted resistance tactics to try and make their voices heard and to compel the state (or private companies) into new and different kinds of engagements. Resistance tactics include protest and civil disobedience, but also modes of resistance that take place within the framework of law and legal process, or that adopt the tools (or appearance) of legal process.

Acts of resistance are often treated as something exterior to the law and to participatory processes. When the state seeks to engage a community and encounters resistance by that community, the community is seen as rejecting the participatory process. However, in my work, I argue that these acts of resistance should be recognized as manifestations and articulations of the right to participation. Rather than the participatory process being designed and determined by the state, acts of resistance are acts of participation that are designed and determined by the affected communities. In refusing to engage with acts of resistance, the state effectively silences participation.

With reference to feminist epistemology, and in particular the idea of hermeneutic injustice (Fricker 2007; Medina 2012; Dotson 2011; Pohlhaus Jr 2020), I argue that certain modes of engagement are routinely excluded and silenced in participatory processes. Particular ways of speaking are not recognized or accommodated and audiences often lack the hermeneutical resources to engage with and hear what is said.

Climate litigation can be a powerful means of compelling certain discussions and engagements into existence and of forcing certain audiences to attend to the speech and knowledge of marginalised groups. However, climate litigation, like all litigation, is costly, slow and shaped by judicial rules of procedure and the choices and speech of lawyers and judges.

Rather than an act of resistance, litigation is generally seen as fundamental to the standard processes of law-making and interpretation.

In this paper, I look at whether climate litigation can be a tool of resistance and examine whether, and how, it can be a form of participation and engagement that is conceptualized and led by marginalized communities whose lives and livelihoods are threatened by climate change impacts and maladaptive climate policies. I examine who the speakers and audiences are in climate litigation – who gets to speak and who is asked to listen – and ask who they ought to be and how other speakers and audiences can be accommodated.

Looking at case studies from South Africa, I argue for an approach to climate change litigation that makes it a tool of resistant participation, accessible to and initiated by marginalized and vulnerable groups and communities.

15 minute break (11h00-11h15)

Session 5(a) – *Climate litigation and constitutionalism in the Global South*

1 hour 15 minutes 11h15 to 12h30

Editors: Jim May & Lisa Benjamin

Moderator: Melanie Murcott

15. Doris Uwicyeza Picard: *The South African courts' treatment of the constitutional right to environment in climate change litigation*

Global South countries are pioneers of environmental constitutionalism as a response to climate change specifically. In Africa, some countries have passed climate change bills, and some have even adopted constitutional provisions expressly addressing climate change. The right to a healthy environment predates these developments as many African constitutions entrenched this right in their bill of rights. Environmental constitutionalism should logically be the catalyst for the rapid growth of rights-based climate litigation in Africa. The proposed study examines South Africa's contribution to climate change litigation in the Global South as it pertains to the right to a healthy environment. The focus on South Africa is due to the fact that Africa accounts for only a small percentage of cases on climate change litigation in the Global South and these cases are mostly concentrated in South Africa.

The right to a healthy environment is entrenched in the South African Constitution which provides that 'everyone has a right to an environment that is not harmful to their health or well-being; and (b)to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources (…)'. In the first litigation to directly feature climate change at the core of its case, *Earthlife Africa v Minister of Environment,* the right to environment was only used by the applicants to supplement their arguments which were based on environmental impact assessment (EIA) requirements as the main ground of action. The South African High Court found that climate change-related impacts need to be considered when conducting an EIA. The court only referred to the constitutional right to a healthy environment to provide more context regarding South Africa's climate change commitments. Following *the Earthlife Africa* judgment, subsequent climate change cases have mainly relied on EIA requirements of South Africa's environmental laws as the main ground for action. The proposed study will examine the development of climate change litigation in South Africa since the watershed judgment of *Earthlife Africa v Minister of Environment* and the treatment of right to a healthy environment in those cases. It is essentially a study into how the right to environment is used in climate change litigation by the parties in their arguments and by the South African court in its findings. The overall objective of the proposed study is to assess the potential for the development of rights-based climate change litigation in Africa through an assessment of the role played by the right to a healthy environment in South African climate change litigation.

16. Maria Daniela de la Rosa: *Human and Constitutional Rights as Grounds of Review for Climate Change Litigation*

The incorporation of human rights in Colombia's domestic law can be evidenced on the catalogue of rights included in the Colombian Constitution. The Constitution classified these into fundamental rights, social, economic and cultural rights and collective rights.

Some of these constitutional rights have been used as grounds of review in recent climate change litigation: the conception of human dignity as a founding principle of the nation (article 1), and the concept of life being inviolable (article 11), children as subjects of special protection whose rights prevail over others, (article 44), the right to a dignified housing (article 51) and the right to enjoy a healthy environment (article 79).

It is important to note that, via constitutional jurisprudential recognition, some other rights have achieved the status of autonomous fundamental rights, such as the right to health (T-

016 of 2007, among others). Also, the access to potable water, when it is destined for human consumption, is considered as a fundamental constitutional right because it directly affects other fundamental rights such as human dignity, health and life.

The main legal protection mechanism for fundamental rights is *tutela* action, which allows expedited access to judicial authorities in order to obtain immediate protection for the violation or threat of a fundamental right. On the other hand, for collective rights, such as the right to a healthy environment, the legal mechanism is the popular action, which seeks to avoid, cease the violation or restore matters to a state before the violation. In cases when the right to a healthy environment relates directly with fundamental rights, the *tutela* action will prevail as the appropriate means for its protection.

In 2016, as a result of a *tutela* action, the violation of the rights of life, health, access to water, food security, healthy environment, and biocultural rights, among others, were recognized and protected by the Constitutional Court. This violation was attributed to several public entities due to their omission of an adequate institutional response. This action was promoted by the ethnic communities that inhabit the Atrato river basins, to stop illegal mining and forestry operations.

This decision recognized for the first time in Colombian jurisprudence, a natural entity, (in this case a body of water) as a subject of rights and ordered its protection, conservation, maintenance, and restoration. Also, it ordered the establishment of a plan to decontaminate the basin, the reforestation of areas affected by mining operations, and an action plan relating to food security.

Even though this decision was not directly linked to climate change, it evidenced deficiencies in Colombian institutions by highlighting the breach of other environmental obligations that ultimately have effects on climate change adaptation and mitigation measures.

In 2018, following the guidelines of the Atrato River Basin decision, Colombia's Supreme Court of Justice (as a result of the review of a decision of a *tutela* action), ordered several public entities to formulate a plan to counteract the rate of Colombian amazon deforestation, to elaborate, together with affected communities, an intergenerational pact for the Colombian amazon that includes measures to reduce deforestation and greenhouse gases emission reductions, and also ordered territorial entities to include on the land use plans, deforestation reduction plans. Also, this decision is celebrated because it recognized the Colombian amazon as a subject of rights.

The claimants were a group of 25 children and young adults that sought the protection of the following rights: a healthy environment, life and health, food security, access to water and

the criteria of intergenerational equity. They displayed an environmental problem such as deforestation on the Colombian amazon region which avoids CO2 capture and provokes greenhouse gases emissions. As a result, this decision allowed the advance of climate action and human rights protection by establishing climate change mitigation measures.

In sum, there have been successful claims before Colombian courts on climate change litigation that are usually based on pre-existing environmental conditions such as deforestation or water pollution, even though there have been reports of non-compliance and lack of effectiveness of these judicial decisions. Moreover, the decisions relate directly to the violation of the right of a healthy environment in connection with other fundamental rights such as life, health, access to potable water, for security and others.

17. Lorena Cristina Zenteno Villa: *Can Latin American Courts and Tribunals effectively protect human rights in the climate change crisis?*

Nowadays, climate change is a topic discussed globally, and climate change litigation has grown meaningful in the last decade, with a focus on multiple dimensions. There is no doubt that climate change will significantly impact Global South countries and will affect human rights.

This global crisis has allowed all branches of government to have a role in tackling climate change, including the judiciary. The court's role during the climate change crisis is described as a vehicle, able to force the executive, legislative, and private sector to deal with climate change. Courts can guarantee the protection of human rights, promote environmental values, and assist the development of climate change law and policy; providing equal access to justice, determining, and not deferring climate change claims; upholding the rule of law.

Whilst climate litigation in the Global North is gaining momentum, in the Global South, including in Latin America, climate litigation is in its early stages of development. In Latin America there are some countries where climate litigation is not yet taking place or where differences exist between current environmental litigation and traditional definitions of climate litigation.

Climate change litigation in the Global South has been predominantly viewed as a human rights issue, and this approach is also advanced where there is a lack of effective climate change law and policy. However, some Latin American countries are still facing the same constitutional barriers to enforcing human rights that were identified at the end of 20th century. In fact, most of the constitutional changes in Latin America committed to the

creation of new economic, social, and cultural rights, leaving the organization of powers basically untouched, limiting the judiciary's power. The constitutional changes concentrate their energies in the recognition of rights, without considering the impact that the organization of power tends to have upon those rights that were protected. Exceptions to this trend are in Brazil and Colombia, where constitutional changes had the potential to affect in a positive way the organization of power and access to justice.

Some Latin American countries still need constitutional amendments that would improve judicial performance when solving climate change cases. Keeping the same constitutional structure with a total absence of legal structures to support the defence of human rights, can help to explain the current state of development of climate change litigation in Latin American countries.

An evaluation of the judiciary's role in Latin America is necessary. The characteristics of this area suggest that the judicial role may be fraught with obstacles and barriers, such as a lack of proper legislation and political instability. Therefore, the recognition of the constitutional obstacles and barriers that prevent courts from protecting human rights is an important element to identify the possible causes of the current state of climate litigation in this area. The main objective of this paper is to identify existing characteristics of the judiciary that could allow Latin American judges to decide climate change cases in a manner that advances climate justice.

The paper is divided in three sections: First (section 1), the situation of climate change and climate change litigation will be briefly described to provide an overview. Secondly (section 2), a) identifying the constitutional and legal barriers that prevent judiciary of an adequate protection of human rights in Latin America; b) identifying the best practices or characteristics from existing Courts when deciding climate change cases. Finally (section 3), designating significant constitutional changes and amendments to the judiciary in (Brazil, Colombia) which explain how recent constitutional transformations have strengthened the performance of courts in the face of climate change.

In this context, this paper provides knowledge in an area where there are few studies and thus may fill a knowledge gap because it could have many applications that would strengthen the performance of courts in the face of climate change.

18. Clive Vinti & Melanie Murcott: *The 'duty' to consider climate change in South Africa: Analyzing rights-based approaches in case law*

Climate change occupies an ambivalent space in the legislative scheme of South Africa. While legislation such as the National Environmental Management: Air Quality Act 39 of 2004 and the Carbon Tax Act 15 of 2019 address specific climate change mitigation concerns, none of South Africa's legislation expressly broaches the 'duty' to consider climate change impacts in development projects. South Africa does not yet have climate change specific legislation though the Climate Change Bill, 2018 was tabled in Parliament in 2021. The Bill did not incorporate such a duty. This legislative gap is reflected in South Africa's climate litigation. To date, there have been at least three instances of climate litigation concerning the duty to consider climate change in South Africa in development projects, two of which, *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (*Earthlife*) and *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* (*PHA*), turned on whether there is duty to consider climate change impacts before the granting of an environmental authorization under section 24O of the National Environmental Management Act 107 of 1998 (NEMA). In *Earthlife* the court reasoned that by virtue of section 24O of NEMA, which requires that all relevant considerations must be taken into account prior to authorizing a development project, it would be unlawful to authorize a new coal-fired power development project without first having considered climate change mitigation concerns. Building on the reasoning in *Earthlife,* in *PHA* the court found that climate adaptation concerns relating to water scarcity ought to be considered prior to authorizing an urban development. The other instance of climate litigation was adjudicated by a quasi-judicial body, the Water Tribunal, in *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation* (WT06/11/2015) [2020] ZAWT 1 (18 July 2020) (*Groundwork*). Like *Earthlife* the proposed development of a new coal-fired power station was the subject of the litigation. The Water Tribunal broadened the duty to consider climate change impacts to instances when the issuing of a water use license under section 27(1)(c) of the National Water Act 36 of 1998 (NWA) is being decided. The duty established in *Earthlife* and expanded upon in *PHA* and *Groundwork* has emerged despite the absence of an express duty to consider climate change impacts in either NEMA or the NWA. Thus, this paper explores the interpretive approach adopted in litigation giving rise to the duty to consider climate change adaptation and mitigation impacts in South African law given that there is no express duty to consider climate change impacts in South African legislation. The significance of constitutionally ordained

purposive rights-based interpretation of South African legislation, particularly with reference to the human right to an environment not harmful to health or wellbeing, a feature of adjudication in climate litigation in the Global South, will be explored. Further, the willingness of courts and other fora to play an activist role in adjudication will be examined with reference to South Africa's model of separation of powers will be explored. This model has been designed to enable judges to advance South Africa's project of transformative constitutionalism and is radically different from a liberal construction of separation of powers typically adopted in Global North jurisdictions. It will be argued that South Africa's model of separation of powers is better suited to responding to the climate crisis and its devastating impacts for vulnerable and disadvantaged people. How this model compares with other Global South jurisdictions where the judiciary has played an activist role in climate litigation will be investigated.

19. Délton Winter de Carvalho: *Climate Constitutionalism as a foundation for climate litigation in Latin America*

The Anthropocene imposes not only the need to understand a narrative of physical emergence (*physis*) but also a crisis for justice (*polis*) strongly oriented to fighting climate vulnerabilities. To deal with this new historical moment, integration between climate governance and global constitutionalism is needed, a development that is being described as *climate constitutionalism.*

At the transnational level, the UNFCCC and the Paris Agreement form the basis for the climate governance constitutionalization process. New global environmental issues brought about by the Anthropocene have triggered the need for a constitutional transition that can address such challenges. Given the lack of enforcement power of international law, as well as the difficulty for domestic law to tackle global problems, *global constitutionalism* has started to develop a coherent body of law to cope with the challenges posed by *climate justice*. National constitutional texts, international or regional normative texts, along with decisions of national, regional and international constitutional courts, have gradually come to form pieces which, though fragmented at first, have developed into an integrated and coherent global system of rules, capable of exerting a reciprocal influence between countries and their courts, emerging as a climate constitutionalism of transnational scope.

For James May and Erin Daly, climate constitutionalism offers at least two additional avenues for advancing *climate justice*: the express incorporation of climate change into constitutional text and the inference that other express constitutional rights (such as the right to life, dignity,

due process, and a balanced environment) implicitly incorporate obligations requiring responses to climate change.

An important characteristic of climate constitutionalism is that it allows for the absorption of evolving acquisitions involving transnational scientific and legal elements that are compatible and consistent with constitutional practice at the national level. In addition, because the Constitution and its text is often accepted as a norm of superior *status* and directed at a particular national or subnational community, it enjoys a perenniality and legitimacy before the courts. Thus, addressing climate content by constitutional theory has the effect of providing higher accessibility, greater operational capacity and better local practical application. The role of climate constitutionalism is to address the global phenomenon of climate change through more localized (constitutional) solutions, stemming from *transnational learning* towards climate justice. The term *climate justice* refers to responding to the ways in which climate change will impact basic human rights, exacerbating vulnerabilities.

Awareness of how serious the *climate emergency* is has led environmental constitutionalism to evolve into climate constitutionalism, with some constitutions beginning to include rights specifically related to climate stability. At least seven countries have already incorporated climate change into their respective constitutional texts, namely, the Dominican Republic (1998), Venezuela (1999), Ecuador (2008), Vietnam (2013), Tunisia (2014), Ivory Coast (2016) and Thailand (2017). Other countries, such as France and Chile, are considering holding referendums to include references to the environment and the fight against climate change. In Brazil, there is the Proposal for Constitutional Amendment – PEC 233/2019 of Climate Stability, which aims to include among the "principles of economic order the maintenance of climate stability and determines the government to take action to mitigate climate change and adaptation to its adverse effects", through the addition of item X to article 170 and item VIII to §1 of article 225 in the Federal Constitution of 1988.

The object of this paper is to observe and describe the peculiarities of how the phenomenon of *climate litigation* has been promoting the development of a legislative and judicial climate constitutionalism of transnational nature in the Global South, more specifically in Latin America. The paper aims to describe the specificities of this phenomenon in the Global South compared to the Global North.

An example of a historical precedent of *climate constitutionalism* in Latin America is the case of *Future Generations v. Ministry of Environment and Others* (Colombia). In the Brazilian scenario, a judicial expression of such Climate Constitutionalism is the public-interest climate civil action *IEA v. Brazil*, whose content postulates the defense of a *fundamental right to*

climate stability, as well as the enforcement of the climate target to combat deforestation in the Amazon foreseen in the Plan to Prevent and Combat Deforestation in the Legal Amazon – PPCDAm, as a sectoral climate mitigation plan. Other actions will be addressed in this paper with a view to identify and outline the constitutional features that underpin climate actions in the Latin American Global South.

The strong adherence of courts and the prominent *status* of the Constitution in the Brazilian legal systems demonstrate the significant potential that climate constitutionalism holds for designing responses to climate justice within the institutional bounds of the rule of law, especially at the domestic level. Moreover, the highest attribute of constitutionalism is to serve as a foundation and support for decisions taken at the national territorial level aimed at resolving climate conflicts concerning the specific circumstances of each country. It is from climate constitutionalism as a transnational phenomenon that a more solid basis for the increasingly vigorous support of climate disputes will be formed.

Session 5(b) – *The role of regional tribunals and regional instruments in advancing climate litigation*

1 hour 15 minutes 11h15 to 12h30

Editors: Emily Barritt & Margaretha Wewerinke

Moderator: Maria Antonia Tigre

20. Juan Auz: *The Political Ecology of Climate Remedies: An Inter-American Human Rights System Prognosis*

The climate crisis is negatively affecting, and will continue to affect, human and natural systems across Latin America. Undoubtedly, the climate crisis jeopardizes entire communities' enjoyment of human rights. The Inter-American Human Rights System (IAHRS) is therefore expected to contribute to tackling the crisis, particularly since its organs have jurisdiction to order remedies over most Latin American countries, provided they determine a rights' violation. Despite the growing number of domestic human rights-based climate litigation in the region, none has yet reached the IAHRS. So far, the Inter-American Commission on Human Rights has dismissed a climate-related case the Inuit community filed against the US in 2005 and has yet to decide on a similar pending case the Athabaskan people filed against Canada in 2013.

Against this backdrop, this paper seeks to answer the following questions: what types of remedies could the organs of the IAHRS order in a climate change case from Latin America

and the Caribbean? Moreover, what implementation barriers could those remedies face? In doing so, a doctrinal approach to analyse the remedial typologies of the IAHRS's organs and a political ecology lens to understand the barriers to compliance will be employed. In that vein, the first part of the paper lays bare the practice of the IAHRS vis-à-vis remedies. Secondly, in order to extrapolate the analysis to climate-related cases, a more granular appraisal of those cases entailing environmental dimensions will be conducted. Thirdly, barriers to compliance in those cases will be compared through a political ecology reading of recent domestic climate cases.

21. Gastón Medici-Colombo: *The Escazú Agreement contribution to climate change litigation in Latin America: the procedural path to climate justice*

Climate change litigation is exponentially growing almost everywhere, and Latin America is no exception. The effectiveness of this tool depends on several factors within which the availability of adequate judicial mechanisms, including proper access to justice, which is central. However, access to justice cannot be taken for granted even in jurisdictions where a strong rule of law allegedly exists. Litigators and scholars in Latin America have been flagging for a while that, when it comes to environmental protection, existing procedural rules and arrangements may not work well since they were generally designed for the protection of individual interests. Consequently, plaintiffs bringing collective or diffuse interests have historically faced significant hurdles in the judicial arena. Even though this particular concern has led to the development of new mechanisms and rules, both nationally (e.g., collective actions) and internationally (e.g., the Aarhus Convention), barriers remain.

The Escazú Agreement goes further than the Aarhus Convention when addressing access to justice. Article 8 establishes the duty to guarantee mechanisms to challenge environmental-conflict actions and also presents a list of conditions to secure effective access to justice (Article 8.3). These refer to judicial bodies' environmental expertise, proceeding costs, standing, precautionary measures, production of evidence, judgments' enforcement, and redress. All of them are crucial for the judicial protection of the environment generally but especially when highly complex issues, like climate stability, are at stake. In climate litigation, for example, concerns exist regarding how scientific knowledge (and uncertainties about it) are included in the proceedings and considered in the judicial decision-making. Likewise, questions about the enforcement of judgments in systemic cases arise. In this sense, the irruption of climate change presents further challenges for the already complicated protection of the environment and related human rights.

This work aims to clarify what could be (at least part of) the contribution of the Escazú Agreement to access to climate justice in the Latin American region. With a focus on the elements presented by article 8 of the Agreement, we propose firstly, to identify procedural barriers and complexities that plaintiffs face in (decided, pending, or future) climate cases before domestic courts of the region. Secondly, we will analyze if and how the proper implementation of the Agreement's provisions could overcome the identified hurdles. To carry out this inquiry, we envisage conducting interviews with Latin American practitioners involved in climate cases as well as a thorough examination of relevant case law and procedural regulations in the region and beyond.

We expect that this research will constitute valuable input for the ongoing process of development and implementation of the Escazú Agreement and, at the same time, for the advance of access to climate justice in the region. Furthermore, we anticipate that Latin American developments and experiences could be of interest to those seeking to overcome procedural barriers in other areas of the Global South or in the Global North. In this sense, this work would reinforce the idea that in this context ample room exists for transnational learning and fertilization, not only from the North to the South, but also the other way around.

22. Ademola Oluborode Jegede: *Climate litigation under the African Human Rights System: The significance of 'Teitiota' and 'Chiara Sacchi' decisions*

The global climate is anticipated to continue to change over this century and beyond. The Intergovernmental Panel on Climate Change (IPCC) in its numerous reports, inclusive of the most recent in 2021, offers high scientific evidence that global temperatures will increase largely due to greenhouse gases produced by human activities. In its earlier report of 2018 on global warming of 1.5°C, the IPCC warns that failure to achieve net zero carbon dioxide (CO_2) emissions and stabilize global temperatures below 2°C by 2100 will worsen the global climate system and have more devastating consequences on human populations. In Africa, established vulnerabilities due to adverse climate change impacts are water resources, food security, natural resource management and biodiversity, human health, settlements and infrastructure, and desertification. In view of the global reality and consequences of climate change, there have been treaty based interventions: the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement (pillar instruments on climate change). The normative development at the international level also includes various resolutions linking climate change to human rights and has triggered the emergence of domestic laws in different parts of the world including Africa.

With the growth in legislation has developed the intensification in climate litigation, as judicial and quasi-judicial bodies at the national, regional and the United Nations (UN) level are being approached to rule on various issues including the interface of climate change on human rights of vulnerable populations and the adequacy or otherwise of states' efforts to implement climate laws. At the UN level, in particular, the decision of UN Human Rights Committee (HRC) in *Teitiota v New Zealand (Teitiota decision)* has been as criticised as hailed in the jurisprudence on 'climate refugees'. Also, more recently in 2021, the UN Committee on the Rights and Welfare of the Child in *Sacchi et al. v. Argentina et al (Sacchi decision)*, gave a decision on the communication in which the applicants alleged that respondent's climate policies are causing and perpetuating climate change, According to the applicants, the State party has failed to take necessary preventive and precautionary measures to respect, protect, and fulfil children rights to life, health, and culture, A development that is exposing one of the most vulnerable groups to life-threatening impacts of climate change.

The development at the African regional level with respect to climate change litigation with focus on human rights is, however, still struggling to emerge. Yet, there is African human rights system (AHRS) that is constituted by a set of human rights instruments that are admitted by states as binding and the quasi-judicial and judicial treaty monitoring bodies Of these instruments, the African Charter on Human and Peoples' Rights (African Charter (1982), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention (2009), the African Convention on the Conservation of Nature and Natural Resources (Conservation Convention (2003), and the African Charter on the Rights and Welfare of the Child (ACRWC (1999) are significant. The treaty monitoring bodies of the AHRS are: African Commission on Human and Peoples' Rights (the Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Nevertheless, there is no pioneering case yet at the AHRS, this paper interrogates issues relating to climate change that may arise and the conceptual challenges that litigants may face before the AHRS in climate litigation. With particular reflection on the *Teitiota and Sacchi* decisions, the paper explores the extent to which the pillar instruments of the AHRS can be engaged in response to arguments and counter arguments on effects of climate change and linkage to human rights before the AHRS.

23. Yusra Suedi: *Admissibility challenges in climate change litigation in the African system of Human Rights*

Key actors in the African system of human rights include the African Commission on Human and Peoples' Rights (ACHPR) and the African Court of Human and Peoples' Rights (ACtHPR). The ACPHR receives communications concerning alleged violations of the African Charter on Human and Peoples' Rights, while the ACtHPR settles disputes and provides advisory opinions on the African Charter's interpretation and application.

To date, neither has been used as an avenue for climate litigation. This is likely due to many reasons: a lack of awareness of victims in Africa that they can pursue climate litigation, the cost of legal counsel in African countries, and challenges related to climate litigation on the domestic level.

However, Africa is a promising regional venue for climate change-related complaints – not least because it is distinctively vulnerable to climate harms. Article 24 of the African Charter uniquely provides that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development". Therefore, in contrast with other regional human rights courts, the ACtHPR may be requested to directly review a state's compliance with the human right to a healthy environment, which can encompass climate change issues. Even though it is the region with the least amount of climate litigation action to date, discussion has begun to stir about prospects of climate change litigation on the domestic level. This is to be expected in the context of the widespread movement across the world to seek judicial redress on domestic and international levels for climate change matters.

In anticipation of climate change litigation utilizing the African system of human rights, this paper seeks to identify and discuss potential admissibility challenges before both the ACHPR and the ACtHPR to assess the degree to which they are suitable venues for such litigation. Arguing that the identified admissibility challenges are circumventable, it concludes that the African system is indeed a viable avenue. Adopting doctrinal legal methodologies in reference to sources of international law (pursuant to Article 38 of the ICJ Statute), the paper is divided into three sections. First, it addresses the requirement of the exhaustion of local remedies, discussing this in light of the recent decision adopted by the Committee on the Rights of the Child on a communications procedure by *Chiara Sacchi et al* (22 September 2021). It then explores the challenge of victimhood and the legal and scientific controversies surrounding this condition of admissibility in the African context. Third, this paper discusses the requirement of providing evidence of a causal link between the plaintiffs' harm and the state's climate action or inaction – rendered particularly difficult due to climate uncertainty.

Rather than addressing every admissibility condition before both the ACHPR and the ACtHPR, the paper focuses on three admissibility issues that are particularly salient in the climate context. The exhaustion of local remedies is a requirement before both the ACHPR and the ACtHPR, while victimhood and the causal link are the relevant requirements before the ACtHPR. In the examination of these aspects of admissibility, the paper makes rigorous and comprehensive reference to the case-law and practice of the ACHPR and ACtHPR.

In an era where communities and individuals across the globe are turning to judicial and quasi-judicial bodies to seek remedies for climate protection, the desired impact of this paper is to provide the necessary practical understanding to both judges making decisions, and to individuals and groups wishing to petition to the African system on climate change issues in the future.