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UNIVERSITY OF THE WITWATERSRAND

Johannesburg, South Africa

EXPLORING TRANSNATIONALISM IN GROUND-BREAKING SOUTH AFRICAN AND GLOBAL NORTH CLIMATE LITIGATION

An LLM Dissertation submitted in fulfilment of the requirements for the Degree of Master of Laws by Dissertation (LLM)

In the School of Law, University of the Witwatersrand

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Date: 29 February 2024

DECLARATION

I, Zunaida Moosa Wadiwala declare that this dissertation is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Master of Laws by Dissertation at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



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DATE

ABSTRACT

Climate litigation represents a way to battle against the worsening climate crisis. With a focus on the role of courts in transnational climate change litigation, evidence presented in this dissertation aims to uncover the scope and meaning of transnationalism in climate litigation, and to explore the system of transnational climate governance emerging from ground-breaking litigation. This dissertation proceeds from two objectives, the first of which examines how, if at all climate jurisprudence is transnational in character. Global climate litigation is a growing phenomenon, and this work analyses what the scope and meaning of transnationalism in climate litigation entails for a system of global climate governance. The second objective considers what the place of South Africa is in a system of transnational court-led governance; and how Global North judgments cognise the impacts of judgments in South Africa, if at all. To lay the groundwork for the development of a transnational analytical framework with which to reach answers to the objectives, the dissertation recognises differences in the definition of climate litigation and identifies claims that underpin transnational climate litigation. These claims include the human rights turn, the role of courts in climate governance, remedies and mitigation and adaptation-based climate litigation. Grappling with the concept of transnational climate litigation, the dissertation applies four theories of transnationalism to climate litigation, and themes from these theories enabled the development of a transnational analytical framework with which to analyse cases. The three South African cases used are *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Other* (*Earthlife*)**,** *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (*Shell*), *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and The Environment and Others (Eskom*). Cases used from the Global North jurisdictions are *The State of the Netherlands v Urgenda (Neth. Sup. CT)* (*Urgenda*), *Friends of the Earth Netherlands (Milieudefensie)et al v Royal Dutch She*ll (*Milieudefensie), and Neubauer et al v Germany* (*Neubauer).* As the dissertation concludes, findings from these cases are compared with each other and applied to the theories of transnationalism.

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DEDICATION

For my parents,

Mr Younus Moosa Bhidia and Mrs Khayronesa Carrim-Moosa Bhidia,

who instilled kindness in everything they did.

“My Lord, have mercy on them as they raised me when I was little, Ameen”.

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I am blessed with having grown through this LLM, and it has left indelible marks in both my personal and professional capacities. From amongst the highlights of this journey are, my appointment as a Rapporteur at the Sabin Center for Climate Change Law, Columbia University, to maintain the South African climate litigation database; being selected as a Course Leader for the University of Cambridge's *Democratising Education for Global Sustainability and Justice Programmes*; and Associate Fellow at the Centre For International Sustainable Development Law. Additionally, I have had the opportunity to publish and present at various workshops and conferences on climate litigation; attend COP28 in Dubai, December 2023, engaging in meaningful discussions with colleagues and judges whose work I cited herein, or collaborated with during webinars; and assist during Climate Law and Governance day in conjunction with Middlesex University Dubai and Universities of Dubai and Cambridge. A particularly moving and unforgettable part of this journey was working on my dissertation in The Hague, Netherlands, in January 2024. Immersed in the atmosphere of the courts and libraries mentioned throughout this work, it was an experience that deeply enriched my research.

ABBREVIATIONS

COP	Conference of the Parties
CJEU	Court of Justice of the European Court
DFFE	Department of Forestry, Fisheries and the Environment, South Africa (formerly Department of Environmental Affairs)
EA	Environmental Authorisation
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
GHG	Greenhouse gas emissions
IPCC	Intergovernmental Panel on Climate Change
NDC	Nationally Determined Contribution
NEMA	National Environmental Management Act 107 of 1998
PAJA	Promotion of Administrative Justice Act 3 of 2000
UNFCCC	United Nations Framework Convention on Climate Change

CHAPTER ONE: INTRODUCTION AND BACKGROUND

1. Introduction

In recent years, climate litigation has emerged as a highly dynamic and rapidly evolving field of legal practice and scholarly work with potential to develop existing and establish new legal principles for global environmental law. The release of the Intergovernmental Panel on Climate Change's (IPCC) Sixth Assessment Report on April 4, 2022, noted how climate litigation is shaping climate governance.[1]

Climate litigation addresses a complex and global environmental challenge, namely the accumulation of greenhouse gases in the atmosphere, which is driving shifts in climatic conditions the world over. Climate change is not bounded by the territorial limits of national states, and it is therefore crucial to acknowledge the inherently transnational character of climate litigation.[2] Courts in so-called Global North and Global South jurisdictions have been called upon to adjudicate claims of individuals from diverse nations, who have increasingly employed legal avenues to safeguard themselves and their environments from the deleterious effects of climate change. By resorting to litigation, a myriad of global actors seeks to compel state policymakers and private entities to undertake more ambitious and effective climate change actions. There are various reasons for this uprise in cases, the most prevalent being that although countries have committed to the United Nations Framework Convention on Climate Change (UNFCCC) objective 'to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system'[3] the commitments nation states have made – most notably, under the 2015 Paris Agreement – are widely perceived as insufficient.[4] In a number of cases, judges have found that this is a

[1] https://www.ipcc.ch Accessed 30 July 2022, p56.
IPCC AR6 WG III, 2022.Summary for policymakers. Jim Skea, Priyadarshi R. Shukla, Andy Reisinger et al. In: *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* at SPM 59, para E.3.3. 'Climate-related litigation, for example by governments, private sector, civil society and individuals is growing, with a large number of cases in some developed countries, and with a much smaller number in some developing countries, and in some cases, has influenced the outcome and ambition of climate governance.' Available at: P56_Doc_3_Approved_Summary_for_Policymakers.pdf (ipcc.ch)

[2] See further, Chapter 2 below.

[3] United Nations Climate Change available at https://unfcc.int/about-us/about-the-secretariat (accessed June 2021).

[4] As will be seen in the discussion on the Global North cases in chapter five of this dissertation.

violation of fundamental rights and are giving directives on timeframes and orders for stronger mitigation measures.[5]

As a global system of climate change jurisprudence takes shape, this dissertation aims to delve into, and scrutinize, the concept of transnationalism in climate litigation. Greater understanding of the concept of transnationalism in climate litigation will enable the formulation of a 'transnational analytical framework' with which to interrogate claims of transnationalism, either in relation to specific cases or the body of climate jurisprudence as a whole. This dissertation develops and applies a transnational analytical framework to climate change cases from South Africa and from the Global North to answer the primary research questions of how, if at all, climate jurisprudence is transnational in character, the implications of which would lead to an understanding of the place of South Africa in a system of transnational, court-led, climate governance.[6] A secondary question relates to how Global North judgments cognise the impacts of judgments in South Africa, if at all.

Global North and Global South are terms which describe and classify countries according to their socio-economic status, with additional distinguishing indicators being politics, technology, wealth and demography.[7] This separation of north and south does not relate to the geographic locations of countries being situated in the Northern or Southern Hemisphere, but rather that Global North countries favour democracy, are technologically driven, established, and wealthy, as opposed to Global South economies which possess the opposite characteristics.[8] For climate change, this distinction is important in the application of the Paris Agreement and its differentiation between developing and developed countries.[9]

[5] For example, the *Urgenda*, *Milieudefensie and Neubauer* cases analysed in this dissertation. This is a legal mandate and not courts straying into polycentric decisions as will be seen in the discussions below on climate governance and the courts.
[6] Transnational,as opposed to international, is the reason behind this study to investigate the influence, if any,which judiciaries and jurisdictions have over each other.
[7] Lemuel Ekedegwa Odeh 'A Comparative Analysis of Global North and Global South Economies' (2010) 12 *Journal of Sustainable Development in Africa* at 340 to 341.
[8] Ibid.
[9] Implying that the co-relation between North/South and Developed/Developing countries is that the North situates developed countries, and the South includes developing countries.

The objectives of the Paris Agreement[10] set out long term temperature goals[11] and calls upon collective and individual efforts to support these goals. Individual efforts include an undertaking from states to formulate their own Nationally Determined Contributions (NDCs) as a global response to climate change. These NDCs have different requirements for 'developing countries' and for 'developed countries.'[12]

Developed countries provide advanced educational and health benefits, a well-developed infrastructure and other services to its citizens, and their economies, calculated according to gross domestic product (GDP), rank higher than that of developing countries.[13] A developing country has a lower GDP than developed countries with a less stable economy, and with only limited access to fundamental rights such as education and health care.[14] For purposes of this dissertation, countries that are developed are considered as Global North countries and developing countries are considered as Global South countries.[15] The Global South regions include Africa, Latin America and the Caribbean, Asia and Oceania (excluding Australia and New Zealand).

1.1 Emergence of climate change litigation as a focus of scholarly interest.

The Grantham Research Institute's 2021 update on climate litigation noted 1,841 until May 2021.[16] According to statistics derived and updated by two global databases, being the Grantham Institute on Climate Change and the Environment (which is based at London School of Economics and Political Science) and by the Sabin Center on Climate Change Law (based

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[10] The Paris Agreement is a legally binding international treaty on climate change under the auspices of the UNFCCC which was adopted by 196 states in Paris, France on 12 December 2015 and which entered into force on 4 November 2016. The document is available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf

[11] Article 2(a) of the Paris Agreement requires 'holding the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels.'

[12] Article 4(4) of the Paris Agreement.

[13] Business Development Bank of Canada, available at: https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/developed-country https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/developed-country#:~:text=A%20developed%20country%E2%80%94also%20called,diverse%20industrial%20and%20service%20sectors.

[14] Ibid.

[15] En.m.wikipedia.org available at: https://en.wikipedia.org/wiki/Global_North_and_Global_South https://en.m.wikipedia.org/wiki/Global_North_and_Global_South#:~:text=The%20Global%20North%20generally%20correlates,countries%20and%20the%20Eastern%20world. For further reading on Global North and Global South see Miles Kenny 'Global North and Global South' Encyclopaedia Britannica updated 30 October 2024 available at Global North and Global South | Definition, Countries, Differences, History, Map, & Facts | Britannica accessed 8 November 2024

[16] Joana Setzer & Catherine Higham 'Global Trends in Climate Change Litigation: 2021Snapshot.' *London: Grantham Research Institute on Climate Change & the Environment & the Centre for Climate Change Economies & Policy, London School of Economics & Political Science* (2021) at 5.

at Colombia Law School), there have been 1,727 climate litigation cases documented worldwide between 1986 and 2020.[17] The 2023 UNEP–Sabin Center Global Climate Litigation Report reflects that at 31 December 2022, the Sabin Center's Climate Change Litigation database included 2,180 cases filed in 65 jurisdictions.[18]

The cases indexed in these databases are identified based on a so-called narrower definition of climate litigation which is discussed more fully in section 1.2 below.

Most of these recorded cases have been filed in the Global North, although recently Global South cases have increased.[19]

The 2023 UNEP report indicates that whilst the 1,522 cases in the databases were filed in courts of the United States of America (USA), cases outside the USA are on the increase, with 658 cases in all other jurisdictions combined.[20]

It is interesting to note from these statistics that most of the litigation has been instituted post the conclusion of the Paris Agreement in 2015.[21]

Scholars have discerned three distinct waves of climate litigation.[22] The first occurs prior to 2007 and captures cases filed mostly within the USA and Australian jurisdictions, and these were cases primarily against domestic states with a focus on improving environmental conditions.[23] Thereafter, between 2007 and 2015, increases in climate litigation in Europe were initiated against states, to enforce climate policy, and against corporations based on tort/delict, being their portion towards the global climate crisis.[24] The final category is the current one, with climate litigation after 2015) moving to different jurisdictions as well as initiating new causes of action, resulting in the establishment of legal duties, for example the judgment in *Urgenda v State of Netherlands*.[25] There is also an upsurge of climate litigation from the Global

[17] Maryam Golnaraghi, Joana Setzer, Nigel Brooke, Wynne Lawrence, Lucia William 'Climate Change Litigation Insights into the evolving global landscape' (2021) The Geneva Association at 6.
[18] Michael Burger and Maria Antonia Tigre, Global Climate Litigation Report: 2023 Status Review (Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme, 2023) at 13.
https://scholarship.law.columbia.edu/sabin_climate_change/202
[19] Ibid at 18.
[20] Burger and Tigre op cit note 18 at 13.
[21] Golnaraghi et al. op cit note 17 at 6.
[22] Golnaraghi et al. op cit note 17 at 13 - 17.
[23] Ibid.
[24] Ibid at 17.
[25] *The State of the Netherlands v Urgenda Foundation, The Supreme Court of the Netherlands*. (20 December 2019) Case number: 19/00135 Citation for the English Translation ECLI:NL:HR: 2019:2007 (Original Dutch citation from the Supreme Court of the Netherlands: ECLI:NL: 2019:2006)

South jurisdictions.[26] According to the latest statistics, 2022 saw the highest number of climate cases from the Global South with the majority of 47 cases filed in Latin America; 28 cases in the Asia-Pacific region; and 13 in Africa.[27] This is raising an awareness of climate impacts and rights and responsibilities have now firmly been entrenched in recent case law.[28]

The first climate litigation case in South Africa[29] was decided in 2020, 35 years after the first climate case were decided in the Global North.[30] This and subsequent cases have been decided in a context where prominent scientists have warned on the consequences of climate change on the South African ecology, biodiversity, and economy.[31]

1.2 Defining climate litigation

Scholars have defined climate litigation on the bases of what is included and what is excluded from the substance of the litigation. This leads to the existence of both a broader and a narrower definition.

The 2023 UNEP report[32] defines climate litigation in two parts. The first includes cases that raise material issues of law or fact relating to mitigation, adaptation, or the science of climate change. The second part is conditional on those cases being brought before a range of administrative, judicial, or other adjudicatory bodies.[33] Cases which are incidental to climate

[26] Burger and Tigre op cit note 18
[27] Ibid.
[28] These cases are discussed in the methodology section.
[29] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) (8 March 2017) Case No: 65662/16
[30] The first ever climate change case, *Maine v Taylor* 477 U.S. 131,106 S. Ct. 2440 (1986) took place in the USA in 1986. As discussed in para 1.1 above, there are three periods (or waves) of climate litigation, with the first being the years prior to 2007 and in which cases were only filed in the USA and in Australia. At that time there was no formal definition or classification of climate litigation. Despite there not having been a formal definition of climate litigation in 1986, the decision in this case gave precedence to environmental well-being over interstate trade which stood at risk of being financially affected. The importance of this case is that it pertained to environmental and climate concerns as it was in 1985, just a year earlier that the world recognised adverse effects and changes in the environment caused by CFCs leading to potentially harmful effects in climate, and as a result, the Vienna Convention for the Protection of the Ozone Layer was created as a response. (For further reading see UNEP – The Vienna Convention for the Protection of the Ozone Layer, available at: The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat) As the field of climate litigation has grown in recent years, and since 2015, a need has arisen to define the concept climate litigation. As can be deduced from the discussion below, major changes have occurred in a short span of time and there has now developed both a broader and narrower definition of climate litigation. Currently in 2024, as opposed to in 2021, the use of the narrower definition has become the accepted norm.
[31] Bob Scholes, Mary Scholes & Mike Lucas *Climate Change Briefings from Southern Africa* (2015) *Johannesburg*: WITS University Press at 50 to 102.
[32] Burger and Tigre op cit note 18 at 3.
[33] Ibid. The Sabin Center further identifies climate litigation with keywords like “climate change”, “global warming” “greenhouse gas” and “sea level rise.”

change, for example those that concern air pollution, are excluded from the definition.[34] This definition is thus narrow in its ambit.

Setzer and Higham are proponents of the narrower definition of climate change litigation. Their annual report identifies a broader definition as including those cases which raise issues of climate change and or mitigation and adaptation factors and which are brought before administrative, judicial, or other authoritative bodies.[35] They use the narrower definition which excludes cases in which climate change is only incidental, or where the facts do not address climate policies or laws. They favour this narrower definition because it highlights cases in which the central issue is climate change and because it facilitates collection for the databases.[36]

A broader definition by contrast would include cases which are connected to but not central to climate change, for example the 2022 South African *Vukani (Deadly Air)* case.[37] In this matter, the applicants sought relief over concerns relating to the extent of the government's obligations regarding air pollution in the Highveld Priority area. This area is home to some twelve of Eskom's coal-fired power stations.[38] The Pretoria High Court found that the air quality failed to meet the National Ambient Air Quality Standards which amounted to breach of the section 24(a) constitutional "right to an environment that is not harmful to health or well-being" and the Minister of Environmental Affairs was directed to prepare regulations in terms of section 20 of the Air Quality Act[39] to implement the 'Highveld Plan.'[40] Air pollution however, does not fall within the ambit of the narrow definition of climate change litigation[41] and it is thus excluded from the databases.[42]

Peel and Lin[43] argue for a broader definition, specifically so that the contribution of cases from Global South is not excluded and developments framing climate litigation in the emerging trend of climate governance from the Global South is then included in the understanding of

[34] Ibid.
[35] Joana Setzer & Catherine Higham (2021) 'Global Trends in Climate Change Litigation: 2021 Snapshot.' *London: Grantham Research Institute on Climate Change & the Environment & the Centre for Climate Change Economics & Policy, London School of Economics & Political Science* at 8
[36] Ibid at 9
[37] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022)
[38] Ibid para 18.
[39] Act 39 0f 2004.
[40] Ibid paras 241.1 – 241.5.
[41] As discussed above.
[42] Being the databases as referred to above.
[43] Jacqueline Peel & Jolene Lin 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113:4 *The American Journal of International Law* at 682

'transnational climate change litigation.'[44] They hold the view that a broader definition is important, so that the value of judgments from the Global South is not lost and that litigants and judges from the Global North could support arguments by referring to Global South judgments.[45] This would open pathways for South-centred judgments to contribute to global climate law.

Bouwer also advocates for a broader definition of climate litigation and differentiates between lesser-known cases which are 'about' climate change which should be part of the definition of climate litigation as well as cases which are 'in' the context of climate change.[46]

Further reasons for a broader definition, especially when intending to include Global South climate litigation within a comprehensive global climate litigation jurisprudence, include the possibility of cases from the South being excluded on the bases that the issue is peripheral to climate itself.[47] This has become evident from research showing cases in South Africa reflecting climate concerns but centring on other issues.[48] Contrary to this, the established global databases[49] require climate change to occupy a central place in the case.

This distinction between a broader and narrower approach is also reflected in the terminology used to refer to climate change related cases. Although the most common term is climate change litigation (which has become synonymous with climate litigation) terminology that arguably captures climate litigation in the broader sense could include public interest litigation,[50] climate justice,[51] climate action[52] legal mobilisation[53] and strategic litigation.[54] It is evident that 'climate litigation' is a contested term and is used broadly by some scholars and narrowly by others. It is also clear that the narrower approach, in which climate change is central to the case, creates a bias against litigation in the Global South. The term transnational

[44] Ibid where the *Leghari* case is cited as an example of a case that meets this broader definition of climate change litigation.
[45] Ibid at 683
[46] Ibid at 690
[47] Ibid at 683
[48] A good example is the *Deadly Air* case.
[49] Both the Sabin Center and the LSE Grantham Database.
[50] Jolene Lin and Jacqueline Peel 'The farmer or the hero litigator? Modes of climate litigation in the global south' (2020*) Open Global Rights* at 3.
[51] Ibid
[52]Melissa Groenink 'From the global to the local: Lessons for South Africa' (2020) Unpublished conference paper, presented at the Climate Litigation in Africa Conference on 25-27 August 2020 Hosted by the University of Exeter and the University of the Witwatersrand at 10.
[53] Jeff Handmaker Working Paper No.641 'Researching Legal Mobilisation and lawfare' *International Institute of Social Studies* February 2019 at 2. See also Jeff Handmaker 'Introduction to the Legal Mobilization Special Focus' (2023) 15 Journal of Human Rights Practice at 2.
[54] Ibid at 7

climate litigation is used in a general sense to refer to comparative litigation from around the globe but when used in the narrow sense it restricts or sometimes excludes the Global South from lending contributions to transnational climate change jurisprudence.

The six cases analysed in this dissertation, although falling within the classification of the narrower definition of climate change litigation, are considered as landmark decisions both in their individual jurisdictions and in the broader climate litigation sphere. The cases are:

(i) *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others*[55] (*Earthlife**)***

(ii) *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*[56] (*Shell*)

(iii) *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and The Environment and Others.*[57] *(Eskom*)

(iv) *The State of the Netherlands v Urgenda (Neth. Sup. CT)*[58] (*Urgenda*)

(v) *Friends of the Earth Netherlands (Milieudefensie)et al v Royal Dutch Shell*[59] (*Milieudefensie)*

(vi) *Neubauer et al v Germany*[60] (*Neubauer)*

Their judgments illustrate the power of the law in addressing climate change and have left such a strong impact that the litigation strategies employed in them have been used in subsequent climate cases.[61] The cases in both the Global North and South African jurisdictions institute action against the state, or a representative of the state as well as against private companies, ensuring a compatible comparison.

1.3. Transnationalism in Climate Change Litigation

Climate litigation is unique in that it addresses a complex, global environmental challenge. As such, it is bound to have a transnational character.

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[55] (65662/16) [2017] 2 All SA 519 (GP)
[56] (3491/2021) 2022 (6) SA 589 (ECMk) (1 September 2022).
[57] (17554/2022) [2022] ZAGPPHC 721 (6 October 2022).
[58] *The State of the Netherlands v Urgenda Foundation, The Supreme Court of the Netherlands*. (20 December 2019) Case number: 19/00135 Citation for the English Translation ECLI:NL:HR: 2019:2007 (Original Dutch citation from the Supreme Court of the Netherlands: ECLI:NL: 2019:2006)
[59] Citation for the Official Translation into the English Language: C/09/571932/HA ZA 19-379 (Citation for the original Netherlands Judgement of the Hague District Court in the Dutch Language: ECLI:NL: RBDHA: 2021:5337)
[60] Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Mar. 24, 2021. Case No 1 BvR 2656/18. 1 BvR 96/20. 1 BvR 78/20. 1 BvR 288/20. Official translation of the judgement into the English Language Available at: https://www.escr.net.org-caselaw
[61] As will be seen in the ensuing chapters.

Academic interest in climate litigation has grown substantially post 2015 as litigation and the corresponding body of jurisprudence has increased.[62] A second bias exists in that literature focuses on ground-breaking cases in Global North jurisdictions, with the result that there is insufficient writing and conclusions drawn about climate litigation in the Global South.[63] The literature nevertheless makes certain claims about transnationalism in climate litigation and climate litigation in the Global South, to which I now turn.

1.3.1 Transnational Climate Action

Transnational climate actions are now considered to play a huge role in the sphere of climate governance.[64] Chan *et al* note, first, that climate governance has become increasingly complex. Secondly, that there is a growing recognition that climate action involves 'transnational' actors.[65] The authors claim that transnational climate actions in the form of partnerships, networks and clubs that aim for mitigation, adaptation and climate-resilient developments drive global climate governance that transcend the inter-governmental negotiations under the UNFCCC.[66] The authors point out that an advantage of transnational actions could be to support governmental efforts in keeping to the objective of average global temperature change below 1.5°C. However, a disadvantage of transnational climate actions could be possible conflicts between regimes causing fragmentation of climate governance.[67]

The authors define transnational climate actions as

> [A]ctivities by stakeholders other than states that are party to the UNFCCC, including initiatives by cities, regions, multinational corporations, small and medium-sized enterprises, civil society actors, investors, indigenous communities, and other societal groups, individually or in

[62] 2015 is the year that the UNFCCC's Paris Agreement was concluded, seeking to hold increases in global temperatures to well below 2°C, and pursuing a limit of 1.5. Marie-Claire Cordonier Segger 'Advancing the Paris Agreement on Climate Change for Sustainable Development' (2016) 5 *Cambridge Journal of International and Comparative Law* at 207.
[63] Peel, J. & Osofsky, HM "Climate Change Litigation' (2020) 8:23 *Annual Review of Law and Social Science* at 27: "A dominance of analyses dealing with climate litigation in the Global North, at the expense of a focus on climate litigation developments in the Global South"
[64] Chan, S. Brandi, C. & Bauer, S. 'Aligning Transnational Climate Action with International Climate Governance: The road from Paris' (2016) 25 *Review of European Comparative and International Law* at 238.
[65] Ibid, at 238 where climate change is described as encompassing sustainable development and needing action from many sectors such as *inter alia* energy, trade and agriculture.
[66] Ibid at 238
[67] Ibid at 238-239

> collaboration, aiming at mitigating greenhouse gas emissions and or adapting to the impacts of climate change.[68]

This is a broad range of transnational actors and is not limited to private actors. The UNFCCC negotiations is the main international process for climate change negotiations; however, other stakeholders are called in to engage and demonstrate broad support for climate action, look at practical mitigation and adaptation efforts, call on governments to implement practical solutions and to ultimately consider more ambitious public policy.

Since COP21 in Paris 2015, transnational actions are gaining more visibility within the UNFCCC process.[69] It is noteworthy that transnational climate action has gained the support of both Governments and the UNFCCC.[70] One of the outcomes of the Paris conference, COP21 is the agreement that national governments determine their own contributions,[71] which has implications for the involvement of non-state actors in global climate governance. These are set out as, first, a strengthened interface between non-state actors and policy members. Next, an acknowledgement of climate actions beyond mitigation; enhanced visibility of non-state and subnational actors and in addition, continued efforts for scaling up climate actions.[72] The question that is posed is to what extent COP21 created a framework to reinforce intergovernmental and transnational spheres of global climate governance? Chan *et al* argue that the opportunity for transnational climate action enhances visibility and effectiveness and sustains the momentum of the Paris Agreement. The answer that they provide suggests that the Paris framework improved recognition and visibility of transnational climate action and led to improvements in policy making but did not deliver a truly comprehensive framework. The result is that the framework, whilst recognising transnational climate action and acknowledging its contribution in governmental policy making, provides little detail on evaluation and implementation of transnational climate action.[73]

Claims about transnationalism have also been made in relation to transnational corporate liability for environmental damage and climate change. Corporations have been linked to widespread environmental threats on a 'truly planetary scale, which also cause harm to

[68] Ibid at 240
[69] Ibid at 241
[70] Ibid at 241, and further that the UNFCCC secretariat launched the Momentum for Change Campaign, in 2011, which highlights the plight of moving towards a low-carbon future by the increase of litigation across the globe.
[71] With the first request for review and an upgrade of these NDCs coming out of COP28 in Dubai, 2023.
[72] Chan et al op cit note 64 at 242-243.
[73] Ibid at 243 -247

vulnerable communities in developing countries.[74] The question that arises is whether there is a duty of care claimable on the part of foreign claimants affected by parent companies in a different country. The premise is that 'without any means of protecting themselves in the local courts, the affected communities may thus have only one viable option: to seek justice in the courts of the home state of the parent company.'[75] The case of *Vedanta v Lungowe*[76] serves as an example of how foreign claimants have engaged in transnational corporate liability litigation.[77]

Peel and Lin have explored the transnationalism of climate litigation in their study on how litigation arises in Global South jurisdictions.[78] They posit five modes of litigation in the Global South which are shaped by the initiating actors. The first group of actors are the 'Grassroots Activists' who are from amongst local activists and community groups who sue governments or companies seeking more ambitious climate action. The second category is the 'Hero Litigator' who is usually a high-profile lawyer-activist in the position of instituting litigation and raising publicity for the case through the media. Third is the 'Farmer' which is typically foundations and non-profit organisations who provide finances to attorneys and environmental non-profit organisations to 'seed' new climate litigation. The "Engineer' is when climate action is brought by a transnational actor to replicate previous strategies which are seen as suitable for transportation to other jurisdictions.[79] This has been seen in the Global North in the *Urgenda* and *Neubauer* cases where an organisation is behind the ground-breaking legal victories that have emerged. The authors anticipate that transnational actors in the Global South could follow this model. Lastly, the 'Enforcer' is when the actor initiating climate litigation is a prosecutor or government agent. The authors suppose that the Enforcer mode could advance climate litigation in the Global South by linking enforcement of existing environmental management laws and climate change.[80]

1.3.2 The Human Rights Turn

[74] Samual Varvastian & Felicity Kalunga 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v Lungowe'* (2021) 9 *Transnational Environmental Law* at 323-324
[75] Ibid.
[76] Ibid at 324 *Vedanta Resources Plc and Anor (Appellants) v Lungowe and Ors (Respondents)* [2019] UKSC 20 on appeal from [2017] EWCA Civ 1528
[77] Judgment in this case was heard in the Supreme Court of the United Kingdom (UK) on 10 April 2019. The issue at hand was 'the liability of an English company for environmental damage caused by its foreign subsidiary in Zambia.' The court held that 'the English parent company could owe a duty of care to foreign claimants affected by its subsidiaries and held additionally that English courts may have jurisdiction.' Ibid at 324
[78] Lin & Peel op cit note 50.
[79] Ibid
[80] Ibid

The most common claim is that climate litigation in the Global South is rights-based. This can also be viewed as a claim about the contribution of Global South cases to transnational climate jurisprudence. Scholars[81] have maintained that what distinguishes climate litigation in the Global South is the reliance on a rights-based approach. They[82] attribute this to constitutional human rights protections in Global South countries.[83]

When referring to climate litigation in the Global South, scholars agree that there is an increase in rights-based approaches to litigation for purposes of both argument and remedies. Wegener,[84] for example, cites cases such as *Leghari*[85], *Urgenda* and *Carvalho*[86] to make the point that the rights-based approach can be observed in Global South cases.

Setzer and Benjamin[87] are of the opinion that 'to a certain extent, climate cases in this area follow trends observed in the Global North.'[88] They explain that despite the apparent trend of the South following the North, there are different characteristics in Global South litigation which are reflected in both a strategic litigation approach and the outcome of the litigation. As proof of this claim, they aver that although litigants in both the North and South rely on human rights and constitutionally based claims, the difference in the South is that because these countries are already at a higher climate change-risk and have less access to essential infrastructure and resources, they are more vulnerable to damage, and their claims are more dire. The example cited is *Future Generations v Ministry of the Environment and Others*[89] in which the Supreme Court of Colombia extrapolated on the human rights implications of climate change in a developing country context.[90]

[81] Ibid
[82] Lin and Peel, ibid.
[83] For example, South Africa and Brazil.
[84] Lennart Wegner 'Can Paris Agreement help Climate Change Litigation and Vice Versa?' (2020) 9:1 *Transnational Environment Law* at 22.
[85] *Asghar Leghari v Federation of Pakistan* W.P. No. 25501/2015, Lahore High Court Green Bench, judgment of 25 January 2018.
[86] *Armando Ferraro Carvalho and Others v The European Parliament and the Council*, case no. T-330/18 ECLI:EU: T:2019:324
[87] Joana Setzer & Lisa Benjamin 'Climate Litigation in the Global South: constraints and innovations' (2020) 9:1 *Transnational Environmental Law* at 79
[88] Ibid.
[89] *Future Generations v Ministry of the Environment and Others* (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018).
[90] Ibid at 3.

Peel and Lin's[91] contribution (which claims to be the first academic review of climate litigation in the Global South) note 'the significant number of Global South climate cases, that like the *Leghari* petition, rely on Constitutional rights or human rights claims, including alleged violations of rights to life or environmental rights.'[92]

More recently, Setzer and Higham have argued that as societies head toward a 'Just Transition', the most common grounds of litigation are the use of human rights arguments based in constitutional law, followed by claims based on administrative law and a minority of cases using tort/delict as the cause of action. [93]

When considering how human rights are used in climate litigation, Saveresi and Setzer[94] look at geographical placement and at distribution of litigation. Africa, together with Europe, Asia-Pacific, Latin America, and North America account for the most cases considered as pro-climate rights-based and are listed as such in the databases. [95]

In considering why rights-based strategies are on the rise, Savaresi points to two trends. The first is that human rights strategies in climate litigation target state actors such as governments and non-state actors such as corporations. The second is that applicants rely on human rights as an avenue to seek redress for harms associated with climate change, framing the harm as human-rights violations.[96]

Setzer and Vanhala look at the relationship between climate litigation and human rights to highlight references to human rights as a trend in scholarly attention.[97] They note that Peel and Osofsky's survey of climate litigation includes human rights claims, and conclude that there is

[91] Peel & Lin op cit note 43 at 684.
[92] Ibid
[93] Setzer & Higham op cit note 35 at 6.
[94] Annalisa Savaresi & Joana Setzer 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (2021) available at: http://dx.doi.org/10.2139/ssrn.3787963 (accessed July 2021) at p3.
[95] Joana Setzer & Lisa Benjamin 'Symposium on J. Peel & J. Lin, "Transnational Climate Litigation: The Contribution of the Global South" Climate Change Litigation in the Global South: Filling in the Gaps' (2020) *Open Access Article, distributed under the terms of the Creative Commons Attribution Licence*. On page 57, "Among other contributions, Peel & Lin identified regional and national variation in terms of the types of cases observed across Global South countries. For instance, in Africa human rights figure in the majority of the cases identified."
[96] Annalisa Savaresi 'webinar Series: Human Rights Strategies in Climate Change Law' (2020*) The Global Network for Human Rights and the Environment (GNHRE*) at p3
[97] Joana Setzer & Lisa C. Vanhala 'Climate Change Litigation: A Review of research on courts and litigants in Climate Governance' (2019) *Wiley Interdisciplinary Reviews: Climate Change* at 10

a 'human rights' turn in climate change litigation."[98] This has been visible from the well-known North cases such as *Juliana*[99], *Urgenda, Milieudefensie* and is further seen by media attention, public awareness and by Judges considering rights-bases claims in *Earthlife, Leghari* and *Shell -Bodo*[100], where the Hague Appeal Court ordered Shell Nigeria to compensate farmers over oil spills in 2008 and 2009, proving that that in the Global South, precedent is now set for holding multinational companies responsible for human rights abuses.

Beyond identifying a human-rights turn in global South litigation, I have not encountered scholars who have interrogated or investigated how human rights approaches advance or contribute to a system of transnational climate governance.

1.3.3. The Role of Courts in Climate Governance

The third set of claims about transnationalism and climate litigation revolves around the role of courts in a system of transnational climate governance.[101] Climate litigation foregrounds the role of judges and courts. Reflecting on the role and functions of judges in adjudicating climate disputes, Preston asserts that the steps of finding, interpreting and applying laws are 'opportunities for the judiciary to make a meaningful contribution to tackling the problem of climate change.'[102] Carnwath (after interviewing and preparing seven YouTube videos of judges presenting their views on the changing role of courts in tackling the climate crisis), comments that the law can be the bridge for communities facing manifest climate change impacts, and that 'judges can and must offer at least some of the building blocks for the law's response to climate change.'[103]

A general sense that 'climate change litigation may become an opportunity to (re)discuss the role of domestic courts in the international legal architecture,' is ascertained from Mitkidis and

[98] Ibid at 10.
[99] *Juliana et al. v United States of America et al*. 339 F. Supp. 3d 1062 (D. Or. 2018), Case no. 6:15-CV-01517-AA (15 October 2018).
[100] *The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 2170 (TCC), Case no. HT-13295 and HT-13339 to 350.
[101] The release of the Intergovernmental Panel on Climate Change's (IPCC) Sixth Assessment Report on April 4, 2022, noted how climate litigation is 'shaping climate governance.' Op cit note 1.
[102] Brian J. Preston 'The Contribution of the courts in Tackling Climate Change' (2016) *Journal of Environmental Law* at 11.
[103] Robert Carnwath 'Climate-conscious courts: reflections on the role of the judge in addressing climate change' (2022) London: *Grantham Research Institute on Climate Change & the Environment & the London School of Economics & Political Science.* Available at: https://www.lse.ac.uk/granthaminstitute/news/climate-conscious-courts-reflections-on-the-role-of-the-judge-in-addressing-climate-change/

Valkanou.[104] These same authors, in drawing from an article titled 'Should Judges make the Law?' by Laura Burgers[105] are in favour of an interplay between law and politics in the realm of international and national climate change litigation, and feel that despite the doctrine of separation of powers, and other confines to judicial law-making in a constitutional democracy, the judiciary may make a decision that opposes democratic majorities if the deviation is founded on the protection of fundamental rights.[106] Burges concludes that 'climate change litigation reflects a "growing consensus" that the environment is of constitutional value and, in turn, a prerequisite for democracy – and such qualification is the basis of the democratic legitimacy of judicial lawmaking on climate change.'[107]

In a review of 25 countries, Setzer and Bangalore[108] found that climate policy is often times complemented or substituted by domestic legislation by the courts, illustrating the ability of the judiciary to take on a more dynamic role.[109] Also relevant to this research is Preston's nine ways in which courts can make meaningful contributions towards solving the problem of climate change.[110] The first of which is for courts to provide equal access to justice by ensuring that justiciable claims are allowed in a court of competent jurisdiction. Secondly, courts have an onus to discharge duties including hearing and determining climate claims, without brushing aside, deferring consideration of or obstructing concerns and claims of people. Thirdly, courts in upholding the rule of law ensure that the legislature and executive, as political branches of government, act in accordance with the law and thus courts uphold and enforce democracy. Fourthly, courts, in hearing and deciding matters of climate litigation can take and can be seen to take the problem of climate change with the seriousness it deserves. This will force the executive, legislature and private sector to take climate change seriously. Fifthly, courts can through its decisions, explain and uphold fundamental values of law, and the manner, extent and terms of laws made by society regarding climate change and its consequences is reflective

[104] Katerina Peterkova Mitkidis & Theodora Valkanou 'Climate Change Litigation: Trends, Policy Implications & the way forward' (2020) 9:1 *Transnational Environmental Law* citing Saiger as evidence for this claim, at 13. This is because the subtheme on the legitimacy of judicial decision-making within the climate change arena is highlighted which raises the interplay between law and politics in a democracy, bearing in mind the doctrine of separation of powers, and the question of whether courts in climate litigation have this capacity or is it *ultra vires*. It also addresses whether foreign judgements should shape climate governance in other countries.
[105] Laura Burgers 'Should Judges Make Climate Change Law?' (2020) 9:1 *Transnational Environmental Law*.
[106] Ibid at14.
[107] Ibid.
[108] Joana Setzer & Mook Bangalore 'Regulating Climate Change in the Courts' in Alina Averchenkova, Sam Frankhauser & Michal Nachmany (ed) Trends in Climate Change Legislation (2017) ch 9.175-192.
[109] Ibid.
[110] Preston op cit note 102 at 17.

of public values and identity of society. Sixthly, through climate litigation courts can promote environmental values by putting a price on them. Whilst clean air, water, public beaches, and open spaces are essentially viewed as free goods, and because they are not valued by society, pollution from GHG emissions threaten environmental quality. Courts can intervene to mitigate climate change by regulating sources of GHG emissions. Seventhly, within the process of the judiciary and the creation of precedence, the development of climate change law can be cemented by courts. Eighthly, by giving decisions based on sound reason, courts are capable of adjudicating disputes around the determination of norms or standards. And finally, climate judgments are based and determined on attribution science, and this type of evidence has the power to quell fears and misinformation relating to climate risks and harms.[111]

Carnwath identifies three areas of common ground in global climate litigation. He claims first that 'international norms and standards play a significant role.'[112] He contends further that aside from international law, 'a process of *transnational* exchange between courts is seen in different jurisdictions grappling with common issues.' Lastly, he notes that judges should acknowledge that because climate change is fraught with a 'complex and global phenomenon' it cannot adhere to current legal frameworks, and he thus calls on judges to respond by identifying what is lacking in domestic jurisdictions and to draw on their counterparts from other jurisdictions in their judgments.[113]

Regarding courts in the Global South, three further claims from judges' perspectives in Carnwath's compilation are useful. Perspectives from Brazil[114] include the view that climate litigation in the Latin American jurisdiction is inevitable and that environmental law has a function therein; whilst a South African judge[115] affirms its judiciary as ready to tackle climate litigation and its related complexities; and lastly Pakistan[116] advises how remedies ordered by courts in climate litigation may lead to the growing awareness of the climate crisis.

[111] Ibid at 12-17.
[112] Carnwath op cit note 103. He holds that this is particularly true in the context of the impact of the Paris Agreement on domestic climate litigation.
[113] Ibid. The example of the human rights approach adopted by Dutch judges in the *Urgenda* case is cited here.
[114] Justice Antonio Hermann Benjamin of the National High Court of Brazil.
[115] Justice Nambitha Dambuza of the South African Supreme Court of Appeal.
[116] Justice Syed Mansoor Ali Shah of the Supreme Court of Pakistan in *Leghari v Federation of Pakistan* op cit note 85.

A related claim is that through cases which are successful and considered as a 'win' in court, the law and governance around climate change is being reshaped and impacts upon future litigation.[117] This can be viewed from a lens of an indirect form of climate governance stemming from climate litigation in the Global South where Bouwer[118] uses *Earthlife* to make the point that cases which 'win' in courts, have a likelihood of contributing meaningfully to climate action. And that 'cases which fail, often in preliminary hearings, but nevertheless might or held to make a positive contribution to climate action in some respect.'[119] This means that the role of the courts, especially when ruling in favour of applicants in climate matters, could now be perceived as a powerful example of regulating climate policies. An example of this can be seen in the analysis of the *Eskom* case in chapter four where the court dismissed the application but still considered the importance of climate change impact assessments.

1.3.4 Remedies

The fourth set of claims on transnationalism and climate litigation centres on remedies, distinguished on the bases of Global North and Global South cases. Setzer and Benjamin[120] argue that Global North climate litigation focuses on the remedies of new legislation and an enactment of laws to provide for climate change matters. In the Global South, by contrast, litigants base claims on existing legislation as enactment of new legislation is cumbersome owing to capacity and other constraints.[121] The point is that climate litigation in the Global South looks towards the courts to remedy inadequate enforcement, which then speaks to their role.

Wegener, reflecting on *Earthlife* and *Leghari*, points out that these cases show that the courts in these jurisdictions[122] lack adequate governance tools.[123] Contrary to this, Setzer and Benjamin[124] point out that 'despite resource and governance constraints, some strategic cases from the Global South have achieved bold outcomes,' and that 'ultimately, the strategies and

[117] Kim Bouwer & Joana Setzer 'Climate Litigation as Climate Activism: What Works?' (2020) *The British Academy: COP26 Briefings* at p10
[118] Ibid 0
[119] Ibid at 10
[120] Mitkidis & Valkanou op cit note 104 citing views of Joana Setzer & Lisa Benjamin at p14.
[121] Ibid at 15
[122] Both are from Global South jurisdictions.
[123] Wegener op cit note 84 at 20-2.
[124] Setzer & Benjamin op cit note 87 at p78

outcomes from these courts in the Global South might be able to contribute to the development of transnational climate change litigation.'[125]

1.3.5 Mitigation-based and Adaptation-based Climate Litigation

Finally, transnationalism also features in differentiated claims regarding the contribution of mitigation- and adaptation-based climate litigation. The Paris Agreement aims to achieve climate mitigation, adaptation and an increase in climate finance by using a variety of cooperative frameworks and mechanisms.[126] The NDCs in particular, by adopting a 'bottom-up' approach pursue domestic mitigation and adaptation targets.[127] Mitigation aims to *reduce*, and adaptation aims to *cope* with the impacts of climate change.[128]

Wegener reflects that cases which seek preventative measures against climate change using mitigation measures are present in both the Global North and South, but the claims are based on national legal conditions.[129]

Setzer and Benjamin[130] claim that there is a stronger possibility that litigants from Global South jurisdictions employ climate litigation as a means to the end to enforce application of mitigation and adaptation policies which have been enacted. They rely on *Leghari* to illustrate how the court, centring on human rights violations, compelled the government agencies to enact climate regulations, despite delays and a dearth of adaptation policies.[131] According to these authors litigation in the Global North, by contrast, is strategically aimed to increase ambition on climate change by governments[132]

Similarly, Peel and Lin[133] suggest that litigation in Global South jurisdictions links the 'peripheral' aspect of climate change to broader issues which concern fundamental rights and

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[125] Ibid
[126] Cordonier Segger op cit note 62 at 208.
[127] Ibid.
[128] Julia Laukkonen, Paola Kim Blanco, Jennifer Lenhart, Marco Keiner, Branko Cavric & Cecilia Kinuthia-Njenga 'Combining climate change adaptation and mitigation measures at the local level' (2009) 33 *Habitat International* at 287.
[129] Wegener op cit note 84 at 23 'While cases like the German *Lliuya v RWE* do not involve state actors, have a specific legal basis and aim to provide a remedy for Climate Change damage, litigation such as in the case concerning deforestation in the Colombian Amazon or in *Juliana v USA* does not involve state actors, is based on rather broader legal concepts, and aims to create or enforce obligations to take preventative action.'
[130] Setzer & Benjamin op cit note 87 at 79-80.
[131] Ibid
[132] Ibid
[133] Peel & Lin op cit note 43 at 706.

environmental conservation. They cite *Earthlife* where the South African High Court found that global climate change was an important consideration in the application for an EA for a new coal-fired plant.[134] Paiement cites the *Urgenda* case as a powerful example of how this was achieved and points out further that this case has become the precedent for global strategic litigation.[135]

This view, that litigation is used to cement mitigation policies, is echoed by Bouwer and Setzer[136] who claim that 'policy changes at present are represented most significantly in challenges to either mitigation or adaptation ambition at national level.' The authors rely on cases from both the Global North[137] as well as the South[138] to assert their view that the aims reflected in climate litigation are firstly, a tactical approach targeting high carbon policies; and secondly, climate litigation can be seen as a stepping-stone for a broader strategic approach.

Thus far this chapter has shown the emergence of climate litigation and scholarly interest in recent years. It has outlined broader and narrower definitions of climate litigation and presented a myriad of claims in relating to transnational, global climate litigation. Notwithstanding all these attempts to distil the key features of climate litigation in Global North and Global South jurisdictions, there is a lack of focus on what transnationalism in climate litigation means. This lays the foundation for the questions this dissertation sets out to answer.

1.4. PROBLEM STATEMENT

There is clear evidence that research in the field of climate litigation is predominantly focused on the Global North. Secondly, the problem is that there is a contested definition of climate litigation; and no definition of transnational climate litigation, which leaves the Global South marginalised. Further, there is no study which considers the contribution of South African jurisprudence to transnational climate litigation. This points to the gap in the literature and at the same time shows how the dissertation fits into the bourgeoning field of climate litigation, jurisprudence, and scholarly enquiry. The dissertation will consider these challenges and

[134] Ibid
[135] Phillip Paiement 'Urgent Agenda: How Climate Litigation builds Transnational Narratives' (2020) 11 *Transnational Environmental Law* 121-143 available at https://doi.org/10.1080/20414005.2020.1772617 (accessed 20 August 2021)
[136] Bouwer & Setzer op cit note 117 at p7.
[137] The *Urgenda* case
[138] The *Leghari* case

attempt to bring further clarity and a stronger definition of the concept of 'transnational climate litigation.'

1.5. RESEARCH OBJECTIVES

The objective of this research is to explore the theoretical basis of transnationalism in order to develop an analytical framework for determining how, if at all, climate jurisprudence is transnational in character, and what the place of South Africa is in a system of transnational court-led governance.

1.6. RESEARCH QUESTIONS

The primary research question of the study will be: *what is the place of South Africa in a system of transnational court-led climate change governance?*

Secondary questions, which will be considered with the aim of further developing the primary research question, are the following:

(i) What is the scope and meaning of transnationalism in climate litigation? What are the elements of transnationalism that can be used to analyse and interrogate South African and foreign case law?

(ii) What insights emerge from studying South African cases through a transnational lens? Have South African climate change cases contributed to transnational climate litigation as a system of global climate governance?

(iii) To what extent are iconic Global North climate cases transnational in character? How is the transnational system of climate governance influencing South Africa?

(iv) How, if at all, have North-centred judgments cognised the impacts of judgments in South Africa as contributing to global climate governance?

1.7. Methodology

The investigations carried out herein are based on desk-based research. The method proceeded by finding a definition of transnational climate litigation developing, a transnational analytical framework, analysing climate litigation and comparing those findings.

1.7.1 Defining transnational climate litigation

This theoretical aspect of the research entailed developing themes from four bodies of theory that would lead to an understanding of the concept of transnational climate litigation. In doing so, the dissertation grappled at first with how to solidify a definition that does not exist. Research was initially conducted in fields where transnationalism was strongly present, such

as transnationalism in business law, and transnationalism in the field of migration of people across borders and transnationalism in law generally, with a focus on international law in particular. Having trawled through a multitude of climate judgements and environmental and climate literature and as work progressed, these false starts expanded to a study of transnationalism in environmental law and later to include transnationalism and the role of courts. Establishing themes from these bodies of theory entailed seeking what was relevant using instinct, in the sense of knowing what was needed but without having a concrete way to guide the type of literature that would be most meaningful.

1.7.2 Developing a transnational analytical framework

As a sense of what transnational climate litigation began to concretise, an analytical framework to apply to the study of cases in different jurisdictions and to identify aspects of transnationalism in the cases started to emerge. The risk of what to include and exclude as part of the framework to identify aspects of transnationalism was adjusted a few times. For example, the analytical framework initially included a focus on the 'transnational sphere of consideration that was included in the decision-making process' and 'theoretical frame used to gauge the transnational powers of the court'. However, these categories could not be easily linked to the facts or decision-making of the chosen cases and were therefore excluded from the final draft.

1.7.3 Analysis of climate litigation

The initial idea was to analyse cases from the African continent, South Africa and from the Global North. Time and space constraints led to the decision to focus only on cases in South Africa and the Global North. Although outside the scope of this dissertation, an analysis of cases from Africa could form the basis for further research and comparison.

Although the doctrine of separation of powers for a court-led system of climate governance could engage questions of checks and balances, it also falls outside the scope of this dissertation and could likely develop further research.

1.7.4 Comparative findings

This chapter proceeds from two paths. The first is a survey of the findings of the six cases based on the transnational analytical framework. Contrasts and similarities are highlighted and analysed to understand the power of law in addressing transnational climate litigation. The second path depicts these findings by referring back to the existing theories of transnationalism from chapters one and two, and confirms, refutes, elaborates and provides nuances that were

not previously seen by applying them on a transnational field. The research expands the perspective of transnationalism in climate litigation.

1.8. Structure of the dissertation

The dissertation contains seven chapters comprising of the introductory chapter, setting out its definitions, objectives and research questions, and five further chapters.

This introductory chapter contains discussions on climate change, climate governance, climate litigation and transnationalism. The problem statement, research gap, research questions and objectives, and methodology are also set out. Another important aim of the chapter is to provide background on the link between climate litigation in the Global North and in the Global South and definitions of these are provided.

Chapter Two considers theory and discusses three key aspects of the concept of transnationalism viz, (i) the origin and definition of the concept of transnationalism, (ii) transnational law, (iii) transnationalism and environmental law and (iv) transnationalism and the role of the courts. These concepts are then linked to climate change and the chapter concludes with outlining a 'transnational analytical framework' as a lens to view South African and foreign climate cases.

Chapter Three applies the transnational analytical framework to three South African climate cases, namely the *Earthlife* (2020), *Shell* (2022) and *Eskom* (2022).

Chapter Four applies the transnational analytical framework to *Urgenda* (2019), *Milieudefensie* (2021) and *Neubauer* (2021). These are the most iconic and the most recent cases in the Global North and the focus here will be with a view to determining how these cases contribute to a web of transnational climate governance which is useful and appropriate for South Africa.

Chapter Five critically analyses the information and material relied on in the preceding two chapters based on the transnational analytical framework. It discusses observations, for example when comparing Global North cases to those of the Global South, the transnational actors, transnational sphere of considerations and other enquiries. This analysis helps in understanding the contribution which climate litigation in South Africa has made to

transnational climate litigation and governance. Essentially this chapter synthesises the analysis of chapters three and four with a view to answering the research questions.

Chapter Six concludes the dissertation by setting out the chief conclusions of the study and recommendations for policy, practice and further research.

CHAPTER TWO: EXPLORING 'TRANSNATIONALISM' – TOWARDS A TRANSNATIONAL ANALYTICAL FRAMEWORK FOR CLIMATE LITIGATION

2.1 Introduction

Chapter Two explores and lays out a theoretical basis for understanding 'transnationalism' to ascertain what the 'transnational' in 'transnational climate litigation' refers to. Themes from four bodies of theory viz, transnationalism, transnational law, transnational environmental law and transnationalism and the role of the courts are explored, and this theoretical excursus on transnationalism will assist in identifying elements or markers of transnationalism in climate litigation.

2.2 The definition and themes of transnationalism

There is no universal definition of transnationalism, but from amongst its most common features are its social, economic, and political elements with different academic definitions for each aspect. This leads to it having an inner processual character (of or relating to a legal process) which is powerful enough to transform contemporary societies. With time, it has become part of international law to capture aspects of cross-border interactions.

Judge Philip C. Jessup, a judge at the International Court of Justice and scholar renowned for his accomplishments in the field of international law, coined the term 'transnational law' in his book of the same title in 1956.[139] According to literature on transnational law, it is important to first differentiate between the concept of international law as a system which penetrates and thus shapes and influences national systems in different ways, and national laws which in turn shape international law.[140] In a broad sketch of transnational law, there are many terms that overlap and which are used inconsistently.[141] In order to avoid confusion, Jessup proposed and defined the phrase transnational law as including 'all law which regulates actions or events that transcend national frontiers.'[142] The focus thus fell on actions or events and national frontiers.

[139] NB Katzenbach 'Review of Transnational Law by Philip C. Jessup' Chicago Unbound Available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?articles=3019&context=uclrev accessed on 30 November 2022

[140] A Basic Introduction to Transnational Law by The University of California, Berkeley, School of Law. At p61 Available at: https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fiD=7587 accessed on 30 November 2022

[141] Terms such as transnational law, the law of nations, international law, public international law, customary international law, general principles of law, conventions, treaties. Ibid at 61

[142] Ibid at 61

The term transnationalism gained momentum in the 1990s when it emerged as a research program in the social sciences.[143] At that time, it referred to studies in social sciences, focusing on social relations and groups of people across borders of nation-states.[144] This research posited transnationalism as both a term and theory, with a distinction between transnationality which refers to the study of organisations, infrastructure and other social mechanisms; and transnationalisation which refers to the coming into existence of social relations across different national borders.[145] With time, transnationalisation is no longer only concerned with the study of a specified social theory and neither is it classified as an independent theory. It has now become a research subject by which to analyse transnational organisations at a meso level, for example linking transnationalism to the growth of organisations; as well as an analysis of transnational societal institutions, for example transnational educational programmes, at a macro level.[146] The definitions of transnationalism and transnationalisation include a 'border-crossing phenomena' with the result that social integration is no longer restricted to one, single place but includes a social process which connects people on many levels.[147] In essence, transnationalisation may, as it extends across different places, create new forms of social diversity,[148] and with that, by implication, social organisation.

Tedeschi *et al*[149] have recently reviewed current debates on transnationalism. They point out that in the first instance, transnationalism is understood as being a component of globalisation, defined as 'all activities spanning social, economic, and political fields that cause greater interaction and interconnectedness between countries and continents.'[150] Globalisation refers to the flow of goods, information and services across national borders, a trend that greatly accelerated in the second half of the 20th century. Transnationalism however, 'concerns individuals and civil society's movements across borders and how increased global connectedness affects those movements across borders.'[151] The authors find that different definitions of transnationalism exist, and that most discuss migration, yet not all the definitions

[143] Pries, L. (2022) Transnationalism. In: Scholten, P (eds) Introduction to Migration Studies. Springer, Charm. At p233-234. Available at: https://doi.org/10.1007/978-3-030-92377-8-15
[144] Ibid.
[145] Ibid at 234
[146] Ibid at 235
[147] These levels are 'local, regional, national, supranational, global, local, diasporic, and transnational.' Ibid at 244.
[148] Ibid at 244
[149] Tedeschi, M. Vorobeva, E & Jauhiainen, JS 'Transnationalism: current debates and new perspectives' (2020) 87 *GeoJournal* at 603-609. For this contribution the authors conducted an evidence-based study drawing on the content of the 50 most cited literature from 2019 to 2020 and analysed the main definitions of transnationalism.
[150] Ibid at 605
[151] Ibid

include this aspect.[152] Their review of definitions of transnationalism in the most cited papers enabled them to identify nine main types of transnationalism.[153]

These types can be summarised as follows: First, transnationalism 'from above' refers to home country policies that channel the transnational activities of migrants[154] and secondly, transnationalism 'from below' refers to migrant practices relating to their country of origin in economic, cultural, and political terms.[155]

A third definition is broad transnationalism, defined as 'a series of material and symbolic practices in which people engage that involve only sporadic physical movement between the two countries, a low level of institutionalization, or just occasional personal involvement, but nevertheless include both countries as reference points.'[156] Fourth is narrow transnationalism, which 'refers to those people involved in economic, political, social, or cultural practices that involve a regular movement within the geographic transnational field, a high level of institutionalization, or constant personal involvement.'[157]

The fifth type of transnationalism that emerges is rejection-based or reactive transnationalism which has the following two definitions, 'symbolic, an identification with the home country as a reaction to the experience of discrimination and racism' and 'economic, investment at origin and so gaining satisfaction and prestige in their home society.'[158]

Sixth is transnationalism, cross-border activities and social processes with two components, viz first those that include multiple ties or interactions linking people or institutions across the borders of nation-states. Secondly is the component that is an emergence of a social process in which migrants establish social fields that cross borders including geographical, cultural and social fields.[159]

Seventh is transnationalism within three contexts, viz, economic which relates to economic initiatives of transnational entrepreneurs, political which refers to activities of government and

[152] The authors stress that transnationalism remains a broad concept, and that 'it is challenging to try to tie together the disparate aspects of its different activities and multidisciplinary dimensions, while simultaneously establishing variables and limits.' Ibid at 605-606.
[153] Ibid at 606 to 609
[154] Ibid at 606 and 609.
[155] Ibid.
[156] Ibid at 606-607 and 609.
[157] Ibid.
[158] Ibid
[159] Ibid at 607-609.

political leaders who aim for political power in either country or socio-cultural which is aimed towards a national identity abroad.

Eighth is minor transnationalism which is defined as cultural assimilation and articulation with the major networks.[160]

Ninth is reverse transnationalism which relates to second generation return to homelands.[161]

Of importance to this study are the third (broad transnationalism), sixth (transnationalism, cross-border activities and social processes) and eighth (minor transnationalism) definitions from the above list. Broad transnationalism can be seen in climate litigation in terms of sporadic physical movement between countries, and a low level of institutionalization. However, symbolic exchange – most notably in the court's use of precedent – is very significant. Transnationalism, cross-border activities, and social processes is the most relevant for climate litigation in that it pertains to multiple interactions linking people across the borders of nation-states, and this could reveal an emergence of a social process establishing social fields that cross geographical borders. The social field, in this instance, is integrally related to the legal process. Minor transnationalism is also reflected in climate litigation articulation through the manner in which national processes such as NDC formulation intersect with major networks, for example the UNFCCC.

Migration as such, however, is not necessarily the main focus of climate litigation (although it could be, if the criteria for defining climate litigation were different). This makes Tedeshi *et al's* typology of limited value for the purpose of this study.

From these definitions, transnationalism is nevertheless closely associated with *inter alia* globalisation, migration, multiculturalism, and internationalism. A broad range of cross-border activities which modify people's lives and stem from economic, sociocultural, and political activities or a combination of these activities are involved. Longley agrees that transnationalism is a vehicle of globalisation which poses a challenge to policymakers in what has become an increasingly global community.[162] He defines transnationalism as either economic, socio-cultural or political in nature which, together with the ideology of globalisation 'results in changes to the economic, socio-cultural, and political character of all countries involved, thus

[160] Ibid at 609.
[161] Ibid.
[162] Longley, R 'What is Transnationalism? Definition, Pros & Cons' (2022) thoughtco.com Available at: https://www.thoughtco.com/what-is-transnationalism-definition-pros-and-cons-5073163

forcing world leaders to look beyond the interests of their nations when creating policies and procedures.'[163] Longley further highlights the pros and cons of transnationalism on different levels with a significant pro being that of raising an awareness of problems affecting different countries, for example, advocating for human rights abuses.[164]

Another aspect of transnationalism that emerges from the literature, is that it has a transformative character; that it is powerful enough to transform contemporary societies.[165] This literature also proves that although there is no universal definition of transnationalism and what is included and excluded from it, it has certain common features which is mainly that it has a processual or in-becoming character. Thus, what is and what is not transnationalism depends on how researchers propose their variables based on their own methodology and materials used. The authors conclude by stating that definitions of transnationalism and its legal and normative requirements are yet to be studied.[166]

A further link between globalisation and transnationalism is identified by Haijer in the understanding of globalisation as a reflection of a transnational legal order emerging in the study of global anti-corruption.[167]

2.3. Transnational Law

Transnational law or regulation 'is the idea that law has "spilled out" beyond the borders of the nation-state and is now commonplace.'[168] In his exploration of transnational law Cotterrell poses the question raises questions regarding the 'law' and 'society' as well as between the different sources of law.[169]

Cotterrell questions whether it is important to conceptualise the concept of transnational law and to classify it as a new legal field.[170] He argues this is necessary as it may assist juristic

[163] Ibid at 4
[164] Ibid at 6
[165] Tedeschi et al op cit note 140 at 603.
[166] Ibid at 615 to 616.
[167] Friederycke Aleydis Haijer *Corporate Crime Conundrums and Globalization* (2021) 48-49.
[168] Roger Cotterrell 'What is Transnational Law?' (2012) 37 *Law & Social Inquiry Journal of the American Bar Foundation* at 500. Examples of transnational law include merchant communities with operations across national borders who make regulations in their dealings with each other that are legally binding. Other examples include European states that have become accustomed to the idea that much of their law comes from European-wide institutions and international criminal justice which catches violators of human rights irrespective of the state they happen to be in.
[169] Ibid at 501-502. 'Transnational law has led to a wide range of regulation operating beyond nation-state boundaries and has become considerable enough to warrant the view that transnational law has new sources, locations, and bases of authority.'
[170] Ibid.

practice as well as sociolegal scholarship to *inter alia* organise, link and make more sense of the broad trends in law that extend beyond boundaries. This new term of transnational law is deemed necessary by scholars 'to indicate new legal relations, doctrines and systems that are not those of nation-state law' but are neither 'fully understood by definitions' of the ambit of international law.[171] 'The new term is "transnational law" widely invoked but rarely defined with much precision.'[172]

Cotterrell describes three scenarios in which the term 'transnational law' is used in the context of jurisdiction, viz first be an extension of national jurisdictions crossing boundaries; secondly in the creation of law in the form of treaties and conventions by international agencies; and thirdly in the creation of regulation in cross-border relations when the need arises.[173]

Cotterell recognises the controversy as to whether transnational law is made up of rules applying across national borders[174] or whether it is regulating substantive rules that are different between states.[175] Ultimately, he suggests three criteria for identifying transnational law: First, does transnational law rely on nation-state law and international law or does it entail a new relationship between law and state? Secondly, is transnational law private in so far as the actors are concerned, meaning are the regulations related to individuals, or corporations and associations or does it include relations involving state and governmental stakeholders? Thirdly, is transnational law building a new regime or is it leaning toward a transnational unification of regulation?[176] Cotterell simply notes that 'these questions defy conclusive answers,' however it is clear that 'areas of established or embryonic regulation often associated with transnational law can easily be listed.'[177]

For purposes of the transnational analytical framework used in this dissertation, Cotterrell's analysis highlights the importance of examining how courts conceive of their jurisdiction and

[171] Ibid
[172] Ibid at 500-501
[173] Ibid at 501. The author also refers to the definition of transnational law by Jessup as 'all law which regulates actions or events that transcend national frontiers' and compares this with the definition proposed by other scholars who 'treat transnational law as conceptually different from national and international law as its primary sources and addresses are neither nation-state agencies nor international institutions based on treaties or conventions, but are rather private, meaning individual, corporate or collective actors involved in transnational relations.'
[174] This would be a 'substantive approach' which would aim for a convergence in regulation, like a monistic approach where 'transnational law aims at a gradual speed of legal uniformity across national boundaries and moves towards a world law.' Ibid at 501
[175] This would be a 'pluralistic approach' which recognises and preserves legal differences, but which soothes the interactions between legal regimes in a transnational conflict of laws system. Ibid at 501
[176] Ibid at 501-502
[177] Ibid at 501.

extra-territoriality, for example, whether they decide a matter by declining jurisdiction for extra-territorial reasons. The development of transnational law, it would seem, depends on judges' willingness to see beyond their borders. Soyapi talks about transnational law in contemporary times and how transnational law has been developing over the past 60 years alongside globalisation.[178] He confirms that it is through globalisation that the international stage has given rise to a multiplicity of actors and thus the emergence of new forms of regulation beyond the state. This is relevant in that it illustrates that 'the state's exclusive control of law-making within its borders and on the international level is no longer intact.'[179] For purposes of the transnational analytical framework, his point confirms the need to understand actors in a transboundary frame. Soyapi states further that this is driven by society and that these changes are no longer about states but about the needs of the global society.[180] Within the context of transnational climate law and governance, he notes that the right to a healthy environment is the mode of development of transnationalism in law. It is this constitutionalisation that is fast happening through the 'judicial process of transplantation, convergence of laws, integration and harmonisation; networking and judicial comparative borrowing.'[181] However, the symbolic exchange that drives transnationalism may extend far beyond a focus on a right to a healthy environment.

2.4. Transnationalism and environmental law

For purposes of this dissertation, this study of transnationalism in environmental law highlights five themes.

The first theme that has become evident is that environmental legal norms are becoming increasingly international due to a global growth of public concern regarding environmental issues and because environmental risks have themselves become globalised.[182] This is reflected in national and international environmental agreements which entrench legal principles that could be construed as a body of law. Yang and Percival attribute the global growth of public concern regarding environmental issues as a reflection of the international and national environmental agreements which emerged as a set of legal principles that could be construed

[178] CB Soyapi 'A Case for Transnational Law in Contemporary Times' (2020) 23:1 *Potchefstroom Electronic Law Journal (PELJ)* Available at: http://dx.doi.org/10.17159/1727-3781/2020/v23i0a8197 at 1
[179] Ibid at 2
[180] Ibid at 5
[181] Ibid at 7
[182] Tseming Yang and Robert V, Percival 'The Emergence of Global Environmental Law' (2009) 36 *Ecology* available online at http://gigitalcommons.law.scu.edu/facpubs/728 at 616.

as a body of law.[183] These authors claim that due to growing international linkages, a new field of law has emerged which they describe as 'global environmental law' and classify as a branch of law which has the characteristics of being international, national, and transnational all at once.[184] They define global environmental law as a 'set of legal principles developed by national, international and transnational environmental regulatory systems to protect the environment and manage natural resources.'[185] What is gleaned from this is that the first dimension of transnationalism in environmental law is consensus about a set of principles for protecting the environment. Global environmental law consists of three branches, firstly public international environmental law, which is a set of treaties and customary international legal principles which govern relations between nations. Second, national environmental law which is concerned with the way that national entities are regulated and third, transnational law which regulates cross-border relationships.[186] This suggests that transnationalism is used in the limited context of cross-border relationships and impacts. However, for purposes of the transnational analytical framework what is of significance is the focus on an established body of principles – whether stated in international, national or cross-border law – and how judges draw on these principles in climate litigation.

The second theme in transnational environmental law is seen in the context of emerging environmental issues, in that transnational environmental law does not bring into existence a new jurisdiction but instead offers a new powerful mode of understanding and engaging with environmental law. Heyvaert and Etty, in questioning how transnational environmental law helps to navigate through transboundary and transgenerational environmental challenges point out that transnational environmental law cannot simply create a new jurisdiction unbound by limitations in terms of either law or of geography, and nor does it reshape legal principles and new themes.[187] By contrast however, this is happening in the realm of climate litigation.[188] Transnational environmental law does however offer a novel approach to legal studies with a new perspective of environmental law. Hence the concept of transnational environmental law 'embodies an *approach* to legal studies and practice.'[189] This approach is being embodied in

[183] Ibid at 616
[184] Ibid at 616
[185] Ibid at 617
[186] Ibid at 617
[187] Veerle Heyvaert & Thijs Etty 'Introducing Transnational Environmental Law' (2012) 1:1 *Transnational Environmental Law* at 2-3.
[188] Ibid
[189] Ibid.

this dissertation as it explicitly adopts the lens of transnationality and attempts to grapple with its meaning.

Like international environmental law, the third theme related to transnational environmental law shows the migration of legal principles and rules across borders. This translates in the movement of norms or principles in environmental law becoming transboundary by having activities with effects in different jurisdictions. A helpful way of looking at transnational environmental law is to compare the way that environmental law governs environmental problems at either domestic or global levels, and to compare the use of legal principles across different jurisdictions.

Heyvaert and Etty further pose questions on the regulation of environmental law and the capacity of law to protect the environment.[190] They claim that 'law's prowess as a stabilising force operating within clearly defined jurisdictional boundaries is well established, but its credential as an engine for global social change are much shakier.'[191] This is very significant in a climate change context. Law was always seen as the vehicle by which national society, industry and economy are organised. But for law to be truly progressive and extraordinary, it needs to be operated at a global level[192] where its legitimacy and authority can be put to the test.[193]

The authors then map out what they consider key sensibilities and assumptions that inspire transnational environmental legal enquiries and hold that transnational environmental law is concerned with the way in which environmental law responds to the global nature of current environmental concerns. Thus, environmental principles become globalised because environmental risks have themselves become globalised. This highlights the importance of understanding which activities in a climate litigation case have a transboundary character. The global risk arising from the release of greenhouse gasses is the most obvious risk, but there may be other risks that also have a transboundary effect.

Building on how environmental law responds to global environmental constitutionalism,[194] Kotze points out that the purpose of global environmental law is primarily designed to attend

[190] Ibid at 1.
[191] Ibid at 2.
[192] The question may be asked here, global or transnational level?
[193] Ibid at 2
[194] Still within the theme of transnational environmental law as a legal process regarding the migration of norms and principles across borders.

to the worsening ecological crisis.[195] This bears a remarkable similarity to the current national and international agreements and declarations which give rise to climate rights,[196] the aims of which are to ensure rights to a healthy environment and a safe climate.[197] The purpose of the article[198] is to propose that

> 'global constitutionalism could contribute to reforms of environmental problems, by providing a new perspective through which to view the current deficient global environmental law and governance regime and by way of a normative process of constitutionalism.'[199]

Kotze holds that 'global environmental governance has recently emerged as a collective descriptive term and normative construct that encapsulates the countless (and growing) political, legal and institutional arrangements at the international, regional, sub-regional, national and sub-national levels that seek to respond to environmental problems.'[200]

Shaffer and Bodansky aver that 'we live in age of transnationalism' yet have 'an uneasy relationship with international law.'[201] Their essay first sets forth a concept of transnational environmental law that 'encompasses' but is 'broader than international environmental law.' Their work shows that because of limitations in international law, there is a need to evaluate transnational environmental law, and further assess the relationship between internationalism and transnationalism. The findings posits the relation of international law to transnational environmental law as 'both a check and consolidator.'[202] The important points emerging is that transnational law and its legal process pertains to the migration and impact of legal norms, rules and models across borders.[203] International environmental law however, is concerned with treaties between states as well as secondary customary international law and general principles of international law.[204] The conclusion arrived at is that the concept of transnational environmental law, while it subsumes international environmental law, in that they both

[195] Louis J. Kotze 'Arguing Global Environmental Constitutionalism' (2012) 1:1 Transnational Environmental Law at 199 available at doi:10.1017/S2047102511000094 [accessed on 10 November 2021]
[196] Examples of the sources of climate rights are International Agreements and Declarations as well as regional agreements and national constitutions.
[197] For example, the UNFCCC Paris Agreement.
[198] Written in 2012 regarding the global ecological crisis.
[199] Kotze op cit note 195 at 200.
[200] Ibid at 201
[201] Shaffer G, Bodansky D. Transnationalism, Unilateralism and International Law. *Transnational Environmental Law*. 2012;1(1):31-41. doi:10.1017/S2047102511000033 at 31.
[202] Ibid at 40.
[203] Ibid at 31. And that 'migration occurs through international law and institutions' and the 'unilateral legal developments in one jurisdiction which impact behaviours in other jurisdictions.'
[204] Ibid

involve application of legal norms across national jurisdictions, is a much broader concept.[205] This leads to a sub-theme in the concept of transnational environmental law which 'encompasses all environmental law norms that apply to transboundary activities or that have effects in more than one jurisdiction.'[206] Thus the definition of transnational environmental law includes environmental regulation that has a horizontal effect across different jurisdictions, and it also includes standards that have developed by private actors that that have effects across borders.[207] This then highlights at least two senses of transnationalism and its effects across borders.

The fourth theme gleaned is that transnational environmental law includes a discussion about transnational climate actions that have come to constitute a sphere of climate governance. This stems from a further contribution to the definition of transnational environmental law by Chan et al[208] who align transnational climate action as a sphere of climate governance.[209]

Etty et al. add more clarity to the understanding of the concept of transnational environmental law and an alignment to climate change by linking the 2020 Covid-19 pandemic to global interconnectedness and how an initially local problem quickly escalated to the extent of transcending international boundaries which held consequences on national, provincial, and local scales.[210] The authors claim that environmental challenges such as climate change, biodiversity and issues with organic pollutants have a similar cross-sectional nature and effect.[211] The point that is made is that similar to the effects of the Covid-19 pandemic, environmental problems are systemic or structural in nature and this has led to the development of the new discipline called transnational environmental law.[212]

The manner in which transnational environmental law can assist and add depth to knowledge and understanding of environmental problems, and specifically transnational climate change,

[205] With the explanation of Shaffer and Bodansky as to why the concept of 'transnational' is broader than that of 'international.'
[206] Ibid at 32.
[207] Ibid.
[208] Chan et al op cit note 64 at 238.
[209]Ibid at 238-239 and 240-241 where the authors reflect on the outcome of the Paris Agreement in having influenced the role of non-State and subnational actors to increase mobilisation efforts to harness greater ambition from States, by engaging in transnational actions aimed at mitigation, adaptation and climate-resilient developments that would transcend the formal UNFCCC negotiations.
[210] Editorial by Thijs Etty, Veerle Heyvaert, Jacqueline Peel et al 'Broadening the Branches and Deepening the Roots of Transnational Environmental Law' 2021 10:1 *Transnational Environmental Law*
[211] Ibid at 1. Environmental challenges such as climate change are likened to the impacts of the Covid-19 pandemic in that it is recognised as a global problem, but which has different impacts and policies in different jurisdictions.
[212] Ibid.

is by analysing actual sites of contestation.[213] By way of an example, an analysis of the climate change case of *Lliuya v RWE*[214] using the theory of 'corrective justice' is done, to conclude that this is one method of understanding the depths and effects of transnational environmental law (and *in casu* climate change law). This method of 'deepening the roots' of transnational environmental law is conducted by an examination of how those suffering from displacement caused by climate change can seek rectification.[215]

The fifth theme is that a rapid increase in regulations beyond the state changes perspectives in governance and leads to transnationalisation. Heyvaert in exploring the relationship between transnational regulation and law through the lens of environmental law lays down two essential claims.[216] The first is that transnational regulation has a transformative impact on law[217] and the second is that this leads to a shift in thinking of regulation beyond the territorial boundaries of states. This in turn leads to a process of 'problematization, contestation and reform' which is termed 'transnationalization of law'.[218]

While transnational environmental law scholarship analyses localised case study to better understand the multi-dimensional impacts of broader environmental problems, it is the structures of environmental governance and their visibility in different environmental sectors that impact most on environmental decision making.[219] The literature refers to scholars who have explored the concept of 'community governance' with the understanding that it could be defined as 'an increased governance by stakeholders and private actors operating at the local or at the transnational level,' resulting in regulation that responds to community context and secures social legitimacy, with communities being local, transnational, private or hybrid.[220]

2.5 Transnationalism and the role of the courts

[213] Ibid at 2.
[214] Ibid. This case, filed in 2022 in the German Higher Regional Court by a Peruvian farmer against a German utility. The Judges in this matter will have to attend an inspection in loco in Huaraz, Peru in order to examine the risk of glacial lake flooding into the plaintiff's house.
[215] Including displacement as *in casu*.
[216] Veerle Heyvaert 'The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation' (2017) 6:2 *Transnational Environmental Law* at 205-206
[217] Ibid at 205
[218] Ibid at 206
[219] Etty et al op cit note 210 at 6.
[220] Ibid.

Kahraman *et al* argue that domestic courts are sites of international political change.[221] The authors posit national courts as global adjudicators who constitute new rules of an international order, firstly by implementing international rules developed by international bodies, and secondly by resolving conflicts as globalisation brings different legal systems into contact.[222] They assert that this is an aspect of transnational governance and this is what enables courts to be the cause of change in the international order, particularly with key concepts such as human rights.[223] In studies reflecting a shift from an international to a transnational legal perspective over the last decade, the influence of the courts, enables transnational law to shape global governance and norms and to guide legal discourse. This engagement by courts in global governance produces new sites of authority.[224]

Preston makes the point that 'in the absence of an international treaty to address climate change, litigation provides an alternative path to encourage mitigation of the causes or redress for the effects of climate change.'[225]

In considering transnationalism and the globalised judiciary, Kersch has argued that the current transnational trend amongst scholars and judges is distinctive in both its origins and goals and is directed towards and is part of a politically motivated worldwide trend towards judicial governance, contrary to the concept of the rule of law.[226]

Murcott *et al* consider what the European Court of Human Rights (ECtHR) can learn from the courts in the Global South in the context of climate injustices.[227] They note that climate litigation in both domestic and regional tribunals, initiated by non-state actors[228] has now become a global phenomenon and has resulted in the courts being important stakeholders in climate governance.[229] They raise the point that climate injustices occur at a global level and that most climate casualties are from amongst the Global South and are those who are marginalised and vulnerable, whilst some nations from the Global North who are largely

[221] Filiz Kahraman, Nikhil Kalyanpuri & Abraham L. Newman 'Domestic courts, transnational law & international order' (2020) 26:1 *European Journal of International Relations* available at https://journals.sagepub.com/doi/10.1177/1354066120938843 at 1
[222] Ibid at 2-3
[223] Ibid
[224] Ibid at 2-4
[225] Brian J. Preston 'Climate Change Litigation (Part 2)' (2011) 2 *Carbon and Climate Law Review* at 244
[226] Ken I. Kersch 'The New Legal Transnationalism, the Globalised Judiciary, and the Rule of Law' (2005) 4:345 *Washington University Global Studies Law Review* at 346
[227] Melanie Murcott, Maria Antonia Tigre & Nesa Zimmerman 'What the ECtHR Could Learn from Courts in the Global South' (2022) *Verfblog* Available at https://verfassungsblog.de/what-the-ecthr-could-learn-from-courts-in-the-global-south/
[228] Such as NGOs and youth movements
[229]Ibid at 1

responsible, continue to exacerbate the climate problem as they continue to extract and burn fossil fuels.[230] With the human rights-based approach being used to address this problem, the courts globally can take on jurisdiction to address these injustices by firstly granting *locus standi* to the climate victims and secondly by pursuing distributive justice in addressing the climate challenge across jurisdictions.[231] This makes the issue of *locus standi* as significant point of analysis for a transnational analytical framework.

Speaking of climate litigation, Preston notes that 'courts have become a critical forum in which the future of greenhouse gas emission regulation and responsibility for adaptation to climate change are debated.'[232] Preston enumerates the advantages of litigation as being three-fold, first that it can improve the quality of the decisions made in that all relevant environmental issues need to be considered, secondly that precedents can be created from the judicial decisions and lastly that media exposure can focus the attention of the public on climate change. This has been seen in both the United States and in Australia where climate change litigation has made effects on governmental decision-making, both directly and indirectly.[233]

2.6. The transnational analytical framework

The excurses into theories of transnationalism, transnational law, transnational environmental law and transnationalism and the role of the courts enables a clearer conception of the elements of transnationalism in climate litigation. Insights gleaned from this literature can be added to the claims about climate litigation presented in Chapter One (the human rights turn in climate litigation, the role of the courts in climate governance and the related remedies, as well as mitigation and adaptation-based climate litigation) to develop a transnational analytical framework. The primary purpose of this framework is to be able to accurately discern elements of transnationalism in the South African and foreign cases selected for analysis.

The transnational analytical framework is set out in Table 2.1 below:

The transboundary nature of the activity	Which activities are transboundary in nature? What made the activity transboundary? How do courts conceptualise climate change as a transboundary risk?
The transboundary actors	Were the actors from more than one jurisdiction? Were there any transboundary actors? What was the transboundary sphere of

[230] Ibid
[231] Ibid at 2
[232] Brian J. Preston 'The influence of climate change litigation on governments and the private sector' (2011) 2: Special Issue *Climate Law* at 485
[233] Ibid at 487

	influence of the actors involved? Do they have offices in more than one country? What types of organisations are involved? How do they relate to Peel and Lin's climate litigation actor categories?
Extra-territorial jurisdiction	How do the courts conceptualise their jurisdiction? Do they explicitly resort to limited national jurisdiction as a ground for decision-making? Do they explicitly address extra-territoriality? How do they justify or shy away from their decisions have extra-territorial effect?
Locus Standi	How did the matter come before the court? What rules of standing were applied? Were distinctions drawn between *peregrini* and *incola* applicants?
Transnational norms and principles enunciated by the court	To what extent are the norms and principles discussed and applied by the court already recognised as transboundary or global in nature? How well do the norms and principles enunciated and applied by the court 'travel' to other jurisdictions?
Evidence of applying laws from another jurisdiction	Was there evidence of applying jurisprudence from other countries (e.g. citing non-national laws and cases)? What is the jurisdiction of cases cited in climate judgments and how are these cases used? Do cited cases from developed or developing jurisdictions.
How the global character of the problem affected the courts judgment	How did the global character of the problem feature in the courts' reasoning? Climate change is a global problem so how does the court read its obligations through that lens?

Table 2.1 The transnational analytical framework

This transnational analytical framework is used to analyse to the case studies in chapters three and four, with the aim of addressing the research questions of this study. The insights generated from this transnational analytical framework answer the primary research objectives, to determine how, if at all, climate jurisprudence is transnational in character and what the place of South Africa is in a system of transnational court-led governance.

2.7. Conclusion

The four sections that comprise this chapter, viz the definition of transnationalism in general, transnationalism in environmental law, the link between transnationalism in environmental law and climate change litigation and transnational jurisprudence were studies and research I carried out in my quest to develop a conceptual framework for the rest of my dissertation.

This chapter addressed the concept of transnationalism in climate litigation. It offered a theoretical examination of four bodies of law most pertinent to transnationalism and to environmental law to enable the concept to be related to the climate litigation context. The

study followed a thematic discussion and revealed that although there is no universal definition of transnationalism, it has characteristics which in practice, render it relevant for global and international law. The findings align with the key claims about transnationalism and climate litigation as presented in Chapter One.

The discussion on the definition and themes of transnationalism revealed that a common feature of transnationalism is its ability to lead transformation in contemporary societies. As a part of international law, transnationalism has aspects of cross-border interactions and connects people on many different levels. This creates social fields that cross geographical boundaries. As a mode of globalisation, transnationalism forces world leaders to create policies and procedures that look further than just their nation. A good example of this is the formation of the UNFCCC. This finding is echoed in the discussion on transformation and the role of the courts where domestic courts are regarded as sites of international political change, and this is seen as an aspect of transnational governance which enables courts to be the cause of change in the international order. Courts exercise transnational governance by implementing international rules made by international bodies, and by resolving conflicts as globalisation brings different legal systems into contact. This then is how transnational law shapes global governance and guides legal discourse.

Transnationalism leads to the formation of new legal relations, doctrines and systems that are not those of the nation-state law but are neither fully understood by definition within the ambit of international law. Together with globalisation, transnational law gives rise to a multiplicity of actors and new forms of regulation beyond the state.

Transnational environmental law offers a novel approach to legal studies and a new mode of understanding and engaging with environmental law. In the climate context, this is reflected in the new modes of litigation, for example the human rights turn that occurred first in *Urgenda* and followed in different Global North jurisdictions thereafter, or the fundamental rights that were enforced in *Earthlife*, and followed in South African climate litigation thereafter.

Another aspect is the migration of legal norms and rules across borders. Transnational climate actions have come to constitute a sphere of climate governance. Rapid increase in regulations beyond the state changes perspectives between transnational law and environmental law.

The chapter concludes by presenting the elements of a transnational analytical framework for purposes of analysing the cases selected for further study in this dissertation.

CHAPTER THREE: CLIMATE CHANGE LITIGATION IN SOUTH AFRICA

3.1 Introduction

The purpose of this chapter is to apply the elements of the transnational analytical framework to three South African cases. South Africa is a developing country that shows an increase in climate litigation. In its overview of global climate litigation, the 2023 UNEP report analyses the growth of climate litigation with the trajectory on an upward surge.[234] Increases in both the amount of litigation instituted as well as in the various jurisdictions in which they have arisen.[235] The global distribution of cases reflect the continent of Africa as holding only 2.3% of all cases according to geographical representation.[236] Of this percentage, as at December 2023, South Africa accounts for the most number of climate cases with a total of ten; and Nigeria, Kenya and Uganda have two cases each that fall within the narrow definition of climate litigation. Therefore, although litigation is present, it is still nascent in both South Africa and in the continent of Africa.

To provide contextual information on South Africa's climate commitments, the South African government signed the UNFCCC in August 1997, acceded to the Kyoto Protocol in July 2002[237] and joined many other nations of the world in ratifying the Paris Agreement on 22 April 2016.[238]

The South African government first responded to the climate crisis in 2012 by the creation of the National Climate Change Response White Paper.[239] The White Paper was guided by the South African Constitution and its Bill of Rights, the National Environmental Management Act, 1998 (NEMA), the Millennium Declaration and the UNFCCC.[240] In December 2022, the President established the Climate Commission, tasked *inter alia*, to advise on the country's NDC.[241] After a long development process, the South African parliament was introduced to the Climate Bill on 18 February 2022, following proceedings commenced in 2018. The National

[234] Burger & Tigre op cit note 18 at 12. The total number of climate litigation in the database for 2017 was 884, with 1550 cases in 2020 and 2180 cases in December 2022.
[235] Ibid at 13. The greatest number of cases are filed in the United States of America and the European Union, followed by Australia, United Kingdom of Great Britain and Northern Ireland, Germany, Brazil, New Zealand, France, Mexico, Spain, and Indonesia.
[236] Ibid at 19.
[237] https://unfccc.int Accessed 30 July 2022
[238] https://www.dffe.gov.za accessed 30 July 2022
[239] The full paper is available at: https://www.gov.za/sites/default/files/gcis_document/201409/nationalclimatechangeresponsewhitepaper0.pdf accessed February 2024.
[240] Ibid.
[241] As required by the Article 4 of the Paris Agreement.

Assembly passed the Bill on 24 October 2023, and it is currently before the second house of Parliament. This Climate Bill will frame the country's climate response going forward. However, it is important to underscore that the cases analysed in this chapter pre-empt the Climate Bill, and none even refer to its provisions. Instead, the Constitution and other relevant (mostly environmental) legislation are the framing laws. The Constitution of South Africa is the supreme law and the provisions and values enshrined therein are fiercely upheld and entrenched by the judiciary, maintaining the balance needed for the implementation of the doctrine of separation of powers. Provisions relied upon in climate litigation discussed below are from the Bill of Rights section of the Constitution which lays down and affirms human rights as a cornerstone of democracy in South Africa.

From the cases discussed in this chapter, one decided in 2020 and two in 2022, all apply South Africa's environmental and administrative legislation to matters of climate change.

3.2 *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others*[242]

3.2.1 Introduction

Earthlife was the first climate case in South Africa and established that climate change impact assessment forms part of obligation to conduct Environmental Impact Assessments (EIA) under the country's National Environmental Management Act, NEMA).[243] From a transnational perspective, it heralds a victory for environmental and climate change activists as the case laid down the importance of considering global climate change and upholding the aims of the UNFCCC and the Paris Agreement. Field enumerates some of the victories related to climate change resulting from this judgment.[244] First that climate change poses a risk to sustainable development in South Africa, linked to intergenerational justice, which is why the consideration of climate change impacts are necessary for the protection of future generations. Secondly, climate change is an important and necessary factor which must be considered in the decision to grant environmental authorisations. Thirdly, in the environmental authorisation process, climate change impacts should support mitigation and adaptation measures and provision for a professionally researched climate change impact report is therefore most

[242] [2017] 2 All SA 519 (GP) (8 March 2017) Case No: 65662/16

[243] The judgment has left a responsibility and an obligation on authorities granting Environmental Impact Assessments (EIA) to consider climate change impacts in its authorisation process.

[244] Tracy-Lynn Field 'A landmark case on climate change in SA' *Global Change Institute – University of the Witwatersrand.* Available at: https://www.wits.ac.za/gci/gci-news/news-archive/a-landmark-case-on-climate-change-in-sa/ Accessed August 2023.

appropriate.[245] This stems from the court acknowledging South Africa's international obligations and its anticipation to decrease reliance on coal across all sectors to achieve its NDC targets as per the Paris Agreement.[246]

3.2.2 Background and Decision

The case, decided by the High Court in Pretoria (GP) , centred around the environmental impacts of building a coal-powered fire station and the granting of the environmental authorisation (EA) for this purpose.[247] The court had to assess if the decision to grant the environmental authorisation was irregular in terms of South African administrative law[248] in that it did not rely on the considerations set out in a properly-conducted climate change assessment[249] before duly granting the environmental authorisation.

In 2015 several coal power plants were being planned and procured, including the Thabametsi power station at the centre of the case. Earthlife, an environmental NGO, raised concerns about the environmental impacts of constructing the plant.[250] The dispute centred on section 24(1) of the NEMA[251] which necessitates an EA for activities listed or specified by the Minister of Environmental Affairs. The construction of the Thabametsi power plant triggered a listed activity and on 25 February 2015 the Chief Director of the Department of Environmental Affairs (DEA) granted an environmental authorisation for the project.[252] Earthlife then appealed to the Minister of Environmental Affairs who subsequently upheld the decision to grant the environmental authorisation on 7 March 2016.[253] Following this, Earthlife approached the courts seeking judicial review of the decision, [254]relying on three grounds.[255] The first was that the decision-makers had failed to comply with section 240(1) NEMA.[256] In

[245] Ibid at 3
[246] *Earthlife* para 35. South Africa has signed and ratified the UNFCCC, acceded to the Kyoto Protocol, and signed the Paris Agreement. South Africa is an Annex I and a Developing Country and has different emissions targets but has obligations under the Paris Agreement to describe its own emission targets to achieve climate mitigation.
[247] *Earthlife* paras 1 - 2.
[248] Section 8 PAJA
[249] Section 240 NEMA
[250] Thabametsi was intended to be a 1200MW coal-fired power station near Lephalale in the Limpopo Province and which was intended to be in operation until at least 2061. *Earthlife* para 1.
[251] Act 107 of 1998
[252] *Earthlife* para 2.
[253] The appeal which *Earthlife* lodged with the Minister was in terms of section 43 of NEMA (which deals with appeals), and directly raised the question of climate change.
[254] *Earthlife* para 2.
[255] *Earthlife* para 11.
[256] *Earthlife* para 5 and 11. In terms of section 24O (1) of NEMA, competent authorities are obliged to take all relevant factors into account when deciding whether to grant an EA. Factors include pollution, environmental impacts or degradation which may be caused.

essence section 24O regulates the criteria to be taken into account by competent authorities when considering applications for EAs. Section 24O(1)(b) stipulates that all relevant factors must be considered, including any pollution, environmental impacts, or environmental degradation likely to be caused. Consideration of climate change impacts were inferred from these provisions as they were not expressly stated. The second ground of review was that the absence of a climate change impact assessment resulted in the granting of the EA and the appeal decision being 'irrational and unreasonable', [257] while the third ground of review was that the Minister had committed material errors of law.[258]

In its prayers, Earthlife sought for the matter to be remitted to the Chief Director, relying on section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In reaching its judgment, the court considered the grounds of review raised by Earthlife, the South African government's climate change and energy policies, the decision of the Chief Director to grant the EA, and the Minister's appeal decision.

Pursuant to a lengthy deliberation, the court ruled in favour of Earthlife and found that the decision of the Chief Director was irregular. The court found further that if the Minister had upheld the appeal related to the climate change obligations[259] then she could have chosen to refer the matter back to the Chief Director, or she could have considered the appeal *de novo* with the requirement that Thabametsi is to obtain a climate change impact assessment report, based on the new evidence that had been put before her.

As a result, the court ordered that it would not set aside the EA, but instead it set aside the Minister's ruling, based on the matter of the climate change impact assessment.[260] The court remitted the matter of the climate change impacts to the Minister for her reconsideration based on new evidence in the climate change report.[261]

Drawing on the discretion granted to it by section 8 of PAJA, the court granted an order that was 'just and equitable, even though it was different from what Earthlife had sought.[262] This is because the court held that by requiring the EA process to commence *de novo*, it would entail

[257] *Earthlife* para 11.
[258] Ibid
[259] That the Chief Director had not considered the state's international and national obligations to mitigate against climate change. The court went to the extent of saying that "had the Minister upheld the fourth ground of appeal, as she should have" *Earthlife* para 121.
[260] Which was the fourth ground of appeal to the Minister by *Earthlife*.
[261] *Earthlife* para 121.
[262] *Earthlife* had applied for both the EA by the Chief Director and the appeal by Minister be set aside for reconsideration with a climate change impact assessment report, a paleontological impact assessment report and comments from any interested parties. *Earthlife* para 117.

that the climate change impact assessment would have to precede the decision to authorise the project.

The judge conceded that:

> The decision to grant the EA without proper prior consideration of the climate change impacts is prejudicial in that permission has been granted to build a coal-fired power station which will emit substantial [greenhouse gas emissions] GHGs in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting the authorisation,"

According to the court, this remedy would be disproportionate. Therefore, the court applied 'the principles of severance and proportionality,' and declared only 'the objectionable part' of 'the administrative action as invalid.' Accordingly, the court did not open the EA process *ab initio*, and instead ordered a fresh appeal by the Minister.[263]

The Minister subsequently upheld the environmental authority for the Thabametsi plant in 2018. Earthlife, now joined by Groundwork, launched new court proceedings, known as the second *Earthlife* case.[264] The High Court once again, on the 19 November 2020 found in favour of the applicants and ordered that the environmental authority granted to Thabametsi in 2015 be reviewed and set aside. This court also reviewed and set aside the appeal decision of the Minister of 30 January 2018. Finally, the court ordered that the application for environmental consideration by Thabametsi be remitted back to the Chief Director for reconsideration.[265]

The result was the grinding halt of construction of the Thabametsi power plant and marked the end of the road with investors withdrawing funding.[266]

3.2.3 The transnational analysis

3.2.3.1 The transboundary nature of the activity.

The transboundary activity in this case is climate change. The court referred to the National Climate Change Response White Paper of 2012 to define climate change and its consequences for global warming.[267] Included in this definition is the harmful effect of GHG emissions

[263] *Earthlife* paras 117 – 125.
[264] Case no 21559/2018
[265] Ibid at 2
[266] Centre for Environmental Rights (CER) 'Celebrating a major climate victory: Court set aside approval for Thabametsi coal power plant. (2020) available at: https://cer.org.za/news/celebrating-a-major-climate-victory-court-sets-aside-approval-for-thabametsi-coal-power-plant
[267] Ibid. The White Paper defines climate change as a 'trend' which is on-going in its effect of changing the planets general weather conditions because of increased amounts of GHG emissions by human activities.

which make the planet warmer, resulting in climate change.[268] For the construction of the coal-fired power station, a climate change impact assessment would need to consider the extent to which the plant would contribute to climate change over its lifetime, calculated by quantifying the GHG emissions during construction, operation, and decommissioning. Additionally, the resilience of the coal-fired power plant to climate change and its impact on *inter alia* rising temperatures, diminishing water supply as well as extreme weather patterns and how these impacts would be avoided, mitigated, or remedied would also be considered.[269]

South Africa, due to its mining and minerals processing as well as its coal-intensive energy system, is a significant contributor of global GHG emissions.[270] The court stressed that South Africa is especially vulnerable to the effects of climate change because of its socio-economic and environmental positions.[271] The court looked at climate variability and the increased frequency and intensity of weather events having detrimental results for society and that South Africa, being a water-stressed country could face droughts in the future.[272]

What also emerges from this decision are the 'human rights' consequences of climate change. The court, in its overview of issues stressed that in its interpretation of section 24O(1) NEMA[273] read together with the Environmental Impact Assessment Regulations, section 24 of the Constitution, South Africa's domestic environmental policies and South Africa's obligations under international climate change conventions, 'a mandatory, pre-requisite' climate change impact assessment must be conducted prior to the granting of an environmental authorisation.[274] *Earthlife* is therefore significant for incorporating a human rights dimension, based on section 24 of the Constitution, into South African climate litigation. Bouwer and Field also point to the 2005 Nigerian case of *Gbembre v Shell* in which an action brought against fossil fuel companies was based on human rights grounds.[275]

[268] Ibid.
[269] *Earthlife* para 6.
[270] *Earthlife* para 25. The court expanded on coal as an emissions-intensive carrier and how coal-fired power stations emit significantly high levels of GHGs, causing climate change.
[271] Ibid.
[272] Ibid
[273] With regards to the criteria to be considered by competent authorities when considering applications.
[274] *Earthlife* par 12
[275] Kim Bouwer and Tracy-Lynn Field Editorial: 'The Emergence of Climate Litigation in Africa' (2021) 2 *Carbon and Climate Law Review* detail at 126.
Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others (2005) FHC/B/CS/53/05.

3.2.3.2 The transboundary actors

The applicant, Earthlife Africa, is a non-profit organisation based in Johannesburg. Founded in 1998 has, it has its aim, seeking a better life for people without harming others or the environment.[276] The organisation fell within the ambit of an interested and affected party as envisaged in section 24(4)(v)(a) of NEMA.[277]

The Trustees for the Time Being of Groundwork Trust joined as the Second Applicant in the second case. Groundwork Trust is also a non-profit organisation working in areas of climate and energy justice, coal, environmental health, and related matters primarily in southern Africa. Their mission is to assist those affected by environmental injustices, and they are guided by section 24 of the South African Constitution.[278]

The actors in the *Earthlife* case could be categorised in a mixture of Grassroots Activists and Farmers.[279] Grassroots activists, as the case involved was public interest litigation aimed at environmental and climate protection. The farmer element arises from the description of the parties as NGOs who were instrumental in initiating ('seeding') climate litigation. This view is supported by Murcott who describes Earthlife as a non-governmental organisation having values which include 'grassroots democracy', and 'solidarity and co-operation with all people who struggle against oppression and exploitation' with one aim of exposing 'flaws in government energy policy.'[280]

A further link to the transboundary nature of the actors is to consider the networking of Earthlife, one of the organisations taking part in South Africa's Life After Coal Campaign, a coalition which aims to 'discourage the development of new coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people.'[281] Life After Coal (Impilo Ngaphandle Kwamalahle) is a joint campaign by Earthlife Africa, Groundwork and the Centre for Environmental Rights[282] and this coalition serves as an example of collaborative governance being seen in climate litigation, as discussed in Chapter One.

[276] See https://earthlife.org.za Accessed August 2023.
[277] *Earthlife* par 3. As such they are authorised to participate in public proceedings regarding potential harms to the environment.
[278] https://groundwork.org.za Accessed August 2023.
[279] According to the classification by Lin and Peel op cit note 50.
[280] Melanie Murcott Transformative Environmental Constitution (2023) at 174.
[281] Ibid.
[282] Extracted from the Life After Coal website, available at: https://lifeaftercoal.org.za/

The respondents in *Earthlife* comprise of governmental departments being the Minister of Environmental Affairs[283], who rejected the appeal to the initial decision, the Chief Director, Integrated Environmental Authorisations of the Department of Environmental Affairs who granted the authorisation, and the Director, Appeals and Legal Review of the Department of Environmental Affairs. While the state respondents have no direct transnational character, aside from the common ground that most climate litigation is instituted against the state or its parastatals, the transnational element is seen in the development company for the proposed coal-fired power station. Thabametsi (Pty) Ltd was financially backed by foreign investors.[284] Thabametsi initially had backing from French company Engie who withdrew its stake in 2015 due to pressure from environmental justice groups. Thereafter, KEPCO from South Korea and Marubeni from Japan joined as stakeholders.[285]

3.2.3.3 Extra-territorial jurisdiction.

Extra-territorial jurisdiction did not feature in the *Earthlife* matter. However, despite this, the court took cognisance of South Africa's international obligation to contribute to the reduction of GHG emissions and the court used international law to interpret the provisions of NEMA.[286] The court did not take these issues and consider them from any other angle aside from its domestic concerns.[287]

3.2.3.4 *Locus standi*

For the purposes of the appeal against the decision of the Chief Director, the applicant had standing in terms of section 43(1) of NEMA which provides that 'any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister.'

[283] now known as the Minister of Forestry, Fisheries and the Environment.
[284] CER op cit note 266
[285] Ibid.
[286] *Earthlife* para 54. The court noted the Applicant's emphasis first on the impacts of climate change on water resources, air quality, human health, biodiversity, and marine fisheries and secondly that South Africa is obliged to commit to the reduction of GHG emissions in terms of international treatise as part of a 'global solution to a global problem.' Thirdly, and still discussing the Applicant's appeal, the court referred to the commitments of the South African government to prioritise climate change responses in all sectors in the White Paper.
[287] Bouwer and Field op cit note 275 at 126, discuss that South African climate litigation is characterised by challenges related to mining and coal-dependant power generation, resulting in water related risks. The *Earthlife* case has been cited and relied upon in subsequent South African climate litigation such as the *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Developing Planning: Western Cape* (2020) (16779/17) [2020] (3) SA 486 (WCC).

Earthlife, as a non-profit organisation had standing to bring this review application in three capacities which were, in its own interest as an interested and affected party; in the public interest; and in the interests of protecting the environment.[288]

3.2.3.5 Transnational norms and principles enunciated by the court.

Humby has framed three clear norms and principles applied by the court which are already transboundary in nature.[289] The first is that of sustainable development, the second is intergenerational equity and the third is the precautionary principle. Within the South African context, section 24 of the Constitution recognises and therefore protects the interrelationship between the environment and development. The court also recognised that section 24 provides for the interrelationship between the environment and sustainable development and that environmental considerations are balanced with socio-economic considerations in order to provide for sustainable development.[290] The court addressed the effects of climate change in the form of rising temperatures, increased water scarcity and the increasing patterns of natural disasters and immediately in the same paragraph links these to sustainable development and the duty of the state to protect the environment for the current and future generations as per intergenerational justice and the precautionary principle.[291]

This reliance on the precautionary principle in the context of climate change governance has also been expounded upon by Kotze and Du Plessis who laud *Earthlife* for associating climate change impact assessments with sustainable development, intergenerational justice and the precautionary principle.[292]

The court also expressed a duty of care. The respondents had contended that there was no express provision in legislation requiring a climate change impact assessment.[293] Against this backdrop the court asserted that this did not entail that there is no legal duty to consider climate change as a relevant consideration and went even further by recommending that a formal expert

[288] This was in terms of section 32(1) NEMA. *Earthlife* para 3.
[289] Tracy-Lynn Humby 'The Thabametsi Case: Case No 65662/16 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*' (2018) 4 *Journal of Environmental Law* at149
[290] *Earthlife* para 82. The court stated that "sustainable development provisions are in S24(b)(iii) of the Constitution and provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development" and the court referred to *the Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).
[291] *Earthlife* para 82 and Humby op cit note 289 at 149.
[292] Louis J. Kotze and Anel Du Plessis 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' (2020) 50:615 *Environmental Law* at 642.
[293] *Earthlife* para 84.

report on climate change impact assessments will serve as evidence of establishing its relevance.[294]

Lastly, in exercising its discretion for a just and equitable remedy, the court applied the principles of severance and proportionality and declared only a portion of the administrative action as invalid.[295]

3.2.3.6 Evidence of applying laws from another jurisdiction

There were multiple instances in which the court referred to international law and to jurisprudence from different countries. It should be noted that the South African Constitution allows courts to consider foreign laws when interpreting the Bill of Rights, and must also consider international law when interpreting legislation and in developing common law or customary law, as stated in section 39(1). For instance, the court referred to South Africa's international obligations to reduce GHG emissions as part of a 'global solution to a global problem.'[296] In this context, it was South Africa's international obligations stemming from having signed and ratified the UNFCCC, acceded to the Kyoto Protocol, and signed the Paris Agreement.[297]

Kotze and Du Plessis point out that the court demonstrated its appreciation for climate change as a global concern governed by both domestic and international law frameworks, creating obligations and offering best practices.[298]

Further in the judgement, as the court outlined the events subsequent to the appeal to the Minister, it furnished guidelines on what should be included in the considerations of a climate change impact assessment.[299] These guidelines advocate for a broadened assessment so as to embrace the procedures followed by the Sabin Center for Climate Change Law.[300]

[294] *Earthlife* para 88.
[295] *Earthlife* para 120.
[296] *Earthlife* para 54. See also para 12 where the applicant centres its case on domestic environmental policies, S24 of the Constitution and to South Africa's obligations under international climate change conventions.
[297] *Earthlife* para 35.
[298] Kotze & Du Plessis op cit note 292 at 642 – 643.
[299] *Earthlife* para 70.
[300] Ibid. These include a consideration of relevant factors using multiple scenarios and climate change projections.

Then, in its analysis of the review of the decision of the Chief Director the court spoke about the way NEMA must be interpreted and highlighted and that it must be interpreted consistently with international law.[301]

The court held accordingly that the various international agreements on climate change are relevant to the proper interpretation of section 24O(1)(b) of NEMA.[302] Field, in an analysis of the courts drawing on international climate change law to interpret NEMA highlights that it is this approach which led to the courts finding that 'climate change impacts are relevant factors that *must* be considered during the EIA process' which is key to promoting sustainable development and upholding the precautionary principle.[303]

Also, in this section of the judgment, the court referred to the work of Professor De Ville in Judicial Review of Administrative Action in South Africa in which the approach of German administrative law is discussed.[304]

In granting its remedy the court referred to the 2010 American case of *Communities for a Better Environment v City of Richmond*[305] with a view to illustrate that the time to consider the climate change impact assessment is before and not after granting approval.

3.2.3.7 How the global character of the problem affected the court's judgment

[301] *Earthlife* para 83. This is in accordance with the provisions of section 233 of the Constitution which holds that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."
[302] Ibid. The court referred to Article 3(3) of UNFCCC which enacts a precautionary principle in that all state parties are required to take precautionary measures to anticipate, prevent or minimise causes of climate change and to Article 4(1)(f) of the UNFCCC which imposes an obligation upon all state parties to take climate change considerations into account when enacting their individual environmental policies and actions.
[303] *Earthlife* para 78 and note105 on the precautionary principle. Humby op cit note 275 at 149 -150. Humby notes the courts considered the risk climate change poses to sustainable development in South Africa and links sustainable development as is recognised by section 24(b0(iii) of the South African constitution with the principle of intergenerational justice, which requires the state to take reasonable measures to protect the environment "for the benefit of present and future generations" and this is further reinforced by the Articles 3(3) and 4(1)(f) of the UNFCCC requiring state parties to take precautionary measures. *Earthlife* para 82.
[304] *Earthlife* para 113. This is with regards to the functus officio principle which applies to final decisions in cases where rights or benefits were granted and would then appear unfair to deprive of the benefit which has already been vested.
[305] *Earthlife* para 118-119, Advocate Budlender for the Applicant referred to *Communities for a Better Environment v City of Richmond* 184 Cal.App.4th 70 (2010) where the Court of Appeal of the State of California held that mitigation measures ought to be identified and formulated during the environmental impact process and not after approval for it. The court in *in casu* held that this judgment was "obviously on point by virtue of its facts being analogous to the facts in this case." Judge Murphy (*in casu*) then spoke on the prejudicial weight the proposed coal-fired power station has in an ecologically vulnerable area over the next 40 years, however, he stressed that setting aside the environmental authorisation and starting the process a fresh would not be the best remedy in this case.

It is trite that the court, the applicant, and the respondents agreed on the consequences of climate change.[306] The dispute centred on compliance with section 24(1) of NEMA which states that certain listed activities (the construction of a coal-fired power station *in casu*), require an EA before commencement and that can only be granted if all relevant factors were taken into account and a further requirement. A further requirement is that section 24O(1)(b) obliges competent authorities to take account of all relevant factors in deciding on an application for an EA, including any pollution, environmental impacts or degradation likely to be caused if the application is approved or refused.[307] The applicant contended that the Chief Director and the Minister had not taken these factors into account in granting the EA.

Thus, the need to conduct an express climate change impact assessment was at the very heart of this matter. The court, in its consideration of global climate change, positioned South Africa from the vantage of the government's climate change and energy policies.[308] Of significance is that the court noted that South Africa is a significant contributor to global GHG emissions[309] and being a water-stressed country, not only contributes but also places itself at higher risk from climate change consequences.[310]

3.2.3.8 Summary of the transnational aspects of the *Earthlife* decision

The seven elements of the transnational analytical framework analysed in *Earthlife* reflect as follows. The transboundary activities were first climate change and its consequences, including the definition of climate change and its harms for global warming. However, the court stressed that South Africa is especially vulnerable and explained how these vulnerabilities could be exacerbated by climate change. Secondly, a human rights dimension stemming from the right to a healthy environment was also considered. Both the applicants and respondents qualify as transboundary actors. Matters of transnational jurisdiction and standing were not an issue. There were five transnational norms and principles highlighted, viz sustainable development; intergenerational equity; the precautionary principle; the duty of care and lastly the principles of severance and proportionality. This court did refer to laws from another jurisdiction on the specific point of South Africa's international climate obligations. To conclude, climate change and its consequences were the global challenges that affected the court's judgment.

[306] *Earthlife* para 6.
[307] *Earthlife* paras 5-6 and NEMA section 24(1), section 24O(1)(b).
[308] *Earthlife* paras 25-35.
[309] *Earthlife* para 25. South Africa is a major contributor to GHG emissions due to its mining and minerals processing in the economy as well as the coal intensive energy system which cause climate change.
[310] Ibid.

3.3 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*[311]

3.3.1 Introduction

Following the success of the *Earthlife* decision, the *Shell* case is considered a landmark decision in the South African context as it was the first climate case where one of the respondents was a private company, who undertook exploration for fossil fuel reserves by means of seismic surveys off South Africa's eastern coast.[312] At the very outset, the judgment pronounced that 'while some enjoy water sports on the beaches comprising the Eastern Cape coast, it is, to others, a home for communities that are steeped in customary rituals. These communities subsist on fishing and other marine resources to supplement their livelihood.'[313] From a transnational perspective, this case heralds a victory in the fight against global climate change in at least two critical ways. First is that the expert testimony that was relied upon by the intervening parties showed that discovered reserves of oil and gas cannot be burnt whilst still trying to maintain global average increases below 1.5°C[314]. The granting of an EA for this would have been inconsistent with South Africa's international climate change commitments. Secondly, was the averment by the respondents that climate change considerations, and with that, the right to access food and livelihood were irrelevant in the consideration of an exploration right.[315] The court convincingly rejected these arguments[316] in support of the applicants, as outlined below, emphasising and addressing the failure of the Environmental Management Programme (EMPr) to take into account relevant considerations[317] in its decision.[318]

3.3.2 Background and decision

[311] [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk)
[312] Shell Exploration and Production South Africa BV is an integrated energy company taking pride as 'one of the largest corporates in the world' and as a 'pioneer' in developing energy technologies and processes. *Shell* para 15.
[313] *Shell* para 2.
[314] *Shell* para 121.
[315] *Shell* para 122.
[316] As authority the court cited Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others showing that the stages of the exploration right are merely a process that would culminate in the production and combustion of oil and gas, and the emission of GHGs, exacerbating the climate crisis thereby impacting on the communities' livelihoods and access to food. *Shell* para 123.
[317] The EMPr described the manner in which negative environmental impacts would be managed, rehabilitated and monitored and how positive impacts would be maximised. *Shell* footnote 23..
[318] *Shell* paras 106-132.

The Wild Coast, a coastal region in the Eastern Cape province of South Africa, stretches from East London in the south to the KwaZulu-Natal border in the north. With warm temperatures throughout the year, it is renowned for its scenic beauty coupled with a rich cultural heritage.[319] The area came under the global spotlight with the 2021 *Shell* case which primarily concerned whether the grant of an exploration right for oil and gas, culminating in the need to conduct a seismic survey along the southeast coast, was lawful. The application was brought in two parts. Part A[320] was an interim interdict application to stop the respondents from proceeding with a seismic survey pending the finalisation of the relief sought in Part B.[321] Part A was successful, and on 28 December 2021 the respondents were interdicted from undertaking seismic operations under the exploration right pending the finalisation of Part B.[322] The success of Part A was based his on several issues, including flaws in the consultation process which was part of the application procedure.[323] The court was also satisfied that the applicants had established *prima facie* rights,[324]viz, a reasonable apprehension of irreparable and imminent harm[325] and that they had no other satisfactory remedy. The court further considered the necessity of protecting the applicants' constitutional rights.[326]

Judgement for Part B was granted on 1 September 2022. In this decision, Justice Mbenege[327] also found in favour of the applicants. The applicants' sought an interdict prohibiting the respondents' from proceeding with the seismic survey unless and until an environmental authorisation had been granted under NEMA.[328] Relief sought included reviewing the decision

[319] Sourced from https://en.m.wikipedia.org/wiki/Wild_Coast_Region,_Eastern_Cape . The Southeast coast of South Africa is otherwise referred to as the Eastern Cape coast and part of this coast is a 250 km strip known as the "Wild Coast" which straggles between the Mthamvuma River in the North and the Great Kei River to the South. *Shell* para 1 and footnote 1.
[320] *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* [2022] 1 All SA 796 (ECG); 2022 (2) SA 585 Hereafter referred to as *Shell Part A*.
[321] *Shell Part A* para 5.
[322] *Shell Part A* para 82.
[323] *Shell Part A* para 10. The Judge also looked extensively at the applicants'' criticism of the consultation process leading up to the approval of the exploration rights and found it inadequate and substantially flawed. Paras 20-32.
[324] *Shell Part A* para 8. The court found that the applicants had three rights to be protected, viz the right to be meaningfully consulted as it impacted on their customary fishing rights, and their rights under NEMA which provides for an environmental authorisation for the oil and gas exploration.
[325] The applicants' relied on cultural and spiritual harm; the threatened harm to marine life and the negative impact on the livelihood of small-scale fishers and the court held that this had established a reasonable apprehension of irreparable harm and further that the mitigation measures contended by Shell were inadequate. *Shell Part A* paras 37-65.
[326] *Shell Part A* para 9. The constitutional rights implicated are all contained in the Bill of Rights and are section 24 environmental rights, section 30 language and culture and section 31 cultural, religious, and linguistic rights.
[327] Judge President of the High Court, Eastern Cape Division.
[328] The principal question was whether the grant of an exploration right for oil and gas, culminating in a seismic survey along the Southeast coast was lawful. *Shell* paras 1-4. It was also common cause that both Impact and

granting the exploration right and renewals thereof and declaratory and interdictory relief.[329] In its conclusion, the court was satisfied that the decisions for granting the exploration right, and for the renewal thereof, were not preceded by a fair procedure, that the decision-maker had failed to take relevant considerations into account and to comply with legal prescripts, and therefore that the decision to grant the exploration rights as well as renewals thereof fell under review in terms of section 6(2) PAJA and the principle of legality. Accordingly, the decision to grant the exploration rights as and renewals thereof were set aside in terms of section 8 PAJA.[330]

3.3.3 The transnational analysis.

3.3.3.1 The transboundary nature of the activity

Transboundary elements are seen in two key elements. First, climate change entered the discussion when the respondents denied possible harmful climate impacts from a seismic vessel and comparing it to a fishing or commercial vessel.[331] The intervening parties however contended that the decision-maker gave no proper consideration to climate change impacts in the decision-making process of granting an exploration right.[332] Expert evidence affirmed that burning of discovered reserves of oil and gas would not be conducive to sustaining global average temperatures increase below 1.5°C.[333] This is an indirect reference to the Paris Agreement goals. Expert testimony further argued that authorising new oil and gas exploration and consequent production, is not consistent with South Africa's international climate commitments.[334] The *Earthlife* case was cited in this context to refute the argument by the respondents that climate change considerations and the right to access food and livelihood are irrelevant and even premature.[335] Expert evidence tendered by the applicants to prove potential

Shell had not secured an environmental authorisation in terms of NEMA, to undertake the impugned survey and exploration. Paras 24 and 27.

[329] *Shell* paras 27-29 and 137-138, additional to the review, the applicants sought an order declaring non-commencement of explorations activities, including the seismic survey without an EA in terms of NEMA. As the courts final order set aside the decision to grant the exploration right, the declaratory relief was moot.

[330] *Shell* para 139.

[331] *Shell* para 33. Expert evidence was tendered to deny harm resulting from seismic surveys and that there is no research globally illustrating injury, death or stranding of marine mammals because of exposure to sound from the seismic surveying. These sound measures were of international standards.

[332] *Shell* para 120.

[333] *Shell* para 121.

[334] Ibid.

[335] *Shell* paras 122-125. According to *Earthlife*, "the absence of express provision (sic) in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change…" *Earthlife* also noted that climate change impacts are a relevant consideration as contemplated by section 24O NEMA.

risks on marine and bird wildlife and ecosystems,[336] and the communities' spiritual and cultural rights and their rights to livelihood was related to this. According to the court, these were all fundamental considerations, which it dealt with under 'failure to take into account relevant considerations.'

3.3.3.2 Transboundary actors

Shell Part A had seven applicants and *Shell Part B* saw two more applicants joining the proceedings. The court found that considering the nature of these proceedings and the issues raised by the parties, it was imperative not only to provide a detailed description of the parties, but to also describe the causes they champion.[337]

Sustaining the Wild Coast NPC, the first applicant, a non-profit company with the objective of promoting sustainable livelihood and constructs, rehabilitates and protects the natural environment of the wild coast. The second applicant represented the Amadiba Traditional Community, traditional healers along the Wild Coast and the uMgungundlovu Community. Thirdly, the Dwesa-Cwebe Communal Property Association, a marine protected area and a duly established juristic entity, whose land was restored post colonialism and apartheid dispossession. Fourthly, the Wild Coast Fishers duly represented by Ntsindiso Nongcavu. Fifth and sixth, the Wild Coast Fishers community and seventh was 'All Rise Attorneys for Climate and Environment Justice NPC, a law clinic and non-profit company representing communities affected by and fighting against climate change.' Then, Natural Justice and Greenpeace Organisation NPC, a voluntary association and an organisation respectively, both which undertake work with local communities in implementing domestic and international law and policy and environmental justice, joined as the eighth and ninth applicants and intervening parties.[338]

The transnational aspect is clearly visible when drawing on the modes of different litigators in the Global South as posited by Lin and Peel.[339] These applicants are a mixture of the grassroots activists, the farmer and the engineer. The legal action *in casu* is thus shaped by these particular

[336] *Shell* para 108.
[337] *Shell* paras 5-17.
[338] *Shell* paras 6-12.
[339] Lin and Peel op cit note 50.

actors who in bringing action against government and companies, entreat the judiciary to instigate more ambitious climate action. The role of the NGOs (farmers), who instituted the class action, can be seen in how they 'seed' new climate action; and the grassroots activists played the vital role of collaboration with the other parties to further realise the climate action. The engineer role is identified as a transnational actor (Greenpeace) replicating previous legal strategies to achieve judicial success.

The first two respondents were governmental Ministers responsible for the administration of environmental related legislation.[340] The third respondent, and the most relevant for the transnational aspect of this matter is Shell Exploration and Production South Africa BV, an integrated energy company and a global corporate. Fourthly, Impact Africa Limited, who undertakes to expand opportunities for historically disadvantaged South Africans to enter the petroleum industry and to benefit from the exploitation of the nation's petroleum resources. The last respondent was, BG International Limited, an external company and an entity of Shell, who owned the project *in casu*.[341]

3.3.3.3 Extra-territorial jurisdiction

There were no extra-territorial jurisdiction issues.

3.3.3.4 *Locus standi*

Standing was relevant when Natural justice and Greenpeace sought leave to join as applicants (intervening parties). The court considered any right adversely affected or likely to be affected; any direct or substantial interest in the subject matter of the case; standing under section 38 of the Constitution;[342] section 32(1) of NEMA;[343] and precedent[344] and ultimately allowed the intervention.[345] Although these were not foreign applicants, they are included in this framework because they fit the category of transnational actors in Chapter One and of the transnational actors in the categories provided for by Peel and Lin.

3.3.3.5 Transnational norms and principles enunciated by the court

[340] Mineral and Petroleum Resources Development (MPRDA) Act 28 of 2002; National Environmental Management (NEMA) Act 107 of 1998; National Environmental Management: Biodiversity (NEMBA) Act 10 of 2004.
[341] *Shell* paras 14 – 17.
[342] This section, titled 'enforcement of rights' pertains to locus standi of applicants and only applies when the bill of rights is directly applied.
[343] Which makes provision for legal standing to enforce environmental laws.
[344] *Ferreira v Levin* where a more generous approach regarding standing (in the constitutional dispensation as opposed to common law) is advocated for. *Shell* para 47.
[345] *Shell* paras 43-52.

There were fundamental considerations that the court considered as being absent from the EMPr[346] and were thus subject to review under PAJA.[347] The first was the anticipated harm to the marine and bird life along the Eastern Cape coast. Based on expert evidence the applicants addressed the anticipated harm to marine and bird life as a 'fundamental consideration' and that the mitigation measures proposed by Shell were inadequate.[348] The respondents likewise, on evidence presented by expert witnesses, refuted the suggestion of possible harm to marine and bird life.[349] The court invoked the precautionary principle declaring it incumbent that the decision-maker ought to have exercised it in this instance.[350]

The court also invoked the no-harm principle in this context, with the institutional competence of judges to make decisions which are relevant and not a 'perilous course.'[351]

The third principle or norm evoked was that of upholding the constitutional values of rights to culture, human dignity, and the right to live a meaningful life.[352] Apropos the applicants' contention that in granting the exploration right the Minister had failed to consider the spiritual, cultural and rights to livelihood of the community, the court gave a lengthy explanation of how these rights stood to be violated by the proposed seismic survey.[353]

Finally, the court considered the link between the right to a protected environment vis-a-vis the right to socio-economic development as enshrined in section 24 of the Constitution outlining that development needs the protection of the environment to subsist and thus the two are inexorably linked.[354]

3.3.3.6 Evidence of applying laws from another jurisdiction

The court, in its discussion on the exhaustion of internal remedies referred to the Namibian case of *Ncumcara Community Forest Management Association v The Environmental*

[346] EMPr refers to an Environmental Management Programme and is a document which describes how negative environmental impacts will be managed, rehabilitated, and monitored and how positive impacts will be maximised.
[347] *Shell* paras 106-107.
[348] *Shell* para 108.
[349] Ibid. The respondents suggested instead that there are no known detrimental effects such as death or stranding caused by exposure to sound seismic surveys.
[350] *Shell* paras 107-110 and with reference to the *Fuel Retailers* case as well as with the understanding that where, due to unavailable scientific knowledge there is uncertainty as to future impacts of a proposed action, as ensued *in casu*, then the precautionary principle becomes incumbent.
[351] *Shell* para 111.
[352] *Shell* para112-117.
[353] Ibid. The court also referred to a few relevant decisions including Part A of this case.
[354] *Shell* para 4.

Commissioner.[355] In this Namibian decision, Reconnaissance Energy Company (PTY) LTD (REN), the sixth respondent, was granted a licence on 26 August 2019 to undertake oil and gas exploration. On 13 July 2022 local Kavango communities together with civil society organisations initiated an urgent application against the Namibian Environmental Commissioner for the decision to amend the exploration licence. The applicants, not having received notice of drilling in the Kavango Delta, sought *inter alia* to make representations and to consult with the local community, averring an infringement of their rights due to the drilling. The application was dismissed by the Namibian High Court on 29 July 2022. Climate change concerns[356] in this matter were raised by the applicants but not considered by the court as in its judgment it held a lack of jurisdiction to deal with this application and that the provisions of the Namibian environmental legislation reserve the appeal for the Minister.

The court in the *Shell* case considered the contention raised by the respondents that the applicants had failed to exhaust internal remedies available to them,[357] by analysing *inter alia* the provisions of PAJA and the courts own discretion in exceptional circumstances. The court concluded that this matter is a 'classical case of an internal remedy that would not have been objectively implemented and would have rendered negatory the values of administrative justice enshrined in the Constitution and upheld by PAJA," and that even the belated reliance to the *Ncumcara* case would not detract from this conclusion.**3.3.3.7 How the global character of the problem affected the courts judgement.**

Climate change considerations were advocated for by the intervening parties.[358] Expert evidence testified to signs of climate change in agriculture, unpredictable weather patterns, and extreme weather events such as droughts and heavy downpours, livestock being sick regularly, and community stresses at the prospect of rising sea levels.[359] Further, there was no evidence that at the time the impugned decisions were taken the possibility of climate harms were considered.[360] The court thus affirmed found that the intervening parties' contention that the

[355] *Shell* para 82. *Ncumcara Community Forest Management Association v The Environmental Commissioner* (HC-MD-CIV-MOT-GEN-2022/00289 [2022] NAHCMD 380 (29 July 2022)
[356] These included concerns that the drilling licence would exacerbate climate change and water scarcity in the already vulnerable country which is prone to droughts. In addition, the applicants raised concerns regarding pollution risks to animal and plant life.
[357] *Shell* para 33
[358] *Shell* para 107.
[359] *Shell* paras 117-124.
[360] Shell para 119. This is because none of the respondents addresses the potential harm to the applicants and their religious or ancestral beliefs and practices.

decision-maker gave no proper consideration to the climate change impacts when granting the exploration right.[361]

3.3.3.8 Summary of the transnational analytical categories of the *Shell* decision

The seven elements of the transnational analytical framework analysed in *Shell* reflect two aspects of climate change as the transboundary nature of the activity. The first pertained to harmful impacts from a seismic vehicle and the second, to the contention that there was no proper consideration of climate impacts by the decision-maker in the granting of the exploration right. Both the applicants and respondents qualify as transboundary actors. Matters of transnational jurisdiction and standing were not an issue. The four transnational norms and principles highlighted were the precautionary principle; the no-harm principle; upholding of constitutional values and the interplay between the right to a healthy environment and the right to socio-economic development. There was a reference to one foreign court case. Included in the global challenges that affected the court's judgment, climate change considerations such as extreme weather events and rising sea levels. There was also an indirect reference to the goals of the Paris Agreement; and there was mention of South Africa's international climate considerations.

3.4 *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and The Environment and Others.*[362]

3.4.1 Introduction

Of the six climate cases analysed in this research, this decision is the only one that has gone against the narrative thus far coming out of the South African judiciary. The court dismissed the application for review of the granting of the EA, despite climate change impacts of a combined cycle gas power plant being one of the central issues. The most important (though not unique) part of the judgment is the importance of public participation (like the importance of the consultation process outlined in the *Shell* case above) which had come to the fore, implying that the voices of people will not be silenced when it concerns matters of the climate.[363] From a transnational perspective, the court underplayed the problem of an inadequate climate change impact assessment, and affirmed the sentiments of the respondents.

[361] *Shell* para 120.
[362] (17554/2022) [2022] ZAGPPHC 721 (6 October 2022).
[363] Judge Shah in *Leghari* op cit note 85 said, "climate change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system."

The issue of climate change was almost silenced, despite the loud cries shrilling from global climate activists.

Despite the precedent set by both the *Earthlife* and *Shell* cases that served to protect vulnerable populations from powerful financial interests and climate and other socio-economic but related harms by enforcing justiciable constitutional rights, this judgment asserted that the climate change impacts as presented were adequate. Rather than being responsive to the already vulnerable position South Africa is in, and of systemic and structural inequalities that are exacerbated by climate change, the judgment asserted that the construction of the plant would assist in upholding South Africa's international climate obligations. However, the climate crisis is recognised across the world and the current global concern echoes the cries of "there is no planet B." With the world being at such a crossroads, and with mounting scientific evidence that it is human induced climate change that is causing disruption to natural systems, the judge should have understood the power of the law in addressing climate change and used the court as a tool to curtail climate harms, thereby ensuring that the judiciary is firm in upholding measures to limit global warming which cause heatwaves, sea level rise, droughts and floods; all of which threaten livelihoods and undermine development.

3.4.2 Background and decision

An electronic judgment from the High Court in Pretoria was delivered on 6 October 2022 in the matter of an application for review and setting aside of an EA granted on 23 December 2019 for the for the construction of a mid-merit [364] combined cycle gas power plant (CCGPP) in Richards Bay. The applicants contended that the issue of the EA was in contravention of NEMA[365] and that the decision to grant the EA, and the subsequent dismissal of the applicants' appeal was an administrative action in terms of PAJA.[366] The court specified that it would consider this matter through the lens of sections 24E and 24O of NEMA.[367] The application brought seven grounds of review to challenge the decisions, and the court grouped these into three sections, viz (i) the absence of considerations of first, alternative or renewable sources of power generation and secondly, climate change impacts associated with a CCGPP; (ii) failure

[364] Mid-merit electricity generation capacity is electricity which is adjusted according to the fluctuations in demand on the national grid and baseload electricity generation capacity continues all day and night.
[365] The court referred to the preamble of NEMA which inter alia states that "… the State must respect, promote and fulfil the social, economic and environmental rights of everyone…" and to sections 24E which legislate minimum conditions attached to EAs and 24O which provides criteria to be taken into account by competent authorities when considering applications.
[366] *Eskom* para 6 and 10; footnote 5.
[367] Ibid.

to comply with the provisions of NEMA as well as the inadequacy of the reports included with the application, including the environmental impact report; (iii) incomplete and insufficient public participation during the process.[368]

The court dismissed the application with the condition that the respondents advertise the EA and the conditions attached thereto by having it published in the IsiZulu language in two newspapers circulated in the Richards Bay area of KwaZulu-Natal.

3.4.3 The transnational analysis

3.4.3.1 The transboundary nature of the activity

Climate change was the first issue addressed in the judgment. The second respondent, the DEFF was obliged to consider the environmental impacts in Eskom's application for an EA.[369] The applicants found the climate change impact assessment inadequate for four reasons, being 'firstly, it did not consider the use of renewable energy plants in lieu of the CCGPP; secondly it did not assess the GHG emissions cycle which would be caused by the CCGPP because of the failure to assess the emissions associated with the extraction of gas and its transportation to the CCGPP in Richards Bay. Thirdly, that assessments of climate change mitigation measures were inadequate; and fourthly that it failed to assess the resilience of the CCGPP to climate change.' [370]

In response, Eskom did not refute the first claim, however, it held the stance that alternate sources[371] were not appropriate in South Africa's just transition aims.[372] With regards to the second claim, it was argued that the CCGPP was a 'bespoke' source of power, to be fuelled by natural gas from Mozambique and would run only for a designated amount of hours at a time, during emergencies. The judge considered proof of two conditions related to the availability of and construction of the gas pipeline and concluded that the entire project and the EA was dependent upon compliance with these conditions.[373]

Regarding the third claim, the court confirmed that a full assessment of climate change impacts formed part of the EIA report, which considered the environmental and social costs of the

[368] *Eskom* paras 10–13.
[369] In terms of section 24O(1)(b)(i) of NEMA, and Eskom paras 16–17.
[370] Ibid.
[371] Particularly renewable energy such as solar or wind.
[372] From a fossil fuel-based energy generation system to a sustainable renewable system. *Eskom* para 19.
[373] *Eskom* paras 19-24. The court also referred to *Earthlife* as authority for compliance with all the environmental impacts associated with the project, but the judge distinguished between the cases on the grounds of differences in jurisdiction.

GHGs that would be emitted during the construction, operation and decommissioning of the CCGPP.[374] The court also stressed that the climate impact assessment and a comprehensive report was considered by the DEFF and the Minister who were satisfied that the CCGPP project would not add materially to the GHG emissions inventory of South Africa.[375]

On the fourth claim, the court noted that both impacts and resilience to climate change must be included in an assessment of climate change impacts.[376] Notably, the report stated that 'climate change may cause warming and drought in KwaZulu Natal' which would require the use of seawater for cooling the power plant.[377] Ultimately, the court found that because the utilization rate of the CCGPP is conditional on it operating as a mid-merit, it is incorrect to aver that relevant information was not considered by the DEFF, and therefore this ground of review failed.[378]

3.4.3.2 The transboundary actors

The two applicants[379] are non-profit and non-governmental organizations who advocate for environmental justice.[380] These applicants fall within the categories of transnational actors as outlined in the previous chapters. Using Peel and Lins categories, they could be defined as the 'farmer,' who seeds new climate litigation.

The respondents were Eskom Holdings SOC LTD who applied for the EA, the Chief Director at the Department of Environmental Affairs the who approved the EA and the Minister of Forestry, Fisheries and the Environment who refused the appeal against the grant of the EA.[381] Being state respondents, they hold no transnational character *per se*.

3.4.3.3 Extra-territorial jurisdiction

The proposed CCGPP was in South Africa although the gas to supply it was to be taken from the recently discovered gas fields off the coast of Mozambique.[382] The applicants argued that the EIA report was meant to deal with *all* the environmental impacts associated with the project.

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[374] *Eskom* paras 35-36.
[375] *Eskom* para 39.
[376] *Eskom* para 51.
[377] *Eskom* para 52. The judge however dismissed this as follows: "This is entirely speculative – not as far as climate change affecting KwaZulu Natal but as far as whether or not the CCGPP will require seawater for cooling or other purposes."
[378] *Eskom* para 54.
[379] South Durban Community Environmental Alliance and The Trustees of the Groundwork Trust advocate for environmental justice.
[380] *Eskom* para 1.
[381] *Eskom* paras 1–4.
[382] *Eskom* para 19.

The court interpreted that this would mean that both the extraction of gas in Mozambique and the shipping thereof in international waters or through the territorial waters of another state would fall within the requirements of NEMA. The judge classified these as 'upstream impacts.'[383] In this context, the judge distinguished between the *Earthlife* case by highlighting that *Earthlife* concerned the construction of a coal fired power station within South Africa as opposed to this matter which concerned a fuel source extracted outside of and to be transported to South Africa, and as such refuted its authority.[384]

3.4.3.4 *Locus standi*

No issues *in casu*, despite the gas being fuelled from fields off the coast of Mozambique. *Locus standi* would only be affected if the extraction of gas in Mozambique and its shipping in international waters impacted jurisdiction.

3.4.3.5 Transnational norms and principles enunciated by the court.

The applicants claimed that there was non-compliance with the provisions of NEMA.[385] Having regard to socio-economic environmental harms, the court found that the CCGPP would not significantly increase negative impacts if appropriate mitigation measures were to be implemented.[386] The court simply parroted the EIA report and said that 'the project will not contribute significantly to the potential impacts on surrounding human populations and is considered of low significance.'[387]

The court also considered the duty to reduce GHG emissions under international obligations[388] and found that the proposed project would contribute towards a reduction in GHG emissions. This was from an alternative energy generation perspective in comparison to coal energy generation.[389]

3.4.3.6 Evidence of applying laws from another jurisdiction

There were three instances in which references were made to jurisprudence from another jurisdiction in the context of the court's consideration of the climate change impacts. The first was the court citing instances from Australia and the United States of America in which a hasty

[383] *Eskom* paras 26–27.
[384] *Eskom* para 28.
[385] *Eskom* paras 57–71.
[386] *Eskom* para 61.4.
[387] *Eskom* para 61.8.
[388] *Eskom* para 61.5. The court referred to the 'COP21 Agreement' instead of using the well-understood 'Paris Agreement.'
[389] Ibid.

transition to renewable energy may have caused complete blackouts.[390] The respondents argued that the applicants had disregarded the role of the proposed CCGPP as a mid-merit facility to produce electricity to South Africa when it was needed, and retorted instead that as the use of coal as an energy source is being phased out, the natural gas would serve as a bridge before implementation of renewable alternatives. The argument hinged on the possibility of cataclysmic consequences of a hasty transition to renewable energy and resultant blackouts in South Australia in 2016 and in Texas, USA in September 2021 and again in February 2022 were cited.

The second reference was that with gas extraction in Mozambique and shipping through international waters or territories to reach South Africa, NEMA would still apply.[391]

Lastly, as has been discussed, the court referred to South Africa's commitments under the Paris Agreement, albeit by a less well-recognised name.

3.4.3.7 How the global character of the problem affected the courts judgment

The failure to consider climate change impacts of a CCGPP was the first ground brought by the applicants.[392] This has already been discussed. However, from the lens of how it affected the court's judgment is put in the context of section 24O(1)(b)(i) of NEMA, which stipulates that the respondent was required to consider pollution, environmental impacts or degradation which could be affected by the approval or refusal of the EA.[393] The respondent disputed these claims by looking at the purpose and specific role of the CCGPP.[394] The court supported the arguments put forward by the respondents by regarding the section 24O(1)(b) factors as conferring a discretion on the decision-maker as factors that may or may not be taken into consideration.[395]

[390] *Eskom* para 22.
[391] *Eskom* para 27-28.
[392] *Eskom* para 16. The applicants claimed that the climate change impact assessment was adequate because it did not consider the use of renewable energy plants as an alternative; secondly that full-cycle emissions of the CCGPP were not assessed; thirdly that the climate change mitigation impacts were inadequate and fourthly that it failed to assess the resilience of the Power Plant to climate change.
[393] Ibid.
[394] *Eskom* para 19-21.
[395] *Eskom* para 20. Judge Millar emphasised the word 'may' as: *"all relevant factors, which **may** include…* [my emphasis]"

The court also supported the respondent against the claim of inadequate climate change impacts at the Richard Bay site and surrounds and was satisfied that a proper climate change impact assessment was conducted and that comprehensive reports were filed.[396]

3.4.3.8. Summary of the transnational analytical categories of the *Eskom* decision

The transnational analysis of *Eskom* reveals that the only reason that this case is categorised under the narrower definition of climate litigation is because climate change impact assessments were raised by the applicants. However, there is not much further in the judgement that is useful towards an understanding of the global climate crisis. The judge does not even refer to climate science, or to the already vulnerable situation that South Africa is in. Rather the judge accepted that the climate change impact assessment report that was submitted with the application for an EA was sufficient. This reference to climate change is however what lends a transboundary nature to this case. The applicants qualify as transboundary actors, and according to Peel and Lin's categories, as NGOs and environmental activists, they would be the 'grassroots activists,' who sue companies and governments to realise more ambitious climate action. The 'farmer' is also relevant as in their role of NGO they provide funding to 'seed' new climate litigation. Matters of transnational jurisdiction and standing were not an issue, although the gas to be supplied to South Africa was from Mozambique. There was no reference to any transnational norms and principles. Evidence of references to foreign jurisprudence was in the form of referring to examples in different countries. Included in the global challenges that affected the court's judgment, climate change considerations such as extreme weather events and rising sea levels. There was a reference to the Paris Agreement but in an obscure way, by calling it the COP21 Agreement. This judgment was essentially a step backward in the fight against global climate change, and it's very minimal understanding of the climate crisis is reflected in two ways. First by not framing the climate crisis in context and by not referring to attribution science, and secondly by viewing this project through a lens that suggests that the project would contribute to meeting South Africa's international climate obligations.

3.5 A comparison of the transnational aspects of the South African cases to each other

This final section contrasts and compares the three cases, highlighting the most, and least, prominent transnational elements.

[396] *Eskom* paras 35-47. The court referred to *Earthlife* and held that *in casu*, unlike in *Earthlife*, an environmental impact report was submitted with the EA application.

Areas of common ground and of significance to transnationalism include climate change impact assessments conducted as part of an EA process. In *Earthlife* the court defined climate change and its consequences for global warming more extensively than was done in *Shell*, whilst *Eskom* did not delve into discussions on global climate change at all.

Earthlife considered impacts on rising temperatures, diminishing water supply as well as extreme weather patterns and how these impacts would be avoided, mitigated, or remedied. Factors influencing the judgment included the courts reading and understanding of section 24O(1) NEMA confirming that climate change impacts are 'relevant factors' in the application for an EA.[397] Included were pollution, environmental impacts or environmental degradation, and adverse effects in the future .[398] Based on this, the judge held that all relevant legislation and policy instruments entail a consideration of how to prevent, mitigate, or remedy environmental impacts of a project, including the climate change impacts.

In *Shell* case, as in *Earthlife* the climate change impact assessments were under scrutiny as the intervening parties contended that no proper consideration was given during the decision to grant the EA.

A striking difference in *Eskom* was that a climate change impact assessment accompanied the application for the EA whereas in *Earthlife* there was no initial climate change impact assessment in the application for the EA.

Highlighting further differences, the court in *Earthlife* was mainly concerned about impacts in South Africa and not the rest of the world.

Also, of significance from *Earthlife* is the courts recommendations on what a climate change impact assessment should consider, and that the basis of the assessment should be broadened to include and adopt the protocols of the Sabin Center for Climate Change Law, indicating a transnational relationship between an NGO and an academic institution.

In *Shell* the climate change considerations were advocated for by the intervening parties, an important difference from *Earthlife*. Amongst the consideration were anticipated harm to marine and bird life, livelihood of the community and climate change impacts.

[397] *Earthlife* para 78-79. The court in looking at the review decision of the Chief Director had to decide whether the administrative action of the Chief Director was tainted by irregularity and held that the answer depends partly on whether climate change impacts had to be considered when the environmental authorisation was granted to Thabametsi.
[398] *Earthlife* para 79

In *Eskom* the extraction of gas in Mozambique and the shipping thereof in international waters or through the territorial waters of another state and in this context, the judge distinguished between the *Earthlife* case by highlighting that *Earthlife* concerned the construction of a coal fired power station within South Africa as opposed to this matter which concerned a fuel source extracted outside of and to be transported to South Africa, and as such refuted *Earthlife* as authority.[399]

Although these transnational elements are new to the South African legal discourse, they do indicate that the South African judiciary can add value to transnational climate litigation. As an example, in the Namibian case of *Ncumcara*, decided in July 2022 and referred to above, the applicants challenged the validity of the EA that was granted, and in this regard raised climate harms. This models on the South African cases, especially the renowned 2017 Earthlife decision, but also seen in other South African climate cases such as the Shell case as discussed above and in *Africa Climate Alliance et. Al. v Minister of Mineral Resources and Energy et. Al*,[400] *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs, KiPower (Pty)Ltd & Others*[401] *and in Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd and Others*[402]

[399] *Eskom* para 28.
[400] (56907/21) [2022] ZAGPPHC 946 (9 December 2022)
[401] 54087/17 Note that this application became moot as the EA had lapsed and was no longer of force and effect. Accordingly, there is no full citation.
[402] 61561/17 With comment as per note 396 above, *mutatis mutandis*.

CHAPTER FOUR: CLIMATE CHANGE CASES IN THE GLOBAL NORTH

4.1 Introduction

In the global distribution of climate litigation according to geographical representation, the UNEP Global Climate Litigation Report 2023 records that the United States has the largest number of cases, followed by Australia, the United Kingdom of Great Britain, all of which are Global North countries, as defined for purposes of this dissertation.[403]

The objective of this chapter is to analyse case examples of how the Global North has adjudicated and conceptualised climate change in the courts and what this means for transnationalism. This study will be based on three landmark decisions from the Global North jurisdictions, which have been considered as having set precedent in the sphere of climate litigation. The anticipated findings will contribute to understanding the role of courts in transnational climate litigation in the Global North as part of the analytical framework to answer the research questions.

4.2 *The State of the Netherlands v Urgenda (Neth. Sup. CT)*[404]

4.2.1 Introduction

The *Urgenda* judgement has received widespread media and academic attention for various reasons. It has been said that it 'marks a historic development in international jurisprudence on climate change.'[405] Backes and Van der Veen refer to the judgement as perhaps the best-known Dutch court ruling ever, and further as a victory in the battle against climate change.[406] The *Urgenda* judgement is particularly renowned for being the first judgement in the Global North to support climate change claims under human rights law, and to thus establish a legal duty of

[403] Burger and Tigre op cit note 14 at 18.
[404] *The State of the Netherlands v Urgenda Foundation, The Supreme Court of the Netherlands*. (20 December 2019) Case number: 19/00135 Citation for the English Translation ECLI:NL:HR: 2019:2007 (Original Dutch citation from the Supreme Court of the Netherlands: ECLI:NL: 2019:2006)
[405] The reason given for this being that this case answered the question of an important legal process, which is whether a domestic court can enforce compliance by a national government of international treaties. Shannon, N & De Wit, E 'Urgenda Foundation v Netherlands: Historic climate change decision upheld' (2019) Norton Rose Fulbright Publications Available at: nortonrosefulbright.com
[406] Chris W. Backes & Gerrit A. Van Der Veen 'Urgenda: the Final Judgement of the Dutch Supreme Court' (2020) *Journal for European Environmental & Planning Law* 307-321 and at 311-312 where the authors discuss the differences between legal obligations and international policy *in casu*, finding that all courts, commencing with the District and going upwards, hold that there is nothing in either international law, EU law nor Dutch law that would be legally binding norms obliging the State to reduce GHG emissions as claimed by Urgenda.

a State to increase climate ambition.[407] The judge's interpretation of the law and how this has led to a human-rights turn in climate litigation is a watershed moment for claimants.

4.2.2 Background and decision

The issue in the *Urgenda* case centred around the obligation of the Dutch state to reduce greenhouse gases (GHG) originating from the Netherlands.[408] The judgments in all three courts, the Hague District Court in 2015, the Hague Court of Appeal in 2018 and the Dutch Supreme Court in 2019 all concurred in favour of the applicants.

In 2007, the Netherlands[409] decided to reduce GHG emissions by 25 to 40 percent by the year 2020.[410] This was in comparison with the reduction target of 30 percent in 1990 as outlined in the 2007 Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report. In 2011 however, the Dutch government stated that it would not be able to meet that target and instead aimed for a reduced target of 14 to 17 percent.[411]

In 2013, Urgenda ('Urgent Agenda') proceeded with legal action against the Dutch state asking for GHG emissions to be reduced by 40 percent by 2020, or by a minimum of 25 percent compared to the 1990 levels.[412]

In 2015 the Hague District Court decided[413] that the Dutch state was obliged to reduce its GHG emissions by the end of 2020 to at least 25 percent compared to 1990.[414] The District

[407] Danting Fan, Boya Jiang, Dimitri de Boer and Xiaoyo Zhang with expert advisors Christina Voigt, Brian Preston, Jacqueline Peel and Others, '10 Landmark Climate Change Cases' (2022) published by ClientEarth, at 5. Available at: https://www.clientearth.org/latest/documents/10-landmark-climate-change-cases/
[408] *Urgenda* 2019, p 815 and para 2.2.1.
[409] According to Eckes, Christina, The Urgenda Case is Separation of Powers at Work (December 7, 2021). To be published in: N. de Boer, B. M. Aernout Nieuwenhuis en J.-H. Reestman (eds.), Liber Amicorum Besselink (Amsterdam, 2021), Amsterdam Law School Research Paper No. 2021-39, Amsterdam Centre for European Law and Governance Research Paper No. 2021-05, Available at SSRN: https://ssrn.com/abstract=3979729 or http://dx.doi.org/10.2139/ssrn.3979 at paragraph 3.1, 'acts of parliament are enacted jointly by the government and the States General based on political decision-making and a balancing of all interests involved.' Furthermore, the Dutch Constitution and the Dutch Supreme Court have imposed restrictions in the intervention of legislation. Using the *Urgenda* case as a discussion on separation of powers at work, the research further finds that notwithstanding these limitations, it remains unclear whether the Dutch State could comply with the order of the Supreme Court without having to first adopt formal acts of parliament.
[410] Andre Nollkaemper & Laura Burgers 'Introductory Note to the State of the *Netherlands v Urgenda* (NETH. SUP.CT.)' (2020) 59 The American Society of International Law at 811 available at: https://doi.org/10.1017/ilm.2020.39
[411] Ibid
[412] Ibid
[413] *Urgenda Foundation v The State of Netherlands, District Court of the Hague*. (24 June 2015). Case Number: C/09/456689/HAZA The citation for this judgement is C/09/456689/HA ZA and the official judgement in the Dutch language is available at ECLI:NL: RBDHA: 2015:7145 and the English translation is available at https://uitspraken.
[414] *Urgenda* 2019 para 2.3.1

Court considered *inter alia* that the Dutch state may be acting unlawfully by violating its duty of care to prevent dangerous climate change.[415] It held however that the legal obligations of the Dutch state towards Urgenda are not derived from[416] the Dutch Constitution,[417] nor the 'no harm' principle[418] and not even the UNFCCC protocols.[419] Quite interestingly and relevant here[420] is that the Hague District Court stated that Urgenda could not be considered as a direct or an indirect victim within the scope of the meaning of Article 34 of the European Convention of Human Rights.[421] Based on this, Urgenda could not rely on the provisions of Articles 2 and 8 of the European Convention of Human Rights (ECHR).[422]

Rather, the District Court based its decision on tort law and the doctrine of negligence.[423] In the District Court's interpretation of hazardous negligence, the behaviour is tortious if it unnecessarily creates danger and acts contrary to the unwritten law of what is deemed fit in societal interrelations.[424] The court referred to the 1965 Netherlands *Kelderluik* judgement in applying the criteria relevant to interpreting a duty of care.[425] The District Court held, on the basis of this reasoning, that the state of Netherlands had a duty of care to take mitigating measures, without which there is a strong likelihood that 'dangerous climate change' will occur.[426] The court mentioned further that aspects relating to the *trias politica* did not hinder the order which was being sought.[427]

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[415] Ibid
[416] Ibid
[417] Ibid. The court referred to Article 21 of the Dutch Constitution which provides for the fundamental right to a clean environment.
[418] The no-harm rule is a concept from Environmental governance and rights and a well-recognised part of customary international law, obliging a state to reduce or prevent the risk of environmental harm to other states. Refer to the definition by the UN Environment Programme – Law and Environmental Assistance Platform. Available at https://leap.unep.org accessed on 8 March 2023.
[419] *Urgenda* 2019 para2.3.1. The judgement refers to the following protocols, Article 191 TFEU (This is the European Union's (EU) environmental policy which is based on the Treaty of the Functioning of the EU and which aims to preserve, protect and improve the quality of the environment and to protect human health. The EU environmental policy is available at http://eur-lex.europe.eu/ Accessed on 8 March 2023.) as well as to the ETS Directive and Effort Sharing Decision which is based on Article 191 TFEU.
[420] I state this as this is where the court of final instance differed in its judgement.
[421] Article 34 of the Convention provides that a party can only invoke a violation if they are the victim of that violation. See European Court of Human Rights – Human Rights Education for Legal Professionals at page 3. Available at https://www.echr.coe.int/Documents/COURtalks_Inad_Talk_ENG.PDF Accessed on 8 March 2023.
[422] Article 2 ECHR protects the right to life, and Article 8 ECHR protects the right to respect for private and family life. *Urgenda* 2019 paras 5.2.2-5.2.3.
[423] Nollkaemper and Burgers op cit note 410 at 811.
[424] Ibid
[425] *Urgenda* 2019 para 2.3.1.
[426] Ibid
[427] Ibid para 2.3.1. This Doctrine of Separation of Powers and the Rule of Law was considered by the Supreme Court.

The next step was an appeal by the state and the Hague Court of Appeal, on the 9 October 2018 confirmed the District Court's decision.[428] Here the State appealed the decision of the court *a quo* and argued that there is no basis for the Dutch State to take reduction measures in the emission of its GHG's. The state based its argument first by asserting that neither the requirements of Article 3[429] nor Article 6[430] of the Dutch Civil Code had been met; and secondly, by claiming that neither national nor international law lays down a legal duty for the State to take measures to achieve the climate reduction targets as sought.[431] The court also allowed Urgenda's cross-appeal to rely on the human rights provisions of Article's 2 and 8 of the ECHR.[432] Because the District Court had ordered a reduction of at least 25% as of end-2020 relative to 1990, and rejected all other claims of Urgenda, the only matter to be decided at those appeal proceedings was the reduction of 25 per cent as the rest of the claims by Urgenda were no longer disputed.[433] The Court of Appeal held that there was a 'genuine threat of dangerous climate change'[434] and held further that this posed the serious risk to the current generation of Dutch inhabitants of either losing their lives or of having their family lives disrupted.[435] The court relied on Articles 2 and 8 ECHR[436] which implies that the State has a duty to protect against the genuine threat of dangerous climate change.[437] In reaching its judgement, the Court of Appeal held first that in terms of standing, that Urgenda, as the applicant in a class action, may rely on Articles 2 and 8 ECHR. Next the court held that the State has a positive obligation within its jurisdiction to uphold the protection laid out in Articles

[428] *The State of Netherlands v Urgenda Foundation, The Hague Court of Appeal* (9 October 2018) Case Number 200.178.245/01. The citation of the judgement in the Dutch language is ECLI:NL: GHDHA: 2018:2610 and the translation into the English language is available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf

[429] Article 3:296 of the Dutch Civil Code, which provides that under Dutch law, 'injunctions are based on article 3:296 DCC, which indicates that if someone is obligated to give, to do, or to refrain from doing something towards another, he is ordered so by court.' From the Dutch Civil Code, available at: https://wilmap.stanford.edu/entries/article-3296-dutch-civil-code Assessed on 1 June 2023.

[430] Article 6:162 of the Dutch Civil Code, which provides that 'a person who commits a wrongful act against another person, which can be attributed to him, is obliged to compensate the damage that the other person suffers as a result.' From the Duch Civil Code, available at: https://minerva-advocaten.nl/en/news/unlawful-act#:~:text=Article%206%3A%20162%20DCC%3A%20the,person%20suffers%20as%20a%20result. Accessed on 1 June 2023.

[431] *Urgenda* 2019 para 2.2.3.

[432] Nollkaemper and Burgers op cit note 410 at 811.

[433] *Urgenda* 2018 para 3.9. See also paragraph 28 where court states that *Urgenda*, although largely agreeing with the judgement of the court *a quo*, believes that the state of Netherlands is doing too little to limit GHG emissions and that swift intervention is needed to save the planet. The grounds of appeal of the State and of *Urgenda* on the cross-appeal are set out in paras 3.1 and 3.2 respectively, as follows: the State disagrees with the judgement of the court *a quo* and seeks to submit the dispute in its entirety on appeal. *Urgenda* on the other hand, seeks to rely on Articles 2 and 8 ECHR in this appeal proceedings.

[434] *Urgenda* 2019 para 2.3.2.

[435] Ibid

[436] Unlike the court *a quo* which based its findings on tort law and negligence.

[437] *Urgenda* 2019 para 2.3.2.

2 and 8 of the ECHR which necessitated protection of the rights of Dutch citizens and to take precautionary measures to prevent infringements of these rights in the face of any real or imminent threats. The third factor considered by the Court of Appeal was the genuine threat of dangerous climate change and lastly the Court considered if the State was acting unlawfully by not adhering to at least 25 percent reduction in GHG by the end of 2020.[438]

The Dutch State then instituted an appeal in cassation.[439] Since the Supreme Court of appeal is a court of cassation *in casu*, and it is of particular importance for this research to analyse both the application of the law as well as the reasoning behind the Court of Appeal, the final judgment ought to be read in conjunction with the judgment of the Hague Court of Appeal as has been proposed by Backes and Van Der Veen.[440] This was met, in September 2019 by opinions of the Advocate General and the Procurator General.[441] On the 20 December 2019, on the advice of the Advocate General and the deputy Procurator Dutch Supreme Court upheld the decision of the Court of Appeal.[442]

4.2.3 The transnational analysis

4.2.3.1 The transboundary nature of the activity

The emission of GHG and its global impacts is the transboundary issue at the very heart of this case. Unlike the South African judgments which tend to focus on the present-day impacts of climate change, the Dutch courts situated climate change in an historical context by starting at the beginning of the Industrial Revolution.[443]

In its appeal of the factual framework the Court of Appeal spent considerable time on the analysis of global warming and established that the current level is around 1.1 degrees Celsius warmer in comparison to the beginning of the Industrial Revolution.[444] The court also clarified

[438] *Urgenda* 2019 para 2.3.2.
[439] This was the main task of the Supreme Court.
[440] Backes and Van Der Veen op cit note 406 at 308 where the authors point out that the Court of Appeal agreed with the decision of the District Court although on different grounds as the District Court based its findings on Tort Law whereas the Court of Appeal based its findings on the duty of the Dutch State to protect the Human Rights. See also Margaretha Wewerinke-Singh & Asleigh McCoach '*The State of the Netherlands v Urgenda Foundation*: Distilling best practice and lessons learnt for future rights-based climate litigation' (2021) 30 *RECIEL* at 276 "In analysing the Supreme Court's judgement, it is important to note that it is based on the facts as established by the Court of Appeal – which were not disputed by either party in cassation."
[441] Nollkaemper and Burgers op cit note 410 at 811 where they explain that the Advocate-General and the Procurator-General are considered the 'most authoritative advisors of the Supreme Court' and who were tasked was to consider the cassation appeal and whether to quash the ruling of the Court of Appeal. They agreed with and advised their approval of the judgement of the Court of Appeal.
[442] *Urgenda* 2019 p815.
[443] *Urgenda* 2018 para 3.2 2018 and *Urgenda* 2019 para 2.1.
[444] *Urgenda* 2018 para 3.5.

the global 'carbon budget' according to the latest scientific developments and insights[445] and determined then that the 'worldwide community' acknowledges the need to reduce GHG emissions in general and CO2 in particular.[446] The court however acknowledged that there is a difference in how the urgency of the level of global warming is assessed within differing global communities. To contextualise this point, the court distinguished between treaties, agreements and arrangements that have been applied first within the UN context, secondly the EU and lastly by the Netherlands.[447] Corroborating the relevance of the transboundary element of this decision are the definitions of 'mitigation' and 'adaptation' as used to prevent or reduce global warming[448] to counter the consequences of climate change.[449]

Continuing with its assessment, the appeal court placed the facts of the case on a 'global level' by discussing the international frameworks, treaties and discussions that made this matter a transboundary one.[450] The establishment of the UNEP, the IPCC and particularly its two assessment reports, viz AR4 and AR5, the conclusion of the UNFCCC and its articles 2, 3 and 4 as well as the list of significant COPs are all discussed and situated within this context to illustrate the transboundary activity of this case.[451]

The Supreme Court, in arriving at its conclusion that the State must not succeed in its appeal in cessation,[452] also commenced its judgement with a discussion of climate change and its consequences.[453] As was done in the court of appeal, the judgement commenced with a discussion of the facts of climate change, and a reflection of the judges' conceptualisation of climate change[454] as that of a global climate change.[455] The court acknowledged the risk of dangerous climate change as being global in nature[456] and this then formed part of the grounds for this judgment. Speaking to this aspect of global climate change, with the objectives of the

[445] *Urgenda* 2018 para 3.5.
[446] *Urgenda* 2018 para 3.6.
[447] Ibid
[448] Ibid. The implications of the term 'global warming' lending transboundary effects is of significance here.
[449] Ibid. Mitigation as defined by the courts here is when 'global warming can be prevented or reduced by ensuring that less greenhouse gases are emitted into the atmosphere' and adaptation is seen as measures that 'can be taken to counter the consequences of climate change, including raising dikes to protect low-lying areas.'
[450] *Urgenda* 2018 para 4 2018.
[451] *Urgenda* 2018 paras 5–6.
[452] *Urgenda* 2019 p 815
[453] *Urgenda* 2019 p819 0 822.
[454] Ibid. The discussion of the facts as are established in the court of appeal, include a discussion of climate change and its consequences, the IPCC reports, the UNFCCC and the COP conferences, the Paris Agreement, and the UNEP reports, all which are international.
[455] Ibid. The use of terminology such as 'warming of the planet,' 'the rise in the planet's temperature,' 'climate change and in the international community,' 'if the earth warms substantially,' 'global warming progresses.
[456] *Urgenda* 2019 para 5.6.1

UNFCCC and the Paris Agreement having recognised climate change and its consequences as a common concern amongst humankind, the literature also solidifies the transboundary classification of climate change.[457] The pertinent point is made that the *Urgenda* case is one in which the court had accepted that international law requires more than a simple compliance with climate treaties. The courts also stressed that the international obligation to protect human rights compels the state of Netherlands to reduce its emissions.[458] Mayer points out further that it is this recognition and compliance with international law that has boosted international climate litigation.[459]

4.2.3.2 Transboundary actors

The plaintiffs were the Urgenda Foundation, which means Urgent Agenda,[460] and whose function as a citizens' platform is to develop plans and measures to prevent climate change.[461] Urgenda is a non-profit organization based in the Netherlands but whose aims are to enforce national and international environmental treaties.[462] Urgenda was founded in Amsterdam, Netherlands in 2007 with the purpose of climate change mitigation and environmental protection and sustainability.[463] Urgenda sees its role as constructive and not merely a litigious organisation,[464] and an organisation in favour of innovation and sustainability, which has led to a huge network of people in the Netherlands.[465]

Urgenda initiated proceedings as a representative of interest groups and individuals living in the Netherlands,[466] and these individuals fall within the jurisdiction of the State as well as the protection of Articles 2 and 8 of the ECHR.[467]

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[457] Benoit Mayer 'Climate Change Mitigation as an obligation under Customary International Law' (2023) 48:105 *The Yale Journal of International Law* at p106
[458] Ibid at 107
[459] Ibid at 108 where the author refers to the Vanuatu case which requested an advisory opinion of the International Court of Justice.
[460] *Urgenda* 2018 para 3.1.
[461] Ibid
[462] https://en.wikipedia.org/wiki/Urgenda
https://en.m.wikipedia.org/wiki/Urgenda and see also https://www.urgenda.nl/en/home-en/

[463] Ibid
[464] As quoted by the attorney for Urgenda, Dennis van Berkel in the article by Isabella Kaminski 'Urgenda two years on: What impact has the landmark climate lawsuit had?' *The Wave* 25 May 2022 Available at: https://www.the-wave.net/urgenda-two-years-on/
[465] Ibid
[466] At paragraph 2.3.2 of the 2019 judgement
[467] Ibid. The court makes a cross reference here to paragraph 39 to 43 of the 2018 judgement which *inter alia* speak to the protection offered to the citizens of the Netherlands.

The fact that Urgenda was a strongly armed body of individuals[468] led to the historic precedence set by this case and although this affected the Netherlands directly, it did serve as a catalyst for further international climate litigation.[469] The result was the 'Urgenda effect' which saw an increase in climate litigation challenging governments based on human rights.[470]

The initial respondents were the state of Netherlands who became the applicants on appeal.

4.2.3.3 Extra-territorial jurisdiction

The Hague Court of Appeal, in discussing the situation in the Netherlands, was relatively open-minded in acknowledging that the Netherlands has a relatively high per capita CO_2 emission in comparison to other industrialised countries.[471] The District Court ordered the State to achieve a reduction by at least 25 per cent by the end of 2020.[472] Urgenda, agreed with the judgement of the Hague District court and agreed that the State of Netherlands is doing too little to limit GHG emissions based on dangerous climate change that could affect the world with a largely inhabitable planet. As such, Urgenda acknowledged that this is a global problem and that the State can only intervene in the emissions from Dutch territory.[473] On the other hand however, Urgenda argued first that the Netherlands is an Annex 1 country according to the UN Climate Convention and continues to profit from the use of fossil energy since the industrial revolution, secondly that the Netherlands has one of the highest 'dangerous' CO_2 emissions in the world; and thirdly, that the Netherlands has signed and ratified the UNFCC, as some of the contributing factors that enforces a duty of care on the State.[474]

As regards extra-territorial jurisdiction however, *Urgenda* did not ask the court to consider its jurisdiction in an extra-territorial sense and there was no question of laws applying extra-territorially to this matter.

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[468] Urgenda consisted of about 900 citizens acting as co-plaintiffs. Anke Wonneberger & Rens Vliegenthart 'Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government' (2021) *Environmental Communication* at p2-3 DOI: https://doi.org/10.1080/17524032,2021.1889633

[469] For example, the *Neubauer* case in Germany as is discussed *infra*, as well as to the 2023 Kenyan case of *Kisumu ELC Petition No.002 of 2023 Julie Atieno Ogolla & 4 Others v Attorney General & 17 Others* where Kenyan farmers sue the Government for insufficient measures against the impacts of climate change affecting their agricultural activities.

[470] Wonneberger and Vliegenthart op cit note 468 at 2.

[471] *Urgenda* 2018 para 26. In terms of emissions, the Netherlands at 2018 ranked 34th of 208 countries and of the total GHG emissions in the Netherlands, 85% are CO2 emissions, largely generated by the energy sector.

[472] *Urgenda* 2018 par 28.

[473] Ibid.

[474] *Urgenda* 2018 paras 28 - 29.

4.2.3.4 *Locus standi*

The Dutch Supreme Court dealt with extra-territorial judicial standing by first considering that under Dutch law, Urgenda, in its collective action had standing, and this based on the interests of the residents of the Netherlands having sufficiently identical claims with regards to climate change. Of relevance is that the court held that based on the Dutch Constitution, Urgenda has standing in that the provisions of international law may be binding on all persons. Thus, the court found that *inter alia* the provisions of the ECHR could be relied upon by Urgenda.[475]

4.2.3.5 Transnational norms and principles enunciated by the court.

In the interpretation of whether Articles 2 and 8 ECHR oblige the State to take measures to protect against dangerous climate change, four norms and principles applied by the Supreme Court may be recognised as transboundary in nature.

The first is that dangerous climate change and its consequences are recognised at an international level.[476] The Supreme Court, much like the Court of Appeal before it, expended much time in an analysis of the danger as well as the consequences of climate change, *inter alia* that it poses a global challenge with inherent risks to the ecosystem jeopardising food supply.[477] The State contended that Articles 2 and 8 ECHR do not make it obligatory to offer protection from the very real threat of dangerous climate change and the State claimed further that since the threat of climate change is global in nature, it does not fall within the ambit of protection afforded by the ECHR.[478] The court considered the meaning of the positive treaty obligations in accordance with the provisions of Articles 1, 2 and 8 ECHR and found that the obligations require the State to take both mitigation as well as adaptation measures and that a court may determine what is reasonable and suitable in this regard.[479] The court found further that the obligations of these provisions refer to the State ensuring it takes measures, and does not pertain to the achievement, or guarantee of an achievement of the expected outcome.[480] Pursuant to these findings, the court held that no other conclusion can be drawn aside from that in terms of Articles 2 and 8 of the ECHR, the state is obliged to take measures to counter the

[475] *Urgenda* 2019 p812.
[476] Drawing on conclusions based on insights derived from climate science, the Supreme Court stressed that the consequences of dangerous climate change are now recognised at an international level, and the State did not challenge this conclusion. *Urgenda* 2019 paras 4.1 to 4.8.
[477] Ibid.
[478] *Urgenda* 2019 para 5.1 2.
[479] Urgenda 2019 paras5.2.1-5.3.4
[480] Ibid

genuine threat of dangerous climate change.[481] Nollkaemper considers this as a key holding relevant to international law and deduced that this decision could be grounded in human rights law, which reinforces the argument that climate change is a human rights issue and is likely to have a positive impact and influence on future transnational climate litigation.[482]

The next principle applied by the Supreme Court which may be considered transboundary in nature is the lens from which the court views these obligations is that of being 'common ground.'[483] The court interpreted 'common ground' within the ambit of Article 31(1) of the Vienna Convention on the Law of Treaties, which provides protection of human rights in terms of the general principles of international law,[484] which stems from the many ways that these obligations have been enforced by the European Court of Human Rights (ECtHR) and which establishes that the provisions of the ECHR must be effective and practical in their interpretation.[485] The stipulation, in Article 31(1) is that the treaty must be interpreted first, in good faith, and secondly, according to the ordinary meaning given to the treaty based upon its objectives and purposes.[486] The court also referred to precedent[487] which held that the ECHR must be interpreted in line with Article 31(3)(c) of the Vienna Convention, which provides that the provisions of the ECHR ought not to be applied in a vacuum but rather in harmony with the principles of international law.[488] The result of this interpretation meant that the target to reduce GHG emissions by 25 per cent by 2020 was incorporated into the positive obligations binding on the Dutch State by Articles 2 and 8 ECHR. Nollkaemper further adds that the fact that the 25 per cent had been transformed into 'common ground' stems from its endorsement by the annual Conferences to the Parties (COP) to the UNFCCC and because the European Union had taken this as its point of reference.[489] The Supreme Court viewed this from an international perspective, in that the resolutions and statements derived from COP showed a

[481] *Urgenda* 2019 para 5.6.2. The court expressed also that the State is to treat this as a national problem constituting a 'real and immediate risk' entailing the risk that the lives and welfare of Dutch residents could be seriously jeopardised.
[482] Nollkaemper and Burgers op cit note 410 at 812.
[483] *Urgenda* 2019 paras 5.4.1 – 5.4.3.
[484] The Vienna Convention on the Law of Treaties, adopted in 1969 but only entered into force in 1980, governs international treaties and applies to written treaties between States. Pat Bauer 'Vienna Convention on the Law of treaties' available at:
https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties Accessed August 2023. The third part of the Vienna Convention, which deals with the application and interpretation on treaties is relevant *in casu* and which the court used in its interpretation of the ECHR. (*Urgenda* 2019 para 5.4.2)
[485] *Urgenda* 2019 paras 5.4.1 – 5.4.2.
[486] Ibid at para 5.4.2.
[487] Ibid.
[488] Ibid
[489] Nollkaemper and Burgers op cit note 410 at 812.

stronger consensus for developed countries to urgently reduce GHG emissions, which in turn gave a more concrete meaning to Articles 2 and 8 ECHR, and this was how the 'common ground' method of interpretation made the distinction between legally binding and positive obligations and non-binding resolutions and documents.[490]

Thirdly, and also likely to have the most influence on transnational aspects of climate litigation, is the point raised by Nollkaemper that the court, in response to the State's position that the Netherlands was only a minor contributor to global climate change, nevertheless held that the Netherlands be subject to its own obligations and was bound to prevent harmful climate change according to Articles 2 and 8 ECHR.[491] The court stressed the obligations from the ECHR and the UNFCCC and applied the 'no harm' principle to demonstrate and reveal that if each state fulfils its own obligations, it will be bound to prevent harm from climate change.[492]

Lastly, the court addressed the State's arguments within the context of the precautionary principle.[493] In essence, the precautionary principle, which is an accepted principle in international law, and which has been incorporated in the UNFCCC as well as confirmed in case law of the ECtHR, is a way to prevent the State of relying on any uncertainty with regards to climate change science.[494]

4.2.3.6 Evidence of applying laws from another jurisdiction

There is evidence of some differences in comparative references referred to in the different courts. The Court of Appeal, in its consideration of whether the State was acting unlawfully by not reducing its GHG emissions by at least 25 per cent by the end of 2020 considered the available climate science from the UNEP[495] and the IPCC.[496]

In its interpretation of Articles 2 and 8 as 'common ground' according to the Vienna Convention on the Law of Treaties, the court had regard to foreign case law, the first being the ECtHR judgement of *Nada/Switzerland* which stated that especially in rules concerning the international protection of human rights, account must be taken of any relevant rules of international law applicable in the relations between the parties.[497] The court also made

[490] Ibid
[491] Ibid at 813
[492] Ibid
[493] *Urgenda* 2018 para 63.
[494] Ibid
[495] *Urgenda* 2018 para 47.
[496] *Urgenda* 2018 para 49.
[497] *Urgenda* 2019 para 5.4.2.

reference in this context to the ECtHR decision in *Demir and Baykara/Turkey* that elements of international law other that the Vienna Convention and the established manner in which European States reflect their common values,[498] with a reference to the Rio Declaration in the footnotes.[499]

There was no mention of any jurisprudence from the Global South.

4.2.3.7 How the global character of the problem affected the courts judgement.

The judges of the Appeal Court unanimously agreed with the finding of the District Court and held that the State failed in its duty of care pursuant to Articles 2 and 8 ECHR by not being willing to reduce its emissions.[500] The judges of the Supreme Court in 2019 rejected the State's appeal in cassation and held in favour of both the District Court as well as the court of Appeal that the State has to reduce its GHG emissions.[501]

To reach a decision on whether Urgenda's claim to order the State to reduce GHG, the court analysed the current levels of global warming in relation to the levels at the beginning of the industrial revolution and then considered the latest recommendations.[502] The court concluded that the 'worldwide community' needs to reduce the GHG emissions, especially that of CO_2. Whilst keeping these frameworks and scientific references in mind, the court, it its assessment of the grounds of appeal of the state and of Urgenda in its cross-appeal looked at Articles 2 and 8 ECHR and at dangerous climate change. The court found that the state has a positive obligation to protect lives of its citizens within its jurisdiction in terms of Articles 2 and 8 ECHR.[503] It can thus be inferred that these frameworks[504] influenced the court's findings.

The Supreme Court also looked at the available climate science and concluded that the high concentration of CO_2 is 'warming the planet' which in turn has 'hazardous consequences.'[505] The court further recognised this as dangerous climate change at an 'international level.'[506] The Supreme Court then addressed the contention of the Court of Appeal at paragraph 45 wherein

[498] Ibid
[499] Urgenda 2019 footnote 28.
[500] *Urgenda* 2018 para 73.
[501] *Urgenda* 2019 paras 8 - 9 2019.
[502] The court established that the current level of global warming is 1.1 degree Celsius warmer than levels at the beginning of the Industrial Revolution with current levels of GHG concentrations at approximately 401 parts per million (ppm), and that human-induced CO2 emissions have increased by 2% annually leading to the continuation of global warming. *Urgenda* 2018 para 3.5 2018.
[503] *Urgenda* 2018 paras 34 – 43.
[504] That there is a threat of 'dangerous climate change,' and a need to reduce GHG emissions.
[505] *Urgenda* 2019 paras 4.1-4.4.
[506] *Urgenda* 2019 paras 4.4-4.5.

the court acknowledged the real threat of dangerous climate change and thus found that the State had a duty to protect its citizens in terms of Article 2 and 8 ECHR. It can thus be seen from this that these frameworks have affected the court's judgement. Following a detailed analysis of Articles 2 and 8 and the obligations thereof, the court, reached the conclusion that the State is obliged to take appropriate measures against the threat of dangerous climate change on the basis of the protection afforded by Articles 2 and 8.[507] Both courts however, in as much as they have acknowledged dangerous climate change to be a global problem, did not include any remedy beyond its jurisdiction, as will be discussed below.

4.2.3.8 Summary of the transnational analytical categories of the decision

The seven elements of the transnational analytical framework analysed in *Urgenda* reveal that both the Court of Appeal and the Supreme Court placed the facts on a global level with global climate change as the transboundary nature of the activity. The courts' analysis included the emission of GHGs and its global impacts, in-depth discussions on climate change and its consequences, the definitions of mitigation and adaptation as used to counter the consequences of climate change, and global warming. Furthermore, there were references to international frameworks, treaties, the various COP meetings, the UNFCCC, IPCC, and UNEP. The applicants qualify as transboundary actors and can be categorised as 'grassroots activists and farmers' who have seeded litigation and enabled more ambitious climate action. The state, although not a transnational actor, is typically seen as the respondent in climate litigation. There was no extra-territorial jurisdiction nor any laws applying extra-territorially. The four transnational norms and principles highlighted were dangerous climate change and its consequences at an international level; a duty of care in the form of obligations to take measures against dangerous climate change; the no-harm principle; and the precautionary principle. Evidence of applying laws from another jurisdiction was present in the references to cases from the EU, with no jurisprudence from the Global South. The global character of the problem was reflected in the courts' judgment first where the court held that, pursuant to Articles 2 and 8 of the ECHR the state had failed in its duty of care. Secondly, with reliance on available climate science the court was able to reach its conclusion on whether to allow Urgenda's claim.

[507] *Urgenda* 2019 paras 5.1-5.9.3.

4.3 *Friends of the Earth Netherlands (Milieudefensie)et al v Royal Dutch Shell*[508]

4.3.1 Introduction

The judgment for *Milieudefensie* was given on 26 May 2021 at the Hague District Court.[509] The defendant, Royal Dutch Shell PLC (RDS) has since appealed the decision and it is thus important to note that the final decision is still pending. As this is a class action, the claimants *in casu* were first, Friends of The Earth Netherlands (*Vereniging Milieudefensie*) and the other parties it represents which are, the foundation *'Stichting Greenpeace Nederland'* in Amsterdam, the foundation *'Stichting Ter Bevordering Fossielvrij-Beweging'* in Amsterdam, the association *'Landelijke Vereniging Tot Behoud Van De Waddenzee'* in Harlingen, the foundation *'Stichting Both Ends'* in Amsterdam, the youth organization *'Jongeren Milieu Actief'* in Amsterdam and the foundation *'Stichting Actionaid'* in Amsterdam. Secondly, there were 17 379 individual claimants who appointed *Milieudefensie* as their representative.

Unlike *Urgenda* and most climate cases in the Global North, this case instituted legal proceedings against RDS[510], classifying this judgment within the ambit of private climate litigation.[511] In terms of Dutch private law, and as happened in this case, liability by a company could be established not only by breach of domestic or international law, but also by acting contrary to specific rules or duty of care.[512]

Following the success of and media attention around the *Urgenda* decision, the *Milieudefensie* case came at a time considered as the second wave of climate litigation, and at a time of global increase in climate litigation.

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[508] Citation for the Official Translation into the English Language: C/09/571932/HA ZA 19-379 (Citation for the original Netherlands Judgement of the Hague District Court in the Dutch Language: ECLI:NL: RBDHA: 2021:5337)

[509] This being the same court of first instance that issued the Urgenda judgement in 2015, although with a different set of Judges on the Bench as pointed out by Phillip Paiement 'Reimagining the energy corporation: *Milieudefensie and others v Royal Dutch Shell Plc*' (2022) *SSRN* at 4 Available at SSRN: http://dx.doi.org/10.2139/ssrn.4218965

[510] Royal Dutch Shell who has its headquarters in The Hague.

[511] Categorised as private climate litigation as RDS is a public limited company, a legal person under private law under the laws of England and Wales, with its head office in The Hague.

[512] *Milieudefensie* para 3.2; Otto Spijkers 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell (2021) *Chinese Journal of Environmental Law* at 1 and at 3, considers this as one of the most interesting aspects of the ruling in that the court found that Shell was acting unlawfully despite not having found a specific breach of domestic or international law. Instead, the court held that Shell's obligation to reduce GHG emissions stems from the "unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful."

4.3.2 Background and decision

The dispute in this matter centres primarily around the volume of CO_2 emissions caused by RDS in their business operations, and also around energy products of RDS and the Shell group, which the claimants construe as an unlawful act towards them.[513] The claimants sought first that RDS be ordered to reduce its aggregate CO_2 emissions [514] and that this obligation to reduce must be relative to the global temperature target as stated in the Paris Agreement, and be relative to the emissions of the Shell group for the 2019 year.[515] Secondly, the claimants asked the court to rule that RDS acted unlawfully toward *Milieudefensie* directly as well as via the Shell group.[516] Thirdly, the claimants to order RDS and the Shell group to limit or cause to be limited the aggregate annual volume of all CO_2 emissions by 2030.[517]

The claimants based their demands on the unwritten standard of care of the Dutch Civil code;[518] that RDS has an obligation to contribute to the prevention of dangerous climate change;[519] and on the human right to life and to the right to respect for private and family life.[520]

The court gave much consideration to climate change and its consequences[521] and to Conventions, international agreements, and policy intentions.[522] The activities of RDS were also considered[523] and in its final assessment the court ordered RDS, both directly and via its consolidated companies, to limit or cause to limit the aggregate annual volume of CO_2 emissions caused by its business operations.[524]

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[513] *Milieudefensie* para 3.1. These claims are referred to as Scope 1, 2 and 3 in the proceedings.
[514] Ibid. The claim refers to the aggregate annual volume of CO2 emissions in the atmosphere due to business operations, sold energy products of RDS and its companies and legal entities.
[515] Ibid.
[516] *Milieudefensie* para 3.1.
[517] Ibid. The claimants specified that by year-end 2030 the aggregate volume of CO2 emissions (Scope 1, 2 & 3), ought to be reduced principally by at least 45% or net 45% relative to 2019 levels; in the alternative, will have reduced by at least 35% or net 35% relative to 2019 levels; further in the alternative, will have reduced by at least 25% or net 25% relative to 2019 levels; and also an order for RDS to pay the costs of these proceedings.
[518] The claimants here, as in the *Urgenda* case, used the 1965 Netherlands case of *Kelderluik* for the interpretation of the unwritten standard of care criteria. *Milieudefensie* para 3.2.
[519] *Milieudefensie* para 3.2. To contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group.
[520] *Milieudefensie* para 3.2. In addition, the soft law as endorsed by RDS, for example the UN Guiding Principles on Business and Human Rights, the UN Global Compact and the OCED Guidelines for Multinational Enterprises.
[521] *Milieudefensie* para 2.3
[522] *Milieudefensie* para 2.4.1-2.4.7 where the following were discussed: UNFCCC, COP, IPCC, UNEP, Paris Agreement, and the International Energy Agency (IEA) and at paragraph 4.4. UN Guiding Principles.
[523] *Milieudefensie* para 2.5
[524] *Milieudefensie* para 5.3

An unusual facet of this case is the disagreement between the parties about the location of the event which gave rise to the damage.[525] The plaintiffs contended that the Netherlands is the place where RDS enacted its corporate policy and hence their claim required the application of Dutch law.[526] RDS however argued that the scope 1, 2 and 3 activities of emitting GHG's is what constitutes the events which gave rise to the damage and hence a myriad of legal systems ought to apply.[527]

This disagreement between the parties regarding the location of the event giving rise to the damage, is the reason why the court had to decide on the applicable law. In other words, the issue to be decided was based on a conflict on how the court had to conceptualize the activities that cause climate change.[528] This is what led to the court relying on Article 7 of Rome II as the applicable law.[529]

In its assessment of applicable law, the court determined that the law applicable to a non-contractual obligation due to environmental damage, shall be Article 4 paragraph 1 of Rome II.[530] The provisions of Rome II deal with the main 'conflict-of-laws rule' as set out in EC Regulation Number 864/2007 which is the law applicable to non-contractual obligations and is found in Article 4(1) and which arises out of tort law in the country in which the damage occurs (the *lex loci damni*) and this is irrespective of the country in which the consequences of the damage occurs.[531] Article 7 has universal application in the sense that it applies irrespective of whether it designates the law of a member of state or not.[532]

The court confirmed a corporate duty of care for climate change mitigation by RDS and based it on the Dutch law of torts as set out in Book 6, Section 162 of the Dutch Civil Code.[533] In its

[525] Milieudefensie para 4.3; Paiement op cit note 509 at 5.
[526] Paiement op cit note 509 at 5.
[527] Ibid.
[528] Ibid.
[529] Ibid. "Ultimately the court found that Article 7 of the Rome II Regulation 'leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified' and that 'RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to the environmental damage and imminent environmental damage.'"
[530] *Milieudefensie* para 4.3.1-4.3.2 and footnote 35. This is in terms of Article 7 Rome II which is Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007
[531] Michael Bogdan (2009) 'The Treatment of Environmental Damage in Regulation Rome II' at 219 In: The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Regime. E-Book ISBN 9789047425250 Publisher Brill/Nijhoff. This literature also points out that there are exceptions to this main rule, and some of the Articles allow for special conflict rules, such as Article 7 which deal with Environmental Damage. Available at https://brill.com https://doi.org/10.1163/ej.9789004171930.i-480.77
[532] Ibid at 220
[533] *Milieudefensie* para 4.4.1.

interpretation of this unwritten standard of care, the court considered 14 different aspects[534] but most important for this analysis are the consequences of the CO_2 emissions for the Netherlands and the Wadden region[535] and the UN Guiding Principles.[536]

The role of climate science also played a large role in the court's analysis as it relied extensively on the scientific facts and figures pertaining to climate change and its consequences in its assessment.

4.3.3 The transnational analysis

4.3.3.1 The transboundary nature of the activity

There are several considerations which speak to the transboundary nature of this dispute, the first of which stems from the claimants themselves, in that they are associations which have organisations elsewhere and not only in the Netherlands.[537] In a similar vein, the activities of the defendant are transboundary in nature.[538] The very nature of the dispute would also be defined as a transboundary activity in that in essence, revolves around the volume of CO_2 being emitted in the air.[539] Like the *Urgenda* case discussed above and the *Neubauer* case discussed below, climate change and its consequences forms the essence behind the litigation, and that climate change is a global challenge is at the very heart of the transboundary aspect and activity. This case too, has the aim of preventing dangerous climate change and to support and enforce the goals of the Paris Agreement.

4.3.3.2 The transboundary actors

The claimants are collectively called *Milieudefensie*. *Milieudefensie* constitutes six foundations from Amsterdam[540] and one from the Wadden area which includes the northern sea-clay area,

[534] *Milieudefensie* para 4.4.2.
[535] *Milieudefensie* para 4.4.6.
[536] *Milieudefensie* paragraph 4.4.11.
[537] *Milieudefensie* paras 2.1.1-2.1.8. Some of the associations of the Claimants were founded in the 1960s, 1970s and 1980s, and their collective as well as individual objectives include environmental protection on a planetary, global, national, regional, and local level.
[538] *Milieudefensie* paras 2.5.3-2.5.4. RDS reports on GHG emissions of its various Shell companies and based on the World Resources Institute GHG Protocol. There are three categories of GHG emissions used by the GHG protocol, viz Scope1which concerns direct emissions from sources that are owned or controlled in full or in part by the organization. Scope 2 which concerns indirect emissions from third-party sources relating to purchased or otherwise acquired electricity, steam, or heating and thirdly, Scope 3 which concerns all other indirect emissions occurring from GHG sources because of the activities of the organization but owned or controlled by third parties.
[539] *Milieudefensie* para 3.1.1.a. The claimants primarily seek a reduction in the direct and indirect emissions volume.
[540] *Milieudefensie* paras 2.1.1-2.1.7.

the Wadden islands, the Wadden Sea and the North Sea.[541] It is significant to note that the Wadden Islands, a UNESCO world heritage site, are situated between the Netherlands and Denmark. The seven claimants were organisations with articles of association reflecting their objectives as, *inter alia*, preserving and sustaining the global environment, combating climate change, pollution and abuse of the planet and related aspects.[542] In addition, there were 17 379 individual claimants who were represented by *Milieudefensie ad litem* seeking RDS to reduce their emissions according to the provision of the Paris Agreement.[543]

The defendant, RDS is a public limited company, and is a legal person under the private law of England and Wales, with its head office in the Hague.[544] RDS is the holding company of the Shell group which has activities worldwide.[545] RDS conducts its activities by holding shares in intermediaries and has shareholders in New York, London, and Amsterdam. The Shell entities have assets and or infrastructure with which they produce and trade in oil, gas, and other energy sources. In addition, they have been granted permits for the exploitation, protection, and extraction of oil.[546]

4.3.3.3 Extra-territorial jurisdiction

Issues of jurisdiction, particularly admissibility and access to courts of class actions, are governed by Dutch law.[547] Accordingly, to test whether foundations such as Milieudefensie, which are considered as having full legal capacity, are allowed to initiate legal proceedings, the provisions of the Dutch Civil Code had to be met.[548] The court found that the interests of current and future generations of the world's population, as served by class actions, were not suitable for bundling, however, the interests of current and future Dutch residents were suitable for bundling.[549] Ultimately, on the issue of jurisdiction, the court held that since the other admissibility requirements[550] are not in dispute, the collective claims of *Milieudefensie* were allowed.

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[541] *Milieudefensie* para 2.1.4.
[542] *Milieudefensie* paras 2.1.1-2.1.7.
[543] *Milieudefensie* para 2.1.8.
[544] *Milieudefensie* para2.2.1.
[545] *Milieudefensie* para 2.2.2.
[546] *Milieudefensie* para 2.2.3.
[547] *Milieudefensie* paras 4.2.1-4.2.2.
[548] *Milieudefensie* para 4.2.1. The class actions of Milieudefensie et al. are governed by Book 3 Section 305a of the Dutch Civil Code which only applied up until 1 January 2020, which was after 5 April 2019, the date of the summons to these proceedings.
[549] *Milieudefensie* para 4.2.3–4.2.4
[550] Under Book 3 Section 305a of the Dutch Civil Code.

4.3.3.4 *Locus standi*

The court tested *locus standi* in two ways. First by considering if the interests served by the class action aligned with the objects as stated in the articles of association.[551] The class action brought by *Milieudefensie* is classified as a public interest action which seeks to protect the interests of the public and therefore cannot be individualised.[552] The common interest of preventing dangerous climate change by reducing the CO_2 emissions can be protected by a class action and thus meets the requirement in Dutch law that class actions must have a 'similar interest.'[553] Accordingly, all of the claimants forming part of the class action were deemed to have *locus standi* except for ActionAid.[554] The court explained that in a class action, it is necessary for the interest in the proposed litigation to be aligned with the objectives in the articles of association of the foundation or association, who with full legal capacity may then institute legal proceedings.[555] The broad objectives of ActionAid pertained to the world with a special focus on Africa.[556] The court concluded on this aspect that ActionAid does not promote the interests of the Dutch residents sufficiently and the collective claim could not be allowed.[557]

The court then tested standing of individual claimants and did not grant *locus standi* to the individual claimants either.[558] This was based on Dutch law which stipulates independent direct interests before claimants have standing in class actions. As the claimants *in casu* did not have any individual interests, and as they share common ground with the class action by which their interests, were already served, the claims of the individual claimants were not allowed.[559]

Paiement argues that the case fits best in the context of strategic climate litigation together with other forms of legal mobilisation against Carbon Majors and other large corporations which emit GHGs.[560] This is because claimants are urging for energy corporations to be held accountable for climate change and its ensuing harms.[561] This literature also refers to the first wave of climate litigation in the USA in the cases of *Comer v Murphy Oil* and *Kivalina v*

[551] *Milieudefensie* para 4.2.5
[552] *Milieudefensie* para 4.2.2.
[553] Ibid.
[554] *Milieudefensie* paras 4.2.3-4.2.5.
[555] *Milieudefensie* para 4.2.1.
[556] *Milieudefensie* para 4.2.5 and para 5.1 See also para 4.2.3 where the court finds that 'bundling' of the interests in foreign populations and does not serve the ambit of this class action. The court reasoned here that although the entire world aims to curb dangerous climate litigation, the differences in time and manner in the way the global population at differing locations will be affected by the CO2 emissions causing global warming.
[557] Ibid
[558] *Milieudefensie* para 4.2.7.
[559] Ibid.
[560] Paiement op cit note 509 at 2.
[561] Ibid

ExxonMobil which are considered as private climate litigation in that they are litigated against private actors. These cases were not successful as the plaintiffs could not convince the court regarding its standing and they could not prove causality between the emissions of the oil and gas companies and the harm that they were experiencing. Thus Paiement argues that *Milieudefensie* constitutes a major development in the trajectory of climate litigation against private actors.[562] Setzer and Vanhala share this view, stating that climate change litigation is becoming more interdisciplinary, and the range of actors are evolving, and litigation is now also used to harness tighter regulatory controls.[563] Thus, notwithstanding not allowing ActionAid or the individual claimants standing, the case is still a milestone.

4.3.3.5 Transnational norms and principles enunciated by the court

Several norms and principles can be included in the court's judgment, including first the 'unwritten duty of care' with which it held RDS liable for climate mitigation in the form of reduced CO_2 emissions.[564] This is within the context of possible reduction pathways to address the consequences of climate change.[565] The IPCC, together with the Paris Agreement,[566] have identified strategies to reach the goal of reduced GHG emissions and have provided scientific insights into the best possible strategies to address dangerous climate change.

That the court referred to conventions, international agreements and policy intentions is trite. What is useful in this analysis is the courts reliance on Article 7 of Rome II to determine the applicable law.[567] In its interpretation of the Rome II Regulations, the court confirmed the territory of the Netherlands as the jurisdiction in which the environmental damage had occurred.[568] However, this also restricted the ambit of accountability as Shell has subsidiaries in many countries around the world and the court could have used this as an opportunity to extend the unwritten duty of care to different jurisdictions, thereby strengthening its commitment to the objectives of the Paris Agreement.[569]

The court also relied on the provisions of the UN Guiding Principles (UNGP) as a widely accepted soft law instrument, in its interpretation of the unwritten standard of care owed by

[562] Ibid at 3
[563] Setzer and Vanhala op cit note 97 at 6.
[564] *Milieudefensie* para 4.4.29 and 4.4.38-4.4.39.
[565] Ibid.
[566] *Milieudefensie* para 4.4.26.
[567] *Milieudefensie* paras 4.3.1-4.3.7.
[568] Benoit Mayer 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation' (2022) *Transnational Environmental Law* at 4
[569] Ibid.

RDS.[570] The UNGP distinguishes between the responsibility of States and that of businesses, and based on this it requires companies and business enterprises to respect human rights. However, the criticism in literature is that the reference to human rights treaties having a horizontal effect on companies and corporations is purely ornamental and cannot assist the court to determine the content of Shell's mitigation duty.[571] Mayer questions the court's finding in this regard and raises the point that more important than the question of an existence of a duty of care by Shell for climate change mitigation, is the question of having to determine the content of that duty of care and what level of GHG emissions would be allowed before breaching the duty of care.[572]

The second principle enunciated is that of the 'best efforts obligation' which amounts to a reduction obligation vesting in RDS and the Shell group.[573] A reduction obligation entails *inter alia* that 'with respect to the business relations of the Shell group, including the end-users, RDS may be expected to take necessary steps to remove or prevent serious risks resulting from CO_2 emissions generated by them.'[574]

Thirdly, the court considered the goals of the Paris Agreement in the context of dangerous climate change.[575] These goals, are derived from the IPCC reports and thus represent the best available scientific findings on climate science.[576] Although non-binding, the goals of the Paris Agreement protect the common interests of preventing dangerous climate change.[577]

Wegener raises an important point on the applicability of the Paris Agreement and its role in climate litigation and its effectiveness and its design and enforcement at national level.[578] In this context it can be seen that although the court envisaged the same goals as purported by the Paris Agreement, the court excluded it as an international tool in litigation in that it based its decision only on the interests of the Dutch people.[579]

[570] *Milieudefensie* paragraph 4.4.11-4.4.17.
[571] Mayer op cit note 568 at 6-7.
[572] Ibid at 6
[573] *Milieudefensie* para 4.4.55.
[574] Ibid.
[575] *Milieudefensie* paras 4.4.27-4.4.37.
[576] *Milieudefensie* para 4.4.27.
[577] Ibid.
[578] Wegener op cit note 84 at 18.
[579] *Milieudefensie* para 5.2, "The court declares that the other collective claims not-allowable insofar as they serve the interest of the entire world population in curbing dangerous climate change caused by CO_2 emissions."

Lastly the court relied on the proportionality of the reduction obligation in its interpretation of the unwritten standard of care.[580] In so doing, the court considered the emissions for which RDS could be held accountable as a very serious threat to the Dutch residents and to the inhabitants of the Wadden region.[581] The court highlighted that 'a characteristic feature of dangerous climate change is that every emission of CO_2 and other GHGs, anywhere in the world and caused in whatever manner, contributes to this development.'[582] On the other hand, each reduction of GHG emissions contributes positively to countering dangerous climate change. The Court held that RDS can affect a reduction of GHG emissions by changing its energy package. The court considered this as a justification for a reduction obligation and concluded that RDS and Shell have freedom to comply with this reduction obligation, noting that a 'global' reduction obligation gave them more freedom of action than a reduction obligation limited to a particular territory.[583]

4.3.3.6 Evidence of applying jurisprudence from another jurisdiction

The parties were divided as to what should be seen as an 'event giving rise to the damage'[584] and the court, in deciding whether to choose Article 7 of Rome II as the applicable law referred to decisions from the Court of Justice of the European Union (CJEU) has not having made a declaration on the 'event giving rise to the damage' in the sense of Article 7 of Rome II.[585]

Aside from this, the court in discussing climate change and its consequences[586] referred to various conventions, international agreements, and policy intentions, including that of the European Union.[587] The court also referred to the UN Guiding Principles in its discussion of RDS' reduction obligations.[588] Lastly, in consideration of what is needed to prevent dangerous climate change, the court referred to the UNSDGs, the Agreement on an International Energy Program and the European Energy Charter Treaty and the Oxford Report.[589]

The court did not refer to the jurisprudence of any developing country, which is unfortunate as the Court could have seized this opportunity to bring awareness of the climate jurisprudence from the Global South, particularly the Earthlife matter which at that stage had gained

[580] *Milieudefensie* para 4.4.54.
[581] Ibid. Including serious human rights impacts for both current and future generations.
[582] Ibid.
[583] Ibid.
[584] *Milieudefensie* para 4.3.2. and footnotes 38-39 with the list of cases from the CJEU.
[585] *Milieudefensie* para 4.3.4.
[586] *Milieudefensie* para 2.3.
[587] *Milieudefensie* paras 2.4-2.4.15.
[588] *Milieudefensie* paras 4.4.11-4.4.17
[589] *Milieudefensie* paras 4.4.11, 4.4.43-4.4.44 and 4.4.52.

substantial media attention and scholarly discourseThis in turn could have paved the way for the court in the South African Shell matter, having been decided in September 2022 to refer to the Milieudefensie case of May 2021 as both matters involved claims against fuel companies.

4.3.3.7 How the global character of the problem affected the court's judgment

The court spent a considerable amount of time analysing climate change and its consequences, which enabled it to reach its final decision.[590] The court discussed the use of fossil fuels since the beginning of the industrial revolution and why CO_2, as the primary GHG warms the earth. The findings of attribution science were considered in much detail. The court further analysed conventions, international agreements, and policy intentions[591] and how these all led to the World Energy Outlook 2020, the Treaty on the Functioning of the European Union (TFEU) which contains the EU's environmental goals.[592] The court also considered the June 2019 Dutch Climate Agreement and the September 2019 Dutch Climate Act.[593] Thus the court approached climate change and climate science from both an international and national law lens in reaching its finding that RDS has an obligation to mitigate climate change, (albeit only in the Netherlands).[594]

In its consideration of the facts of climate change, and despite its lengthy discussion of global warming, the court isolated the consequences for Europe and for the Netherlands, without considering the effects on the rest of the world.[595] The court identified that due to the relatively high per capita CO_2 emissions that Netherlands has in comparison to other industrialised countries, the impacts of global warming are already noticeable in the Netherlands.[596] Mayer contends that this is questionable as no scientific evidence was presented for distinguishing between the impacts of climate change and global warming in Netherlands and at various other

[590] *Milieudefensie* paras 2.3.1-2.4.15.
[591] Ibid. The court gave a historical account of these and commenced its analysis with the 1972 Stockholm Declaration, the 1992 UNFCCC which has been ratified by most of the global community, the various COP convening's, the IPCC, the UNEP, the Paris Agreement, and the IEA.
[592] Ibid
[593] Ibid
[594] *Milieudefensie* para 5.3.
[595] *Milieudefensie* para 2.3.6 where the court, with reference to the 2012 European Environment Agency 'Climate change, impacts and vulnerability in Europe 2012' which highlighted that all parts of Europe will be encountering the adverse effects due to climate change resulting in frequent heat waves, coastal flooding, and an increased risk of storms.
[596] *Milieudefensie* paras 2.3.7-2.3.9 where the court discusses the findings of climate science and what this will mean for Dutch residents. The findings indicate, amongst others, a major disruption in the climate system of the Netherlands with rising sea levels, dangerous weather patterns including hurricanes and climate change-related health hazards for Dutch residents.

locations.[597] Mayer further purports that the court should have considered the global benefits of climate mitigation and in so doing would have made a stronger case for reducing Shell's global CO_2 emissions instead of the benefits of this finding being restricted to the territory of the Netherlands.[598]

4.3.3.8 Summary of the transnational analytical considerations of the *Milieudefensie* decision

From the transnational analytical framework analysed in *Milieudefensie*, global climate change and its consequences forms the essence of the transboundary nature of the activity. This includes the volume of CO_2 emissions on the part of RDS and Shell, and the prevention of dangerous climate change and the support of the goals of the Paris Agreement. In terms of the transboundary actors, there were five environmental foundations, one youth organization and one association that comprised the claimants in this class action, and 17,379 individual claimants who had issued documents to Milieudefensie to represent them. These claimants qualify as transboundary actors and can be categorised as 'grassroots activists, farmers and engineers' who have seeded litigation, enabled more ambitious climate action and used a particular legal strategy in its climate litigation. The respondents, RDS and Shell Group have worldwide activities and are thus transnational actors. There were no issues with extra-territorial jurisdiction. Standing was allowed for all the claimants apart from ActionAid and the individual claimants. The five transnational norms and principles highlighted, being the unwritten duty of care and a standard duty of care owed by RDS; the best efforts or GHG reduction obligations. Next was the common interests to prevent climate change and lastly, the proportionality of reduction obligation. Evidence of applying laws from another jurisdiction was present in the references to cases from European courts, laws and international agreements. The global character of the problem was reflected in the courts judgement first in the discussion of climate change and its consequences, then in the analysis of why CO_2 warms the earth, then in its analysis of the facts and figures as derived from climate science, and lastly the impacts of global climate change on the Netherlands.

4.4 *Neubauer et al v Germany*[599]

[597] *Milieudefensie* para 4.2.3. Mayer op cit note 547 at 4.
[598] Ibid.
[599] Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Mar. 24, 2021. Case No 1 BvR 2656/18. 1 BvR 96/20. 1 BvR 78/20. 1 BvR 288/20. Official translation of the judgement into the English Language Available at: https://www.escr.net.org-caselaw

4.4.1 Introduction

The Federal Republic of Germany (Germany) is a federal parliamentary republic with a Chancellor as a head of government and a President as head of state. Germany comprises 16 states, each with their own constitution and with the internal organisations being mostly autonomous. Germany has been a member country of the European Union since 1 January 1958.[600] The current Constitution of Germany is called the Basic Law *(Grundgesetz)* (GG) and was adopted on 23 May 1949.[601]

Judgment for the *Neubauer* case was given on 24 March 2021 in the German Federal Constitutional Court *(Bundesverfassungsgericht)*. The case is made up of the following cases, Case No 1 *BvR 2656/18*; 1 *BvR 96/20*; 1 *BvR 78/20*; and 1 *BvR 288/20*. Kotze has referred to this case as 'ground-breaking' and it has been classified as the first example of a new paradigm termed planetary climate litigation.[602] There are various reasons why this decision has received both favourable as well as critical comments but what is most relatable to this study is firstly that this is the first time that a climate case anywhere in the world has taken the approach of a constitutional rights-based climate protection which recognises climate protection as a human right, and which also includes the duty to protect fundamental rights of future generations, and this at the crucial time when all possible legal avenues for climate protection are being sought. Secondly, this is also the first climate case to have explored a 'planetary perspective' in that the Constitutional Court considered not only a purely domestic perspective but instead adopted a planetary view in reaching its decision.[603] This is the first time that a court focused on the extraterritorial obligations of Germany.

The relevant legislation on climate change in this matter is first, Article 2(2) first sentence of the Basic Law which provides for protection of rights against environmental pollution, and which also provides for the duty to protect life and health against climate change risks with the possibility of the duty to protect future generations. Secondly, Article 20a of the Basic Law which is the provision obliging the state to take climate action to achieve climate neutrality. Like the position in South Africa,[604] rights are not absolute and must be weighed against other

[600] Germany – EU member profile. Available at https://european-union.europa.eu Accessed on 19 March 2023. (An official EU website)
[601] Constitution of the Federal Republic of Germany. Available at https://www.bmi.bund.de Accessed on 19 March 2023.
[602] Louis J. Kotze '*Neubauer et al. versus Germany*: Planetary Climate Litigation for the Anthropocene?' (2022) *Cambridge Core* 22:8 at 1-2
[603] Ibid at 4.
[604] There is a limitation of constitutional rights and freedoms, and 'they are not absolute, but have boundaries set by the rights of others as well as by important social concerns such as public order, safety, health, and

rights guaranteed by the Constitution.[605] Article 20a has an international dimension as it compels the state to tackle climate change at the global level by engaging in internationally orientated climate activities and to promote climate action within the international framework.[606] The legislator is also mandated to set out the necessary provisions for emissions in the form of parliamentary legislation in order to protect the fundamental rights of the Basic Law.[607]

Thirdly is the Federal Climate Change Act (Hereafter referred to as KSG).[608] Prior to the enactment of the KSG, Germany's climate targets were based on the various plans and programmes it had defined for the period 2020 onwards. However, with section 3(1) of the KSG, these climate targets were now given statutory force.[609] In this way, the KSG responds to the need for greater protection in terms of climate action and is considered the legal basis for Germany's obligation in terms of the Paris Agreement.[610] However, the challenge brought by this application concerns the specific climate targets as set out in the KSG.[611]

4.4.2 Background and decision

This is a lengthy judgement based on a complex legal and factual matrix. Part A discusses the legal bases of this case and considers first the KSG and the legislator's purpose and climate targets within the framework of the Act, and secondly, the aims of the Paris Agreement.[612] The constitutional complaints in this case are all directed against the provisions of the KSG in that

democratic values. The South African Constitution in section 36 has a general limitation section which provides the criteria for the justification of restrictions of the rights in the Bill of Rights.' Ian Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) 163.

[605] *Neubauer* Headnote of the judgement which also states that within this balancing process, increasing weight is given to the obligation to considr climate change as it intensifies.

[606] *Neubauer* Headnote. 'The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate action at the global level and is required to promote climate action within the international framework.'

[607] *Neubauer* headnote.

[608] Federal Climate Change Act of 12 December 2019 known as *Bundes-Klimaschutzgesetz* – KSG. The English translation of this act is available at: https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html accessed on 27 March 2023.

[609] *Neubauer* para 5.

[610] *Neubauer* para 3.

[611] Section 3 of the KSG sets out the specific climate targets and these are the challenges put forth by the claimants *in casu*. Section 3 provides for the gradual reduction of GHG emissions, with 'at least 55% reduction by the year 2030 compared to levels in 1990. This reduction quota applies to all GHG emissions contributing to climate change but excludes GHG emissions from land-use change and forestry and from international aviation and shipping which is attributed to Germany.' *Neubauer* para 4.

[612] Article 2.1.a of the Paris Agreement highlights its central aim to strengthen the global response to the risks and threats of climate change in the context of sustainable development by 'holding the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels'.

the applicants claim that the legal framework does not cater, swiftly enough, for the reduction of GHG's, particularly carbon dioxide (CO_2), which is necessary to limit the increase in global temperature below 2 degrees Celsius and preferably 1.5 degrees Celsius.[613] The court then considered the factual bases of climate change and more specifically, anthropogenic climate change and its inherent risks and consequences. The court relied on the scientific reports published by the IPCC which conclude that it is the human-induced increase in GHG that leads to global warming. The court considered the effects on both the environment and climate and the impacts of global warming and climate change as well as the sources of emissions.[614] The judgment then considers the factual bases of climate action and states that the reduction of CO_2 emissions is the only way to significantly slow down human-induced climate change.[615] The judgment looks at the available options with which to limit the CO_2 concentrations in the earth's atmosphere[616] while reduction measurements and the amount of CO_2 concentrations which needs to be restricted (the CO_2 budget)[617] are considered separately from the scale of transformation.[618] There were four constitutional complaints which make the *Neubauer*

[613] *Neubauer* para 1. The Constitutional complaints are based on the protection of fundamental rights of Article 2(2) first sentence and Article 14(1) of the Basic Law. *Neubauer* para 7 which specifies that according to Article 2(1)a of the Paris Agreement, the increase in global temperature should be well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels.
[614] *Neubauer* paras 16-30.
[615] 'There is presumed to be a roughly linear relationship between the total amount of anthropogenic CO_2 emissions accumulated over time and the global temperature increase.' *Neubauer* paras 31- 32
[616] Measures such as emission reduction for example by not burning fossil fuels, negative emissions technology, which although considered essential by the IPCC are difficult to implement, particularly on larger scales due to economic risks and impediments and adaptation strategies which could possibly involve work on dykes, changes in the growing of crops, planting more trees and conservation of forests and updated urban planning are discussed at *Neubauer* paras 33-34.
[617] The options are 'whether it is necessary to restrict the CO_2 concentrations which affect the rise in temperature to particular levels and draws on what those levels ought to be as a matter of climate policy, together with targets and measurement parameters from climate science and the Paris Agreement targets,' or a 'further formulation based on climate physics to derive specifications for reducing CO_2 emissions from a global temperature target' as discussed at paras 35-36.
[618] *Neubauer* para 37

decision[619] in which the primary complainant is that the German state has failed to create a legal framework to sufficiently reduce GHG emissions, particularly CO_2.[620]

Part B[621] deals with matters of admissibility and the court ruled that in so far as the complainants were natural persons, their constitutional complaints were admissible. The court held that the complainants can, in certain instances, base their claims on Article 2(2) first sentence GG and some claims can be based on the violation of Article 14(1) first sentence GG.[622]

4.4.3 The transnational analysis

4.4.3.1 The transboundary nature of the activity

The climate crisis is a global crisis and is one that needs addressing to secure fundamental rights of people across the globe. The fact the German Federal Constitutional Court agreed with these sentiments and *in casu* ruled that the German legislator has to set out the necessary provisions for emission amounts for certain periods, has drawn attention around the globe.

The German federal Constitutional Court *in casu*, relying on the findings of the IPCC and unanimous scientific opinion, acknowledged that the climate crisis is a global crisis caused by

[619] These are *BvR 2656/18* (which was lodged prior to the KSG coming into force and thus the complainants alleged that the state/legislator had failed to act. The German *Bundestag* (German Federal Parliament), the *Bundnis 90/Die Grunen* (a parliamentary group) and the Federal Government all considered this complaint as inadmissible), *BvR 288/20* (This complaint was directed against the KSG and was instituted by adolescents and young adults who claimed the violation of a fundamental right to a future consistent with human dignity, and they also claimed that the climate actions by the German legislator was insufficient and that the national climate target for the year 2030 is insufficient with the annual emissions amounts allowed being too high and that the provisions of the KSG allowing unused emission allocations to be sold to other EU member states thereby negating the efforts of climate action, as a failure by the legislator to fulfil its duties of protection. The German *Bundestag* and the Federal Government found these complaints to be inadmissible and unfounded), *BvR 96/20* (these proceedings were also instituted by children and adolescents who complained that the climate efforts by the legislator are insufficient and that the KSG is incompatible with the minimum standard for the protection of their fundamental rights based on the findings of the IPCC. The German Bundestag considered these complaints as inadmissible and unfounded) and *BvR 78/20*(these proceedings were instituted by complainants living in Bangladesh and in Nepal and claimed that Germany had violated its duties of protection due to insufficient climate efforts, in that Bangladesh and Nepal are especially vulnerable in a range of different way to the changes brought about by climate change. The German Bundestag found this complaint inadmissible and unfounded while the Federal Government was of the view that fundamental rights violations are to be excluded due to the non-domestic circumstances of this matter), respectively. At paras 39-89.

[620] These constitutional complaints are based on the duty by the state to protect fundamental rights and these are *inter alia* Article 2(2) first sentence and Article 14(1) of the Constitution on a fundamental right to a future consistent with human dignity and a fundamental right to an ecological minimum standard of living based on Art 2(1). At paras 38-89.

[621] *Neubauer* paras 90-141.

[622] Article 2(2) first sentence provides for the 'fundamental right to life and physical integrity' and Article 14(1) provides for the 'right to property, inheritance, and expropriation.' Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

human-induced increases in GHG concentrations which lead to global warming.[623] The court stated that 'without additional measures to combat climate change, it is now considered likely that the global temperature will increase by more than 3 degrees Celsius.'[624] This global temperature rise is considered to be 'drastic.'[625] In essence then, the court made it clear that climate change, is anthropogenic in origin, and results in a global crisis with worldwide consequences.[626] This then is the first aspect of what makes the activity in question[627] transboundary.

The second aspect of this case that lends it a transboundary air is the fact that by acknowledging the climate crisis as a global crisis, Germany has an obligation to pledge nationally determined actions for climate mitigation and adaptation to strengthen the global response to the threat of climate change.[628]

An extraordinary feature of this judgement is the understanding that both Germany's obligation to take climate action and Article 20a of the Basic Law has an international dimension in that 'no state can resolve the problems of climate change on its own due to the global nature of the climate.' This necessitates that the state must partake of activities on an international level to tackle climate change and to adhere to international frameworks calling for climate action.[629]

4.4.3.2. The transboundary actors

There were a broad range of complainants that made this a class action matter.[630] Collectively the complainants were children and young people from Germany, Bangladesh and Nepal as well as supporting organisations Fridays for Future[631], Greenpeace[632] and Friends of the Earth

[623] *Neubauer* paras 17 – 19.
[624] *Neubauer* para 19.
[625] *Neubauer* para 22.
[626] For example, the court cites the impacts of global warming on the environment and Earth's climate on ice masses (cryosphere) which melts continental ice sheets in Greenland and Antarctica, leading to the retreat of glaciers that are observed worldwide and are seen in rising sea levels. *Neubauer* para 20.
[627] Which is that legislation in Germany makes it obligatory to reduce GHG emissions in accordance with the aims of the Paris Agreement.
[628] This stems from the fact that Germany has ratified the Paris Agreement, an international and binding treaty and according to which countries pledge, *inter alia*, to take nationally determined, quantifiable and progressive action for climate mitigation and adaptation for the 1.5 and 2 degrees Celsius. At Articles 2-3 Paris Agreement.
[629] *Neubauer* headnote.
[630] See footnote 619 *supra*.
[631] Fridays for Future is a youth led movement protesting the lack of action on the climate crisis. It was formed in Germany in August 2018 when the then 15-year-old Greta Thunberg together with other youth activists-initiated protest action in Sweden, and today incorporates more than 14 000 000 people across 7500 cities. https://fridaysforfuture.org/
[632] Greenpeace, founded in 1971 in Canada is a global campaigning network of environmental activists with the goal to "ensure the ability of the Earth to nurture life in all its diversity" and focuses on worldwide issues amongst them being climate change. https://www.greenpeace.org

(BUND)[633]. According to Peel and Lin's category, these would entail the 'grassroots activist' who comprises local and community activists and groups who take on governments to secure stronger climate action. There would also be the 'farmer' in the form of the environmental NGOs who build capacity for more climate litigation. The 'engineer' is also present in the way that the *Urgenda* case, as a particular legal strategy from another jurisdiction was 'transplanted' in casu. The opposing parties in all four cases were the Bundestag Parliamentary group called BUNDNIS 90/DIE GRUNEN and the Federal Government, both of whom considered the complaints as inadmissible and unfounded.[634]

These complainants fall within the range of transnational actors according to the classification outlined in chapter two of this dissertation.[635] In essence, transnational climate actors can be identified as people in the form of partnerships, networks and clubs that aim for mitigation, adaptation and climate-resilient developments according to the ambitions of the UNFCCC.[636] As mentioned above, the *Neubauer* case consists of four different constitutional complaints which were bundled. In *BvR 288/20*[637], and in *BvR 96/20*,[638] the complainants are predominantly adolescents and young adults from Germany, and in both cases regard the climate efforts of the German legislator as insufficient. They also claimed a violation of the fundamental right to a future consistent with human dignity and a violation of their fundamental rights respectively. In the matter of *BvR 288/20*, the complainants claim violations of fundamental rights consistent with human dignity, based on several provisions of the GG and KSG, namely, a violation of a fundamental right based on Article 1(1) in conjunction with Article 20a GG, as well as a violation of a fundamental right based on Article 2(2) 1st sentence in conjunction with Article 20a GG. They then claim the violation of their occupational freedom from Article 12(1) GG and the violation of the guarantee of property from Article 14(1) GG, both in conjunction with Article 20(3) GG, with related guarantees laid down in Article 2 and 3 of the ECHR. Lastly, they regard the efforts of the German legislator in terms

[633] BUND is an acronym for 'Bund fur Umwelt and Naturschutz Deutschland' which means 'German Federation for the Environment and Nature Conservation' is an independent NGO formed in the mid-1970s and today consisting of more than 650 000 members, 16 state organisations and 2300 local and regional groups in Germany. Bund campaigns for the environmental protection and nature conservation issues and amongst others includes climate protection. BUND also has a youth branch called BUNDjugend, consisting of young people up to the age of 25 who also campaign. Friends of the Earth International. Available at https://www.foei.org accessed May 2023.
[634] *Neubauer* paras 38–89.
[635] See chapter 1 *supra*.
[636] Ibid
[637] *Neubauer* paras 59-61.
[638] *Neubauer* paras 71-76.

of climate action as insufficient and they take objection to the national climate targets that were specified for the year 2030 in S 3(1) of the KSG.[639]

The complainants in *BvR 96/20* challenged the following five provisions as they termed them insufficient climate action efforts which violated first, their fundamental rights under Article 2(2) 1st sentence GG, then Article 14(1) GG. They also challenged S3(1), S4(1) 3rd sentence KSG in conjunction with Annexes 1 and 2, and S8 and S9 KSG. Lastly and fifth, they challenged what 'they regarded as the legislator's persistent failure to take suitable and prospectively sufficient measures to stay within the remaining CO_2 budget.'[640]

The complainants in *BvR 78/20* are those living in Bangladesh and Nepal who claimed that Germany had violated its duties of protection due to insufficient climate action. They claimed that the duties of protection under first, Article 2(2) 1st sentence GG and secondly, Article 14(1) 1st sentence GG were violated by Germany due to insufficient climate actions. They claimed further that both Bangladesh and Nepal are particularly vulnerable in a range of different ways to changes in climatic conditions and are furthermore directly affected by the persistent climate change.[641]

In its reasoning, the court found in favour of the complainants residing in Germany *(BvR 288/20 and BvR 96/20)* and thus ordered that certain parts of the KSG be struck down as they are incompatible with the complainants' fundamental rights. However, the court did not engage in an assessment of Germany's responsibility to the rights of the children from Bangladesh and Nepal (*BvR 78/20*) where the court stated 'ultimately, no violation of a duty of protection arising from fundamental rights is ascertainable vis-à-vis the complainants who live in Bangladesh and Nepal.'[642] In further discussing the duties of protection vis-à-vis complainants living in Bangladesh and Nepal, the court held that 'although it does appear conceivable in principle, there is no need to decide at this point whether duties of protection arising from fundamental rights also place the German state under an obligation vis-à-vis the complainants living in Bangladesh and in Nepal to take action against impairments caused by global climate change.'[643] The reasoning for reaching this conclusion here is explained by the court that the foreign complainants are exposed to the consequences of global warming within their own

[639] *Neubauer* paras 59-70.
[640] *Neubauer* paras 71-77.
[641] *Neubauer* paras 78-89.
[642] *Neubauer* para 173. See also a discussion on this aspect in the case note on the Advancing Child Rights Strategic Litigation website available at:
https://www.acrisl.org/casenotes/m2ll8m8skjpglk8-83mk2-k5yza-dcafy-x5ztr-bjfxk-c9y55-5ryfp
[643] *Neubauer* para 174.

countries, caused by global GHG emissions. In order to minimise emissions which have a global impact, all states have to take climate action to prevent further global warming. This implies that GHG emissions in Germany must be reduced to climate-neutral levels.

4.4.3.3. Extra-territorial jurisdiction

In deciding the issue of admissibility, the court drew a distinction first between the complainants, both those inside the jurisdiction of Germany as well as those abroad, as natural persons and then secondly between the constitutional complaints. The court ruled that as natural persons, who claim a violation of fundamental rights, the complaints were admissible.[644] This is quite significant for this research[645] as the court reasoned that the violation of these fundamental rights could be as a result of the state having taken insufficient measures to reduce GHG emissions in its adoption of the KSG.[646] As far as the complaints from those living in Bangladesh and Nepal were concerned, the court ruled that, as natural persons, they also had standing on the reasoning that the fundamental rights contained in the Basic Law (GG) also make it obligatory upon the German state to protect them against the impacts of global climate change.[647]

On the second distinction, which concerns the issues challenged in the constitutional complaints, the court ruled that as they are complaints directed against the KSG, they have an admissible subject matter.[648] In essence, the overarching complaint *in casu* was that the complainants claim a violation of their fundamental rights as the legislator had taken insufficient measures to reduce GHG emissions and limit global warming.[649]

4.4.3.4. *Locus standi*

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[644] The court found that the complainants can claim a violation of their fundamental right to property in terms of Article 2(2) GG and or a violation of their fundamental right to property in terms of Article 14(1) GG. See para 90. The court ruled further in this same paragraph that for those living in Germany, it could further hold that 'their fundamental rights are violated by having to accept considerable reduction burdens with the necessary corresponding losses of freedom during the period after the year 2030 with the climate action that will then be "constitutionally necessary" due to "overly generous" of GHG emissions allowed by the KSG until the year 2030.' Hence the court ruled that the constitutional complaints are admissible as they challenge section 3(1) second sentence and section 4(1) third sentence KSG together with Annexure 2, however, in all other respects, the court held that the constitutional complaints are not admissible. At para 90.

[645] Within the transnational and global reach of climate change.

[646] *Neubauer* para 90.

[647] Ibid.

[648] *Neubauer* para 91.

[649] *Neubauer* para 92, the court here addressed the first of the individual cases (B v R 2656/18) that jointly make up this case and held that although this case was lodged before the enactment of the KSG, the complaint *ab initio* concerned the failure of the state to take action, with the promulgation of the KSG, this complaint, as in the subsequent cases, will be allowed as far as the claim that the KSG fails to satisfy constitutional requirements.

On the issue of standing, the court granted standing to all the complainants who were natural persons.[650] The court held in this context that as the complainants regard the provisions of emissions allowed until the year 2030 in these sections as overly generous, there is the possibility that the duties of protection of fundamental rights in Article 2(2) first sentence[651] and Article 14(1) GG[652] have been violated.

With respect to the complainants living in Bangladesh and Nepal,[653] the court also found that they have standing,[654] however, added that 'the Federal Constitutional court has yet to clarify whether the Basic Law's fundamental rights oblige the German state to contribute towards protecting people abroad against impairments caused by the effects of global climate change and under what circumstances such a duty of protection could potentially be violated.'[655] Later in the decision[656] the court held 'ultimately, no violation of a duty of protection arising from fundamental rights is ascertainable vis-à-vis the complainants who live in Bangladesh and Nepal.'[657] It seems that for this court, this was a bridge too far.

In the matter which concerned the duty of care for those claimants living outside Germany, the court noted that reducing GHG emissions produced within Germany is a way by which the German state could protect people living outside its jurisdiction from the consequences of climate change, in the same manner it protects people living within the German state. The court spoke here to the global dimension of climate change reiterating that Germany, on its own, is incapable of halting climate change and its consequences and thus is reliant upon international involvement due to the global nature of climate change. What is of special significance is that the court held that it is this global dimension of climate change which determines the content of the duty of climate-change-related protection. As an example, the court cited that the German state, in seeking to resolve the climate problem, must rely on international

[650] *Neubauer* para 96. This was in terms of section 3(1) second sentence and section 4(1) third sentence of the KSG together with Annexure 2. Section 3 dictates the German national climate targets and S3(1) provides that 'emissions of GHG shall be gradually reduced in comparison with their levels in the year 1990 by at least 65 percent by the year 2030.' Section 4 deals with permissible annual emission budgets and mitigation targets and section 4(1) provides that 'to achieve the national climate targets referred to in section 3, annual mitigation targets shall be set by stipulating annual emission targets in the energy, industry, transport, buildings, agriculture, and waste & other sectors.' Annexure 2 sets out 'the permissible annual emission budgets for the years 2020 to 2030' at section 4.
[651] Article 2(2) reads that 'every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.'
[652] Article 14(1) provides that property and the right to inheritance shall be guaranteed.
[653] In the matter of *BvR 78/20*.
[654] *Neubauer* para 101.
[655] Ibid.
[656] *Neubauer* para 173.
[657] This with regards to the duties of protection vis-à-vis complainants living in Bangladesh and Nepal.

involvement. This duty of protection is what compels the state to attend to the climate crisis at the global level by engaging in international activities as embedded in framework policies[658] as well as nationally determined contributions aimed at halting climate change.[659] With the understanding that the duty to protect people living abroad entails the German state relying on international cooperation, the court ruled that this in principle, would not exempt the state of the duty of protection of fundamental rights in this context.[660] The court stated further that it is the global dimension of climate change which is significant in the determination of the content of the duty of climate-change-related protection.[661] The difficulty with this duty toward people living abroad, according to the court, is that Germany would not have the same options for taking additional protective action. There is a limitation of German sovereignty in terms of international law, and this limits the potential for the German state to implement adaptation measures as a form of protection towards people living abroad.[662] It is the implementation of these type of measures which would not be possible for Germany to carry out abroad. The court held that it is this reason alone which distinguishes the content of the duty of care towards those living in Germany as opposed to people abroad. The court reiterated that it is the task of individual states to implement the necessary protection measures.[663] The court does however continue to state that despite this difficulty in implementation of protective and adaptation measures, Germany is not absolved of its responsibility in terms of international law, to ensure that it takes positive steps to protect people from poorer and harder-hit countries.[664]

4.4.3.5. Transnational norms and principles enunciated by the court

[658] The court refers to international framework policies through negotiations via treaties or in organisations without specifically naming any of these.
[659] *Neubauer* para 178 read together with para 149.
[660] *Neubaue*r para 149.
[661] Ibid. As an example the court cites that the state must involve the international level in seeking to resolve the climate problem.
[662] *Neubauer* paras 178-179 and the court cites examples of 'protective measures such as minimising the further development of open spaces, restoring, unsealing, renaturing, and reforesting suitable areas, as well as introducing resilient plant varieties, all of which are feasible at state level, but which would be difficult for Germany to implement abroad.' The court relies on the adaptation measures considered by the IPCC such as 'the modification of existing infrastructure to provide better protection from heat, wind and flooding or for areas prone to cyclones and flooding, the use of houses with aerodynamic design, sewage systems, dykes, flood levees, beach nourishment and the retrofitting of buildings, and with regards to cities, the IPCC lists sustainable infrastructure such as green roofs, urban parks and porous pavements. For agriculture, efficient irrigation systems and plants with high drought tolerance.'
[663]This is also the position under the Paris Agreement at article 4.2, which makes provision for Nationally Determined Contributions as opposed to the determinations on Annexure 1 and Annexure 2 states under the Kyoto Protocol.
[664] *Neubauer* para 179.

A ‘duty of protection’ appears to be the norm used to decide on the obligations of Germany. This is the first transnational norm identified regarding the duties of protection vis-à-vis the complainants living in Bangladesh and Nepal, in relation to which the court found that no violation of a duty of protection arising from fundamental rights is ascertainable.[665] The court stated that there is no need to decide whether duties of protection that arise from fundamental rights also place an obligation on Germany to take actions against difficulties caused by global climate change, towards Bangladesh and Nepal.[666] The court found in this case that the complainants were, in their own countries, exposed to the risks associated with global warming, and since this was caused by GHG emissions which have a global impact, the only way in which further global warming could be prevented is by climate action taken by all states.[667] This entails the reduction of GHG emissions to climate-neutral levels in Germany as well, and this is for Germany to limit,[668] and ultimately the court held that no violation of a duty of protection is ascertained for the foreign complainants.[669]

The second norm occurs in the courts factual basis of climate action where the court acknowledged anthropogenic climate change[670] giving rise to the duty to implement ‘adaptation’ strategies.[671] Article 20a of the German Constitution provides that when there is scientific uncertainty of a causal relationship of environmental relevance, then there is an obligation to take account of sufficiently reliable indications pointing to the serious impairments, and to take climate action.[672] The court acknowledges that this obligation to take climate action has an international dimension[673] and that this places an obligation on the state to engage in ‘internationally orientated activities to tackle climate change at the global level’ with the further requirement to promote climate action within the international framework.[674] The court stated further that although fundamental rights are binding on Germany by virtue of Article 1(3) GG, this binding effect is not restricted to German territory.[675] The court gave an

[665] *Neubauer* para 173.
[666] *Neubauer* para 174.
[667] Ibid
[668] *Neubauer* para 174.
[669] *Neubauer* para 173
[670] *Neubauer* para 16 & 31-32
[671] *Neubauer* para 34. This is included as a norm because Germany has a strategy to alleviate the negative impacts of climate change and is commonly referred to as “adaptation.”
[672] *Neubauer* Headnote para 2.b-c.
[673] *Neubauer* Headnote para 2.c “The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action.”
[674] Ibid.
[675] *Neubauer* para 175.

exception to the obligation as just established that, despite this comprehensive binding effect, there are specific fundamental rights protections whose scope would vary for countries abroad, as per the circumstances that they are applied.[676] This then necessitates distinguishing between different dimensions of fundamental rights[677] and the different circumstances in which fundamental rights could be relied upon in establishing duties of protection for those living abroad have yet to be clarified fully, with a possible factor to consider in this duty of protection would be the severity of the climate change impacts already or potentially faced by the claimants.[678]

For the parties living in Germany the court ruled that the constitutional complaints were partially successful.[679] The court then held that the risks as posed by climate change are what gives rise, for the claimants who live in Germany, to the duties of protection.[680]

Thirdly, the precautionary principle was applied to climate measures in the domestic context, in that the responsibility of Germany, either politically or under international law, should not fall significantly short of the protection goal.[681] The precautionary principle was applied here quite strictly, and despite scientific uncertainty, the court relied on the duty of care imposed on the legislator in matters of the environment.[682]

4.4.3.6. Evidence of applying laws from another jurisdiction

The court referred to foreign jurisprudence in the following contexts.

First, when it came to citing any non-national laws and cases, the court *in casu* referred to foreign judgements on the issues of standing. As mentioned above[683], the court granted standing to the complainants with respect to the fundamental rights violations as claimed by all the complainants. The court held that the protection of life and physical integrity[684] extends to protection against impairments caused by environmental pollution.[685] The court cited as

[676] Ibid.
[677] And the court cites as examples, positive obligations of the state, defensive rights against state interference or as decisions on values enshrined in the Constitution. At para 175.
[678] Ibid.
[679] *Neubauer* para142. The court reasoned that fundamental rights are thus violated because the emission amounts that were allowed by the KSG for the current period render the possibility of substantial burdens to reduce future emissions.
[680] *Neubauer* paragraph 143. The duties of protection referred to her are Article 2(2) first sentence GG, rights to life and physical integrity and Article 14(1) GG, rights to property, inheritance, and expropriation.
[681] *Neubauer* paras 179-181.
[682] Fang et al op cit note 386 at 10.
[683] See para 4.4.3.4 *supra* and footnotes 665-667 *infra.*
[684] In Article 2(2) first sentence GG as relied upon by the claimants.
[685] *Neubauer* para 99.

authority here, not only earlier decisions of the German Federal Constitutional Court, but also to judgments from Turkey,[686] Russia,[687] and Italy.[688]

Secondly, on the discussion of the factual bases of climate action, the court made extensive reference to the IPCC, Special Report.[689] Thirdly, under this same discussion, on the topic of achieving GHG neutrality by the year 2050, the court referred to a European publication.[690]

Fourthly, in the discussion of the Constitutional complaints in the matter of BvR 288/20, the complainants referred to the European Effort Sharing Regulation and claimed that the legislator has failed in its duties of protection.[691]

4.4.3.7. How the global character of the problem affected the courts judgment

The court broke down the merits into three parts, the first of which comprises the duties of protection vis-à-vis complainants living in Germany,[692] secondly the duties of protection vis-à-vis complainants living in Bangladesh,[693] and lastly, the intertemporal guarantee of freedom.[694]

Whilst acknowledging that climate change is a global problem, with a global impact, the court chose not to provide an assessment of responsibility of the German state for the foreign claimants and instead left this as Germany having to apportion its own GHG emissions. It further resorted to the *trias politica* by stating that this is a decision for the German legislator.[695] It is noteworthy that the court made explicit that although Article 1(3)[696] of the Basic Law makes fundamental rights binding on the German state, it does not limit this binding effect to Germany.[697] Regarding the duty of the German state to states abroad, the court explained that, as far as scope for rights abroad are concerned, the German constitution guarantees its protection as fundamental rights, depending on the circumstances under which they apply. The court found that it is thus necessary to distinguish between the different dimensions of

[686] *Oneryildiz v Turkey* judgement of 30 November 2004.
[687] *Budayeva and Others v Russia* judgement of 20 March 2008.
[688] *Cordella and Others v Italy* Judgement on 24 January 2019.
[689] *Neubauer* para 33.
[690] *Neubauer* para 37. The court cited the 'European Topic Centre on Waste and Materials in a Green Economy, Textiles and the environment in a circular economy, 2019.'
[691] *Neubauer* para 60, and para 104 on the issue of standing.
[692] *Neubauer* paras 142-172.
[693] *Neubauer* paras 173-181.
[694] *Neubauer* paras 182-265.
[695] *Neubauer* para 174.
[696] Of the German Constitution, the Basic Law (GG) which provides for equality before the law.
[697] *Neubauer* para 175.

fundamental rights,[698] however, it seems that this is a moot point as the court noted that 'the circumstances under which fundamental rights may be invoked as the basis for establishing duties of protection vis-à-vis people living abroad have yet to be fully clarified.'[699] A possible factor to consider when establishing a constitutional duty of protection in this context would be the 'severe impairments already or potentially faced' by the complainants as a result of the GHG emissions emanating from Germany. However, despite this reasoning, the court still claimed that there is a difference in the duty of protection for those abroad as opposed to those in Germany. The court stipulated that there are two ways in which the German state can fulfil its duty to protect the fundamental rights against violations caused by the effects of climate change for the people living in Germany.[700]

4.4.3.8 Summary of the transnational analytical categories of the *Neubauer* decision

The elements of the transnational analytical framework analysed in *Neubauer,* illustrate that the first transboundary nature of the activity is the global climate crisis, induced by human activities that led to an increase in GHG emissions and to global warming, and secondly was Germany's obligations for nationally determined actions for climate mitigation and adaptation actions. The range of transboundary actors and can be categorised as 'grassroots activists, farmers and engineers' were environmental NGOs and youth-led movements as well as foreign claimants. The respondent state was also part of the trend in climate litigation. Jurisdiction and standing were granted for both the German and foreign the claimants. The three transnational norms and principles highlighted were the duty of protection, the duty to implement adaptation strategies and the precautionary principle. The court referred to several foreign judgments and international documents such as the IPCC special report. The global character of the problem was reflected in how the duty of protection was broken down into those claimants living in Germany. The foreign claimants and the intertemporal guarantee of freedom.

4.5 A comparison of the transnational aspects of the Global North cases to each other

[698] And the court cited three categories of fundamental rights, first as an example of 'defensive rights,' secondly as 'positive obligations of the state' and thirdly as 'decisions on values enshrined in the Constitution, or as the basis for duties of protection.' At para 175.
[699] *Neubauer* para 175. Noteworthy to mention also that the court stated here that: 'one possible factor capable of establishing a constitutional duty of protection here would be that the severe impairments already or potentially faced by the complaints due to climate change are caused to some – albeit small – extent by greenhouse gas emissions emanating from Germany.'
[700] The first being the duty to inculcate measures which would assist in decreasing rates of global warming and the second being the adoption of adaptation measures. See para 177.

This final section contrasts and compares the three cases, highlighting the most, and least, prominent transnational elements.

Common across all three judgments, climate change was considered the transboundary nature of the activity. *Urgenda* centred around the emission of GHG emissions and its global impacts. Both the District and Supreme courts engaged in much depth on climate change and its consequences, and the definitions of mitigation and adaptation as used to counter the consequences of climate change. The facts were placed on a global level with discussions of international frameworks, treaties and UNFCCC and COPs. In *Milieudefensie* global climate change and its consequences, the volume of CO_2 emissions by RDS and Shell as well as the goal to prevent dangerous climate change and to support the goals of the Paris Agreement were the gist. *Neubauer* acknowledged that the global climate crisis is human induced, with the increase in GHG emissions leading to global warming. Germany's obligations for nationally determined actions for climate mitigation and adaptation were central to the discussion.

There were further similarities in the three cases in the transboundary actors, who largely constituted class actions with youth and environmental and NGOs as claimants. This tied in with Peel and Lin's classification of grassroots, farmer and engineer litigants initiating the legal proceedings, and doing so in a novel manner. All three decisions resulted in additions of new precedents in climate litigation, being the human rights turn, action against a private company and an order for climate legislation to be amended.

There were no instances of applying laws between Global North and Global South jurisdictions. Jurisprudence from north-centred courts were present. Regarding the foreign complainants in *Neubauer,* the court ruled that as natural persons they had standing on the reasoning that the fundamental rights contained in the Basic Law also make it obligatory upon the German state to protect them against the impacts of global climate change. This despite seeming at odds with the courts position on finding that there was no violation of protection in relation to those claimants.

Standing was granted to all parties, largely based on their objectives as stated in the articles of association. As mentioned previously, *Milieudefensie* excluded ActionAid from the proceedings as their interests included the continent of Africa.

Transnational norms and principles included in *Urgenda* were dangerous climate change and its consequences at an international level, obligations to take measures against dangerous climate change as 'common ground', the no-harm principle, the precautionary principle and

the duty of care. Featured in *Milieudefensie* was the unwritten duty of care and the standard or duty of care by RDS; the best efforts and reduction obligations; common initiatives to prevent climate change and the proportionality of reduction obligations. *Neubauer* implemented the duty of protection, the duty to implement adaptation strategies and the precautionary principle.

All three courts applied international climate frameworks and cited jurisprudence from the Global North.

The global character of the problem and which affected the Supreme Court's judgment in Urgenda was that pursuant to Articles 2 and 8 ECHR the state had failed in its duty of care. The District Court prior seemed hesitant to acknowledge the human rights implications of climate change and rather based its decision on torts. Perhaps a key concern was the trias politica and how a human rights approach would have necessitated considerations of judicial overreach. The Supreme court relied extensively on attribution science and to conclude that the evidence pointed to 'dangerous climate change' at an 'international level.'

CHAPTER FIVE: COMPARATIVE ANALYSIS AND FINDINGS.

5.1 Introduction

Despite many differences, there are also many similarities between the jurisdictions of South Africa and the Global North. The presence of transnational elements in three South African and three foreign climate cases are evaluated in this chapter by highlighting contrasts and identifying common patterns and threads. The results answer the research questions and further clarify the theory outlined in Chapter Two and the claims from Chapter One.

Common to all the cases used in this analysis is that they are classified within the narrower definition of climate change litigation, and as such are all included in the various climate litigation databases.

Also common to each case is the theory of Anthropogenic Climate Change and the understanding that climate change is human induced caused primarily by the burning of fossil fuels, coal, oil and natural gas.[701]

5.2 The transboundary nature of the activity

In every case analysed, the nature of the activity encompassed climate change as the common core legal issue. Existing on both a domestic and global dimension this qualified the cases as transnational.[702]

In the Global North the legal analysis questioned inadequate climate action by states. In South Africa however, climate change was conceptualised in the form of not having prior and proper consideration of climate change impacts in the decision to grant an EA.

The courts conceptualised climate change and global climate change within the framework of attribution science.[703] The sources and impacts of global climate change received substantial discussion in *Urgenda, Milieudefensie, Neubauer* and *Earthlife*. There was no evidence though, of the courts being alive to different issues in different countries. *Urgenda* for example, marked the beginning of the industrial revolution and the consuming of energy on a large scale by mankind as having generated CO_2 and resulting in the 'greenhouse effect.'[704] This is significant as it was not 'mankind' but a very small group of developed countries. *Earthlife*, in

[701] With references to *inter alia* rising temperature, sea level rise and increased extreme weather events.
[702] Based on the theory unpacked in Chapter Two.
[703] This is evident from all the cases analysed in this dissertation where judges referenced the science of climate change and referred to the IPCC AR reports, save for the *Shell* case.
[704] *Urgenda* 2019 para 2.1.

a similar vein referred to coal as an emissions-intensive carrier and called out coal-fired power stations as significant emitters of GHGs, causing climate change.[705] In contrast, it was only somewhat addressed in *Shell*[706] and not at all in *Eskom*. Thus, although the judge's conceptualisation of climate change may be called 'similar,' they are inherently different in that in South Africa, climate change and attribution science was seen through a lens of the effect of climate change on water scarcity and extreme weather events and the relief was sought by enforcement of administrative laws. In the Global North, it was seen through the eyes of violations of human rights, compensation for climate harms and upscaling legislative provisions in keeping with international climate rights and obligations.[707]

Likewise, judges in all three Global North jurisdictions as well as in *Earthlife* gave due consideration to the establishment of the UNFCCC and the obligations of the Paris Agreement as well as to references to the findings of the IPCC. This was omitted in *Shell* and *Eskom.*

The above, whilst providing a rich comparison of legal approaches to climate change in different jurisdictions, also lends insights suggesting that climate change is identified as a core legal issue across all the cases, regardless of the jurisdiction. This highlights that globally, climate change has an interconnected nature and legal systems worldwide are grappling with how to address it. Further, it emphasises that legal frameworks and judgments must accommodate both domestic and international concerns due to the highly complex nature of climate change that cannot be solved within the confines of any one singular nation legal system, strengthening the 'transnational' label.

Differentiated approaches from the jurisdictions are also gleaned, in that the primary question in the Global North concerned inadequate climate action by states and referred to failure of governments to meet their obligations under international agreements such as the Paris Agreement, and to take sufficient steps to mitigate or adapt to climate change. In these jurisdictions, climate change is conceptualised largely in terms of human rights violations with a focus on the upscaling of legislative provisions in line with international climate obligations. In South Africa however, climate change is framed differently, with an emphasis on EAs and lack of proper consideration of climate impacts in the decision-making process. The focus is on ensuring that climate impacts are properly integrated into administrative decisions. The

[705] *Earthlife* para 25.
[706] *Shell* para 121.
[707] *Neubauer* found parts of the German Climate Act unconstitutional, and the legislator had to amend it.

approach is more about enforcement of existing laws rather than expanding human rights or legislative frameworks. With the enactment of the new Climate Change Act, this may change.

Therefore, whilst climate change is a universal problem, legal approaches are shaped by specific economic and historical contexts of each jurisdiction, and this fits with the concepts of Global North and Global South as discussed in chapter one. The common reliance on attribution science, however, shows an urgent need for greater international coherence in climate litigation to ensure that global obligations are addressed.

5.3 The transboundary actors

Applicants in every case comprised of NGOs, non- profit organisations, youth-led claimants, or a combination of these. All cases were class actions The human-rights turn referred to in Chapter One of this dissertation was seen in all the Global North jurisdictions, with claimants relying on the rights to life and the rights to privacy and family life.

In South Africa, rights-based claims claimed alleged violations to the fundamental right to a healthy environment, rights in terms of just administrative action. It should be noted that the legal position in South Africa regarding class action lawsuits is different from that of other international jurisdictions. There is currently no legislation promulgated in South Africa for class action (as compared to and commonly known in the USA) and it is considered a novelty area for procedural law.[708]Hence there is currently no legislative measures that defines and provides requirements of what a class action would constitute.[709] As this procedure is forthcoming in judgments from the Supreme Court of Appeal and the constitutional Court, it is still developing and is currently instituted according to the Rules of the High Court and the Constitution of South Africa.[710] In terms of who can bring class proceedings as seen in *Earthlife, Shell and Eskom*, section 38 of the Constitution provides that "anyone acting as a member of, or in the interest of, a group or class of persons" which means that individual groups or representative bodies will be entitled to lodge class applications and the court will have to approve it.[711] This is different to the position regarding class actions in the Netherlands as was seen in *Milieudefensie* where the claimants in the class action were jointly referred to as Milieudefensie et al. and consisted of seven class action claimants as well as 17 379 individual

[708] Pieter Conradie and Anja Hofmeyr 'South Africa' in Ian Dodds-Smith and Alison Brown (contributing eds) The International Comparative Legal guide to Class & Group Actions 2017 9th Edition at Chapter 18, 122
[709] Ibid.
[710] Ibid.
[711] Ibid at 123.

claimants who appointed Milieudefensie as their representative ad litem to claim on their behalf that RDS reduces emissions in accordance with the Paris Agreement requirements,[712] Admissibility of class actions in Dutch courts is governed by Dutch law and in terms of Book 3 Section 305a of the Dutch Civil Code, a foundation or association with full legal capacity may institute legal proceedings if it for the protection of similar interests.[713] One of the requirements for admissibility is that the body representing the class action must have articles of association and the interest served by the class action must align with the objects stated in the articles of association and must also be promoted.[714] The issue of standing in German courts is also regulate by law and in Neubauer the court stipulated that in so far as the complainants were natural persons, they had standing with regards to provisions of the Federal Climaet Change Act (KSG).[715]

From the modes of litigation as posited by Peel and Lin[716] transnational actors leading behind the ground-breaking legal victories in *Urgenda, Milieudefensie* and *Neubauer* were organisations which could be classified as 'Farmer,' being foundations and NGOs 'seeding' by funding and initiating new climate litigation, and new strategies in that litigation. Transnational actors in the Global South in *Earthlife, Shell* and *Eskom* were the same, in that they fall into the category of foundations and NGOs who fund and seed new climate litigation.

A further link to the transboundary nature of the actors is to consider the history and aims of *Earthlife* which is like the applicants in climate litigation in the Global North.[717] This is seen in the articles of association of the various foundations and organisations that comprise the claimants. Earthlife is one of the organisations taking part in South Africa's Life After Coal Campaign with the aim to 'discourage the development of new coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people.'[718]

Respondents in *Urgenda* and *Neubauer* were states and in contrast, South Africa instituted action against governmental departments and Ministers of states. *Milieudefensie* and *Shell* instituted action against private (transnational) companies, the former seeking accountability for GHG emissions, the latter seeking to interdict actions that would harm the environment and

[712] *Milieudefensie* para 2.1.8
[713] *Milieudefensie* para 4.2.1
[714] *Milieudefensie* para 4.2.5
[715] Neubauer para 96 – 97.
[716] See chapter one.
[717] See chapter five.
[718] Murcott op cit note 280 at 174.

exacerbate climate change. There were also private actors who were implicated in the South African cases through funding for example. These were transnational as they were foreign companies funding South African projects.

5.4 Extra-territorial jurisdiction

There was no instance of the courts dealing with laws that had an explicit extra-territorial effect. In *Neubauer* which saw foreign claimants instituting action in the German court, the court had to grapple with the extra-territorial reach of the duty to protect, which it resolved by speaking to the different dimensions and protections of fundamental rights.

In the Eskom case, the applicants argued that the Environmental Impact Report submitted for the CCGPP needed to deal with all the environmental impacts associated with the project. The court interpreted this to mean the extraction of gas in Mozambique and the transportation of gas from Mozambique to South Africa using either international waters or the territorial waters of another state. The court resolved this by refuting *Earthlife* as authority and by distinguishing between the jurisdictions. The court stated further that this had 'upstream effects' and would likely create an impossible situation involving lengthy time periods for authorisation for such a broad consideration.

5.5 *Locus standi*

In South African law *locus standi* in litigation is a requirement for instituting legal proceedings. From common law it is usually sufficient if the applicant has an interest in the proceedings. Section 38 of the Constitution provides a list of who is entitled to approach the court on an alleged infringement of a right in the Bill of Rights. Hence standing is a non-issue in South Africa due to these generous and diverse standing provisions.

A recent study has indicated that South African jurisprudence has undergone a profound transformation in how it expands locus standi in public interest litigation pertaining to environmental law.[719] The Constitution in section 38 and NEMA in section 32 grant prospective litigants standing, but an infringement of a fundamental right needs to be proven, and although challenges have arisen, courts have interpreted standing in favour of litigation.[720]

[719] Busisiwe Mqinqgwana An Analysis of Locus Standi in Public Interest Litigation with Specific Reference to Environmental Law; A Comparative Study between the Law of South Africa and the Law of the United States of America (unpublished LLM thesis, University of Pretoria, 2011 at 80 -81.
[720] Ibid

In the Netherlands, Urgenda as a class action was granted standing based on the interests of the residents of the Netherlands having the same claims with regard to climate change. The court also found that Urgenda had standing on the provisions of international law which may be binding on all persons and that the provisions of the ECHR could be relied upon by Urgenda.

Milieudefensie excluded a claimant[721] from the class action since its interests aligned to that of Africa, which was dissimilar to the interest of the rest of the claimants' constituting the class action.

Standing was not an issue in the German jurisdiction for the claimants in Neubauer, and all claimants who were natural persons were granted standing. The court also granted standing to the foreign claimants but could not grant them a duty of protection.[722] **5.6 Transboundary norms and principles enunciated by the court**

Moving through the litigation process in the different jurisdictions, it became evident that courts tasked either with resolving disputes (South Africa) or enforcing climate obligations (Global North), rose to these challenges using advanced arguments premised on a range of internationally recognised norms and principles to advance climate harmonization in keeping with the goals of the Paris Agreement.[723] Except for the *Eskom* case, in which the applicants were unsuccessful, there is uniformity among the rest of the litigation to undertake more ambitious climate mitigation and adaptation goals.

Cases in both jurisdictions were premised on a broad range of 'transnational' legal theories, most commonly the duty of care doctrine, which was seen in every case, the exception being *Eskom* in which it was glaringly absent. *Urgenda* premised the duty of care on the state to reduce GHGs, based on the duty to protect human rights. *Milieudefensie* had an unwritten duty of care. *Neubauer* exercised a duty of care in the form of the duty of protection towards the German claimants but excluded this from the foreign claimants. *Earthlife* made clear that the absence of legislation requiring a climate change impact assessment did not preclude a legal

[721] Namely, ActionAid.

[722] For further reading on international public interest litigation in climate matters see Marie-Claire Cordonier-Segger, Thalsa-Thiziri Mekaouch**,** Zunaida Moosa Wadiwala, et al 'Defending the Defenders: State Responsibilities to Respect Climate Justice, Rule of Law and Rights of Counsel in Climate Litigation Worldwide' in Ezio Costa Cordella and Pilar Moraga Saeigo (eds) *State Responsibilities in the Climate Crisis: Legal Standards and Global Litigation* (2024)

[723] See also Zunaida Moosa Wadiwala 'The Impact of Climate Change on Human Rights and the Legal Obligations of States to Protect Them – A Comparative Jurisdictional Analysis' (2023) 17:3 Carbon and Climate Law Review at 135.

duty of care to consider climate change. *Shell* demonstrated a duty of care via the fundamental considerations of marine and bird life and concerns of livelihood on fishing rights of indigenous people.

The precautionary principle weaved a thread through five of the six cases, with *Eskom* once again not applying it. *Urgenda* used the precautionary principle in the context of state obligations and without reliance on uncertainty from climate science. *Milieudefensie* within the context of 'best-effort' and *Neubauer* within the domestic context of legislative measures to limit climate change, with caution that there is no shortfall in the protection goal. *Earthlife* and *Shell* within the context of the duty of the state to protect the environment.

The principle of severance and proportionality appears in both sets of cases, though not all.

The no-harm principle made an appearance in both jurisdictions, once again confirming the court's strong sense of duty of care that governments owe their citizens.

Despite the cases illustrating a general trend towards ambitious climate mitigation and adaptation goals,[724] there remains inconsistency in their general application, particularly in the *Eskom* case, where legal doctrines were absent[725] and the varying applications of principles in the other cases,[726] suggest that climate litigation is still developing unevenly across jurisdictions, which could undermine its overall effectiveness.

5.7 Evidence of applying laws from another jurisdiction

Domestic and international legal frameworks were considered in every case. In the Global North, there was evidence of applying jurisprudence from different jurisdictions, though not from any Global South jurisdiction.

In *Urgenda* the Court of Appeal and the Supreme Court referred extensively to available climate science relying on reports from the UNEP and the IPCC. The Supreme Court interpreted 'common ground' in accordance with the provisions of the Vienna Convention and referred to judgments from the ECtHR.

The court in *Milieudefensie* had to grapple with what was the applicable law as there was dissensus as to the 'event giving rise to the damage.' In reaching its decision to apply the

[724] As seen from both Global North and South African jurisdictions having utilized legal arguments with internationally recognised principles to support climate goals in line with the Paris Agreement.
[725] For example, the duty of care.
[726] For example, the precautionary and the no-harm principles.

provisions of Article 7 Rome II the court considered judgments from the CJEU. In its discussion on the consequences of climate change, regard was had to various relevant conventions, international agreements and policy intentions including from the EU. The UN Guiding Principles were also consulted. For the prevention of dangerous climate change the UN SDGs, the Agreement on an International Energy Program and the European Energy Charter Treaty and the Oxford Report were considered.

The *Shell* and *Eskom* cases referred to the *Earthlife* case, although *Shell* refused its relevance.

There was a lack of citation between the South African and Global North cases, South African courts are not drawing from the jurisprudence of the Global North or vice versa. This absence of legal cross-pollination indicates legal isolation between jurisdictions and indicates that courts are not fully utilising the rich body of international climate law and cases In so-doing, climate litigation is likely to become more developed globally. Furthermore, the knowledge gap could be closed if judges engage with foreign laws and cases, which could enhance and innovate legal arguments, for example the human rights approach can be used in South African courts and from there likely to expand to the rest of the continent.

5.8 How the global character of the problem affected the courts judgment

The global character of the problem refers to climate change. In the Global North, judgements analysed climate change and its consequences. They further analysed treaties, conventions, and international agreements and policies along with domestic climate laws. They relied on the findings provided by the UNFCC and the IPCC. They concluded that there is 'dangerous climate change' and an urgent need to reduce GHG emissions. Remedies provided include protection of climate and human rights, domestic enforcement of climate laws and adherence to international commitments. Despite this recognition of a global climate crisis, and despite the application of international laws, these jurisdictions could only provide mitigation measures within their own countries.

The strongest influence in judgements from South Africa came from the way that courts viewed climate change and its consequences. The 'harms of climate change' motivated wins and victories in *Earthlife* and *Shell* and framed the impugned decisions as administrative actions subject to review and called for climate impact assessments.

Ultimately, the global character of the problem, as highlighted in *Neubauer* is that the action of all states is required to solve the climate crisis.

5.9 Applying the findings to the theory of transnationalism

The first part of this chapter depicted the differences and the similarities between the South African and Global North jurisdictions, focusing on areas of transnationalism based on the elements of the transnational analytical framework.

The second part hereunder uses these findings to bear on the theory of transnationalism as was unlocked in Chapter Two and on the claims of transnationalism highlighted in Chapter One.

From the theory on the definition and themes of transnationalism developed in chapter two, the first theme of significance is that whilst there is no universal definition of transnationalism, it has an in-becoming nature which leads to transformation in contemporary societies. The *Urgenda* case was the first case to adopt a rights-based approach to climate litigation. By supporting Urgenda's claim under human rights law and holding that the state is obliged to achieve the Paris Agreement reduction target due to the risk of dangerous climate change that could severely impact the people of the Netherlands, this case illustrates the ability of transnationalism to lead transformation in contemporary societies.

This novel approach to climate litigation further confirms the second claim from this theory, which is that transnationalism is part of international law in regard to cross-border interactions and how it connects people on many different levels. The *Neubauer* case also testifies to cross-border interactions in that part of the claimants comprised youth from Bangladesh and Nepal. All three Global North cases also reflects how transnationalism connects people on different levels in the different foundations and NGOs that came together to institute legal proceedings in the fight against climate change. Although these claimants were from one country, they had global environmental and climate concerns as a binding force. ActionAid in the Netherlands had concerns for the continent of Africa stated in its articles of association.

That transnationalism creates social fields that cross geographical borders is evident in the annual COPs and all six of the cases analysed made reference to the COP. The outcomes of the COP are significant, particularly COP21 which saw the conclusion of the Paris Agreement.

The themes, in engaging with debates on transnationalism found that transnationalism is a component of globalisation with activities spanning social, economic and political fields that could cause greater interaction and interconnectedness between countries and continents. This has shown to be significant in transnational climate litigation in the Global North in *Neubauer* where the litigation followed hot on the heels of *Urgenda's* rights-based approach. Like the

court in the Netherlands, the German court found that the state was not pursuing sufficient climate action to protect the rights of its citizens and called for the legislator to amend the German climate bill.

Interconnectedness was further illustrated for the first time in private climate litigation after the claimants in *Milieudefensie* sued Royal Dutch Shell in 2021 with South Africa in 2022 instituting a successful claim against Shell Exploration & Production. The South following the North here is cognisant of the claim that globalisation refers to *inter alia* the flowing of 'information' and how this connectedness affects that across borders and builds on this theory.

From the nine types of transnationalism that were outlined in chapter two, transnationalism with cross-border activities and social processes is most relevant for climate litigation. Fridays for Futures, part of the class action in *Neubauer* and Earthlife Africa, part of the Life After Coal campaign in *Earthlife* reflect the social processes that is dominant in transnationalism via environmental activists and NGOs, often having more than one jurisdiction, for example Greenpeace International. This dimension is present in the interactions that link people across borders, and also reveals an emergence of this type of social process.

Transnationalism is seen as a mode of globalisation by which leaders create policies and procedures that look further than just their nation states. Of relevance in climate litigation sphere is the categorisation of socio-cultural transnationalism, which results in creating policies and procedures of all countries involved. Urgenda would be the most fitting example here in the courts being the first to adopt a human rights approach to secure claimants' rights against dangerous climate change, thereby setting a global precedent for future rights-based climate litigation, as occurred with *Neubauer*.

Transnationalism is not without pros and cons, but a material pro is the raising of awareness of problems affecting different countries, for example, advocating for human rights abuses. This is seen in cases, which although outside the scope of this research are included here by way of example.

The term 'transnational law' is used in three scenarios in the context of jurisdiction. In the first instance, as extensions of jurisdictions across nation-state boundaries, and Neubauer with its foreign claimants fall into this category. Secondly as non-binding regulation in the form of treaties or conventions between states, with the Paris Agreement as a befitting example. Thirdly as a space for regulation not yet in existence but for which there is a need across borders, this being the underlying character of the global problem that is climate change.

The most striking claim emerging from the theme on transnationalism and environmental law is that transnational law and its legal process pertains to the migration and impact of legal norms, rules and models across borders. This is evident from the *Urgenda* case leading the way for climate litigation on a human rights basis across the globe.

Very significant is that migration of legal norms and rules across borders and transnational climate actions have come to constitute a sphere of climate governance. Aside from the obvious example of Urgenda, this is seen in South Africa where Earthlife challenged the validity of the EA because climate change impacts were one of the necessary inferences from NEMA, and which then relied on PAJA to have it set aside as administrative action. This strategy was followed in both the *Shell* and *Eskom* cases thereafter. These examples are also befitting to confirm that transnationalism and the role of courts domestic courts are sites of international political change, and this is an aspect of transnational governance which enables courts to be the cause of change in international orders. This is done by implementing international rules by international bodies and by resolving conflicts as globalisation brings different legal systems into conflict. Thus, transnational law shapes global governance and norms and guides legal discourse.

In the absence of international treaties to address climate change, that climate litigation provides an alternative path to encourage mitigation can be verified predominately from the Global North cases, all three of which showed the respective courts as applying reduction obligations and a duty of care in its sphere of transnational principles and norms.

The most obvious theme emerging from this study is that transnational climate action is seen in three ways being an action by stakeholders other than states who are party to the UNFCCC; in the form of partnerships, networks and clubs that aim for mitigation and adaptation and drives global climate governance and or through one or more of Peel and Lin's modes of litigation. This could benefit transnational climate litigation indicating that because climate action is increasingly being driven by non-state actors, common to all countries, it lends legitimacy and diversity to transnational climate litigation, thereby opening more legal avenues and greater opportunity for litigation.

Whilst the human rights turn in climate litigation has attracted much scholarly recognition in the form of global conferences and international academic publications, the human rights turn in transnationalism has not received much attention (if any) either by scholars or courts. Beyond identifying a human-rights turn in global South litigation, scholars have not

interrogated or investigated how human rights approaches advance or contribute to a system of transnational climate governance. However, this means that there is potential for human rights frameworks to contribute to litigation, and this would strengthen the link between human rights and transnational climate governance.

The role of courts in climate governance reflects an interplay between law and politics, and how this shapes judgments. Thus it can be deduced that judgments affect the interpretation of the law and its ability to evolve with changing circumstances. It should be noted that in climate litigation reached international courts with advisory opinions being given by both the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) in April 2024, the International Tribunal for the Law of the Sea (ITLOS) during May 2024 and the International Court of Justice (ICJ) set to have hearings in December 2024.[727]

Remedies from climate litigation through climate governance by asking legislators or states to step up and increase climate protection has been seen across the Global North jurisdictions and all three cases support this claim.

Similarly, courts are seen as regulating climate policies, for example mitigation or adaptation or NDC policies are also visible across the spectrum of the cases analysed, irrespective if it is seen as a win or loss.

[727] Cordonier-Segger, Mekaouch, Wadiwala et al. op cit note 772.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Summary of key findings

Researching and writing from the perspective that the climate crisis is a global crisis, the idea behind this dissertation was to consider if courts paid cognisance of the fact that judgments from climate litigation in individual jurisdictions affect judgments around the globe because of the very nature of climate change. Climate litigation is still very much an emerging field of law and yet burgeoning with cases across the globe as it attempts to solve a global crisis in single and independent jurisdictions, together with pressure from time constraints as the climate crisis degenerates. Thus, the idea of Global North and Global South jurisdictions lending support and extending ideas through transnational climate change developed a transnational analytical framework. Chapter One spoke to the claims of transnational climate litigation. Chapter Two developed the concept of transnationalism in climate litigation from themes extracted from four bodies of theory and presented the transnational analytical framework. Chapters Three and Four applied the framework to six cases, and Chapter Five presented findings based on a comparison of the cases, and by refuting or confirming the claims and themes discussed in Chapters One and Two.

The first part of the research objective of this dissertation was *how, if at all climate jurisprudence is transnational in character?* This was explored and answered with the theoretical basis of transnationalism in order to develop an analytical framework to determine how, if at all, climate jurisprudence is transnational in character. The transnational analytical framework provides that transnationalism has an inner processual character which is powerful enough to enable transformation in contemporary societies. This happens when globalisation, as a vehicle of transnationalism, forces world leaders, including judges', to create policies and procedures that look further than just their nation states.

These decisions are an illustration of how globalising concepts and relying on international law for interpretation have begun to shape transnational climate governance in accordance with the framework. The three common threads woven through the jurisdictions are firstly, the conceptualisation of climate change as having a global character and presenting a global challenge. Secondly, in interpreting legislation, all jurisdictions resort to international jurisprudence. Thirdly, both the jurisdictions considered fundamental human rights provisions, albeit different fundamental rights.

The implications of these observations are that a concept of transnational climate governance is emerging from precedents in different jurisdictions. These decisions are without question a major victory for claimants in their respective jurisdictions. At the same time, there is a flaw to the extent that while the court identified climate change to be a global problem, it provided a remedy only for the claimants within the court's jurisdiction.

For now, climate litigation is shaping climate governance at a national level,[728] and with *Urgenda* being the first to rely on human rights as a reason for the Netherlands to increase climate action, the way was paved for *Neubauer*, also relying on human rights, to alter legislation to ensure stronger climate action, in keeping with Paris Agreement targets. However, this narrative is working for Global North to Global North judgements only. South Africa has not yet modelled the Global North judgements in this way.

Having answered the first part of the primary research objective I turn now to answering the second part of the primary research objective *what is the place of South Africa in a system of transnational court led climate change governance?* In this author's view, transnational climate litigation, although showing promise of transnational climate governance, is not yet at a point where it has developed a concept of emerging transnational climate governance. The findings indicate that South Africa does notyet, have a firm place in transnational court led climate governance. Although *Earthlife* and *Shell* have been the subject of global scholarly discussion and debate, these decisions have not been cited in Global North judgments. Climate change ignores borders and it is time that the law and courts use solutions that cross borders to tackle the issue fairly. The time to act is now, and a swift global response to climate change is urgently required.[729]

6.2 Recommendations

The evidence from this study suggests that there are hindrances to transnational climate litigation and to judges passing decisions that are beyond their domestic jurisdiction. This was evident in *Urgenda* when the Netherlands, although recognising 'dangerous climate change' affecting the 'worldwide community, only gave a remedy to protect the Dutch citizens. It was seen in *Neubauer* when the German judge could not afford protection against 'dangerous

[728] As has been seen in how these cases rely on fundamental human rights and constitutional provisions.
[729] Cherkaoui, Ayman and Wadiwala, Zunaida Moosa "The Urgency of Global Response to Climate Change." in: Cordonier Segger, Marie-Claire and Voigt, Christina (Eds.). *Routledge Handbook of Climate Law and Governance: Courage, Contributions and Compliance.* London: Routledge, (2025) 1st Edition.

climate change' to foreign claimants. In the Global South, the judge in *Eskom* was reluctant to pass a ruling on a matter that involved different jurisdictions, due to difficulties in consideration of 'upstream effects' which would have likely created an almost impossible situation.

Although out of the scope of this dissertation, some restrictions in transnational climate litigation are based on the doctrine of separation of powers and the limited reach of sovereignty, and there is scope for further research in exploring how transnational climate governance, extending from North-centred to South-centred claims and vice versa would be able to tackle the global climate crisis using the courts as a tool, and thereby overcoming the restrictions imposed by the *trias politica*.

The judges in South Africa (for example *Shell* with its global respondent company), Netherlands (For example *Milieudefensie* with its international respondents) and Germany (for example *Neubauer* with its foreign claimants) could have substantially strengthened the influence of these cases had they considered and extended solutions outside their jurisdictions. Writing from a transnational perspective, therein lies a capacity chasm which requires new teachings and innovation in order to realise urgent and erudite transnational legal solutions with new jurisdictional rules for climate disputes.

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12. List of Foreign Statutes and Regulations

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