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Rights-based climate change litigation: a global review

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Abbreviations

ACHPR: African Charter on Human and Peoples' Rights.

AComHPR: African Commission on Human and Peoples' Rights.

AR6: IPCC Sixth Assessment Report.

CBDRRC: Common But Differentiated Responsibilities and Respective Capabilities.

CESCR: Committee on Economic, Social and Cultural Rights.

CFREU = Charter of Fundamental Rights of the European Union

COP: Conference of Parties.

CRC: Convention on the Rights of the Child.

ECHR: European Convention on Human Rights.

ECtHR: European Court of Human Rights.

UNGA: United Nations General Assembly.

GHG: greenhouse gas.

HRC: Human Rights Council.

HRCttee: Human Rights Committee.

IAComHR: Inter-American Commission on Human Rights.

IACtHR: Inter-American Court of Human Rights.

ICCPR: International Covenant on Civil and Political Rights.

ICESCR: International Covenant on Economic, Social and Cultural Rights.

ICJ: International Court of Justice.

IPCC: Intergovernmental Panel on Climate Change.

NDCs: Nationally Determined Contributions.

NGO: non-governmental organization.

OHCHR: Office of the High Commissioner for Human Rights.

REDD: Reducing Emissions from Deforestation and forest Degradation.

SR1.5: IPCC Special Report on Global Warming of 1.5°C.

UN: United Nations.

UNEP: United Nations Environment Programme.

UNFCCC: United Nations Framework Convention on Climate Change.

UNGP = United Nations Guiding Principles on Business and Human Rights

WHO: World Health Organization.

Introduction

Climate change is a complex and pressing problem that affects virtually every sphere of human endeavor and will persist for generations.

There is now an overwhelming scientific consensus that global climate warming is underway and is caused by human activities. The most recent IPCC report estimated that human activities, particularly GHG emissions, have caused a temperature increase of over 1°C above pre-industrial levels[1]. Current trends suggest that the temperature will increase by over 3°C by 2100. The IPCC and other institutes, such as the UNEP[2], have continuously monitored and examined the phenomenon of climate change and its impacts on natural and human systems.

These impacts are directly related to the rate of warming and affect terrestrial and freshwater ecosystems, coastal ecosystems, food and ecosystem products, cities and infrastructure, health and well-being, poverty and livelihoods.

The international community recognized the importance of addressing climate change through a regime of international cooperation, which began with the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. The 1997 Kyoto Protocol and the 2015 Paris Agreement were subsequently adopted within this framework.

Despite the efforts of the international community and the adoption of various strategies to combat climate change (from top-down to bottom-up approaches, to the hybrid and flexible approach embraced by the Paris Agreement), the goal of limiting temperature rise has not been achieved. Current commitments are insufficient to avoid the ongoing climate crisis.

In parallel with the development of the international normative framework, there has been a gradual recognition of the impacts of climate change on numerous human and fundamental rights. It is becoming increasingly clear that climate change is not only an environmental problem but also a threat to various rights, including the right to life, health, food, water, and self-determination. These impacts are particularly severe in some areas of the planet and for vulnerable groups and indigenous peoples.

There is a growing recognition that climate change presents a unique challenge compared to other environmental issues. Unlike pollution resulting from a specific activity in a particular area,

[1] IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], Geneva, Switzerland, 184 pp., doi: 10.59327/IPCC/AR6-9789291691647 (hereinafter SYR6).

[2] UNEP, *Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)*, Nairobi, 2023, available at: https://www.unep.org/resources/emissions-gap-report-2023; UNEP, *Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation leaves world exposed*. Nairobi, 2023, available at: https://www.unep.org/resources/adaptation-gap-report-2023.

greenhouse gas emissions come from multiple sources and combine in the atmosphere. Additionally, establishing a causal chain between emissions and resulting harm is complex.

Due to inadequate international response, local mobilization by individuals and NGOs and judicial initiatives have challenged government inaction and the inadequacy of climate policy. Climate litigation has thus emerged as a tool of climate governance.

This has led to an increasing incidence and relevance of climate litigation. Climate governance has shifted to the local level, with many lawsuits filed against States and private actors to challenge their omissions or the inadequacy of measures aimed at tackling climate change. This phenomenon has also expanded to the international level, with initiatives brought before international courts, tribunals, and quasi-judicial bodies. Litigation has taken different characteristics in each legal system, based on different normative foundations.

This study analyzes so-called rights-based climate litigation, i.e., litigation in which nationally and internationally enshrined human and fundamental rights are invoked to establish the responsibility of the State (or private actors) for inadequate action on climate change.

In recent years, there has been a significant increase in climate litigation. Specifically, there has been a surge in rights-based litigation, with the number of cases increasing enormously in just a few years, from 2017 to the present. This expansion is referred to as the *rights-turn* in climate litigation, indicating an increasing reliance on human and fundamental rights. The use of human rights has become a key tool for influencing climate policies and the actions of the executive and legislative powers.

After reconstructing the international and European regulatory framework and the relevant international environmental law principles, this work provides an overview of climate litigation, including its qualitative, quantitative, and geographic characteristics. It then focuses on rights-based climate litigation and examines how human rights obligations can be applied to climate change and what obligations are imposed on States and private actors.

The study examines some of the most significant cases of climate litigation based on rights that have emerged globally in the last decade, both nationally and internationally. These cases can be traced back to two approaches: the mitigation-focused approach, which concerns the alleged inadequacy of action to reduce greenhouse gas emissions, and the adaptation-focused approach, which concerns the inadequacy of measures to reduce and limit the impacts of climate change.

Specifically, an overview of the litigant's arguments for each case is provided, followed by an analysis of the ruling, while considering the peculiarities of each system.

Based on the examined cases, this work provides an initial evaluation of the outcomes of rights-based litigation, by first examining the more or less favorable results of legal initiatives and

the reasons for such outcomes, and then highlighting the strengths and weaknesses of a human rights approach. It examines typical trends and hurdles that have emerged from litigation, such as causation, separation of powers, and the precise identification of the obligations of States and private actors.

The purpose of this analysis is to demonstrate the usefulness of a human rights-based approach in promoting better climate policies and ensuring greater protection of human rights. Future prospects for such litigation are also outlined, including the (to date largely unexplored) potential of adaptation-focused litigation.

CHAPTER I

Climate change and human rights

1. The climate emergency

The environmental crisis we are experiencing is global and unprecedented. In recent decades, climate change has become one of the most serious and urgent problems faced by the international community, presenting new challenges and necessitating urgent policies and strategies to avoid and reduce the risks and impacts associated with it, which are already affecting millions of people around the world.

It is now indisputable that human activity has a significant influence on climate and the environment. The current geological era is often referred to as the "Anthropocene", a human-dominated epoch where human action deeply affects the environment and non-human life[3]. Man's capacity to impact global ecosystem and its decisive impact on the climate and the environment is what distinguishes this geological era from those that preceded it.

The term – which has now made its way into legal literature – therefore characterizes a strong human-nature relationship where "*the human and non-human elements of the earth system have become so completely intertwined that no change can occur in one without impact on the other*"[4]; it denotes that we are living in a time in which human beings have become capable of impacting the functioning of the global ecosystem, creating global environmental problems.

On the one hand, this tight relationship demands an unrivalled responsibility that our species has never faced but, on the other hand, it allows for a convergence of human and non-human interests and represents, therefore, an opportunity. The global nature of environmental problems makes cooperation within the international community necessary in order to successfully tackle these new issues.

The science of climate change and its impacts are (and have been) continuously evaluated by the Intergovernmental Panel on Climate Change (IPCC), a United Nations body established in

[3] S.L.LEWIS, M.A.ASLIN, *Defining the Anthropocene*, in *Nature*, 519, 2015, p. 171. The term was used by Dutch scientist Paul Jozef Crutzen (1995 Nobel Prize in Chemistry for his work concerning the formation and decomposition of ozone, as consultable at: https://www.nobelprize.org/prizes/chemistry/1995/crutzen/facts/), see: S.BENNER, G.LAX, P.J.CRUTZEN, U.PÖSCHL, J.LELIEVELD, H.GÜNTER BRAUCH, *Paul J. Crutzen and the Anthropocene: A New Epoch in Earth's History*, Springer, 2022; M.DI PAOLA, *Il clima dell'Antropocene: disamina realistica di alcune sfide di una nuova epoca,* in G.GABRIELLI (ed.), *Allenarsi per il futuro. Sfide manageriali del XXI secolo,* Frango Angeli, 2021, pp. 77-90; E.PADOA-SCHIOPPA, *Antropocene. Una nuova epoca per la terra, una sfida per l'umanità*, Il Mulino, 2021.

[4] W.F.BABER, J.R.MAY (eds.), *Environmental Human Rights In The Anthropocene - Concepts, Contexts, and Challenges*, Cambridge University Press, 2023, p. 1. See also, on the topic: L.J.KOTZÉ (ed.), *Environmental Law and Governance for the Anthropocene*, Oxford: Hart Publishing, 2017; P.D.BURDON, J.MARTEL (eds.), *The Routledge Handbook of Law and the Anthropocene*, Routledge, 2023.

1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP). Its main objectives are not only to assess the impact of climate change, but also to provide strategies for dealing with it.

The subject has a significant amount of scientific literature devoted to it. However, in this text, we will focus on the work of the ICCP, which is considered to be one of the most comprehensive, authoritative, accredited, and reliable sources. The ICCP thoroughly and objectively covers all relevant aspects of the phenomenon and engages thousands of scientists from numerous countries[5]. Moreover, the findings and key messages of most scientific bodies are in line with those of the IPCC and the scientific basis for climate change has now been vastly accepted[6]. The IPCC's work is widely regarded as successful in achieving a balance between scientific accuracy and effective communication, making it a crucial reference for climate decision-making. This is due to its ability to address complex issues while maintaining comprehensibility[7].

Since 1990, the IPCC has published six assessment reports, the most recent of which was completed in 2023 (AR6). The first report was published in 1990, confirming the scientific bases of climate change and predicting a steady rise in global temperatures over the following decades.

The evidence of observed changes and their causes has further strengthened since AR1; the key findings of previous assessment reports were consolidated by combined evidence evaluated in AR6.

The Sixth Assessment Report (AR6) includes the assessment reports of three Working Groups and three Special Reports. Working Group I covered the physical science basis of climate change[8]; Working Group II evaluated impacts, adaptation and vulnerability[9]; Working Group III addressed mitigation of climate change[10].

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[5] K. FISCHER KUH, *International climate change treaty regime* (hereinafter FISCHER KUH), in K.S. COPLAN, S.D.GREEN, K. FISCHER KUH, S.NARULA, K.R.RABAGO, R.VALOVA, *Climate Change Law - An Introduction*, Edward Elgar, 2021, p. 6.

Key reports on the climate from the UN are available at: https://www.un.org/en/climatechange/reports.

[6] N.S. GHALEIGH, *Science and Climate Change Law. The Role of the IPCC in International Decision-Making*, in CARLARNE C.P., GRAY K.R., TARASOFSKY R. (eds.), *The Oxford Handbook of International Climate Change Law*, Oxford University Press, 2016, pp. 53-56 and p. 63 where the author concludes that "*The Assessment Reports of the IPCC are now questioned principally by the mischievous and mendacious*" although such criticisms have led to the establishment of an even more comprehensive mechanism of peer review.

[7] Ibid., pp. 70-71.

[8] IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 2021, 2391 pp. doi:10.1017/9781009157896 (hereinafter AR6 – WG1).

The contribution of Working Group I also provides an in-depth illustration of the mechanisms that determine global warming (known as the "greenhouse effect"); the report states (p. 39) that "*In a stable climate, the amount of energy that Earth receives from the Sun is approximately in balance with the amount of energy that is lost to space in the form of reflected sunlight and thermal radiation. 'Climate drivers', such as an increase in greenhouse gases or*

A Synthesis Report (SYR)[11] concluded the assessment cycle, synthetizing and integrating the key findings of the three Working Group contributions and the Special Reports[12]; the SYR includes a Summary for Policymakers that provides the key findings concerning current status and trends, future climate change risks and near-term to long-term responses.

The mentioned reports – and AR6 in particular, as it represents the most recent assessment – will be particularly useful in illustrating the impacts of climate change on human and natural systems.

With regards to current status and trends, AR6 concluded, in short, with high (or very high) confidence[13], that: human influence has warmed the atmosphere, ocean and land; human activities, mainly through emissions of GHG, have unequivocally determined an increase in global surface temperature of 1.1°C above 1850–1900 in 2011–2020; climate change is already affecting "*many weather and climate extremes in every region across the globe*"; adaptation measures, observed across all sectors and regions, have determined various benefits, although adaptation gaps still exist and will continue to increase, while current financial resources for adaptation are insufficient, particularly in developing countries; in light of nationally determined contributions (NDCs), it is likely that warming "*will exceed 1.5°C during the 21st century*" and it will be harder to limit

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aerosols, interfere with this balance, causing the system to either gain or lose energy", underlines (p. 244) that "*The main human causes of climate change are the heat-absorbing greenhouse gases released by fossil fuel combustion, deforestation, and agriculture, which warm the planet*" and further specifies (p. 515) that: "*The greenhouse gases trap infrared radiation near the surface, warming the climate. Aerosols, like those produced naturally by volcanoes, on average cool the climate by increasing the reflection of sunlight. Multiple lines of evidence demonstrate that human drivers are the main cause of recent climate change*".

[9] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA, 2022, 3056 pp., doi:10.1017/9781009325844 (hereinafter AR6 – WG2).

[10] IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA, 2022, doi: 10.1017/9781009157926.001 (hereinafter AR6 – WG3).

[11] IPCC, *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], Geneva, Switzerland, 184 pp., doi: 10.59327/IPCC/AR6-9789291691647 (hereinafter SYR6).

[12] The three Special Reports are the following: *Global Warming of 1.5°C (2018): an IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (hereinafter SR1.5); *Climate Change and Land (2019): an IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*; *The Ocean and Cryosphere in a Changing Climate (2019)* (hereinafter SRCCL). All reports are accessible at: https://www.ipcc.ch/reports/.

[13] The IPCC always provides either a specific level of confidence of each assertion (that spans from very low confidence to very high confidence) or an indication of the level of agreement and the strength of the supporting evidence.

warming below 2°C, despite the fact that there are "*gaps between projected emissions from implemented policies and those from NDCs*"[14].

More specifically, WGI has concluded, among other things, that: current concentrations of CO2 are higher than at any time in at least the past two million years; the climate system is changing at rates unprecedented in at least the last 2000 years[15]; global mean sea level (GMSL) has risen by 0.20m since 1901 and is still rising at an even faster rate[16]; human activities are very likely to have determined the global retreat of glaciers and the decrease in Arctic sea ice area[17].

In regards to future risks, AR6 highlighted that: temperatures will continue to increase in the near term (2021–2040) – reaching 1.5°C even in very low GHG emission scenarios – "*mainly due to increased cumulative CO2 emissions in nearly all considered scenarios and modelled pathways*", and every increment will intensify multiple and concurrent hazards and risks to ecosystems and humans[18]; in order to limit warming to 1.5°C with no or limited overshoot, or to limit warming to 2°C, drastic and immediate GHG emissions in all sectors are necessary in this decade; limiting human-caused global warming requires net zero CO2 emissions; excessive warming could gradually be reduced again through net negative global CO2 emissions, although overshoot would take decades and it would determine adverse impacts, some irreversible, and further hazards[19].

It should also be noted that, as highlighted by WGI, "*many changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level*"[20]. It was also stressed that, without a strengthening of current policies, global warming of 3.2 [2.2 to 3.5]°C is projected by 2100[21].

AR6 concludes that the chance to secure a "*liveable and sustainable future for all*" must be guaranteed within a short and closing window, through the adoption of mitigation and adaptation measures that also entail the provision of adequate financial resources for vulnerable regions and groups: swift and radical adoption of such measures would significantly reduce projected losses and damages for humans and ecosystems[22].

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[14] SYR6, see supra, pp. 4, 5, 8 and 10.
[15] AR6-WG1, see supra, p. 290.
[16] Ibid., p. 77
[17] Ibid., p. 5.
[18] SYR6, see supra, pp. 12, 14 and 15, where it is highlighted that near-term hazards include "*an increase in heat-related human mortality and morbidity (high confidence), food-borne, water-borne, and vector-borne diseases (high confidence), and mental health challenges (very high confidence), flooding in coastal and other low-lying cities and regions (high confidence), biodiversity loss in land, freshwater and ocean ecosystems (medium to very high confidence, depending on ecosystem), and a decrease in food production in some regions (high confidence)*".
[19] Ibid., pp. 20-23.
[20] AR6-WGI, see supra, p. 21.
[21] SYR6, see supra, p. 11.
[22] Ibid., pp. 24-26.

It is now clear that adequate climate action requires ambitious measures with regards to both mitigation and adaptation. While several viable adaptation options exist, there are limits to adaptation and the efficiency of measures might be hampered by lack of adequate mitigation targets (resulting in higher increase in temperature).

As indicated by the most recent UNEP reports, existing State commitments are severely lacking, even when compared to the benchmarks established by the Paris Agreement, with regard to both mitigation and adaptation efforts.

On November 20, 2023, the UNEP published its 2023 Emissions Gap Report[23]. Despite recognizing significant progress since the adoption of the Paris Agreement, the Report found that the full implementation of current commitments (reflected in Nationally Determined Contributions – NDCs) would lead to an increase in global temperature of 2.9°C above pre-industrial levels; even if further conditional commitments were to be implemented, the expected increase would be of 2.5°C.

The likelihood of keeping the global increase in temperature within 1.5°C is very slim (estimated at 14% in the most optimistic scenario); limiting temperature rise to 2°C is still feasible but requires more ambitious and rapid action on multiple fronts[24].

As to adaptation, on November 2, 2023, the UNEP issued the 2023 Adaptation Gap Report[25]. The Report found not only that adaptation action is insufficient, but that it is slowing rather than accelerating. The key findings of the Report are the following: the estimated needed costs of adaptation for developing countries are between US $215 billion to US $ 387 billion per year in this decade, 10 to 18 times as great as public finance flows, which were at around $ 21 billion in 2021; slow mitigation and adaptation action results in an increase in loss and damages, while could be minimized by ambitious investments; there is a need to consider new ways to increase financing through both domestic expenditure and international and private finance[26].

1.1 Impacts, vulnerability and adaptation options

As mentioned, Working Group II (WGII) has provided – within the sixth assessment cycle – a thorough review of the impacts and future risks of climate change, along with the identification of possible adaptation measures. The report builds on prior assessments (namely the Group's previous

[23] UNEP, *Emissions Gap Report 2023…*, cit.
[24] UNEP, *Emissions Gap Report 2023*. Key Messages, 2023.
[25] UNEP, *Adaptation Gap Report 2023 …*, cit.
[26] UNEP, *Adaptation Gap Report 2023. Key Messages*, 2023.

contribution to AR5 and the three subsequent Special Reports, including the Special Report on the impacts of global warming of 1.5°C above pre-industrial levels)[27].

It should be noted that, compared with AR5 and SR1.5, risks have generally increased to high and very high level at lower global warming levels[28].

The contribution – which also draws from the conclusions reached by WGI – dedicates chapters 2 to 8 to the assessment of impacts, risks and possible responses with regards to all systems impacted by climate change, while chapters 9 to 15 provide an in-depth analysis of impacts and risks at regional and sub-regional levels.

WGII concluded that "*Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability*"[29].

The report identifies 120 key risks, which have then been clustered in the following 8 "overarching" risks to: low-lying coastal areas; terrestrial and marine ecosystems; critical infrastructures and networks; living standards; human health; food security; water security; peace and human mobility[30].

The report also provides adaptation options, which are aimed at reducing vulnerability or exposure to climate hazards and responding to the unavoidable consequences of climate change[31].

It is therefore useful to provide a brief illustration of the various risks, impacts, and adaptation options, in light of the most recent findings of the IPCC. The overview sets the grounds for effectively addressing climate litigation: as will be illustrated in the following chapters, the science basis of climate change represents one of the most crucial and determining elements of lawsuits and constitutes a fundamental parameter in assessing States' due diligence.

1.2 Terrestrial and freshwater ecosystems

Several impacts on terrestrial and freshwater ecosystems (and their component species) have already been observed and documented in the Report (as likely or very likely and with either high or very high confidence), and they include: changes in the "*ranges, phenology, physiology and morphology*" of terrestrial and freshwater species, particularly as a consequence of an increase in

[27] IPCC, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA (hereinafter SR1.5).

[28] AR6-WGII, see supra, p. 2417.

[29] Ibid., p. 9.

[30] Ibid., pp. 2502-2503.

[31] Ibid., p. 2504.

frequency and harshness of extreme events; a range shift among numerous species to higher latitudes or elevations; a general increase in water temperature (up to 1°C per decade in rivers and up to 0.45°C in lakes); a 25% decrease in ice cover and an over two week duration reduction; an increase in wildlife disease and the expansion of vector-borne diseases in more areas (such as the high Arctic and Nepal); an expansion of forest insect pests, also as a consequence of warmer winters and reduced insect mortality; local population extinctions among plants and animals, along with mass mortality events in birds and fish as a consequence of extreme heat waves; global extinctions or near-extinctions of species in a few documented cases; biome shifts and structural changes within ecosystems; increased area burned by wildfire above natural levels; drought-induced tree mortality[32].

As specified in the report, several changes that prior IPCC reports had predicted have subsequently been observed. In terms of projected risks, they include species extinctions, biome shifts (including changes in the major vegetation) on a significant percentage of global land, increases in the areas burned by wildfire, increases in wildfire frequency and the release into the atmosphere of carbon stored in the biosphere[33].

With respect to adaptation, the report underlines that resilience of the systems can be enhanced through adaptation actions that include protection and restoration, although there is currently limited evidence of the actual degree to which adaptation measures have been adopted and "*virtually no evaluation of the effectiveness of adaptation measures in the scientific literature*"[34]. It is also clear that not all impacts of climate change can be prevented, and adaptation needs to consider and address several inevitable changes.

The mentioned findings are entirely in line with the conclusions of SR1.5 which also stressed that limiting the temperature increase to 1.5°C would significantly reduce the negative impacts as compared to the scenario of a 2°C increase[35].

1.3 Water cycle, oceans and coastal ecosystems

Water security is one of the most relevant aspects of climate change. According to the IPCC's findings, roughly half of the world's population is affected, at least in certain periods of the year, by water scarcity, and it is estimated that, in the last few decades, 44% of all calamities have been flood-related; moreover, approximately 60% of all adaptation measures were adopted as a

[32] Ibid., pp. 200-203.
[33] Ibid., p. 202.
[34] Ibid., p. 203.
[35] SR1.5, see supra, p. 179, p. 213.

remedy for water-related hazards[36]. The risks are often associated with water scarcity and water-related disasters.

The already observed impacts include: the intensification of the hydrological cycle (including the increase in intensity of heavy precipitation in several regions) and the consequent aggravation of vulnerabilities; the increase, in both likelihood and intensity, of extreme weather causing floods and droughts; the (consequent) impact on people and ecosystems, on agriculture and energy production with significant yield losses and on incidence and outbreaks of water-related diseases[37].

Risks are estimated to increase with each degree of warming and the impacts will be particularly severe for vulnerable regions and peoples (with a disproportionate impact on the poor, women, children and indigenous peoples).

Although adaptation measures – which often include water interventions such as irrigation and rainwater harvesting – are capable of reducing, to a certain extent, various risks, their effectiveness decreases in higher warming scenarios. This confirms the importance of limiting warming to 1.5°C, as that would determine a general reduction of water-related risks in all regions and sectors[38].

Over the past few decades, water security[39] has also become a significant concern in international law[40] and several instruments were adopted during the 1990's (such as the 1992 Helsinki Watercourses Convention and the 1997 UN Watercourses Convention), with the main purpose of establishing cooperation, reducing risks of conflict and achieving water security[41]. The emphasis, however, has mainly been on surface water, while groundwater has received little attention (despite the fact that it represents a primary source of water for many countries)[42].

The necessity to tackle the issue of water security has become even more urgent in light of environmental problems such as climate change, that have already determined, among other effects, reduced availability, scarce quality and unequal distribution of the resource[43].

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[36] AR-WGII, see supra, pp. 555, 558.

[37] Ibid., p. 555.

[38] Ibid., p. 556.

[39] The IPCC defines water security as the "*capacity of a population to safeguard sustainable access to adequate quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability*". The definition is borrowed from D. GREY C.W. SADOFF, *Sink or Swim? Water security for growth and development*, in *Water Policy*, 9(6), pp. 545–571.

[40] For a comprehensive overview of water law and policy, see A. RIEU-CLARKE, A. ALLAN, S. HENDRY (eds.), *Routledge Handbook of Water Law and Policy*, Routledge, London, 2016.

[41] P. CULLET, L. BHULLAR, S.KOONAN, *Water Security and International Law,* in *Annual Review of Law and Social Science*, 2021, 17, pp. 261-276.

[42] Ibid., p. 270.

[43] Ibid., p. 273.

As to oceans and coastal ecosystems, it is well known that they are fundamental to human life and well-being as they host huge biodiversity and regulate various aspects of the climate system.

The observed impacts and vulnerabilities in this sector are also very significant. According to WGII: the current conditions of ocean and coastal ecosystems are "*unprecedented over millennia*", with a big impact on life in the ocean and along its coasts; the changes in the physical and chemical characteristics of the ocean have determined a change in timing of seasonal activities, distribution and abundance of organisms; marine heatwaves have become more frequent and more severe and have determined, among other consequences, biodiversity losses, mass mortalities; the impacts on ocean and coastal environments have determined changes in specific industries and economic losses; human health is also endangered as a consequence of the impacts of climate change on ocean and costal ecosystems (including, among other things, the spread and risk of marine-borne pathogens, the accumulation of toxins and contaminants into marine food webs, the increase in salinity of coastal waters, aquifers and soils)[44].

The IPCC's projections with regards to risks and impacts are also particularly concerning, and include: warming, acidification, deoxygenation and level rise of the oceans (with different magnitudes depending on the different warming scenarios); species extirpation and habitat collapse as a consequence of more frequent and more severe heatwaves; biomass alteration of marine animals, modification in the timing of seasonal ecological events, disruption of life cycles and food webs; coastal erosion and decreases in natural shoreline that will, among other consequences, pose a risk to an increasing number of coastal communities (who will also be facing further risks such as loss of cultural heritage and nutrition, exposure to toxins, pathogens and contaminants, salinization of groundwater and soil)[45].

Effective adaptation measures in this context (such as restoration, revegetation and warning systems for extreme events) would be feasible and low-risk in low-emission scenarios; in high-emission scenarios, however, adaptation would require transformative actions such as relocation of people and hard infrastructure. Nature-based solutions would still be insufficient beyond 2030 and 2040 with regards to specific aspects such as the protection of coral reefs and mangroves[46].

WGII once again stressed that the available adaptation measures are not able to offset certain impacts, especially on marine ecosystems and the services they provide. In order to achieve a significant reduction of the impacts, measures should be implemented at adequate scales and associated with serious mitigation commitments.

[44] AR6-WGII, see supra, p. 381.
[45] Ibid., p. 382-383.
[46] Ibid.

As in most cases, the effectiveness of nature-based solutions declines as warming increases.

1.4 Food and ecosystem products

The impacts of climate change on food production systems and food security were closely assessed in AR5 and in the 2019 Special Report on Climate Change and Land (SRCCL): AR6-WGII builds upon those reports and adopts a similar approach.

The Food and Agriculture Organization has defined food security as a "*situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life*"[47].

Global warming has already affected the supply of varied, nutrient and affordable food, and Chapter 5 of AR6-WGII thoroughly analyses such impacts and future risks, vulnerabilities and feasible adaptation options.

The main findings are summarized in the executive summary and it is useful to briefly expose them.

As to the observed effects, WGII described a severe impact on agriculture, forestry, fisheries and aquaculture, making it increasingly difficult to meet human needs, along with food losses and reduced productivity of all agricultural and fishery sectors, with impacts on food security and livelihoods. According to WGII, the effects are (and will be) particularly severe for vulnerable groups and small producers, with a higher risk of malnutrition and competition over resources[48].

Climate change will also impact the suitability of certain areas for food production and, in general, food availability, safety and nutritional quality. As a consequence, the IPCC predicts an increased risk of hunger – especially in specific regions such as Sub-Saharan Africa, South Asia and Central America – and increased malnutrition and diet-related mortality. Heat stress on workers and animals is also estimated to reduce production, along with higher temperatures and humidity that will favour the spread of pathogens and other hazards. Other projected impacts include: alteration of aquatic food provisioning services and water security; modifications on the occurrence and the distribution of pests, weeds and diseases and increased costs for their control; negative effects on forest production systems, especially in tropical forests[49].

Current adaptation measures would be insufficient to achieve Goal 2 ("zero hunger") of the 2030 Agenda for Sustainable Development[50]. Several adaptation options are considered viable and

[47] Ibid., p. 720.
[48] Ibid., pp. 717-718.
[49] Ibid.
[50] The UN recently published the latest report on the implementation of the 2030 Agenda, see UN DESA, *The Sustainable Development Goals Report 2023: Special Edition*, July 2023. New York, USA, available at: https://unstats.un.org/sdgs/report/2023/ (hereinafter SDG Report).

effective, but they often lack adequate economic or institutional practicability and would require further technologic innovation and international cooperation. Such measures include agricultural diversification, land restoration, agroecology, agroforestry and the development of a sustainable circular bioeconomy based on bioresources[51].

Ambitious public policies, along with more public and private investments, would be necessary in order to overcome financial barriers and feasibility of adaptation measures in agriculture, fisheries, aquaculture and forestry. However, adaptation and mitigation policies should guarantee stakeholder participation and carefully assess the risks of adverse effect: this is particularly relevant in the context of land acquisition[52].

1.5 Cities and infrastructures

Chapter 6 of AR6-WGII addresses impacts, risks and adaptation options with regards to cities, settlements and key infrastructures.

Urban areas host 4.2 billion people, over half of the world's population, and "*an additional 2.5 billion people are projected to be living in urban areas by 2050, with up to 90% of this increase concentrated in the regions of Asia and Africa*"[53]. Climate change has resulted in an increase in risks and vulnerability in cities and urban areas (especially in settlements with limited adaptation options and in less developed and low income regions) and there has been a large increase in the number of people expected to live in areas that are significantly exposed to climate change impacts. The risks are associated with both rapid-onset events (such as floods) and slow-onset events (such as droughts and sea level rise) and an increase in human and economic losses since AR5 was observed; marginalized communities and vulnerable groups (such as those living alongside coasts or rivers) will be severely affected and investments to address the issues of such communities should be prioritized[54]. Severe risks in cities are also associated with limited water availability, heatwaves, air pollution, disease outbreaks[55].

Despite the development of adaptation plans, there has been limited implementation and significant urban adaptation gaps exist, especially in specific regions. Adaptation options are often limited by previous infrastructure design and characteristics, as well as insufficient financial means and lack of adequate policies. The careful planning of settlements and key infrastructures is a fundamental aspect of tackling the impacts of climate change[56].

[51] SR6-WGII, see supra, p. 719.
[52] Ibid.
[53] Ibid., p. 909.
[54] Ibid., p. 910.
[55] Ibid., p. 993
[56] Ibid., pp. 910-911.

Adaptation measures should be implemented through cooperation with local communities and national governments and should evaluate the specific vulnerabilities and priorities of each city (as main risks differ significantly between cities, and those with scarce financial resources and technical limitations are often more vulnerable)[57] .

1.6 Health and wellbeing

AR5 concluded with very high confidence that climate change negatively impacts the health of human populations. Risks highlighted included injury, disease and death as a consequence of more intense and frequent extreme events, undernutrition and diseases. AR5 stated that climate change also exacerbated existing vulnerabilities[58].

AR6 confirms such conclusions and provides even stronger evidence of the impacts of global warming on human health (including mental health), with an even more detailed assessment of health outcomes.

Health and wellbeing are (and will be) affected in direct and indirect ways and the consequences will vary widely depending on geographical, economic and social factors[59].

According to WGII, "*Climate hazards are increasingly contributing to a growing number of adverse health outcomes (including communicable and non-communicable diseases (NCDs)) in multiple geographical areas (very high confidence). The net impacts are largely negative at all scales (very high confidence)"*[60]; associated food insecurity could lead to further malnutrition and disease susceptibility, especially in poorer countries. A relevant increase in ill health and premature deaths is projected, with an excess of 250,000 deaths per year by 2050 (with half of if estimated to be in Africa), along with increased exposure to heatwaves and heat-related morbidity and mortality; adverse effects on mental health – as a consequence of the various implications of climate change such as higher temperatures, malnutrition, distress and anxiety – are expected, especially with regard to vulnerable groups (including people with pre-existing medical conditions)[61].

Climate change will also determine forced migration and displacement, with the main drivers being extreme events and sea level rise (the latter representing a serious threat for the existence of low-lying States[62].

WGII also provides an assessment on the feasible solutions.

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[57] Ibid., pp. 993-995.
[58] Ibid., p. 1048.
[59] Ibid., p. 1126.
[60] Ibid., p. 1045.
[61] Ibid., p. 1046.
[62] Ibid., p. 1127.

A general enhancement of public health systems through multi-sectoral collaboration and planning – in order to make the systems more efficient and more climate resilient – is considered one of the main and most crucial objectives, which should be complemented by specific investments to guarantee better protection against specific hazards[63]. The necessity for coordinated action between different sectors has clearly emerged from the COVID 19 pandemic, which has also shown the "*inter-connected and compound nature of risks, vulnerabilities, and responses to emergencies that are simultaneously local and global*"[64].

Other suggested measures include disease surveillance, warning systems and response systems for human settings, vaccine development, tested and updated response strategies and other long-term options such as urban planning and design[65].

1.7 Poverty and livelihoods

Chapter 8 of the report explores the impacts on poverty and livelihoods. Several factors have an impact on poverty and livelihoods and, therefore, it is difficult to distinguish the consequence that are directly and immediately associated with climate change. However, as WGII underlines, climate change certainly has an amplifying effect on pre-existing vulnerabilities and exacerbates inequalities by disproportionally affecting disadvantaged groups.

In particular, poor people and their livelihoods are "*especially vulnerable to climate change because they usually have fewer assets and less access to funding, technologies and political influence*" and "*many poor communities, especially in regions with high levels of vulnerability and inequality, are less resilient to diverse climate impacts*"[66].

All the impacts of climate change are much greater in poorer and more vulnerable regions such as East, Central and West Africa, South Asia and Central America and, more generally, in countries that face challenges such as underdevelopment, hunger, conflict and environmental degradation[67]. These difficulties seriously hamper the ability to respond to hazards and extreme events; therefore, those countries and regions require urgent adaptation measures.

WG II stresses that "*without strong adaptation measures, losses and damages will likely be concentrated among the poorest vulnerable populations*"[68]; however, poorer and vulnerable countries often have very limited adaptation possibilities. Consequently, public and private

[63] Ibid., p. 1128.
[64] Ibid., p. 1047.
[65] Ibid.
[66] Ibid., p. 1174
[67] Ibid., p. 1251.
[68] Ibid.

investment plays again a pivotal role, with the necessity for considerable public investment in poorer countries[69].

1.8 A brief overview of regional and sub-regional impacts, risks and adaptation options

Despite the fact that Africa is among the lowest contributors to GHG emissions, the region is already facing some of the most severe consequences of global warming, especially with regards to "*biodiversity loss, water shortages, reduced food production, loss of lives and reduced economic growth*"[70].

Three key risks were identified in Africa, which will be increasingly more severe depending on the warming scenarios: risk of food production losses, risk of biodiversity loss and risk of mortality and morbidity from heat and infectious diseases[71]. The report also underlines that there are major barriers to adaptation, especially because of "*technological, institutional and financing factors*"[72].

As to Europe, WGII observed – as with most other regions – a substantial increase of climate change impacts, including extreme events, and estimated further increase of warming in Europe at faster rates than the global mean.

The report formulates the following four main risks for Europe, which will once again vary in the different warning scenarios: heat and associated mortality, morbidity and harm to ecosystems; losses in agriculture; water scarcity[73].

The southern regions of Europe tend to be the most negatively affected (especially with regard to water availability and agricultural production) while some benefits for the north are anticipated (including increased crop yields). The consequences will be particularly severe for urban areas, and European cities are *"hotspots for multiple risks of increasing temperatures and extreme heat, floods and droughts (high confidence)*"[74].

Nonetheless, feasible adaptation measures have increased in most of Europe since AR5 and there is now a wider range of options available to reduce risks. Adaptation is already being implemented across the European countries, although more depth and speed are required to avoid the risks and certain barriers, including limited economical resources, do exist, especially within vulnerable sectors or regions[75].

[69] Ibid., p. 1253.
[70] Ibid., p. 1289.
[71] Ibid., p. 1299.
[72] Ibid., p. 1293.
[73] Ibid., p. 1819.
[74] Ibid., p. 1820.
[75] Ibid.

An increase of climate change impacts has been observed in North America. Several risks are similar to those highlighted in the European region, although the report also stresses how "*misinformation and politicisation of climate-change science has created polarisation in public and policy domains in North America, particularly in the USA, limiting climate action*"[76].

Ten key risks were specified: divergent perceptions regarding the attribution and implications of climate change, posing a risk to adaptation; human life, safety and property; economic and social well-being; marine social–ecological systems; terrestrial ecosystems and their services; freshwater services; physical and mental health; food and nutritional security; commerce and trade; quality of life[77].

The identified key risks in Central and South America are the following: risk of food insecurity; risk to life and infrastructure; risk of water insecurity; risk of severe health effects; systemic risks of surpassing infrastructure and public service systems capacities; risk of large-scale changes and biome shifts in the Amazon; risk to coral reef ecosystems due to coral bleaching; risks to coastal socioecological systems due to sea level rise, storm surges and coastal erosion[78].

The report stresses that "*Central and South America (CSA) are highly exposed, vulnerable and strongly impacted by climate change, a situation amplified by inequality, poverty, population growth and high population density, land use change particularly deforestation with the consequent biodiversity loss, soil degradation, and high dependence of national and local economies on natural resources for the production of commodities*" and further observes that "*The Amazon forest, one of the world's largest biodiversity and carbon repositories, is highly vulnerable to drought"* and has suffered high tree mortality rates[79].

According to WGII, the main obstacle to adaptation, in most sectors, is financing[80].

With regards to Asia, the Report formulates the following key risks: dust storms, heat waves, extreme rainfall, sea level rise, floods, biodiversity, agriculture, wildfire and permafrost thawing.[81]

Particular emphasis is placed on Asian glaciers, which constitute the water resources for about 220 million people in the downstream area. Glaciers are decreasing in Central, Southwest, Southeast and North Asia[82]. Other major issues include water scarcity and sea level rise (especially

[76] Ibid., p. 1931.
[77] Ibid., p. 1982.
[78] Ibid., p. 1721.
[79] Ibid., p. 1691.
[80] Ibid., p. 1693.
[81] Ibid., p. 1533.
[82] Ibid., p. 1459.

in China, India, Bangladesh, Indonesia and Vietnam, which have a huge number of coastal populations)[83].

The region has great heterogeneity under multiple aspects: ecosystems, economic development, resources. Adaptation options are therefore numerous and different and face different limitations[84].

Australia and New Zealand will face nine key risks, identified in light of their magnitude: potential irreversible damage concerns loss and degradation of coral reefs and biodiversity and loss of alpine biodiversity; other severe risks are the "*transition or collapse of alpine ash, snowgum woodland, pencil pine and northern jarrah forests in southern Australia*", loss of "*kelp forests in southern Australia and southeast New Zealand*", "*Loss of natural and human systems in low-lying coastal areas due to sea level rise*", "*Disruption and decline in agricultural production and increased stress in rural communities in southwestern, southern and eastern mainland Australia*", "*Increase in heat-related mortality and morbidity for people and wildlife in Australia due to heatwaves*", "*Cascading, compounding and aggregate impacts on cities, settlements, infrastructure, supply chains and services due to wildfires, floods, droughts, heatwaves, storms and sea level rise",* while the main implementation risk consists of the "*Inability of institutions and governance systems to manage climate risks"*[85].

WGII notes that adaptation is uneven and lagging, and faces several barriers that include lack of consistent policies[86].

Ultimately, small islands are severely affected by climate change, with sea level rise, tropical cyclones and other extreme events representing one of the major threats, and freshwater systems being among the most threatened on the planet[87]. Some small islands are projected to become uninhabitable in the second half of the 21st century. Therefore, WGII underlines that "*Small islands present the most urgent need for investment in capacity building and adaptation strategies*"[88]. Adaptation options include both reactive measures and anticipatory measures: the latter allow for a longer-term view and often include the relocation of communities from vulnerable locations (mainly away from coasts in order to avoid the risks of sea level rise and coastal erosion)[89].

[83] Ibid., p. 1532.
[84] Ibid., p. 1534.
[85] Ibid., p. 1584.
[86] Ibid.
[87] Ibid., p. 2045.
[88] Ibid.
[89] Ibid., p. 2095-2096.

2. Tackling climate change at international level

Climate change is a relatively recent problem and efforts by the international community to address it have started in the last few decades.

However, the internationalisation of environmental issues and the development of international environmental law are usually placed in the early 1970s, as the first UN global conference on the environment was held in Stockholm in June 1972: the Stockholm Declaration and the Action Plan for the Human Environment were adopted. The Declaration made environmental issues a key problem of the international community and addressed them in connection with human life and its existence, highlighting the importance of international cooperation in safeguarding natural resources and ecosystems. It includes 26 principles which would then be reiterated in subsequent conferences[90]. Another successful outcome of the Conference was the creation, in 1972, of the United Nations Environment Programme (UNEP), whose work turned out to be fundamental in providing up to date information on the environment, coordinating policies and strengthening environmental action. The Stockholm Declaration remained a key international document for over 20 years.

The so-called "Earth Summit", the UN Conference on Environment and Development, was held in Rio de Janeiro in June 1992.The Conference gathered a large participation from governments, scientists and non-governmental organizations, drawing big global interest. The conference adopted the Rio Declaration[91] (which includes 27 principles) and Agenda 21, which is a strategic plan of action to achieve sustainable development. The Rio Declaration reaffirms and builds upon the Stockholm Declaration, with the goal of establishing further cooperation between States and adopting agreements to protect the global environment. The Declaration is particularly significant as it includes – although without binding force – several fundamental principles and concepts of environmental law which are crucial in the context of climate change: the CBDRRC principle, the "polluter pays" principle, the right to public participation and access to information in environmental decision-making, the duty to conduct environmental assessments, the consideration for the needs of future generations.

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[90] UN Conference on the Human Environment, *Declaration of the U.N. Conference on the Human Environment*, June 16, 1972, UN Doc. A/CONF.48/14 (hereinafter Stockholm Declaration). Principle 1 states that: "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*"; Principle 2 states that: "*The natural resources of earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management as appropriate*". The Principles repeatedly mention the need to consider future generations: this aspect is particularly crucial and often called upon in the context of climate litigation, as it will emerge in the following.

[91] UN, *Rio Declaration on Environment and Development*, Rio de Janeiro, 3-14 June 1992, UN Doc A/CONF.151/26.

Subsequent summits mainly revolved around finding ways to implement the principles: the 2002 Johannesburg Summit represented a shift towards implementation[92] and such tendency was confirmed by the 2012 Rio Summit and its outcome document, entitled "The Future We Want", which the UNGA endorsed[93].

Subsequent negotiations led to the adoption by the General Assembly, in 2015, of the 2030 Agenda for Sustainable Development[94], establishing 17 goals, each one inclusive of specific targets (for a total of 169 targets): goal 13 is entitled "climate action" and requires urgent measures to tackle climate change and its impacts[95].

However, international action to tackle climate change began at the Rio Conference. Two fundamental environmental treaties were adopted at the 1992 Conference: the UN Convention on Biological Diversity and the UN Framework Convention on Climate Change (UNFCCC). The latter represents the starting point of the UN climate change legal framework.

In the following, the UN climate change regime and its core principles will be examined, with a particular focus on the Paris Agreement – which today represents the key instrument – and the subsequent developments.

The analysis adopts human rights lenses: therefore, the gradual emergence of human rights language and discourses within the regime will be mapped.

It should be stressed that the international law on climate change includes all the body of law that concerns climate change: the UNFCCC framework is an important component, but other treaty regimes are generally included within the notion[96], along with all the relevant norms and principles of public international law and international environmental law[97]. As will be seen in the

[92] P.M.DUPUY, J.E.VIÑUALES, *International Environmental Law,* Cambridge University Press, 2018, pp.17-20 (hereinafter DUPUY, VIÑUALES).

[93] UN General Assembly, *The Future We Want*, A/RES/66/288, September 11, 2012.

[94] UN General Assembly, *Transforming our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, 21 October 2015.

[95] An overview of all goals and targets, along with assessments on current progress, are available at: https://sdgs.un.org/goals; see also SDG Report, supra.

[96] These include, for example, the regime on the protection of the ozone layer, the regimes aimed at reducing maritime and aviation GHG emissions, the regime on biological diversity.

For instance, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (and its subsequent amendment) have had a significant impact in reducing greenhouse gases emissions and, therefore, in mitigating climate change. The UNFCCC regime is clearly insufficient in dealing with all the consequences of climate change, which is an extremely complex phenomenon that, as Humphreys noted,*"seems to touch on everything everywhere. It demands wideranging concerted action, speedy technological innovation, massive investment, comprehensive regulation. But, because the activities that cause it are central to economic activity everywhere, it cannot be treated as a merely technical issue: it goes to the heart of local politics in every polity*", see S.HUMPHREYS, *Climate change: too complex for a special regime*, in *Journal of Energy & Natural Resources Law*, Vol. 34 N. 1, p. 52.

[97] Such norms and principles include the no-harm and due diligence rules, the precautionary principle, the polluter-pays principle and the principle of intergenerational equity. All the recalled norms and principle will be addressed in the following, as they play a role in climate change and climate change litigation.

following, principles of international environmental law are particularly relevant in the context of climate change.

2.1 The climate change governance framework and its human rights references

2.1.1 The United Nations Framework Convention on Climate Change (UNFCCC)

Although scientific concerns about potential anthropogenic changes to the climate had emerged during the late 1970s[98], a response from the international community only occurred starting from the late 1980s, with the release of the Brundtland Report[99] and the establishment on the IPCC.

In 1990, the United Nations General Assembly (UNGA) adopted Resolution 44/212[100] which established a committee tasked with negotiating the first climate change treaty[101]. The negotiations[102] led to the adoption, on May 9, 1992, of the United Nations Framework Convention on Climate Change (UNFCC)[103], which entered into force in 1994.

The UNFCCC, the Kyoto Protocol and the Paris Agreement constitute the core instruments of climate change law[104]. The UNFCC represents the basis for the regime and it was well known, even in 1992, that, despite its vague formulations and unclear commitments, more detailed

[98] A. BIRCHLER, *Climate Change, Resulting Natural Disasters and The Legal Responsibility of States - An International Law Perspective*, Cambridge University Press, 2020, pp. 46-47 (hereinafter A.BIRCHLER). For a detailed history of the discovery of the phenomenon, see S.WEART, *The Discovery of Global Warming*, Harvard University Press, 2008.

[99] UNGA, *Report of the World Commission on Environment and Development: Our Common Future*, 1987, doc. A/42/427. The report provides the first definition of sustainable development as "*meeting the needs of the present without compromising the ability of future generations to meet their own needs*". The definition foreshadows the concept of intergenerational equity and intergenerational responsibility, which – as will be illustrated – represent some of the most interesting principles in climate change and climate change litigation. The principle became a fundamental concept in subsequent conferences, see L. HAJJAR LEIB, *Human Rights and the Environment Philosophical, Theoretical and Legal Perspective*, Martinus Nijhoff, 2011, Leiden, Boston, p. 112..

[100] UN General Assembly, *Protection of global climate for present and future generations of mankind*, A/RES/45/212 December 21, 1990.

[101] C.P.CARLANE, K.R. GRAY, R. TARASOFSKY, *International Climate Change Law, Mapping The Field,* in CARLARNE C.P., GRAY K.R., TARASOFSKY R. (eds.), *The Oxford Handbook of International Climate Change Law*, Oxford University Press, 2016, p. 4.

[102] The negotiations of the UNFCCC were characterized by a juxtaposition between developed and developing countries and the main causes of disagreement – which have also determined tension in subsequent negotiations within the climate change regime – were related to establishing the different responsibilities and commitments in light of States' (past, present and future) contribution to emissions, wealth, economic development and vulnerability. See FISCHER KUH, cit., p. 7; see also D.BODANSKY, J.BRUNNÈE, L.RAJAMANI, *International Climate Change Law*, Oxford University Press, 2017, pp. 99-10 (hereinafter BODANSKY et al.); see also G. PARIHAR, K. DOOLEY, *Human Rights, differentiated responsibility? Advancing equity and human rights in the climate change regime*, in S.DUYCK, S.JODOIN and A.JOHL (eds.), The Routledge Handbook of Human Rights and Climate Governance, Routledge, 2018, p. 268.

For a detailed description of the negotiations, see I.M.MINTZER, J.A. LEONARD, *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge University Press, 1994.

[103] United Nations Framework Convention on Climate Change, 1771 UNTS 197, May 9, 1992 (hereinafter UNFCCC).

[104] FISCHER KUH, cit., pp. 6-7.

obligations and objectives would need to be established in future instruments[105]. In fact, the UNFCCC represented a compromise between the positions of countries (such as the US) that did not want to make binding commitments and countries that supported a more strict regulation[106].

The goal of the UNFCCC is, according to Article 2, to stabilize GHG concentrations at a level that prevents "*dangerous anthropogenic interference with the climate system*". However, no precise targets are set and no definition of "dangerous interference" is provided.

Article 3[107] sets out the fundamental principles that the Parties should follow, including: the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC[108]); the principle of intergenerational equity; the precautionary principle.

The principle of CBDRRC governs the commitments and determines the distinction between Annex I and non-Annex I Parties, which is basically a distinction between developed and developing countries.

The UNFCCC regime is structured on the fundamental distinction between developed countries on one side (which are the main historical contributors to GHG emissions and targets for the main obligations) and developing and vulnerable countries on the other side[109].

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[105] B.MAYER, *The International Law on Climate Change*, Cambridge University Press, 2018, p. 35. For an in-depth analysis of the UNFCCC regime, see D.FREESTONE, *The United Nations Framework Convention on Climate Change: the basis for the climate change regime*, in CARLARNE C.P., GRAY K.R., TARASOFSKY R. (eds.), *The Oxford Handbook of International Climate Change Law*, Oxford University Press, 2016; see also D.BODANSKY, *The United Nations Framework Convention on Climate Change: A Commentary*, in *Yale Journal of International Law*, Vol. 18, Issue 2, 1993.

[106] A.BIRCHLER, cit., p. 48.

[107] Art. 3: "*In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:*

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties. […]".

[108] See generally C.D.STONE, *Common But Differentiated Responsibilities in International Law*, in *American Journal of International Law*, Vol. 98, Issue 2, 2004.

[109] It is worth mentioning that within the UNFCCC regime, matters of justice and distribution of responsibility have been among the most crucial; such approach has been firmly criticized by Eric Posner and David Weisbach, who claim that the inclusion of questions of justice and different allocation of burdens face several objections, therefore affirming that climate agreements should be based on different themes, look forward rather than backward and adopt a practical approach, see E.POSNER, D.WEISBACH, *Climate Change Justice*, Princeton University Press, 2010, pp. 1-9.

Article 4 establishes the commitments that Parties agreed to undertake, taking into account their common but differentiated responsibilities[110]. Article 4.1 sets out general commitments that apply to all Parties and which include the implementation of national programs to mitigate climate change and the need to consider climate change when developing policies; the subsequent paragraphs set out more specific commitments for developed countries that include the adoption of policies to reduce GHG emissions and the transfer of financial resources and technology to less developed countries.

While the commitments may seem generic – as they do not include, among other things, specific mitigation targets – the Convention marked the beginning of international action on several fronts and provided adequate foundation for further negotiations and (eventually) more precise obligations[111].

Article 7 established the Conference of Parties (COP), the "*supreme body of this Convention*" which "*shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention*". The COP is composed of representatives of all Parties; it meets annually and its main function is to evaluate the implementation of the commitments and to adopt the related necessary measures.

As Bodansky noted, the COPs "*have become the most distinctive type of international environmental institution*"[112]. Not only COP sessions (and decisions) draw huge attention from the public opinion and apply pressure on States to strengthen the commitments, but it is within the COP sessions that crucial climate negotiations occur. Among them, COP21 should be mentioned as it adopted the Paris Agreement. Therefore, the COP turned out to be a key institution within the climate change regime.

There have been 28 COP sessions so far, and the latest one was held in Dubai in November - December 2023[113].

COPs have become a crucial institution in international environmental law: COPs allow treaty regimes to be dynamic, to evolve and to efficiently face new problems (through the adoption of new protocols or amendments)[114].

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[110] Art. 4: "*All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances* […]".

[111] S.ATAPATTU, *Human Rights Approaches to Climate Change: Challenges and Opportunities*, Routledge, 2016, p. 23 (hereinafter S.ATAPATTU). It should be noted that setting very specific binding commitments does not necessarily result in more efficient climate action and different approaches can ben (and have been) followed, even in further negotiation (the main example being the radically different approaches adopted by the Kyoto Protocol on the one hand and the Paris Agreement on the other hand).

[112] BODANSKY et al, cit., p. 142.

[113] All information and material concerning past and future COPs can be found at: https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop.

The Secretariat, the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation are established by, respectively, Articles 8, 9 and 10. Article 11 introduces a financial mechanism aimed at providing resources and transfer of technology[115].

The FCCC does not include human rights notions, despite the generic and implicit recognition of certain procedural rights concerning public access, information and participation[116].

2.1.2 The Kyoto Protocol and subsequent developments

The first COP, held in Berlin in 1995, established the so-called "Berlin Mandate", a commission tasked with negotiating a new protocol. The main goal was to adopt an instrument that would establish specific GHG reduction obligations for Annex I Parties (developed countries), while no binding commitments would be established for developing countries. The distinction is a manifestation of the CBDRRC principle.

The Kyoto Protocol was adopted in December 1997[117] and only entered into force in February 2005 after Russia's ratification. Despite the ambitious expectations and its complex and remarkable negotiations, the Protocol quickly became controversial and was not considered entirely successful, due to several issues, including: the fact that the United States refused to ratify the treaty; the fact that no binding commitments were established for countries such as China, Brazil and India, which would quickly become some of the major contributors to GHG emissions. Therefore, the Protocol was defined as "*the wrong solution at the right time*"[118].

The protocol followed a rigid top-down approach, imposing specific obligations of result (GHG reductions): despite the debatable (and debated) approach – which would be overturned by

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[114] D.BODANSKY, *Thirty Years Later: Top Ten Developments in International Environmental Law*, in *Yearbook of International Environmental Law*, Vol. 30, No. 1, 2019, pp. 6-7.

[115] For a deeper analysis of the mentioned bodies and mechanisms, see BODANSKY et al, cit., pp. 143-148. See also L. RAJAMANI, *The United Nations Framework Convention on Climate Change: A Framework Approach to Climate Change*, in D.A. FARBER, M. PEETERS (eds.), *Elgar Encyclopedia of Environmental Law vol. 1: Climate Change Law*, Edward Elgar, 2016.

[116] L. RAJAMANI, *Human Rights in the Climate Change Regime. From Rio to Paris and Beyond*, in J. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, pp. 238-239.

[117] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, December 11, 1997, 2303 UNTS 162 (hereinafter Kyoto Protocol).

[118] A.M. ROSEN, T*he Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, in *Politics and Policy*, Vol. 43(1), 2015; see also D.G.VICTOR*, The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming*, Princeton University Press, 2004.

For a critique of the framework established by FCCC and the Kyoto Protocol, along with insights on a different approach that would favour cooperation between States, see B.TONOLETTI, *Da Kyoto a Durban. Il cambiamento climatico nel quadro internazionale*, in G.F.CARTEI (ed.), *Cambiamento climatico e sviluppo sostenibile*, Giappichelli, 2013.

the Paris Agreement – it is well known that the GHG reduction targets were not sufficiently ambitious[119].

Article 3 establishes the main commitments and timetables and adopts a system of assigned amount units (AAUs) to assess compliance with the targets (which could be met individually or jointly).

Multiple flexibility mechanisms were also introduced: Joint Implementation, regulated by Article 6 and allowing Annex I Parties to trade emission reduction units (ERUs) with other Annex I Parties; the Clean Development Mechanism, regulated by Article 12, allowing Annex I countries to undertake mitigation projects in developing countries in order to achieve GHG reduction targets; Emissions Trading, regulated by Article 17, allowed Parties to trade emissions.

A complex and meticulous compliance mechanism is regulated by Article 18 and revolves around the Compliance Committee, established by the COP[120].

Once again, the Kyoto Protocol does not include references to human rights and sticks to an environmental and economic view[121]. The lack of commitments for developing countries on the one hand, and Canada's withdrawal along with refusal to ratify from the US, resulted in a very limited scope which was soon considered insufficient. Further negotiations quickly started and led to the adoption, in December 2012, of the Doha Amendment, extending the obligations (which were to expire in 2012) to 2020: however, the Doha Amendment only entered into force in December 2020[122].

At the same time, negotiations were necessary in order to introduce binding provisions for developing countries and for States who had not ratified the Kyoto Protocol: this led to the adoption, in 2007, of the Bali Action Plan[123]. The Plan embraced, for the first time, a global vision of climate governance, addressing mitigation for both developed and developing countries (although with different wording and a persistent distinction) and setting four main themes (mitigation, adaptation, technology and financing). No reference was yet made to the human dimension of climate change; however, as some have noted – in light of the reference, included in the Plan, to a gender-sensitive approach that should consider vulnerable groups and indigenous knowledge – the human rights language was "*slowly creeping into the climate change regime*"[124].

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[119] E.HEY, *Advanced Introduction to International Environmental Law*, Edward Edgar, 2016, pp. 38-39.

[120] UNFCCC, Decision 27/CMP.1, *Procedures and mechanisms relating to compliance under the Kyoto Protocol*, FCCC/KP/CMP/2005/8/Add.3, November 30, 2005.

[121] S.ATAPATTU, cit., p. 24.

[122] General information on the Amendment and its entry into force is available at: https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment.

[123] UNFCCC, Decision 1/CP.13, *Bali Action Plan*, UN Doc. FCCC/CP/2007/6/Add.1, 2008.

[124] S.ATAPATTU, cit., p. 26.

Subsequent negotiations did not lead to the adoption of a new binding instrument. Instead, at the Copenhagen conference of December 2009, the Copenhagen Accord – a political agreement between 28 countries – was adopted[125]. Despite its non-binding nature, the Accord set a specific objective with regard to mitigation: limiting temperature increase within 2°C above pre-industrial levels. Moreover, the Accord requested developed and developing countries to, respectively, adopt emission reduction targets and adopt mitigation actions, which the States themselves would freely determine and submit[126].

The different commitments reflected faith to the CBDRRC principle, although the distinction between developed and developing countries certainly started to falter.

The Copenhagen Accord is also representative of a significant change in approach, as compared to the Kyoto Protocol: instead of establishing obligations of result from the top, commitments are freely determined from the bottom.

In 2010, the Cancun Agreements were adopted[127]. Despite the reiteration of several contents of the Copenhagen Accord, the Agreements made the first reference to human rights within the UNFCCC regime, affirming that "*Parties should, in all climate change related actions, fully respect human rights*"[128], while also recognizing the need to consider the needs of vulnerable groups, to protect them and involve them in climate action[129]. The Agreements therefore represent the starting point towards human rights protection in international climate change action. Moreover, the Green Climate Fund (GCF) was established to provide financial assistance for projects, programs, policies, and similar undertakings in developing countries. The Climate Fund represents a considerable step towards increasing international collaboration in mitigating and adapting to climate change in developing nations[130].

At the 17th COP, held in Durban in 2011, the Parties tasked the Ad Hoc Working Group on the Durban Platform for Enhanced Action[131] to start the negotiations for a new binding legal instrument. The negotiations[132] led to the adoption of the Paris Agreement.

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[125] UNFCCC, Decision 2/CP.15, *Copenhagen Accord*, December 18-19, 2009 (hereinafter Copenhagen Accord); BODANSKY et al, cit., p. 110.

[126] D.BODANSKY, *The Copenhagen Climate Change Conference: A Postmortem*, in *American Journal of International Law*, Vol. 104, p. 230.

[127] UNFCCC, Decision 1/CP.16, *The Cancun Agreements: outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*, December 10-11, 2010 (hereinafter Cancun Agreements).

[128] Ibid., para. 8.

[129] L. RAJAMANI, *Human Rights in the ...,* cit., p. 240.

[130] As of 2023, the GCF has implemented over 240 projects in developing nations, with a majority located in Africa and the Asia-Pacific region. The GCF has allocated USD 15.5 billion divided equally between mitigation and adaptation efforts. Updated information on the projects of the GCF are available at: https://www.greenclimate.fund/projects.

[131] UNFCCC, Decision 1/CP.17, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, 2011.

2.1.3 The Paris Agreement and its human rights implications

After long negotiations, the Paris Agreement was adopted on December 12 at the 21st COP. It was signed by 195 States and entered into force on November 4, 2016[133]. The Agreement is considered by many a landmark and a remarkable diplomatic achievement[134].

The Agreement established the specific goal of holding the temperature increase "*well below 2°C pre-industrial levels*" while "*pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels*". As mentioned, limiting the temperature increase to 1.5°C would significantly reduce the risks and impacts of climate change, as underlined not only in AR6 but also in the 2018 Special Report (SR1.5).

However, as clearly highlighted in the 2022 Emissions Gap Report published by the UNEP[135], the targets seem very difficult to hit in light of current emission trends, and a way steeper temperature increase is expected[136]. Current policies are estimated to determine a temperature increase of 2.8°C over the 21st century and countries' NDCs are highly insufficient as they would still lead to an increase of 2.6°C or 2.4°C. States are also off track to achieve the proposed NDCs[137].

These findings were confirmed by the 2023 Emissions Gap Report, which estimated that the full implementation of current NDCs would still lead to a temperature increase of 2.9°C.

Nonetheless, the 2° C target is particularly meaningful – and, as we will see, very relevant in the context of climate change litigation – especially as a parameter to evaluate the adequacy of State action with regard to mitigation[138].

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[132] For a detailed history of the negotiations, see J.BULMER, M.DOELLE, D.KLEIN, *Negotiating History of the Paris Agreement*, in D.KLEIN, M.P.CARAZO, J.BULMER, M.DOELLE, A.HIGHAM (eds.), *The Paris Climate Agreement: Analysis and Commentary*, Oxford University Press, 2017. For an analysis of the main features of the Agreement, see M.MONTINI, *Riflessioni critiche sull'accordo di Parigi sui cambiamenti climatici*, in *Rivista di diritto internazionale*, Vol. 100, Issue 3, 2017, pp. 719-755.

[133] UNFCCC, *Paris Agreement*, Decision 1/CP.21/, Annex, UN Doc FCCC/CP/2015/10/Add.1,Decision 1/CP.21/, 2016 (hereinafter Paris Agreement). Information on the status of treaties is accessible at: https://treaties.un.org.

[134] D.BODANSKY, *International Climate* …, cit., p. 209; see also D.BODANSKY, *The Forever Negotiations*, in *EJIL:Talk!, Blog of the European Journal of International Law* (accessible at: https://www.ejiltalk.org/the-forever-negotiations/), who observes that "*for all its limitations, the Paris Agreement still represents the best that can be agreed internationally. Although it falls short of putting the world on a pathway to limit climate change to less than 1.5°C, the pledges parties have made (in their NDCs, mid-century net-zero goals, and side announcements) would reduce temperature increase by more than a degree if fully implemented, from the 3.5-4° C projected pre-Paris to about 2.4° C today. That is a considerable achievement. While strengthening the agreement would be desirable, the more immediate challenge is to prevent backsliding from what has already been agreed, as COP27 illustrated*".

[135] UNEP, *Emissions Gap Report 2022: The Closing Window – Climate crisis calls for rapid transformation of societies*, Nairobi, 2022, accessible at: https://www.unep.org/emissions-gap-report-2022 (hereinafter 2022 Emissions Gap Report).

[136] FISCHER KUH, cit., p. 11.

[137] 2022 Emissions Gap Report, see supra, Executive Summary.

[138] C.VOIGT, *The power of the Paris Agreement in international climate litigation*, in *RECIEL*, 32(2), 2023, pp. 237–249. The author outlines the relevance of the Paris Agreement – especially Articles 2.1 and 4.3 – in interpreting obligations included in other international instruments.

What clearly differentiates the Paris Agreement from the Kyoto Protocol is its bottom-up approach. Since the Copenhagen Accord, the climate change regime started to abandon Kyoto's top-down approach, and the Paris Agreement confirms and consolidates such tendency[139].

Unlike the Kyoto Protocol, which imposed binding reduction targets, under the Paris Agreement Parties are free to determine mitigation commitments through a system of Nationally Determined Contributions (NDCs). Nonetheless, specific mechanisms were established in order to persuade countries in pursuing adequate and ambitious measures.

There is hence no obligation of achieving a specific outcome, and we can therefore again classify the main obligations established by the Paris Agreement in the context of mitigation as obligations of conduct[140].

Environmental law keeps developing tools and strategies to encourage participation by States and the Paris Agreement is a clear example, as it relies on self-determined commitments and adopts a "*hybrid approach to legal form*"[141]: despite being a treaty under international law (pursuant to the Vienna Convention on the Law of Treaties)[142], no binding commitments to reach a specific target are established.

According to Article 4, "*each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve*"; the communications occur every five years and each successive NDC is expected to represent a progression and a stronger commitment (given that no clear legal obligations are established in this regard).

The CBDDR principle is still reflected in the Paris Agreement, but with a slightly different formulation: as stated by Article 2.2, the Agreement shall be applied to reflect the CBDDR principle but "*in the light of different national circumstances*", therefore introducing a variable element to be considered when interpreting and applying the principle[143].

The Agreement also introduced a transparency framework which requires Parties to provide information on the adopted measures and a mechanism to assess the implementation of the

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[139] M.DOELLE, *Assessment of Strengths and Weaknesses*, in D.KLEIN, M.P.CARAZO, J.BULMER, M.DOELLE, A.HIGHAM (eds.), *The Paris Climate Agreement: Analysis and Commentary*, Oxford University Press, 2017, pp. 375-376.

[140] FISCHER KUH, cit., p. 15. See also J.WERKSMAN, *Remarks on the International Legal Character of the Paris Agreement*, in *Mayland Journal of International Law*, Vol. 34, Issue 1, p. 362.

[141] D.BODANSKY, *Thirty Years Later …* , cit., p. 11

[142] Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331. As some have noted, there is no doubt that the Paris Agreement is a binding treaty under international law; however, establishing whether specific provisions are binding or not is a different matter, to be solved on a case by case basis and in light of the wording of the provision, see R.BODLE, S.OBERTHÜR, *Legal Form of the Paris Agreement and Nature of Its Obligations*, in D.KLEIN, M.P.CARAZO, J.BULMER, M.DOELLE, A.HIGHAM (eds.), *The Paris Climate Agreement: Analysis and Commentary*, Oxford University Press, 2017, pp. 97.

[143] L.RAJAMANI, E.GUÉRIN, *Central Concepts in the Paris Agreement and How They Evolved*, in D.KLEIN, M.P.CARAZO, J.BULMER, M.DOELLE, A.HIGHAM (eds.), *The Paris Climate Agreement: Analysis and Commentary*, Oxford University Press, 2017, pp. 83-84.

Agreement: the "global stocktake"[144]. COP28, which was held between November 30 and December 12, 2023[145], marked the conclusion of the first global stocktake (which is thereafter undertaken every five years). UNFCCC Executive Secretary Simon Stiell observed that the decision that concluded COP28[146] represents the "*beginning of the end*" of the fossil fuel era[147]. The decision called upon Parties to contribute to various global efforts which include "*Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner* […]" and "*Phasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible*"[148].

During the negotiations of the Agreement, significant and incisive human rights advocacy emerged, which not only put pressure on the Parties but also raised awareness in the public opinion.

From non-governmental organizations to international bodies, many parties requested the introduction of human rights concerns in the Agreement. In 2014, 27 UN Special Procedures mandate holders, requested the inclusion of human rights in a new climate agreement[149].

Although proposals were made to include human rights references in operative parts of the agreement[150], multiple disagreements between the parties emerged during the negotiations, and human rights provisions were eventually only included in the Preamble[151], which reads as follows: "*Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity*".

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[144] For a detailed analysis of the mechanism, see J.FRIEDRICH, *Global Stocktake (Article 14)*, in D.KLEIN, M.P.CARAZO, J.BULMER, M.DOELLE, A.HIGHAM (eds.), *The Paris Climate Agreement: Analysis and Commentary*, Oxford University Press, 2017, p. 319 and ff.

[145] Up-to-date information on the 2023 global stocktake is available at: https://unfccc.int/topics/global-stocktake/about-the-global-stocktake/why-the-global-stocktake-is-a-critical-moment-for-climate-action.

[146] UNFCCC, *Draft decision -/CMA.5 Outcome of the first global stocktake*, FCCC/PA/CMA/2023/L.17, December 13, 2023.

[147] The press release, along with a brief recap of the main achievements of COP28, is available at: https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era.

[148] UNFCCC, *Draft decision …,* see supra, para. 28, lett. d), lett. h).

[149] For a detailed reconstruction of the human rights claims during the negotiations, see B.MAYER, *Human Rights in the Paris Agreement*, in *Climate Law,* Vol. 6, p. 111.

[150] C.T.ANTONIAZZI, *What Role for Human Rights in the International Climate Change Regime? The Paris Rulebook Between Missed and Future Opportunities*, in *Diritti umani e diritto internazionale*, Issue 2, May-August 2021, p. 439.

[151] The Preamble bears relevance in interpreting the treaty, according to Article 31.2 of the 1969 Vienna Convention on the Law of Treaties. See also L.RAJAMANI, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, in *Journal of Environmental Law*, Vol. 28/2, 2016, p. 343, underlining the relevance of the location of the provision: "*If it is located in the preamble, for instance, it provides context, adds 'colour, texture and shading' to the interpretation of the agreement, including in determining the 'object and purpose of the agreement', but it will not by itself create rights and obligations for Parties*"

From a human rights perspective, the Paris Agreement represents a milestone as it is the first multilateral environmental treaty that includes human rights discourse[152].

A careful analysis of the wording, however, shows that the inclusion is very circumscribed: firstly, it refers to "*respective obligations*" therefore suggesting that no new obligations are established; secondly, it refers to taking action and seems, therefore, to merely consider response measures adopted by States to tackle climate change while "*it is silent with respect to whether they should take human rights considerations into account in determining the ambition, scope and scale of their mitigation or adaptation actions*"[153].

The wording is also quite vague and obscure where it requires States to "*respect, promote and consider*" their human rights obligations, rather than requiring them to respect, protect and fulfil human rights: the notorious tripartite division of human rights obligations is therefore rejected in favour of a generic – and seemingly weaker – formulation. This determines a discrepancy between the concepts and contents of international human rights law and those of the climate change regime.

The list of rights included in the Preamble is also questionable and does not include, for instance, the right to life: this shows, once again, the non-technical and somewhat generic language adopted within the climate change regime.

The formulation seems to indirectly recognize the need to respect procedural rights (also as a mean to safeguard vulnerable groups) and, therefore, obligations of conduct; but no substantive obligations, nor obligations of result, are established[154].

Despite the criticisms, the consequences of the absence of clear human rights obligations within the climate change regime should be carefully evaluated: human rights obligations are established by human rights law; therefore, answers on whether an obligation for States exists or not should, first of all, be sought within human rights norms. Human rights obligations would therefore certainly not lose relevance, even if they were completely neglected within the climate change regime.

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[152] A.SAVARESI, *The Paris Agreement: A New Beginning?*, in *Journal of Energy & Natural Resources Law*, Vol. 34, N. 1, 2016, p. 25 where the inclusion of human rights in the Preamble is defined as a "marginal victory"; see also B.MAYER, *Human Rights in* .., cit., p. 117, observing that the Agreement constitutes a step forward for human rights and climate change, although the provisions on human rights are "*mostly vague and incantatory*".

For an overview of the gradual emergence of human rights concerns in the climate regime, see S.DUYCK, S.JODOIN and A.JOHL *Integrating human rights in global climate governance: An introduction*, in S.DUYCK, S.JODOIN and A.JOHL (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, 2018, pp. 3-4.

[153] D.BODANSKY, *International Climate Change Law*, cit., p. 228.

[154] L.RAJAMANI, *Integrating Human Rights in the Paris Climate Architecture: Contest, Context, and Consequence*, in *Climate Law,* Issue 9, 2019, pp. 189-201.

At the same time, the inclusion of human rights within specific regimes is not merely a symbolic action. The inclusion is desirable and very useful, especially – and for the purpose of this analysis – for its implications on climate litigation based on human rights[155]. As will emerge from the analysis of rights-based litigation, the Paris Agreement and its (albeit limited) reference to human rights, constitute a fundamental element of the plaintiffs' allegations and overall strategy.

Besides the preamble, human rights are never explicitly mentioned in the Agreement, although, as some scholars have underlined[156], human rights are evoked and echoed by several provisions, especially those related to adaptation (including Artt. 6 and 7), that mention gender-responsive action, participatory and transparent approaches and consideration for vulnerable groups.

Nonetheless, the Paris Agreement represents a key passage towards the inclusion of human rights discourse within the climate change regime.

2.1.4 The Paris Rulebook and beyond

COP24 was held in Katorwice in December 2018 and adopted the Paris Rulebook[157], a document that aimed to implement the Paris Agreement by providing detailed guidelines for the Parties. The Rulebook mainly addressed transparency and accounting, by specifying the contents of NDCs and requiring Parties to provide related information[158]. Other aspects were left for subsequent COPs to regulate.

Despite evoking human rights through generic statements, the Rulebook does not contain any human rights reference nor does it provide insights or clarification on the provisions of the Paris Agreement. Therefore, its outcome was considered underwhelming[159].

COP25, which was held in Madrid in December 2019, failed to finalize the Rulebook and was once again negligible with regards to human rights[160].

COP26 was held in Glasgow and adopted the Glasgow Climate Pact (GCP)[161], requesting States to strengthen their mitigation commitments by revisiting their NDC's and, generally, to

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[155] J. KNOX, *The Paris Agreement as a Human Rights Treaty*, in D. AKANDE, J. KUOSMANEN, H. MCDERMOTT, D. ROSER (eds.), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*, Oxford University Press, 2020, pp. 323 ff. The author underlines that the inclusion of human rights within other international regimes is necessary and examines how human rights law may influence the climate change regime.

[156] C.T.ANTONIAZZI, *What Role for …,* cit., p. 441.

[157] UNFCCC, Decision 4/CMA.1, *Further Guidance in Relation to the Mitigation Section of Decision 1/CP.21*, Doc, FCCC/PA/CMA/2018/3/Add.1, December 15, 2018.

[158] See M.DOELLE, *The Heart of the Paris Rulebook: Communicating NDCs and Accounting for Their Implementation*, in *Climate Law*, Issue 9, 2019, pp. 3-20.

[159] C.T.ANTONIAZZI, *What Role …,* cit., p. 467, stating that "*Paris Rulebook has missed several opportunities to specify what human rights obligations concretely imply for States when they act to implement the Paris Agreement*".

[160] A brief recap of the outcomes of COP25, provided by the European Parliamentary Research Service, is available at: https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649324/EPRS_ATA(2020)649324_EN.pdf.

strengthen their climate action in order to meet the goals established by the Paris Agreement[162]. The missing rules of the Rulebook were also adopted[163]. No human rights provisions were introduced (despite reproducing formulas already present in the Paris Agreement).

Sharm el-Sheikh hosted COP27, which achieved the remarkable result of establishing a loss and damage fund[164]: the establishment of such fund was strongly demanded by several developing countries and small-island States. It is now clear that loss and damage – which generally refers to harm caused by climate change through extreme events and slow-onset events[165] – represents now a crucial element of climate change and should therefore always be considered in climate policy along with mitigation and adaptation[166]. Once again, no specific provisions on human rights are found, despite a generic mention of food security risks.

As mentioned, COP28 (which was held in Dubai in from November 30 to December 12, 2023) concluded and evaluated the first global stocktake, and confirmed that current policies and current NDCs are largely insufficient to hit the targets set by the Paris Agreement. COP28 also reached an agreement on the operationalization of the loss and damage fund[167].

In November 2022, the Center for International Environmental law (CIEL) and the OHCHR published a toolkit to integrate human rights in nationally determined contributions, providing guidance to States and policymakers in integrating human rights in their NDCs during the planning, implementation and evaluation phases[168].

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[161] UNFCCC, Decision, 1/CMA.3, *Glasgow Climate Pact,* FCCC/PA/CMA/2021/10/Add.1, November 13, 2021.

[162] For a general evaluation of the Glasgow Climate Pact, see R.LYSTER, *The Glasgow Climate Pact, Is It All Just 'Blah, Blah, Blah?',* in *Yearbook of International Disaster Law Online*, April 13, 2023; see also J.DEPLEDGE, M.SALDIVIA, C.PEÑASCO, *Glass half full or glass half empty?: the 2021 Glasgow Climate Conference,* in *Climate Policy*, Vol. 22, n. 2, 2022, pp.147-157.

[163] See generally R.S.SUN, X.GAO, L.C.DENG, C.WAN, *Is the Paris rulebook sufficient for effective implementation of Paris Agreement?*, in *Advances in Climate Change Research*, Vol. 22, 2022.

[164] Loss and damage is a topic that has slowly developed within the UN regime. The first step was the establishment of the Warsaw International Mechanism for Loss and Damage at COP19 (UNFCCC, Decision 2/CP.19, *Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts*, November 23, 2013), which was followed by the inclusion of a specific provision on loss and damage in the Paris Agreement (Article 8) and the establishment, at COP25, of the Santiago Network for Loss and Damage, to link assisting and assisted countries (UNFCCC, Decision 2/CMA.2, *Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and its 2019 review*, 2019); see also D.BODANSKY, *The Forever Negotiations …,* cit.

For an in-depth analysis of the mechanism of the concept and its implementation in the UNFCCC regime, see B.MAYER, *The International Law …* , cit., pp. 183-194.

[165] However, the UNFCCC regime does not provide a definition of loss and damage and scholars have proposed various definitions, see M.BROBERG, B.M.ROMERA, *Loss and damage after Paris: more bark than bite?*, in *Climate Policy*, Vol. 20 n. 6, 2020, pp. 662-663.

[166] See M.DOELLE, S.SECK, *Loss & damage from climate change: from concept to remedy?*, in *Climate Policy*, Vol. 20 n. 6, 2020, pp. 670-680, displaying how litigation could be a useful tool to respond to loss and damage and seek adequate remedy.

[167] See the press release available at: https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era.

[168] OHCHR, CIEL, *Integrating Human Rights in Nationally Determined Contributions (NDCs), Toolkit For Practitioners*, November 2022, available at: https://www.ohchr.org/en/climate-change.

It is worth observing that, despite the widespread disappointment associated with a lack of consideration for human rights within the UNFCCC regime, it is not obvious what the ideal content of human rights provisions should be. NGO's, along with UN Bodies, have often advocated a reference for human rights, not only during the negotiations of the Paris Agreement, but also in subsequent COPs[169]: however, the precise legal implications that such references would generate are unclear and difficult to predict. At the same time, the adequacy of the inclusion of more specific provisions aimed at clarifying human rights obligations (or establish new ones) within the climate regime is also questionable (and has been much debated within negotiations)[170].

As will be discussed in the next paragraphs, international climate change law and human rights law are closely related and easily overlap. The failure to include human rights in COP24 was then considered a missed opportunity or even a step backwards. In light of the outcomes of subsequent COPs, it seems clear that, as it stands, Parties to the UNFCCC regime seem reluctant to build upon the basis established by the Paris Agreement's Preamble[171]. It remains to be seen how to the two regimes will interact in the future and whether potential developments within the UNFCCC regime will also have an impact on human rights law and obligations. The inclusion of human rights concerns – in light of the proposals formulated by several UN Bodies, and without necessarily establishing new obligations for States – would certainly guarantee, at the very least, better coherence between the systems. As Duyck noted, lack of human rights considerations within the UNFCCC regime "*might lead to a strengthening of the role of human rights institutions, including the Human Rights Council, its Special Procedures mandate holders, and the human rights treaty bodies*"[172], adding that "*If the climate change regime continues to plod several years behind normative developments in human rights institutions on the interplay between human rights and*

[169] A description of the efforts made by the OHCHR and the HRC to integrate human rights in the UNFCCC regime can be found at: https://www.ohchr.org/en/climate-change/integrating-human-rights-unfccc. See also UNHCHR, *Open-Letter from the United Nations High Commissioner for Human Rights on priorities for human rights-based climate action at the 27'h Conference of the Parties to the United Nations Framework Convention on Climate Change*, available at: https://www.ohchr.org/sites/default/files/2022-11/2022-11-02-HC-Open-Letter-to-UNFCCC-COP27.pdf; see, ahead of COP24, UNHCHR, *Open-Letter from the United Nations High Commissioner for Human* Rights on Integrating Human Rights in Climate Action, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/OpenLetterHC21Nov2018.pdf.

[170] D.BODANSKY, *International* …, cit., p. 311, where the author illustrates how some Parties argued that introducing human rights concerns in the Paris Agreement would "*dilute the climate objectives it contained*" and that "*other forums are more appropriate for furtherance of human rights objectives*"; see also S.DUYCK, *Delivering on the Paris Promises? Review of the Paris Agreement's Implementing Guidelines from a Human Rights Perspective*, in *Climate Law*, Issue 9, 2019, pp. 222-223.

[171] In 2017, Quirico noted that "*Institutional integration between climate change and human rights is far from achieved regionally and internationally. However, a regional tendency is progressively emerging to substantively ground integration in the human right to a sustainable environment*", O.QUIRICO, *Systemic integration between climate change and human rights in international law?,* in *Netherlands Quarterly of Human Rights*, Vol.35, Issue 1, March 2017, pp. 31-50.

[172] S.DUYCK, *Delivering on …*, cit., p. 223.

climate change, it risks undermining its own role as the powerhouse for shaping and governing climate change responses"[173].

2.2 The European framework

The European Union has now taken a leading role in the fight against climate change, a commitment rooted in a long history of environmental protection that began in the 1970s and led to the adoption of specific initiatives to combat air pollution in the 1980s, even before the adoption of the FCCC[174]. The Single European Act of 1986 introduced environmental protection into the Treaties, and subsequent amendments by the Treaties of Maastricht, Amsterdam and Lisbon have progressively structured and specified European environmental policy. With the 2007 Lisbon Treaty and the introduction of Art. 191 TFEU, the problem of climate change and the need for efforts to combat this phenomenon found explicit recognition in treaty law.

Art. 191 TFEU sets out the Union's environmental objectives and the principles to guide EU action[175], while Art. 192 TFEU regulates the decision-making procedures (establishing the ordinary legislative procedure as a general rule, but also providing for cases in which the Council acts

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[173] Ibid.

[174] A.PISANÒ, *Il diritto al clima. Il ruolo dei diritti nei contenziosi climatici europei*, Edizioni Scientifiche Italiane, 2022, pp. 149-150. See also, for a detailed reconstruction of the development of environmental law in the EU, G.CORDINI, P.E.M.FOIS, S.MARCHISIO, *Diritto ambientale. Profili internazionali europei e comparati*, Giappichelli, 2017, pp. 61-107.

[175] Art. 191 TFUE reads as follows:

" *1. Union policy on the environment shall contribute to pursuit of the following objectives:*

— preserving, protecting and improving the quality of the environment,

— protecting human health,

— prudent and rational utilisation of natural resources,

— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

— available scientific and technical data,

— environmental conditions in the various regions of the Union,

— the potential benefits and costs of action or lack of action,

— the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements".

unanimously). In addition, eight Environment Action Programs have been adopted since 1973, and the eighth was adopted in 2022[176].

Since 2009, the European Union has taken systematic actions to reduce GHG emissions, with gradually more ambitious and long-term targets. However, the most significant developments have occurred since 2016.

In October 2016, the EU ratified the Paris Agreement, and has subsequently submitted, as one Party, its NDCs pursuant to Art. 4.9 of the Agreement. Subsequent actions by the Union have provided a stronger impetus to achieve climate mitigation goals, in parallel with the consolidation of scientific data provided by the IPCC and the worrying scenarios already highlighted at that time in IPCC's SR1.5.

In 2018, Regulation No. 2018/1999 on Governance of the Energy and Climate Action Union was adopted[177], aiming to achieve the goals set in the Paris Agreement by requiring member States to adopt National Energy and Climate Plans (NECPs), to be submitted to the EU Commission for its approval. Said plans must include the State's strategy with regard to GHG emissions, decarbonisation, energy efficiency and security, the energy market, research and innovation; moreover, they must be periodically updated[178]. This is an aspect that, as will be seen, has also become relevant in the context of national climate litigation[179].

In 2019, the European Green Deal was adopted through a communication from the European Commission: this is a document that identifies a set of policies aimed at combating climate change and achieving the green transition and climate neutrality by 2050[180].

It is within the European Green Deal context that the European Climate Law was adopted, with Regulation n. 2021/1119[181]. The Regulation – which is binding and directly applicable in all member States – established the framework for achieving climate neutrality, setting a binding target of neutrality by 2050. Art. 1.2 provides that "*This Regulation sets out a binding objective of climate*

[176] *EU Decision 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030*, Doc. n. 32022D0591, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022D0591. More information on the 8th Environment Action Programme is available at: https://environment.ec.europa.eu/strategy/environment-action-programme-2030_en.

[177] *Regulation (EU) 2018/1999 of the European Parliament and of the Council*, L 328/1, December 11, 2018.

[178] For updated information on NECPs, see: https://commission.europa.eu/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-energy-and-climate-plans_en.

[179] It can already be pointed out, for instance, that in the context of Italian and Spanish climate litigation the plaintiffs have, among other grievances, highlighted the inadequacy of the national plans adopted pursuant to Reg. 2018/1999.

[180] *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Green Deal*, Brussels, COM (2019) 640 final, December 11, 2019.

[181] *Regulation (EU) 2021/1119 of the European Parliament and of the Council*, L 243/1, June 30, 2021.

For a detailed analysis of the Regulation, see D.BEVILACQUA*, La normativa Europea sul clima e il Green New Deal. Una regolazione strategica di indirizzo*, in *Rivista trimestrale di diritto pubblico*, n. 2, 2022, pp. 297-327.

neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030".

In order to achieve climate neutrality by 2020, the Regulation established the intermediate goal of a domestic reduction of GHG emissions by at least 55% compared to 1990 levels by 2030 and devised specific mechanisms to constantly monitor progress.

Additionally, it provided the European Scientific Advisory Board on Climate Change with the task of providing scientific advice to support the Union's policy-making, while inviting Member States to establish a national climate advisory body to provide advice to the national authority.

The regulation also addressed adaptation, recognizing the need to continuous progress to enhance adaptive capacity, strengthen resilience and to reduce vulnerability, while requiring the Commission to adopt a Union strategy on adaptation.

The European Climate Law represents the most recent and ambitious attempt by the European Union to provide a consistent, evidence-based framework for developing – through public participation – mitigation and adaptation policies across Member States.

In doing so, the new framework aims to enhance public and stakeholders' participation and science-based decision-making, along with frequent updates to assess progress. However, some authors critically remarked that the regulation leaves too much discretion to Member States and does not establish any specific and detail policy for reduction of GHG emissions; although this is coherent with the idea of a gradual transition, such approach may not be incisive enough[182].

Through procedural provisions that guarantee the participation of privates in developing climate change policies, the regulation demonstrates that a successful climate action entails both top-down and bottom-up approaches[183].

In July 2021, the Commission adopted the so-called "Fit for 55": a range of legislative proposals aimed at achieving the goals established in the European Climate Law[184]. This has led to the adoption, in 2023, of all the elements of the framework, including the EU's emissions trading system[185] and the social climate fund[186].

[182] D.BEVILACQUA*, La normative ...,* cit., pp. 325-326.
[183] Ibid., pp. 326-327.
[184] More information on the legislative package is available at: https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/
[185] *Directive (EU) 2023/959 of the European Parliament and of the Council*, L 130/134, May 10, 2023.
[186] *Regulation (EU) 2023/955 of the European Parliament and of the Council*, L 130/1, May 10, 2023.

In October 2023, the Council submitted updated NDC on behalf of the EU and the Member States to the UNFCCC, which update 2020's NDC and aims to achieve the 55% GHG reduction target by 2030, pursuant to the "Fit for 55" objectives.

2.3 Relevant rules and principles of International environmental law

International climate change law, interpreted in a broader sense, includes – despite all specific treaty regimes that directly or indirectly concern climate change – norms and principles of general international law that are relevant in the context of climate change[187].

Climate change emerged, first of all, as an environmental issue. Therefore, concepts, principles and norms of international environmental law are particularly relevant.

Assessing the content and legal status of these principles is a necessary step in order to establish what obligations States bear under international law in the context of protecting the climate system.

However, unlike most environmental harms, climate change crosses national boundaries to a degree that is unprecedented, and its transboundary impacts differ significantly from typical transboundary environmental harms (where specific activities from a State would pollute certain areas of a different State), posing even more difficult issues (including those related to causation).

Nonetheless, several core principles of international environmental law – which will be briefly recalled in the following paragraphs – play a role in climate change and climate change litigation: firstly, the plaintiffs' arguments are sometimes grounded (among other sources) on these principles; secondly, these principles have revealed to be important parameters that courts need to consider when assessing the legitimacy of States' conduct.

It is hence appropriate to illustrate the main environmental principles that are relevant to climate change and climate change litigation, making it clear from the outset that they have arisen in the context, and primarily concern, relations between States, and therefore operate horizontally; despite their general relevance to climate change, they often remain in the background in the context of rights-based litigation (although their sporadic valorisation will be highlighted in individual cases in the following)[188].

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[187] B.MAYER, *The International Law* …, cit., p. 12; D.BODANSKY, *International Climate Change Law*, cit., pp. 10-11. Moreover, several initiatives at national, regional and international level have emerged with regard to climate change (in all areas of law) and the implications of the phenomena are related to multiple sectors of international law (including human rights, migration, biodiversity, security, trade and competition): scholars have therefore often debated about the fragmentation of climate change governance, see D. BODANSKY, *International Climate Change Law*, see supra, p. 33; see also O.QUIRICO, *Disentangling Climate Change Governance: A Legal Perspective,* in *Review of European Community & International Environmental Law*, 21(2), 2012, p. 97.

[188] See generally, on international State responsibility related to climate change, M. GERVASI, *Le regole della responsabilità internazionale degli Stati dinanzi alla sfida del cambiamento climatico*, in A. SPAGNOLO, S.

The legal grounding of these norms and principles must be addressed on a case-by-case basis, as the issue is highly debated, especially with regards to locating the principles within international customary law[189]: it is understood, however, that these principles may become binding between the parties where they are transposed in international agreements[190].

Authors use different categories to classify environmental concepts, principles and norms. A particularly useful distinction – which will be followed in the following analysis – is that between principles of prevention and principles of balance: the former (which include the no-harm principle, the prevention and precautionary principles and other procedural principles) generally apply to all States and aim to avoid or reduce environmental damage; the latter (which include the polluter-pays principle, the CBDR principle and inter-generational equity) aim to establish differentiation between States and achieve a balance between environmental protection and other interests[191].

The general duty to cooperate could be seen as the backbone of climate action, especially in the context of addressing global problems[192]. Indeed, several norms of international law – including

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SALUZZO (eds.), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Ledizioni, 2017, pp. 61-88.

[189] Furthermore, even the inquiry about the existence of customary rules and the criteria to identify such rules is a much debated issue, especially in the context of environmental protection. See R.M.BRATSPIES, *Reasoning Up. Environmental Rights as Customary International Law*, in J. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, pp. 122-135. As Bratspies notes, when delineating international customary rules, the traditional approach is usually focused on an top-down analysis at international level (assessing States' interactions, the content of multilateral treaties, declarations from UN Bodies); however, the author suggests that a bottom-up (or "reasoning up") approach could be followed, where customary rules may emerge as a consequence of near-universal environmental duties established by States at national level through their municipal laws, observing that "*under such an approach, the consistency of environmental principles enshrined across state regulatory law becomes evidence of both state practice and opinion juris*" (p. 122). Bratspies concludes that "*Too often, international law and domestic law are treated as independent spheres developing in parallel rather than in dialectical tension. Looking to how states consistently bind themselves through their domestic laws can provide valuable information about how states view their own obligations qua states*" (p. 134).

[190] For an analysis of the contents of customary international environmental law and its formation, see P.M.DUPUY, G.LE MOLI, J.E. VIÑUALES, *Customary international law and the environment*, in L.RAJAMANI, J.PEEL (eds.), *The Oxford Handbook of International Environmental Law, Oxford University Press*, 2021, pp. 385-401; see also S.DI BENEDETTO, *Sovranità dello Stato sulle risorse naturali e tutela degli equilibri ecologici nel diritto internazionale generale*, Giappichelli, 2018.

For an overview of environmental protection within international, regional and Italian sources, see S.GRASSI, *La tutela dell'ambiente nelle fonti internazionali, europee ed interne*, in *Federalismi.it,* n. 13. 2023, pp. 1-46.

[191] DUPUY, VIÑUALES, *International Environmental Law*, cit., p. 61; E.HEY, *Advanced Introduction to …,* cit., p. 58 (adopting a distinction based of relations of interdependence); see also, for an analysis of the core principles of international environmental law, P.SANDS, J.PEEL, *Principles of International Environmental Law*, Cambridge University Press, 2018, pp.197-251; M.GERVASI, *Prevention of Environmental Harm Under General International Law. An Alternative Reconstruction*, Edizioni Scientifiche Italiane, 2021; M.FITZMAURICE, M.BRUS, P. MERKOURIS, A. RYDBERG (eds.), *Research Handbook on International Environmental Law*, Edward Elgar, 2021.

For an in-depth analysis of the no-harm principle, see J.BRUNNÉE, *Harm Prevention*, in L.RAJAMANI, J.PEEL (eds.), *The Oxford Handbook of International Environmental Law, Oxford University Press*, 2021, pp. 269-284.

[192] K.HORNE, M.A.TIGRE, M.B.GERRARD, *Status Report on Principles of International and Human Rights Law Relevant to Climate Change*, Sabin Center for Climate Change Law, Columbia Law School, 2023, p. 21, affirming that the duty to cooperate "*is not only a well-established general principle of international law, but also one of the most significant norms of contemporary international environmental law*". The authors underline how to principle is included in numerous environmental treaties and vastly present in the jurisprudence at all levels.

the UN charter, which places cooperation at its core – suggest that a duty to cooperate exists at international level. Despite the, once again debatable, legal status of the principle, it is worth stressing that cooperation is a fundamental aspect in the UNFCCC regime, and appears in all the core instruments. For instance, the Paris Agreement stresses the need for effective cooperation in various areas: effectiveness of NDCs; support for other States; education, awareness, public participation, and public access to information[193].

2.3.1 Principles that reflect prevention

The no-harm principle (also referred to as the duty to prevent transboundary harm) is a pillar of international environmental law, and one of the first principles that emerged. Its first formulation dates back to the *Trail Smelter* case[194] and its customary nature was confirmed by the International Court of Justice (ICJ) in the *Corfu Channel* case, defining it "*every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*"[195].

The principle has also been defined as the duty of States to ensure that "*activities carried out within their jurisdictions do not harm the environment and territory of other States*"[196].

The International Law Commission (ILC) has also specifically addressed the content of the principle in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities[197]. Article 3 provides that the State of origin – which is the State in the territory or otherwise under the jurisdiction or control of which activities that involve a risk of causing significant transboundary harm are carried out – shall take "*all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof*"[198]. Other duties are established in subsequent articles and include cooperation in good faith to prevent significant transboundary harm or

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For an overview of civil liability for transboundary pollution in public and private international law, see G.LAGANIÈRE, *Liability for Transboundary Pollution at the Intersection of Public and Private International Law*, Bloomsbury, 2022.

[193] Paris Agreement, see supra, see Article 6, Article 7, Article 12. For an overview of the role of cooperation, its development and its future in the UNFCCC regime, see J.RUDALL, *The Obligation to Cooperate in the Fight against Climate Change*, in *International Community Law Review* (23), 2021, pp. 184-196.

[194] *Trail Smelter Arbitration*, Reports of International Arbitral Awards, vol. III, pp. 1905–1982.

[195] *Corfu Channel case (UK v. Albania)*, ICJ Reports, 1949, p. 22.

[196] K.HORNE, M.A.TIGRE, M.B.GERRARD, *Status Report on Principles of International and Human Rights Law Relevant to Climate Change*, Sabin Center for Climate Change Law, Columbia Law School, 2023, p. 10, citing *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, July 12, 2016, para. 941.

[197] International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, 2001, For the purpose of the Draft, Article 2 points out that: "(*a) "Risk of causing significant transboundary harm includes risks taking the form of a high probability of causing significant transboundary harm; (b) "Harm" means harm caused to persons, property or the environment; (c) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border* […]".

[198] International Law Commission, *Draft Articles* …, see supra, Article 3.

minimize the risks[199], the implementation of legislative, administrative or other action including monitoring mechanisms[200], the assessment of risks in decision-making and consultation between States on prevention measures[201].

The scope of the principle gradually expanded – in conformity with principles set by the Stockholm Declaration and the Rio Declaration[202] – leading to the emergence of the more comprehensive prevention principle, inclusive of the duty to prevent harm caused to areas beyond national boundaries and jurisdiction, as the ICJ recognised in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, affirming its customary nature by stating that "*the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*"[203].

The distinction between the two principles – as expressed in Principle 21 and Principle 2 of, respectively, the Stockholm Declaration and the Rio Declaration – lies in the their focus: States' liability for damage caused to other States in the first case and the general duty to prevent damage to the environment in the second[204].

The ICJ confirmed the structure of the prevention principle in the Pulp Mills case[205] and in the Costa Rica/Nicaragua case[206][207].

The principle is considered to establish obligations of conduct, and the assessment on the adequacy of States' conduct must consider several factors, including the nature of the environmental issue and the best available techniques and environmental practices[208].

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[199] Ibid., Article 4.

[200] Ibid., Article 5.

[201] Ibid., Articles 8 and 10.

[202] UN, *Rio Declaration on Environment and Development,* see supra, Principle 2, reading: "*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*"; See also UN, *Stockholm Declaration*, see supra, Principle 21.

[203] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, para. 29.

[204] DUPUY, VIÑUALES, *International Environmental Law*, cit., p. 66.

[205] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports, 2010.

[206] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* ICJ Reports, 2015, p. 665.

[207] DUPUY, VIÑUALES, *International Environmental Law*, cit., p. 69, noting that "*In its present understanding, the prevention principle entails: (i) a general duty not only to refrain from causing significant damage to the environment but also to pro-actively take measures to prevent such damage as well as to ensure that such measures are effectively implemented; (ii) with a first procedural extension in the form of a duty of cooperation, particularly through notification and consultation, as well as (iii) a second procedural extension in the form of a requirement to conduct an environmental impact assessment where the proposed activity is likely to have a significant adverse impact*".

[208] E.HEY, *Advanced Introduction to ...,* cit., p. 71; see also K.HORNE, M.A.TIGRE, M.B.GERRARD, *Status Report ...,*cit., p. 11.

The relevance and applicability of the no-harm and prevention principles with respect to climate change is very problematic and debated, also as a consequence of the global nature of the phenomenon and the difficulty to attributing harm to specific actions or omissions[209].

Although the vast majority of the doctrine, along with the above-mentioned international rulings, consider the no-harm and prevention principles to be part of customary international law, such conclusion is questionable: some authors note that there is currently no settled State practice (*diuturnitas*) and there only seems to be a push in that direction from the international jurisprudence, therefore concluding that the rule is, at best, an emerging principle, and that principles enshrined in the Stockholm Declaration (Art. 21) and Rio Declaration (Art. 2) currently do not correspond to customary international law[210].

The precautionary principle – which is also enshrined in the Rio Declaration[211] – has several different formulations within treaty regimes, case law and soft-law instruments and its content and legal status are debated among scholars[212].

In general, the principle requires due diligence in case of scientific uncertainty; such uncertainty should not prevent States from taking adequate action, especially if environmental consequences could be severe or irreversible[213]. However, what is still debated and difficult to establish is the required standard of proof and, moreover, whether the burden of the proof lies with the plaintiff or the defendant[214].

Some argue that the principle is part of customary international law (at least in the context of specific areas) or constitutes a general principle of international law; however, such conclusion is highly debated and the issue is still unsettled[215].

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[209] C.CAMPBELL-DURUFLÉ, *The Significant Transboundary Harm Prevention Rule and Climate Change: One-Size-Fits-All or One-Size-Fits-None?*, in B.MAYER, A.ZAHAR (eds.), *Debating Climate Law*, Cambridge University Press, 2021, p. 31; see also, for a diametrically opposed view, S.MALJEAN-DUBOIS, *The No-Harm Principle as the Foundation of International Climate Law*, in B.MAYER, A.ZAHAR (eds.), *Debating Climate Law*, Cambridge University Press, 2021, p. 16, who observes that the "*no-harm principle was first recognized in a transboundary context, but it also applies to global threats like climate change*".

[210] B.CONFORTI, M.IOVANE, *Diritto internazionale*, Editoriale Scientifica, 2021, pp. 245-246. Nonetheless, Conforti and Iovane conclude that an obligation of cooperation and information between States exists in case of harmful use of territory.

[211] UN, *Rio Declaration on Environment and Development,* see supra, Principle 15, stating that: "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*".

[212] K.HORNE, M.A.TIGRE, M.B.GERRARD, *Status Report ...,* cit., p. 16, where the authors note that "*International courts and tribunals have been reluctant to accept that the precautionary principle has status as customary international law*"; see generally, on the precautionary principle in international law, S.DI BENEDETTO*, Il principio di precauzione nel diritto internazionale*, Argo, Lecce, 2012.

[213] DUPUY, VIÑUALES, *International Environmental Law*, cit., p. 70.

[214] HORNE, M.A.TIGRE, M.B.GERRARD, *Status Report ...,* cit. p. 18.

[215] Ibid.

Nonetheless, the principle is included in multiple agreements and, as of interest here, it is one of the principles that should guide the Parties to the FCCC pursuant to Art. 3.3, which provides that "*Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects*. *Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures* […]".

As will be illustrated in the following chapters, the principle is recognized and applied in the recent jurisprudence of the European Court of Human Rights (ECtHR) in the context of environmental protection; moreover, it is mentioned in the Treaty on the Functioning of the European Union and the Court of Justice recognized its normative ground as a general principle of European Union law[216].

The duty to conduct environmental impact assessments is also particularly relevant in environmental law[217] and has now gained great attention from scholars and, even more evidently, has increasingly become relevant in recent climate litigation[218]. The principle has, once again, emerged in *soft-law* instruments and is included among the principles in the Rio Declaration[219].

The ICJ recognized its customary status in the Pulp Mills case, pointing out that "*it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource*"[220].

Norms that establish the duty for States to conduct environmental impact and risk assessments are found in numerous and different regimes[221]. Environmental assessments are

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[216] Ibid, p. 73; see European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; October 26, 2012, Art. 191.

[217] See generally V.MEUNIER-RUBEL, *Interstitial Law-Making in Public International Law: A Study of Environmental Impact Assessments,* Brill Nijhoff, 2022; A.MORRISON-SAUNDERS, *Advanced Introduction to Environmental Impact Assessment*, Edward Elgar, 2018; O.ELIAS, M.WONG, *Environmental Impact Assessment*, in M.FITZMAURICE et al. (eds.), *Research Handbook ...,* cit.

[218] F.M.PALOMBINO, D.GRECO, *La valutazione d'impatto ambientale e sanitario nel prisma della frammentazione del diritto internazionale*, in S.CAFARO (ed.), *Beni e valori comuni nelle dimensioni internazionale e sovranazionale*, Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea, XXV Convegno Lecce 24-25 settembre 2021, p. 27.

[219] UN, *Rio Declaration on Environment and Development,* see supra, Principle 17, providing that "*Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority*".

[220] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports, 2010, para. 204.

[221] F.M.PALOMBINO, D.GRECO, *La valutazione ...*, cit., p. 57.

conducted by States in the context of climate change mitigation (mainly to evaluate estimated GHG emissions of projects) but they are particularly relevant with regard to adaptation as well. This is reflected in the Paris Agreement, which requires States to "*engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions*"[222] which may include the "*assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems*"[223].

Palombino and Greco observed that the peculiar nature of climate change as a global phenomenon makes it difficult to ascertain what constitutes a "significant" impact, since all GHG emissions worldwide contribute to such impact, and not the single project alone: this explains why the US, Canada and EU followed a "quantitative approach" by establishing that when certain GHG emission thresholds are met, the obligation to conduct the assessment is established[224].

As to the legal grounding of the principle, the issue is, once again, highly debated[225]. In order to conclude that the principle is part of customary international law, settled State practice must be ascertained, and its existence is doubtful[226]. Despite being considered – by several international jurisdictions – as a part of international customary law, such conclusion has often lacked adequate motivation with regard to consistent State practice; nonetheless, some scholars highlighted that a careful and detailed analysis of the widespread State practice (especially in light of treaty regimes) unveils the grounding of such conclusion[227].

2.3.2 Principles that reflect balance

These principles include the polluter-pays principle, the principle of common but differentiated responsibilities, the principle of participation and the principle of inter-generational equity.

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[222] Paris Agreement, see supra, Article 7.9.;

[223] Ibid., Article 7.9 (c).

[224] F.M.PALOMBINO, D.GRECO, *La valutazione …*, cit., p. 48.

[225] B.MAYER, *The Emergence of Climate Assessment as a Customary Law Obligation,* in B.MAYER, A.ZAHAR (eds.), *Debating Climate Law*, Cambridge University Press, 2021, p. 286, where Mayer argues for the existence of "*an emerging rule of customary international law requiring states to conduct climate assessment*". The conclusion, however, is radically and vigorously contested by other commentators: see A.ZAHAR, *Environmental Impact Assessment for Greenhouse Gas Emissions Is Pie in the Sky*, in B.MAYER, A.ZAHAR (eds.), *Debating Climate Law*, Cambridge University Press, 2021, pp. 297-309.

[226] B.CONFORTI, M.IOVANE, *Diritto internazionale,* cit., p. 248.

[227] F.M.PALOMBINO, D.GRECO, *La valutazione …*, cit., p. 58. Other authors ground the inclusion of the principle within customary law on its universal recognition in national legislations. See R.M.BRATSPIES, *Reasoning Up* …, cit., observing that "*Support for the proposition that EIAs have become customary international law can be found in widespread state practices under municipal law. Focusing on what states actually do – how states use law to construct their own environmental decision-making authority – reveals striking, near-universal commonalities that bolster the customary law status of the EIA norm* […]. *Virtually every government has enacted EIA requirements as explicit legal principles governing their environmental decision making within its borders, with regard to choices about the environment*" (p. 123).

The polluter-pays principle is defined by Principle 16 of the Rio Declaration[228] and requires the polluter to bear the costs of pollution, and requires States to develop instruments to hold the polluter liable. As Dupuy and Viñuales observed, the main scope of the principle is international instruments is often the "*internalisation of costs at the level of individuals and enterprises. Therefore, it would be difficult to invoke the polluter-pays principle in the distribution of social costs (incurred by the international community) generated by States*"[229].

As we will see, the principle raises critical issues in the context of climate litigation, especially with regards to who should be held responsible for excessive GHG emissions.

The CBDR(RC) principle has already been addressed as a fundamental aspect of the UNFCCC regime and as the foundation of the distinction between developed and developing countries within the regime. Beyond its recognition in specific instruments, its status within the sources of international law is debated, although the issue has limited practical relevance in light of the inclusion of the principle in pertinent treaties[230].

The principle of participation in environmental decision-making operates vertically and requires States to guarantee participation to those who could potentially be affected. Beyond its recognition in the Rio Declaration, it is included is multilateral agreements and, above all, the Aarhus Convention[231]. Moreover, the right to participate in the conduct of public affairs is recognized by the International Covenant on Civil and Political Rights[232]. Participation has therefore roots in human rights law and this is particularly relevant in the contest of litigation based on human rights law, as will be highlighted in the following.

Ultimately, the principle of inter-generational equity had already been foreshadowed in the so-called 1987 Brundtland report, where it was underlined that the needs of present generations must be achieved without compromising those of future ones. Principle 3 of the Rio Declaration

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[228] UN, *Rio Declaration on Environment and Development,* see supra, Principle 16, affirming that: "*National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment*".

[229] DUPUY, VIÑUALES, *International Environmental Law*, cit., p. 83; see also B.CONFORTI, M.IOVANE, *Diritto internazionale,* cit., p. 248.

[230] Ibid., p. 85.

[231] *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, June 25, 1998, 2161 UNTS 447.

[232] UN General Assembly, *International Covenant on Civil and Political Rights* (hereinafter ICCPR), December 16, 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 25.1: "*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:(a) To take part in the conduct of public affairs, directly or through freely chosen representatives. (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;(c) To have access, on general terms of equality, to public service in his country*"

stated that "*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*".

The principle entails that present generations (and, more precisely, environmental policies adopted by present generations) should take into account the interests of future ones so that their options or the quality of the environment are not undermined[233].

The principle turned out to be particularly significant in climate change litigation. As the following chapters will illustrate, plaintiffs have often claimed not only violations of their human rights that had already occurred, but also violations of rights of future generations. Therefore, intergenerational equity has been (and will be) frequently brought to court and it constitutes one of the most interesting concepts emerging from the current litigation "explosion". The principle will therefore be addressed in the following.

It should be noted that, even with respect to the principle of intergenerational equity, its legal grounding – and, specifically, its inclusion within customary law – is debated[234].

3. Climate change as a human rights issue

When we address the relationship between climate change and human rights, we can refer to two different phenomena.

Firstly, we can refer to how the effects of climate change represent a threat to the enjoyment of a number of fundamental rights: this correlation is now self-evident and has been progressively recognized and examined by UN bodies in recent decades. It is clear that extreme events such as hurricanes and heatwaves, as well as slow on-set events such as sea level rise, can negatively affect (directly or indirectly) multiple human rights, including the right to life, the right to health and the right to food.

This aspect, and the gradual recognition of the link between climate change and human rights, will be addressed in the following paragraphs.

Secondly, the expression also highlights a more strictly legal fact, which concerns the relevance of human rights law to climate change[235]: the question is therefore what obligations are imposed on States (and on private actors) and when they can be held responsible for a violation of human rights[236].

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[233] E.HEY, *Advanced Introduction to ...,* cit., pp. 66-67

[234] B.CONFORTI, M.IOVANE, *Diritto internazionale*, cit., p. 249.

[235] S.HUMPHREYS, *Competing claims: human rights and climate harms*, in S.HUMPHREYS (ed.), *Human Rights and Climate Change*, Cambridge University Press, 2010, pp. 37-38.

[236] D.BODANSKY, *Climate change and human rights: unpacking the issues,* in *Georgia Journal of International and Comparative Law*, Vol. 38, 2010, pp. 518-519.

The mere fact that climate change interferes with human rights does not entail that a violation of human rights law has occurred and that a State is responsible for it. An approach based on human rights law is therefore much more problematic and requires multiple investigations that concern, among other issues, the identification of duty-bearers and right-holders, the content of the obligations, the causal link between the conduct and the alleged harm. These issues are central to climate change litigation and will therefore be thoroughly addressed in chapters III and IV.

3.1 Linking human rights and climate change: rights at risk and vulnerable groups

The relationship between human rights and climate change has only recently been the subject of international interest. The issue has been addressed over the last two decades within the UNFCCC regime and by UN treaty bodies and special procedures.

The 2007 Malé Declaration is often considered a crucial moment in climate negotiations. It resulted from Maldives' efforts to influence the development of a new climate agreement. In November 2007, the representatives of Small Islands States adopted the Malé Declaration on the Human Dimension of Global Climate Change[237]. The Declaration is brief and straightforward but represents a landmark, as it prompted the HRC and the OHCHR to advocate human rights concerns, also within the UNFCCC regime[238]. In light of the fact that climate change has "*clear and immediate implications for the full enjoyment of human rights*"[239], the Declaration required the COP of the UNFCCC to cooperate with the HRC and the OHCHR to assess the impacts of climate change on human rights. The Declaration also required the OHCHR to "*conduct a detailed study into the effects of climate change on the full enjoyment of human rights*"[240].

Soon after, the HRC adopted its first resolution concerning the link between human rights and climate change[241], manifesting its concern for the severe consequences of climate change on people and communities around the world and for its implications on the enjoyment of human rights. The HRC therefore requested the OHCHR to conduct an analytical study on the relationship

[237] *Malé Declaration on the Human Dimension of Global Climate Change*, November 14, 2007. Available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf. For an assessment of the Declaration and its background, see D.MAGRAW, K.WIENHÖFER, *The Malé Formulation of the Overarching Environmental Human Right*, in J. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, pp. 214-232.

[238] For an overview of the UN initiatives on linking human rights and climate change and the need for an integration between the UNFCCC and human rights protection mechanisms, see S.AKTYPIS, E.DECAUX, B.LEROY, *Systemic integration between climate change and human rights at the United Nations?*, in O.QUIRICO, M.BOUMGHAR (eds.), *Climate Change and Human Rights: An international and comparative law perspective*, Routledge, 2016, pp. 221-235.

[239] *Malé Declaration,* see supra.

[240] Ibid.

[241] UNHRC, *Resolution 7/23*, UN Doc A/HRC/RES/7/23, March 28, 2008.

between climate change and human rights. The OHCHR Report was published in 2009[242]. The first chapter draws upon the findings of IPCC's fourth assessment report – which is the scientific basis of the Report – and describes the main impacts of climate change.

The Report then addresses, in chapter II, the implications for the enjoyment of human rights, covering: the affected rights, the effects on specific groups, displacement, conflict and security risks, human rights implications of response measures; chapter III illustrates relevant human rights obligations; chapter IV draws the conclusions on the relationship between climate change and human rights.

The Report underlines that "*While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense"*[243], further observing that "*qualifying the effects of climate change as human rights violations poses a series of difficulties. First, it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights. Second, global warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. Accordingly, it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming. Third, adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred*"[244].

These statements highlight some of the key issues related to a human rights approach to climate change, which will be thoroughly addressed in chapters III and IV.

In the following paragraphs – without claiming to be exhaustive – an overview of specific rights threatened by climate change and their grounding in international law will be provided, along with an assessment of vulnerable groups[245].

It should be stressed that the legal grounding of the affected rights differs and will therefore be assessed on a case-by-case basis (while certain rights are enshrined in binding instruments, the legal status of others is still debated and mainly addressed in soft-law instruments).

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[242] OHCHR, *Report of the Office of the U.N. High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change*, UN Doc. A/HRC/10/61, January 15, 2009 (hereinafter OHCHR Report).

[243] OCHR Report, see supra, para. 70.

[244] Ibid.

[245] A vast range of human rights are affected by climate change but, for the sake of brevity, not all of them will be covered. Human rights not specifically addressed in the following include the right to adequate housing, the right to development and cultural rights.

The OHCHR will be an important reference, although the findings of IPCC's Sixth Assessment Report (AR6) – widely illustrated in paragraph 1 to which reference is made – also constitute clear evidence of the impacts on the enjoyment of a wide range of rights[246].

The UNEP also conducted a study – in collaboration with the Columbia University – on the impacts of climate change on human rights, published in 2015, which is perfectly in line with the conclusion of the above-mentioned bodies[247].

It should also be noted that, since Resolution 7/23, the HRC has constantly addressed human rights and climate change, covering its impacts on migration and on specific groups such as persons with disabilities, children and elderly people[248]. The HRC has also, in multiple occasions, requested the OHCHR and the Secretary-General to conduct analytical studies on specific issues and has held thematic panel discussions[249]. These studies will be recalled when addressing specific rights and groups.

In October 2021, with Resolution 48/14[250], the HRC established the mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change and, in March 2022, Mr. Ian Fry was appointed as the first Special Rapporteur and was tasked with conducting a wide range of (currently on-going) activities and studies concerning climate change and human rights[251].

[246] See also, for an overview of affected rights, S.MCINERNEY-LANKFORD, M.DARROW, L.RAJAMANI, *Human Rights and Climate Change, A Review of the International Legal Dimensions,* The World Bank, 2011; see also OHCHR, *Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet No. 38,* accessible at: https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-38-frequently-asked-questions-human-rights-and-climate.

[247] UNEP, *Climate Change and Human Rights*, December 2015.

[248] All the resolutions on the subject are accessible at: https://www.ohchr.org/en/climate-change/human-rights-council-resolutions-human-rights-and-climate-change.

[249] A list of the studies conducted at the request of the HRC and the thematic panel discussions are available at: https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change.

As to the role of the HRC in the context of climate change, see M.WEWERINKE-SINGH, *The Role of the UN Human Rights Council in Addressing Climate Change*, in *Human Rights and International Legal Discourse 13*, 8(1), 2014.

[250] UNHRC, *Resolution 48/14*, UN Doc A/HRC/RES/48/14, October 13, 2021.

[251] More information on the mandate is accessible at: https://www.ohchr.org/en/specialprocedures/sr-climate-change/about-mandate. Savaresi defined the creation of a SR on the topic "*a positive development*", noting, however, that the powers of a SR are "*limited to advocacy, persuasion and naming and shaming*", see A.SAVARESI, *UN Human Rights Bodies and the UN Special Rapporteur on Human Rights and Climate Change*, in *Yearbook of International Disaster Law Online*, April 13, 2023, pp. 408-409, available at: https://brill.com/view/journals/yido/4/1/article-p396_18.xml?language=en.

3.2 The right to life

The right to life is enshrined in the ICCPR, in the Convention on the Rights of the Child (CRC) [252] and in regional instruments such as the ECHR and the African Charter on Human and People's Rights.

The Human Rights Committee (HRCttee) has defined the right to life as supreme and fundamental to the enjoyment all other rights and clearly stated that climate change is among the most serious threats to the enjoyment of the right for present and future generations[253]; furthermore, it added that "*Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors*"[254].

The OHCHR Report, in light of the findings of the IPCC's AR4, affirmed that "*A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. IPCC AR4 projects with high confidence an increase in people suffering from death, disease and injury from heatwaves, floods, storms, fires and droughts*"[255].

To this day, these conclusions are entirely confirmed – and even exacerbated – by the most recent findings of AR6, which identified several risks to human life as a consequence of more intense and frequent extreme events, undernutrition and diseases.

According to the World Health Organization (WHO), 250,000 additional deaths per year are estimated as a consequence of malnutrition, malaria, diarrhoea and heat stress between 2030 and 2050[256].

3.3 The right to health

The right to health is enshrined in multiple international instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR)[257].

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[252] ICCPR, see supra, Art. 6: "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*"; UN General Assembly, *Convention on the Rights of the Child*, November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 6.

[253] UN Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc CCPR/C/GC/36, October 30, 2018, paras. 2 and 62.

[254] Ibid., para. 62.

[255] OHCHR Report, see supra, para. 22.

[256] The WHO provides key facts on climate change available at: https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health; a fact sheet with key facts is available at: https://www.who.int/publications/m/item/fast-facts-on-climate-change-and-health

[257] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, (hereinafter ICESCR), December 16, 1966, United Nations, Treaty Series, vol. 993, Article 12: "*1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for*

The UN Committee on Economic, Social and Cultural Rights, thoroughly addressed the content of the right to health in its General Comment n. 14[258], pointing out that the right includes the underlying determinants of health and, among them, environmental conditions[259].

According to the OHCHR, climate change "*is projected to affect the health status of millions of people, including through increases in malnutrition, increased diseases and injury due to extreme weather events, and an increased burden of diarrhoeal, cardiorespiratory and infectious diseases*"[260].

In 2016, the OHCHR concluded its analytical study on the relationship between climate change and the right to health and concluded that "*climate change has substantial negative impacts on the enjoyment of the highest attainable standard of physical and mental health*"[261]. The impacts are related to, among other factors: heat, air pollution, extreme weather events and expanding disease vectors. Vulnerable groups such as migrants and indigenous peoples are included among the most severely affected.

Once again, the findings of AR6 also provide a grim scenario: as highlighted above, AR6 confirmed the conclusions of AR5 and provided strong evidence of multiple adverse effects on human health in direct and indirect ways, with vulnerable groups and areas suffering harsh consequences.

3.4 The right to food and the right to water

Food security is one of the eight "overarching" risks identified by AR6 – WG II: as already highlighted, the impacts of climate change on food security are extremely serious[262].

The right to food is recognized by Article 11 of ICESCR as a part of the right to an adequate standard of living[263].

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the healthy development of the child; (6) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness"

[258] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4, August 11, 2000.

[259] Ibid., para. 12

[260] OHCHR Report, see supra, para. 32

[261] UNGA, *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/32/23, May 6, 2016, para. 53.

[262] See generally, on the impacts of climate change on the rights to food, water and health, A.FRANCA, *Climate change and interdependent human rights to food, water and health*, in O.QUIRICO et al., cit., pp. 89-103.

[263] ICESCR, see supra, Article 11: 1. "*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

The UN Secretary-General recently concluded – pursuant to a specific request from the HRC – a report on the adverse impact of climate change on the right to food[264], confirming the negative effects of climate change on the realization of the right to food (with a disproportionate impact on vulnerable groups and on those of contributed the least to the phenomena), while also providing several recommendations to States[265].

As AR6 clearly demonstrated, water security is one of the most crucial aspects of climate change and the impacts are mainly associated with water scarcity water-related disasters. These conclusions are in line with those of the OHCHR, which highlighted the impacts of both slow on-set and extreme events on water availability[266].

It should be noted that the right to water is not explicitly recognized by the ICESCR, although the CESCR implied it into Article 11 of the Covenant in General Comment n. 15[267]. The UN General Assembly also recognized the right to water in its 2010 Resolution 64/292[268] which, however, as is well known, falls within soft-law instruments.

Nonetheless, scholars have underlined that the right lacks a uniform content and, as a consequence, related States' obligations also lack uniformity. This is also associated with the fact the right is sometimes implicitly derived from other rights or functional to their enjoyment. Even General Comment n.15 stated that right contains "*both freedoms and entitlements*"[269] but did not clearly identify the content of the right to water[270].

The HRC established the mandate of the Special Rapporteur on the human rights to safe drinking water and sanitation, tasked with, among other things, assessing human rights obligations, conducting research and undertaking country missions, collecting good practices[271].

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2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: […]".

[264] UNGA, *Adverse impact of climate change on the full realization of the right to food, Report of the Secretary-General*, A/HRC/53/47, June 19, 2023.

[265] Ibid., paras. 50 and ff. For an overview of the current state of food security, see FAO, IFAD, UNICEF, WFP, WHO, *The State of Food Security and Nutrition in the World 2023. Urbanization, agrifood systems transformation and healthy diets across the rural–urban continuum*, Rome, FAO, 2023, available at: https://doi.org/10.4060/cc3017en.

[266] OHCHR Report, see supra, para. 29.

[267] CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, January 20, 2003, E/C.12/2002/11, para. 2.

[268] UNGA, *The human right to water and sanitation*, A/RES/64/292, August 3, 2010.

[269] CESCR, *General Comment No. 15 …,* see supra, para. 10.

[270] M.PACE, *Il valore della norma sul diritto umano all'acqua*, in S.CAFARO (ed.), *Beni e valori comuni nelle dimensioni internazionale e sovranazionale*, Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea, XXV Convegno, Lecce 24-25 settembre 2021, pp. 131-132.

[271] Information and documents concerning the initiatives of the Special Rapporteur on the human rights to safe drinking water and sanitation are available at: https://www.ohchr.org/en/special-procedures/sr-water-and-sanitation.

As with several other affected rights, the obstacles to the enjoyment of the right to water are particularly evident for specific vulnerable groups and include lack of adequate infrastructure, geographical conditions and economic and financial difficulties[272].

The legal status of the right to water in international law is disputed: it could be considered as a human right under the ICESCR only if the "*implied rights doctrine*"[273] is accepted; as to customary international law, there currently seems to be insufficient State practice[274].

However, some authors noted that, although the argument of the customary nature of the right is not entirely convincing, the norms on the right to water could be considered "interstitial norms", functioning as an interpretative parameter to be used on a procedural level and as an instrument to fill protection gaps[275].

3.5 The right to self-determination

Unlike other affected rights, the impact of climate change on the right to self-determination may seem less intuitive.

The right to self-determination has emerged in the context of decolonization after World War II and was therefore included in common Article 1 of the ICCPR and the ICESCR[276]. The principle, which is also enshrined in Article 1 of the UN Charter[277], is part of international customary law and falls within the *jus cogens* category[278]. It has found application, even in the

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[272] M.PACE, *Il valore della ...,* cit., pp. 144-145.

[273] N.NDEUNYEMA, *Unmuddying the Waters: Evaluating the Legal Basis of the Human Right to Water Under Treaty Law, Customary International Law, and the General Principles of Law*, in *Michigan Journal of International Law*, Vol. 41, Issue 3, 2020, p.490.

[274] Ibid., p. 456. For a comprehensive analysis of the rights to water and sanitation, see L.HELLER, *The Human Rights to Water and Sanitation*, Cambridge University Press, 2022.

[275] M.PACE, *Il valore della ...,* cit., pp. 143-144.

[276] ICESCR, ICCPR, Article 1: "1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations".

See generally, on the right to self-determination: M.BAK MCKENNA, *Reckoning with Empire: Self-Determination in International Law*, Brill Nijhoff, 2023; A.CASSESE, *Self-determination of Peoples: A Legal Reappraisal, Cambridge University Press*, 1995; M.DISTEFANO (ed.), *Il principio di autodeterminazione dei popoli alla prova del nuovo millennio*, CEDAM, 2014.

[277] UN, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI.

[278] The term indicates norms from which no derogation is permitted, and that are hence placed at the top of the hierarchy of sources. See generally, among others: N.RONZITTI, *Diritto internazionale*, Giappichelli, 2023, pp. 193-197; U.VILLANI, *Lezioni di Diritto Internazionale*, Cacucci Editore, 2023, pp. 116-119; F.MARRELLA, D.CARREAU, *Diritto internazionale*, Giuffré-Francis Lefebvre, 2023, p. 85 and ff.; D.TLADI (ed.), *Peremptory Norms of General International Law (Jus Cogens). Disquisitions and Disputations*, Brill Nijhoff, 2021.

See also the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Art.53 and Art. 64.

For an in-depth analysis of the origin, content and legal status of the right to self-determination, see J.SEBUTINDE, *Is the Right to Self-Determination Jus Cogens Reflections on the Chagos Advisory Opinion*, in

jurisprudence of the ICJ, with regard to decolonization, entailing the right to become independent and to freely establish a political regime in case of foreign domination and occupation[279].

However, the OHCHR Report included the right among the ones threatened by climate change, noting that "*Sea level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States*" resulting in a "*range of legal questions, including concerning the status of people inhabiting such disappearing territories and the protection afforded to them under international law*"[280].

It is now clear that low-lying small-island States are facing an existential threat[281].

Since then, the topic has become highly debated among scholars: this is not surprising, considering that this represents an innovative and unprecedented application of a principle that had emerged in a completely different context. One of the main related legal problems is statehood and State extinction, since territory is one of the essential requirements for a State to exist; therefore, commentators have provided various views as to the existence of statehood despite uninhabitability and the continuity of the right to self-determination even in the absence of a State[282].

More generally, the need to protect populations affected by sea level rise has received increasing attention in recent years. Some authors have therefore examined the role that international law and international cooperation can play in addressing this issue[283].

D.TLADI (ed.), *Peremptory Norms of General International Law (Jus Cogens) Disquisitions and Disputations*, Brill Nijhoff, 2021, pp. 386-412. For an analysis of Art. 53 and Art. 64 of the 1969 Vienna Convention, see E.CANNIZZARO, *Diritto internazionale*, Giappichelli, 2023, p. 245 and ff.

[279] B. CONFORTI, M.IOVANE, *Diritto internazionale*, cit., p. 29 and ff.. This interpretation of the principle is usually defined as "external" self-determination, as opposed to "internal" self-determination, which entails a political meaning but is not considered to be part of international customary law. See also T.FRERE, C.YOW MULALAP, T.TANIEL, *Climate Change and Challenges to Self Determination: Case Studies from French Polynesia and the Republic of Kiribati,* in *The Yale Law Journal*, Vol. 129, 2019-2020, where the authors analyse the emblematic cases of French Polynesia and the Republic of Kiribati, accurately showcasing the relevance of self-determination in the context of climate change, especially with regards to small-islands and low-lying States.

[280] OHCHR Report, see supra, paras. 40-41.

[281] O.SHARON, *State Extinction Through Climate Change*, in B.MAYER, A.ZAHAR (eds.), *Debating Climate Law*, Cambridge University Press, 2021, p. 349; see also S.LEE, L.BAUTISTA, *Climate Change and Sea Level Rise. Nature of the State and of State Extinction*, in R.BARNES, R.LONG (eds.), *Frontiers in International Environmental Law: Oceans and Climate Challenges: Essays in Honour of David Freestone*, Brill Nijhoff, 2021, p. 194 and ff.

[282] O.SHARON, *State Extinction ...,* cit., pp. 361-364; see also C.MOORE, *Waterworld: Climate change, Statehood and the right to self-determination*, in O.QUIRICO, M.BOUMGHAR (eds.), *Climate Change and Human Rights: An international and comparative law perspective*, Routledge, 2016, pp. 104-117; N.JONES, *Prospects for invoking the law of self-determination in international climate litigation*, in *RECIEL,* Vol.32, Issue 2, 2023, pp. 250–258, where the author reconstructs, by relying on analogy, the obligations of States in the context of climate change and examines the potential of the self-determination principle in the context of climate litigation.

[283] P.G.TELES, C.DUVAL, V.T. DA VEIGA, *International Cooperation and the Protection of Persons Affected by Sea-Level Rise. Drawing the Contours of the Duties of Non-affected States,* in *Yearbook of International Disaster Law Online*, 3(1), pp. 213-237. The authors provide an analysis of the impacts of sea level rise and examine the duty of States to cooperate and its grounding in general international law, in international human rights law and

Teles, Duval and Da Veiga suggest that international cooperation bears significant relevance in providing protection to populations affected by sea level rise and provide useful insights on the content of non-affected States' obligations. The authors make a case for the existence of two main duties for non-affected States in cases where affected States are unable to protect their population: firstly, the duty to give adequate and timely consideration to assistance requests; secondly, the duty to offer assistance to affected States[284]. Criteria for the identification of which States should intervene are also outlined and include: the existence of agreements between the States; the existence of a request for assistance; the financial and technical capability of a non-affected State; the particularly relevant expertise of a State in providing protection from sea level rise; the geographical proximity[285].

The ILC has added the topic of sea level rise to its agenda and established a Study Group to investigate related legal issues[286].

3.6 Vulnerable groups

The 2009 OHCHR Report also addressed the impacts of climate change on vulnerable segments of the population, with focus on women, indigenous peoples and children.

More recently, the HRC requested the Secretary-General to conduct a study on the impact of climate change on human rights of people in vulnerable situations[287]. The report was submitted in May 2022[288] and thoroughly described the impacts, building upon the most recent findings of the IPCC. The study concluded that "*poverty, historical and structural inequity and discrimination, as well as geography, affect people's exposure to the adverse effects of climate change*"[289].

As to indigenous peoples, the report underlines that indigenous territories, food security, traditional livelihoods and cultural practices are tremendously affected by extreme weather events, along with other events such as droughts, sea level rise, ocean acidification and degradation of land; the study also stresses the negative effects associated with historic marginalization and discrimination[290].

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international disaster law. Additionally, they outline the duty of non-affected States to cooperate in the protection of individuals affected by sea-level rise.

See generally, on the correlation between human rights and human vulnerability from an international law and philosophy of law perspective, V.LORUBBIO, M.G.BERNARDINI (eds.), *Diritti Umani e Condizioni di Vulnerabilità*, Erickson, 2023.

[284] P.G.TELES et al., cit., pp. 236-237.

[285] Ibid., pp. 232-233.

[286] Ibid., p. 214.

[287] UNHRC, *Resolution 47/24*, A/HRC/RES/47/24, July 26, 2021.

[288] UNGA, *The impacts of climate change on the human rights of people in vulnerable situations Report of the Secretary-General*, A/HRC/50/57, May 6, 2022.

[289] Ibid., para. 44.

[290] Ibid., para. 8. See also: F.CITTADINO, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection: Access, Benefit-sharing and Conservation in Indigenous Land,* Brill Nijhoff, 2019;

As the OHCHR Report underlined, land use and adverse effects of reduced emissions from deforestation and degradation projects (REDD) are among the most problematic aspects[291].

The UN Declaration on the Rights of Indigenous Peoples recognizes numerous rights, including the right to self-determination and the right to the lands, territories and resources which indigenous peoples have traditionally owned[292]. Indigenous peoples have played a significant role in the UNFCCC regime and related negotiations. The language of the Paris Agreement now includes the concerns of indigenous peoples [293].

Later parts of this analysis will illustrate the substantial role that indigenous peoples continue to play in climate change litigation[294].

The report then addresses the impacts on migration and displacement, recalling the data provided in 2021 by the International Displacement Monitoring Centre[295], which estimated that around 89% of disaster displacements between 2008 and 2020 were determined by extreme weather events, which contributed to internally displacing 30.7 million people in 2020[296].

In 2018, the OHCHR elaborated on the issue and published, pursuant to a specific request from the HRC, a study that addresses the human rights protection of migrants and displaced persons across international borders as a consequence of climate change[297]. The report confirmed the impacts of climate change on human mobility but also highlighted protection gaps and urged States to "*refrain from returning migrants to territories affected by climate change that can no longer sustain them and steadfastly uphold the fundamental principle of non-refoulement and other*

S.L.CARRILLO YAP, *Land and Forest Rights of Amazonian Indigenous Peoples from a National and International Perspective A Legal Comparison of the National Norms of Bolivia, Brazil, Ecuador, and Perù,* Brill Nijhoff, 2022.

[291] A recent study has found that REDD projects are often way less beneficial than claimed, see T.A.P.WEST, S.WUNDER, E.O.SILLS, J. BÖRNER, S.W.RIFAI, A.N.NEIDERMEIER, G.P.FREY, A.KONTOLEON, *Action needed to make carbon offsets from forest conservation work for climate change mitigation*, in *Science*, Vol. 381, Issue 6660, 2023, pp. 873-877.

[292] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, October 2, 2007.

[293] See generally F. TORMOS-APONTE, *The influence of indigenous peoples in global climate governance*, in *Current Opinion in Environmental Sustainability*, Vol. 52, 2021, pp. 125-131; see also B.POWLESS, *The indigenous rights framework and climate change*, in S.DUYCK, S.JODOIN and A.JOHL (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, 2018, pp. 217-218.

[294] This was recently highlighted by the UNEP, see: https://www.unep.org/news-and-stories/story/climate-crisis-alters-their-lands-indigenous-peoples-turn-courts.

[295] UNGA, *The impacts ...,* see supra, para. 12. See IDMC, *GRID 2021: International Displacement in A Changing Climate*, 2021, available at: https://www.internal-displacement.org/publications/2021-global-report-on-internal-displacement. A subsequent report, addressing displacement and food security, was recently published, see IDMC, *GRID 2023: Internal Displacement and Food Security*, 2023, available at: https://www.internal-displacement.org/global-report/grid2023/.

[296] UNGA, *The impacts of ...,* see supra, para. 12.

[297] UNGA, *Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps*: *Report of the United Nations High Commissioner for Human Rights*, A/HRC/38/21, April 23, 2018.

international human rights law obligations"[298]. The issue has emerged in very significant cases of climate change litigation, as will be displayed in the following[299].

The report also addresses the impact on children, noting, among other things, that children are particularly affected by climate-related stresses as a consequence of their less developed immune systems and physiology[300].

With regards to persons with disabilities, the study highlights that most of them live in conditions of poverty, and the poorest people are among those who will be most severely affected by climate change; disabled people are therefore estimated to "*suffer from disproportionately higher rates of morbidity and mortality in emergencies, and face challenges in accessing emergency support*"[301]. Small-island States are considered "*among those most exposed and vulnerable to climate change impacts, despite having contributed the least to its occurrence*"[302].

The study also points out the good practices shared by States (including the integration of loss and damage within national NDCs)[303]. Ultimately, the study provides several recommendations for States and other stakeholders, highlighting the importance of developing adaptation measures that take into account the specific needs and requests of vulnerable groups[304].

4. The human right to a healthy environment

In October 2021, the HRC adopted resolution 48/13, recognizing "*the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights*", encouraging States, among other things, to implement said right to fulfil their human rights obligations and inviting the UN General Assembly to "*consider the matter*"[305].

In July 2022, the UN General Assembly recognized the right to a clean, healthy and sustainable environment with Resolution 76/300, adopted with 161 votes in favour and 8 abstentions, and utilizing a text similar to the one adopted the previous year by the HRC.

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[298] Ibid., para. 66.

[299] For further insights on this legal issue, see: J.MCADAM, *Protecting People Displaced by The Impacts of Climate Change: The UN Human Rights Committee and The Principle of Non-refoulement*, in *American Journal of International Law*, Vol. 114, Issue 4, October 2020, pp.708-725; A.Y.NOORDA, *Climate Change, Disasters and People on the Move. Providing Protection under International Law*, Brill Nijhoff, 2022.

[300] UNGA, *The impacts of …,* see supra, para. 13. For an overview of children protection in environmental law, see A.PAPANTONIOU, *Children and the Environment Pathways to Legal Protection*, Brill Nijhoff, 2022.

[301] UNGA, *The impacts of …,* see supra, para. 14.

[302] Ibid., para. 15.

[303] Ibid., para. 38.

[304] Ibid., para. 52.

[305] HRC, *The human right to a clean, healthy and sustainable environment*, Resolution 48/13, UN Doc. A/HRC/RES/48/13, October 18, 2021.

This outcome represents a significant achievement in a prolonged journey at the international level. It traces back to the Stockholm Declaration of 1972, which explicitly acknowledged this right.

Despite being recognized in many constitutions and receiving protection from regional human rights systems, the debate at the international level has been protracted and gradual[306].

This issue is of considerable importance in the context of climate change, as the global recognition of such a right would have significant implications in a number of areas, including, for what is of interest here, rights-based climate litigation. Several authors have indicated that this right would have significant implications regarding causation, as will be discussed in Chapter IV[307].

It is worth underlining that plaintiffs in climate litigation are increasingly invoking the right to a healthy environment, often with successful outcomes (as the analysis in Chapters III and IV will show); this has led some authors to question whether such right could represent a "*game changer*," although the number of cases remains limited at present[308].

The recognition of the right to a healthy environment has been a topic of discussion within the Council of Europe. Recently, an additional protocol to the ECHR has been proposed, to recognize the right to a safe, clean, healthy, and sustainable environment. The Parliamentary Assembly made the proposal in Recommendation 2211/2021, which the European Committee of Ministers will consider[309]. As will be highlighted, this development could significantly impact the outcome of climate litigation.

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[306] For an early analysis of the main lessons that can be learned from the process, see M.LIMON, *United Nations recognition of the universal right to a clean, healthy and sustainable environment: An eyewitness account*, in *RECIEL*, Vol. 13, Issue 2, 2022, pp. 153-170, pp. 169-170, where the author observes that "[…] *two of the most critical and contentious questions that States and UN experts will have to grapple with (and that have important implications for future climate and environmental litigation) are: can the impacts of climate change and other environmental harms be considered a human rights violation (in strict legal terms), and would States' obligations to promote, protect and respect the universal right to a healthy environment extend beyond their borders (i.e. would they apply extraterritorially)?*". Moreover, Limon underlines that "*the UN retains an unparalleled ability to generate what Bertrand Ramcharan, among others, has called a 'normative cascade'. In other words, UN bodies like the HRC, and the resolutions they adopt, have the power to 'send a signal' or indicate a 'direction of travel' to the rest of the international community, inspiring further steps at global, regional, and national levels*".

For a thorough examination of numerous aspects of the human right to a healthy environment, see J.KNOX, R. PEJAN (eds.), *The Human Right* …, cit.

[307] See, on the topic: O.QUIRICO, J.BROHMER, M.SZABO, *States, climate change and tripartite* …, cit., in O.QUIRICO et al., cit.; F.FRANCIONI, O.QUIRICO, *Untying the Gordian Knot: towards the human right to a climatically sustainable environment?*, in O.QUIRICO et al., cit., pp. 133-156.

[308] P.DE VILCHEZ, A.SAVARESI, *The Right to a Healthy Environment and Climate Litigation: A Game Changer?*, in *Yearbook of International Environmental Law*, 2023, p. 17.

[309] O.QUIRICO, *The European Union and global warming: A fundamental right to (live in) a sustainable climate?*, in *Maastricht Journal of European and Comparative Law*, 0(0), OnlineFirst, October 9, 2023, p. 12.

CHAPTER II

Climate change litigation: setting the stage

1. Defining climate change litigation.

The notion of climate change litigation is highly controversial and much debated among scholars, who have proposed numerous definitions, ranging from narrow to broad interpretations of the phenomenon[310]. This should be no surprise and may simply reflect the complexity of climate change and climate change law.

The amount of legislations, policies, regulations, non-binding instruments and judicial or quasi-judicial decisions concerning climate change are now overwhelming and they cover national, regional and international level. Within the broad context of climate change law, the international climate change regime constitutes a minimal part.

Such proliferation is further confirmation of the trend toward bottom-up approaches, where policies, regulations (and even litigation) are based on local needs. The climate change governance – and environmental governance in general – seems indeed to be shifting towards a local dimension. This is reflected in the Paris Agreement and subsequent developments: by adopting an approach based on nationally determined contributions, the success or failure of the regime inevitably depends on efforts at national level in achieving the proposed mitigation targets. This change in approach and, more generally, the shift towards lower levels of governance is perhaps the natural consequences of the awareness that international negotiations and international instruments have proven to be insufficient to successfully tackle climate change.

In these circumstances, climate action at national level found fertile grounds: the possibility for States to unilaterally determine their contributions goes along with mechanisms to pressure States and to ascertain whether national measures are compliant with NDC's. These actions may take different forms, including lawsuits before national courts.

Climate change litigation – which has emerged only in the last two decades and has grown enormously in the last few years, as we will see – can therefore also be seen as a remedy to insufficient and inadequate action at both national and international level[311].

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[310] J.SETZER, L.C.VANHALA, *Climate change litigation: A review of research on courts and litigants in climate governance,* in *WIREs Climate Change*, Vol. 10, Issue 3, May 2019, p. 3, p. 19, who note, upon examining the literature on the issue, that "*There are as many understandings of what counts as "climate change litigation" as there are authors writing about the phenomenon*". The authors also observe that, despite the significant increase in scholars' interest towards climate litigation, contributions mainly concern a few key cases, underlining that "*research has been focused on a limited set of jurisdictions and has placed disproportionate emphasis on certain actors and specific aspects of the climate agenda*".

[311] However, as Peel and Osofsky noted, "*litigation is a tool but not the tool to achieve needed climate policy and behavioral responses. Litigation has its limits and cannot work effectively in isolation from other political and*

Within this context, citizens and NGOs have taken the lead in protesting, advocating, and pressuring States and private actors, but have also brought the issue to domestic, regional and international courts and bodies, therefore taking a gradually more prominent role in influencing climate change governance. As a consequence, the role of the judicial power in the context of climate governance has gradually increased.

Within a global phenomenon, and in light of all the actors and legislations (including local ones) involved, a very large portion of litigation – which occurs at several different levels and is grounded on different branches of law – could fairly be qualified as climate change litigation.

Therefore, definitions of climate change litigation vary according to which of the many variables are considered decisive. Sometimes authors include only those cases in which the plaintiffs directly address climate change policy and legislation; other times, all cases that are even indirectly related to climate change are included.

Moreover, the term "litigation" could be interpreted as referring to judicial proceedings exclusively, or could be understood as including quasi-judicial processes and non-binding decisions[312].

An often-cited definition is that of Markell and Ruhl, which reads as follows: "*any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts*"[313]. This is often referred to as the narrow definition of climate change litigation, requiring the pertinent issue to be raised directly and expressly. However, wider definitions have gradually been put forward, with the aim of including within the notion all cases where climate change is not at the core of the lawsuit but represents a peripheral or secondary aspect[314].

Despite the heated definitional debate, its implications should not be overestimated. As Setzer and Vanhala observed, scholars should, first of all, aim to be "*clear about how they are conceptualizing and operationalizing their ideas about what climate litigation is and is not*"[315].

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social mobilization efforts, including policy advocacy work and social campaigns", see J.PEEL, H.M.OSOFSKY, *Climate Change Litigation*, in *Annual Review of Law and Social Science*, Vol. 16:21-38, 2020, p. 34.

[312] J.PEEL, H.M.OSOFSKY, *Climate Change Litigation*, cit., p. 22 and ff. The authors classify climate change litigation through a series of concentring circles: cases where climate change is the central issue are placed at the core and, moving outwards, we find cases where climate change is only a peripheral issue, cases where climate change is a motivation but is not displayed as an issue and cases where there is no explicit climate change display but there implications for mitigation or adaptation.

[313] D.MARKELL, J.B.RUHL, *An Empirical Assessment of Climate Change In The Courts: A New Jurisprudence Or Business As Usual?*, in *Florida Law Review*, Vol. 64, Issue 1, 2012, p. 27.

[314] I.ALOGNA, C.BAKKER, J.GAUCI, *Climate Change Litigation: Global Perspectives*. *An Introduction*, in I.ALOGNA, C.BAKKER, J.GAUCI (eds.), *Climate Change Litigation: Global Perspectives,* Brill Nijhoff, 2021, p. 16 (hereinafter ALOGNA et al.).

[315] J.SETZER, L.C.VANHALA, *Climate change litigation ...,* cit., p. 3.

As mentioned above, litigation can have multiple dimensions: it takes place before national courts and before various regional and international courts, tribunals and quasi-judicial bodies; it is based on a variety of legal sources; it may have different objectives and different parties[316].

With regards to the pursued aims, a common distinction is usually made between "proactive" (or "strategic") litigation and "reactive" litigation: the former aims to challenge existing legislations so that more ambitious measures are adopted or implemented (therefore representing a tool to contrast legislators' or governments' inertia or inadequate action); the latter aims to oppose the adoption of new measures[317].

Proactive litigation is usually considered to include rights-based litigation, grounded on human rights enshrined in national constitutions and international instruments: this type of litigation has substantially increased within the last few years[318]. As to reactive litigation, lawsuits are usually aimed at opposing the adoption of legislations and policies on several grounds that include constitutional illegitimacy or violations of rights and legitimate interests[319].

With respect to the subjects involved, in strategic litigation claimants are generally individuals or civil society organizations, while defendants are mostly governments[320]: that is intuitive, since a large part of litigation is aimed at challenging existing legislation, or concerns alleged breaches of human rights (and States are the main duty-holders under human rights law)[321].

That being the case, within the last few years, relevant cases of litigation against private companies, such as major oil industries or multinational corporations (who are responsible for significant amounts of GHG emissions[322]) have emerged, often aimed at seeking compensation for damage caused by climate change as a consequence of excessive GHG emissions.

The following sections provide an overview of climate change litigation, focusing on early examples of litigation that included climate change concerns at the "core" of the litigation and that illustrate some of the recurring procedural and substantive issues that are still typical of rights-based

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[316] See, on this issue, M.CARDUCCI, *La ricerca dei caratteri differenziali della "giustizia climatica"*, in *DPCE Online*, Vol. 43 No. 2, 2020, pp. 1345 – 1369, p. 1353. In reconstructing the classifications made within climate change law sources, the author describes a "tree" structure with nine levels: geographical location of the dispute; nature of the defendant; nature of the plaintiff; content of the claim; parameter utilized (international sources, national norms, contracts); nature of censored conduct (omission, commission, negligence); nature of liability (contractual, non-contractual, objective); nature of the alleged harm; nature of the alleged harmful event.

The author also provides an in-depth analysis of the concept of "climate justice": it is sufficient to notice that climate litigation is a concept that must be kept distinct from the concept of climate justice; the latter does not refer to specific lawsuits or legal proceedings. See also H.SHUE, *Climate Justice: Vulnerability and Protection*, Oxford University Press, 2014

[317] A.SAVARESI, J.AUZ, *Climate Change Litigation and Human Rights: Pushing the Boundaries,* in *Climate Law* 9, 2019, pp. 246-247.

[318] ALOGNA et al., cit., pp. 18-19.

[319] Ibid., p. 19.

[320] Ibid., p. 20

[321] A.SAVARESI, J.AUZ, *Climate Change ...,* cit., p. 247.

[322] Ibid., p. 248.

litigation. For the purpose of this work, the analysis will subsequently focus on human rights-based litigation at both national and international level, which will be thoroughly addressed in Chapter III: its enormous expansion constitutes one of the most remarkable developments of the last five years within climate litigation.

For defining purposes, climate litigation could, in this context, be interpreted as to include lawsuits that use human rights norms (or fundamental rights enshrined in national constitutions) as tools to tackle climate change and its consequences, by requiring States (or other non-State actors) to adopt adequate mitigation and adaptation measures.

2. An overview of the current state of climate change litigation

Climate change litigation has constantly increased in the last decade and its trends and status are constantly assessed and monitored by two main databases, issued by the Sabin Centre for Climate Change Law at New York's Columbia Law School[323] and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics (LSE)[324].

In July 2023, the Sabin Center for Climate Change Law, the Columbia Law School and the UNEP published a report on the status of global climate litigation[325], which updates previous UNEP reports (issued in 2017 and 2020) and provides an overview of the current state of climate change

[323] The litigation database can be accessed at: https://climatecasechart.com/. Two separate databases are provided: a US litigation database and a global litigation database (which includes all cases globally except the US cases). As of September 2023, the US chart is includes 1627 cases, while the global chart includes 775 cases, from over 55 countries.

The Sabin Centre also clarified the method that was adopted to categorize litigation, pointing out that: "*To fall within the scope of the U.S. and Global databases, cases must satisfy two key criteria. First, cases must generally be brought before judicial bodies (though in some exemplary instances matters brought before administrative or investigatory bodies are also included). Historically, the term "cases" in the U.S. database included more than judicial actions and proceedings. Other types of "cases" formerly contained in the database included quasi-judicial administrative proceedings, rulemaking petitions, requests for reconsideration of regulations, notices of intent to sue (in situations where lawsuits were not subsequently filed), and subpoenas. Since 2018, these other types of cases have not been added to the U.S. database, and approximately 100 older such cases were removed from the database in November 2021.*

Second, climate change law, policy, or science must be a material issue of law or fact in the case. Cases that make only a passing reference to climate change, but do not address climate-relevant laws, policies, or actions in a meaningful way are not included.

In general, cases that may have a direct impact on climate change, but do not explicitly raise climate issues, are also not included in the database […]".

We could therefore say that the Sabin Centre adopted a narrow definition of climate change litigation. For more information on adopted classification criteria, see https://climatecasechart.com/about/.

The Columbia Law School also provides monthly updates on climate change litigation, outlining all new cases and decisions, see: https://climate.law.columbia.edu/litigation-updates.

[324] The database is accessible at https://climate-laws.org/ and provides access to the full text of global climate change laws and policies and UNFCCC submissions.

[325] M.BURGER, M.A.TIGRE, *Global Climate Litigation Report: 2023 Status Review* (Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme), 2023, available at: https://scholarship.law.columbia.edu/sabin_climate_change/202/ (hereinafter 2023 Litigation Report).

litigation, its trends and the main issues that are raised before courts, tribunals and quasi-judicial bodies.

According to the definition of climate litigation adopted by the Report, the research includes "*cases that raise material issues of law or fact relating to climate change mitigation, adaptation or the science of climate change*"[326].

Climate litigation is constantly expanding in terms of number of lawsuits and in terms of jurisdictions involved. The 2017 Report identified 884 cases in 24 jurisdictions and the 2020 Report identified 1550 cases in 39 jurisdictions[327]. The 2023 Report detected 2180 cases in 65 jurisdictions[328]: therefore, the number of cases has more than doubled since 2017 and the number of jurisdictions has almost tripled.

A very significant percentage of cases were filed in the United States: 1,522 cases, compared to 658 cases filed in all other jurisdictions combined[329].

If US litigation is excluded, Europe as a region accounts for 31,2% of the cases, followed in descending order by Oceania (23.2%) and international or regional courts, tribunals, quasi-judicial bodies or other adjudicatory bodies (which represent 19.2% of global cases)[330]. Litigation in the Global South "*represents a small but growing percentage of global climate litigation*"[331].

The Report then addresses the main trends in climate change litigation, identifying six categories of cases: (i) The use of "climate rights" in climate litigation; (ii) Domestic enforcement; (iii); Keeping fossil fuels and carbon sinks in the ground (iv); Corporate liability and responsibility; (v) Climate disclosures and greenwashing; (vi) Failure to adapt and the impacts of adaptation[332].

The main findings of the Report within each area will be subsequently briefly addressed.

The use of climate rights (i) is – for the purpose of this analysis – particularly relevant: a detailed analysis of human rights-based litigation is the object of Chapter III and therefore lies outside the scope of this paragraph, which will be limited to providing some key indications.

The plaintiffs in this category of cases usually argue that inadequate action taken by the State in the context of mitigation and adaptation has resulted in the violation of various rights such

[326] Ibid., p. 3.
[327] Ibid., p. 12.
[328] Ibid., pp. 12-13.
[329] Ibid., pp. 15-17. Cases in the US represent nearly 70% of the total. Despite the US, the top ten jurisdictions with regards to number of cases are, in descending order: the European Union, Australia, the United Kingdom, Canada, Brazil, New Zealand, Germany, France, Spain, Mexico and India.
[330] Ibid., pp. 18-19.
[331] Ibid., p. 20.
[332] Ibid., p. 26.

as the right to life, health, food, and a healthy environment. The report distinguishes between cases at the international and domestic levels[333].

It should be stressed that cases brought against companies and grounded on their human rights responsibilities are gradually emerging, and usually concern excessive GHG emissions, as highlighted in a recent report[334].

At international level, the number of cases has steadily grown and the claims are often grounded on a variety of both binding and soft-law instruments. Several claims were brought before UN Bodies and have led to very significant decisions, although most of them do not have binding force; the Report notes that initiatives to seek advisory opinions from international courts have also taken place[335].

At regional level, a few cases (which also include advisory opinions) have emerged within the Inter-American System of Human Rights and the East African Court of Justice. In the European context, while only two cases were brought before the Court of Justice of the European Union, twelve cases are pending before the ECtHR: the plaintiffs' arguments usually revolve around alleged violations by Member States of Articles 2, 8 and 14 of the Convention as interpreted in light of the Paris Agreement[336].

Domestic litigation in this category aims to challenge the inadequacy of domestic policies and legislation, as well as and the failure of governments to prevent the impacts of climate change and related human rights violations. These cases often rely on fundamental rights guaranteed at constitutional level or enshrined in human rights instruments (such as the ECHR). Furthermore, the right to a healthy environment, as well as the rights of nature, or a combination of all these arguments, are utilized[337].

The plaintiffs in rights-based cases are mainly individuals or groups (who constitute the main right-holders in human rights law) and defendants are mainly States and public authorities.

The 2023 Litigation Report also highlights the key role played by children and youth-led litigation: as of December 2022, 34 cases were filed, mainly revolving around the vulnerability of the group and the principle of inter-generational equity.

[333] Ibid., pp. 27-28.

[334] J.SETZER, C. HIGHAM, *Global trends in climate change litigation: 2022 snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, pp. 33-34.

[335] 2023 Litigation Report, see supra, pp. 28-31.

[336] Ibid., pp. 34-35.

[337] Ibid., pp. 36-37.

Overall, the constantly increasing number of claims grounded on human rights represents one of the key findings of the 2023 Litigation Report[338].

The fact that a significant and unprecedented increase in human rights-based litigation has occurred after 2015 makes it reasonable to claim that the adoption of the Paris Agreement has played a role in fostering the phenomenon: not only through the inclusion of human rights concerns in the preamble, but also through the introduction of new objectives, a specific goal as to temperature increase and, more generally, a hybrid approach that favours delocalized action.

Moreover, the system of NDCs established by the Paris Agreement – while achieving broad participation of States due to the lack of binding commitments – has in fact provided plaintiffs with solid arguments to challenge national legislation and climate policies, especially considering that most NDCs turned out to be largely inadequate, as recent UNEP Gap Reports demonstrate. In this respect, the reference to a specific temperature increase target in the Paris Agreement, together with continuously updated data from scientific bodies providing precise indications on future scenarios in the light of current NDCs, provides a reliable basis for determining whether policies and legislation, and State action in general, are adequate or insufficient.

As to domestic enforcement (ii), defendants are mostly governments (although similar claims have gradually emerged against corporations as well) and the cases revolve around compliance with mitigation targets set in national legislation or in international agreements and instruments[339].

Cases concerning keeping fossil fuels and carbon sinks in the ground (iii) aim to challenge projects that extract fossil fuels in order to guarantee an assessment of climate change impacts of each project and compliance with the goals set in the Paris Agreement or in national commitments; therefore, environmental impact assessments and related requirements are often at the core of these claims[340].

As mentioned above, litigation that concerns corporate liability (iv) has also emerged, and the cases increased since 2017. A relevant theme within this category of claims is corporate obligations and responsibility for excessive GHG emissions[341].

Examples of claims associated with so-called greenwashing (v) have also increased in the last few years, mainly concerning climate disclosures and protection of investors and consumers.

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[338] Ibid., p. 74. Suits against governments grounded on human rights, in the context of non-US litigation, currently amount to 128 cases, with a significant portion relying on the right to a healthy environment, see https://climatecasechart.com/non-us-case-category/human-rights/.

[339] Ibid., pp. 42-43.

[340] Ibid., pp. 44-49.

[341] Ibid., pp. 50-51. A significant amount of cases in non-US litigation also concern environmental impact assessments and permitting and misleading advertising, as is shown in the climate charts at: https://climatecasechart.com/non-us-case-category/corporations/.

Lastly, the Report underlines that the number of cases concerning adaptation are still limited and usually address two main issues: harm caused by the implementation of adaptation measures; the failure to devise and implement adequate adaptation measures[342].

The subsequent section of the Report provides – in light of observed trends – an indication on what could be some relevant aspects of future litigation, suggesting that crucial areas will include, among others, climate migration, claims brought by vulnerable groups, implementation of judicial decision and transnational responsibility[343].

So-called "backlash" or "anti-climate" cases are also emerging. These cases challenge existing regulations aimed at tackling climate change and include, among the most important examples, international investment litigation and just transition litigation.

Litigation in the context of international investment is becoming particularly relevant with regards to climate change: investors are usually suing States (often grounding their claims on standards of protection established by investment treaties) and seeking compensation for the negative effects of climate change legislation and policies on their assets. In order to meet their climate goals, States need to adopt a wide range of measures that often impact investments (this is particularly evident in the context of fossil fuel infrastructure), resulting in higher risk of litigation from affected investors[344].

As to "just transition" cases, the expression refers to cases where decarbonization policies are challenged in light of their impact on the enjoyment of human rights. Transitioning towards low-carbon targets while granting adequate protection to minorities and vulnerable groups can be particularly difficult. This is especially the case in the Global South and, in this context, procedural rights play a key role[345].

2.1. Main trends in rights-based litigation and persistent gaps

Some scholars highlighted that there are still relevant knowledge gap in climate change litigation, and this is also the case for rights-based litigation. Some authors have therefore recently tried provide a more comprehensive and systematic analysis of current trends (and future scenarios) of human rights-based litigation[346].

As Savaresi and Setzer observed, while most authors have focused their studies and contributions on litigation that aims to pursue climate objectives, there is very little knowledge

[342] Ibid., p. 60.
[343] Ibid., pp. 62-71.
[344] Ibid., p. 71.
[345] Ibid., p. 72.
[346] A.SAVARESI, J.SETZER, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, in *Journal of Human Rights and the Environment*, Vol. 13, No. 1, March 2022, pp. 7–34.

about litigation that does not "*align with climate objectives*", also defined as "*just transition litigation*"[347]. The expression refers to cases where climate change is not the core of the claim and policies aimed at tackling climate change are not challenged merely for their purpose, but rather because of their impacts on the enjoyment of human rights. Claims of this kind provide a clear example of the importance of procedural and substantive obligations and once again demonstrate that measures aimed at tackling climate change – with regard to both mitigation and adaptation – can also hamper the enjoyment of human rights, making it necessary to carefully assess and balance conflicting interests. Therefore, "*Greater understanding of this litigation is necessary to appreciate tensions associated with the transition towards zero carbon societies, and ways in which such tensions may be resolved*"[348].

Savaresi and Setzer also provided additional valuable insights on peculiar aspects of rights-based litigation. These new insights were also acknowledged in the 2023 Litigation Report, which specifically addressed so-called "backlash" cases.

As to the geographical distribution, we have already pointed out that the majority of cases are brought before US courts. However, this is not the case for rights-based litigation. The geographical distribution seems to follow the trends observed in environmental rights-based litigation. Europe is where the majority of rights-based climate cases are filed, followed by North America and Latin America[349].

There is also confirmation that rights-based litigation is a recent phenomenon: over 60 % of cases have been filed since 2018, and the number of cases has been constantly on the rise since 2005[350].

Rights-based litigation – as well as climate litigation in general – mainly concerns mitigation. States or corporations are usually required to adopt measures to adequately reduce GHG emissions. Adaptation cases are less frequent. Savaresi and Setzer identified, in 2022, 83 cases concerning mitigation, 9 concerning adaptation and 20 concerning both[351].

In the majority of rights-based cases, human rights are at the core of applicants' arguments and are therefore considered to have a central role; in other cases, human rights are among applicants' arguments but play a secondary (or peripheral) role[352].

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[347] Ibid., pp. 28-30. The authors mention, among several examples, "*litigation targeting corporate actors and states for breaches of human rights obligations associated with the rights of Indigenous peoples*" and cases where "*applicants have alleged breaches of the right to access to justice, associated with the adoption of climate change legislation and projects*".

[348] Ibid., p. 30.

[349] A.SAVARESI, J.SETZER, *Rights-based ...,* cit., pp. 10-11.

[350] Ibid., p. 12.

[351] Ibid., p. 15.

[352] Ibid., p. 16, noting that human rights "*played a central role in 75 out of 112 rights-based cases*".

3. A rights turn

In recent years scholars have often referred to a "rights turn" or a "human rights approach", in the context of the climate litigation[353].

With this expression, authors have highlighted the gradual emergence of a new phenomenon in the context of climate litigation, namely a new wave of litigation grounded on international human rights law and fundamental rights recognized in national constitutions. It is now evident that this trend is consolidating (as the overview of categories of climate litigation has shown).

We have also clearly understood that litigation can be grounded on the most varied legal basis. Up until 2018, the first, and numerically most relevant, category of litigation in countries with the most number of cases (mainly US and Canada), concerned statutory law and its interpretation[354]. As Peel and Osofsky observed, at that time most claims, especially in the US and Canada, involved "*statutory law causes of action alleging that governments failed to take climate change considerations adequately into account in their decision-making processes*"[355]. The landmark case of Massachusetts v. EPA is one of the most important examples [356].

Within this context, cases grounded on human rights, albeit not being an unknown feature at the time, were considered unconventional and rarely successful. Nonetheless, their increasing relevance and dissemination has not gone unnoticed. Besides, the use of a human rights approach to provide remedies in the context of environmental harm is well known and not a new phenomenon[357], as is demonstrated by the now vast jurisprudence of the ECtHR on human rights and the environment. The Court has consistently held that environmental risks can jeopardize the protection of human rights, including the right to life and the right to respect for private and family life, although it has not recognized an autonomous right to a healthy environment[358].

However, climate change poses several new challenges and difficulties – at the core of the analysis of Chapters III and IV – in light of its peculiar characteristics which distinguish it from all other types of environmental problems.

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[353] J.PEEL, H.M.OSOFSKY, *A Rights Turn in Climate Change Litigation?*, in *Transnational Environmental Law*, 7:1, 2018, pp. 37–67.

[354] Ibid., p. 39.

[355] Ibid.

[356] *Massachusetts v. Environmental Protection Agency*, 549 US 497 (2007).

[357] A.SAVARESI, J.HARTMANN, *Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry*, in J.LIN, D.A.KYSAR (eds.), *Climate Change Litigation in the Asia Pacific,* Cambridge University Press, 2020, p. 74; see generally A.BOYLE, M.R.ANDERSON, *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1998; D.K.ANTON, D.SHELTON, *Environmental Protection and Human Rights*, Cambridge University Press, 2012.

[358] For a recent and detailed factsheet of the jurisprudence of the ECtHR on environmental matters, see ECtHR, *Environment and the European Convention on Human Rights*, October 2023, available at: https://www.echr.coe.int/documents/d/echr/fs_environment_eng.

It should be noted that until 2015, less than 20 human rights-based cases were reported, while by December 2021, nearly 150 cases based on human rights arguments had been identified, with Europe being the most active region in this category of litigation[359].

4. What obligations for States and private actors?

We can now safely affirm that climate change certainly has adverse impacts on the enjoyment of a wide range of human rights: however, this statement in itself is not of much legal significance.

As Bodansky stressed, "*The fact that climate change impacts the enjoyment of human rights does not mean that climate change itself constitutes a human rights violation*"[360].

States are the main duty-bearers under human rights law, and individuals are the main right-holders. This shows the significant differences between a human rights approach and an environmental approach (as will be noted when addressing the relevant principles of international environmental law, the related obligations are mainly owed by States to each other).

A human rights approach to climate change entails coming to terms with how and to what extent human rights norms are relevant and applicable in the context of climate change. This is also essential in order to assess the advantages and disadvantages of litigation strategies grounded on human rights sources.

First of all, duty-bearers and right-holders should be identified. The precise content of duty bearer's obligations should then be established, in order to ascertain whether or not a violation of such obligations has occurred in each case.

Human rights norms have already found wide application in the context of environmental protection. Since climate change constitutes a peculiar environmental issue, obligations related to the environment could provide a useful starting point in establishing States' duties in the context of climate change[361]. However, it should be stressed that the mere transposition of obligations that emerged in a different context would likely be inappropriate and unsatisfactory: climate change differs from all other environmental issues, it crosses all international boundaries and all GHG emitters simultaneously contribute to it. These peculiarities are also the origin of some of the legal

[359] C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency: how human rights, courts, and legal mobilization can bolster climate action*, Cambridge University Press, 2023, p. 2 (hereinafter RODRÌGUEZ-GARAVITO).

[360] D.BODANSKY, *International Climate Change Law*, cit., p. 304.

[361] See generally, on the relationship between environmental human rights and climate change, B.LEWIS, *Environmental Human Rights and Climate Change. Current Status and Future Prospects*, Springer, 2018; M.C. PETERSMANN, *When Environmental Protection And Human Rights Collide. The Politics of Conflict Management by Regional Courts*, Cambridge University Press, 2022; A.GOURITIN, *EU Environmental Law, International Environmental Law, and Human Rights Law. The Case of Environmental Responsibility,* Brill Nijhoff, 2016.

issues associated with a human rights approach to climate change: legal standing – which is to be assessed and established in the first phase of the dispute[362] – causation and extraterritoriality.

States' obligations in the context of environmental issues have been thoroughly explored and mapped by UN bodies, special procedures, international organizations and scholars, over the course of the last 15 years.

The most comprehensive evaluations of human rights obligations in the context of environmental matters were conducted within special mandates of the HRC. The mandate of the UN Special Rapporteur on human rights and climate change was only established in 2021. However, from 2013 to 2019, the issue was thoroughly addressed by the Independent Expert (and subsequently by the Special Rapporteur) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Mr. John Knox was the first Independent Expert on human rights and the environment (from 2012 to 2015) and his mandate was extended for another three years as a Special Rapporteur; Mr. David R. Boyd was appointed in March 2018 and his mandate was renewed in 2021 for another three years.

The work conducted by John Knox will be particularly useful, as it is the result of an in-depth and comprehensive analysis of all relevant sources. As Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Knox mapped the obligations relevant to environmental issues in his 2013 Mapping Report[363].

In order to conduct his study, Knox reviewed a wide range of sources of human rights law, received assistance from academics and law firms, assessed the jurisprudence of tribunals and treaty bodies, and examined the text of numerous agreements and soft-law instruments. Thousands of pages of materials were reviewed, including texts of agreements, declarations and resolutions, statements by international organizations and States, and interpretations by tribunals and treaty bodies[364]. This resulted in 14 reports, which were edited in light of several consultations, subsequently reviewed by outside experts and eventually summarized in the final report.

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[362] F.SINDICO, M.M.MBENGUE, K.MCKENZIE, *Climate Change Litigation and the Individual: An Overview*, in F. SINDICO, M.M.MBENGUE (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects*, Springer, 2021, p. 8. The authors address the main phases involved in bringing a climate change dispute and illustrate the main characteristics and issues of each of the three phases: "*standing (the possibility to be heard by a court in the first place), grounds of review (discussion on the merits of the claim) and remedies (action following a positive decision by the court in favour of the individual bringing the claim)*".

[363] UNGA, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/25/53, December 30, 2013 (hereinafter Mapping Report).

[364] Mapping Report, see supra, paras. 8 and 9.

In his 2016 report, Knox conducted a detailed study on human rights obligations related to climate change[365]. In March 2018, Knox concluded the final report of his mandate, presenting framework principles on human rights and the environment, and providing an overview of previous findings[366]. The obligations of States and businesses relating to the environment were also explored and clarified by newly-appointed Special Rapporteur, Mr David R. Boyd, in his 2019 report[367].

The UNEP, in its 2015 Report, explored the content of States' and private actors' human rights obligations relevant to climate change[368]. In 2019, the UNEP published its first global report on environmental rule of law[369]. These contributions will also be useful in shedding light on existing obligations.

Overall, the studies conducted by John Knox and David Boyd constitute the most comprehensive analysis of human rights obligations related to climate change[370]. In reconstructing States' obligations, the findings of the OHCHR 2009 Report have nonetheless represented a fundamental starting point.

In the following paragraphs, an overview of States' obligations will be provided, in light of the findings of the above-mentioned mandates and UN bodies, bearing in mind that reconstructions fall within soft law and therefore have no binding value.

It should be noted that all bodies and organizations draw similar conclusions as to the existence and content of obligations. UN Bodies and scholars usually distinguish between substantive obligations and procedural obligations: while substantive obligations mainly entail the adoption of measures to prevent human rights violations, procedural obligations entail access to remedies, information and participation in decision-making.

Along with substantive and procedural duties, obligations related to specific vulnerable groups are usually assessed. Some authors and bodies also distinguish obligations at national level and obligations at international level

There is hence no reason to depart from the commonly used distinction. Such distinction between substantive, procedural and group-specific obligations sets the stage for assessing which of these obligations are commonly invoked in the context of rights-based climate litigation: the analysis of numerous cases – conducted in Chapter III – will try to provide an answer on whether or

[365] UNGA, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/31/52, February 1, 2016 (hereinafter 2016 Report).

[366] UNGA, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles on Human Rights and the Environment*, A/HRC/37/59, January 24, 2018.

[367] UNGA, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/74/161, July 15, 2019.

[368] UNEP, *Climate Change and Human Rights*, see supra, December 2015.

[369] UNEP, *Environmental Rule of Law. First Global Report*, January 2019.

[370] A.SAVARESI, *UN Human Rights …*, cit., p. 402.

not the obligations that emerged in the context of environmental matters can successfully be applied to climate change. The role of the jurisprudence in clarifying States' and private actors' obligations is particularly crucial in this context, especially considering the very recent emergence of rights-based litigation.

4.1 Legal grounding of human rights obligations and typologies of duties

A detailed analysis of the features of international human rights law lies outside the scope of this work[371]. However, in order to fully understand the contents and implications of rights-based litigation, a grasp of certain features of international human rights law is necessary. Therefore, some important concepts will be briefly addressed as they often recur in the context of climate litigation and, more precisely, rights-based climate litigation.

As will be illustrated in chapter III, rights-based litigation is usually grounded on human rights enshrined at international (and regional) level and on fundamental rights enshrined in national constitutions. Therefore, authors have distinguished "fundamental" rights (recognized at domestic level) and "human" rights (recognized at international or regional level) in light of their different legal grounding[372]. On a practical level, however, the distinction can often be quite nebulous[373].

The obligations that will be illustrated in the following are often based on the core instruments of human rights law: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, regional human rights systems, and rights guaranteed at that level, also play a pivotal role[374].

Human rights enshrined in instruments such as the ECHR are particularly relevant in the context of climate change litigation, not only because a significant percentage of rights-based cases were brought before European countries, but also due to the fact that, while international

[371] For a comprehensive coverage of international human rights law, see D.L.SHELTON, *Advanced Introduction to International Human Rights Law*, Edward Edgar, 2020; I.BANTEKAS, L.OETTE, *International Human Rights: Law and Practice*, Cambridge University Press, 2020; R.K.M.SMITH, *Texts and Materials on International Human Rights*, Routledge, 2020; P.PUSTORINO, *Introduction to International Human Rights Law*, Springer, 2023; O.DE SCHUTTER, I*nternational Human Rights Law. Cases, Materials, Commentary*, Cambridge University Press, 2019; C.ZANGHÌ, L.PANELLA, *La protezione internazionale dei diritti dell'uomo*, Giappichelli, 2019; P.PUSTORINO, *Tutela internazionale dei diritti umani*, Cacucci Editore, 2022; A.CASSESE, *I diritti umani oggi*, Laterza, 2009; E.PARIOTTI, *I diritti umani: concetto, teoria, evoluzione*, CEDAM, 2018.

For a compilation of international customary human rights norms, see W.A.SCHABAS, *The Customary International Law of Human Rights*, Oxford University Press, 2021.

[372] E.PARIOTTI, *I diritti umani* …, cit., CEDAM, 2018, p. 2.

[373] A. PISANÒ, *Il diritto al clima …,* cit., 2022, p.16.

[374] A thorough illustration of regional human rights systems falls outside the scope of this analysis. It is sufficient to point out that human rights systems established at regional level (especially within the Council of Europe, the Organization of American States and the African Union) are gradually emerging as venues to adjudicate rights-based litigation in the context of climate change. For an overview focused on climate change, see S.ATAPATTU, *Climate change under regional human rights systems*, in S.DUYCK, S.JODOIN and A.JOHL (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, 2018, pp. 128 and ff.

instruments (such as the above-mentioned core treaties) provide mainly formal recognition of certain rights, mechanisms established at regional level – including Courts that deliver binding judgements – guarantee a substantial application of such rights[375].

The jurisprudence of regional human rights Courts has also played a key role in clarifying States' obligations in the context of environmental harm, and it is constantly recalled by UN Independent Experts and Special Rapporteurs when framing human rights obligations relevant to climate change. As already mentioned, obligations associated with environmental matters constitute a fundamental starting point in exploring obligations associated with climate change.

Overall, the conjunction between human rights protected at international and regional level and fundamental rights recognized at national level, determines a multi-level recognition and protection of rights, along with a multi-level governance and human rights policy where new actors – such as individuals, NGOs and lawyers – play an increasingly relevant role[376].

The primary importance of treaties in protecting human rights makes the issue of the legal standing of such rights – namely their inclusion within international customary law and *jus cogens* norms – less troublesome on a practical level. However, as Pustorino noted, there is a tendency among international semi-judicial bodies and sometimes even international courts to "generously" assess the correspondence of treaty norms to international customary law[377]. This seems to apply to HRC's special mandates and UN bodies as well, as will be illustrated.

With regards to the typologies of duties, a widely used categorization identifies three main types of obligations established by human rights law: the duty to respect; the duty to protect; the duty to fulfil[378]. The duty to respect entails negative obligations, requiring States to abstain from interfering with the enjoyment of human rights; the duty to protect requires States to adopt adequate measures to prevent violations by third parties; the duty to fulfil indicates positive obligations, requiring States to adopt measures to guarantee the realization of rights (including legislative, administrative and judicial measures)[379].

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[375] A.PISANÒ, *Sul momento applicativo del diritto dei diritti umani*, in *Rivista di filosofia del diritto*, Vol. 1, 2017, p. 134.

[376] A.PISANÒ, *Il diritto al clima …,* cit., pp. 18-19.

[377] P.PUSTORINO, *Tutela internazionale* …, cit., p. 28. The author observes that this tendency depends on at least two reasons: the fact that the protection of human rights is also grounded on moral instances; the fact that international bodies often "promote themselves" by suggesting debatable interpretations of the legal status of human rights norms. Pustorino also notes that, while this can be accepted to a certain extent, going beyond a dialectical relationship between courts and international bodies may lead to conflict between jurisdictions at national and international level and may negatively impact legal certainty and the credibility of human rights law.

[378] O.DE SCHUTTER, *International* … , cit., p. 292. The tripartite conceptualization emerged in the 1980s in the work of Asbjørn Eide and Henry Shue. See A.EIDE, *The Right to Adequate Food as a Human Right*, E/CN.4/SUB.2/1983/25, 1983; A.EIDE*, The Right to Adequate Food as a Human Right*, E/CN.4/SUB.2/1987/23, 1987; H. SHUE, *Basic Rights, Subsistence, Affluence, and US Foreign Policy*, Princeton University Press, 1980, p. 52.

[379] UNEP, *Climate Change and Human Rights*, see supra, p. 15. See also D.BODANSKY, *Climate change and human rights: unpacking …,* cit., pp. 519-521.

These obligations may apply to rights regardless of whether they are enshrined in the ICCPR, the ICESCR or other human rights instruments and, therefore, regardless of the "generation" of rights involved[380]. However, first generation rights (which include civil and political rights) require States to mainly refrain from certain actions (duty to respect) while second generation rights (such as economic and cultural rights) often require States to engage in positive – usually gradual and resource-dependent – action (duty to protect and fulfil)[381].

It should be noted that the distinction between first, second, third and even fourth generation rights, although widely utilized among scholars, is based on a merely temporal criteria, associated with their emergence within States' practice[382]. Although rights that emerged earlier (such as civil and political rights) are generally considered to benefit from a greater level of international protection, that is not always the case in States' practice (as third generation rights such as the right to self-determination may receive greater protection than certain political rights).

Some authors have underlined the little practical use of the distinction between different generations of rights[383] and others have argued that such distinctions represent a danger and may lead to the establishment of arbitrary hierarchies among rights[384].

4.1.1 Substantive obligations

Substantive obligations in the context of environmental issues include, firstly, the duty to adopt and implement adequate legal frameworks that prevent (and respond to) environmental harm which may hamper the enjoyment of human rights[385].

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[380] O.QUIRICO, *Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation*, in *Netherlands International Law Review*, Vol. 65, 2018, pp.185–215, p. 188.

[381] Ibid.

[382] P.PUSTORINO, *Tutela internazionale* …, cit., pp. 111-112. First generation rights are civil and political rights; second generation rights are economic, social, and cultural rights; third generation rights include the right to self-determination, the right to development and the right to a healthy environment; fourth generation rights have emerged as a consequence of scientific developments in biotechnologies and biomedicine. The author also notes that there is no unanimous consensus on which rights should be included within each category (especially with regard to third and fourth generation rights).

[383] Ibid., p. 111.

[384] C.ZANGHÌ, L.PANELLA, *La protezione internazionale* ..., cit., pp. 12-13.

[385] 2016 Report, see supra, para. 65; Mapping Report, see supra, para. 47. This aspect has been addressed by the ECtHR on several occasions: see ECtHR, *Fadeyeva v. Russia* (Application no. 55723/00, June 9, 2005) where the failure to implement a legislative framework to tackle industrial pollution accounted to a violation of Article 8 of the ECHR; see also ECtHR, *Budayeva and others v. Russia* (Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, March 20, 2008) where the Court found a violation of Article 2 as a consequence of failure to provide deterrence against environmental threats to the right to life.

For other insights from the ECtHR on the content of the duty to adopt adequate legal frameworks, positive measures to prevent environmental harm and to strike a reasonable balance between conflicting interests see: *Giacomelli v. Italy* (Application n. 59909/00, October 19, 2006); *Hatton v. the United Kingdom* (Application no. 36022/97, July 8, 2003); *Oneryildiz v. Turkey*, Application no. 48939/99, November 30, 2004; *Tătar v. Romania*, Application no. 67021/01, January 27, 2009; *Cordella and others v. Italy*, Applications no. 54414/13, 54264/15, January 24, 2019; *López Ostra v. Spain*, Application no. 16798/90, December 9, 1994, where the Court found a breach of Art. 8 as a consequence of not striking a fair balance between conflicting interests.

This obligation does not entail preventing all activities that cause pollution and potential environmental harm: States do have discretion to strike a reasonable balance between the need to protect the environment and other relevant interests such as economic development[386].

The content of national legislation and standards of pollution also represent a crucial aspect in evaluating States' conduct and establishing whether or not a fair balance was struck.

In the context of climate change, the obligation would necessarily entail adaptation and mitigation measures. As Knox noted, the obligation is unambiguous with regard to the adoption and implementation of adaptation measures (although, as we have seen, adaptation options may vary in each country or region in light of various factors, and they may be limited in less developed and poor areas). Nonetheless, adaptation action should guarantee prior informed public participation, it

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The Court took a step further in the recent case of *Pavlov and others v. Russia* (Application no. 31612/09, October 11, 2022).

The applicants claimed that they had been exposed to industrial pollution in the city of Lipetsk and claimed that failure by the government to take adequate measures to reduce or eliminate pollution in the area accounted to a violation of Art. 8 of the ECHR. The Court stressed that "*it is not its task to determine what precise practical steps should have been taken in the present situation to reduce pollution in a more efficient way. However, it is within its jurisdiction to assess whether the State approached the problem with due diligence and gave consideration to all the competing interests (see Fadeyeva* […])." (para. 90). The Court recognized that several measures had been adopted and tangible results in reducing pollution were achieved; however, it observed that industrial air pollution had not been "*sufficiently curbed, so as to prevent that the residents of the city be exposed to related health risks*" (para. 92), and that "*domestic authorities* […] *failed to strike a fair balance in carrying out their positive obligations to secure the applicants' right to respect for their private life*" (para. 92), therefore concluding that that a violation of Art. 8 had occurred (para. 93).

This decision is particularly interesting under various aspects, which might all be relevant to climate change litigation: first off, some applicants were allowed to proceed despite the fact that they had not appealed the decision at national level, therefore adopting a "loose" approach to the rule of prior exhaustion of local remedies; secondly, the case concerned large-scale pollution, where applicants were not in the immediate surroundings of the polluting site and, nonetheless, the case was admissible and applicants met the 'victim' status; despite recognizing States' margin of appreciation and the significant measures adopted to curb emissions, the Court evaluated the adequacy of such measures more strictly and with a deeper control (with a potential shift towards transforming an obligation of means to an obligation of result, as the dissenting opinion of Judge Lobov noted); non-pecuniary damage was awarded despite the fact that pollution was on a large-scale and no specific damage to health of the applicants was alleged and proved.

For more insights on the *Pavlov and others v. Russi*a case, see M.BALAJI, *Another 'Green Reading' of Article 8 of the ECHR in Pavlov & Others v Russia*, Oxford Human Rights Hub, November 29, 2022, available at: https://ohrh.law.ox.ac.uk/another-green-reading-of-article-8-of-the-echr-in-pavlov-others-v-russia/.

For an overview of the case law of the ECtHR on environmental rights, see: O.W.PEDERSEN, *The European Court of Human Rights and International Environmental Law*, in J. KNOX, R. PEJAN (eds.), *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, pp. 86-96; A.SACCUCCI*, La protezione dell'ambiente nella giurisprudenza della Corte Europea dei Diritti Umani*, in A.CALIGIURI, G.CATALDI, N.NAPOLETANO (eds.), *La tutela dei diritti umani in Europa: tra sovranità statale e ordinamenti sovranazionali*, 2010, p. 111 and ff.; Council of Europe, *Manual on Human Rights and the Environment (3rd edition). Principles emerging from the case law of the European Court on Human Rights and the conclusions and decisions of the European Committee of Social Rights*, February 2022. See also *The Strasbourg Principles of International Environmental Human Rights Law – 2022*, in *Journal of Human Rights and the Environment*, Vol. 13, Special Issue, September 2022, pp. 195-202: the principles were drafted by human rights and environmental law experts brought together at the "Human Rights for the Planet" conference held in Strasbourg at the ECtHR in 2020.

[386] Mapping Report, see supra, para. 53.

should account national and international standards and it should be neither retrogressive nor discriminatory[387].

Conversely, the content of the obligation may be more problematic with regards to mitigation. All countries contribute – in varying degrees – to climate change, and its consequences are the result of global emissions[388].

Establishing how much a State should do – and whether or not the State can be held responsible for inadequate action – is not straightforward. However, the Paris Agreement has provided a useful parameter – that is, the 2°C temperature goal – which, along with up-to-date scientific data, allows for a reliable assessment of the adequacy of national mitigation policies[389].

Secondly, substantive obligations include the duty to protect against environmental harm from private actors[390]. According to Knox, this duty would also entail "*taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*"[391].

Knox also notes that according to the Guiding Principles on Business and Human Rights[392], States must "*protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises*", underlining that the pillars of the business and human rights framework should apply to all environmental issues, including climate change[393].

States are the duty-bearers under human rights law, which does not establish obligations for private actors. Considering the lack of binding human rights provisions for private actors, the obligation to protect may be relevant in determining States' responsibility for excessive GHG

[387] 2016 Report, see supra, para. 68. This is consistent with Article 7 of the Paris Agreement, which provides that "*adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach*".

[388] Ibid., para. 71. It is worth underlining that, as Mayer noted, outlining an obligation to mitigate climate change under human rights law poses the issue of extraterritorial obligations. According to Mayer, establishing such obligation "*is only convincing insofar as the benefits of mitigation action can be framed within the scope of the relevant treaty obligations—that is, insofar as mitigation action contributes to the protection of human rights within the geographical (i.e., mainly territorial) scope of the treaty*", see B.MAYER, *Climate Change Mitigation as an Obligation under Customary International Law*, in *The Yale Journal of International Law*, Vol. 48, 2023, p. 109; B.MAYER, *Climate Change Mitigation as an Obligation under Human Rights Treaties?*, in *The American Journal of International Law*, Vol. 115:3, 2021, p. 409, noting that "*human rights treaties open only a narrow window on the applicability of general mitigation obligations arising under climate treaties and customary international law*".

[389] After the adoption of the Paris Agreement, several scholars suggested that the newly established parameter could play a key role in assessing the adequacy of States' conduct. See A.D.BROWN, *Using the Paris Agreement's ambition ratcheting mechanisms to expose insufficient protection of human rights in formulating national climate policies*, in S.DUYCK, S.JODOIN, A.JOHL (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, 2018, pp. 222-232.

[390] Mapping Report, see supra, para. 58.

[391] 2016 Report, see supra, para. 67.

[392] OHCHR, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04, 2011.

[393] 2016 Report, para. 66.

emissions by private actors[394], although the litigation that has emerged so far has not openly explored this issue and has usually challenged the excessiveness of GHG emissions generally attributable to the defendant State.

Indeed, as mentioned, States have a duty to protect individuals from violations that may occur as a consequence of action by third parties, including private actors[395].

However, it should be noted that some authors have put forward several arguments in favour of the emergence of direct obligations for businesses under HRL[396], asserting that businesses do have (at least partial) legal personality and may be bound by HRL obligations. This conclusion would certainly challenge some of the traditional concepts of international law (such as the notion that States are the main – or the only – subjects of international law) but provides useful insights for a "*conceptual and structural evolution of IHRL*"[397].

It is worth noting that Special Rapporteur Boyd, in his 2019 Report, dedicated an entire section to "business responsibilities"[398]. According to Boyd, businesses must adopt human rights policies, adopt due diligence and remedy human rights violations; moreover, they should comply with the Guiding Principles on Business and Human Rights[399]. The Special Rapporteur outlines five business responsibilities in the context of climate change: reducing GHG emissions from their activities; reducing GHG emissions from their suppliers; publicly disclosing their emissions, climate vulnerability and the risk of stranded assets; guarantee access to effective remedies in case of human rights violations[400].

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[394] A.RIDDELL, H*uman rights responsibility of private corporations for climate change? The State as a catalyst for compliance*, in O.QUIRICO, M.BOUMGHAR (eds.), *Climate Change and Human Rights: An international and comparative law perspective*, Routledge, 2016 (hereinafter QUIRICO et al.), pp. 53-68. See also O.QUIRICO, J.BROHMER, M.SZABO, *States, climate change and tripartite human rights: the missing link*, in QUIRICO et al., cit., p. 8 and ff.

[395] See generally A.CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford, 2006; N.BERNAZ, *Business and Human Rights: History, Law and Policy. Bridging the Accountability Gap*, Routledge, 2016.

[396] A.F.LÓPEZ LATORRE, *In Defence of Direct Obligations for Businesses Under International Human Rights Law*, in *Business and Human Rights Journal*, Vol. 5:2, 2020, pp. 56-83. The author observes that "*Although international law, including IHRL, has developed in a particular historical way in which the state has been the main duty-holder and only subject of international law (except for international organizations), international law is undergoing a conceptual and structural evolution required to address non-state actors' accountability. This conceptual evolution implies a re-reading of international legal subjectivity as an index of certain capacities that can be recognized in different degrees as challenging the sharp distinction between subjects and objects of international law. According to this conceptual evolution, businesses and other non-state actors have the capacity to bear international rights and obligations, and to participate in international proceedings*", p. 83.

[397] Ibid. p. 83.

[398] The Special Rapporteur distinguishes "State obligations" and "corporate responsibilities": the different wording seems particularly indicative of the difficulty in establishing corporate obligations under environmental law and human rights law.

See generally P.GAILHOFER, D.KREBS, A.PROELSS, K.SCHMALENBACH, R.VERHEYEN, *Corporate Liability for Transboundary Environmental Harm An International and Transnational Perspective*, Springer, 2023.

[399] 2019 Report, see supra, para. 71.

[400] Ibid., paras. 71-72.

Clearly, the regulatory framework regarding this matter is rather underdeveloped[401]. However, in recent years, there has been a growing number of impactful lawsuits against the private sector, especially the so-called Carbon Majors. This trend will be further explored below.

In light of the findings of UN Special Rapporteurs, Savaresi and Setzer distinguish, in the context of climate change, between positive substantive obligations (which include the duty to adopt legislation and the duty to enforce legislation) and negative substantive obligations (which entail refraining from harmful activities). The majority of pending claims are grounded on alleged violations of substantive obligations, mainly concerning the adoption of legislative frameworks and the duty to refrain from authorizing projects with significant negative impacts[402].

Some authors have recently underlined the emergence of the principle of "non-regression" in environmental protection, prohibiting States from weakening the level of environmental protection granted at national level[403].

4.1.2 Procedural obligations

Procedural obligations play a crucial role in decision-making in environmental matters. They are associated with three main aspects: gathering and providing information, participation and access to remedies.

Access to information is generally considered the basis and prerequisite for exercising other procedural rights related to participation in decision-making and access to remedies.

In the context of climate change, the duty requires States to provide the public with information concerning the causes and consequences of climate change. States are also required to evaluate the impacts and potential harmful effects and impacts on human rights of major activities, policies and proposals[404].

The duty to guarantee public participation in decision-making – which is grounded in the core instruments of HRL such as the UDHR (Art. 21) and the ICCPR (Art. 25) – is also crucial in

[401] For insights on the human rights responsibility of the private sector, see A.RIDDEL, H*uman rights* …, cit, pp. 53-68, who concludes that "*Both internationally and domestically, human rights responsibility of private corporations is centred around the State, which should be ultimately answerable for GHGs emitted by private corporations.* […]. *As a consequence, the obligation to protect human rights emerges as the main tool in keeping private corporations responsible, whereby the State is answerable for failure to prevent their GHG emissions. The effectiveness of this duty is nevertheless problematic, because of the issues of policy discretion and extraterritoriality*".

At EU level, the Commission has recently adopted a proposal for a directive on corporate sustainability due diligence, see: https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

[402] A.SAVARESI, J.SETZER, *Rights-based litigation in the climate emergency …,* cit., p. 21.

[403] A.D.MITCHELL, J. MUNRO, *An International Law Principle of Non-regression From Environmental Protections*, in *International & Comparative Law Quarterly*, Vol. 72:1, 2023, pp. 35-71. See also: M.MONTEDURO, *Crucialità, criticità e complessità del dibattito sul principio di non regressione ambientale*, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, Issue n. 2, 2021, pp. 4-17; G.BÁNDI, *Harnessing the non-retrogression principle for setting environmental thresholds*, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, Issue n. 2, 2021, pp. 103-133.

[404] 2019 Report, p.18

the context of climate action[405]. As Boyd pointed out, participation should be inclusive, equitable and gender-based, and particular attention should be paid to vulnerable groups, local communities and other groups or communities at potential risk. States are required to respect the rights of indigenous peoples in undertaking climate action, including the right to prior informed consent[406].

Public participation is also promoted, within the UNFCCC regime, by Art. 7 of the FCCC and Art. 12 of the Paris Agreement.

Lastly, the duty to guarantee access to remedy – which is also enshrined in the UDHR (Art. 8) and the ICCPR (Art. 2.3) – requires States to establish affordable and timely mechanisms that provide appropriate redress (such as monetary compensation along with other means of relief). Such mechanisms should be granted before independent and impartial judicial authorities who provide binding decisions.

The above-mentioned duties have often found application to environmental issues in the jurisprudence of human rights courts (including, in the European context, the ECtHR)[407].

As noted by Savaresi and Setzer, cases regarding claimed procedural breaches pertain to the right to access to information and the right to participation in environmental decision-making, whereas the right to access to remedy has exclusively been invoked together with other entitlements thus far[408].

An analysis of judicial and non-judicial decisions will allow for an evaluation on whether or not the obligations illustrated above may in fact be successfully applied to climate change.

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[405] 2016 Report, para. 56.

[406] 2019 Report, p. 18.

[407] The ECtHR has gradually outlined a vast range of rights relevant to environmental matters. In *Guerra v. Italy* (Application no. 14967/89, February 19, 1998) the Court found a violation of Art. 8 of the ECHR as a consequence of lack of environmental information (which concerned the risks that applicants could encounter by continuing to live in Manfredonia). In *Oneryildiz v. Turkey* (Application no. 48939/99, November 30, 2004) the Court once again stressed the importance of access to information, especially in the context of dangerous activities.

In *Taşkin and Others v. Turkey* (Application no. 46117/99, November 10, 2004) the ECtHR stressed the need to conduct assessments and studies when facing severe environmental issues and to guarantee public access to the results of such assessments. The need to consider the needs and interests of individuals in environmental decision-making was also highlighted in *Hatton and Others v. the United Kingdom* (Application no. 36022/97, July 8, 2003) and *Tătar v. Romania* (Application no. 67021/01, January 27, 2009). See also *Brânduşe v. Romania* (Application no. 6586/03, April 7, 2009).

Very useful insights have also emerged in other regional systems.

As to the African system, see *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (Ogoniland case)*, October 27, 2001, where the AComHPR ascertained a violation, by the Federal Republic of Nigeria, of the right to health and the right to a satisfactory environment, determined by lack of environmental assessments and adequate information, while also stressing the need to guarantee participation in the decision-making process.

As to the American system, see *Claude-Reyes et al. v. Chile*, C No. 151, September 19, 2006, where the IACtHR found a violation of the right to freedom of expression determined by lack of information on environmental action.

[408] A.SAVARESI, J.SETZER, *Rights-based litigation in the climate emergency ...,* cit., pp. 23-24.

4.1.3 Extraterritorial obligations

The nature of climate change as a global and transboundary environmental phenomenon inevitably raises the question of extraterritorial obligations. This is a hotly debated issue in international law[409] and involves the question of whether and to what extent States can be obligated to protect the human rights of those outside the territory of the State.

There is, on the one hand, the issue of obligations that "follow" the State when it occupies foreign territory; on the other hand, there is the question of whether and in what cases extraterritorial obligations may exist[410]. The issue is closely related to the notion of jurisdiction.

Traditionally, there has been minimal consideration of human rights obligations beyond States' territorial borders. However, over the last few decades, extraterritorial obligations have emerged in various sectors, including migration[411], peace and security and the environment[412].

Certain human rights treaties establish their scope of application explicitly, although with different formulations. The ICCPR provides in Article 2.1 that: "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant* […]"[413]. Similarly, Art. 1 of the ECHR provides that "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*"[414]. In contrast, the ICESCR does not include any provision that refers to jurisdiction or territory.

Despite the global nature of climate change, the constructability of extraterritorial obligations in this area is quite controversial. In particular, establishing jurisdiction is quite complex given that climate change is the result of the aggregate emissions of all States and private actors. In this sense, even an expansive interpretation of the notion of jurisdiction included in the main

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[409] See, among numerous contributions: F.COOMANS, M.KAMMINGA (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia-Hart, 2004; M. MILANOVIC, *Extraterritorial application of human rights treaties. Law, Principles, and Policy*, Oxford, 2011; M.GIBNEY, G.E.TÜRKELLI, M.KRAJEWSKI, W.VANDENHOLE (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations*, Routledge, 2022 (hereinafter GIBNEY et al.)

For insights on extraterritorial obligations related to climate change, see S.L.SECK, *Climate justice and ETOs*, in GIBNEY et al., cit., pp. 421-433. For a recent contribution, see C.GENTILE, *Climate litigation ed extraterritorialità dei diritti*, in *Federalismi.it*, n. 5, 2023, pp. 1-26.

[410] O.DE SCHUTTER, *International ...,* cit., pp. 145-147.

[411] G.MINERVINI, *Extraterritorial Jurisdiction Before the Human Rights Committee: First Considerations on S.A. and Others v. Italy*, in *Diritti umani e diritto internazionale*, Vol. 15, Issue 3, 2021, pp. 575-598.

[412] W.VANDENHOLE, G.E TÜRKELLI, M.GIBNEY, M.KRAJEWSK, *Introduction*, in GIBNEY et al., 2022, pp. 1-2.

[413] The scope of the norm was addressed by the ICJ, which concluded that the Covenant applies to acts committed by a State in the exercise of its jurisdiction outside its own territory. See ICJ, *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, General List No. 131, July 9, 2004.

[414] For an analysis of extraterritorial obligations in the European system, see Y.HAECK, C.BURBANO-HERRERA, H.GHULAM FARAG, *Extraterritorial obligations in the European human rights system*, in GIBNEY et al., cit., pp. 125-139.

international human rights instruments to include cases where the State exercises "effective control" may be insufficient with respect to a phenomenon such as climate change.

The topic has been thoroughly explored by John Knox, who acknowledged that enforcing extraterritorial obligations on climate change would be "*politically controversial and practically difficult"* and suggested that a more effective approach might be to emphasize, and leverage, the existence of an obligation for States to cooperate internationally to combat climate change; moreover, the UNFCC and the Paris Agreement are the best proof of the need for global action to combat the phenomenon[415].

Of course, the issue of extraterritoriality does not necessarily arise in the context of all climate litigation; on the contrary, in most cases, it is the State's conduct with respect to persons who are unquestionably subject to its jurisdiction (usually persons within the State's territory) that is relevant; the issue arises, instead, when State liability is invoked for violations that occurred outside its jurisdiction (such as, for example, damages claimed by citizens of other States).We refer, in particular, to so-called "diagonal claims", i.e., lawsuits filed by individuals against States other than their own[416]. It is equally clear that, from a strictly practical point of view, it may often be sufficient to characterize the State's obligation as a purely domestic obligation if we consider that mitigation measures, even if taken for the purpose of fulfilling domestic obligations, benefit everyone; this is all the more true for adaptation measures, which are usually left to individual States (although, on closer examination, the obligations of international cooperation appear to be crucial for the successful implementation of such measures).

In the context of the analysis of rights-based litigation in Chapter III, we will examine the terms in which extraterritoriality has been raised. In this respect, it can already be noted that an important landmark (which, moreover, has been echoed in subsequent pronouncements) is the 2017 Advisory Opinion of the IACtHR.

On November 15, 2017, the IACtHR issued its Advisory Opinion on human rights and the environment pursuant to a request from the Republic of Colombia[417].

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[415] J.H.KNOX, *Bringing Human Rights to Bear on Climate Change*, in *Climate Law*, Vol. 9, 2019, p. 172. See also J.H.KNOX, *Climate Change and Human Rights Law*, in *Virginia journal of International Law*, Vol. 50, 2009, pp. 200-215.

[416] J.KNOX, *Diagonal Environmental Rights*, in M.GIBNEY, S.SKOGLY (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, 2010, pp. 82 and ff.

[417] IACtHR, *Advisory Opinion on Environment and Human Rights*, OC-23/17, November 15, 2017. For an evaluation, see: T.SCOVAZZI, *La Corte interamericana dei diritti umani svolge una trattazione sistematica del diritto umano ad un ambiente sano*, in *Rivista Giuridica dell'Ambiente*, Vol. 34, Issue 4, 2019, pp. 713-716; E. CARPANELLI, *International Human Rights Law and Transboundary Environmental Harm: Trends and Challenges*, in M. ARCARI, M., I.PAPANICOLOPULU, L.PINESCHI (eds.), *Trends and Challenges in International Law. Selected Issues in Human Rights, Cultural Heritage, Environment and Sea*, Springer, 2022, pp. 13-48.

The IACtHR found that, under the American Convention on Human Rights (ACHR), the State Parties are under an obligation to respect and protect the rights recognized by the instrument to all individiuals subject to their jurisdiction. Under Art. 2.1 of the Convention, the exercise of jurisdiction outside the territory of the State is exceptional and must be examined restrictively; the notion of jurisdiction entails "*any situation in which a State exercises effective control or authority over a person or persons, either within or outside its territory*"[418]. With regards to transboundary harm or damage, the Court found that "*a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation*"[419].

This principle could be applied to climate change since it can be argued that the State has "effective control" over its GHG emissions. Nonetheless, it would still be essential to provide evidence of the causal link between such emissions and the harm complained of, even if we adopt the Court's perspective in its advisory opinion. Therefore, even "cross-border" lawsuits would require providing evidence of causation (as a necessary element to prove jurisdiction, even before delving into the merits of the case). As will be highlighted in Chapter III, the issue has recently surfaced again in the context of climate litigation at the international level.

4.2 The influence of environmental constitutionalism

As mentioned earlier, the use of constitutionally guaranteed fundamental rights is a common strategy in rights-based climate litigation. Environmental constitutionalism, or the "*ecologizing of constitutions*"[420], has been occurring for decades, resulting in environmental themes being reflected in various constitutional systems around the world. Although this path has been characterized by significant heterogeneity, to date, numerous constitutions around the globe recognize the right to a healthy environment or at least acknowledge the significance of environmental concerns by recognizing procedural and substantive rights[421]. In 1989, only about 40 constitutions provided for

[418] IACtHR, *Advisory Opinion* …, see supra, para. 104.
[419] Ibid.
[420] D.AMIRANTE, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene*, Il Mulino, 2022, p. 49.
[421] A detailed reconstruction of the phenomenon lies outside the scope of this work. For a comprehensive analysis, see: D.AMIRANTE, *Costituzionalismo ambientale…,* cit.; D.AMIRANTE, S.BAGNI (eds.)*, Environmental Constitutionalism in the Anthropocene*, Routledge, 2022; E.DALY, J.R.MAY, *Learning from Constitutional Environmental Rights*, in J.KNOX, R. PEJAN (eds.), *The Human Right* …, cit., p. 42 and ff.; R.O'GORMAN, *Environmental Constitutionalism. A comparative study*, in *Transnational Environmental Law*, Vol. 6, Issue 3, 2017, pp. 435-462; G.CORDINI, P.E.M.FOIS, S.MARCHISIO, *Diritto ambientale* …, cit., pp. 109-164; UNEP, *Global Judicial Handbook on Environmental Constitutionalism*, 2019, available at: https://wedocs.unep.org/handle/20.500.11822/28125.

some form of environmental protection. Today, more than 150 constitutions have such provisions[422].

This phenomenon has contributed to the development of multi-level environmental protection. This will be apparent from the analysis of rights-based litigation, as plaintiffs' claims are often based on multiple sources, including national constitutions.

Regarding the particular relevance of environmental constitutionalism in relation to climate litigation, it is worth noting that – even though only a handful of constitutions explicitly acknowledge climate change[423] – the phenomenon holds significance not only because constitutional provisions can direct legislative and administrative action and play a role in shaping these actions, but also because they serve as a fundamental parameter that Courts may rely on when assessing whether State climate action is appropriate, given local and national characteristics.

This issue has already arisen in some legal cases in the Global South (i.e. the *Leghari* case which will be examined below). Even when the right to a healthy environment is not explicitly acknowledged, recognizing the environment as a protected interest and incorporating environmental protection into constitutional systems offers plaintiffs (and Judges) an additional instrument to assess, arguably more stringently, the legitimacy – including from the standpoint of human rights law – of States' (as well as private actors') conduct.

5. Early examples of climate litigation

5.1 The Inuit petition

The 2005 petition by the Inuit community represents the first endeavour to utilize a human rights approach to climate change and can thus be regarded as the genesis of rights-based litigation[424].

While the proliferation of this type of litigation is a recent development that has spiked in the past five years, the legal matters brought forth in the Inuit petition continue, to this day, to pose significant obstacles in rights-based litigation and specifically in determining State liability in cases of alleged human rights violations.

The petition was filed before the IAComHR on December 7, 2005, by the Chair of the Inuit Circumpolar Council (Sheila Watt-Cloutier), on behalf of all Inuit of the arctic regions of the US

[422] D.AMIRANTE, *L'ambiente preso sul serio. Il percorso accidentato del costituzionalismo ambientale*, in *Diritto pubblico comparato ed europeo*, Special Issue, 2019, p. 2.

[423] UNEP, *Global Judicial* …, cit., pp. 83-84, underlining that three countries have so far included climate change in national constitutions: The Dominican Republic, Ecuador and Tunisia.

[424] *Petition to the Inter American Commission on Human Rights Seeking Relief From Violation Resulting From Global Warming Caused by Acts and Omissions of the United States*, December 7, 2005 (hereinafter Inuit petition), available at: https://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/.

and Canada. The applicants sought relief for alleged human rights violations determined by the failure of the United States to reduce GHG emissions. The Petition illustrated the negative effects of climate change in the Arctic and the impacts on traditional land and Inuit rights, including the right to life, to health, to physical integrity, to culture and to property.

The applicants thoroughly described Inuit's relationship with their land and their strong reliance on the Arctic ecosystem and traditional knowledge. They first illustrated how climate change was impacting multiple aspects of Inuit life, pointing out that all Inuit shared a dependence on harvesting, sharing of food, travel on snow and ice, a common base of traditional knowledge, and adaptation to similar Arctic conditions[425].

The scientific foundation of the Inuit petition was the IPCC's Third Assessment Report. The petitioners emphasized that, as illustrated in the report, the Arctic was facing the gravest repercussions of climate change, with visible transformations in land conditions, water level, quality and accessibility, along with weather unpredictability, changes in plant and animal species, deterioration in ice conditions, loss of permafrost.

As a consequence, the enjoyment of numerous rights was hampered: the right to benefits of culture; the right to use and enjoy the lands that the Inuit traditionally occupied; the right to use and enjoy personal property; the right to health; the right to physical integrity and security; the right to means of subsistence; the right to residence and movement and inviolability of home[426].

The claims were mainly grounded on the American Declaration of the Rights and Duties of Man and on the ICCPR[427] and the petition also relied on international environmental law obligations such as the no-harm principle and those established within the UNFCCC regime[428].

The Inuit argued that the United States, at the time the highest GHG emitter, bore responsibility for the illustrated impacts and associated human rights violations due to its actions and omissions.

The petitioners requested that the IACHR: conduct an on-site investigation to confirm the violations of the named individuals' rights and the harms they have suffered and hold a hearing to investigate the claims; declare that the US is responsible for violations of rights affirmed in international instruments; recommend that the US adopt GHG reduction measures and develop plans, in coordination with the affected communities, to protect Inuit culture and resources,

[425] Inuit petition, see supra, summary and pp. 35-67.
[426] Ibid., pp. 76-95.
[427] Instruments such as the ACHR and the ICESCR (which were nonetheless mentioned) played a secondary role, given that they were not ratified by the US.
[428] Inuit Petition, see supra, pp. 97-100.

including adaptation measures to the unavoidable impacts; provide "*any other relief that the Commission considers appropriate and just*"[429].

The case was dismissed on November 16, 2006 on the grounds that the information contained in the Petition did not satisfy the requirements set forth in the Commission's rules and that "*Specifically, the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration*"[430].

Therefore, the IAComHR simply did not process the petition, even with regard to its admissibility.

Based on the comprehensive legal and scientific evidence presented, this conclusion appears to be highly questionable. Several commentators have thus described the decision as a missed opportunity to shed light on the relationship between human rights and climate change long before climate change litigation became a widespread strategic legal tactic[431].

As Knox observed in 2019, the claim may have seemed "*quixotic*" at the time, but, in retrospect, it represented the first "*cascade of efforts to bring human rights to bear on climate change*"[432]. This conclusion remains valid today. The Inuit petition marked a pivotal moment by emphasizing the human aspect of climate change and the need to address it not only as an environmental issue, but also as a threat to human communities.

This was also highlighted by Osofsky, who noted that Inuit petition "*serves as an important example of creative lawyering in both substance and form. It reframes a problem, typically treated as an environmental one through a human rights lens, and moves beyond the confines of U.S. law to a supranational forum.* […]. *In addition, the petition raises critical issues about the mix of advocacy tools needed to address pressing problems. For example, Watt-Cloutier presented the petition as part of a dialogue with the U.S. government and openly acknowledged the difficulties of formal enforcement. An examination of the Inuit petition thus opens broader questions about the best way to address cross-cutting environmental problems like global climate change*"[433].

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[429] Ibid., p. 118.

[430] IAComHR, Letter dated November 16, 2006, available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2006/20061116_na_decision.pdf

[431] M.FERIA-TINTA, *Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee*, in I.ALOGNA, C.BAKKER, J.GAUCI (eds.), *Climate Change Litigation: Global Perspectives,* Brill Nijhoff, 2021, p. 318; M.BOUMGHAR, *Missing opportunities to shed light on climate change in the Inter-American human rights protection system*, in O.QUIRICO, M.BOUMGHAR (eds.), *Climate Change and Human Rights: An international and comparative law perspective*, Routledge, 2016, pp. 270-286.

[432] J.KNOX, *Bringing Human Rights to Bear on Climate Change*, in *Climate Law*, Vol. 9, 2019, p. 166.

[433] H.M.OSOFSKY, *The Inuit petition as a bridge? Beyond dialectics of climate change and indigenous peoples' rights*, in *American Indian Law Review*, Vol. 31, pp. 676-677.

From a legal perspective, the Petition adopted innovative approaches which are still retrievable in recent rights-based litigation, such as the reference to goals established within the UNFCCC regime as a standard to evaluate States' compliance with human rights obligations.

Although the petition was rejected, the Commission invited the Inuit Alliance, along with representatives of the Center for International Environmental Law ("CIEL") and Earthjustice, to discuss the link between climate change and human rights and the associated legal issues[434].

The requested hearing was held on March 1, 2007. This hearing provided valuable insights on the key legal issues related to the Petition, which remain essential to rights-based litigation [435].

The most challenging issue was establishing a causal connection between the actions or omissions of a particular State and the effects on human rights[436]. During the hearing, Martin Wagner, counsel for the petitioners, pointed out the each State is responsible separately as well as jointly[437].

This topic will be comprehensively addressed in the following sections, as it is a recurring theme in rights-based litigation.

It is worth mentioning that – in order to overcome some of aforementioned legal issues – courts may adopt principles from tort and civil rights litigation, such as shifting the burden of proof in cases with multiple polluters, or theories of joint and several liability, which hold every wrongdoer responsible[438].

Similar issues arose from the "second" Inuit petition, filed in 2013 by the Arctic Athabaskan Council, representing Arctic Athabaskan peoples, to the IAComHR. The petition alleges human rights violations as a result of inadequate regulation of black carbon emissions by Canada, and is grounded on the rights to culture, property, health and to means of subsistence[439]. Similarly to the

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[434] M.LIMON, *Human Rights and Climate Change: Constructing a Case for Political Action*, in *Harvard Environmental Law Review*, Vol. 33 No. 2, 2009, p. 441.

[435] See M.CHAPMAN, *Climate Change And The Regional Human Rights Systems*, in *Sustainable Development Law & Policy*, Vol. 10 Issue 2, 2010, p. 38, observing that "*This hearing offers perhaps the best indication of the challenges that future litigation over human rights violations as consequence of climate change will face before a regional human rights body. The questions from three commissioners addressed (1) how to attribute or divide responsibility among states in the region or even states that are not members of the OAS; (2) how the rights violations suffered by the Inuit could be tied more closely to concrete acts or omissions of specific states; (3) whether the petitioners had exhausted domestic remedies, a requirement for admissibility in any of the regional human rights systems; and (4) what examples of good practices undertaken by states could guide the Commission in making recommendations*"; see also International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide*, 2008, p. 42, available at https://rm.coe.int/168069629f.

[436] As Peel and Osofsky noted, one of the main hurdles that rights-based litigation faces is "*establishing causal links between a country's GHG emissions, or failures in adaptation policies, and specific climate change impacts, which in turn adversely affect human rights*", see PEEL, H.M.OSOFSKY, *A Rights Turn ...,* cit., p. 46.

[437] International Council on Human Rights Policy, *Climate Change ...,* cit., pp. 42-43.

[438] Ibid., pp. 42-43.

[439] The Petition, as well as the most recent updates on the status of the proceeding, can be accessed at: https://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/.

Inuit petition, the petitioners requested that Commission conduct an onsite visit to investigate and confirm the harms suffered by Arctic Athabaskan peoples and to hold a hearing; they also requested the IAComHR to recommend that Canada adopt measures to reduce black carbon emissions and implement a plan to protect Arctic Athabaskan culture and resources[440].

The petition is still pending and offers an opportunity for the IAcomHR to issue a ground-breaking decision that could strengthen the protection of indigenous communities and increase their involvement in preserving the environment and biodiversity[441]. Nonetheless, even if the Petition were to be dismissed, it could still "*contribute to opening, or rather continuing, a discourse on climate change and human rights*"[442], especially with regard to the protection of indigenous communities, their territories and customs.

In light of the legal and scientific developments that have occurred since 2007, it is reasonable to assume that the Court will not dismiss the case without proper consideration this time.

5.2 Massachusetts v. EPA

The Massachusetts v. EPA case[443] has been defined by environmental law practitioners and academics as one of the most important environmental decisions of all time[444].

Although the case does not fall within rights-based litigation – and in fact followed a very different approach – it nonetheless played an integral part in the development and spread of climate change litigation and served as a significant historical and political milestone.

The case originates in 1999, when the State of Massachusetts and other cities and environmental organizations filed a petition for rulemaking before the Environmental Protection Agency (EPA), requesting it to regulate GHG emissions from motor vehicles under § 202 of the Federal Clean Air Act of 1979 (CAA). The petitioners' claim was based on the classification of

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For a thorough examination of the petition and the legal claims presented with it, see A.SZPAK, *Arctic Athabaskan Council's petition to the Inter-American Commission on human rights and climate change—business as usual or a breakthrough?*, in *Climatic Change*, 162, 2020, pp. 1575–1593; see also O.QUIRICO, *Climate Change …,* cit.

[440] Athabaskan petition, see supra, p. 86.

[441] A.SZPAK, *Arctic Athabaskan …,* cit., p. 1589.

[442] Ibid.

[443] *Massachusetts v. Environmental Protection Agency*, 549 US 497 (2007) (hereinafter Massachusetts v. EPA). All key documents (including the petitioners' brief and the decision) are accessible at: https://climate.law.columbia.edu/content/massachusetts-v-epa.

[444] D.MARKELL, J.B.RUHL, *An Empirical …,* cit., p. 76; M.B.GERRARD, *Climate Change Litigation in the United States: High Volume of Cases, Mostly About Statutes*, in I.ALOGNA, C.BAKKER, J.GAUCI (eds.), *Climate Change Litigation: Global Perspectives,* Brill Nijhoff, 2021, p. 34 defining it "*the most important US climate change decision to date*". The author provides a comprehensive analysis of climate change litigation in the US, distinguishing federal statutory cases, common law cases, public trust doctrine cases, securities cases and failure to adapt cases.

GHG emissions from motor vehicles as "*air pollutants*" which endanger public health and welfare, necessitating their regulation to address environmental deterioration[445].

In 2003, the EPA rejected the petition, declining to intervene and regulate emissions, stating that – under the CAA – it lacked authority to issue binding regulations regarding climate change, and arguing that CO2 emissions from motor vehicles were not considered air pollutants. The EPA noted that intervening would still be "unwise" since, even if a connection between emissions and climate change was proven, the Agency's regulations would not significantly reduce GHG emissions in the face of other States' projected increases[446]. Although the U.S. Court of Appeals for the D.C. Circuit concluded that EPA's refusal to regulate emissions was legitimate and that the Agency had properly exercised its discretion, the Supreme Court rendered a milestone verdict in April 2007, contradicting the previous decision.

The complaint before the Supreme Court was lodged by the State of Massachusetts along with other US States, local governments and NGOs. The plaintiffs claimed that the EPA had neglected its obligations by not regulating emissions from automobiles, which was supposedly mandatory under the Clean Air Act.

The Supreme Court ruled by a 5-4 vote in favour of the plaintiffs.

The initial challenging legal issue that the Court confronted was legal standing, and it concluded that petitioners had standing to challenge the EPA's denial of their rulemaking petition[447]. The judgment's reasoning with respect to this profile offers noteworthy insights and tackles paramount issues concerning rights-based litigation.

To demonstrate standing, the Court's jurisprudence requires claimants to fulfil three conditions: firstly, claimants must have suffered a "*concrete and particularized injury that is either actual or imminent*"; secondly, the injury must be "*fairly traceable to the defendant*" (causation); thirdly, a "*favourable decision will likely redress that injury*" (redressability)[448].

The Court noted that EPA's "*steadfast refusal to regulate greenhouse gas emissions*" presented a risk of harm to Massachusetts that was both actual and imminent, further observing that there was a substantial likelihood that the judicial relief requested "*will prompt EPA to take steps to reduce that risk*"[449].

[445] A.PISANÒ, *Il diritto al clima ...,* cit., pp. 210-211.
[446] Ibid.
[447] Massachusetts v. EPA, Syllabus, para. 1.
[448] Ibid., para. 1 (a).
[449] Massachusetts v. EPA, Syllabus, para. 1(a).

Assessing causation proved to be intricate and challenging. Nevertheless, the Court presented remarkable perspectives that shed light on the matter[450].

First, the Court recognized the severity and well-established nature of climate change's harms, with a strong consensus among scientists on its impacts on, *inter alia*, sea levels, ecosystems, economies, spread of diseases and extreme weather events. Despite the shared nature of these impacts, the Court emphasized that Massachusetts' vested interest in this litigation remained significant[451].

Second, the Court emphasized that EPA's refusal to regulate GHG emissions would at least contribute to Massachusetts's injuries, and it criticized EPA's argument based on the idea that its marginal domestic reduction of GHG emissions would have no significant benefit in mitigating climate change, especially in light of projected emissions from developing countries, remarking that "*Agencies, like legislatures, do not generally resolve massive problems in one fell swoop […] but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed*"[452] and adding that "*Leaving aside the other greenhouse gases, the record indicates that the U. S. transportation sector emits an enormous quantity of carbon dioxide into the atmosphere*"[453].

The Court acknowledged that EPA's regulations alone cannot reverse climate change, but this did not preclude it from deciding whether the Agency had a duty to take steps to slow or reduce it. The Court emphasizes that even a domestic effort to mitigate climate change can still have a positive impact on slowing global warming, regardless of actions taken elsewhere[454].

In accordance with this reasoning, the Court determined that all necessary prerequisites for standing were satisfied, and turned to examine the merits.

According to the definition of air pollutant under the CAA, the Court deemed greenhouse gases as fitting within this category, and stated that the EPA had authority to regulate emissions from motor vehicles. It was noted that the EPA's decision not to regulate those emissions lacked proper justification and was based on arguments that were inconsistent with the CAA's provisions. The CAA required the EPA to make a judgment based on an evaluation of whether air pollutants

[450] It should be noted, however, that the Court's analysis of standing was peculiar. The Court stated that in light of "*Massachusetts' stake in protecting its quasi-sovereign interests*" the Commonwealth was entitled to "*special solicitude in our standing analysis*" (Massachusetts v. EPA, Opinion of the Court, p. 17).

The conclusion was contested by dissenting judges, including Robert C. J who noted that "*It is not at all clear how the Court's "special solicitude" for Massachusetts plays out in the standing analysis, except as an implicit concession that petitioners cannot establish standing on traditional terms. But the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability*" (see Massachusetts v. EPA, ROBERTS, C. J., dissenting opinion, p. 6).

[451] Massachusetts v. EPA, Syllabus, para. 1(b).

[452] Ibid., para. 1(c).

[453] Ibid.

[454] Ibid., para. (1d).

could reasonably be expected to pose a threat to public health or welfare, while EPA had put forward considerations that were impermissible. The Court therefore concluded that EPA's action was "*arbitrary, capricious, or otherwise not in accordance with law*" and stated that, upon remand, the EPA must ensure that its reasons for taking or not taking action are rooted in the statute[455].

The significance of this decision can be seen in multiple profiles.

One is a political profile, as the Court's ruling initially impacted federal regulation of GHG emissions during Obama's presidency, and subsequently affected all successive administrations[456].

The case also served as a critical foundation for climate change mitigation litigation and provided helpful reasoning to overcome certain complex issues that plaintiffs often face in climate change litigation. These issues – and causation in particular – have traditionally been the main obstacles to achieving favourable court outcomes.

5.3 The Kivalina case

The Kivalina case was another early example of the significant legal implications of climate change for human rights[457].

Kivalina is a small Inupiat village of approximately 400 people, located at the tip of a barrier reef around seventy miles north of the Arctic Circle in Alaska.

As noted above regarding the effects of climate change and the Inuit petition, the impacts of climate change in the Arctic are particularly severe. The region is warming at an alarming rate, faster than any other region, and sea levels are rising as a result. Additionally, there has been a significant reduction of glaciers and sea ice and an increase in winter storms, which will ultimately lead to the Kivalina becoming uninhabitable. Therefore, the US Army Corps of Engineers and the

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[455] Ibid., para. 4.

[456] PEEL, H.M.OSOFSKY, *Climate Change Litigation* …, cit., p. 25; J.SETZER, M. NACHMAN, *National Governance The State's Role in Steering Polycentric Action*, in A.JORDAN, D.HUITEMA, H. VAN ASSELT, J.FORSTER (eds.), *Governing Climate Change. Polycentricity in Action?*, Cambridge University Press, 2018, p. 58, observing that "*the ruling in Massachusetts v. United States (US) Environmental Protection Agency by the Supreme Court in 2007 not only created a legal basis for regulating carbon dioxide emissions but also formed the basis for a bilateral deal with China, and the Obama government's participation in the Paris Agreement*"; see also D.MARKELL, J.B.RUHL, *An Empirical …,* cit., pp. 59 and ff., outlining EPA's subsequent rulemakings.

[457] Native Village of Kivalina and City of Kivalina v. ExxonMobil corporation, Northern District of California, 663 F.Supp.2d 863, 30 September 2009 (Kivalina I); Kivalina 696 F.3d 849, Ninth Circuit Court of Appeals, 21 September 2012 (Kivalina II). All case documents are accessible at: https://climatecasechart.com/case/native-village-of-kivalina-v-exxonmobil-corp/.

The case is included by Gerrard among the few – but particularly crucial – cases of US litigation grounded on the common law, more specifically the public nuisance doctrine, under which an individual may be held accountable for inappropriate actions that result in harm to the public, see M.B.GERRARD, *Climate Change Litigation in the United States …,* cit., pp. 38-39. For an analysis of the case, see T.LAMBOOY, H.PALM, *Challenging the human rights responsibility of States and private corporations for climate change in domestic jurisdictions*, in O.QUIRICO, M.BOUMGHAR, *Climate Change* …, cit., pp. 324-328; see also C. SHEARER, *Kivalina. A Climate Change Story*, Haymarket Books, 2011, providing a tragic portrayal of how climate change has affected the residents of Kivalina.

US Government Accountability Office concluded that Kivalina must be relocated, with a cost estimated from $95 to $400 million[458].

In 2008, the governing bodies of the Kivalina community filed a lawsuit for monetary damages before the US District Court for the Northern District of California, Oakland Division, against 24 oil, power and utility companies – including Exxon Mobil, Chevron and Shell – responsible for the largest amount of GHG emissions in the US. The plaintiffs alleged that their rights – including the right to use and enjoy public and private property – were negatively affected by defendants' CO2 emissions (which constituted "*unreasonable interference*"[459] with such rights); they claimed that Kivalina suffered "*millions of dollars in damages in lost property value and revenue*" and quantified the expected costs of relocation[460].

Therefore, they requested that the Court hold defendants jointly and severally liable for public nuisance, for civil conspiracy and for concert of action and award monetary damages. Plaintiffs sought further relief by requesting the Court to "*Enter a declaratory judgment for such future monetary expenses and damages as may be incurred by Plaintiffs in connection with the nuisance of global warming*"[461].

In September 2009, the Court granted the defendants' motion to dismiss the lawsuit for lack of subject matter jurisdiction. The conclusion was grounded on the finding that the federal claim for nuisance was "*barred by the political question doctrine and for lack of standing*"[462].

As to the first finding, the Court highlighted that federal courts have a limited jurisdiction and that, according to the political question doctrine, certain questions are not within the purview of federal courts as they pertain to political choices, and therefore are the responsibility of the political branches rather than the judiciary. This principle aims to prevent the judiciary power from interfering with decisions that are inherently political and ensure the separation of powers.

The Court recalled the principles established by the Supreme Court in *Baker v. Carr* for identifying non-justiciable political matters – the so-called "six Baker factors" – and narrowed them down to three main issues: whether the matter is committed by the Constitution to a coordinate branch of Government; whether the Court would go beyond its area of judicial; whether there are considerations of prudence contrary to judicial intervention[463].

The first aspect was not at issue: the Court made the premise that the global nature of the environmental issue at stake did not automatically imply the non-justiciability of the claim, and

[458] Kivalina I, Complaint for damages, p. 1.
[459] Ibid., p. 62.
[460] Ibid., p. 64.
[461] Ibid., p. 67.
[462] Kivalina I, *Order granting defendants' motions to dismiss for lack of subject matter jurisdiction*, p. 24
[463] Ibid., pp. 6-7.

subsequently noted that the defendants had not provided any proof that the issue was attributed to the executive or legislative branches[464].

As to the second aspect, the Court first addressed the various environmental cases cited by the plaintiffs and highlighted how global warming constitutes a far different environmental issue than the others alleged. While environmental cases usually involve specific polluters causing specific injuries in a specific area, GHG emissions and their consequences represent a completely different phenomenon: emissions come from sources located everywhere in the world and combine in the atmosphere, affecting the entire planet; moreover, unlike common environmental harms, the series of events that lead to the alleged injury is basically undistinguishable[465].

The Court therefore recognized the lack of "*judicially discoverable and manageable standards*" to be employed in resolving the claims and noted that previous environmental cases did not provide instruments to reach a reasoned resolution of the case, which also required the imposition of liability and damages on an unprecedented scale. As a consequence, judicial consideration was, for that aspect alone, precluded[466].

The Court also noted that plaintiffs' claim necessarily required the Court to evaluate and weigh the benefits of the defendants' activities against the harms they caused, and concluded that the claim asked the judiciary to make a policy judgment, emphasizing that issues such as allocation of fault and costs of global warming is a "*matter appropriately left for determination by the executive or legislative branch in the first instance*"[467]. Judicial review was also precluded by this consideration.

The Court then proceeded to consider legal standing and thoroughly addressed the issue of causation.

First, it noted that in order to prove standing, plaintiffs bore the burden of establishing three elements: an injury in fact; causation (a traceable link between the injury and the alleged conduct of defendants); redressability (the likelihood that the injury will be remedied through the sought relief)[468]. Nonetheless, as the Court itself noted, the case mainly revolved around causation and it was immediately underlined that – as stated in multiple occasions by the Supreme Court – plaintiffs

[464] Ibid., p. 9.

[465] Ibid., pp. 12-13, where the Court notes that: "*In a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which in turn results in the planet retaining heat, which in turn causes the ice caps to melt and the oceans to rise, which in turn causes the Arctic sea ice to melt, which in turn allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms*".

[466] Ibid., p. 13.

[467] Ibid., p. 15.

[468] Ibid.

needed to prove that there was a substantial likelihood that the injury in fact was caused by the defendant's conduct[469].

The plaintiffs claimed that proving the defendants' mere contribution to activities that caused the injury was sufficient to establish standing, despite the fact that such injuries could not be linked to any specific defendant.

This approach was grounded on several environmental cases – namely water pollution cases – where, in light of the fact that polluting activities were conducted by multiple actors, pollution of any actor could be considered to have caused at least part of the injury.

However, the Court disagreed and held that the mere "contribution" theory – and the associated presumption of substantial likelihood of injury – could only apply to cases where defendants' discharges exceeded federal standards, while no such standards existed with regard to GHG emissions, therefore concluding that "*no presumption arises that there is a substantial likelihood that any defendant's conduct harmed plaintiffs. Without that presumption, and especially given the extremely attenuated causation scenario alleged in Plaintiffs' Complaint, is it entirely irrelevant whether any defendant "contributed" to the harm because a discharge, standing alone, is insufficient to establish injury*"[470].

Moreover, the Court stressed that the plaintiffs did not and could not show that the defendants' conduct constituted the seed of their injury. The conclusion was grounded on the well-known characteristics of the phenomenon: the fact that GHG emissions come from all sources worldwide and span over a significant period of time; the fact that the effects cannot be attributed to a specific subject at a specific point in time[471].

Another element which weakened – or even disrupted – the "chain of causation" was the geographical element. The Court noted that the plaintiffs were not within the zone of discharge and that proximity was a fundamental aspect in establishing the causal link between the conduct and the injury. Such link could not be established and the Court held that the "*Plaintiffs' claim for damages is dependent on a series of events far removed both in space and time from the Defendants' alleged discharge of greenhouse gase*s"[472].

Therefore, failing to prove causation[473] constituted another fundamental ground for dismissing the plaintiffs' claims[474].

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[469] Ibid., p. 16.
[470] Ibid., p. 19.
[471] Ibid., pp. 20-21.
[472] Ibid., p. 22.
[473] On the issue of establishing causation, see S.LAWSON, *The conundrum of climate change causation: using market share liability to satisfy the identification requirement in Native Village of Kivalina v. Exxonmobil Co.*, in *Fordham Environmental Law Review*, Vol. 22 n. 2, 2010, pp. 433–492, where the author proposes the use of market

In September 2012, the Ninth Circuit Court upheld the dismissal on the ground that a lawsuit could not be filed under the public nuisance theory as it had been displaced by new legislation (namely the Clean Air Act)[475]. In addition, the Court noted that the solution to Kivalina's issues must rest in the hands of the legislative and executive branches rather than the federal common law[476].

Subsequently, Kivalina filed a petition for writ of certiorari before the US Supreme Court; in May 2013, the Supreme Court denied the writ of certiorari without motivation[477].

As the above analysis shows, the Kivalina case is a noteworthy example of early climate change litigation, as it encompasses several relevant aspects: it addresses the harmful effects of global warming, the vulnerability of indigenous peoples and the need for both mitigation and adaptation measures; it also highlights the accountability of private actors and the legal barriers faced by victims seeking justice.

As Peloffy noted in 2013, climate change victims face *"considerable substantive obstacles concerning the justiciability of climate change and the attribution of losses, two issues that plagued Justice Brown Armstrong, the trial judge who dismissed Kivalina's action in first instance*"[478]; nonetheless, she added that the issue of causation was bound to evolve "*as the scientific knowledge of probabilistic attribution of climate change events to anthropogenic sources continues to advance*"[479]. This is certainly the case in 2024, as the on-going surge of rights-based litigation –

share liability to overcome certain elements of causation and concludes (p. 492) that "*plaintiffs still face an uphill battle, particularly in the area of causation*".

[474] It is worth mentioning that the plaintiffs also relied on the "special solicitude" argument derived from the *Massachusetts v. EPA* case, claiming that the standing requirements should be assessed on a relaxed basis. This argument was rejected by the Court, which stated that: "*Plaintiffs are not entitled to any "special solitude" under the circumstances presented. Unlike Massachusetts, Plaintiffs are not seeking to enforce any procedural rights concerning an agency's rulemaking authority. Rather, Plaintiffs claim is one for damages directed against a variety of private entities. Nor may Plaintiffs rely on the "quasi sovereign interests" referenced by the Supreme Court. […]. Even a relaxed application of the requisite standing requirements would not overcome these fatal flaws in Plaintiffs' case*", see pp. 22-23.

[475] For a critique of this conclusion, see K.PÉLOFFY, *Kivalina v. Exxonmobil: A Comparative Case Comment*, in *McGill International Journal of Sustainable Development Law and Policy*, Vol. 9, No. 1, 2013, p. 127, who observes that "*Respectfully, this comment submits that the Ninth Circuit erred in extending displacement to damages claims. Conceptually, climate change governance implies both mitigation and adaptation, two necessary but independent pillars that require different legal remedies. The bulk of private climate change litigation in the United States, including AEP, seeks to judicially govern mitigation through injunctive relief seeking to abate GHG emissions.*

In contrast to AEP, Kivalina's lawsuit was instituted post-Massachusetts and specifically sought to avoid the displacement and justiciability issues raised by those cases. Not only would injunctive relief directly compete with the "new" regulatory function of the EPA, but it would also only minimally help Kivalina. For Kivalina's residents, mitigation comes too late; the entire village already needs to relocate. Hence, Kivalina sought only damages to fund its climate adaptation needs, a common law remedy not provided for under the CAA".

[476] T.LAMBOOY, H.PALM, *Challenging* …, cit., pp. 327-328.

[477] K.PÉLOFFY, *Kivalina* ..., cit., p. 124.

[478] Ibid., p. 142.

[479] Ibid., p. 143.

now supported by even more robust scientific evidence and clearer legal obligations for States – demonstrates.

CHAPTER III

Rights-based litigation

1. Introduction

Chapter III provides an analysis of rights-based lawsuits that have arisen at national and international level in recent years.

We cannot provide an exhaustive coverage of all rights-based litigation cases[480]. In illustrating a selected sample of the most crucial ones, the goal is to provide a detailed overview of the legal strategies utilized by the plaintiffs and the defendants (by examining instances of both favourable and unfavourable outcomes) as well as the most common procedural and substantive issues that arise in rights-based litigation.

The inquiry ultimately aims to answer the fundamental question of what are the strengths and weaknesses of a human rights-based approach, and thus what is the added value of the human rights paradigm in the context of climate change. Cases will be examined starting with those at the national level, followed by those before supranational courts and tribunals and quasi-jurisdictional bodies.

National litigation has become increasingly prevalent in recent years, particularly in Europe. The focus is primarily on States' mitigation obligations, although some adaptation-focused cases have recently arisen, especially in poor and vulnerable regions of the world. It is not uncommon for these initiatives, largely directed at States, to yield at least some positive results. In any event, analyzing the litigation enables identification of recurrent issues that are further elaborated below, including proof of causation, legal standing, and the problem of separation of powers. Furthermore, litigation has recently arisen against private actors and, while not easily replicated, has produced favourable results.

As to international cases, there have been recurrent procedural and substantive hurdles but, nevertheless, some remarkable outcomes have recently been achieved. In addition, a few crucial international cases are currently still pending.

2. Cases at national level

2.1 The Urgenda case: a landmark for rights-based litigation

[480] For this purpose, reference should be made to the constantly updated database available at: https://climatecasechart.com/.

Urgenda (short for "urgent agenda") is a Dutch NGO established in 2008 within the Dutch Research Institute for Transition and whose main purpose is to promote a quick transition toward a more sustainable society.

In 2013, Urgenda, together with 866 individuals, filed a lawsuit in the District Court of The Hague against the Dutch State to hold it accountable for excessive GHG emissions[481]. The lawsuit followed a letter to the Prime Minister dated November 12, 2012, in which Urgenda called on the State to strengthen its mitigation commitments, to which the government responded by acknowledging the need for stronger efforts.

Plaintiffs requested the Court to rule that: the joint volume of GHG emissions in the Netherlands is unlawful and the State is liable for it; the State acts unlawfully if it fails to reduce or have reduced GHG emissions in the Netherlands by 40%, in any case at least 25%, compared to 1990, by the end of 2020. Therefore, they requested to Court to: principally, order the Dutch State to reduce joint volume of annual GHG emissions in the Netherlands by 40%, or in any case by at least 25% compared to 1990 by the end of 2020; alternatively, reduce or have reduced the joint volume of annual GHG emissions in the Netherlands by at least 40% by 2030, compared to 1990[482].

Regarding the scientific basis, Urgenda referred to the Fourth and Fifth Assessment Reports of the IPCC and emphasized that GHG emissions are warming the earth and climate change threatens large groups of people and their human rights, especially in the face of global warming scenarios above 2°C; Urgenda also underlined that the Netherlands' per capita GHG emissions are among the highest in the world.

The plaintiffs claimed that GHG emission levels of the Netherlands – which the State has the power and ability to regulate as they occur on its territory – are unlawful and in breach of the duty of care; additionally, they claimed that they constitute a violation of Art. 2 and Art. 8 of the ECHR[483].

Moreover, the plaintiffs emphasized that the State is responsible for its contribution to climate change under Dutch tort law and under Article 21 of the Dutch Constitution[484] and that the obligation to reduce GHG emissions derives from both national and international law (with regard to the latter, Urgenda recalled the no-harm rule, the UNFCCC regime and the principles thereby established such as the precautionary principle, and the TFEU).

[481] Hague District Court, *Urgenda Foundation v. the State of the Netherlands*, C/09/456689/HA ZA 13-1396, June 24, 2015 (hereinafter Urgenda I).

[482] Urgenda I, see supra, pp. 28-29.

[483] Ibid., pp. 29-30.

[484] Which reads as follows: "*It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment*".

The State argued that Urgenda lacked standing, that no legal obligation could be identified to meet the reduction targets outlined by Urgenda and that there was no unlawful action attributable to the State. It also underlined that current policies aim to limit temperature increase to 2°C, and nonetheless, the climate policies of the Netherlands should be assessed as part of the international agreements and goals set by the EU. Lastly, it argued that allowing the claim would interfere with the State's discretion and the system of separation of power.

Legal standing was the first issue that the Court addressed, and it concluded that Urgenda had standing under Book 3, section 303a of the Dutch Civil Code, noting that foundations and associations may bring an action to protect general or collective interests of others, as long as such interests are among the objectives formulated in its by-laws[485].

The climate science and the climate policy were subsequently thoroughly reconstructed[486] and Court concluded that *"The State acknowledges that this is a serious problem and that it is also necessary to avert this threat by mitigating greenhouse gas emissions. The dispute between the Parties therefore does not concern the need for mitigation, but rather the pace, or the level, at which the State needs to start reducing greenhouse gas emissions*"[487].

The Court moved to analyse legal obligations of the State, starting from international instruments, observing that international obligations under the FCCC, the Kyoto Protocol and the no-harm principle are not binding towards citizens and only establish obligations between States: therefore, Urgenda could not rely on these sources[488]. Nonetheless, the Court recognized a "reflex effect" of such obligations in national law and pointed out that they shall be considered when establishing whether a State has complied with its obligations towards citizens[489].

As to Articles 2 and 8 of the ECHR, it was established that Urgenda did not meet the victim requirement under Art. 34 of the Convention[490]. However, the Court once again underlined that the norms could serve as a parameter to provide specific content to private-law provisions such as the standard of care established by the Dutch Civil Code, while clarifying that the State "*has the*

[485] Urgenda I, p. 31, stating that "*Urgenda's claims against the State indeed belong to the group of claims the Dutch legislature finds allowable and has wanted to make possible with Book 3, Section 303a of the Dutch Civil Code*".

[486] Ibid., pp. 32-38.

[487] Ibid., p. 36.

[488] Ibid., p. 39, underlining that "*When the State fails one of its obligations towards one or more other states, it does not imply that the State is acting unlawfully towards Urgenda*" and pointing out that "*The comments above regarding international-law obligations also apply, in broad outlines, to European law, including the TFEU stipulations*".

[489] C.BAKKER, *Climate Change* …, cit., p. 204.

[490] Urgenda I, p. 40, stating that "*Even if Urgenda's objectives, formulated in its by-laws, are explained in such a way as to also include the protection of national and international society from a violation of Article 2 and 8 ECHR, this does not give Urgenda the status of a potential victim within the sense of Article 34 ECHR*"; see also C.BAKKER, *Climate Change* …, cit., p. 204, noting that this conclusion was reversed by the Court of Appeal in Urgenda II.

discretion to determine how it fulfils its duty of care. However, this discretionary power vested in the State is not unlimited: the State's care may not be below standard"[491].

In light of these observations, the Court found that, although no legal obligation towards Urgenda could derive from Art. 21 of the Dutch Constitution and all the other mentioned international principles and sources (such as the UNFCCC regime and its protocols, the ECHR and the TFEU), the provisions were still relevant to establish whether or not the State had met its duty of care towards Urgenda[492]. In doing so, the Court showed awareness of the complexity of the assessment and the need to consider multiple aspects, which were specifically covered and included: the extent, foreseeability and chance of occurrence of damage deriving from climate change; the nature of the acts and omissions of the State and the burden of precautionary measures; the discretion of the State, also in light of available scientific knowledge, technical options and cost-benefit assessments[493].

On this basis, the court assessed each aspect and determined that the defendant acted negligently and unlawfully towards Urgenda by initiating a reduction target for 2020 that was less than 25% as compared to the year 1990[494].

As to the causal link – which, as previously mentioned, always constitutes a crucial aspects in the context of rights-based litigation – the Court provided some interesting insights, finding that the fact that GHG emissions attributable to the Netherlands only represent a minimal part of global emissions "*does not alter the State's obligation to exercise care towards third parties*"[495]. Furthermore, it observed that GHG emissions from the Netherlands still contribute to climate change and that a sufficient causal link was established between the Dutch GHG emissions, global climate change and its impacts on the Dutch climate[496].

Lastly, the Court separately addressed the issue of separation of powers and clarified that the action of governments and parliaments may, and sometimes must, be evaluated by courts; nonetheless, within a system where each power has its own specific tasks, the court has to "*limit itself to its own domain, which is the application of law*" and the depth of its intervention inevitably

[491] Urgenda I, p. 43.

[492] Ibid., p. 42 and p. 44, where the Court observes that "*The objectives and principles stated here do not have a direct effect due to their international and private-law nature, as has been considered above. However, they do determine to a great extent the framework for and the manner in which the State exercises its powers. Therefore, these objectives and principles constitute an important viewpoint in assessing whether or not the State acts wrongfully towards Urgenda*".

[493] Ibid., p. 44 and ff.

[494] Ibid., p. 50. Among other evaluations, the Court also underlined that the State never argued that a more ambitious mitigation target would be "*disproportionately burdensome*"; rather, the State considered it a possibility, see p. 49.

[495] Ibid., p. 48.

[496] Ibid., p. 50.

changes in light of the specific issues submitted[497]. While courts settle disputes between specific parties, political decision-making has to consider multiple aspects and interests; although this does not entail that the judge should refrain from his duties whenever issues are "*the subject of political decision-making*", a prudent and restrained approach is nonetheless justified by the direct and indirect effects that the claim may have on third parties[498].

It should be noted that when referring to separation of powers and the extent of Court review on actions of other powers, the Court emphasized that the Netherlands did not deny the possibility of pursuing more ambitious targets[499].

The Court therefore ordered the State to limit joint GHG emissions by at least 25% at the end of 2020 compared to 1990 levels and clarified that there were insufficient grounds for granting an order beyond a 25% reduction (as requested by Urgenda)[500].

2.1.1 The Appeal judgement

The judgement was appealed by the Netherlands before the Court of Appeal of The Hague[501].

The State filed 29 grounds of appeal, which substantially covered the entire judgement of the District Court. Conversely, Urgenda agreed to a large extent with the decision and filed a cross-appeal on only one ground, while entirely contesting all of the Netherland's grounds of appeal. Urgenda challenged the District Court's determination that, according to Art. 34 of the ECHR, it lacked standing (or lacked the victim requirement) and therefore could not rely on Art. 2 and Art. 8 of the Convention. As to the 25% reduction order, no grounds were put forward by Urgenda to claim a further reduction beyond 25%; therefore, this aspect was no longer in dispute.

After summarizing the defences presented by the State and by Urgenda, the Court of Appeal clarified that it shall entirely re-assess the dispute, beginning with Urgenda's cross-appeal (while simultaneously addressing certain related arguments put forth by the Netherlands)[502].

The Court of Appeal underlined that the District Court incorrectly applied Art. 34 of the ECHR: as the Court of Appeal accurately observed, Art. 34 regulates access to – and applies to

[497] Ibid., pp. 50-51, where the Court observes that "*Depending on the issues and claims submitted to it, the court will review them with more or less caution. Great restraint or even abstinence is required when it concerns policy-related considerations of ranging interests which impact the structure or organisation of society*".

[498] Ibid.

[499] This suggests that offering sufficient justifications for an inability to enhance mitigation commitments could serve as a persuasive argument for States in the context of climate litigation.

[500] Ibid., pp. 52-53. As Bakker observed, the principle of separation of powers led the Court to exercise restraint regarding the scope of the reduction and to avoid specifying particular choices for achieving it, see C.BAKKER, *Climate Change* …, cit., p. 205.

[501] Court of Appeal of The Hague, *Urgenda Foundation v. the State of the Netherlands*, Civil-law Division, C/09/456689/ HA ZA 13-1396, October 9, 2018 (hereinafter Urgenda II).

[502] Urgenda II, see supra, p. 10.

proceedings before – the ECtHR; it does not regulate access to national courts, including the Dutch court. Such access must be determined by Dutch judges in accordance with Dutch law. Therefore, Art. 34 of the ECHR could not serve as a ground to exclude reliance on Art. 2 and Art. 8 of the ECHR[503].

Dutch law indeed granted Urgenda access to court under Book 3, Section 305a of the Civil Code. Just like individuals may rely on Articles 2 and 8 of the ECHR (which have direct effect), Urgenda may also do so under aforementioned Section 305a. Therefore, the Court of Appeal concluded that Urgenda's appeal was well-founded[504] and proceeded to examine the alleged unlawfulness of State action under Articles 2 and 8 of the ECHR.

Under such norms, States have positive obligations to adopt measures to prevent violations of the interests enshrined therein: this obligation can also be defined as a duty of care. Both Art. 2 and Art. 8 are applicable to environmental issues and even more so to dangerous industrial activities: the former applies to cases where environmental situations pose a threat to the right to life; the latter applies when a State's act or omission impacts an individual's home or private life, provided a minimum level of severity is reached[505].

These obligations require the adoption of concrete measures in all cases of real and imminent danger, the Court of Appeal clarified. In order to establish whether climate change constitutes a real and imminent threat – as Urgenda alleged – the Court of Appeal mainly relied on the findings of recent climate science (including IPCC's AR5). After listing the most relevant facts about climate change (including its causes, its effects, current emission trends and temperature targets under the Paris Agreement), the Court of Appeal found that "*it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life.* […] *it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat*"[506].

The Court of Appeal concluded that, under Articles 2 and 8 of the ECHR, an obligation to reduce GHG emissions by at least 25% by the end 2020, as established by the District Court, is "*in*

[503] Ibid., pp. 10-11.

[504] Ibid., p. 11. The Court also pointed out that the State had no interest in – and the Court did not need to consider – the ground related to alleged lack of standing with regard to future generations of Dutch nationals and current and future generations of foreigners, since Urgenda's claim was already admissible in light of the fact that it acted on behalf of the interests of the current generation, who will certainly face the impacts of climate change in their lifetime if GHG emissions are not adequately reduced.

[505] Ibid., pp. 11-12. To this regard, the Court mentioned the jurisprudence of the ECtHR that addressed States' obligations under Art. 8 in the context of environmental harm, including *Öneryildiz v. Turkey*, *Budayeva et al v. Russia* and *Fadeyeva v. Russia*, which we also addressed in previous paragraphs.

[506] Urgenda II, see supra, p. 13.

line with the State's duty of care"[507], and it underlined that the Netherlands did too little to mitigate climate change and failed to fulfil its duty of care under Articles 2 and 8 of the ECHR[508].

Arguments brought forward by the Netherlands were subsequently addressed and entirely rejected. They included: the claim that the European Emission Trading System stood in the way of adopting further measures to reduce GHG emissions; the claim that there was a lack of causal link between GHG emissions attributable to the Netherlands and climate change. As to the first argument, the Court of Appeal underlined that under Article 192 of TFEU, Member States are allowed to pursue more ambitious reduction targets. As to the second argument, the Court of Appeal did not address it in depth: it underlined that if the "lack of causal link" argument were to be accepted, all States could refuse to adopt measures and no effective remedy would be provided to a global issue; nonetheless, the Court of Appeal stressed that, in proceedings where plaintiffs seek to obtain an order on the State and do not claim damages, causality "*only plays a limited role*" and for an order to be given "*it suffices (in brief) that there is a real risk of the danger for which measures have to be taken*"[509].

It should be noted that the fact that Netherland's policies with regards to GHG emissions reduction were in line with those of the EU was insufficient to exclude State's responsibility: as some authors have underlined, the Court of Appeal believed that the targets set by the IPCC should prevail over those set by the EU[510].

The Court of Appeal therefore upheld the judgment of District Court, but on different grounds. While the District Court mainly relied on Dutch tort law, the Court of Appeal relied on human rights law, namely Articles 2 and 8 of the ECHR: this represents the most innovative and ground-breaking approach of the judgement which, according to many, played a crucial role in the so-called "rights turn", especially in the European context.

Overall, the judgement presented several crucial human rights arguments, which were subsequently examined by the Supreme Court in its final verdict, and will be addressed in the next section.

The judgement of the Court of Appeal – and, even more so, the judgement of the Supreme Court which will be subsequently examined – drew immense attention from scholars and practitioners[511]. While the majority of authors have considered the case a victory for climate

[507] Ibid., p. 15.
[508] Ibid., p. 18.
[509] Ibid., p. 16.
[510] A.PISANÒ, *Il Diritto al Clima* …, cit., p. 221.
[511] C.W.BACKES, G.A. VAN DER VEEN, *Urgenda: the Final Judgement of the Dutch Supreme Court*, in *Journal for European Environmental & Planning Law*, 17, 2020, pp. 307-321; L.MAXWELL, S.MEAD, D. VAN BERKEL, *Standards for adjudicating the next generation of Urgenda-style climate cases*, in *Journal of Human Rights and the Environment*, Vol. 13, No. 1, 2022, pp. 35–63; F.PASSARINI, *Ambiente. CEDU e cambiamento climatico,*

litigation, a landmark decision and a catalyst for rights-based litigation, others have questioned the validity of the legal arguments and the overall impact of the decisions in successfully mitigating climate change[512]. Some of these aspects will be addressed in the following paragraph, in light of the (definitive) findings of the Supreme Court.

2.1.2 The Supreme Court's judgement

The Netherlands appealed the decision before the Dutch Supreme Court. On December 20, 2019, the Supreme Court delivered its judgement and upheld the decision of the Court of Appeal of The Hague[513], confirming the order to reduce GHG emissions by the end of 2020 by at least 25% compared to 1990. The case mainly revolved around two fundamental aspects: whether – and to what extent – the State was obliged, under Articles 2 and 8 of the ECHR, to take measures to mitigate climate change; whether an order from a court would "invade" the political domain and constitute an illegitimate order to create legislation.

As to the first aspect, the Supreme Court confirmed and further developed the arguments already brought forward by the Court of Appeal, finding that the judgement was correctly based on obligations deriving from the ECHR.

In its appeal, the Netherlands argued that Articles 2 and 8 of the ECHR do not bind the State to grant protection from the threats of climate change, as it constitutes a global issue that lacks specificity and therefore falls outside the scope of such norms. The Supreme Court rejected this argument and confirmed that, under Articles 2 and 8, the State is obliged to adopt measures to tackle climate change. As to the scope of Art. 2, the Supreme Court notes that the norm requires States to adopt positive measures to safeguard lives of individuals subject to its jurisdiction, including in situations involving environmental disasters. States must therefore implement adequate measures when there is a real and immediate risk, terms which – according to the Supreme Court – must be interpreted as referring to risks that are "*genuine and imminent*". However, imminence is not to be interpreted as indicating a short timeframe; instead, it refers to the fact that the risk is "*directly threatening the persons involved*", even by materializing over a long period of time. The

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nella decisione della Corte Suprema dei Paesi Bassi nel caso Urgenda, in *Diritti umani e diritto internazionale*, Vol. 14, No. 3, 2020, pp. 777-785; T.SCOVAZZI, *La decisione finale sul caso Urgenda , in Rivista Giuridica dell'Ambiente*, Vol. 2, 2020, pp. 419-478.

For an overview of the surge of climate litigation in Europe, see K.POUIKLI, *Editorial: a short history of the climate change litigation boom across Europe*, in *ERA Forum*, 22, 2021, pp. 569–586.

[512] B.MAYER, *The Contribution of Urgenda to the Mitigation of Climate Change*, in *Journal of Environmental Law*, 2022, XX, pp. 1–18; B.MAYER, *Prompting Climate Change Mitigation Through Litigation*, in *International & Comparative Law Quarterly* , Vol. 72 , Issue 1, 2023, pp. 233-250.

[513] Supreme Court of the Netherlands, *The State of the Netherlands v Urgenda Foundation*, Case No 19/00135, December 20, 2019 (hereinafter Urgenda III). All case documents are available at: https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.

Supreme Court also clarifies that protection granted by Art. 2 (and Art. 8) is not limited to specific individuals, but to population and society in general (i.e. with regards to environmental harms that endanger entire regions)[514].

As to the scope of Art. 8, it requires States to take measures whenever there is a serious environmental issue that may "*affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely*"[515] even in case of a risk that does not exist in the short term. The Supreme Court specified that obligations under Art. 2 and Art. 8 largely overlap and that in the context of environmental hazards, States are "*expected to take the same measures pursuant to Article 8 ECHR that it would have to take pursuant to Article 2 ECHR*"[516], consequently expanding the circumstances that can give rise to a duty.

The Supreme Court pointed out that, in accordance with the precautionary principles, State obligations include the adoption of preventive measures even in case of scientific uncertainty. Such measures, with regard to climate change, include both mitigation and adaptation action and may vary depending on the specific circumstances. The judges then clarified that it is within the Courts' purview to assess whether the measures implemented by the State are adequate and reasonable[517].

Climate change was considered by the Court to be a real and imminent threat to the lives and welfare of current generations of Dutch people, with the consequence that the State has an obligation to protect individuals from such threat pursuant to Articles 2 and 8 of the ECHR[518].

This conclusion was drawn from the IPCC's findings, alongside UNEP reports and COP decisions, indicating that the livelihood and welfare of Dutch inhabitants were at risk as a consequence, among other things, of sea level rise, which, according to the Court, could result in part of the Netherlands becoming inhabitable.

On this aspect, Bakker noted that "*By exclusively relying on these scientific reports, the Supreme Court neither provided any further analysis on how dangerous climate change meets the criterion of a real and immediate risk as required by Article 2, nor does it explain how the 'severity test' of Article 8 (requiring a 'significant impairment of the applicant's ability to enjoy his or her*

[514] Urgenda III, see supra, para 5.3.1. However, as Bakker noted, the "immediate risk" requirement remains quite nebulous. The author underlines that "*the question remains what is left of the criterion of an 'immediate risk', if it neither refers to a timeframe, nor to any identified persons involved. Even if the term 'persons involved' refers to a population as a whole, one would assume that in order for a positive obligation to arise (and thus for a State to be held accountable for its failure to comply with that obligation), there must still be a concrete, determinable link between a specific risk and the population whose life might be in danger*", see C.BAKKER, *Climate Change* …, cit., p. 210, further observing that this was confirmed by the ECtHR in *Cordella and others v. Italy.*

It is clear, nonetheless, that the Supreme Court has gone beyond the traditional scope of positive obligations under Articles 2 and 8, adopting a collective dimension where duties are established towards vast groups of individuals.

[515] Urgenda III, see supra, para. 5.2.3.

[516] Ibid., para. 5.2.4.

[517] Ibid., para. 5.3.2 and 5.3.3.

[518] Ibid., para. 5.6.2.

home or private or family life') is met. The Supreme Court clearly considers that these criteria are fulfilled by the predictions offered by climate science, thereby recognizing that science may constitute a deciding factor in establishing accountability of States for breaching their human rights obligations. This is another significant outcome of this judgment, which effectively helps to overcome one of the main obstacles for climate change litigation based on human rights. One question that could be raised, however, is whether these general scientific reports also provide sufficient evidence for the materialization of risks to the lives and welfare of those who fall within the jurisdiction of a particular State"[519].

The Supreme Court was aware that the aforementioned risks would only materialize decades later, with impacts on large parts of the population rather than specific individuals or groups; nonetheless, it stressed that those circumstances do not imply that Articles 2 and 8 of the ECHR do not provide protection against climate change, despite the State's assertions.

As Bakker underlined, this is certainly a wide interpretation of the scope of human rights norms, even as compared to ECtHR's jurisprudence on environmental issues[520]. Under Art. 34 of the ECHR, and pursuant to its admissibility criteria and strict victim requirement, a claim before the Court may only be legitimately brought by individuals who are directly or indirectly affected[521].

It should be noted that, although the ECHR has, to some extent, introduced a collective dimension of human rights regarding environmental hazards, its case law has focused on the risks posed to individuals or groups located in areas that were directly impacted by the polluting activity[522] (although, as the recent *Pavlov v. Russia* case demonstrates, not necessarily in the immediate surroundings of the polluting site).

In order to establish how much a State should do to comply with its obligations under Articles 2 and 8, the Court adopted the notion of partial responsibility of individual States and

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[519] C.BAKKER, *Climate Change* …, cit., p. 211.

[520] Ibid., pp. 212-213, noting that "*By extending the ECtHR's approach regarding Articles 2 and 8 to the danger of climate change, the Supreme Court has contributed to the evolution of such an increasingly collective interpretation of individual human rights, thereby confirming, as it were, a 'public interest dimension' of these rights*"; see also F.FRANCIONI, *International Human Rights in an Environmental Horizon*, in *The European Journal of International Law,* Vol. 21 No. 1, 2010, pp. 41-55, p. 55, where Francioni argues in favour of moving beyond individualistic views of environmental rights and advocates for a "*more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation and adapts the language and technique of human right discourse to the enhanced risk posed by global environmental crises to society and, indeed, to humanity as a whole*".

It remains to be seen how the ECHR will address the issues of admissibility and victim requirement in climate change cases that are currently pending, namely *Duarte Agostinho and Others. v Portugal and Others* (Application no. 39371/20) and *Klimaseniorinnen v Switzerland* (Application no. 53600/2020), which will be thoroughly examined below.

[521] See ECHR, Practical Guide on Admissibility Criteria, February 28, 2023, available at: https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

[522] C.W.BACKES, G.A. VAN DER VEEN, *Urgenda: the Final Judgement …,* cit., pp. 314-315.

affirmed that, in order to tackle a global issue, the Netherlands is obliged to do its part[523]. This conclusion was grounded on the content of the UNFCC (which recognizes the global nature of climate change and requires States to tackle it on the basis of the CBDR principle), the no-harm principle and Art. 47 of the ILC's Draft Articles on Responsibility of State for Internationally Wrongful Acts[524].

Similarly to the Court of Appeal's judgement, the Supreme Court rejected – for the same reasons – the State's argument that GHG emissions attributable to the Netherlands were negligible in the context of global climate change[525].

After determining that the Netherlands has an obligation to reduce its GHG emissions under the concept of shared responsibility, the Supreme Court turned to identifying the precise terms of that obligation and stated that it would observe restraint in determining minimum obligations, especially when only soft-law instruments apply.

More specifically, the Supreme Court was called to examine whether the 25% GHG emission reduction was consistent with the minimal obligations resulting from Articles 2 and 8 of the ECHR.

The Court examined emission goals found within both binding and non-binding instruments, including the UNFCCC regime, COP decisions and findings of the IPCC – all parameters which, according to the Supreme Court, are relevant in interpreting obligations under the ECHR – and concluded that "*there is a high degree of consensus in the international community on the need for in any case the Annex I countries to reduce greenhouse gas emissions by 25% to 40% by 2020, in order to reduce global warming to the maximum of 2°C deemed responsible at the time of AR4*"[526].

Therefore, it concluded that the 25% reduction target constituted the "*absolute minimum*" positive obligation required to the Netherlands under Article 2 and 8 of the ECHR[527].

As to the "political domain" argument, the Court upheld the Court of Appeal's decision, pointing out that it is within the courts' purview to decide whether "*the government and parliament have remained within the limits of the law by which they are bound*"[528], and clarified that the order issued by the District Court leaves the State free as to the means to achieve the reduction goal of 25%.

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[523] Urgenda III, see supra, paras. 5.7.1 – 5.8.

[524] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 47.1:"*Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act* […]".

[525] Urgenda III, see supra, para. 5.7.7.

[526] Ibid., para. 7.2.7.

[527] Ibid., para. 7.5.1.

[528] Ibid., para. 8.3.2. The Court also stressed that "*If the government is obliged to do something, it may be ordered to do so by the courts, as anyone may be, at the request of the entitled party (Article 3:296 DCC). This is a fundamental rule of constitutional democracy, which has been enshrined in our legal order*", see para 8.2.1.

The appeal was therefore entirely rejected.

As previously noted, the Urgenda case is a significant milestone in climate change litigation[529].

The reliance of the Urgenda case on obligations enshrined in the ECHR has resulted in the emergence of several initiatives that use similar arguments. Recent developments, particularly in Europe, indicate that the case and its legal arguments are having a considerable impact on the current surge of litigation: this will clearly emerge from the analysis, in subsequent paragraphs, of the most recent rights-based cases[530].

Nevertheless, a few of the more interesting lessons to emerge from this case are worth briefly highlighting.

As to causality, the Dutch courts have certainly taken a lenient stance and have exempted the plaintiffs from proving a full causal link between State's conduct and a violation of rights protected under Articles 2 and 8 ECHR, which would be nearly impossible to prove. Such approach is, at least in part, determined by the fact that, under Dutch law, plaintiffs seeking orders to perform without compensation carry a lesser burden of proof and are not required to prove such a tight causal link[531]. Therefore, it is evident that the difficulty of establishing a causal connection in the context of climate litigation will vary depending on the burden of proof required in each jurisdiction: each system – and the same applies for supranational courts and tribunals and quasi-judicial bodies – adopts different evidentiary rules for establishing causation; moreover, such rules may different in light of the nature of plaintiffs' claims (i.e. whether they seek an order to perform or compensation).

Another element that emerges from the Urgenda case is the growing relevance of soft-law instruments and science in identifying the content of States' obligations. The conclusion that a 25% reduction was the lower limit of the Netherlands' obligation derived from the analysis of a wide range of political statements, other non-binding declarations and scientific data. This shows, on the one hand, that as non-binding statements become widely supported and repeated, the distinction between them and binding-obligations thins out; on the other hand, scientific evidence has the

[529] G.PANE, *Pro e contro dei rimedi domestici: prospettive di sinergia europea nel contenzioso climatico collettivo*, in *Ordine internazionale e diritti umani*, 2023, pp. 390-391 noting that Urgenda and its related arguments have been widely cited in several subsequent cases in European countries. Despite varying impacts on each State, almost every judgement consistently mentions Urgenda whether or not the rights were recognized; see also: A. NOLLKAEMPER, L. BURGERS, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, January 6, 2020, available at: https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/.

[530] The Urgenda case had a significant impact on climate cases in the Netherlands (including the *Milieudefensie v Shell* case which will be discussed later) while also serving as an inspiration for multiple lawsuits in European countries, see F.PASSARINI, *Ambiente. CEDU ...,* cit., p. 785.

[531] C.W.BACKES, G.A. VAN DER VEEN, *Urgenda: the Final Judgement ...,* cit., p. 310.

potential to play a critical role in climate-related lawsuits, as the legitimacy of government and parliamentary actions may depend on the general opinion of the scientific community[532].

2.2 Friends of the Irish Environment v. Ireland

In 2017, the NGO Friends of the Irish Environment (FIE) – active in environmental protection in Ireland – filed a lawsuit before the High Court of Ireland, challenging the National Mitigation Plan (hereinafter "the Plan"), approved by the Government pursuant to the Climate Action and Low Carbon Development Act (hereinafter "the Act")[533].

FIE claimed that Plan violated the Act, the Constitution of Ireland and human rights obligations deriving from the ECHR, namely the right to life and the right to private and family life enshrined in Articles 2 and 8. Plaintiff's core argument revolved around the claim that the Plan failed to achieve necessary short and mid-term GHG emission reductions, as required by the international community to avoid dangerous climate change. FIE therefore requested the High Court to quash the government's approval of the Plan and, if appropriate, order the adoption of a new plan.

The High Court delivered its judgement on September 19, 2019, ruling in favour of Ireland and refusing the reliefs sought.

Firstly, Mr. Justice MacGrath noted that the 2017 Plan is the State's initial attempt to mitigate climate change and to move towards a "*low-carbon and climate resilient and environmentally sustainable economy by 2050*"[534]. The Plan serves as a living document that marks

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[532] Ibid.,, p. 314. The authors ask the following question: "*Is it possible for a democratically responsible government and a democratically elected parliament to pursue a climate policy that scientists do not consider to be ambitious enough?"* and emphasize that *"This way, the results of scientific research, having gained broad acceptance, also gain legal momentum and drive. However, this goes at the expense of the latitude and influence that national democratically responsible and elected bodies wield. This, if we interpret it correctly, represents a marked shift in the global balance of power. A shift that may actually be commanded by the immense threat posed by the effects of global warming, but a shift to the judiciary from the democratic domain nonetheless*".

Despite highlighting numerous critical aspects that the Urgenda case left unanswered, the authors also emphasize that, if Urgenda's line of reasoning were applied in other environmental issues such as air pollution, Courts should have no difficulty in issuing orders against States; in fact, air pollution constitutes the largest risk to people's health in Europe, with PM 10 and PM 2.5 values often being way above the WHO standards, and there is a direct causal link between such pollution and deaths and health complaints. The authors therefore note: "*Why is it fine for our authorities and legislator to give economic reasons for setting the air quality limit values at twice the values scientists all over the world deem necessary, but at the same time is not okay for them to set the minimally necessary greenhouse gas emissions reductions at a value one-fifth lower than scientists deem necessary? There is a distinct possibility that before long the Supreme Court, or courts in other countries, will be asked to apply the Urgenda line of reasoning to other files in which more resolute action by legislator and government alike could save human lives and prevent health hazards. Examples are not hard to find. The question will be where the Supreme Court, and other courts, will draw the line regarding the rights arising from Articles 2 and 8 ECHR*", see p. 320.

[533] *Friends of the Irish Environment CLG v. The Government of Ireland,* 2017 No. 793 JR, [2019] IEHC 74, September 19, 2019 (hereinafter FIE v. Ireland I); *Friends of the Irish Environment CLG v. The Government of Ireland*, Appeal No. 205/19 [2020], July 31, 2020, SC (hereinafter FIE v. Ireland II). All case documents are available at: https://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/.

[534] FIE v. Ireland I, see supra, para. 108.

the starting point for future mitigation action, albeit without outlining a specific path towards the 2050 objective. Additionally, implementation progress will be updated annually, and additional measures will be taken to ensure continuous improvement. The Act also mandates the adoption of new mitigation plans every five years[535].

The applicant asserted that the document's "living" nature did not grant it immunity from challenge. In contrast, Ireland contended that the Plan was not subject to judicial review and involved policy considerations that fell under the purview of the government[536].

The High Court acknowledged the close connection between justiciability and separation of powers, whereby courts should refrain from making decisions that require specific "*qualification, experience, or democratic responsibility*". The adoption and execution of policies is a typical executive function, although courts may syndicate their compliance with the law and the Constitution[537].

Nonetheless, separation of powers requires courts to adopt a careful and prudent approach, without interfering with legislative or executive margin of discretion, which may sometimes be wide[538].The High Court emphasized that "*Courts are and should be reluctant to review decisions involving utilitarian calculations of social, economic and political preference*"[539].

Mr. Justice MacGrath observed that the Act and the Plan left a significant margin of discretion to the government as how to achieve the transition to a low-carbon economy by 2050 and that it is not up to the court to "*second-guess the opinion of Government on such issues*"[540]; moreover, the High Court underlined that the adoption of measures required a balance of numerous relevant factors, especially with regard to measures that have cost implications.

The High Court therefore concluded that, in light of such discretion, it could not conclude that the respondent had breached the provisions of the Act[541].

Regarding alleged violations of the Constitution and conventional human rights, the High Court evaluated the potential breach, although it observed that it would seem inconsistent for there to be a freestanding challenge on such basis in light of the Plan being deemed not to be *ultra vires* and in accordance with primary legislation[542].

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[535] Ibid., para. 84. In paras. 100-107, the Court examines the content of the six chapters of the Plan, which address various aspects of the transition, including de-carbonising electricity generation, the building environment and transport and carbon neutrality for agriculture, forest and land use sectors.

[536] Ibid., para. 86.

[537] Ibid., para. 89.

[538] Ibid., paras. 91-94.

[539] Ibid., para. 92.

[540] Ibid., para. 97.

[541] Ibid., paras. 113 and 118.

[542] Ibid., paras. 121-122.

As to constitutional rights, they included the rights to life, to bodily integrity and to an environment consistent with human dignity. Mr. Justice MacGrath argued as follows: "*I am not satisfied that it has been established that the making or approval of the Plan by the respondent has the effect of breaching those rights. Accepting for the purposes of this case, that there is an unenumerated right to an environment consistent with human dignity, in my view, it cannot be concluded that it is the plan which places these rights at risk. As I previously stated, I could not reasonably conclude that the Plan resiles from the national transition objective as specified in the legislation nor could I reasonably conclude that the plan runs contrary to the national policy on climate change. The Plan is but one, albeit extremely important, piece of the jigsaw*"[543].

The High Court stressed that "*it is not for the domestic court to declare rights under the Convention, but that this is a matter for the European Court*"[544] and recalled the decision of Fennelly J, where it was underlined that "*The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence*"[545].

The High Court also noted that positive obligations fall within State's margin of appreciation, as clarified in the *Budayeva* case, and that the Plan could not be considered to have exceeded such margin. Nonetheless, the High Court stressed that, even pursuant to Article 8 of the ECHR, the Plan fell within respondent's discretion and, as the ECtHR pointed out in *Fadeyeva v. Russia*, the domestic legitimacy of an act is one of the aspects that need to be considered in evaluating an alleged violation of Article 8 ECHR[546].

FIE leapfrog-appealed the High Court's ruling before the Supreme Court of Ireland. The Court issued its ruling on July 31, 2020, overturning the High Court's decision and quashing the Plan.

The Supreme Court deemed the Plan insufficient and lacking specificity, in contrast to the lower court's decision. It observed that the Plan did not provide sufficient detail as to how the National Transitional Objective would be met by 2050 and left numerous aspects to be explored in the future. This was deemed to be in breach of the requirements established by the 2015 Act[547].

However, the approach taken by the Supreme Court towards human rights claims is what clearly distinguishes this case from the Urgenda case.

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[543] Ibid., para. 133.
[544] Ibid., para. 139.
[545] Ibid., para. 140.
[546] Ibid., paras. 143-144.
[547] FIE v. Ireland II, see supra, paras. 6.46- 6.47. See also para 9.2, where the Supreme Court concludes that "*the 2015 Act, and in particular s.4, requires a sufficient level of specificity in the measures identified in a compliant plan that are required to meet the National Transitional Objective by 2050 so that a reasonable and interested person could make a judgement both as to whether the plan in question is realistic and as to whether they agree with the policy options for achieving the NTO which such a plan specifies*".

The Government argued that FIE lacked standing as it invoked personal rights, including those enshrined in Articles 2 and 8 ECHR, which only belong to individuals.

The Court found that indeed FIE lacked standing, observing that, as a corporate entity, it did not itself enjoy human rights under the Constitution or the ECHR and that "*So far as standing to maintain the claims under the ECHR are concerned, it was accepted at the oral hearing that FIE would not have standing to bring a complaint before the ECtHR*"[548]. The Irish Constitutional system, just like the control mechanisms established by the ECHR, do not recognize the so-called *actio popularis*[549].

Nonetheless, the Supreme Court provided some insights on the existence of a constitutional right to a healthy environment and concluded that such right would be either superfluous or too vague and ill-defined and concluded that it cannot be derived from constitutional norms. However, the Court reserved the position of "*whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial*"[550].

Similarly to Urgenda, the ruling of the Irish Supreme Court was by many considered a landmark decision: the case was successful despite Irish courts' general tendency to exhibit deference to the executive branch[551].

However, the decision may be viewed as a setback from a human rights standpoint, as compared to Urgenda. The human rights arguments that proved successful in Urgenda – which clearly inspired the applicant – were not addressed due to a lack of standing. This shows that standing constitutes a crucial aspect that plaintiffs need to carefully assess when filing lawsuits. This is especially the case for NGOs, who may favour indicating individuals as plaintiffs to avoid risks of having their claim rejected on preliminary standing grounds[552].

Nonetheless, as some authors have underlined, a careful reading of the ruling suggests that the issue of standing may not be insurmountable[553]: the Supreme Court pointed out that "*In the present case, no real attempt has been made to explain why FIE has launched these proceedings*

[548] Ibid., para. 7.6.

[549] M.CORLETO, *La pianificazione governativa in tema di cambiamento climatico dinanzi alla Corte suprema irlandese*, in *Diritti umani e diritto internazionale*, Issue 1, 2021, p. 205.

[550] FIE v. Ireland II, see supra, para. 9.5.

[551] V.ADELMANT, P. ALSTON, M. BLAINEY, *Courts, Climate Action, and Human Rights Lessons from the Friends of the Irish Environment v. Ireland Case*, in C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency ...,* cit., p. 305.

[552] Ibid., pp. 315-316. The authors observe that standing rules in common law countries can pose an insurmountable barrier, especially since plaintiffs may not have experienced any specific harm or loss yet. They also provide various arguments that plaintiffs could use to push for a progressive approach to legal standing, underlining that more loose standing regimes have been established in many countries, including Canada (where public interest standing is allowed), the United Kingdom (where "*courts are assumed to have a particular responsibility to develop standing principles that meet the needs of modern society*"), the Philippines and Latin America.

[553] G.PANE, *Pro e contro dei rimedi ...,* cit., p. 385.

and why individual plaintiffs have not commenced the proceedings, or sought to be joined"[554] and that "*The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted*"[555]. This indicates that the matter might be successfully brought before the Court again.

As to the value of ECHR rights, the uncertainties and different approaches followed by national courts demonstrate that guidance from the ECtHR may be crucial in clarifying States' obligations and the scope of Convention rights in the context of climate change[556].

2.3 Notre Affaire à Tous and Others v. France

In March 2019, four NGOs (Notre Affaire à Tous, la Fondation pour la Nature et l'Homme, Greenpeace France and Oxfam France) filed a claim before the Administrative Court of Paris against the French Administration, arguing that the State failed to comply with its obligations related to climate change and alleging State's liability for ecological damage[557]. Plaintiffs challenged State inaction, sought symbolic compensation of one Euro and requested an injunction against the Prime Minister and other competent ministers to adopt necessary measures to adequately tackle climate change and prevent damage associated with excessive GHG emissions.

The lawsuit – which is often referred to as "L'Affaire du Siecle" (The Affair of the Century) and represents the most famous case of climate litigation in France[558] – followed the French

[554] FIE II, see supra, para. 7.18.

[555] Ibid., para. 7.21.

[556] V.ADELMANT, P. ALSTON, M. BLAINEY, *Courts, Climate ...,* cit., pp. 310-311; O.KELLEHER, *A critical appraisal of Friends of the Irish Environment v Government of Ireland*, in *RECIEL*, Vol. 30, Issue 1, 2021, p. 146. See also C.BAKKER, *Climate Change* …, cit., pp. 220-221, who observes that some of the legal arguments adopted by the Dutch Supreme Court may be difficult to accept in other climate litigation cases, and notes that "*some of the conclusions of the Dutch Supreme Court in Urgenda are quite innovative and extensively interpret principles laid down by the ECtHR, such as the exclusive reliance on climate science to establish the existence of a real and immediate risk to the lives and welfare of the Dutch population as a whole*".

[557] M.TORRE-SCHAUB, *Climate Change Litigation in France: New Perspectives and Trends*, in ALOGNA et al., cit., p. 131, where the author clarifies that "*Ecological damage' is defined by the Biodiversity Act of 8 August 2016—which introduced the concept into the French Civil Code— as 'consisting of a significant damage to the elements or functions of the ecosystems or to the collective benefits humans derive from the environment*".

[558] Ibid., pp. 127-130. The author notes that the French system regulates two types of actions before administrative courts to challenge State deficiencies in climate action: the action for the illegality of an administrative act and the action for liability for harm caused. The *Grande-Synthe v. France* case belongs to the first category and constitutes the first major example climate litigation for illegal action of the administration ("excès de pouvoir") and failure to adapt; on the other hand, *Affaire du Siècle* is a prime example of litigation falling under the second category, where State liability is engaged for wrongful acts and ecological damage.

Nonetheless, the Affaire du Siécle case was certainly influenced by the Grande-Synthe case which is, under many aspects, similar. The low-lying coastal municipality of Grande-Synthe, particularly exposed to the dangers of climate change (especially sea level rise and floods), filed a claim before the Council of State, arguing for State's excess of power determined by lack answers to applicants' requests towards the President of the Republic, the Prime Minister and other Ministers. Plaintiffs requested the Council to order defendants to adopt all necessary measures to curb GHG emissions and implement adequate adaptation measures. The Council of State issued a non-definitive decision on

government's rejection of the plaintiffs' request, which was submitted in 2018 in the form of a letter of formal notice and constitutes the first step in a "*recours en carence fautive*", a legal action for failure to act.

The Court delivered its first and non-final judgement on February 3, 2021, ruling partially in favour of the applicants but ordering, as a preliminary matter, an additional investigation[559].

As to the existence of ecological damage, the Court heavily relied on scientific evidence and thoroughly outlined the most recent findings of the IPCC (mainly referring to SR1.5), while also pointing out the effects described by the Centre Interprofessionel Technique d'Études de la Pollution Atmosphérique (CITEPA), a body attached to the Ministry of Ecological Transition. It concluded that, in light of the impacts described, the ecological damage must be considered established[560].

The existence of wrongful omissions and the causal link were subsequently examined.

Applicants claimed that, on the one hand, the administration failed to implement legislative and regulatory frameworks and, on the other hand, that GHG reduction targets would fail to keep the rise in global temperature limited to 1.5°C.

In the applicants' view, the alleged aggravation of the ecological damage resulted from the failure to meet objectives in different areas: improving energy efficiency, increasing the share of energy produced from renewable sources, and reducing GHG emissions[561].

The Court found that France indeed recognized climate change as an emergency and acknowledged its capacity to adequately address it. According to the Court, this emerged from numerous instruments and provisions, including the FCCC, the Paris Agreement, EU climate policies and objectives and national provisions (such as Art. 3 of the Environment Charter – which has constitutional value – and the Energy Code), which all demonstrate that France has taken an obligation to combat climate change[562].

As to improving energy efficiency and increasing the share of renewable energies, despite finding that the objectives had not been achieved, the Court found that they could not be regarded as

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November 19, 2020, requesting the Government to provide, within three months, additional information, concerning the measures adopted to achieve its climate goals. On July 1, 2021 the Council of State delivered its final judgement and ordered the government adopt all the necessary measures to curb GHG emissions according to established climate goals by the end of March 2022. All case documents are available at: https://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/

[559] *Notre Affaire à Tous and Others v. France*, Paris Administrative Court, case nos. 1904967, 1904968, 1904972, and 1904976/4, Judgment of February 3, 2021.

[560] Ibid., para. 16.

[561] Ibid., para. 22.

[562] Ibid., paras. 19-21.

"*having contributed directly to the aggravation of the ecological damage for which the applicant associations are seeking reparation*"[563], therefore dismissing the point.

Conversely, with regards to GHG emissions, the Court emphasized that at the end of the 2015-2018 period, France had substantially exceeded its first carbon budget and, in light of the findings of the Haut Conseil Pour le Climate (High Council for the Climate), concluded that the State disregarded the first carbon budget and failed to adopt adequate action to reduce GHG emissions[564].

According to the Court, the NGOs could only claim that the State was liable, under art. 1246 of the Civil Code, in the context of the first carbon budget, for part of the ecological damage; for the rest, their conclusions were rejected[565].

As to compensation for ecological damage, the Court underlined that under Art. 1249 of the Civil Code, reparation is primarily done in kind, while only in case of impossibility of inadequacy of remedial measures a court shall order to pay damages. Applicants provided no allegation that the State would be unable to provide reparation in kind for ecological damage and the request for symbolic payment was deemed unrelated to the extent of that damage. The claim was therefore rejected[566].

In contrast, moral compensation was allowed in light of the undermining of interests defended by NGOs as a consequence of State's failure to meet its commitments. The Court ordered the State to pay, for each applicant, the symbolic sum of one Euro[567].

With regard to the requested injunction, the Court found that it was not possible for it to determine exactly what measures should be ordered and thus, before ruling on the conclusions, it required a supplementary investigation, providing the competent ministers with a two months term to provide the (previously uncommunicated) observations concerning the measures adopted to achieve GHG reduction targets.

Nonetheless, the recognition of an ecological damage was considered a remarkable outcome and the initiative a "*political and social success*", as it prompted the legislative to adopt more ambitious policies – such as the first Climate-Energy Act – and provided NGOs with even more political prominence as leaders of the climate justice movement[568].

On October 14, 2021, the final judgement was delivered[569].

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[563] Ibid., paras. 25-27.
[564] Ibid., para. 29.
[565] Ibid., para. 33.
[566] Ibid., paras. 35-36.
[567] Ibid., paras. 41-42.
[568] M.TORRE-SCHAUB, *Climate Change* …, cit., pp. 134-135.
[569] *Notre Affaire à Tous and Others v. France*, Paris Administrative Court, case nos. 1904967, 1904968, 1904972, and 1904976/4, Judgment of October 14, 2021.

The Court first clarified that its task was to merely ascertain, on the day of the judgement, whether the damage continued to exist and whether reparation measures had been adopted; conversely, it was not within the Court's purview to establish whether State's measures were sufficient to achieve the GHG reduction goals[570].

In light of the significant ascertained surplus of GHG emissions, the Court found that damage continued to exist and that plaintiffs had due grounds to request an injunction, in order to repair the damage and prevent its worsening[571].

As to the content of the injunction, the Court recognized that the life of GHGs in the atmosphere is of around 100 years and, consequently, measures must be adopted swiftly.

The Court therefore ordered the Prime Minister and the competent Ministers to take all the measures to repair the ecological damage and prevent its worsening[572]. However, it pointed out that such measures may take different forms and that it is within the Government's discretion to identify the specific measures and define their form[573]; it nonetheless considered reasonable for reparation to be effective as at December 31, 2022, at the latest, and concluded that "*There is no need, however, to impose a sanction on top of this injunction*"[574].

Several recurring elements of climate litigation arise from the examined case, including the importance of science in determining State responsibility and the issue of separation of powers.

As to the first aspect, it is worth stressing that the relevance of the scientific data was not limited to the findings of the IPCC, as the Haut Conseil Pour le Climate (an independent body established to verify GHG emission reduction measures and their implementation) and the CITEPA also provided crucial information[575]. Since the Court was called upon to rule on the sufficiency of French administrative action, it is justifiable to place importance on evaluations that specifically pertain to French State action.

From an etiological standpoint, and for the purposes of the law applied in this instance, the issue of attributing environmental damage to the emissions of a specific State was not decisive: excessive GHG emissions were deemed sufficient to establish ecological harm. Besides, as previously stated, the etiological profile assumes distinct implications in each jurisdiction and varies

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[570] Ibid., p. 41, para. 6.

[571] Ibid., p. 43, para. 9.

[572] Ibid., p. 44, para. 13.

[573] This outcome was predicted by M. Torre-Schaub, who noted that: "*although the judge has accepted that a 'delay' in State action thereby created a 'fault of the administration', the judge will now at most have to determine the obligation to achieve 'a' result (such as lowering greenhouse gas emissions), but in no case will the judge be able to determine obligations of 'means'. In other words, even if the Affaire du Siècle has been partially a success at this stage, this success will be limited because the French judge himself is constrained in his power to give orders to the administration. The judge cannot determine what precise measures or means the State should take, because it would interfere with the principle of separation of powers*", see M.TORRE-SCHAUB, *Climate Change* …, cit., p. 133.

[574] *Notre Affaire à Tous and Others v. France*, see supra, p. 44, para. 14.

[575] A.PISANÒ, *Il Diritto al Clima* …, cit., p. 230.

among the different branches of law (it should be noted that, in the present case, the purpose of the administrative ruling was to seek an injunction).

Although it achieved a similar result to Urgenda by establishing the State's obligation to address climate change and its responsibility for any failure to do so, this case indeed took a different approach.

The main element from which one immediately grasps the difference in approach between the Affaire du Siècle case and the Urgenda case is the lack of any reference to human rights in the former.

While the plaintiffs specifically referred to the rights recognized in Articles 2 and 8 of the ECHR[576], the two judgments make no mention of human rights. Furthermore, the ECHR is not even listed as one of the normative acts considered for the decision.

However, this factor should not be overvalued as it is intertwined with the characteristics of the ruling, the arguments presented, and the relevant law. Therefore, it is no surprise that the Court, which is an administrative court, has grounded its decision on normative sources that appeared to be more immediately relevant[577].

2.4 Klimaatzaak v. Kingdom of Belgium & Others

In 2015, the non-profit organization Klimaatzaak – along with 58.000 citizens as co-plaintiffs – filed a lawsuit against the Belgian State, the Wallonne Region, the Flemish Region and the Brussels-Capital Region before the Court of First Instance of Brussels, Civil Section[578].

Applicants requested to Court to find that: by 2020, defendants had not reduced GHG emissions by 40% or at least 25% compared to 1990 levels; the defendants were in breach of Articles 1382 and 1383 of the Belgian Civil Code (negligent conduct referred to public authorities);

[576] Applicants argued that States are required to implement adequate frameworks and to adopt preventive measures to protect rights enshrined in Articles 2 and 8 ECHR and recalled the principles established in the jurisrpudence of the ECtHR (especially in *Budayeva and others v. Russia*, *Oneryildiz v. Turkey* and *Tatar v. Romania*). Moreover, plaintiffs argued for the existence of a right to live in a sustainable environment as a general principle stemming from numerous national and international provisions and instruments: this aspect was also not specifically addressed by the Court.

[577] See L.DEL CORONA, *Brevi considerazioni in tema di contenzioso climatico alla luce della recente sentenza del Tribunal Administratif de Paris sull'"Affaire du Siécle"*, in *Gruppo di Pisa. La Rivista*, Vol. 1, 2021, p. 334, who underlines that, in light of the fact that the French Environment Charter has constitutional value, the Court could easily affirm the existence of a constitutionally relevant duty to protect the environment by simply referring to Article 3 of the Charter, without having to resort to the argument of the instrumentality of environmental protection to the protection of constitutionally protected human rights.

[578] *VZW Klimaatzaak v Kingdom of Belgium & Others*, Court of First Instance of Brussels, 2015/4585/A, Judgement of June 16, 2021 (hereinafter Klimaatzaak v. Belgium). All case documents (in French) and an unofficial English translation of the judgment are available at: https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/.

the defendants were in breach of Articles 2 and 8 of the ECHR and Articles 6 and 24 of the International Convention on the Rights of the Child[579].

Applicants therefore requested the Court to order the defendants to adopt the necessary measures in order to achieve: by 2025, a GHG emissions reduction of 48% or at least 42% compared to 1990 levels; by 2020, a reduction of 65% or at least 55% compared to 1990 levels; in 2020, net zero emissions. They also requested the Court to put the case "*en continuation*", to periodically monitor defendants' progress towards the goals.

Similarly to Urgenda, applicants relied on two main legal arguments: the non-contractual liability of the defendants under national law (Articles 1382 and 1383); the breach of human rights provisions under the ECHR (Articles 2 and 8) and the UN Convention on the Rights of the Child (Articles 6 and 24). After detailing the relevant facts of global warming, as outlined in IPCC's 2018 SR1.5 Report, the analysis highlighted Belgium's "*commitments and failures*," exposing the inadequacies of State climate governance[580].

According to the plaintiffs – who were required, under the non-contractual liability regime, to prove negligence, damage and the causal link between the two – defendants' negligence was demonstrated by their lack of adequate action despite full knowledge of the severe threat of climate change, while the damage and the causal link were established in light of solid scientific literature[581].

As to human rights provisions, applicants underlined the applicability of the ECHR to environmental threats in light of the established case law and argued that the UN Convention on the Rights of the Child should also apply, as children will disproportionately be affected by the impacts of global warming.

The Court firstly laid out the relevant factual background of the claim[582]. From the establishment of the UNEP and the IPCC, the key events of each year, starting from 1990, were outlined. The Court thoroughly examined the legal developments within the UNFCC regime, the European framework and Belgian policy (with a particular focus on the federal and regional action in the last few years and the European Commission's evaluation of Belgian mitigation plans); simultaneously, it emphasized scientific advancements through subsequent IPCC's reports and the related findings.

In light of the Regions' objection that the Court lacked jurisdiction to hear the claim (as it would substitute the legislative and executive powers), the Court preliminarily addressed this issue

[579] Klimaatzaak v. Belgium, see supra, pp. 42-43.
[580] Klimaatzaak v. Belgium, see supra, Unofficial English summary of plaintiff's arguments, paras. 8 and ff.
[581] Ibid., para. 13.
[582] Klimaatzaak v. Belgium, see supra, pp. 6 to 41.

and found that it was within the judiciary's competence to prevent or remedy alleged wrongful infringements of rights by the public authority in the exercise of its powers. Therefore, the Court observed that it was within its powers to assess whether the requirements for civil liability of the public authority were met and whether defendants engaged in wrongful conduct; it also clarified that the extent to which the judge may compel the public authority to repair or prevent the harm concerned the merits of the case (and was therefore addressed in a later part of the ruling)[583].

As to the admissibility of the claim, the existence of a direct and personal interest of the plaintiffs, required under Articles 17 and 18 of the Belgian Judicial Code, was examined[584].

With regards to the interest of natural persons, the Court stressed that Belgium and its population are not immune to the impacts of climate change and that "*diplomatic consensus*" grounded on the findings of authoritative climate science proved indisputably that climate change constitutes a real threat. As the plaintiffs sought to hold defendants liable for the impacts of climate change on the lives of generations residing in Belgium, the Court maintained that each individual has a direct and personal interest in bringing the action[585].

With regards to the interest of Klimaatzaak, the Court noted that, although traditionally the interest of legal persons only concerns their very existence or their patrimonial assets and moral rights, the Aarhus Convention provides environmental organizations with a privileged status[586]; moreover, the Constitutional Court and the Belgian legislator – pursuant to the scope of the Aarhus convention – recognized and guaranteed the legal standing of associations that included environmental protection within their object. The Court concluded that Klimaatzaak's lawsuit fell within its object and that there was a direct and personal interest involved[587].

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[583] Ibid., p. 45.

[584] Ibid., p. 47, where the Court notes that, under Art. 17, the interest must be personal and direct and the proceedings must provide a benefit to the plaintiff. Actions brought in the general interest and that do not provide plaintiffs with direct benefit are therefore excluded.

[585] Ibid., p. 50.

[586] Ibid., pp. 51-54, where the Court elaborates on Article 9 of the Aarhus Convention (see supra), which, at paragraphs 1 to 4, reads as follows: "*1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.*

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation. […]".

[587] Klimaatzaak v. Belgium, see supra, pp. 54-55.

The Court provided an overview of the relevant principles, starting with a clarification on the extent of public authorities' liability under Belgian law. It then proceeded to identify the specific scope of Articles 2 and 8 of the ECHR.

The Court recalled the jurisprudence of the ECtHR on environmental matters, recognizing that States have positive obligations to adopt adequate measures to protect the rights of individuals from known dangerous activities and disasters; nonetheless, the choice of the appropriate measures falls within States' discretion[588]. It also stressed that, as the ECtHR clarified, in the context of hazardous activities, the positive obligations outlined in Article 2 share significant overlap with those set forth in Article 8.

In light of the recalled scientific findings, the impacts of climate change on Belgium's inhabitants were deemed certain and, according to the Court, the global nature of the issue did not exempt the State from its obligations under the ECHR. The Court explicitly recalled, with regards to this aspect, the decision of the Dutch Supreme Court in Urgenda, and concurred with its findings, concluding that plaintiffs correctly invoked Articles 2 and 8 ECHR as sources of positive obligations to tackle climate change, while pointing out that such measures are not obligations of result and that States do have a margin of appreciation[589].

As to Articles 6 and 24 of the UN Convention on the Rights of the Child[590], the Court concluded that they are were not applicable, due to two reasons: firstly, they do not impose positive

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[588] Ibid., pp. 60-61. The Court mentioned several ECtHR cases which we already addressed previously, including: *Tàtar v. Romania*, *López Ostra v. Spain*, *Budayeva and Others v. Russia* and *Cordella and Others v. Italy*.

[589] Ibid., pp. 61-62.

[590] UN General Assembly, *Convention on the Rights of the Child*, see supra, Art. 6: "*1. States Parties recognize that every child has the inherent right to life.*

2. States Parties shall ensure to the maximum extent possible the survival and development of the child"; Art. 24:

"*1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

obligations on the public authority, as they allow for flexibility in achieving the objectives; secondly, said norms only impose obligations for State Parties but cannot be invoked by individuals in domestic courts[591].

Once these issues were clarified, the Court analyzed their application to the present case.

The Court noted that a "*diplomatic consensus*" had developed among States even with regards to the thresholds that should not be exceeded; moreover, the Federal State and the Regions gave their assent to international instruments and supported the findings of the IPCC.

After examining the submitted data concerning the content of State action in mitigating climate change, the Court concluded that – despite full knowledge of the risks of climate change for the population – Belgian climate governance was inadequate, as repeatedly underlined by EU Institutions[592]. The State and the three Regions failed to act with prudence and diligence pursuant to Article 1382 of the Civil Code; additionally, the same findings indicated a violation of the obligation to adopt measures to prevent the impacts of climate change according to Articles 2 and 8 of the ECHR[593]. The Court found that the cooperative federal structure of the State justified the conclusion that each defendant was individually responsible for inadequate climate governance[594].

Nonetheless, the Court declined to issue an injunction. The conclusion was grounded on the principle of separation of powers. In the Court's view, while it is within the judiciary's purview to establish the Federal State's and the Regions' failure to comply with the applicable norms, the Court is not authorized to set specific targets for decreasing GHG emissions. The principle of separation of powers prevents the judiciary from substituting itself in the exercise of discretionary competence that belongs to the public authority. In this case, no binding obligations to achieve the required reduction targets exist at neither international nor European level. The Court notes that international law only set a common objective – keeping the global temperature well below 2°C below pre-industrial levels – and the commitment to pursue efforts to limit it to 1.5°; moreover, Belgium is not legally bound to EU's targets[595].

Therefore, the "*extent and pace of Belgium's GHG emission reductions and the internal distribution of the efforts to be made in this direction are and will be the result of political arbitration in which the judiciary cannot interfere*"[596]. The plaintiffs' request for an injunction was

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4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries".

[591] Klimaatzaak v. Belgium, see supra, p. 63.

[592] Ibid., p. 79.

[593] Ibid.

[594] Ibid., p. 80.

[595] Ibid., pp. 80-82.

[596] Ibid., p. 82.

therefore rejected. The Court held that defendants were in breach of Art. 1382 of the Civil code and Articles 2 and 8 of the ECHR and rejected all the other plaintiffs' claims[597].

The Klimaatzaak case shares numerous similarities with the Urgenda case, including the strategy and arguments of the plaintiffs, as well as the Court's motivations. Both cases arrived at comparable conclusions concerning the violation of national legislation and Articles 2 and 8 of the ECHR. However, a significant difference between the two is that despite finding a violation, the Court in Klimaatzaak determined that it could not grant the requested injunction based on its interpretation of the separation of powers principle.

In November 2017, Klimaatzaak lodged an appeal against the Court's verdict, aiming to partially reverse it. Despite mostly concurring with the verdict, the main grievance concerned the Court's dismissal of the plaintiffs' request to mandate specific GHG cuts, predicated on the separation of powers principle[598]. The defendants also lodged an appeal against the verdict. The plaintiffs and the defendants presented their written conclusions and the case was heard between September and October 2023.

On November 30, 2023, the Brussels Court of Appeal delivered its judgement, ruling again in favour of the plaintiffs and upholding in large part the findings of the first instance Court[599].

The ruling is of utmost importance as it overcomes the main obstacle that prevented the lower court from issuing the injunction, namely the principle of separation of powers. The Court of Appeal confirmed the inadequacy of mitigation action and the resulting violations of Articles 2 and 8 of the ECHR and Belgian civil law by three of the four defendants; on this point, it ruled out any liability on the part of the Walloon Region, pointing out that its climate mitigation action was in line with obligations established at national, European and international level.

However, the most important aspect of the ruling is that, contrary to what was decided in the first instance, the Court of Appeal upheld the injunction ordering the federal government, the

[597] Ibid., p. 83.

[598] Although the Court stated that it could not determine the obligations of a public authority and that the State's GHG emissions reduction are not subject to binding provisions, a problematic aspect becomes apparent upon closer examination of this profile. When analyzing the scientific findings, it became clear that the State failed to meet the required reduction targets, thereby breaching its obligations. This, in turn, does shed light on the content of the State's obligation and suggests that an alternative required conduct exists. To hold that there are no obligations to meet a specific target and, simultaneously, to find that a violation occurred due to not doing what, in fact, was deemed necessary by the cited scientific sources, may be subject to criticism. In other words, if it is determined that the failure to meet specific GHG reduction targets constitutes a violation of Articles 2 and 8 of the ECHR, then it follows that the State must achieve that particular reduction goal in order to comply with these norms. Therefore, the obligation of the State is clear at this point, and its discretion would concern the means of achieving the reduction, but not the extent and pace of the reduction. This would thus not prevent issuing an injunction that imposes specific reduction (similarly to what occurred in the Urgenda case).

[599] *VZW Klimaatzaak v Kingdom of Belgium & Others*, Cour d'Appel Bruxelles, n. 8411/2023, Judgement of November 30, 2023 (hereinafter Klimaatzaak v. Belgium II). For an early evaluation of the ruling, see A.BRIEGLEB, A.DE SPIEGELEIR, *From Urgenda to Klimaatzaak. A New Chapter in Climate Litigation*, in *VerfBlog*, December 5, 2023, available at: https://verfassungsblog.de/from-urgenda-to-klimaatzaak/.

Flemish Region and the Brussels-Capital Region to reduce their GHG emissions by at least 55% by 2030 compared to 1990 levels; this is, according to the Court of Appeal, the minimum reduction standard mandated by national, European and international law, as well as scientific evidence. This rejects the appellants' (more ambitious) argument that an even greater reduction should have been ordered in view of Belgium's historical responsibilities (an argument which, as in other national disputes, sought to identify targets considered "fair" in terms of overall contribution to climate change).

With regard to the principle of the separation of powers, the Court of Appeals pointed out that the judiciary has the power to prevent and remedy violations of subjective rights by public authorities, by ordering, without violating the principle of the separation of powers, the adoption of measures to put an end to such violations; this also applies to the legislative power[600]. On the other hand, it is not permissible for the judiciary to perform acts of public administration and prevent the public authority from choosing the measures to be taken to achieve the ordered result. On this basis, the Court of Appeals held that, contrary to the lower court's assertion, the order to reduce GHG emissions did not violate the principle of the separation of powers because, on the one hand, it established a minimum target below which there would be fault or negligence and which was undoubtedly necessary and achievable over the course of several years, and, on the other hand, the order left the defendants free to identify the various measures that could be specifically adopted to achieve that target[601].

2.5 Neubauer et al. v. Germany

In February 2020, a group of nine teenagers and young adults – including Luisa Neubauer – filed a constitutional complaint before the German Federal Constitutional Court, challenging the Federal Climate Protection Act (in German “Bundesklimaschutzgesetz”, hereinafter KSG), adopted in 2013 and amended in 2019[602].

Complainants alleged violations of fundamental rights enshrined in the Basic Law (“Grundgesetz”), namely the right to human dignity, life and physical integrity (Articles 1 and 2.2 in conjunction with Article 20a), freedom of occupation and property (Articles 12.1 and 14.1), as well as the violation of basic rights with regard to Articles 2 and 8 of the ECHR[603].

[600] Klimaatzaak v. Belgium II, see supra, p. 142.
[601] Ibid., pp. 142-143.
[602] *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, Federal Constitutional Court, Ruling of March 24, 2021 (hereinafter Neubauer v. Germany). The main case documents (in German along with unofficial English translations) are available at: https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/.
[603] Ibid., Constitutional complaint, p. 2.

Similar complaints were simultaneously filed by other individuals from Bangladesh and Nepal and minors from Germany. The Constitutional Court decided jointly on all complaints.

The complainants – some of whom claimed be farmer or to run sustainable tourism businesses in Germany – requested the Constitutional Court to: declare that, by only implementing a 55% GHG emissions cut by 2030 compared to 1990 levels, the KSG violated the basic rights of the complainants enshrined in the Basic Law; declare that the Federal legislature is obliged to ensure that GHG emissions in Germany are kept as low as possible through a new statutory regulation within a period to be determined by the Court; declare that the Federal legislator is obliged to adopt regulations within a specific period of time that prohibit the transfer of emissions allocations to other European countries[604].

In their view, the Federal Climate Protection Act failed to meet the required mitigation targets in light of the findings of the IPCC and did not take into account Germany's and the EU's obligation under the Paris Agreement to limit the global temperature increase to well below 2°C, with efforts to pursue the more ambitious target of 1.5°C compared to pre-industrial levels. Moreover, it did not include any plan for the post 2030 period.

In order to prove their claim, complainants firstly outlined the "*factual and legal starting point*", providing an overview of the science of climate change, the international legal framework and the inevitable impacts of climate change[605]; secondly, they examined the provisions of national legislation, namely The Federal Climate Protection Act, underlining that it only aimed to implement the EU's climate goals which, however, fail to follow a sufficient reduction path and are not consistent with neither the 1.5°C nor the 2°C target[606].

After presenting background information on each plaintiff, including their employment and education, a paragraph is devoted to analyzing the decisions rendered in the Urgenda case with specific attention to the decisive impact of the Dutch Supreme Court's rulings on the present case[607]. Complainants stressed that Germany and the Netherlands share similar legal systems and that the proceedings pose similar issues and, above all, "*whether in the absence of a higher authority to regulate the global problem of climate change, a state obligation can be derived by the courts from scientific statements together with the international law standards arising from human rights norms or obligations to protect. This is because a concrete obligation under international law to reduce*

[604] Ibid.
[605] Ibid., pp. 13-48.
[606] Ibid., pp. 63-70.
[607] Ibid., pp. 74-81.

greenhouse gases in the Netherlands or Germany by 2020 or 2030 is not contained in the Paris Agreement or in other international treaties"[608].

The main legal arguments – which largely drew upon Urgenda, but with some innovative elements – were subsequently presented.

Aside from the arguments concerning the admissibility of the constitutional complaint, the core of complainants' arguments concerned the merits of the claim. The alleged violation of Articles 1 and 2 in conjunction with Art. 20a was firstly addressed[609].

Complainants argued that, in light of the dimension of the climate crisis, German legislation failed to achieve the minimum level of protection required under Articles 1 and 20a.

Article 20a protects the natural foundations of life and animals, requiring the State to abstain from, or averting, related impairments; the obligation does not only apply to common environmental aspects such as air and water, but include the climate, and requires the protection of environmental goods even outside Germany, therefore establishing an obligation to international cooperation.

The complainants highlighted the future-focused principles of Art. 20a, which include preventing, eliminating, or compensating for any environmental damage, minimizing risks, and prohibiting significant environmental degradation. Additionally, the provision requires a long-term assessment of the harmful effects of environmental changes on future generations[610].

They therefore concluded that Germany did not fulfil its obligation to provide protection under Article 1 in conjunction with Article 20a, as it established an inadequate reduction rate of 55%, when a minimum of 70% reduction would be acceptable[611].

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[608] Ibid., p. 76.

[609] *Basic Law for the Federal Republic of Germany*, revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 28 June 2022 (Federal Law Gazette I, p. 968). An English translation provided by the Federal Ministry of Justice is available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. Article 1 reads as follows:

"*(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.*

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law".

Article 2 states that:

"(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) 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".

Article 20a provides that: "*Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*".

[610] Neubauer v. Germany, pp. 102-103.

[611] Ibid., pp. 122-123.

The alleged violation of Article 2.2 of the Basic Law in conjunction with Article 20a was grounded on analogous reasoning[612]; alleged violations of Articles 12.1 and 14 were subsequently outlined[613].

The Constitutional Court delivered its unanimous decision on April 29, 2021, declaring the Federal Climate Protection Act partly unconstitutional. The Court held that paragraph 3(1) second sentence and paragraph 4(1) third sentence of the Federal Climate Change Act were "*incompatible with fundamental rights insofar as they lack provisions on the updating of reduction targets for periods from 2031 that satisfy the constitutional requirements*[…]"[614]. It also held that the legislator must "*enact provisions by no later than 31 December 2022 on the updating of reduction targets for periods from 2031 as set forth in the reasons*"[615]. All other constitutional complaints were rejected.

The decision is divided in multiple sections.

Section A (paras. 1-90) provides an objective overview of the case's legal basis, including the Federal Climate Change Act, the Paris Agreement, and EU law. The section also presents the factual underpinnings of climate change, such as the IPCC's reports, the causes and consequences of global warming, as well as the impacts of climate change on the environment and climate. In addition, the section introduces the constitutional complaints raised by the joint proceedings.

Section B (paras. 90 to 141) addresses the admissibility of the complaints. The Court found the claims admissible and held that the complainants were presently, individually and directly affected in their fundamental freedoms[616].

Section C (paras. 142 to 265) examines the merits, while Section D provides the result.

In summarizing the findings of the merits, the Court states that: "*The constitutional complaints are partially successful. While it is not ascertainable that the legislator has violated its constitutional duties to protect the complainants against the risks of climate change (I and II), fundamental rights have nonetheless been violated because the emission amounts allowed by the Federal Climate Change Act in the current period are capable of giving rise to substantial burdens to reduce emissions in later periods (III). […]. This risk to fundamental freedoms is not unconstitutional on the grounds of any violation of objective constitutional law. No violation of Art.*

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[612] Ibid., pp. 123-126.

[613] Ibid., pp. 126-131. Article 12 provides that:

"*(1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.*

(2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

(3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court".

Article 14.1 provides that: "*(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws*".

[614] Neubauer v. Germany, see supra, p. 6

[615] Ibid.

[616] Ibid., paras. 108, 129-131.

20a GG can ultimately be ascertained (III 2 a). However, there is a lack of precautionary measures required by fundamental rights in order to guarantee freedom over time and across generations – precautionary measures aimed at mitigating the substantial emission reduction burdens which the legislator offloaded onto the post-2030 period with the challenged provisions and which it will then have to impose on the complainants (and others) due to Art. 20a GG and due to the obligation arising from fundamental rights to afford protection against impairments caused by climate change".

Hence, the Court recognized that duties of protection under Art. 2 and Art. 14 of the Basic Law arise with regards to climate change, but it found that no violation of said duties could be ascertained[617].

It also stressed that the ECHR imposes positive duties towards environmental risks, as highlighted by the ECtHR's case law on Articles 2 and 8. However, it also stated that this does not provide a higher level of protection than what is granted by Art. 2.2[618].

According to the Court, such duties are not, in principle, excluded by the fact that climate change is a global problem and that Germany itself is not capable of halting it[619]. Moreover, such global dimension allows determining the content of such obligations which includes activities at international level to tackle climate change[620].

The Court acknowledged its ability to conduct only a restricted review of measures enacted by the legislature to fulfil its responsibilities relating to fundamental rights, since the legislature possesses a margin of appreciation and evaluation; however, this does not indicate that the evaluation of such measures falls outside the scope of the Court, which could nonetheless establish that a violation occurred in cases where no precautionary measures are taken or the adopted measures are clearly inadequate[621]. The Court concluded that this was "*ultimately not the case*"[622] as the German legislator had certainly adopted precautionary measures that "*are not manifestly unsuitable*"[623]. This conclusion derived from an analysis of German's effort with regards to both mitigation (revolving around hitting the target set by the Paris Agreement) and adaptation. The

[617] Ibid., para. 143.
[618] Ibid., para. 147.
[619] Ibid, see also para. 201, where the Court observes that: "*Either way, the obligation to take national climate action cannot be invalidated by arguing that such action would be incapable of stopping climate change. It is true that Germany would not be capable of preventing climate change on its own. Its isolated activity is clearly not the only causal factor determining the progression of climate change and the effectiveness of climate action. Climate change can only be stopped if climate neutrality is achieved worldwide. In view of the global reduction requirements, Germany's 2% share of worldwide CO2 emissions (BMU, Climate Action in Figures, 2020 edition, p. 12) is only a small factor, but if Germany's climate action measures are embedded within global efforts, they are capable of playing a part in the overall drive to bring climate change to a halt*".
[620] Ibid., para. 149.
[621] Ibid., para. 152.
[622] Ibid., para. 153.
[623] Ibid., para. 154.

Court observed that "*If the executive and legislative branches therefore assume that by limiting the increase in the average temperature to well below 2°C and preferably to 1.5°C […], the impact of climate change in Germany could be alleviated using adaptation measures to an extent that would allow the level of protection required under Art. 2(2) first sentence GG to be reached, they are not overstepping the decision-making leeway afforded to them in fulfilling the duty of protection arising from fundamental rights – at least not presently*"[624]. Moreover, it noted that "*it cannot presently be ascertained that the state has violated its duty of protection with the reduction pathway specified until 2030, which is possibly still oriented towards a target of 2°C. It is not evident that the health consequences arising from 2°C global warming and from the associated climate change in Germany could not be alleviated by supplementary adaptation measures in a manner that would be sufficient under constitutional law*"[625]. It also stressed that national efforts could still be adjusted in order to achieve the specified target for 2030, and that reduction deficits could still be turned around within this period[626].

On the same grounds, the Court excluded that a violation of the duty of protection arising from fundamental rights pursuant to Art. 14 was ascertainable[627].

Instead, the Court found that the legislator violated fundamental rights of the complainants in light of the fact that, by allowing the specified amounts of CO2 to be emitted until the year 2030, it determined an interference-like effect that required constitutional justification. The Court found that the provisions were unconstitutional to the extent that they determined "*disproportionate risks that freedom protected by fundamental rights will be impaired in the future*", further observing that "*Since the two provisions specify emission amounts until 2030 which – in fulfilling the obligation arising from constitutional law to take climate action – significantly narrow the emission possibilities available after 2030, the legislator must take sufficient precautionary measures to ensure that freedom is respected when making a transition to climate neutrality. […]. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded onto the future […]. In this respect, there is a lack of a legal framework specifying minimum reduction requirements after 2030 that would be suitable for providing orientation and incentives in time for the necessary development of climate-neutral technologies and practices*"[628].

[624] Ibid., para. 165.
[625] Ibid., para. 167.
[626] Ibid., para. 170.
[627] Ibid., paras. 171-172.
[628] Ibid., paras. 182-183. See also para. 195, where the Court observes: "*However, the provisions are unconstitutional insofar as they give rise to a risk of serious impairments of fundamental rights in the future – a risk that is not sufficiently contained at present. Since the emission amounts specified until 2030 in the two provisions significantly narrow the emission possibilities that will be available in accordance with Art. 20a GG thereafter, the*

The Court found that, according to the principle of proportionality, one generation is not allowed to consume a disproportionate share of the CO2 budget, as that would unfairly burden subsequent generations with the challenging task of drastically reducing emissions, exposing them to significant losses of their freedom[629]. It also stressed that "*When Art. 20a GG obliges the state to protect the natural foundations of life – partly out of responsibility towards future generations – it is aimed first and foremost at preserving the natural foundations of life for future generations. But at the same time, it also concerns how environmental burdens are spread out between different generations*"[630].

Ensuring the protection of future generations lies at the heart of the Constitutional Court's decision. Of particular significance is the claim that the State's duty to protect life and health – which also applies to climate change – encompasses future generations, especially in the case of irreversible phenomena such as global warming. The Court nonetheless noted that such duty – also enshrined in Art. 20a of the Basic Law – only has an objective dimension, because future generations are not rights-holders in the present[631]. Such objective dimension requires that the State preserves the environment so that future generations will not have to resort to extreme measures[632].

The obligation also operates at international level, requiring the State to participate in the international framework and in global efforts to tackle climate change, especially in light of the global nature of the issue and the fact that no single State can successfully address it on its own; moreover, the existence of significant GHG emissions in other countries does not exempt the State from adequate climate action[633].

Despite the relevance of constitutional provisions and targets set in the Paris Agreement, the application of the intergenerational-equity principle is particularly remarkable as it was interpreted not only as programmatic principle but also as a tool to assess, in the present, the disproportionate impact of current measures[634].

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legislator must take sufficient precautionary measures to ensure that a transition to climate neutrality is made in a way that respects freedom, in order to alleviate the reduction burdens faced by the complainants from 2031 onwards and to contain the associated risks to fundamental rights. The specifications drawn up in this regard for the reductions required after 2030 must provide sufficient orientation and incentives for the development and comprehensive implementation of climate-neutral technologies and practices. These have so far been lacking".

[629] Ibid., para. 192. See also para. 186, where the Court stresses that "*provisions that allow CO2 emissions in the present pose an irreversible legal risk to future freedom because every amount of CO2 that is allowed today irreversibly depletes the remaining budget*".

[630] Ibid., para. 193. The Court also notes (paras. 197-198) that "*Art. 20a GG is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations who will be particularly affected*" and that Art. 20a "*obliges the state to take climate action*".

[631] Ibid., para. 146.

[632] Ibid., Headnotes, para. 4.

[633] Ibid., para. 2c.

[634] P.PUSTORINO, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale,* in *Ordine internazionale e diritti umani*, 2021, p. 602; see also F.GALLARATI, *Il contenzioso climatico di tono costituzionale:*

Furthermore, the Court recognized the need to balance climate protection with the preservation of other relevant interests and constitutional principles. However, as climate change becomes more severe, the priority of climate action should increase[635]. Additionally, scientific uncertainty regarding the causal aspects determines a specific duty to "*take account of sufficiently reliable indications pointing to the possibility of serious or irreversible impairments*"[636].

As to the scientific aspects, although the Court also referenced national reports, the IPCC's reports were considered by the Court to be a fundamental instrument in guiding decision-making processes, while also constituting the basis of scientific knowledge on climate change[637]. However, when assessing State's targets and duties, the Paris Agreement and its temperature goal – to which Germany's policy was in line – represented the most relevant parameter.

It is also worth noting that certain scientific uncertainties have partially constrained the Court's examination, leading it to conclude that it is within the legislator's purview to set climate targets and assess the most appropriate measures to fulfil its duty to protect fundamental rights[638]. This was particularly evident with regards to the available carbon budget, which could not be precisely established and could be both smaller or bigger than assumed[639].

By rejecting the State's argument regarding its minor role in climate change and affirming the complainants' standing due to their direct impact on fundamental freedoms, this case serves as another successful example of overcoming legal standing and causation issues.

The Neubauer ruling, like other crucial cases such as Urgenda, was a ground-breaking decision that garnered significant attention, especially for its focus on future generations and for its great relevance in the context of environmental constitutionalism and constitutional rights-based litigation. More generally, this case serves as a partially successful instance of rights-based litigation seeking to bridge the gaps in climate governance and aimed at prompting governments to adopt and implement – once again in a mitigation perspective – more ambitious policies geared towards responding swiftly to the looming threats of climate change.

Kotzé underlined another fundamental and innovative aspect of the ruling: its "*planetary perspective*"[640]. Kotzé proposes that the Court's adoption of a planetary perspective represents a new and desirable approach, especially from an "Anthropocene" perspective. The Court expanded

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studio comparato sull'invocazione delle costituzioni nazionali nei contenziosi climatici, in *BioLaw Journal – Rivista di BioDiritto*, n. 2/2022, p. 166.

[635] Ibid., para. 2a.

[636] Ibid., para. 2b.

[637] Ibid., para. 17.

[638] Ibid., paras. 162 and 210.

[639] Ibid., paras. 220, 221 and 222.

[640] L.KOTZÉ, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, in *German Law Journal,* Vol. 22 Issue 8, 2021, pp.1423-1444.

its analysis beyond the national context and to the global phenomenon of climate change[641]. This desirable approach should guide the Courts – and, more generally, the law, lawyers and legal actors – when facing the challenges of the Anthropocene era[642].

Soon after the Constitutional Court's ruling, a more ambitious reform was adopted by the Federal legislator, setting a 65% GHG emissions reduction target by 2030 and outlining post-2030 goals[643].

In 2022, a case was brought before the ECtHR by nine teenagers and young adults, claiming that the new goals established by the amended German Climate Protection Act were insufficient and amounted to a violation of Articles 2 and 8 of the ECHR[644]. Between September 2022 and February 2023 the ECtHR held procedural meetings concerning climate change cases other than those pending before the Grand Chamber. The Court decided to adjourn its examination of such cases – including Engels v. Germany – until such time as the Grand Chamber has ruled in pending climate change cases[645].The ECtHR also declared the inadmissibility of two applications[646] on the grounds that applicants lacked the victim requirement under Art. 34 as they were not sufficiently affected by the alleged violations of the Convention.

2.6 A Sud et al. v. Italy ("Giudizio Universale")

In June 2021, the Italian NGO "A Sud", along with over 200 plaintiffs including 24 NGOs, 162 adults and 17 minors represented by their parents, filed a lawsuit against the Italian State, specifically the Presidency of the Council of Ministers represented by the Prime Minister, in the Italian Civil Court of Rome[647].

The lawsuit is the result of a long and extensive campaign, named *Giudizio Universale* (The Last Judgement), which engaged numerous citizens, students, scientists, lawyers, activists, research centers, independent media and environmental associations[648].

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[641] Ibid., p. 1425.

[642] Ibid., p. 1426. See also p. 1428, where Kotzé observes that: "*A planetary perspective therefore offers an opportunity to see and understand that everything is interconnected, that cause-and-effect relationships exist, and that what we do in our own backyards has a much more widely diffused impact than we thought possible*. […]. *The progression from "environmental" to "planetary" thinking heralds nothing less than a long overdue paradigm shift*".

[643] For an overview of Germany's climate policies after the Neubauer ruling, see K.APPUN, J.WETTENGEL, *Germany's Climate Action Law*, available at: https://www.cleanenergywire.org/factsheets/germanys-climate-action-law-begins-take-shape#:~:text=Germany%20must%20reduce%20greenhouse%20gas,state%20between%202021%20and%202030.

[644] *Engels and Others v. Germany*, ECtHR, Case n. 46906/22.

[645] The press release is available at: https://www.echr.coe.int/w/chamber-procedural-meetings-in-climate-cases.

[646] *Humane Being and Others v. the United Kingdom* (Application no. 36959/22) and *Plan B. Earth and Others v. United Kingdom* (Application no. 35057/22). In the latter, applicants claimed that the UK failed to adequately tackle climate change, resulting in a violation of Articles 2, 3 8 and 14 of the Convention.

[647] *A Sud et al. v. Italy*, Tribunale di Roma – Seconda Sezione Civile, R.G. n. 39415/2021 (hereinafter A Sud et al. v. Italy).

[648] All the information on the campaign and the lawsuit is available at: https://giudiziouniversale.eu/.

The plaintiffs seek a declaration of State's liability for its failure to comply with its obligations to adequately reduce CO2 emissions and a Court order to adopt all necessary measures to reduce, by 2030, national emissions of CO2-eq to 92% compared to 1990 levels.

The factual and legal basis for the claim is thoroughly outlined in the summons.

In paragraph I of the "In Fact" section, entitled "Climate Issues", plaintiffs present an explanation of the phenomenon of global warming and the related climate change; they then emphasize the impacts on human life, stressing that climate is the prerequisite for life everywhere[649].

Paragraph II describes the "Planetary Climate Emergency" as ascertained by the scientific community, by the EU and by Italy, with a specific focus on the findings of the IPCC's 2018 Special Report (SR1.5), utilizing the "Carbon Budget" as a fundamental tool. Plaintiffs also emphasize the emission gaps of States and the risk of global tipping points[650].

Paragraph III focuses on the climate emergency in Italy, with the plaintiffs highlighting the country's high vulnerability and fragility as a climate hot-spot through multiple allegations, including the scientific findings of numerous Institutions which are part of the organization of the Italian State[651].

The concept of a hot-spot refers to a geographical region where temperature, precipitation, and variability parameters undergo a joint modification, leading to a worsening of the impacts in that specific area. The plaintiffs argue that this condition results from the country's position on the border of arid and temperate zones, its vulnerability to temperature increases due to its peninsula shape, and its exposure to the ecosystemic changes of the Mediterranean Sea[652].

As a consequence, Italy is particularly affected by feedback loops and pathogenesis, with an exponential increase in damages and losses as a consequence of local vulnerability and the fragility of the territory. Plaintiffs provide an illustration of the observed and expected impacts, as outlined in specific reports on climate change in Italy issued by Climate Analytics[653] and the CMCC. Said impacts include: an intensification of heat waves and a significant increase of people exposed to them, especially in higher temperature increase scenarios; constant drought, with the potential for Italy to become desert-like if temperatures increase by 3°C; an increase in the intensity of extreme precipitations, hydrogeological instability and floods, in a context where "*91% of Italian*

[649] A Sud et al. v. Italy, see supra, Summons, pp. 15-22.

[650] Ibid., pp. 22-33.

[651] Ibid., pp. 33-41. The institutions include: Sistema Nazionale Protezione Ambiente (SNPA); Istituto Superiore per la Protezione e la Ricerca Ambientale (ISPRA); Agenzia per le Nuove Tecnologie, l'Energia e lo Sviluppo Economico Sostenibile (ENEA); Istituto di Scienze dell'Atmosfera e del Clima del Consiglio Nazionale delle Ricerche; Istituto Superiore della Sanità (ISS); Euro-Mediterranean Center on Climate Change Foundation (CMCC).

[652] Ibid., pp. 33-34.

[653] The findings of the Climate Analytics report constitute a fundamental basis for the plaintiffs' arguments.

municipalities are already at risk of landslides and floods induced by heavy rainfall"[654]; a significant increase in the consequences of erosion and coastal flooding; an increase in duration and intensity of damaging fires[655].

The plaintiffs also stress that the Italian State has in numerous occasions explicitly acknowledged the seriousness of the threat posed by climate change, with declarations coming from the President of the Republic, the Government, the Ministers and the Parliament, underlining that such acts amount to "environmental information" under Art. 2 n. 3 of the Aarhus Convention[656].

Lastly, the "In Fact" section of the summons provides an analysis of Italy's climate policies to tackle climate change, which the plaintiffs deem largely insufficient and inadequate, especially in light of Italy's vulnerability and the fact that the country has already faced a 1.2° C temperature increase (with a rate twice as fast as the global one). The National Integrated Plan for Energy and the Climate (PNIEC) is Italy's strategic document that defines the country's long-term climate policy, and was adopted pursuant to EU Regulation n. 2018/1999.

The plaintiffs observe that current measures are estimated to result in a 26% emissions reduction compared to 1990 levels, and measures indicated in the PNIEC are estimated to lead to a 36% emissions reduction compared to 1990 levels. However, in light of the findings of the Climate Analytics report – grounded on the IPCC's methodology, on the ISPRA data and on the data included in the PNIEC – a 92% emissions reduction would be required by 2030 in order to meet the 1.5°C temperature increase goal set in the Paris Agreement[657].

According to the plaintiffs, any target below said reduction would inevitably determine a failure to meet the targets set by the Paris Agreement and would generate intergenerational inequity, bearing future generations with negative consequences and costs, in violation of the inter-generational equity enshrined in Art. 3 of the UNFCCC and the preamble to the Paris Agreement.

Moreover, even if an equal reduction rate among all States were to be considered, Italy would be required to reduce its emissions by at least 63% by 2030.

The plaintiffs also stress that, if all countries adopted Italy's ambition level, the temperature increase would exceed 3°C by the end of the century[658]. They also emphasize that NDC's provided by the EU also fall short and that the EU should achieve an 85% reduction by 1990 in order to meet its "fair share" in achieving the Paris Agreement's long-term target[659].

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[654] A Sud et al. v. Italy, see supra, p. 36.
[655] Ibid.
[656] Ibid., pp. 36-37.
[657] Ibid., pp. 38-39. It should be noted that such reduction constitutes the "fair share" determined in light of the principle of equity and common but differentiated responsibilities.
[658] Ibid., p. 39.
[659] Ibid., pp. 40-41.

The "In Law" section of the summons constitutes the core of the plaintiffs' claim, where various legal arguments are put forward to demonstrate the Italian State's responsibility: paragraph IV addresses the climate obligation and its sources; paragraph V illustrates the infringed rights; paragraph VI outlines the climate liability of the Italian State.

As to the climate obligation and its sources, the plaintiffs firstly provide an overview of the Italian and European jurisprudence on climate change. As to the Italian jurisprudence, they stress that the need to protect the individual has been recognized by the Italian Court of Cassation (which underlined that human dignity must be protected in cases of serious risks deriving from climate change)[660]. Moreover, the Council of State recognized the collective interest in gradual reduction of CO2 in the atmosphere and the Constitutional Court recognized the public goal to eliminate dependence on fossil fuels[661].

With regards to national jurisprudence in the European context, the plaintiffs recall the crucial rulings in Urgenda, Neubauer, Friends of the Irish Environment and Notre Affaire à Tous, underlining that the European jurisprudence demonstrates not only that climate change affects human rights, but also that States are responsible for failure to pursue maximal ambition in reducing GHG emissions[662].

The Urgenda and Neubauer case also identified the core of affected rights, to be protected through precaution, equity, intergenerational equity, the duty to comply with scientific findings and a limitation of State's discretion. Such core content cannot be disallowed in light of the non-discrimination principle within the European context pursuant to Art. 21.2 of the Nice Charter[663] and Art. 14 of the ECHR[664].

Secondly, the plaintiffs point out that Italy's climate obligation is mainly included in the UNFCCC, the Paris Agreement and EU Law (namely regulations nos. 2018/842, 2018/1999, 2020/852 and 2021/241) and argue that such obligation has a "complex" nature (entailing primary and secondary duties) and is science based.

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[660] Ibid., p. 42. The plaintiffs also underline that, according to the most recent jurisprudence of the Court of Cassation, international sources on climate change to which the EU participates constitute EU law and are provided with direct applicability in Italy.

[661] Ibid., pp. 41-42.

[662] Ibid., pp. 42-43.

[663] *Charter of Fundamental Rights of the European Union (2007/C 303/01)*, December 14, 2007, C 303/1 (hereinafter CFREU). Art. 21.2 provides that: "*2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited*".

[664] A Sud et al. v. Italy, see supra, Summons, p. 43. Art. 14 of the ECHR provides that: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".

The UNFCCC is considered the fundamental source of climate obligations, which set the goal of stabilizing GHG concentrations in the atmosphere to prevent interference with the climate system and established the primary duty of mitigating climate change, as well as secondary duties that shed light on the precise content of the primary duty and include the principle of equity set by Art. 3.1 (or "fair share", inclusive of the CBDR principle), the principle of climate precaution set by Art. 3.3, the recourse to science formalized in the Preamble and in Articles 4.2(d) and 5, and the duty to provide information established by Art. 6[665].

With regards to the Paris Agreement, the plaintiffs point out that it specified the objectives of the UNFCCC by setting the goal of limiting temperature increase to well below 2°C compared to pre-industrial levels, with efforts to limit the increase to 1.5°C. In addition, it confirmed the secondary duties established in the UNFCCC of recourse to science, equity and the CBDR principle, as well as the scientific method by referring to the "*best available science*" in Art. 4.1.

Drawing on the findings of SR1.5, the plaintiffs underline that 2023 is to be considered the deadline and point of no return to achieve required GHG emission reductions in order to stabilize the climate system within the set temperature goals[666].

In the Italian legal system, the UNFCCC is therefore expression of recognized principles of international law to which Italy adapts through Article 10 of the Constitution[667]; at the same time, it constitutes an interposed source pursuant to Art. 117.1 of the Constitution[668] and it establishes obligations under art. 1173 of the Italian Civil Code[669][670], therefore bearing relevance even with regards to rights of private parties.

Thirdly, the plaintiffs stress that the scientific method is binding for the State and operates as a limitation of its discretion, pursuant to the Italian Constitution[671], the TFEU[672] and the ECHR[673].

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[665] A Sud et al. v. Italy, see supra, Summons, pp. 44-46.

[666] Ibid., p. 47.

[667] Art. 10.1 provides that "*The Italian legal system conforms to the generally acknowledged provisions of international law*".

[668] Art 117.1 reads as follows: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*".

[669] Art. 1173 provides that "*Obligations arise out of contract, unlawful acts or any other act or fact that could give rise to them pursuant to the legal system*".

[670] A Sud et al. v. Italy, see supra, Summons, pp. 49-50.

[671] Ibid., p. 52, para. 18, where the plaintiffs recall the "scientific reserve" doctrine, remarking that a constitutional jurisprudence has developed with regards to Articles 9, 32 and 33, confirming the constitutional legitimacy of regulations based on scientific guidelines that pose a restraint on political decision-making. See also p. 53, para. 21, where the plaintiffs stress that the Constitutional Court has affirmed, in several occasions, that scientific findings constitute a limit to both political discretion and the judiciary's findings.

[672] Plaintiffs mention Art. 171, which provides for EU's policy on the environment. Art. 171.3 requires the Union to take account of available scientific and technical data in developing its environmental policy.

[673] Ibid., p. 52, para. 19, where the plaintiffs cite the EctHR's jurisprudence which acknowledged the importance of evaluating States' measures in view of scientific and social developments. They further highlight that the same principle was recognized by the Netherlands Supreme Court in the Urgenda case.

Lastly, plaintiffs underline that the climate emergency, denounced by global scientific consensus as well as national and international political institutions, imposes limitations and conditions upon the discretion of the State, especially in light of the fact that 2030 constitutes the deadline to tackle the emergency. In the context of an undisputable climate emergency, "*the invocation of the State's unquestionable discretion would degrade into indifference*"[674].

Section V of the summons addresses the infringed rights. After providing a description of the indissoluble link between climate change and human rights (as recognized by national and international institutions and growing judicial precedents[675]), the plaintiffs argue for the existence of a human right to a safe and stable environment as a corollary to the non-regression principle and as a precondition for the right to life. Although human life could abstractly adapt to higher temperatures, it would, however, be a "*life in regression with respect to the existential quality of the present time and therefore worse for future generations*"[676]; future generations would therefore be affected by anticipated interference, as clearly outlined by the German Constitutional Court in the Neubauer case.

Rights under the ECHR are subsequently addressed. In light of the findings of the ECtHR's jurisprudence, plaintiffs, who ground their claim on Articles 2, 8 and 14, underline that the State has a positive obligation to adopt adequate measures to safeguard life of individuals under its jurisdiction, an obligation which applies to any activity where the right to life may be threatened and includes the adoption of preventive measures. In the same manner, the State has an obligation to protect the right to private and family life pursuant to Art. 8 ECHR. Plaintiffs point out that positive obligations under Art. 2 and Art. 8 overlap, as they require the State to adopt the same practical measures. Compliance with said obligations requires, in the first place, the adoption of adequate frameworks to tackle threats to life and to private and family life and to implement preventive measures (suggested by scientific knowledge). The ECtHR has moreover ascertained Italy's violations of Art. 8 as a consequence of failure to manage risks of damage associated with environmental pollution and natural disasters[677].

According to the plaintiffs, positive obligations are triggered irrespective of the pre-emptive identification of potential victims, since human rights under the ECHR must be protected even when the threat concerns the general population.

[674] Ibid., p. 55, para. 26.
[675] Ibid., pp. 55-59.
[676] Ibid. p. 59, para. 8
[677] Ibid., pp. 63-64.

In order for an obligation to arise, the threat must be real and the State must be aware of it. Such awareness may derive from the existence of scientific sources of various nature, although the burden of proof concerning lack of awareness bears on the State.

As to Art. 14, plaintiffs draw upon arguments brought forward by plaintiffs in *Duarte Agostinho et al v. 33 States,* a crucial climate change case currently pending before the ECtHR (which will be thoroughly addressed in the following). According to the plaintiffs, climate change would disproportionately impact specific groups, resulting in discrimination against them; this is especially the case for children, as a consequence of placing the burden of climate change consequences on them. Plaintiffs also mention the findings of Urgenda, concurring with its conclusions and defining it "*an inescapable point of reference*"[678].

Procedural obligations in the context of environmental harm are also outlined, including: the duty to assess the risks of potentially dangerous activities, the duty to provide information to affected individuals[679]. The plaintiffs claim that Italy failed to comply with said obligations by either not responding or confessing the total absence of adequate scientific information when specific civic access initiatives had been promoted by the plaintiffs[680].

Paragraph VI of the summons outlines the climate liability of the Italian State and its legal grounds.

The plaintiffs argue that what outlined in preceding chapters of the summons demonstrates the non-contractual liability of the Italian State pursuant to article 2043 of the Civil Code[681]. In fact, as specified, the State failed to implement actions and measures to stabilize the climate and to contain global temperature increase within the limit of 1.5°C above pre-industrial levels[682].

Art. 2043 CC constitutes the general clause of liability for unlawful acts and the plaintiffs illustrate the jurisprudence of the Italian Constitutional Court and the Court of Cassation to demonstrate that the norm may be pre-emptively utilized to eliminate or prevent potential damage to health or other fundamental rights of persons and to obtain a measure that, through the inhibition of the conduct or the order to adopt positive measures, poses an end to unlawful conduct and avoids the occurrence of the damage. The plaintiffs therefore underline that Art. 2043 CC may be invoked – as confirmed by the Court of Cassation and by numerous judgements of merit – to obtain an order

[678] Ibid., p. 66 para. 21.

[679] Ibid., pp. 67-68, where plaintiffs mention the findings of the Italian Constitutional Court, the ECJ and the ECtHR (in the cases of Hatton, Oneryildiz, Taskin, Giacomelli and Tatar).

[680] Ibid., p. 68.

[681] According to Art. 2043 of the Italian Civil Code ("Compensation for unlawful acts"): "*Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages*". The norm constitutes the general clause of liability for fault, while subsequent articles provide special rules for liability.

[682] Ibid., p. 69.

imposing the adoption of adequate measures not only to eliminate actual damage, but to avoid potential damage: a scenario that arises when there is a danger to health or other fundamental rights of individuals as a consequence of an omission of the public authority, in violation of its duty of *neminem laedere*[683].

The plaintiffs argue that a causal link exists between climate issues and the violation of multiple rights. This correlation is demonstrated through the best available scientific evidence, making it indisputable. The aforementioned rights encompass not only the right to health and a healthy environment, but also various other rights, including but not limited to the rights to life, food and water. These rights are recognized and safeguarded in various instruments ranging from the Italian Constitution to the ECHR and the CFREU[684].

Therefore, the plaintiffs argue that the Italian State must be ordered to act and to adopt adequate measures to remove the causes of current climate instability and to prevent its future occurrence, pursuant to Art. 2058 CC, which regulates specific redress[685]. Such obligation to act also derives from the UNFCCC, the ECHR (namely Articles 2, 8 and 14) and the Italian Constitution (Articles 2, 3 and 32), which allow to precisely identify the content of the required conduct under Art. 2043 CC, a norm that, as plaintiffs emphasize, identifies duties on a case-by-case basis, taking into account the specific characteristics of the case and the position held by the parties involved[686].

Under Art. 2043 CC – which constitutes the key norm on tort liability in the Italian legal system – plaintiffs are required to prove various elements, including the subjective element (intent or negligence), a wrongful (or unjustified) injury, and causation. The plaintiffs in A Sud et al. v. Italy therefore aim to prove each element, which is separately addressed in the summons.

It is firstly underlined that the injury is undoubtedly wrongful as it concerns fundamental rights of the human person, and it would still be wrongful even if referred to climate stability, which constitutes a legally relevant interest that may be subject to protection under Art. 2043 CC[687].

As to the causal link, the plaintiffs emphasize that the numerous and widely accepted scientific findings demonstrate, without doubts, that anthropogenic GHG emissions are the causal antecedent of climate change[688]. The conduct of the Italian State is therefore a condition determining the causal process of the situation of danger and the plaintiffs argue that a prognostic

[683] Ibid., p. 72. See Cass. Civ. SS. UU., n. 8092/2020; Cass. Civ. SS.UU. n. 23908/2020.
[684] Ibid.
[685] Art. 2058 CC provides that: "*The injured party can demand specific redress when this is wholly or partially possible. The court, however, can order that the redress be made only by providing an equivalent, if specific redress would prove to be excessively onerous for the debtor*".
[686] A Sud et al. v. Italy, see supra, p. 76.
[687] Ibid., p. 78.
[688] Ibid., p. 79.

counterfactual judgement leads to the conclusion that a timely reduction of emissions would have prevented with preponderant evidence (according to the criterion of "*more likely than not*") the occurrence of the dangerous situation or at least would have reduced it[689].

The plaintiffs then aim to refute the defendant States' commonly held argument that there is no causation (and thus no State liability) because climate change depends on the overall behaviour of the generality of States, and the conduct of a single State lacks causal efficiency.

Each local GHG emission impacts on the climate system and its stability and, in presence of multiple conducts causing a harm, each of them establish the liability of the individual author, irrespective of the different nature of the infringed norms, the nature of the responsibility and the extent of the consequences arising from each conduct; what matters is the uniqueness of the harmful event[690]. In the plaintiffs' view, said conclusion is confirmed by Article 2055 CC, which regulates joint and several liability and provides that "*If the act causing damage can be attributed to more than one person, all are jointly and severally liable for the damages. The person who has compensated for the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom. In case of doubt, the degree of fault attributable to each is presumed to be equal*". Moreover, the same principle is adopted in the Principles of European Tort Law[691], which provide at Art. 3:105 (entitled "*Uncertain partial causation*") that: **"***In the case of multiple activities, when it is certain that none of them has caused the entire damage or any determinable part thereof, those that are likely to have [minimally] contributed to the damage are presumed to have caused equal shares thereof*".

With regard to the subjective element, the plaintiffs emphasize the existence of State negligence pursuant to Art. 2043 CC. They underline that the Italian State has long been fully aware of the phenomenon of climate change and its seriousness and that the dangerous situation was foreseeable and avoidable[692].

As a subordinate request, the plaintiffs argue for the existence of non-contractual liability of the Italian State pursuant to Art. 2051 CC, which regulates liability for things in custody and provides that "*Everyone is liable for injuries caused by things in his custody, unless he proves that the injuries were the result of a fortuitous event*".

In the plaintiffs' view, the State is the custodian of the climate system (the "thing" relevant under Art. 2051 CC), as it has effective control over it and has the power to eliminate related

[689] Ibid., p. 81.
[690] Ibid., p. 82.
[691] The principles were drafted by the European Group on Tort Law. The Principles, as well as more information on the activity of the Group, are available at: http://www.egtl.org/index.html.
[692] Ibid., pp. 84-85.

situations of danger; the causal link between the climate instability and the situation of danger is deemed indisputable in light of the illustrated scientific data, which also excludes the fortuitous event.

The plaintiffs also stress that, pursuant the jurisprudence of the Court of Cassation, Article 2051 CC not only requires the adoption of measures to neutralize dangerous elements that were not foreseeable, but also requires preventive activities that, in light of a judgment of foreseeability *ex ante*, allow to prevent damage etiologically related to the thing in custody[693].

Lastly, the plaintiffs claim, in the further alternative, the liability of the Italian State for "qualified social contact" pursuant to Art. 1173 and Art. 1218 CC[694]. According to the plaintiffs, the liability for qualified social contact falls within the schemes of contractual liability and justifies the application of Art. 1453 CC, which represents a general remedy for breach of obligations[695].

In light of all the above, the plaintiffs request the Court: principally, to declare the liability of the Italian State under Article 2043 CC and, consequently, order the defendant, pursuant to Art. 2058 CC, to take all necessary steps to reduce, by 2030, CO2 emissions by 92% compared to 1990 levels; in alternative, to declare the liability of the Italian State under Art. 2051 CC and, consequently, order the defendant, pursuant to Art. 2058 CC, to take all necessary steps to reduce, by 2030, CO2 emissions by 92% compared to 1990 levels; in further alternative, to declare the failure of the Italian State to fulfil its obligation to protect the rights deriving from the qualified social contact established and, consequently, order the defendant, pursuant to Article 1453 CC, to bring the PNIEC in line with the CO2 emissions reduction target of 92% by 2023 compared to 1990 levels; in an even more graduated manner, to declare the liability of the Italian State for qualified social contact and, consequently, order the defendant, pursuant to Art. 2058 CC, to conform the PNIEC with the adequate provisions to achieve the 92% CO2 emissions reduction by 2030[696].

The first hearing was held on December 14, 2021 and the Judge granted the Parties deadlines to deposit evidentiary pleadings pursuant to Art. 183.6 of the Italian Civil Procedure Code (hereinafter CPC), applicable *ratione temporis* prior to the so-called Cartabia Reform.

After the second hearing, held on June 21, 2022, the judge determined that, in light of the defendant's objections and defences, as well as the documentation on record, it was not appropriate to conduct the additional investigation requested by the plaintiffs. Thus, in accordance with Art. 189

[693] Ibid., p. 88. See Cass. Civ. n.1725/2019.

[694] Art. 1218 CC (entitled "Liability of the debtor") provides that: **"***The debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him*".

[695] Ibid., pp. 89-96, where the plaintiffs outline the prerequisite for qualified contact liability and demonstrate why such liability exists in the present case.

[696] Ibid., pp. 97-98.

CPC (applicable *ratione temporis*), the Court scheduled the final hearing on September 13, 2023. At said hearing, the judge referred the case for decision and assigned deadlines of 60 days to deposit final briefs and additional 20 days to deposit briefs of response, pursuant to Art. 190 CPC (applicable *ratione temporis*).

The verdict is expected at any time after the expiration of the aforementioned terms.

It is worth noting that, following the initiation of the lawsuit, there have been some relevant developments both domestically and internationally that are potentially relevant to the examination of the merits of the plaintiff's claim. Specifically, on the domestic front, the constitutional reform that introduced protection of the environment, biodiversity and ecosystems – also in the interest of future generations – in the Italian Constitution, particularly in Article 9, is noteworthy[697].

If this constitutional reform can already, from various perspectives, strengthen the plaintiff's arguments, also regarding the alleged existence of a right to a healthy environment, it should also be noted that the explosion of litigation at both the European and global levels continued in 2022 and

[697] The Constitutional Law of 11 February 2022, No. 1 (in Official Gazette No. 44 of 22 February 2022), introduced a new paragraph at the end of Art. 9, which now reads as follows:

"*The Republic shall promote the development of culture and of scientific and technical research.*

It shall safeguard the natural beauties and the historical and artistic heritage of the Nation.

It shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals".

The reform also amended Art. 41 of the Constitution, which now provides that economic initiative may not be carried out "*in such a way as to damage health and the environment*" and that the law shall determine the programs and appropriate controls so that public and private economic activity may be directed and coordinated for social "*and environmental*" purposes. This may be particularly relevant in the context of litigation against private actors, while also influencing economic activities towards environmental objectives; moreover, referring to future generations is also a means of compelling the State to use resources rationally and plan its policies for the long term.

See, on the topic, F.FRACCHIA, *L'ambiente nell'art. 9 della Costituzione: un approccio in "negativo"*, in *Il diritto dell'economia*, n. 107 (1, 2022), pp. 15-30; M.CECCHETTI, *Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione*, in *Corti supreme e salute*, n. 1/2022; G.ARCONZO, *La tutela dei beni ambientali nella prospettiva intergenerazionale: il rilievo costituzionale dello sviluppo sostenibile alla luce della riforma degli articoli 9 e 41 della Costituzione*, in P.PANTALONE (ed.), *Doveri intergenerazionali e tutela dell'ambiente. Atti del Convegno svoltosi presso l'Università degli Studi di Milano, 7 ottobre 2021*, in *Il diritto dell'economia*, December 2021, pp. 157-185; F.GALLARATI, *Tutela costituzionale dell'ambiente e cambiamento climatico: esperienze comparate e prospettive interne*, in *DPCE Online*, 2/2022, pp. 1085-1110; L.FERRAJOLI, *Per una Costituzione della Terra. L'umanità al bivio*, Milan, Feltrinelli, 2022; A.STEVANATO, *Il costituzionalismo oltre lo Stato alla prova del cambiamento climatico: lezioni svizzere e tedesche per il nuovo articolo 9 della Costituzione italiana*, in *DPCE Online*, Sp-2/2023, pp. 593-608; P.LOMBARDI, *Ambiente e generazioni future: la dimensione temporale della solidarietà*, in *Federalismi.it*, n. 1/2023, pp. 86-103; S.GRASSI, *La cultura dell'ambiente nell'evoluzione costituzionale*, in *Rivista Associazione Italiana dei Costituzionalisti*, n.3/2023, pp. 216-254; A.GRATTERI, *Il futuro delle generazioni e l'età per l'elettorato attivo nella revisione della Costituzione*, in *Rivista Giuridica AmbienteDiritto.it*, Issue n. 3/2022, pp. 1-28.

For an early assessment of the impacts of said reform on climate litigation, see R. LUPORINI, M.FERMEGLIA, M.A.TIGRE, *Guest Commentary: New Italian Constitutional Reform: What it Means for Environmental Protection, Future Generations & Climate Litigation* , April 8, 2022, available at: https://blogs.law.columbia.edu/climatechange/2022/04/08/guest-commentary-new-italian-constitutional-reform-what-it-means-for-environmental-protection-future-generations-climate-litigation/. The authors conclude that "*Yet this reform is important as it finally embeds environmental protection as one of the key fundamental principles of the Italian legal system. Moreover, the amended text of Article 41 provides a unique legal provision insofar as it explicitly orients economic activities towards, among other things, the achievement of the overarching environmental objectives set out in the international and EU environmental and climate change regimes*".

2023. Additionally, in 2022, the General Assembly explicitly acknowledged the human right to a healthy environment[698].

Upon reviewing the writ of summons, it becomes clear that the plaintiffs' approach aligns with several aspects of the Urgenda case, which is explicitly cited, along with other significant European climate litigation cases such as the Neubauer case.

However, it is important to exercise caution when applying this approach to a distinct legal system and to acknowledge the presence of some problematic factors that could hinder the successful outcome of the case. Said issues are both procedural and substantive. As to the former, they include justiciability and the separation of powers doctrine; as to the latter, they mainly concern causation[699].

It is important to note that the outcome of climate litigation is heavily influenced by the legal systems of individual States. For example, while the ECHR has direct effect in the Netherlands, it does not have the same effect in the Italian legal system, although it constitutes an interposed parameter of constitutional legitimacy which the legislator must follow[700].

As to civil remedies under Italian law, Puleio noted that "*There are several reasons for perplexity*"[701] concerning the normative basis of the civil action, grounded on Artt. 2043 and 2051 CC.

The plaintiffs' claim certainly constitutes a very peculiar application of said norms, which in fact have a "*different structure and function from those advocated by plaintiffs*"[702]. As Luporini observed, the plaintiffs request a civil court to issue an injunctive order against the government which is "*not at all common in the Italian legal system. Accordingly, the admissibility stage could constitute a serious hurdle*"[703].

According to Puleio, plaintiffs are substantially requiring a civil court the annulment of a series of sources of first and second instance that define national policy on climate change; however, the Italian legal system does not provide any legal instruments for proactive regulation of

[698] UN General Assembly, *The human right to a clean, healthy and sustainable environment*, Resolution 76/300, UN Doc. A/RES/76/300, August 1, 2022. The resolution was adopted with 161 votes in favour, and 8 abstentions and followed a similar previous text adopted by the UN Human Rights Council: HRC*, The human right to a clean, healthy and sustainable environment*, Resolution 48/13, UN Doc. A/HRC/RES/48/13, October 18, 2021.

[699] For an early assessment of these issues, see R.LUPORINI, *The 'Last Judgment': Early reflections on upcoming climate litigation in Italy*, in *QIL*, 77/2021, pp. 27-49.

[700] Ibid. See Art. 117 of the Italian Constitution, which provides that: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*".

[701] G.PULEIO, *Rimedi Civilistici e Cambiamento Climatico Antropogenico*, in *Persona e Mercato*, 2021/3, p. 493.

[702] Ibid.

[703] R.LUPORINI, *The 'Last Judgment' ...,* cit., p. 35.

climate change[704]. Furthermore, the Italian Constitutional Court cannot be directly approached for this matter. Beyond the fact that, even in this respect, the well-known problem of the separation of powers would arise as a limit to the judicial power to interfere in political choices. Perhaps other solutions could be explored, such as relying on the so-called *Francovich* liability or on Articles 263 and 340 of the TFEU, which could adequately guarantee fundamental rights with regards to the Union's responsibility and to States' responsibility for failure to comply with EU law[705].

Moreover, it is worth noting that, under Articles 2043 and 2051 CC, meeting the burden of proof, which rests with the plaintiffs, appears to be a challenging task, particularly regarding causation, which is generically alleged by plaintiffs but would require rigorous proof with regards to the specific conduct of the State and the alleged damage resulting therefrom, even from a prognostic perspective based on the alternative conduct that could be demanded and the possible more favourable outcome that would have resulted on the basis of the "*more likely than not*" criterion[706].

Other concerns have been raised regarding the standing to bring an action due to the challenge of pinpointing a specific harm suffered by the plaintiffs that distinguishes their position from that of all other citizens[707].

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[704] However, as Bruno stressed, the injunction request formulated by plaintiffs does not concern an act and does not imply a formal assessment of validity, but factual determinations on the production of the danger. See I.BRUNO, *La causa «Giudizio Universale». Quattro test costituzionali sui poteri del giudice adito*, in *Federalismi.it*, n. 18/2022, p. 31. The author analyses the case from a constitutional perspective and offers insightful suggestions for overcoming some of the aforementioned issues. Bruno underlines, in addition to other considerations, that "*Plaintiffs do not request anything subversive from the civil judge. It is widely accepted that the judge can order public institutions or authorities to perform a certain action*", p. 37.

[705] G.PULEIO, *Rimedi Civilistici ...,* cit., p. 494.

[706] The established Italian jurisprudence has determined that the evidentiary rule for causation in civil liability is the principle of the preponderance of evidence (the so-called "more likely than not" rule), which applies to both material causation (the causal connection between the conduct and the harm to a particular interest) and legal causation (the causal connection between the harm to a particular interest and the concrete detrimental consequences). The principle of the preponderance of evidence has found application in environmental matters as well. For a detailed overview of the issue of causation in the Italian system of civil liability, see M.ROSSETTI, *Il danno alla salute*, CEDAM, 2021, pp. 363 and ff.; P.TRIMARCHI, *La responsabilità civile: atti illeciti, rischio, danno*, Giuffrè, 2021, pp. 475 and ff.; M.FRANZONI, *L'illecito*, Giuffrè, 2010, p. 67 and ff.

For an historical overview of the rule of preponderance of evidence in civil law, see J.LEUBSDORF, *The surprising history of the preponderance standard of civil proof*, in *Florida Law Review*, Vol. 67 Issue 5, 2016, pp. 1569-1618

[707] Y.GUERRA, R.MAZZA, *Climate change litigation: riflessioni comparate alla luce dell'affaire du siècle*, in S.LANNI (ed.), *Sostenibilità globale e culture giuridiche comparate, atti del convegno SIRD*, April 22, 2022, Milano, p. 20; see also, for an analysis of the legal issues posed by "Giudizio Universale": G.GHINELLI, *Le condizioni dell'azione nel contenzioso climatico: c'è un giudice per il clima?*, in *Riv. Trim. Dir. Proc. Civ*., 2021, n. 4, pp. 1273-1297; S.VINCRE, A.HENKE, *Il contenzioso "climatico": problemi e prospettive*, in *BioLaw Journal – Rivista di BioDiritto*, n. 2/2023, pp. 137-158.

For an analysis of the case as a manifestation of the "One Health" approach, see M.CARDUCCI, *L'approccio One Health nel contenzioso climatico: un'analisi comparata*, in *Corti supreme e salute*, Issue n. 3, 2022, pp. 734-751.

2.7 Greenpeace v. Spain

In December 2020, Greenpeace Spain and two other NGOs (Oxfam Intermón and Ecologistas en Acción) filed a lawsuit before the Spanish Supreme Court (Tribunal Supremo), claiming that, despite Spain's commitments to undertake action to tackle climate change, the State failed to implement adequate policies with regards to climate targets, resulting in a violation of both national provisions and international instruments (including EU regulations and the Paris Agreement)[708].

They alleged that, pursuant to EU Regulation 2018/1999, Spain was bound to adopt its National Energy and Climate Plan for 2021-2030 (NECP – PNIEC), along with a long-term decarbonisation plan for 2050.

Spain adopted – *medio tempore* – the PNIEC and a decarbonisation strategy, leading to a request, from the State Attorney, to dismiss the claim; the Court nonetheless considered the claim to be justiciable, since plaintiffs not only contested the failure to adopt said legislation, but claimed that mitigation commitments should have been more ambitious.

In May 2021, soon after the adoption of the PNIEC, the plaintiffs filed a second lawsuit before the Supreme Court, challenging the newly adopted PNIEC[709].

According to the plaintiffs, Spain's commitments were insufficient to achieve the temperature targets set in the Paris Agreement and outlined by the IPCC in SR1.5 and by the UNEP in its 2019 Emissions Gap Report. In addition, the plaintiffs adopted numerous arguments found in similar cases, such as Urgenda, outlining a violation of Articles 2 and 8 of the ECHR as a consequence of insufficient mitigation measures; other relevant cases of national climate change litigation were mentioned by the plaintiffs. From a human rights perspective, the plaintiffs' arguments presented some peculiarities. While human rights are enshrined both nationally (Article 10.2 of the Spanish Constitution) and internationally, to demonstrate the link between human rights and climate change, the plaintiffs referred to the Malè Declaration and the 2013 report of the Human Rights Council's independent expert on human rights obligations in relation to the environment.

Similar to Urgenda, the plaintiffs argued that inadequate mitigation measures could result in a violation of human rights enshrined in the Constitution and Articles 2 and 8 of the ECHR. In light

[708] *Greenpeace v. Spain I*, Tribunal Supremo, n. 265/2020. All case documents in Spanish are available at: https://climatecasechart.com/non-us-case/greenpeace-v-spain/.

[709] *Greenpeace v. Spain II*, Tribunal Supremo, n.162/2021, Judgement n. 1079/2023. All case documents in Spanish are available at: https://climatecasechart.com/non-us-case/greenpeace-v-spain-ii/

of this, they sought to challenge the State's discretion not only with regard to the possibility of taking measures, but also with regard to their precise content[710].

In the plaintiffs' view, the programmed 23% GHG reduction was inadequate and fell short in achieving the Paris 1.5°C temperature increase target. Therefore, they requested that the Court declare the PNIEC null.

The Supreme Court ruled that the two pending cases would be heard together due to their connection[711] and it delivered its decision on 20 June 2023, ruling in favour of the defendant.

In summary, the Court found that Spain's commitments are consistent with what is required by the Paris Agreement and in line with European obligations. The decision addressed, first, the disputed procedural errors in the approval of the PNIEC and, second, the alleged substantive deficiencies of the plan.

With regard to the first aspect, although an environmental assessment was in fact carried out after the adoption of the PNIEC (as argued by the plaintiffs), the Court found that this procedural defect was not sufficiently serious to justify a declaration of nullity[712]. As to the alleged violation of EU's Climate Governance Regulation (imposing a multilevel dialogue with various stakeholder), the Court once again ascertained that, despite the failure to establish such dialogue, the plan could not be declared null[713].

With respect to the second aspect, the Court found that – despite the need to enhance mitigation action – the Paris Agreement only established procedural obligations (namely the obligation to submit NDCs), with which Spain complied through the submission of NDC's by the EU, but did not establish binding temperature reduction targets and only provided generic commitments. Specific obligations were only established at EU level, and Spanish commitments align with said obligations. In addition, the Court stressed that declaring the PNIEC null would result in interference with the attributions of the executive and legislative powers. For instance, it would entail revoking other related national legislation, with impacts on Spanish commitments under the Paris Agreement. Moreover, it would – at least indirectly – interfere with the EU's regulation of climate change.

The Court also underlined that, within the national and international margin of discretion of the administration, the government's action could not be defined as arbitrary[714]. The court also

[710] A.PISANÒ, *Il diritto al clima* …, cit., pp. 246-248.

[711] S.GONZALEZ MERINERO, M.A.TIGRE, *Understanding Unsuccessful Climate Litigation: The Spanish Greenpeace Case*, September 11, 2023, available at: https://blogs.law.columbia.edu/climatechange/2023/09/11/understanding-unsuccessful-climate-litigation-the-spanish-greenpeace-case/.

[712] Ibid.

[713] Ibid.

[714] Greenpeace v. Spain, see supra, p. 29.

quoted some extracts from the ruling of the ECJ in the so-called "The People's Climate Case"[715] (which will be addressed in the following), to underline that EU's efforts to tackle climate change – along with their complex implications – may not be challenged without a solid basis; in this sense, and in a human rights perspective, the Court referred to the ECJ's findings concerning the applicants' failure to demonstrate that they were directly and individually affected by the contested measure.

The examined case reaches conclusions that are significantly different from those of the Urgenda and Klimaatzaak cases, despite the plaintiffs using similar arguments. It is noteworthy that national courts can adopt vastly different approaches: some courts considered scientific findings and the objectives outlined in the Paris Agreement to be crucial in understanding a State's human rights law obligations in the context of climate change. However, in other cases, such as the one under review, a more formalistic approach limited to the absence of binding provisions has been taken. Additionally, there are varying interpretations of the margin of discretion granted to the administration, which is understood here in the sense of a less incisive control of judicial power.

Despite the unsuccessful outcome of judicial initiative, pursuant to EU's policies (including Regulation 2021/1119), Spain has recently updated its mitigation targets under the PNIEC, with a more ambitious GHG emissions reduction plan[716].

2.8 Klimatická žaloba ČR v. Czech Republic

In April 2021, Czech Republic's first rights-based case was filed before the Prague Municipal Court[717].

The plaintiffs – including the NGO Klimatická žaloba ČR, along with a municipality and four individuals – claimed that the government and four ministries were responsible for inadequate climate action and failure to comply with the allowed carbon budget. In the plaintiffs view, this resulted in a violation of human rights (such as the right to life, to health and to a healthy environment) enshrined in the Czech Constitution and in international and European instruments such as the CFREU, and the ECHR. Plaintiffs – who brought an "interference action" under Section 82 of the Code of Administrative Justice[718] – sought an injunction for the defendants to implement

[715] *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*, European Court of Justice, C-565/19 P, Judgement of March 25, 2021.

[716] S.GONZALEZ MERINERO, M.A.TIGRE, *Understanding ...* , cit.

[717] *Klimatická žaloba ČR v. Czech Republic*, Prague Municipal Court**,** Judgment No. 14A 101/2021, June 15, 2022 (hereinafter Klimatická I); Supreme Administrative Court of the Czech Republic, Judgement No. 9 As 116/2022 – 166, February 20, 2023 (hereinafter Klimatická II).

[718] *Klimatická I*. para. 192, where the Court outlines the action, observing that "*Pursuant to Section 82 of the Code of Administrative Justice, anyone who claims that he or she has been directly prejudiced in their rights by unlawful interference, instruction or enforcement (hereinafter "interference") from an administrative authority, other*

measures deemed necessary in combating climate change and complying with the available carbon budget. The claim was grounded on alleged "*unlawful interference*" determined by State's inaction in addressing climate change (with regards to both mitigation and adaptation).

The Court issued its decision, which was partially in favour of the plaintiffs, on June 15, 2022.

As to legal standing, the plaintiffs were required – under Section 82 of the Code of Administrative Justice – to demonstrate a direct violation of their rights as a consequence of unlawful interference by an administrative authority[719]. The Court found that human rights of the applicants, including the right to a favourable environment, may be interfered with by the State's failure to adopt mitigation and adaptation measures, as said measures are necessary to protect their rights from the negative impacts of climate change. In addition, the NGO had standing as it sought protection of rights of its members[720].

As to passive standing, the Court found that the Government could not be considered an administrative authority and therefore lacked passive standing; however, the defendant ministries did meet the requirements to be defined an administrative authority and were responsible for the adoption of mitigation and adaptation measures[721].

The Court moved to examine the merits and ascertained whether a direct deprivation of the applicants' rights could be established, and whether it was determined by an unlawful interference of an administrative authority directly aimed at them and directly affecting them. In the Court's view, the impacts of climate change in the country and in Europe were so significant that plaintiffs could be considered to be directly affected, even if the interference concerned a relatively indeterminate group[722]. Once again, the IPCC reports carried significant weight in said conclusion. Moreover, plaintiffs were entitled to the right to a favourable environment enshrined in the national constitution and in Art. 35 of the CFREU and interpreted as the right to an environment that guarantees the exercise of the needs of human life: climate change constituted an interference with said right[723].

The Court also referred to the findings of Urgenda and agreed with the conclusion that human rights obligations deriving from the ECHR impose the adoption of measures required under international commitments. The Czech Republic was therefore required to adopt measures to

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than a decision, which was directed directly against him or her or as a result of which he or she was directly affected, may bring an action before the court for protection against it or for a declaration that the interference was unlawful".

[719] Ibid., para. 158.

[720] Ibid., paras. 163-164.

[721] Ibid., paras. 167, 173, 176.

[722] Ibid., paras. 194-198.

[723] Ibid., paras. 213 and 225.

address climate change, although the precise content of such measures was not defined[724]. As to the allowed carbon budget put forward by plaintiffs, the Court noted that it lacked binding character and only represented the opinion of the authors of the associated assessment.

Under the Paris Agreement, namely Art. 4.2, State Parties are obliged to ensure that their mitigation efforts are aimed at achieving the objective set in the NDC. The temperature goal established by the Paris Agreement is specified at EU level through the EU's NDC, setting a GHG emissions cut of at least 55% by 2020 compared to 1990 levels. Despite EU's obligation, the individual responsibility of each State under the Paris Agreement remains[725].

With regards to mitigation commitments, the Court found that defendants violated the Paris Agreement by failing to develop measures to achieve the objectives set therein, as it was not clear how the Czech Republic intended to pursue such result and no concrete plan was formulated[726].

As to adaptation, however, the Court concluded that defendants had fulfilled their obligations (including those set at EU level) by adopting an adaptation plan, implementing adaptation measures and passing legislation in various sectors[727].

Lastly, the Court examined the causal link between the alleged interference and the violation of plaintiffs' rights, observing that "*A cause of an effect is a fact without which the effect would not have occurred at all, or would have occurred but in a different way from that in which the cause in question was involved*"[728]. In this case, although climate change would nonetheless occur despite the defendants' conduct, "*if the defendants had properly fulfilled their obligations, climate change would have been milder and averting dangerous climate change under Article 2(1)(a) of the Paris Agreement would have been more likely*. […]. *Defendants' failure to act is therefore a partial cause of the current adverse impacts of climate change*"[729].

The Court then rejected the claim that the defendants' responsibility could be excluded in light of other States' contribution to the phenomenon. According to the Court – which once again recalled the findings of the Dutch Supreme Court in Urgenda – this approach would cancel the possibility of legal protection in all cases where a State is not among the high emitters, in contrast with the CBDR principle[730].

In conclusion, the Court found: that defendant ministries unlawfully interfered with applicants' right to a favourable environment under Art. 35 of the EU Charter by failing to adopt a

[724] Ibid., para. 235.
[725] Ibid., paras. 250-259.
[726] Ibid., paras. 280-281.
[727] Ibid., para. 320.
[728] Ibid., para. 324.
[729] Ibid., para. 325.
[730] Ibid., para. 326.

mitigation plan aimed at achieving a 55% GHG emissions reduction by 2020 compared to 1990 levels; defendants had not breached their duty to adopt adaptation measures[731].

The Court prohibited the defendants from continuing the violation of plaintiffs' rights and ordered the defendants to adopt a mitigation plan aimed at achieving EU's targets, although it did not specify the mitigation measures, in light of the separation of powers principle[732].

Applicants were therefore partially (and unexpectedly[733]) successful in this case, where the Court followed an approach similar to Urgenda[734].

However, the Ministries appealed the decision to the Supreme Administrative Court of the Czech Republic which, in February 2023, granted the appeal and overturned the decision of first instance court, referring the case back to the Prague Municipal Court for further examination of certain aspects. According to the Supreme Administrative Court, two main aspects required specific consideration: the collective nature of EU's mitigation obligation and its allocation among EU's member States; the need to clarify how defendants violated their obligations and how they interfered with the applicants' rights. The case is currently pending before the Prague Municipal Court.

2.9 Leghari v. Federation of Pakistan

When Peel and Osofsky postulated a shift towards rights-based climate litigation, the Leghari case was among the most significant ones that exemplified that trend, as well as one of the first examples of a successful application of human rights in the context of climate change litigation[735]. The Leghari case, along with similar initiatives like Urgenda, thereby initiated the onset of litigation based on human rights[736].

In April 2015, Mr. Ashgar Leghari, a Pakistani farmer, brought a lawsuit against the Federation of Pakistan before the Lahore High Court, challenging State's inaction and delay in addressing climate change and related risks and vulnerabilities. The applicant relied on public

[731] Ibid., paras. 328-331.

[732] Ibid., paras. 333-334.

[733] M.A.TIGRE, *Guest Commentary: An Unexpected Success for Czech Climate Litigation,* October 18, 2022, available at: https://blogs.law.columbia.edu/climatechange/2022/10/18/guest-commentary-an-unexpected-success-for-czech-climate-litigation/.

[734] For an early analysis of the judgement of the Prague Municipal Court, see H.MÜLLEROVÁ, A. AČ, *The First Czech Climate Judgment: A Novel Perspective on the State's Duty to Mitigate and on the Right to a Favourable Environment*, in *Climate Law*, 12(3-4), pp. 273-284. The authors underline that the ruling, which follows the arguments of *Urgenda,* is the first of its kind in Czech Republic, where courts generally follow a more conservative approach.

[735] J.PEEL, H.M.OSOFSKY, *A Rights Turn ...,* cit.

[736] *Ashgar Leghari v. Federation of Pakistan*, Writ Petition No. 25501/2015, Lahore High Court, orders of September 4 and 15, 2015 (hereinafter Leghari I); Judgement of January 25, 2018 (hereinafter Leghari II). For an in-depth analysis of the Leghari case, see W.A.MIR, *From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights Is More Complex than a Celebratory Tale*, in J.LIN, D.A.KYSAR (eds.), *Climate Change Litigation in the Asia Pacific,* Cambridge University Press, 2020, pp. 261-293 (hereinafter W.A.MIR).

interest litigation, a type of litigation that allows the enforcement of fundamental rights protected under Pakistan's Constitution in the interest of specific groups (including vulnerable ones)[737].

The applicant argued that the State failed to implement the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030). Leghari claimed that climate change posed a threat to water, food and energy security in Pakistan and constituted a violation of fundamental rights enshrined in the Pakistan Constitution, such as the right to life (Art. 9), the right to dignity of the person and privacy of home (Art. 14) and the right to property (Art. 23)[738].

On September 4, 2015 the High Court ruled in favour of Leghari.

The Court framed climate change as the "*defining challenge of our time*", with particularly dramatic impacts in Pakistan, especially for vulnerable and weak groups, as a consequence of floods and droughts and impacts on water and food security[739]. It also stressed environmental protection's tight link to constitutional rights and underlined that current environmental jurisprudence needed to move on to address urgent and overpowering issues such as climate change[740].

The Court observed that the right to life included the right to a healthy and clean environment and that fundamental rights should be read along with "*constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine*"[741]. It suggested the necessity to move from environmental justice, which has a limited scope, to climate change justice, with human rights law being at the core of both concepts. In this context, rights enshrined in the Constitution provide the judiciary with instruments to evaluate the adequacy of State action to address climate change.

It found that the "*delay and lethargy*" of the State amounted to a breach of fundamental rights and required Ministries, Divisions and Departments to each appoint a climate change focal person, tasked with working closely with the Ministry of Climate Change to guarantee the implementation of the Framework and to assist the Court. Moreover, it required the government to

[737] J.PEEL, H.M.OSOFSKY, *A Rights Turn* …, cit., p. 52. For an analysis of climate change litigation in Pakistan and India, see B.OHDEDAR, *Climate Change Litigation in India and Pakistan: Analyzing Opportunities and Challenges*, in ALOGNA et al., cit., pp. 103-123 (hereinafter B.OHDEDAR).

[738] Lin and Peel observed that "*the relatively high percentage of rights-based claims in the Global South docket is, at least in part, due to the fact that many of the national constitutions of Global South jurisdictions contain environmental rights and/or the right to life that have been interpreted to include the right to live in a healthy and clean environment*", see J.LIN, J.PEEL, *The Farmer or the Hero Litigator? Modes of Climate Litigation in the Global South*, in C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency …,* cit., p. 192.

[739] Leghari I, see supra, para. 6.

[740] Ibid., paras. 6 and 7.

[741] Ibid., para. 6.

present a list of adaptation measures that could be achieved before December 31, 2015, and established a Climate Change Commision (CCC) that would monitor the implementation. The CCC shall include representatives of the government, NGOs and technical experts[742].

On September 14, 2015 several representatives of federal and provincial governments and appointed focal persons appeared before the Court which, on the same day, issued a second decision, constituting the CCC and appointing its members. The CCC was granted with the power to co-opt any person/expert at any stage and Ministries and Departments were required to provide full assistance to the Commission. The Commission was also tasked with conducting reports at the Court's request.

In the following years, the Commission conducted reports on the implementation of climate change measures and presented a supplemental report to the Court on January 25, 2018. The report summarized implementation progress with regards to actions considered primary until December 31, 2017.

On January 25, 2018 the Court issued its final ruling.

It first pointed out that it treated the claim as a continuing mandamus and considered it to be a writ of kalikasan, which is a legal remedy that protects an individual's constitutional right to a healthy environment. Accordingly, the Court summoned representatives of the federal and provincial governments and proceeded in an inquisitorial manner[743].

It was then highlighted that although Pakistan is one of the lowest contributors to GHG emissions, it is also one of the most vulnerable States, with the least financial and technical capacity

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[742] As Peel and Osofsky noted, this represents an "activist approach", typical to several decisions in Pakistan and India, where the Court not only determines whether a violation has occurred, but also establishes remedial mechanisms, see J.PEEL, H.M. OSOFSKY, *A Rights Turn* …, cit., p. 54. See also B.OHDEDAR, cit., p. 103, who notes that "*The courts in Pakistan and India are often identified for their climate change litigation potential because of a history of public interest litigation and a reputation for an 'activist' judiciary*".

It is well known that India is one of the world's largest emitters of GHGs. Moreover, as already highlighted in illustrating the impacts of climate change, it is an extremely vulnerable country. These aspects, along with the dramatic impacts of climate change on the rights of the children and on future generations, were emphasized in the Pandey case, which is the Indian case that received the most international attention. Ridhima Pandey, a 9 year old, filed a complaint before the National Green Tribunal of India, invoking a wide range of sources, both domestic and international, to demonstrate that the government should was obliged to pursue more ambitious climate action. The petition was dismissed. See *Ridhima Pandey v. Union of India*, National Green Tribunal, Application no. 187/2017. The case documents are available at https://climatecasechart.com/non-us-case/pandey-v-india/.

See generally, on climate litigation in India and the role of the judiciary: S.GHOSH, *Climate Litigation in India*, in F. SINDICO, M.M.MBENGUE (eds.), *Comparative Climate* …, cit., pp. 347-368; E.CHATURVEDI, *Climate Change Litigation: Indian Perspective*, in *German Law Journal*, 22, 2021, pp. 1459–1470. See also B.OHDEDAR, cit., p. 122, who concludes that "*Courts in India have provided a rich jurisprudence that draws attention to the human and environmental aspects of water, in a way legislation and policy have failed to. The judiciary has expanded the right to life to include the human right to water, as well as drawn upon the relevance of principles of international environmental law, such as the precautionary principle, polluter-pays, and sustain able development in cases concerning water. However, beyond pronounce ments of principles and rights, the judiciary have not provided much detail of 'how' these principles apply. Moreover, the legislature and the executive have largely ignored these principles in formulating new legislation and policy*".

[743] Leghari II, see supra, p. 3 para. 4.

to adapt to its effects[744]. The Court highlighted that adaptation is therefore Pakistan's primary concern, especially considering its vulnerability to the impacts of climate change[745].

The findings of the CCC were outlined and showed that, according to the latest report, 66.11% of priority actions had been implemented. The Chairman of the CCC therefore suggested that it would be up to the government – which, in the meanwhile, approved the 2017 Climate Change Act and established a Climate Change Authority – to guide further action[746].

The Court dissolved the Commission and stressed the pivotal role it played in raising awareness of the urgency of tackling climate change and prompting adequate State action[747]. Nonetheless, a Standing Committee was simultaneously established, acting as a link between the Court and the Executive and tasked with facilitating the implementation of climate change policy for both Federal and Provincial governments[748].

In the ruling, the court also made noteworthy observations regarding climate justice.

It stressed that, while environmental justice mainly concerned local issues and specific ecosystems, we have now moved to climate justice, which links human rights and development to achieve a "*human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly*"[749].

It also emphasized the contribution of the present case to a new dimension to environmental issues: the impact of climate change has transformed the conversation from a narrow local environment concern to a multifaceted global issue[750].

A specific paragraph was dedicated to water justice, which the Court defined as sub-concept of climate justice that concerns the access of individuals to clean water for survival and recreational purposes. The Court underlined that water quality and availability represent one of the most crucial issues in Pakistan, worsened by the impacts of climate change, and stressed that water is a human right and that "*Right to life and Right to human dignity under articles 9 and 14 of the Constitution protect and realise human rights in general, and the human right to water and sanitation in particular*"[751].

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[744] B.OHDEDAR, cit., p. 105, where the author stresses that Pakistan (as well as India) is among the States who have historically maintained that it is up to the developed countries, who are responsible for most GHG emissions, to address climate change mitigation and to provide developing countries with financial and technological assistance to support adaptation efforts. This is also reflected in the negotiations within the UNFCCC regime and the CBDR(RC) principle enshrined in the FCCC.

[745] Leghari II, see supra, p. 6 para. 4.

[746] Ibid., p. 21 para. 19.

[747] Ibid., p. 25 para. 24.

[748] Ibid., p. 25 para. 25.

[749] Ibid., p. 22 para. 21.

[750] Ibid.

[751] Ibid., p. 24, para. 23.

The Leghari case was defined as the "*most significant case in South Asia regarding climate change*"[752]. It is one of the most relevant examples of adaptation-focused litigation and this may not seem surprising as Pakistan is among the countries which are most severely affected by the impacts of climate change.

As previously stated, however, the majority of climate litigation cases focus on mitigation and scholars have primarily focused on significant mitigation cases[753], like the Urgenda case. Despite expectations that adaptation cases would be more relevant, particularly in the Global South where countries are small emitters but vulnerable to climate change impacts, Luporini noted that this is also not the case[754].

Nonetheless, adaptation definitely constitutes a priority for Global South countries, as they are particularly vulnerable to the (now in part inevitable) consequences of climate change.

The Leghari case could therefore serve as a model and valuable precedent for adaptation-litigation in the South Asian region and, more generally, as Luporini observed, in countries that are particularly vulnerable to climate change and in jurisdictions that offer "*accessible avenues for public interest litigation on environmental issues*"[755].

This would be a desirable development as it is now clear that adaptation is just as crucial as mitigation. Moreover, as the analysis of the science of climate change has demonstrated, there are – to this day in various areas of the world – numerous and evident adaptation gaps and lack of adequate legal frameworks. Nonetheless, after the successful outcome of the Leghari case, mitigation-focused litigation has also emerged in Pakistan, as the pending *Maria Khan* case demonstrates[756].

The adaptation-based nature of the Leghari case sets it apart from most European cases, focused on mitigation. The other aspect that immediately emerges when comparing this case to European litigation is the degree to which the executive has been incisive and has significantly interfered in choices that, in other systems, traditionally belong to the legislative and executive powers. This trend, as pointed out, went as far as the establishment of a commission as a link

[752] B.OHDEDAR, cit., p. 112.

[753] J.LIN, J.PEEL, *The Farmer* …, cit., p. 189.

[754] R.LUPORINI, *Strategic Litigation at the Domestic and International Levels as a Tool to Advance Climate Change Adaptation? Challenges and Prospects*, in *Yearbook of International Disaster Law Online*, Vol. 4 Issue 1, p. 203. The author presents a thorough analysis of the obstacles and opportunities of strategic litigation in promoting climate change adaptation. More specifically, the author explores the reasons for the underdevelopment of strategic litigation on climate change adaptation and how it could develop in the future.

[755] Ibid., p. 226.

[756] *Maria Khan et al. v. Federation of Pakistan et al.,* Writ Petition n. 8960/2019, Lahore High Court. All case documents available at: https://climatecasechart.com/non-us-case/maria-khan-et-al-v-federation-of-pakistan-et-al/. Similarly to the Leghari case, plaintiffs' claims are grounded on fundamental rights and the right to a healthy environment. However, they challenge State's inadequate action in prioritizing renewable energy projects and in cutting GHG emissions.

between the executive and the judiciary, tasked with constantly monitoring the implementation of policies.

Ohdedar noted that "*As with many other instances of PIL, the Court took it upon itself to push the executive into action*"[757]. The ruling has been identified as a case of transformative adjudication, which denotes the involvement of the judiciary in addressing major gaps caused by the government's inactivity. In this case, the Court was called to guarantee protection of constitutional rights against a threat that the government failed to address pursuant to its own agenda[758]. Moreover, the judgement may be among the most crucial and influential in the Global South: firstly, it provided a judicial response to climate change in areas that are already facing extremely severe consequences[759]; secondly, it provided legal arguments that may be picked up by other courts in the Global South, which operate in similar economic and social conditions[760].

The ruling's reasoning is generally brief and, at times, bold and categorical. Additionally, unlike European judgements – which are generally supported by detailed motivations – the verdict lacks any mention of climate science, which, in other contexts, served as both a means to clarify the extent of the climate change phenomenon and a pivotal basis for determining the State's responsibilities.

2.10 Juliana v. USA

In August 2015, 19 individuals, the NGO Earth Guardian and Future Generations (through their guardian James Hansen) filed a complaint for declaratory and injunctive relief before the federal Oregon District Court against the United States and several federal officials, agencies and departments[761].

Plaintiffs requested the Court: to declare that defendants violated their fundamental constitutional rights (such as the right to life, liberty and property) by causing dangerous CO2 concentrations in the atmosphere and interfering with a stable climate system; to declare that defendants violated public trust; to enjoin defendants from further violations of the Constitution and further violations of the public trust doctrine; to declare that national related provisions (such as the

[757] B.OHDEDAR, cit., p. 113.

[758] E.BARRITT, B.SEDITI, *The symbolic value of Leghari v Federation of Pakistan:climate change adjudication in the global south*, in *King's Law Journal*, Vol. 30, No. 2, 2019, p. 207.

[759] Ibid., p. 208, stressing that "*The impacts of climate change for Pakistan and other countries in the Global South are live and devastating. Developing an appropriate judicial response in situations of urgency will therefore look quite different to the response in jurisdictions where the devastation of climate change still seems distant*".

[760] Ibid., p. 208. The authors observe that: "*Leghari thus provides a precedent thatbetter reflects the realities and needs of the Global South*".

[761] *Juliana v. United States*, Oregon U.S. District Court, Case n. 6:15-cv-1517. The complaint and the numerous case documents are available at: https://climatecasechart.com/case/juliana-v-united-states/.

Energy Policy Act) are unconstitutional; to order defendants to adopt and implement a plan to reduce fossil fuel emissions and atmospheric CO2 in order to stabilize the climate system[762].

This initiative represents the first step in a highly articulated and still pending case, the essential coordinates of which will be outlined below from a procedural standpoint, to then focus on the substantive arrests that are most relevant for the purposes of the present discussion[763].

The Juliana case is also a famous example of public trust litigation in the context of climate change, a phenomenon which emerged in the United States at the initiative of the non-profit group Our Children's Trust and resulted in the filing of numerous lawsuits aimed at demonstrating that the public trust doctrine also finds application to the atmosphere: according to this doctrine the State has a duty to hold certain components of the environment in trust for the general public[764]. Although most of the cases were dismissed, the pending Juliana case has led, in some early stops, to partially favourable outcomes for the plaintiffs.

Even before the trial stage, the defendants requested the Court to dismiss the case on multiple grounds: lack of standing, failure to allege a specific injury, lack of jurisdiction of the federal court for public trust claims[765]. Throughout the course of the proceeding, the defendants made various efforts to prevent the case from reaching the merits.

In November 2016, the District Court of Oregon, presided over by Judge Ann Aiken, issued an important decision denying the defendants' motion to dismiss the claims[766], a ruling that provided the case with tremendous resonance and influence.

The Court recognized the existence of a constitutional right to a climate system capable of sustaining human life and held that the public trust doctrine established an obligation on the Federal State even in the context of GHG emissions, grounded on constitutional provisions[767]. Judge Aiken observed: "*I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the "foundation of the family," a*

[762] Ibid., Complaint for Declaratory and Injunctive Relief, pp. 94-95.

[763] For an overview of the case, see: M.POWERS, *Juliana v United States: The next frontier in US climate mitigation?*, in *RECIEL*, 2018;27, pp. 199–204; S.MINJARES ODOM, *Juliana v. United States: standing on the 'eve of destruction'*, in *Golden Gate University Law Review*, Vol. 52, No. 2, September 2022, pp. 79-96.

A constantly updated timeline of the case is available at: https://www.ourchildrenstrust.org/juliana-v-us.

[764] M.B.GERRARD, *Climate Change Litigation in the United States ...,* cit., pp. 40-41.

[765] *Juliana v. United States ,* see supra, Federal defendants' motion to dismiss.

[766] Ibid., Opinion and Order, November 10, 2016.

[767] Ibid., pp. 32 and 49. See also p. 47, where the Judge notes, with regard to the public trust doctrine: "*I can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not to the federal government*; see also p. 40, where the Judge concludes that "*it is not necessary at this stage to determine whether the atmosphere is a public trust asset because plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea*".

stable climate system is quite literally the foundation "of society, without which there would be neither civilization nor progress"[768].

In outlining the content of this right, however, the Court provided some clarifications to specify its extent and exclude from its scope of operation any form of pollution and interference with the environment, which cannot constitute a constitutional violation per se[769].

As Gerrad noted, many scholars and practitioners were surprised by such finding, "*as no previous federal court had found there to be a federal constitutional right to a clean environment*"[770].

As to the political doctrine argument**,** the Court observed that when a case "*presents a political question, federal courts lack subject matter jurisdiction to decide that question*"[771] and moved to examine the so-called Baker factors to establish whether or not a political question arose.

It concluded that, although the case brought a political issue, it was not barred by the political question doctrine, and stressed that **"***There is no need to step outside the core role of the judiciary to decide this case. At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary*[772]**"**. There was hence no valid reason to dismiss the case early on, although the Judge pointed out that "*Should plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so*"[773].

As to legal standing to sue, the Judge held that plaintiffs' allegations were sufficient to establish standing at the current stage; with respect to the injury in fact, the alleged injuries were deemed to be sufficiently concrete, particularized and actual or imminent[774].

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[768] Ibid., p. 32.

[769] Ibid., pp. 32-33, where the Judge observes that: "*On the one hand, the phrase "capable of sustaining human life" should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right*".

[770] M.B.GERRARD, *Climate Change Litigation in the United States …,* cit., p. 41.

[771] *Juliana v. United States ,* see supra, Opinion and Order, p. 6.

[772] Ibid., p. 16.

[773] Ibid., p. 17. The plaintiffs claimed various harms including psychological harm and exacerbated medical conditions, along with damage to their properties.

[774] Ibid., pp. 18 and 21.

As to the causal link, the Court recognized that each link of the causal chain may be difficult to prove; however, said aspect was not decisive in the early stage of the proceeding, where plaintiffs had adequately alleged the existence of a causal link between defendants' conduct and asserted injuries; redressability was also sufficiently alleged and only implied the need to show that the requested remedies would at least slow or reduce the alleged harm[775].

More generally, Judge Akin concluded that various aspects of the plaintiffs' claim were to be examined at a later stage of the trial. At the motion to dismiss stage, plaintiffs' allegations were sufficient to allow the trial to proceed with the substantive challenge to the defendants' conduct[776].

However, following further attempts by the defendants to prevent the case from going forward, on January 17, 2020, the Court of Appeals for the Ninth Circuit delivered its opinion and, with a 2 to 1 vote, referred the case back to the District Court with instructions to dismiss the case for lack of Article III standing[777].

The Court recognized the climate change phenomenon, its rapid pace with unprecedented rise in CO2 concentrations as a consequence of fossil fuels combustion and the need to address it in order to preserve the Earth's environment. The Court also stressed the government's awareness of the risks related to fossil fuels combustion and associated CO2 emissions[778].

Despite agreeing with the District Court's findings concerning the concrete and particularized character of the alleged injuries and the sufficient allegation of the causal link (at least for the purposes of a summary judgement), the Court of Appeals found that the plaintiffs' claim lacked redressability. According to the Court, "*it was beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches. The panel reluctantly concluded that the plaintiffs' case must be made to the political branches or to the electorate at large*"[779].

As to the asserted constitutional right to a climate system capable of sustaining human life, the Court observed that reasonable jurists can disagree about its existence, although, for the purpose of examining redressability, the Court would assume its existence[780].

The Court observed that "*The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate*

[775] Ibid., p. 26.
[776] Ibid., p. 36.
[777] Juliana v. United States, United States Court of Appeals for the Ninth Circuit, Case no. 18-36082 D.C. No. 6:15-cv-01517-AA, January 17, 2020, p. 32.
[778] Ibid., pp. 4-5.
[779] Ibid., p. 5.
[780] Ibid., p. 21.

change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. […]. *We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.* […]. *For the reasons above, we reverse the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing*"[781].

The Court was sceptical with regards to the possibility for the order to be sufficient to stop climate change or ameliorate plaintiffs' injuries[782]. In the Court's view, the relief requested by the plaintiffs – that is, the order requiring the government to adopt a plan to phase out of fossil fuel emissions and reduce atmospheric CO2 – was beyond its constitutional power and said request must instead be directed towards political institutions[783]. The adoption and implementation of a plan to tackle climate change would entail complex decision-making left to the discretion of the executive and legislative branches[784] .

In addition, the Court observed that ordering the implementation of a plan would also require the Court, pursuant to Article III of the U.S. Constitution, to thereafter evaluate the adequacy of the plan to remedy constitutional violations of plaintiffs' right to a stable climate: in the Court's view, supervising and enforcing such plan fell outside its purview and "*in the end, any plan is only as good as the court's power to enforce it*"[785].

Judge Staton firmly dissented and, in its lengthy dissenting opinion, held that plaintiffs brought a claim under the Constitution, with sufficient evidence to press such claims at trial and therefore had standing to challenge the defendants' conduct[786].

As to redressability, Judge Stanton mentioned the findings of Massachusetts v. EPA and observed that "*Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm. Accordingly, I conclude that the court could do something to help the plaintiffs before us. And "something" is all that standing requires. In Massachusetts v. EPA, 549 U.S. 497 (2007), the Supreme Court explicitly held that a non-negligible reduction in emissions—*

[781] Ibid., pp. 31-32.
[782] Ibid., pp. 23- 25.
[783] Ibid., p. 11.
[784] Ibid., p. 25.
[785] Ibid., p. 29.
[786] Ibid., pp. 5-6.

there, by regulating vehicles emissions— satisfied the redressability requirement of Article III standing"[787].

According to Judge Stanton, under the doctrine of judicial review, federal courts are required to relief legal wrongs even if that entails instructing the other branches as to the constitutional limitations of their power[788]. Despite the difficult tasks associated with addressing the plaintiffs' claim, "*we are constitutionally empowered to undertake them. There is no justiciability exception for cases of great complexity and magnitude*"[789].

In addition, Judge Stanton observed that "*Courts routinely grant plaintiffs less than the full gamut of requested relief, and our inability to compel legislation that addresses emissions beyond the scope of this case—such as those purely in the private sphere or within the control of foreign governments—speaks nothing to our ability to enjoin the government from exercising its discretion in violation of plaintiffs' constitutional rights.* […]. *In sum, resolution of this action requires answers only to scientific questions, not political ones. And plaintiffs have put forth sufficient evidence demonstrating their entitlement to have those questions addressed at trial in a court of law*"[790].

Judge Stanton concluded as follows: "*Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?*"[791].

The Court's findings were also criticized by some authors, who observed that plaintiffs had standing to sue since the redressability requirement was met, claiming that a court order would likely provide redress and that it was within the court's purview to provide relief[792].

Similar to Urgenda, this landmark case has raised some of the most challenging issues associated with climate litigation, most notably the separation of powers argument. This is an issue that is inevitably influenced by the particularities of each legal system; while a decision on the merits was not precluded in Urgenda, in the United States, courts have often tended to take a more conservative approach to standing requirements, and this case is an example of that[793]. In addition, the plaintiffs' claim may have been too broad and ambitious and did not identify a specific and

[787] Ibid., p. 46.
[788] Ibid., p. 49.
[789] Ibid., p. 51.
[790] Ibid., p. 61.
[791] Ibid., p. 64.
[792] S.MINJARES ODOM, *Juliana v. United States …,* cit., pp. 91-95.
[793] P.D.FARAH, I.A.IBRAHIM, *Urgenda vs. Juliana: Lessons for Future Climate Change Litigation Cases,* in *University of Pittsburgh Law Review*, Vol. 84, 2023, p. 19.

achievable goal (unlike in Urgenda, where the plaintiffs indicated a precise target for the State to meet)[794]. Nevertheless, the decision was welcome in other respects, and there is no doubt that the explicit recognition of the seriousness of climate change and the government's role in exacerbating its effects will be a powerful argument for similar judicial initiatives.

Following the Court of Appeals' decision, in March 2021 the plaintiffs filed a motion to amend their complaint. According to the plaintiffs, the amended complaint would meet the redressability requirement under Article III by omitting the request for a specific relief that the Ninth Circuit deemed outside its purview. Instead, plaintiffs seek a declaratory judgement ascertaining that the national policy is unconstitutional, a remedy that would be likely to at least partially redress the asserted injuries.

In June 2023 the U.S. District Court of Oregon granted the motion for leave to file an amended complaint[795]. The Court found that the plaintiffs' amended pleadings satisfied redressability as declaratory relief alone was substantially likely to redress the injury and that said redress fell within the powers of Article III courts[796]. Therefore, it concluded that "*This relief is squarely within the constitutional and statutory power of Article III courts to grant. Such relief would at least partially, and perhaps wholly, redress plaintiffs' ongoing injuries caused by federal defendants' ongoing policies and practices. Last, but not least, the declaration that plaintiffs seek would by itself guide the independent actions of the other branches of our government and cures the standing deficiencies identified by the Ninth Circuit. This Court finds that the complaint can be saved by amendment*"[797].

As a result, the case can now proceed to trial (although the defendants have already filed motions to dismiss and to stay the case), and it is reasonable to assume that the amended complaint – while not as ambitious as the original complaint – has a much better chance of success.

2.11 Rights-based litigation in South America: the cases of Colombia, Perù and Brazil

2.11.1 Generaciones Futuras v. Colombia

In January 2018, the first climate change and future generations lawsuit in Latin America was filed against the Colombian government by a group of 25 plaintiffs aged between 7 and 26 years old[798]. The plaintiffs argued that their fundamental rights (such as the right to a healthy

[794] Ibid., pp. 29-30.
[795] *Juliana v. United States*, Case 6:15-cv-01517-AA, Opinion and Order, June 1, 2023.
[796] Ibid., pp. 14 and ff.
[797] Ibid., p. 19.
[798] *Salamanca Mancera et al v Presidencia de la Republica de Colombia et al*, Tribunal Superior de Bogota, January 29, 2018; *Salamanca Mancera et al v Presidencia de la Republica de Colombia et al,* Corte Suprema de Justicia de Colombia*,* Case no 110012203 000 2018 00319 01, April 5, 2018 (hereinafter Salamanca et al. v Colombia).

environment, to life and to health) and the rights of future generations were threatened by the State's failure to comply with its commitments to reduce, and stop by 2020, deforestation in the Amazon region.

The main objective of the lawsuit, akin to other cases presented in courts in Perù, was to address the deterioration of the Amazon rainforest and to contest the insufficient measures taken by the State to safeguard the Amazon ecosystem[799].

The plaintiffs employed the "*acción de tutela*" a legal action outlined in the Colombian Constitution designed to safeguard fundamental rights[800]. In fact, the rights for which they sought protection are rooted in the Colombian Constitution, which explicitly recognizes and safeguards the right to a healthy environment in Art. 41[801].

The lower court dismissed the plaintiffs' claim. The plaintiffs subsequently appealed to the Supreme Court. On April 5, 2018, the Supreme Court reformed the prior decision, ultimately upholding the plaintiffs' claim.

In the complaint, plaintiffs indicate that, given the average life expectancy of men and women, they are expected to live their adult lives between 2040 and 2070, with an expected temperature increase in Colombia during that time of 1.6°C and 2.14°C, respectively[802].

According to the Paris Agreement and national law, the government is obligated to decrease GHG emissions and deforestation. Additionally, it is committed to achieving a net-zero deforestation rate in the Colombian Amazon by 2020. Nonetheless, plaintiffs argue that, as demonstrated by multiple data and reports (even from the Ministry of Environment and Sustainable Development), deforestation has increased as a consequence of land grabbing, illicit crops and other factors[803]. Deforestation has negative effects not only in the Amazon region, but also across the entire national territory. These effects include alterations to the water cycle and availability,

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Case documents in Spanish are available, along with an unofficial translation of the main findings of the Supreme Court, at: https://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/.

For an examination of climate change litigation in Colombia, see M. DEL PILAR GARCÍA PACHÓN, A.VILORIA, M.D. DE LA ROSA CALDERÓN, *Climate Change Litigation in Colombia*, F. SINDICO, M.M.MBENGUE (eds.), *Comparative Climate ...,* cit., pp. 53-74; see also P.A.A.ALVARADO, D.RIVAS-RAMÍREZ, *A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court*, in *Journal of Environmental Law,* Vol. 30, Issue 3*,* 2018, pp. 519–526.

[799] J.SETZER, G.J.S. LEAL, C. BORGES, *Climate Change Litigation in Brazil: Will Green Courts Become Greener?*, in ALOGNA et al., cit., p. 156.

[800] P.DE VILCHEZ, A.SAVARESI, *The Right to a Healthy Environment and Climate Litigation: A Game Changer?*, in *Yearbook of International Environmental Law*, 2023, p. 8.

[801] Which provides that: "*Every individual has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it. It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends*".

[802] Salamanca et al. v. Colombia, p. 2 para. 2.

[803] Ibid., p. 2, para. 2.2.

modifications to soil composition that contribute to floods, and increased emissions of GHGs[804]. The defendants' failure to adopt appropriate measures has thus resulted in an alteration of living conditions of the plaintiffs and has hampered their enjoyment of a healthy environment[805].

The action was deemed inadmissible by the lower court, as it was perceived to be addressing a collective problem. However, the Supreme Court determined that the claim was admissible as it satisfied the established requirements of constitutional jurisprudence. These requirements include a connection between the violation of collective rights and individual or fundamental rights and a direct impact on the plaintiff's position; moreover, the violation must be fully proven and the requested judicial order must be focused on restoring individual rights rather than collective ones[806].

The Supreme Court stressed that the protection of fundamental rights does not only concern the individual, but implicates all other inhabitants of the planet, animals and plant species. In addition, it includes the unborn, who are entitled to experience the same environmental conditions as us[807].

This requires a careful use of resources and determines an obligation that involves the environmental rights of future generations and limits the freedom of action of present generations[808].

The Court outlined the serious consequences for plaintiffs and for all inhabitants of Colombia of present and future generations as a result of deforestation in the Amazon, which is considered the "*lung of the world*". This determined a breach of the environmental principles of precaution, intergenerational equity and solidarity[809].

As to the first principle, the Court noted that the risk of damage is out of doubt and that its irreversibility is also scientifically certain. With regards to intergenerational equity, the estimated temperature increase demonstrates that future generations will be affected unless the deforestation rate is reduced to zero. As to solidarity, the principle obliges the Colombian State to adopt adequate mitigation measures and to stop deforestation, a duty that is owed to the plaintiffs and to all inhabitants of the globe[810].

According to the Court, the persistent intensification of the problem of deforestation in the Amazon demonstrated the inadequacy of State action and a failure to govern natural resources and to sanction related violations, resulting in a breach of fundamental guarantees[811].

[804] Ibid., p. 3, para 2.4.
[805] Ibid., p. 3, para 2.5.
[806] Ibid., pp. 10-13.
[807] Ibid., p. 18, para 5.2
[808] Ibid., pp. 20-21.
[809] Ibid., pp. 30-35.
[810] Ibid., pp. 35-37.
[811] Ibid., pp. 39-42.

Within this view, the Colombian Amazon is explicitly recognized as a "subject of rights", entitled to protection from the State and constituting an essential ecosystem for the global future[812].

In light of the illustrated findings, the Court granted the relief and ordered the Colombian government to draft an action plan to address deforestation in the Amazon (inclusive of short, medium and long term strategies); moreover, it ordered the establishment of a public process and an "intergenerational pact" for the adoption and the implementation of measures aimed at reducing GHG emissions and tackling deforestation, through the participation of the plaintiffs, along with the affected communities and scientific organizations[813].

This is a noteworthy decision since the Court grounded its ruling on the right to a healthy environment, which proved to be a useful tool to address insufficient State action and to seek an injunction against the governments. The right was also associated with the need for the protection of future generations: the Court emphasized, not dissimilarly from the Neubauer case, the need to take action to ensure that the environmental conditions of future generations are not worse than our own.

Moreover, the case represents an example of extending the scope of application of legal remedies aimed at protecting social rights to socio-economic rights of individuals threatened by climate change. Nonetheless, enforcement of the order has proven to be a problematic knot, and there is still much to be done to achieve the set goals of reducing deforestation[814].

2.11.2 Álvarez et al v. Perù

In December, 2019, a similar lawsuit was filed against the government in Perù, before the Superior Court of Lima. The claim was brought by seven plaintiffs, represented by their parents, who alleged that the State failed to adopt and implement policies and regional plans to reduce and halt deforestation in the Peruvian Amazon[815]. The plaintiffs claim that this amounts to a violation of the right to a healthy environment enshrined in the Peruvian constitution and in international instruments (such as the ICESCR[816]).

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[812] Ibid., p. 45.

[813] Ibid., pp. 48-49.

[814] J.SETZER, G.J.S. LEAL, C. BORGES, *Climate Change* …, cit., pp. 158-159. However, recent data shows that deforestation in the Colombian Amazon dropped by 29% in 2022, see: https://www.theguardian.com/world/2023/jul/12/colombia-deforestation-amazon-rainforest-peace.

[815] *Álvarez et al v. Perù*, Superior Court of Lima, Complaint of December 16, 2019. The complaint in Spanish is available at: https://climatecasechart.com/non-us-case/alvarez-et-al-v-peru/.

[816] ICESCR, Art. 12, providing that: "*1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene; […]".

The plaintiffs seek specific court orders towards various levels of government. They request that the Ministries establish goals and targets to completely eliminate deforestation in the Peruvian Amazon by 2025. Additionally, they seek an order mandating the regional governments to develop plans to achieve this result, including the implementation of adaptation measures, and they ask for an order requesting the Ministry of Agriculture to suspend deforestation permits. Lastly, the plaintiffs request the Court to declare that the Peruvian Amazon is entitled to legal protection, and that the current state of environmental conservation in the region is unconstitutional.

The case is still pending before the Superior Court of Lima.

The examined lawsuits in Colombia and Perù have thus contributed to activism against deforestation while simultaneously placing their arguments in the context of climate change[817].

2.11.3 PSB et al. v. Brazil

An influential climate litigation case began in Brazil in 2020 and recently received a ground-breaking decision from the Brazilian Federal Supreme Court.

In June 2020, four political parties brought a constitutional claim for omission before the Federal Supreme Court, contesting the government's failure to disburse funds from the Climate Fund, established in 2009 under the National Climate Policy Act. The Fund required the government to annually allocate resources for climate change mitigation and adaptation activities. However, in 2019 and 2020, during President Bolsonaro's term, the Fund remained inoperative, and the government did not allocate the necessary resources[818].

Plaintiffs requested that the Fund be resumed and sought an junction mandating the government to reactivate the Fund and to refrain from further omissions. According to the plaintiffs, the State's omission amounted to a breach of the right to a healthy environment enshrined in Art. 225 of the Federal Constitution and a violation of international commitments.

The defendant argued that the government has the sole authority to manage funds for climate-related purposes, as the Constitution does not mandate the creation of a climate fund. They further contended that judicial review in this matter would infringe upon the separation of powers principle.

Before examining the merits, the Court briefly outlined the climate change phenomenon and the international climate change framework to which Brazil is a party; it also underlined that Brazil

[817] J.SETZER, G.J.S. LEAL, C. BORGES, *Climate Change* …, cit., p. 160.

[818] *PSB et al. v. Brazil*, Superior Tribunal de Justiça, ADPF 708, July 1, 2022.The original documents in Portuguese, along with unofficial English translations, are available at: https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/. For an early analysis of the case, see M.A.TIGRE, *Advancements in climate rights in courts around the world*, available at: https://blogs.law.columbia.edu/climatechange/2022/07/01/advancements-in-climate-rights-in-courts-around-the-world/.

committed to reduce GHG emissions by 37% in relation to the 2005 level by 2025, and by 43% by the year 2030[819].

The Court observed that deforestation has continued to rise steadily since 2013, with a notable increase in 2019, 2020, and 2021; in fact, 2021 had the highest deforestation rate in the past 15 years. This demonstrated that the country is "*moving in the opposite direction*" to its mitigation commitments, resulting in risks to rights to life, health and food of its inhabitants[820].

As to the legal basis relevant to climate change, the Court rejected the defendant's argument that climate change is not a constitutional matter; in contrast, Art. 225 of the Brazilian Constitution recognizes the right to an ecologically balanced environment and establishes an obligation for the public authority to protect and restore the environment for the interest of present and future generations. Therefore, the protection of the environment does not fall within the executive's discretion but rather constitutes an obligation upon the government to fulfil. In addition, Brazil is a party to international human rights instruments and recognizes their "*supralegal character*"[821]. In the Court's view, international environmental treaties – which clearly include the Paris Agreement – are a species of the genus "human rights treaties" and enjoy supranational status. In this context there is hence "*no legally valid option of simply omitting to combat climate change*"[822].

In a context of political inaction and a collapse in public policies to address climate change, the Court noted that national courts and constitutional tribunals have the power to intervene and prevent regression. The non-regression principle is violated when the level of environmental protection declines due to inaction by the State or inadequate policies that replace ones that have been suppressed[823].

The Court underlined that the Climate Fund constitutes the main federal instrument aimed at tackling climate change; nonetheless, the Fund was deliberately left inoperative in 2019 and through part of 2020, and a rushed allocation of resources was only established after the lawsuit was filed[824].

Granting the operation of the Fund and allocating its resources constitutes an obligation for the government, and not a free choice; said omission, along with the repeated aversion towards the phenomenon expressed by the government and the severity of the environmental situation in Brazil, lead the Court to conclude that the plaintiffs' request was founded.

[819] PSB et al. v. Brazil, paras. 6-11.
[820] Ibid., para. 15.
[821] Ibid., para. 16.
[822] Ibid., para. 17.
[823] Ibid., para. 18.
[824] Ibid., paras. 19-25.

Moreover, the allocation of resources involves the legislative power along with the executive: therefore, ignoring the determinations of the legislative would constitute a violation of the principle of separation of powers[825].

Said allocation of resources is a manifestation of the duty to protect the environment and the fundamental rights that rely on it. According to the Court, State action is "*manifestly unsatisfactory and, more than that, is in clear retrogression*"[826].

In light of the right to a healthy environment and the duty to comply with international obligations, and pursuant to the separation of powers principle, the Court ruled in favour of the plaintiffs. It recognized the government's omission, it determined the government to abstain from further omissions and to guarantee operation of the Fund and the allocation of resources and it prohibited contingency of revenues forming part of the Fund[827].

The Brazilian court's ruling is unprecedented and it is the first decision to ever recognize the Paris Agreement as a human rights treaty[828]. Therefore, it holds significant importance in the context of human rights-based litigation.

The decision not only effectively imposes on the State the obligation to mitigate climate change, based on human rights and the right to a healthy environment, but also enforces the non-regression principle, increasingly evident in climate litigation, which mandates climate action to ensure a continually improving environment.

Its relevance is especially notable in the Brazilian context where there is an on-going increase in rights-based climate litigation[829]. The Supreme Court's arguments will benefit potential future cases,

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[825] Ibid., paras. 27-28.

[826] Ibid., para. 30.

[827] Ibid., para. 36.

[828] M.A.TIGRE, *The 'Fair Share' of Climate Mitigation: Can Litigation Increase National Ambition for Brazil?*, in *Journal of Human Rights Practice*, 2023. Some authors had already supported such conclusion, see J.KNOX, *The Paris Agreement* …, cit., pp. 323–347.

[829] For a detailed analysis of rights-based climate cases before the Supreme Court in Brazil, see D. DE ANDRADE MOREIRA, A.L. B NINA, C. DE FIGUEIREDO GARRIDO, M.E. SEGOVIA BARBOSA NEVES, *Rights-Based Climate Litigation in Brazil: An Assessment of Constitutional Cases Before the Brazilian Supreme Court*, in *Journal of Human Rights Practice*, 2023, pp. 1-24. The authors observe that plaintiffs increasingly ground their claims on the human right to a healthy environment as a tool to challenge State inaction and they underline that in most cases the Court has recognized the State's obligation to protect the environment and its power to exercise control over action of the public administrator. They conclude (p. 20) that "*Most of the characteristics found in the selected cases reveal that STF is a court willing and prepared to challenge the abuses of executive action and inaction, affirming its fundamental role as the ultimate interpreter and enforcer of the Federal Constitution. The STF did not shy away from carving its place in addressing the local and global impacts of Brazilian environmental policy. The present study confirms, thus, the potential of climate litigation in Brazil to protect human rights, especially the human right to a healthy environment, both for present and future generations*". For an analysis of Brazil's legal regime and environmental case law in the country, see J.SETZER, G.J.S. LEAL, C. BORGES, *Climate Change* ..., cit., pp. 143-168.

For an examination of climate change litigation in Latin America and its potential, see M.A.TIGRE, N.URZOLA, A.GOODMAN, *Climate litigation in Latin America: is the region quietly leading a revolution?*, in *Journal of Human Rights and the Environment*, Vol. 14 No. 1, March 2023, pp. 67–93.

promoting the adoption of more ambitious and efficient national policies and ultimately granting protection to human rights. Thus, this pronouncement lays the groundwork for further victorious cases.

Overall, human rights arguments are widely adopted in climate change litigation in Latin America and plaintiffs' requests are often granted by the judiciary on human rights grounds.

Latin America therefore seems to represent a notable example of successful rights-based litigation, which "*goes hand-in-hand with environmental constitutionalism*"[830].

2.12 Challenging corporate liability

Private actors also bear responsibility for GHG emissions and climate change, and thus climate litigation has been undertaken against them in addition to States.

Since the 2000s, there have been attempts in the United States to hold fossil fuel companies accountable for the impact of their actions on the climate system. However, these attempts have not been successful.

The publication of a research by Richard Heede in 2014[831], which proved the huge impact of so-called Carbon Majors on global GHG emissions (estimated at about two-thirds of the total)[832], provided the impetus for a new wave of litigation. One of the earliest and most well-known cases is the petition against Carbon Majors promoted in the Philippines[833]. Greenpeace Southeast Asia and other NGOs and individuals filed a petition before the Philippines Commission on Human Rights, requesting it to conduct an inquiry on, among other things, the contribution to climate change of 50 Carbon Majors and their responsibility for human rights violations. The Commission inquired 47 so-called Carbon Majors and concluded its report on May 6, 2022. Although lacking binding powers, the Commission confirmed the significant impact that these corporations have on global emissions. In addition, it found that the corporations had knowledge of the adverse impacts on the climate since 1965, that they engaged in obfuscation of climate science and obstruction towards a global transition from fossil fuel and that they have a responsibility to undertake human rights due diligence and to provide remedies for human rights violations[834].

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[830] M.A.TIGRE, N.URZOLA, A.GOODMAN, *Climate litigation in …,* cit., p. 92.

[831] R.HEEDE, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers. 1854–2010*, in *Climatic Change*, Vol. 122, 2014, pp. 229–241.

[832] J.SETZER, C. HIGHAM, *Global trends in climate change litigation: 2023 snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, pp. 35-36.

[833] Republic of the Philippine Commission on Human Rights, *Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Case No. CHR-NI-2016-0001, 2015. The case documents are available at: https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/.

[834] Ibid., National Inquiry on Climate Change Report, May 6, 2022, pp. 99-114.

As the 2023 Snapshot highlighted, 59 cases have been filed globally against so-called Carbon Majors[835]. Setzer and Higham distinguish between "retrospective" cases (such as Lliuya v RWE[836]) where plaintiffs usually seek damages in light of companies' historic contributions to climate change, and "prospective" cases, where plaintiffs commonly request courts to ascertain responsibility for excessive GHG emissions and issue orders requiring defendants to comply with goals set at international level and human rights obligations.

The Milieudefensie case, which is of particular relevance as an example of litigation against Carbon Majors and will therefore be discussed in the following section, belongs to this second category.

It can be noted as of now that rights-based litigation against corporations has proven to be a useful tool in influencing their conduct and pushing them to operate in compliance with human rights, even in the absence of binding instruments; moreover, it proved to be an effective instrument to raise awareness, affect corporate reputation and policy and promote responsible business standards[837].

It is worth stressing that, along with a surge in climate litigation, legislative initiatives have been undertaken to fill the gaps in corporate liability by introducing human rights and due diligence legislation (especially in the global North)[838].

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[835] J.SETZER, C. HIGHAM, *Global trends …*, cit., p. 35. For an overview see J.SETZER, *The Impacts of High-Profile Litigation against Major Fossil Fuel Companies*, in C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency …*, cit., pp. 206-219; see also C.MACCHI, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'*, in *Business and Human Rights Journal*, Vol. 6 Issue 1, pp. 93-119, p. 119 where the author notes that "*Most examples of climate change-related lawsuits initiated against corporations and states, some of which are successful, highlight that corporations are increasingly expected to take action in the two main areas: risk mitigation, which for some corporations might entail a significant reduction of emissions, and integration, which requires incorporating climate impacts across HRDD processes. Given the growing number of lawsuits, regulatory developments such as the upcoming EU-wide rules on human rights and environmental due diligence, as well as the increased attention of investors towards climate-related risks, corporations failing to take adequate action are exposed to legal, reputational and financial consequences*".

[836] *Luciano Lliuya v. RWE AG*, Essen Regional Court, Case n. 2 O 285/15, 2015. In this case, a Peruvian farmer filed a lawsuit against German multinational energy company RWE before the Essen District Court in Germany, alleging that RWE's significant contribution to climate change resulted in the melting of glaciers in his hometown, which in turn determined a relevant volumetric increase of a nearby glacial lake. In light of this, the plaintiff requested the Court to order the defendant to pay a share of the estimated costs to implement flood protections; said share was determined in light of REW's contribution to global GHG emissions. The case was dismissed by the District Court, which found that no effective redress could be provided and that no direct causal link could be established between specific GHG emissions and the alleged climate change impact. However, the Higher Regional Court of Hamm – to which Lliuya appealed the decision – found the appeal admissible and allowed it to proceed to the evidentiary phase, which is still on-going. The Court appointed experts that conducted an on-site hearing at the glacial lake to establish the potential threats to the plaintiffs' house. The main case documents are available at: https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/.

[837] E.BIRCHALL, S.DEVA, J.NOLAN, *The Impact of Strategic Human Rights Litigation on Corporate Behaviour*, The Freedom Fund, November 2023,

[838] M. RAJAVUORI, A.SAVARESI, H.VAN ASSELT, *Mandatory due diligence laws and climate change litigation: Bridging the corporate climate accountability gap?*, in *Regulation & Governance*, Vol. 17, Issue 4, 2023, pp. 944-953, p. 945; S.DEVA, *Business and Human Rights: Alternative Approaches to Transnational Regulation*, in *Annual Review of Law and Social Science*, Vol. 17, 2021, pp. 139-158.

2.12.1 Milieudefensie et al. v. Royal Dutch Shell PLC

In April 2019, the Dutch environmental NGO Milieudefensie and 6 other organizations filed a lawsuit before the District Court of The Hague, summoning Royal Dutch Shell Plc, a holding company under foreign law with its principal place of business in The Hague, which determines the policy of the whole Shell Group[839].

The case represents one of the first attempts to hold corporate actors liable for excessive GHG emissions, seeking to extend positive mitigation obligations to the private sector.

The plaintiffs claimed that, by causing dangerous climate change, Shell was in breach of its duty of care under Dutch Tort law and they argued that the company should reduce its GHG emissions pursuant to the goals established in the Paris Agreement and in light of human rights obligations deriving from the ECHR (namely Articles 2 and 8).

As a reading of the complaint quickly reveals, the plaintiffs' legal approach was significantly shaped by the Urgenda case and expands upon it.

The complaint first addresses the issues of jurisdiction, applicable Dutch law and the plaintiffs' cause of action[840]. Second, the plaintiffs set out the key facts of the climate change phenomenon and reconstruct the international framework of climate change[841]. Third, the plaintiffs rely on the findings of the IPCC to demonstrate the impacts of dangerous climate change in 1.5°C and 2°C scenarios, with a particular focus on Europe and the Netherlands[842].

Next, the plaintiffs set forth the legal grounds for their claims. In summary, they argue that Shell should be held liable for failing to adequately reduce CO2 emissions from its activities, underlining that the global consensus on required measures to prevent climate change, as resulting from the Paris Agreement and substantiated by the IPCC, bears a legal meaning for the defendant, who is required to contribute to mitigation actions[843].

In the plaintiffs' view, Shell is guilty – just like the State of the Netherlands – of unlawful endangerment as all the five related criteria are met[844], and should therefore be required, by means

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As to the EU's Commission proposal on corporate sustainability due diligence, see https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

[839] *Milieudefensie et al. v. Royal Dutch Shell Plc*, District Court of the Hague, Case no. C/09/571932, Judgement of May 26, 2021. All case documents, including a court-issued English translation of the judgement, are available at: https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/.

[840] Ibid., Summons, pp. 22-72.

[841] Ibid., pp. 73-90.

[842] Ibid., pp. 91-123.

[843] Ibid., p. 125, para. 503.

[844] Ibid., p. 127, para. 512. The criteria indicated by the plaintiffs are the following: (i) the nature and the scope of the damage caused by climate change; (ii) the knowledge and foreseeability of this damage; (iii) the likelihood that

of a court order, to eliminate such unlawful situation through the adoption of adequate CO2 emissions reductions[845].

As to the role of human rights, the plaintiffs argue that the legal arguments adopted by the Court of Appeal of The Hague in Urgenda[846] should also apply to this case. By failing to sufficiently reduce its emissions, Shell violates the duty of care imposed by Articles 2 and 8 of the ECHR, provisions which entail the adoption of preventive measures pursuant to the precautionary principle; said provisions "*colour the duty of care*"[847] to be expected from Shell, which, in the plaintiffs' view, also operates horizontally, establishing obligations that private individuals and legal entities owe to each other[848].

According to the plaintiffs, the need for protection against Shell's dominant position is similar the need for protection against the power of the State, and they stress that, as Professor A.S. Hartkamp observed: "*certain private legal entities have such legal, economic or actual control over (the fate of) individuals that individuals have to be protected against such control in a similar way as they are protected against the control over these individuals by public organisations such as the State*"[849].

To support their conclusions, the plaintiffs analyzed the case law of the ECtHR concerning the application of Articles 2 and 8 of the Convention to environmental issues. They also emphasized the provisions of various non-binding instruments such as the UN Guiding Principles on Business and Human Rights, which Shell regarded as a reference for its human rights policy, the UN Global Compact[850] and the OECD Guidelines for Multinationals to which Shell has committed itself[851].

The plaintiffs therefore requested the Court: to declare that Shell has acted unlawfully towards the claimants by failing to reduce its overall volume of CO2 emissions by at least net 45% compared to 2010 levels (with further requests to indicate even higher reduction targets of 72% and 100%); to order Shell to reduce its volume of CO2 emissions by at least 45% by 2030 compared to 2010 levels (with further requests to indicate even higher reduction targets of 72% and 100%)[852].

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dangerous climate change will manifest itself; (iv) the nature of the behaviour (or the omissions) of the State; (v) the inconvenience of the precautionary measures to be taken.

[845] Ibid., p. 153, paras. 634, 638.

[846] At the time of the summons, the Supreme Court of the Netherlands had not yet issued its ruling; plaintiffs therefore relied on the findings of the Hague Court of Appeal.

[847] *Milieudefensie et al. v. Royal Dutch Shell Plc,* Summons, p. 175, para. 724.

[848] Ibid., pp. 160-161, paras. 667-668.

[849] Ibid., p. 161, para. 668.

[850] More information on the Un Global Compact is available at: https://unglobalcompact.org/about. It is thereby defined as a "*voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals*".

[851] *Milieudefensie et al. v. Royal Dutch Shell Plc,* Summons, pp. 173-175. For information on the OECD Guidelines, see: https://www.oecd.org/corporate/mne/.

[852] *Milieudefensie et al. v. Royal Dutch Shell Plc,* Summons, p. 204.

Shell responded to the claim by filing a comprehensive statement of defence, offering detailed and extensive counterarguments to the allegations made in the claim and requesting the Court to deny Milieudefensie et al. a cause of action for their claims or, in any case, deny those claims[853].

Regarding human rights, Shell stated that Articles 2 and 8 of the ECHR are not binding on Shell and are applicable only to States[854]. Additionally, Shell emphasized that States have a broad discretion in determining the appropriate measures under those provisions, which the Court should not adjudicate. Furthermore, the plaintiffs' claims are considered too vague and are deemed not to fall within the scope of these provisions. Finally, Shell emphasized that these conclusions remain unaffected by the precautionary principle and the non-binding guidelines mentioned by the plaintiffs[855].

On May 26, 2021 the Court issued its judgement, ruling in favour of the plaintiffs[856] and ordering Royal Dutch Shell PLC – directly and through the companies part of the Shell group – to reduce its volume of CO2 emissions by at least 45% by the end of 2030 as compared to 2019 levels[857].

With respect to admissibility, the Court found that the claims of Milieudefensie et al. were admissible under Section 305a Dutch Civil Code, which allows associations to bring legal proceedings for the protection of public interests. In this case, the interests of current and future generations of Dutch inhabitants were deemed

[853] *Milieudefensie et al. v. Royal Dutch Shell Plc,* Statement of Defense, p. 232.

[854] Ibid., pp. 202-203, paras. 578-579, where the defendant observes that "*These provisions are simply not intended to bind individual parties and thus do not have direct effect as provided in Article 93 of the Dutch Constitution. The provisions impose obligations on States*. […]. *The articles thus fail to provide a basis for the claims against RDS. This is a key difference between the present case and Urgenda, which was lodged against the State*".

See also p. 216, para. 624, where the defendant points out that "*Fundamental rights derived from the ECHR can, at most, play an indirect role in private party relationships, i.e. by helping interpret the open standards of private law*".

[855] Ibid., p. 202, para. 576.

[856] Except for ActionAid, whose claim was brought in the interest of citizens outside the Netherlands and was therefore denied for lack of standing.

[857] For a critique of the judgement, see: B.MAYER, *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation. Milieudefensie v. Royal Dutch Shell. District Court of The Hague (The Netherlands)*, in *Transnational Environmental Law*, Vol. 11 Issue 2, 2022, pp. 407-418; A.HÖSLI, *Milieudefensie et al. v. Shell: A Tipping Point in Climate Change Litigation against Corporations?*, in *Climate Law*, Vol. 11 Issue 2, 2021, pp. 195-209; C.MACCHI, J.VAN ZEBEN, *Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell*, in *RECIEL*, Vol. 30 Issue 3, 2021, pp. 409-415; G.ALPA, *Tre casi paradigmatici di responsabilità sociale delle imprese per violazione di diritti fondamentali: Vedanta, Okpabi, Milieudefensie*, in *Contratto e Impresa Europa*, Vol. 2, 2021, pp. 257-266.

For insights on the relationship between rising climate change litigation and the WTO's climate policy, see M.SARACINO-LOWE, *Urgenda, Milieudefensie, and the Impact of Climate Change Litigation on Global Trade Policy*, *in Minnesota Journal of International Law*, Vol. 32(1), pp. 301-320.

suitable for bundling (unlike the interests of the world's population which the Court considered not suitable for bundling), and they aligned with the objectives pursued by plaintiffs associations[858].

As to Shell's mitigation obligation, the Court observed that it is grounded on the unwritten standard of care laid down in Art. 6:162 of the Dutch Civil Code, which requires the duty holder to observe standards of due care[859]. In order to identify the precise content of said unwritten standard, numerous aspects must be assessed. The Court evaluated 14 circumstances, which include: Shell's policy and CO2 emissions (which exceed those of many States, including the Netherlands); the right to life and the right to respect for private and family life recognized by Articles 2 and 8 of the ECHR and Articles 6 and 17 of the ICCPR; the UN Guiding Principles on Business and Human Rights; possible reduction pathways[860].

The Court observed that Shell is a major player in the global fossil fuels market and its significant amount of CO2 emissions certainly contributes to climate change and even exceeds that of numerous States, including the Netherlands[861].

With respect to human rights, the Court recognized that they only apply to the relationship between States and individuals and cannot be invoked by the plaintiffs against Shell. However, given the fundamental interest of human rights and their value to society, they may play a role in the relationship between the plaintiffs and Shell, and are relevant in interpreting the unwritten standard of care owed by the defendant[862]. Moreover, as the Urgenda ruling demonstrates, Articles 2 and 8 of the ECHR offer protection against climate change, as confirmed by the UN Human Rights Committee and the UN Special Rapporteur on Human Rights; therefore, the defendant's claim that human rights offer no protection against climate change was rejected[863].

The Court heavily relied on international soft law, including the UNGP, to interpret the standard of care. It emphasized the authoritative character and the universal endorsement of the instrument. The UNGP outlines human rights obligations of businesses and its content aligns with that of other non-binding instruments like the UN Global Compact and the OECD Guidelines[864].

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[858] *Milieudefensie et al. v. Royal Dutch Shell Plc*, Judgement of May 26, 2021, para. 4.2.

[859] Art. 6:162 defines a tortious act and provides as follows: "

- 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.

- 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.

- 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)".

[860] *Milieudefensie et al. v. Royal Dutch Shell Plc*, Judgement of May 26, 2021, para. 4.4.

[861] Ibid., para. 4.4.5

[862] Ibid., para. 4.4.9.

[863] Ibid., para. 4.4.10.

[864] Ibid., para. 4.4.11.

The Court observed that "*The responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations*"[865].

It therefore stressed that "*It can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR as well as other 'internationally recognized human rights', including the ECHR*"[866]. Said obligation concern the companies' own activities and the activities linked to their operations, products or services[867].

The Court then relied on the findings of the IPCC to conclude that reduction pathways of 45% by 2030 constitute the best chance to prevent the most serious consequences of climate change[868]; this is in light of the global goal of limiting global warming to 1.5 or 2°C above pre-industrial levels, an objective that was decisive in this case.

In the Court's view, and similarly to Urgenda, the global nature of the phenomenon, and the only limited contribution to it by Shell, did not absolve the defendant from its individual partial responsibility; in addition, the Court noted that "*much may be expected of RDS in this regard, considering it is the policy-setting head of the Shell group, a major player on the fossil fuel market and responsible for significant CO2 emissions*"[869].

Upon examining all the 14 relevant factors, the Court concluded that "*the policy, policy intentions and ambitions of RDS for the Shell group are incompatible with RDS' reduction obligation. This implies an imminent violation of RDS' reduction obligation. It means that the court must allow the claimed order for compliance with this legal obligation*"[870]. Therefore, it ordered RDS "*both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels*"[871].

[865] Ibid., para. 4.4.13.
[866] Ibid., para. 4.4.14.
[867] Ibid., para. 4.4.17.
[868] Ibid., para. 4.4.29.
[869] Ibid., para. 4.4.37.
[870] Ibid., para. 4.5.3.
[871] Ibid., para. 5.3.

The Court's decision is groundbreaking and unprecedented, as it constitutes the first imposition of broad mitigation targets for a corporation[872].

Although, as in all domestic litigation, the outcome of the case depended in part on the peculiarities of the national legal system, there are some particularly interesting and potentially influential aspects of the litigation as a whole that are worth mentioning. First, the increasing relevance of soft law, which has played a key role in defining the company's obligations (so much so that this has been referred to as an example of "hardening" of soft law[873]); secondly, the Court's reliance on human rights provisions to determine the precise content of Shell's duty of care under national law. Overall, the Court reconstructed Shell's obligation by building upon numerous sources such as the UNGP, the Paris Agreement, the scientific findings and human rights instruments.

The issue of corporate responsibility is particularly pressing because corporate activities often have a significant impact on the environment (even greater than that of many States)[874], and adequate mitigation action necessarily involves action by the private sector, as the Paris Agreement acknowledges, even in the absence of specific binding reduction targets. However, this impact is not matched by a binding human rights liability regime for corporations, and attempts to create one at the international level have so far failed. Therefore, accountability for corporate human rights abuses can only be derived from international soft law instruments[875].

As Macchi and Van Zeben noted, "*in the context of litigation against corporations, which are not directly bound by international treaties, the use of international human rights treaties to interpret a domestic standard of care can be key to establishing liability for what is essentially a human rights violation*"[876].

It should be stressed, however, that while the Court has cited human rights treaties among the factors to be considered in examining Shell's obligation, it is unclear how and to what extent these sources – namely the ECHR – affected the Court's determinations. On this aspect, Mayer observed that "*Human rights treaties do not contain any specific standards that can help to determine the requisite level of mitigation action of any particular actor. This is true with regard to states, and even more so for corporations. Thus, the reference to human rights treaties is purely*

[872] B.MAYER, *The Duty of Care* …, cit., p. 408.

[873] C.MACCHI, J.VAN ZEBEN, *Business and human*, cit., p. 412, who observes that "*Milieudefensie v RDS is an important example of how these non-binding instruments can be hardened through the interpretation of domestic hard law and how they relate to environmentally damaging activities*".

[874] For an analysis of the substantial contribution to climate change of the largest oil, gas, and coal companies, see R.HEEDE, *The Evolution of Corporate Accountability for Climate Change*, in C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency* …, cit., pp. 239-253. The major emitters in the 1965-2020 period include: Saudi Aramco, Gazprom, Chevron, ExxonMobil, National Iranian Oil Co., BP PLC, Shell and Coal India.

[875] C.MACCHI, J.VAN ZEBEN, *Business and human*, cit., p. 412.

[876] Ibid.

ornamental; it cannot help the Court to determine the content of Shell's mitigation duty. Nor is the reference to human rights helpful in determining the existence of a duty of care; the fact that CO2 emissions cause illicit harm can be justified without reference to human rights law"[877].

Nonetheless, the human rights standards established in the UNGP played a crucial role. This could potentially constitute a case where soft law human rights instruments held even greater relevance than binding instruments.

The ruling drew criticism for its failure to sufficiently justify certain crucial steps in determining Shell's reduction obligations. Mayer noted that the Court did not clearly state the reasons for choosing a specific reduction pathway over other feasible ones; additionally, the Court imposed a 45% overall target for Shell without considering the practices of other companies in similar sectors or the concrete targets attainable by Shell[878].

Shell appealed the decision before the Dutch Court of Appeal in The Hague and the case is still pending. Following the first Court's ruling, Shell published an FAQ where it noted that "*Appealing the court's judgment does not change Shell's goal to become a net-zero emissions energy company by 2050, in step with society. We see the court's order for us to reduce Shell's own emissions (Scope 1 and 2) as an acceleration of our Powering Progress strategy and aim to rise to the challenge*"[879].

2.12.2 Towards a new wave of litigation against Carbon Majors? Greenpeace Italy et al. v. ENI S.p.A.

The Milieudefensie case has already prompted similar initiatives in other European countries, one of the best and most recent examples being the lawsuit filed in Italy before the Civil Court of Rome by two NGOs and 12 citizens against ENI S.p.a and ENI's two largest shareholders, the Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.a. The plaintiffs claim that ENI's decarbonisation plan does not align with the targets set in the Paris Agreement and the

[877] B.MAYER, *The Duty of Care* …, cit., p. 413.

[878] Ibid., pp. 413-418. Mayer critically remarks that "*Arguably, the issue lies not just in the execution but also in the Court's methodological choices, as neither international agreements nor climate science provide a sufficient basis to determine Shell's requisite mitigation action. The case comment has outlined an alternative methodology based partly on an ascending reasoning, where the Court would seek to induce a standard of care from an observation of common practice in the relevant economic sector. Relying on ascending reasoning, in combination with descending reasoning, would be more consistent with the function of courts to apply the law, rather than to make the law*".

For an analysis of other relevant aspects of the judgement – including an assessment of the Court's response to defendants' commonly utilized arguments within climate litigation – see O.SPIJKERS, *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, in *Chinese Journal of Environmental Law*, Vol. 5, 2021, pp. 237–256. Spijkers concludes that the Netherlands has certainly not turned into a dikastocracy (a "*society ruled by judges*") and that Courts in Urgenda and Milieudefensie merely applied the law to settle the disputes brought before them.

[879] The FAQ is available at: https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case/_jcr_content/root/main/section/simple/text_1377231351_copy.multi.stream/1657006823005/460167304a697f411be1b9f80c6e05be0ac057fb/dutch-district-legal-case-faq.pdf.

recommendations of climate science, resulting in violations of human rights enshrined in the Italian Constitution and international instruments[880]. Similarly to Milieudefensie (and along the lines of "Giudizio Universale") the plaintiffs ground their claims on Articles 2 and 8 of the ECHR and Articles 2043, 2050 and 2051 of the Italian Civil Code. The plaintiffs requested the Court to declare the joint and several liability of the defendants for past and potential future damages to their fundamental rights; in addition, they requested an order against the defendants to adopt an industrial plan to cut CO2 emissions by 45% by 2030, pursuant to the goals set in the Paris Agreement.

The proceeding is still at an early stage; the Parties submitted evidentiary pleadings before the first hearing pursuant to new Art. 171 *ter* of the Italian Civil Procedure Code.

However, it must be acknowledged that, in view of the numerous and extensive defences raised by ENI, both procedural and on the merits, there are clear obstacles to be overcome in order to grant the plaintiff's claim. It is worth pointing out that, beyond the issues of jurisdiction, passive legitimacy and statute of limitations, there are also other elements on the merits that lend themselves to criticism (some of which are well highlighted by ENI's consulting expert Prof. Ing. Daniele Bocchiola), including the uncertainties related to the so-called attribution science, i.e. the criticalities in identifying a subjective allocation of emissions, the shortcomings in the related calculation criteria and the difficulty in proving the causal link.

2.13 Other examples of rights-based litigation

As previously mentioned, the overview of domestic litigation is not intended to be exhaustive, but rather to provide insights into the specifics of rights-based litigation and the most significant issues arising from related judgments.

That said, it should be noted that rights-based initiatives have emerged in other European contexts, such as Austria, as well as in non-European States like Canada and South Korea. As highlighted below, the strategies employed are largely similar to those found in the examined cases.

In Greenpeace et al. v. Austria, the plaintiffs relied on Articles 2 and 8 ECHR and Articles 2 and 7 CFREU and aimed to invalidate tax exemptions on cross-border flights in light of their impacts on global warming. The Constitutional Court dismissed the claim for lack of legal standing[881].

[880] *Greenpeace Italy et. al. v. ENI S.p.A., Ministero dell'Economia e delle Finanze and Cassa Depositi e Prestiti S.p.A.,* Civil Court of Rome, R.G. n. 26468/2023. ENI published the summons and its statement of defence on its website, along with detailed insights on the lawsuit, which is thereby defined as "*la falsa causa*" (the fake lawsuit), see: https://www.eni.com/it-IT/media/causa-eni-greenpeace-recommon.html.

[881] The main case documents (in German) are available at: https://climatecasechart.com/non-us-case/greenpeace-v-austria/.

Other European initiatives have resulted in unfavourable outcomes for plaintiffs, who have subsequently taken action before the ECtHR. These cases will be addressed in the examination of litigation before the ECtHR.

In ENVironnement JEUnesse v. Procureur General du Canada, a NGO brought a class action against the Canadian government on behalf of young Québec citizens. The plaintiffs argued that Canada's GHG emissions and insufficient mitigation targets violated their rights enshrined in the Canadian Charter of Rights and Freedoms and in the Québec Charter of Human Rights and Freedoms. The claim was dismissed on the ground that it was not within the court's purview to instruct the legislative power on how to tackle climate change[882]. The margin of discretion left to the legislative and executive powers therefore played a crucial role in this case.

In the case of Do-Hyun Kim et al. v. South Korea, 19 young climate activists filed a lawsuit with the Constitutional Court of Korea alleging a violation of their fundamental rights as a result of the inadequacy of national legislation to mitigate climate change[883]. The case is still pending.

Overall, it should be noted that rights-based litigation is prevalent in certain regions, such as Europe, which has therefore been the subject of more extensive discussion in this analysis, and is moreover the main focus of scholarly study. However, there is still a significant knowledge gap regarding some States, including major contributors to global warming such as China and Russia[884].

3. Cases at international level

Parallel to the rapid increase of climate litigation at the domestic level, supranational litigation before human rights courts, tribunals and monitoring bodies has also experienced significant growth.

Similar to domestic litigation, these initiatives have faced procedural and substantive challenges, including establishing legal standing, exhausting domestic remedies, proving victim status and demonstrating a causal link between alleged violations and State emissions. Furthermore, there is the common issue of interpreting the exact nature of States' obligations related to mitigation and adaptation in order to determine whether human rights law standards have been violated.

Supranational litigation, which in some cases has resulted in favourable outcomes for the plaintiffs, has sometimes assumed peculiar characteristics that distinguish it from the examined

[882] The main case documents are available at: https://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/.

[883] The case documents in Korean, along with unofficial English translations, are available at: https://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/.

[884] For an overview of the status of climate change litigation in Russia and China, see: A.Y.KAPUSTIN, *Prospects for Climate Change Litigation in Russia*, in I.ALOGNA, C.BAKKER, J.GAUCI (eds.), *Climate Change Litigation: Global Perspectives*, cit., pp. 225-243; C.ZHOU, T.QIN, *Prospects for Climate Change Litigation in China*, in I.ALOGNA, C.BAKKER, J.GAUCI (eds.), *Climate Change Litigation: Global Perspectives*, cit., pp. 244-268.

However, it is worth stressing that no significant cases of rights-based litigation have emerged so far.

domestic litigation: in particular, we refer to cases of "diagonal litigation", a term we use to refer to claims brought by individuals against States other than their own. This raised the question of the extraterritorial human rights obligations of States, a much debated issue that represents a relevant aspect of important pending cases (including the pivotal climate change cases pending before the ECtHR).

The following paragraphs review some of the most relevant cases that have arisen at the international level and provide an assessment of the main procedural and substantive obstacles and how they have been addressed by adjudicating bodies to date.

3.1 Climate change before the UNCRC: Sacchi et al. v. Argentina et al.

In September 2019, sixteen young climate change activists (including Greta Thunberg), of 12 different nationalities, submitted a communication before the UN Committee on the Rights of the Child against five State parties to the UN Convention on the Rights of the Child: Argentina, Brazil, France, Germany and Turkey[885][886].

The Communication firstly provided an overview of the climate crisis, its adverse impacts and children's vulnerability to climate change[887]. The petitioners then illustrated how climate change is already harming their health, putting their life at danger and disrupting their cultural traditions, as a consequence of extreme heat, wildfires, drought, dangerous air quality, storms and flooding, sea-level rise and other harmful impacts[888].

In the petitioners' view, climate change triggers four human rights obligations: the duty to prevent foreseeable harm; the duty to cooperate at international level to tackle climate change; the duty to apply the precautionary principle and prevent life-threatening consequences even in cases of uncertainty; the duty to guarantee intergenerational equity for children and for posterity[889].

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[885] *Communication to the Committee on the Rights of the Child in the case of Chiara Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey*, Communications No. 105-108, September 23, 2019. All case documents are available at: https://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/.

The communication was submitted pursuant to Art. 5 of the Third Optional Protocol to the UN Convention on the Rights of the Child, which entered into force in April 2014 and regulates individual communications, providing that they may be submitted by individuals or group of individuals, within the jurisdiction of a State party, who claim to be victims of a violation of rights enshrined in the Convention.

[886] For an early evaluation of the communication, see M.LA MANNA, *Cambiamento climatico e diritti umani delle generazioni presenti e future: Greta Thunberg (e altri) dinanzi al Comitato sui diritti del fanciullo*, in *Diritti umani e diritto internazionale*, Issue 1, January-April 2020, pp. 217-224; for an analysis from the counsels of the law firm that drafted and filed the petition, see I.GUBBAY, C.WENZLE, *Intergenerational Climate Change Litigation: The First Climate Communication to the UN Committee on the Rights of the Child*, in ALOGNA et al., cit., pp. 343-365.

[887] *Communication to the Committee* …, see supra, pp. 14-26.

[888] Ibid., pp. 27-45.

[889] Ibid., pp. 46-54.

They further argued that respondent States were fully aware, for decades, of the deadly consequences of climate change but have nonetheless caused and perpetuated the climate crisis, in breach of their human rights obligations and causing injuries to the petitioners' rights[890].

The petitioners claimed that the respondents failed to adequately reduce their GHG emissions and failed to pressure other States, who are responsible for the highest share of emissions, to reduce their emissions in order to protect children. As a consequence, respondent States determined an exacerbation of the climate crisis and associated natural events, with a violation of human rights of the petitioners enshrined in the Convention, such as the right to life (Art. 6), the right to health (Art. 24) and the indigenous petitioners' right to their culture (Art. 30). In addition, they claimed that the respondent States failed to make the best interest of children a primary consideration in climate action, resulting in a violation of Art. 3 of the Convention[891].

As to admissibility, the petitioners relied on Art. 7 lett. e) of the Optional Protocol to the Convention, which provides that communications are admissible when "*All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief*". The petitioners argue that children face numerous obstacles in accessing justice for their rights, especially in the context of climate change; they stress that exhausting domestic remedies in the respondents' jurisdictions would be unduly burdensome, unlikely to bring effective relief, and unreasonably prolonged[892], therefore concluding that the communication should be deemed admissible, as no effective remedies could be exhausted at domestic level[893].

The petitioners therefore requested the Committee to find that "*climate change is a children's rights crisis*", to find that each respondent "*has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change*" and to find that "*by recklessly perpetuating life-threatening climate change, each respondent is violating petitioners' rights to life, health, and the prioritization of the child's best interests, as well as the cultural rights of the petitioners from indigenous communities*[894].

Moreover, they requested the Committee to recommend respondent States to ensure that mitigation and adaptation efforts are accelerated (through reviews or amendments to their policies),

[890] Ibid., pp. 55-70.
[891] Ibid., pp. 77-90.
[892] Ibid., p. 92.
[893] Ibid., p. 94. For an illustration of the barriers to justice with regard to human rights violations associated with climate change, see M. WEWERINKE-SINGH, *Remedies for Human Rights Violations Caused by Climate Change*, in *Climate Law*, 9(3), 2019, pp. 224-243.
[894] Ibid., p. 96.

"*to the maximum extent of available resources and on the basis of the best available scientific evidence to (i) protect the petitioners' rights and (ii) make the best interests of the child a primary consideration, particularly in allocating the costs and burdens of climate change mitigation and adaption.* In addition, they requested the Committee to recommend respondent States to "*initiate cooperative international action—and increase its efforts with respect to existing cooperative initiatives—to establish binding and enforceable measures to mitigate he climate crisis, prevent further harm to the petitioners and other children, and secure their inalienable rights*" and to ensure, pursuant to Article 12, "*the child's right to be heard and to express their views freely, in all international, national, and subnational efforts to mitigate or adapt to the climate crisis and in all efforts taken in response to this Communication*"[895].

In October 2021, the Committee adopted five decisions (one for each defendant), rejecting the applicants' communication[896].

It did not examine the merits of the case as it found the claim inadmissible for failure to comply with the requirement of prior exhaustion of local remedies[897].

Jurisdiction was firstly examined. Under Art. 2.1 of the Convention, State parties' human rights obligations concern each child within their jurisdiction. Pursuant to Art. 5.1 of the Optional Protocol, communications may be submitted by applicants within the jurisdiction of a State party. The Committee noted that, despite the lack of specific reference to territory within the Convention and the Protocol, the notion of jurisdiction should be interpreted narrowly[898].

It underlined that the ECtHR's and the Human Rights Committee's jurisprudence on extraterritorial jurisdiction refers to different situations, while the pending communication posed new issues related to transboundary harm associated with climate change[899].

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[895] Ibid., pp. 96-97.

[896] *Sacchi et al. v. Argentina et al*., CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019,CRC/C/88/D/108/2018, October 8, 2021. In the following, "decision" refers to the five decisions.

For an assessment of the remarkable aspects of the decision and its limits, see: L.MAGI, *Cambiamento climatico e minori: prospettive innovative e limiti delle decisioni del Comitato per i diritti del fanciullo nel caso Sacchi e altri*, in *Diritti umani e diritto internazionale*, Vol. 16 Issue 1, 2022, pp. 157-166;M.LA MANNA, *Il Comitato sui diritti del fanciullo si pronuncia in merito al cambiamento climatico: punti di forza e criticità della decisione Sacchi e altri c. Argentina e altri*, in *Quaderni di SIDIBlog*, Vol. 8, 2021, pp. 33-47 ; E.CARPANELLI, *Cambiamenti climatici e obblighi intergenerazionali dinanzi agli organi di controllo istituiti dai trattati sui diritti umani: alcune riflessioni alla luce della recente decisione di irricevibilità del Comitato dei diritti del fanciullo nel caso Sacchi et al. c. Argentina et al.*, in P.PANTALONE (ed.), *Doveri intergenerazionali e tutela dell'ambiente. Atti del Convegno svoltosi presso l'Università degli Studi di Milano*, October 7, 2021, in *Il diritto dell'economia*, December 2021, pp. 102-118.

[897] It is worth mentioning that very useful guidance on the content of States' obligations to respect, protect and fulfil children's rights in the context of climate change, with specific indications on mitigation, adaptation and loss and damage, has recently been provided by the Committee in its General Comment No. 26, see CRC, *General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, UN Doc CRC/C/GC/26, August 22, 2023.

[898] *Sacchi et al. v. Argentina et al*., CRC/C/88/D/104/2019, para. 10.3

[899] Ibid., para. 10.4.

On this matter, the Committee recalled the IACtHR's Advisory Opinion OC-23/2017, which ruled that in instances of transboundary environmental harm, State jurisdiction exists when the State has effective control over the activity occurring on its territory that has caused harm to individuals outside its borders, effectively placing them under State jurisdiction. Therefore, the State is responsible for any harm inflicted on individuals outside its borders resulted from activities that occurred within its territory and are under its effective control[900].

The Committee upheld this approach, finding that it constitutes the "*appropriate test for jurisdiction in the present case*"[901] and concluding that, with regards to GHG emissions, the State's ability to regulate such activities demonstrates its effective control over the emissions.

Moreover, in light of the CBDR principle, the global nature of climate change does not exclude State's individual responsibility for its emissions; in addition, the potential harm of carbon emissions, in light of robust scientific evidence, was deemed "*reasonably foreseeable*"[902].

Therefore, the Committee concluded that "*the State party has effective control over the sources of emissions that contribute to the causing of reasonably foreseeable harm to children outside its territory*"[903].

As to the victim requirement, the Committee found that it was met. Applicants alleged to have been personally affected by events such as diseases and hospitalizations as a consequence of extreme events, vector-borne diseases and water scarcity and insecurity. The Committee underlined that children are particularly vulnerable to the impacts of climate change and require special safeguards; in light of all the mentioned factors, it concluded that the applicants "*have sufficiently justified, for the purpose of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable*" and that they have "*prima facie established that they have personally experienced a real and significant harm in order to justify their victim status*"[904].

Thus, the applicants successfully cleared two challenging procedural obstacles. Nonetheless, the Committee determined that they had not fully pursued all national remedies available to them.

It stressed (similarly in each decision against the five resistant States) that applicants had not attempted to initiate any domestic proceeding in their State and pointed out that they could not be absolved from doing so in light of mere doubts and assumptions concerning the chance of success and effectiveness of national remedies[905]. Despite expressing such doubts, the applicants provided

[900] Ibid., para. 10.5.
[901] Ibid., para. 10.7.
[902] Ibid., paras. 10.9-10.11.
[903] Ibid., para. 10.12.
[904] Ibid., para. 10.14.
[905] Ibid., paras. 10.17-10.18.

no further arguments as to why they did not pursue available remedies; moreover, no specific information on the excessive length of proceedings in the State parties was provided.

The Committee also recalled, in its decision concerning Germany, the Neubauer case, its timely decision and favourable outcome, which constituted an example of successful pursue of local remedies[906].

In light of the above, the Committee concluded that "*in the absence of any specific information by the authors that would justify that domestic remedies would be ineffective or unavailable, and in the absence of any attempt by them to initiate domestic proceedings in the State party, the authors have failed to exhaust domestic remedies*"[907].

Although the petitioners' claims were denied, the Committee's decision contains particularly interesting arguments on some of the most problematic procedural aspects of rights-based litigation, particularly standing and extraterritorial jurisdiction.

With regards to extraterritorial jurisdiction, the Committee further specified the concepts set forth by the IACtHR in its 2017 Advisory Opinion, specifying the requirements of effective control and reasonable foreseeability of harm[908].

With respect to standing, the Commission found that the victim requirement was satisfied, noting that the petitioners were directly and personally affected by the conduct of the resisting States. This may indicate that there is evidence – or at least that evidence can be provided in the context of similar proceedings – of the causal link between the alleged injury and the resistants' conduct. It should also be recalled, however, that the inquiry for the purpose of establishing standing clearly does not have the same degree of depth as that required for a decision on the merits; if the causal profile can be treated relatively superficially in the first instance, it is reasonable to assume that a decision on the merits will require a more scrupulous examination of the causal link (and thus a heavier burden of proof on the part of the plaintiff).

Overall, the pronouncement in question does not provide much useful guidance as to the etiological profile, which is only briefly touched upon without any in-depth exploration of the complex causal chain connecting a State's GHG emissions to a specific harm[909].

Nevertheless, and in conclusion, the decision, although based on procedural grounds, demonstrates that, contrary to what might appear at first glance, the procedural obstacles are surmountable. Moreover, both the extraterritoriality problem and the victim requirement were

[906] *Sacchi et al. v. Argentina et al*., CRC/C/88/D/107/2019, paras. 9.17-9.19.

[907] *Sacchi et al. v. Argentina et al*., CRC/C/88/D/104/2019, para. 10.20. This conclusion has nonetheless been the subject of criticism as being a harbinger of potential gaps in human rights protection; moreover, the availability of effective remedies in Turkey has also been questioned, see E.CARPANELLI, *Cambiamenti climatici* …, cit., p. 112.

[908] E.CARPANELLI, *Cambiamenti climatici* …, cit., p. 114.

[909] Ibid., p. 115, observing that the causal aspect was not explored in sufficient depth.

overcome and, on closer examination, the reasons given by the Committee with regard to the failure to exhaust domestic remedies suggest that this requirement could also be met if supported by specific reasons on the part of the petitioners (although this profile inevitably depends on the effectiveness or lack thereof of the remedies provided in each State).

As Carpanelli noted, the decision has paved the way "*at least from a procedural point of view, for the "successful outcome" of potential future communications*"[910].

3.2 Climate change and migration before the UNHRCttee: Teitiota v. New Zealand

In September 2015, Ioane Teitiota, a citizen of the Republic of Kiribati, submitted a communication before the HRCttee, claiming that New Zealand violated his right to life under Art. 6 of the ICCPR by rejecting his application for refugee status and removing him to Kiribati[911].

The applicant claimed that the impacts of climate change, including sea level rise and water scarcity, forced him to migrate from the island of Tarawa in the Republic of Kiribati where he lived, seeking asylum in New Zealand. However, the Immigration and Protection Tribunal denied his request on the grounds that no objective real risk of persecution was established and there was no evidence to support the applicant's allegations concerning lack of access to potable water and risks to his life; therefore, he could not qualify as a refugee under the 1951 Refugee Convention[912]. Despite appealing the decision, the Court of Appeal and the Supreme Court each denied the applicant's appeals[913].

After exhausting the national remedies, Mr. Teitiota filed his submission to the HRCttee, where the applicant emphasized the risks to his and his family's lives as climate change worsened and highlighted that the rise in sea level in Kiribati has led to environmental degradation and violent land disputes[914].

On January 7, 2020, the HRCttee published its views concerning the communication. Despite concluding that no violation of Art. 6 of the IPCCR could be ascertained, the decision touches upon aspects that are particularly relevant in the context of rights-based climate litigation[915].

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[910] Ibid., p. 115.

[911] *Teitiota v. New Zealand*, Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016*, CCPR/C/127/D/2728/2016, January 7, 2020 (hereinafter Teitiota v. New Zealand). The decision is available at: https://climatecasechart.com/non-us-case/un-human-rights-committee-views-adopted-on-teitiota-communication/.

[912] Ibid., paras. 2.8-2.9.

[913] Ibid., para. 2.2.

[914] Ibid., para. 3, para. 7.3.

[915] The case has drawn significant attention from scholars. For an analysis of the most relevant aspects of the Committee's Views, see: A.MANEGGIA, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee*, in *Diritti umani e diritto internazionale*, Issue 2, 2020, pp. 635-643; J.MCADAM, *Protecting People Displaced by the Impacts of Climate*

The Committee deemed the communication admissible, as the author provided, for the purpose of admissibility, enough elements to demonstrate that he faced a risk to his right to life as a consequence of New Zealand's decision to remove him to the Republic of Kiribati[916]. The merits were subsequently examined.

The Committee firstly recalled the content of its 2004 General Comment No. 31 concerning the obligation of States not to extradite, deport, expel or remove a person from their territory when there is a real risk of irreparable harm under Articles 6 and 7 of the Covenant, stressing that said risk must be personal and cannot derive from mere general conditions of the receiving State except "*in the most extreme cases*"[917]. It also stressed that States' obligations under Art. 6 are wider in scope than the principle of *non-refoulement* established under the 1951 Refugee Convention, as it also applies to aliens who do not qualify as refugees. States are therefore required to guarantee procedures that allow providing protection against *refoulement* for all asylum seekers. The assessment of the existence of a real risk of irreparable harm is generally left to the States Parties, unless the assessment amounts to a manifest error or denial of justice, or is clearly arbitrary[918].

Regarding the obligations of States under Art. 6, it is clarified that they encompass any reasonably foreseeable threats that may lead to loss of life. Furthermore, a violation can be detected even if no loss of life occurs. The Committee noted that environmental degradation and climate change constitute one of the most pressing threats to the right to life of present and future generations, and that these rights may be violated as a consequence of environmental degradation, as also clarified by the ECtHR[919].

Thus, the Committee has made clear that its evaluation concerns only the existence of manifest arbitrariness, manifest error or denial of justice in the assessment made by the State authorities. In this regard, it emphasized that the domestic Courts have extensively examined the allegations and evidence submitted by the applicant under both the Refugee Convention and the ICCPR. In light of the evidence gathered, the authorities of New Zealand concluded that there was no evidence of an actual and imminent risk to life in the event of return to Kiribati[920].

Change: The UN Human Rights Committee and the Principle of Non-refoulement, in *American Journal of International Law* , Vol. 114, Issue 4 , October 2020 , pp. 708-725 ; F.MUSSI, *Cambiamento climatico, migrazioni e diritto alla vita: le considerazioni del Comitato dei diritti umani delle Nazioni Unite nel caso Teitiota c. Nuova Zelanda*, in *Rivista di Diritto internazionale*, 2020, pp. 827-831; M.FOSTER, J.MCADAM, *Analysis of 'imminence' in international protection claims: Teitiota v New Zealand and beyond*, in *International & Comparative Law Quarterly* , Vol. 71, Issue 4, October 2022 , pp. 975-982; S.DOMAINE, *Cambiamenti climatici e diritti umani: il divieto di refoulement in Teitiota c.Nuova Zelanda*, in *Federalismi.it*, n. 23/2020, July 27, 2020, pp. 25-43.

[916] Teitiota v. New Zealand, see supra, para. 8.6.

[917] Ibid., para. 9.3.

[918] Ibid.

[919] Ibid., paras. 9.4-9.5.

[920] Ibid., para. 9.6.

In the Committe's view, there appeared to be no evidence of manifest arbitrariness or manifest error or denial of justice in the decision of the domestic authorities as to whether Mr. Teitiota faced a real, personal and reasonably foreseeable risk of a threat to his right to life, under any of the risk profiles highlighted by the applicant[921].

It concluded that "*Without prejudice to the continuing responsibility of the State party to take into account in future deportation cases the situation at the time in the Republic of Kiribati and new and updated data on the effects of climate change and rising sea-levels thereupon, the Committee is not in a position to hold that the author's rights under article 6 of the Covenant were violated upon his deportation to the Republic of Kiribati in 2015*"[922] and that "*The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not permit it to conclude that the author's removal to the Republic of Kiribati violated his rights under article 6 (1) of the Covenant*"[923].

However, in what constitutes the most remarkable finding of the decision, the Committee stressed that, in its view, "*without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized*"[924].

Committee member Vasilka Sancin disagreed with the majority's conclusion that the Committee was not in a position to consider the State Party's assessment with regard to access to safe drinking water clearly arbitrary, manifestly erroneous or a denial of justice[925].

Commission member Duncan Laki Muhumuza expressed a stronger dissent, stating that the Commission imposed an excessively burdensome proof requirement on the applicant to demonstrate a real risk to their right to life under Art. 6[926]. He also pointed out that the living conditions exhibited by the author, as a result of climate change, are sufficiently severe to constitute a real, personal, and reasonably foreseeable threat to his right to life. In this regard, "*the threshold*

[921] Ibid., para. 9.7-9.12.
[922] Ibid., para. 9.14.
[923] Ibid., para. 10.
[924] Ibid. para. 9.11.
[925] Ibid., Annex I, Individual opinion of Committee member Vasilka Sancin (dissenting), concluding that "*Considering all of the above, I am not persuaded that the author's claim concerning the lack of access to safe drinking water is not substantiated for finding that the State Party's assessment of author's and his family situation was clearly arbitrary or manifestly erroneous. This is why, in the circumstances of the present case, I disagree with the Committee's conclusion that the facts before it do not permit it to conclude that the author's removal to Kiribati violated his rights under article 6 (1) of the Covenant*".
[926] Teitiota v. New Zealand, see supra, Annex II, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting).

should not be too high and unreasonable"[927] and "*It would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable; in order to consider the threshold of risk as met*"[928]. While pointing out that adaptation measures are being implemented in Kiribati, the author's standard of living remains below the standard of dignity, irrespective of the fact that this circumstance is widespread for many other individuals in the country. In conclusion, Duncan Laki Muhumuza underlined that "*New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk*"[929].

While the Committe's conclusions on the merits, which are undoubtedly influenced by the limited degree to which national decisions are subject to review, are open to criticism, the most significant aspect of the decision is the extension of the *non-refoulement* obligation of States to climate change due to its impact on human rights. Thus, the fact that immediately emerges from this pronouncement is the potentially fundamental role of human rights in ensuring protection for people displaced by climate change (so-called "climate refugees" or "climate change migrants").

Clearly, the responsibility for safeguarding human rights rests firstly with the domestic authorities of each State. The success of the human rights framework is largely determined by the degree to which States enforce stringent standards for assessing real and personal risk and irreparable harm at the domestic level. It should be noted that in the current case, although it was acknowledged and established that Kiribati would become uninhabitable due to rising sea levels, the applicant's claim could not be accepted, as adaptive measures adopted in Kiribati within 10 to 15 years could still protect their right to life[930]. Although setting a risk threshold may seem reasonable, exceeding that threshold could result in a delayed response and undermine the effectiveness of protecting rights.

Rather, the key question concerns the imminence and/or foreseeability of the harm, which, as some authors have pointed out[931], the Committee did not express in a particularly clear manner. Specifically, the question arises as to whether it is necessary to look at the temporal datum and the imminence of the harm in order to establish the existence of a human rights violation.

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[927] Ibid., para. 3.

[928] Ibid., para. 5.

[929] Ibid., para. 6.

[930] The Committee also referred to the efforts by the international community to assist the Republic of Kiribati in implementing adaptation measures, including relocation when necessary, to protect its population (see para. 9.12.)

Maneggia noted that "*In this sense, the decision seems to suggest and promote future discussion and search for solutions on 'climate change and the most affected populations' using the paradigm of the responsibility to protect doctrine, revised and adapted to the large-scale consequences of climate change, in particular as to the role of the international community*", see A.MANEGGIA, *Non-refoulement* …, cit., p. 641.

[931] M.FOSTER, J.MCADAM, *Analysis* …, cit., p. 975.

This issue does not usually arise in international protection cases, where it is assumed that the risk faced by the individual would manifest itself within a short period of time after his or her return. In the case of climate change, however, there are phenomena, such as rising sea levels, that manifest themselves over a longer period of time.

In this regard, it has been pointed out that in international human rights law, as well as in international refugee law, there is no requirement of imminence: the principle of *non-refoulement* requires proof of a well-founded fear of being persecuted under refugee law, and proof of a real risk of being subjected to irreparable harm in HRL (although imminence is relevant to eligibility and victim requirement under the ICCPR)[932].

Certainly, the existence of an imminence requirement would in no small way frustrate the human rights paradigm in the context of climate change. However, there are reasons to believe that the Committe's decision was more properly based on the principle of foreseeability of harm, which, on closer examination, is a more appropriate criterion for analysis[933].

It is worth underlining – and this once again demonstrates the direct and indirect positive impacts of rights-based litigation – that the Teitiota case has already had an influence on national jurisprudence: the Italian Court of Cassation, in ruling No. 5022/2021, has cited the Committe's views on the Teitiota case, emphasizing that when evaluating widespread danger in the applicant's country of origin for humanitarian protection purposes, the risk to the right to life and dignity posed by environmental degradation and climate change must be taken into account[934].

3.3 The potential of adaptation-focused litigation: Torres Strait Islanders v. Australia

In May 2015, eight Australian nationals from an indigenous minority group living on low-lying islands in the Torres Strait region of Queensland, Australia, submitted a communication to the HRCttee alleging that they are victims of violations of the ICCPR resulting from Australia's failure to address climate change through adequate mitigation and adaptation measures[935].

The authors of the communication emphasized that their culture and way of life are deeply tied to the land, and that they are among the communities most threatened by climate change,

[932] Ibid., pp. 976-977.
[933] Ibid., pp. 981-982.
[934] *I.L. v. Italian Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*, Ordinance n. 5022/2021, Corte Suprema di Cassazione, Sez. II Civile. The ordinance is available at: https://climatecasechart.com/non-us-case/il-v-italian-ministry-of-the-interior-and-attorney-general-at-the-court-of-appeal-of-ancona/.
[935] *Torres Strait Islanders v. Australia*, Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019, September 22, 2022 (hereinafter Torres Strait Islanders v. Australia). The decision and the communication are available at: https://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/.

especially by rising sea levels, which will make the islands uninhabitable unless urgent action is taken[936].

In the authors' view, Australia failed to provide infrastructure to protect their lives, homes and culture against the impacts of climate change and failed to adequately reduce GHG emissions pursuant to the targets set in the Paris Agreement, resulting in a violation of Articles 2.1, 2.2, 2.3, 6 (the right to life), 17 (the right to privacy, family and home), 24 (the rights of children and future generations) and 27 of the ICCPR (the right to culture)[937]. They also emphasized that Australia provided no effective judicial remedies and that the communication should therefore be deemed admissible pursuant to Art. 5.2 lett.b) of the Optional Protocol[938].

The authors then outlined the main facts of the claim, illustrating the characteristics of the Torres Strait, the impacts of climate change in the region, Australia's climate change policy and the State's obligations under the climate change regime and human rights framework.

They therefore requested the Committee to declare Australia's violation of the recalled ICCPR's provisions by reason of its failure to adopt adaptation and mitigation measures; moreover, they requested the Committee to set out specific adaptation and mitigation measures[939]. As to adaptation, they included: the commission of a study on coastal defence for each island, in order to avoid displacement of communities; the implementation of measures to secure the communities' safe existence in their respective islands; the monitoring and review of the implementation of said measures. As to mitigation, the authors mentioned the need to amend laws and policies in order to strengthen mitigation commitments and comply with obligations under the ICCPR.

On September 22, 2022, the HRCttee issued its Views concerning the communication, ruling in favour of the authors.

The Committee declared the authors' claim admissible, recognizing, among other things, the authors' extreme vulnerability to the effects of climate change (which have already occurred and are ongoing), particularly in light of their location and limited resources, which created a more than theoretical possibility of a risk of violation of their rights[940].

As to the exhaustion of local remedies, the Committee found that Art. 5.2 lett.b) of the Covenant did not preclude the examination of the communication, underlining that Australia did not contest the authors' allegation that the highest court in Australia has ruled that State organs "*do not owe a duty of care for failing to regulate environmental harm*" and noted the absence of

[936] Ibid., Communication No. 3624/2018, para. 3.
[937] Ibid., paras. 7-8.
[938] Ibid., paras. 9-27.
[939] Ibid., paras. 210-216.
[940] *Torres Strait Islanders v. Australia*, Human Rights Committee, *Views adopted ...,* see supra, para. 7.10-7.11.

information from the State party indicating the effectiveness and availability of domestic remedies[941].

Each alleged violation of Covenant rights was subsequently examined.

As to Art. 6 (the right to life), the Committee once again stressed that the right to life shall not be interpreted in a restrictive manner and that States are required to adopt positive measures to protect it; in addition, it underlined that the right includes the right of individuals to enjoy a life with dignity and to be free from "*acts or omissions that would cause their unnatural or premature death*"[942]. Nonetheless, the Committee did not ascertain a violation of the authors' right to life under Art. 6. Crucial to this conclusion, and not dissimilar to the Teitiota case, was the fact that Australia had demonstrated that it had planned (and partially implemented) a range of adaptation measures to protect the lives of the authors in the face of the threat of sea-level rise (including the Torres Strait Seawalls Program, aimed at constructing infrastructures o address ì coastal erosion and storm surges); the time frame of 10 to 15 years indicated by the authors was considered sufficient for the adoption of appropriate measures to protect the authors' rights (including the possible relocation of the population)[943].

However, the Committee found that a violation of the authors' rights under Art. 17 and Art. 27 had occurred and this precluded the examination of the remaining claims under Art. 24.1[944].

As to Art. 17, it was stressed that State parties are required to prevent interference with the right to privacy, family and home even from environmental damage. The Committee noted that the authors heavily rely on resources of their land for subsistence and livelihoods and are dependent on the health of their surrounding ecosystems, all elements which fall within the scope of Art. 17, which requires States to adopt positive measures to ensure the effective exercise of said right[945]. In this regard, the Committee noted that the State party had not provided any information to demonstrate that it had fulfilled its positive obligation to adopt measures of adaptation to protect authors' rights under art. 17, and therefore found a violation of that provision.

As to Art. 27, the Committee stressed that it "*enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity*"[946]. According to the Committee, climate change has already interfered with the authors' right to culture as a consequence of reduced viability of the islands and

[941] Ibid., para. 7.3
[942] Ibid., para. 8.3.
[943] Ibid., para. 8.7.
[944] Ibid., paras. 9-10.
[945] Ibid., para. 8.10.
[946] Ibid., para. 8.13.

the surrounding seas; said impacts "*could have reasonably been foreseen*"[947] by Australia, as the authors raised the issue since the 1990s. Despite the (ongoing) implementation of adaptation measures, the Committee found that Australia's delay demonstrated an inadequate response to the threat and, in light of the available information, concluded that the State party failed to adopt timely and adequate adaptation measures aimed to protect the authors' "*ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources*"[948]. Therefore, it found a violation the authors' rights under Art. 27.

In light of the above, the Committee emphasized that the State party is under an obligation to provide full reparation to individuals whose rights have been violated. It stated that the State party is under an obligation to provide adequate compensation and to continue to implement and monitor measures to protect authors' rights, as well as to prevent future violations[949].

The Committee also requested the State party to provide, within 180 days, information on the steps taken to give effect to the Committee's Views and to publish and publicize the Views[950].

The case illustrates the unique challenges in safeguarding the human rights of indigenous peoples. The use of land is fundamental to their cultural and religious identity, making it an indispensable element. This underscores the critical importance of land protection in upholding these rights.

The decision constitutes the first successful case before international human rights bodies and therefore represents an important step forward in rights-based litigation[951], although the authors' claims were only granted in part and only with reference to the rights enshrined in Articles 17 and 27. Moreover, State's responsibility was associated with insufficient and non-timely adaptation action, while no useful indications were provided with regard to mitigation obligations (which, conversely, constitute the main focus of domestic climate litigation).

Unlike in Teitiota, the requirement of prior exhaustion of domestic remedies was met; however, in light of the decision, it appears that this depended, at least in part, on Australia's failure to specifically challenge some of the claimants' allegations. It is therefore difficult to predict whether this approach will be followed in future cases, although it is worth reiterating that the effectiveness of local remedies varies from country to country.

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[947] Ibid., para. 8.14.
[948] Ibid.
[949] Ibid., para. 11.
[950] Ibid., para. 12.
[951] R.LUPORINI, A. SAVARESI, *International human rights bodies and climate litigation: Don't look up?*, in *RECIEL*, 2023;32, p. 275. For an analysis of the decision, see C.BHARDWAJ, *Adaptation and human rights: a decision by the Human Rights Committee Daniel Billy et al. v. Australia CCPR/C/135/D/3624/2019*, in *Environmental Law Review*, Vol. 25, Issue 2, 2023, pp. 154-161.

As observed earlier, previous climate cases before international human rights bodies – namely *Teitiota*, *Sacchi et al. v. Argentina* and the *Inuit* case – were unsuccessful.

The Committee's use of a different standard for assessing the existence of a violation of the right to life, on the one hand, and the rights to culture, private and family life, and housing, on the other, has been criticized for leaving various gaps and for not considering the inter-dependence of human rights[952]. In fact, Committee Member Duncan Laki Muhumuza, in his individual opinion, recalled the findings of Urgenda and argued in favour of the existence of a violation of Art. 6, observing that the State party had not taken sufficient measures to prevent foreseeable loss of life from the impacts of climate change, including measures to reduce GHG emissions (therefore referring to mitigation obligations, rather than exclusively considering adaptation).

Proving a violation of the right to life protected by Article 6 is significantly more intricate than invoking collective rights like the right to culture and land use. Hence, leveraging these rights, particularly in litigation undertaken by indigenous peoples, appears to be the most effective approach to uphold claims.

Overall, there are several aspects of the case that make it particularly important in the context of rights-based climate litigation. First, as noted above, the case demonstrates that in certain circumstances it is feasible to appeal directly to international human rights bodies using exceptions to the rule of prior exhaustion of domestic remedies.

In addition, and perhaps most significantly, this case demonstrates the great potential of adaptation-focused litigation, which to date is underdeveloped – just as national policies on adaptation are far less developed than those on mitigation – but is likely to become increasingly important. Adaptation-focused litigation can be an important and highly effective tool because it often does not require proof of the complex causal chain between a State's emissions and the alleged human rights violation that is (at least in theory) required in mitigation cases. Instead, the focus is on assessing whether the individual State has taken adequate measures to protect human rights through its adaptation efforts. As such, issues of causation and attribution are less relevant. In this sense, claims on climate change adaptation may have a better chance of success, especially when they address situations of State inaction towards indigenous groups, vulnerable communities and territories severely affected by climate change.

While the Committe's Views are not legally binding, they have a significant influence on policy decisions. This impact extends not only to the State directly affected – as evidenced by Australia's recent allocation of substantial funds for marine infrastructure in the Torres Strait and

[952] C.BHARDWAJ, *Adaptation ...,* cit., p. 154, p. 161.

the Northern Peninsula[953] – but also to the wider community of States and even to national courts' decisions[954].

3.4 Procedural hurdles before the CJEU: the People's Climate case

In May 2018, Armando Carvalho and 35 other individuals from Germany, France, Italy, Romania, Kenya, and the Fiji Islands, together with the NGO Sáminuorra, filed a case against the European Parliament and the Council before the General Court of the European Union (often referred to as "The People's Climate Case"). The applicants sought the annulment, pursuant to Art. 263 TFEU, of a series of normative acts adopted by the EU pursuant to the Paris Agreement, as a part of its climate policy, namely directive n. 2018/410[955], regulation n. 2018/841[956] and regulation n. 2018/842[957][958]; in addition, the applicants sought the establishment of the non-contractual liability of the institutions pursuant to Art. 268 and Art. 340 TFEU[959].

The applicants asserted that the EU's goal to decrease GHG emissions by 40% by 2030 as compared to 1990 levels failed to meet the necessary ambition. Consequently, this policy violated international norms and human rights protected by the CFREU.

The applicants also requested the Court to order the defendants to adopt measures aimed at achieving GHG reductions of 50%-60% by 2030 as compared to 1990 levels.

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[953] See https://minister.infrastructure.gov.au/c-king/media-release/torres-strait-and-northern-peninsula-area-receive-record-investment-marine-infrastructure.

[954] This was recently highlighted by Luporini, who also provided other interesting insights on the case, see R.LUPORINI, *Climate Change Litigation before International Human Rights Bodies: Insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case)*, in *The Italian Review of International and Comparative Law*, Vol. 3, 2023, pp. 238–259, p. 259; see also C.CERETELLI, *Tutela dei diritti umani e lotta al cambiamento climatico: il caso Torres Strait Islanders dinanzi al Comitato dei diritti umani*, in *Diritti umani e diritto internazionale*, Vol. 17, Issue n. 3, 2023, pp. 761-773.

[955] *Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814*, L 76/3, March 14, 2018.

[956] *Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/E*, L 156/1, May 30, 2018.

[957] *Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013*, L 156/26, May 30, 2018.

[958] As outlined by the applicants, the legislation regulates three different sources of GHG emissions: power generation, heavy industry and aviation, subject to an emission trading system (ETS); other sources which are subject to the effort sharing regulation (ESR), such as emissions from buildings, transportation and agriculture; sources from land use, land use change and forestry (LULUCF).

[959] *Armando Carvalho and Others v. European Parliament and Council of the European Union*, Case T-330/18, Order of the General Court (Second Chamber), May 8, 2019; *Armando Carvalho and Others v. European Parliament and Council of the European Union*, Case C-565/19 P, Judgment of the Court (Sixth Chamber), March 25, 2021 (hereinafter Carvalho et. al. v. EU).

Similarly to most climate change cases, the applicants firstly illustrated the impacts of climate change by largely relying on the findings of the IPCC and then illustrated the specific effects on the applicants[960].

The admissibility of the application pursuant to Art. 263.4[961] (as to annulment) and Art. 340 (as to non-contractual liability) TFEU was subsequently addressed. The applicants claimed that they were directly and individually concerned by the challenged acts. As to being individually concerned, they argued that the standard established by the Plaumann formula[962] was met; in the alternative, they claimed that the Plaumann formula should not apply for various reasons, including the potential refusal of legal protection and the "*intolerable paradox that the more serious the harm and thus the higher the number of affected persons is, the less legal protection is available*"[963]. As to admissibility under Art. 340 TFEU, the applicants argued that "*Claims based on Article 340 TFEU need only to show that the plaintiff has suffered damage caused by EU action. Causation of loss is addressed in detail below; on the basis of the facts there alleged, it is submitted that the claims are admissible*"[964].

The applicants argued that higher rank norms bound the Union to avoid human rights violations associated with climate change and to adopt adequate mitigation measures; in their view, the EU's policy fell short and should therefore be nullified. Moreover, the failure to comply with higher rank norms determined the EU's non-contractual liability. Said higher norms include: the provisions of the CFREU, namely Art. 2 (the right to life), Art. 3 (the right to health), Art. 24 (rights of children), Art. 15 (the right to an occupation), Art. 17 (the right to property); customary rules such as the no-harm principle; the Paris Agreement; EU primary law and the principle of prevention of damage pursuant to Art. 191 TFEU[965].

The claim that EU's targets fell short was grounded on the alleged violation of EU's equitable share in the global carbon budget. In order to identify said equitable carbon budget, the

[960] Carvalho et. al. v. EU, Application of May 23, 2018, pp. 9-26.

[961] Art. 263.4 of the TFEU reads as follows: "*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*". See generally, on legal standing for non-privileged applicants, R.ADAM, A.TIZZANO, *Lineamenti di Diritto dell'Unione europea*, Giappichelli, 2022, pp. 267-272; U.DRAETTA, F.BESTAGNO, A.SANTINI, *Elementi di Diritto dell'Unione europea*, Giuffrè, 2022, pp. 301 and ff.

[962] *Plaumann & Co. v Commission of the European Economic Community*, Case 25-62, EU:C:1963:17, July 15, 1963. In this landmark judgement, the Court articulated the so-called Plaumann formula, stating that: "*Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*".

[963] Carvalho et. al. v. EU, Application of May 23, 2018, para. 133.

[964] Ibid., para. 152.

[965] Ibid., pp. 41-53.

applicants largely drew upon the findings of the IPCC and, in light of the targets set in the Paris Agreement, identified a budget range calculated on a per capita population basis; calculations were then made with regards to the time necessary to exhaust such budget and with regard to EU's necessary rate of emissions reductions in order to remain within its budget range[966].

On May 8, 2019, the General Court dismissed the action as inadmissible.

With regards to admissibility of the claim for annulment, the Court observed that the challenged legislative acts did not identify the applicants as addresses; therefore, the first criteria for establishing standing under Art. 263.4 was excluded[967].

As to the third criteria established by Art. 263.4 TFEU, under which an action may be brought against a regulatory act (if certain conditions are met), the Court concluded that the challenged acts were legislative acts (adopted pursuant to Art. 192.1 TFEU) and therefore admissibility could not be established on that basis[968].

As to the second criteria established by Art. 263.4 TFEU, which allows action against an act that is of direct and individual concern to the applicants, the Court first noted that the requirements are cumulative and that the failure to establish the individual concern would preclude the examination of the existence of a direct concern[969]. The Court recalled the Plaumann case and observed that *"According to settled case-law, natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the addressee*"[970].

According to the Court, the plaintiffs failed to show that the challenged legislation violated their fundamental rights and distinguished them individually from all other individuals affected by the legislation. While it is true that each individual may be differently affected by climate change, "*the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application*"[971].

In the Court's view, "*a different approach would have the result of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless and of creating locus standi*

[966] Ibid., paras. 256-258.
[967] Carvalho et. al. v. EU, Order of May 8, 2019, para. 35.
[968] Ibid., paras. 40-42.
[969] Ibid., para. 44.
[970] Ibid., para. 45.
[971] Ibid., para. 49.

for all without the criterion of individual concern within the meaning of the case-law resulting from the judgment of 15 July 1963, Plaumann v Commission (25/62, EU:C:1963:17), being fulfilled"[972].

With regard to the NGO Sàminuorra, the Court concluded that its action was also inadmissible, not only because it had not shown that it was individually concerned, but also because the other conditions for the admissibility of an action for annulment brought by an association were not met[973].

The Court also rejected the applicants' claim that the established interpretation of Art. 263.4 would result in a violation of Art. 47[974] of the CFREU (the right to an effective remedy and to a fair trial) by making a directly applicable regulation immune to judicial review. According to the Court, Art. 47 does not provide individuals with an "*unconditional entitlement to bring an action for annulment of such a legislative act of the Union directly before the Courts of the European Union*"[975].

In addition, the Court observed that, despite the inadmissibility of a direct challenge of said acts, natural and legal persons would still be able to either plead their invalidity indirectly under Art. 277 TFEU or ask national courts to "*question the Court in that regard through questions referred for a preliminary ruling*"[976].

With regards to the admissibility of the claim for damages, the Court recognized that the action for damages is an autonomous form of action and it may not be declared inadmissible automatically as a consequence of the inadmissibility of the annulment action. However, it should be declared inadmissible if it aims to achieve a result similar to the result of annulling the act when the action for annullment would be inadmissible[977].

The Court underlined that, through the action for damages, applicants did not seek compensation for damages, but instead aimed to obtain an injunction order requesting the Union to adopt measures to put an end to its unlawful and harmful conduct. Therefore, the two actions aimed to obtain the same result (the introduction of new measures that pursue a more ambitious GHG

[972] Ibid., para. 50.

[973] Ibid., para. 51, where the Court observes that "*In the second place, it is settled caselaw that actions for annulment brought by associations have been held to be admissible in three types of situation: firstly, where a legal provision expressly grants a series of procedural powers to trade associations; secondly, where the association represents the interests of its members, who would themselves be entitled to bring proceedings; and, thirdly, where the association is distinguished individually because its own interests as an association are affected, in particular because its negotiating position has been affected by the act in respect of which annulment is sought*".

[974] Art. 47.1 CFREU provides that: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*".

[975] Carvalho et. al. v. EU, Order of May 8, 2019, para. 52.

[976] Ibid., para. 53.

[977] Ibid., para. 55-56.

reduction target): from the inadmissibility of the action for annulment follows that the action for compensation, aimed to obtain the same result, is also inadmissible[978].

The applicants appealed the decision to the ECJ. On March 25, 2021, the ECJ dismissed the appeal[979].

The ECJ largely confirmed the correctness of the General Court's findings and reasoning. It is worth noting that with regard to the plaintiffs' request to change the interpretation of admissibility established since the Plaumann judgment, the ECJ found that this would be contrary to what is expressly enshrined in a Treaty provision, namely Article 263.4 TFEU, and therefore noted that "*appellants cannot ask the Court of Justice to set aside such conditions, which are expressly laid down in the FEU Treaty, and, in particular, to adapt the criterion of individual concern as defined by the judgment in Plaumann, in order that they may have access to an effective remedy*"[980].

The decisions of the General Court and the ECJ are in line with the established case law that has developed since the Plaumann ruling, so the pronouncements, while unsatisfactory for the purposes of access to climate justice and the protection of fundamental rights, should certainly not be surprising. Moreover, the Court reached a similar conclusion in the Sabo and others case, where the plaintiffs challenged the EU's directive on renewable energy and sought its annulment[981]. The ECJ confirmed its restrictive interpretation of Art. 263.4 TFEU, pursuant to the established Plaumann formula.

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[978] Ibid., paras. 69-70.

[979] For an analysis of the judgements of the General Court and of the ECJ and the lingering obstacles to legal standing for climate change claims before the ECJ, see: M.WILLERS, *Climate Change Litigation in European Regional Courts: Jumping Procedural Hurdles to Hold States to Account?*, in ALOGNA et. al., cit., pp. 294-309; F.VONA, *La Corte di Giustizia conferma l'irricevibilità del ricorso nel c.d.'People's Climate Case': la formula 'Plaumann' quale persistente ostacolo all'accesso alla giustizia in materia climatica*, in *Ordine internazionale e diritti umani*, 2021, pp. 484-492; I.ANRÒ, *Il difficile accesso alla giustizia ambientale per le ONG e la riforma del Regolamento di Aarhus: nuove vie verso la Corte di giustizia dell'Unione europea?*, in *Federalismi.it*, n. 11/2022, pp. 1-29; G.AGRATI, *I limiti della formula Plaumann in tema di diritto ambientale: brevi note alla sentenza della Corte di giustizia nella causa C-565/19 P, Carvalho e a. c. Parlamento e Consiglio*, in *Eurojus*, May 23, 2021.

For an analysis of the judgements and an overview of climate change litigation before the ECJ and the ECtHR, see: J.HARTMANN, M.WILLERS, *Protecting rights through climate change litigation before European* courts, in Journal *of Human Rights and the Environment*, Vol. 13 Issue 1, 2022, pp. 90-113; O.QUIRICO, *The European Union and global warming: A fundamental right to (live in) a sustainable climate?*, in *Maastricht Journal of European and Comparative Law*, 0(0), OnlineFirst, October 9, 2023, pp. 1-19; E.VANNATA, *Environmental Solidarity and the Rule of Law in the EU System: Some Explanatory Reflections on Climate Justice Case-Law*, in T.RUSSO, A.ORIOLO, G.DALIA (eds.), *Solidarity and Rule of Law. The New Dimension of EU Security*, Springer, 2023, pp. 227-242; M. VAN WOLFEREN, M. ELIANTONIO, *Access to Justice in Environmental Matters: The EU's Difficult Road Towards Non-Compliance with the Aarhus Convention*, in M. PEETERS, M. ELIANTONIO (eds.), *Research Handbook on EU Environmental Law*, Edward Elgar Publishing, 2020, pp. 148 and ff.

[980] Carvalho et. al. v. EU, Judgement of March 25, 2019, para. 76.

[981] *Sabo and Others v. European Parliament and Council of the European Union*, Case T-141/19, Order of the General Court, May 6, 2020; *Sabo and Others v. European Parliament and Council of the European Union*, Case C-297/20 P, Order of the Court, January 14, 2021. In the present case, the plaintiffs, who came from areas particularly impacted by forest logging, challenged the EU's directive that considered forest biomass a renewable source of energy, highlighting, among other things, the significant GHG emissions of wood-burning power plants, see J.HARTMANN, M.WILLERS, *Protecting rights ...*, cit., pp. 93 and ff. All case documents are available at: https://climatecasechart.com/non-us-case/eu-biomass-plaintiffs-v-european-union/.

Nevertheless, this approach has been firmly contested by the doctrine[982] as conflicting with both the provisions of Article 9.3 of the Aarhus Convention, under which "[…] *each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*"[983] and Art. 47 of the CFREU.

To date, legal arguments aimed to reverse said tendency – which have been extensively illustrated by plaintiffs in reviewed cases – have not been taken up by the CJEU, which, on closer inspection, has not even examined them in detail.

Therefore, it appears that significant procedural obstacles remain, making it difficult to challenge European legislation before the CJEU, even when adopting a human rights-based approach. It is unlikely that these obstacles can be overcome unless there is a radical change in case law[984].

In fact, even recent legislative developments have had limited scope. Regulation 2021/1767 has amended the Aarhus Regulation[985], aiming to broaden standing requirements for NGOs in environmental matters. It extended administrative recourse to non-legislative acts of general application, which are now appealable by NGO's. However, as Anrò observed, a substantial progress in access to justice would require broadening the requirements for judicial recourse; this would include overcoming the Plaumann jurisprudence by allowing NGO's to challenge general legislation when an environmental harm is established[986].

3.5 Climate change before the ECtHR

3.5.1 Duarte Agostinho et al. v. Portugal and 32 other States

[982] M.WILLERS, *Climate Change* …, cit., p. 302. See also F.PASSARINI, *Legal Standing of Individuals and NGOs in Environmental Matters under Article 9(3) of the Aarhus Convention*, in *The Italian Review of International and*

Comparative Law, Vol. 3, 2023, p. 298 and ff.

[983] The provision was implemented by the EU through *Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies*, L 264/13, September 6, 2006.

[984] O.QUIRICO, *The European Union* …, cit., p. 18.

[985] *Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies*, L 356/1, October 6, 2021. For an analysis of the Regulation, see I.ANRÒ, *Il difficile accesso* …, cit.

[986] I.ANRÒ, *Il difficile accesso* …, cit., p. 25. However, as the author notes, this would create unequal treatment with associations bearers of other diffuse interests, e.g., in health care or the protection of fundamental rights, which would be difficult to justify.

In September 2020, Cláudia Duarte Agostinho and five other Portoguese youth filed a complaint before the ECtHR, alleging that the 33 respondent States violated their rights enshrined in the Convention by contributing to climate change[987].

The applicants alleged that the respondent States failed to comply with their positive obligations under Art. 2 (the right to life), Art. 8 (the right to respect for private and family life) and Art. 14 (prohibition of discrimination) read in conjunction with Art. 2 and Art. 8.

In the applicants' view, the 33 States, who are under an obligation to adopt adequate measures to regulate their contribution to climate change, failed to comply with mitigation targets set in the Paris Agreement, aimed at minimizing the risks and effects of climate change.

In the Statement of facts section, the applicants illustrate the climate change international framework, the causes and current trends of climate change and the measures required to meet the 1.5°C target. They then outline their vulnerability to climate change impacts, underlining that Portugal is already facing the consequences of climate change with extreme high temperatures, heatwaves and consequent wildfires; they allege to be currently exposed to risks of harm from increased heat and its associated consequences.

The applicants live in Lisbon and in the district of Leiria, areas which they claim to be facing an increase in extreme fire risk; they allege that wildfires came very close to their homes, making them anxious and upset and horrified by the awareness of nearby people being killed by the fires; moreover, one of the applicants could not attend school as a consequence of excessive smoke in the air[988]. Additionally, the applicants allege that heatwaves interfere with their ability to sleep, exercise and spend time outdoors.

As to the alleged violations, the applicants firstly elaborate on Articles 2 and 8 as interpreted by the jurisprudence of the Court and stress that the respondent States' duties must be construed in light of the principles of intergenerational equity and precaution; they claim that the Respondents have breached their duties, as their mitigation measures have allowed global warming that will vastly exceed the 1.5°C target and must therefore be presumed inadequate. In addition, a violation of Art. 14 (read together with Articles 2 and 8) is alleged as a consequence of greater interference of climate change on the applicants' rights as compared to older generations.

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[987] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Other States*, Application no. 39371/20, September 7, 2020 (hereinafter Duarte Agostinho). The respondent States are Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Spain, Estonia, Finland, France, United Kingdom, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Sweden, Turkey and Ukraine. Case documents are available at: https://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/.

[988] *Duarte Agostinho*, see supra, Application, paras. 21-22.

As to the admissibility criteria under Art. 35 of the Convention (prior exhaustion of national remedies), the applicants have brought the case directly to the ECtHR, without firstly exhausting local remedies. However, in their view, there are no adequate domestic remedies reasonably available to them, for the following reasons: firstly, the alleged violations are a consequence of all respondent States' cumulative contributions to climate change and the urgency of the matter prevents the pursuit of an adequate remedy in each and every State's domestic courts, and there is therefore an exceptional need to absolve the applicants from the requirement; secondly, the applicants are children and young adults from families of modest means and requiring them to exhaust remedies in each Respondent State (let alone the issue of legal standing to do so), would impose an unreasonable and disproportionate burden on them[989].

The applicants' arguments are further outlined in the Annex to the application form. As to the alleged violations, the victim status and the respondents' responsibility, the applicants underline that Art. 34 should not be applied in a rigid way, that victimhood may be established where there is "*reasonable and convincing evidence of the likelihood that a violation affecting [an applicant] personally will occur*" and that it is "*sufficient that an applicant is specifically likely to be affected by the impugned act/measure; or that the measure potentially affects everyone*"[990].

With regards to causation, the applicants reject the thesis that each respondent State's contribution to climate change, taken in isolation, would not cause an interference with the applicants' rights. They emphasize that "*there is no 'but for' test for causation in the jurisprudence of the ECtHR*" and that "*Breach is found in the absence of proven causation where reasonable preventive measures were available and not taken*", recalling the findings of Urgenda and of the ICJ in the Bosnian Genocide case[991].

Moreover, the applicants emphasize that international persons who contribute to an invisible injury share responsibility when each of them engages in a distinct conduct that constitutes a breach of an international obligation; they underline that this conclusion is reflected in Principles 2 and 4 of the Guiding Principles on Shared Responsibility in International Law[992] and in the Articles on

[989] Ibid., para. 32.

[990] Ibid., Annex, para. 7.

[991] Ibid., Annex, para. 9. Useful indications on the standard of proof concerning causation adopted by the Court in environmental matters can be found in the Court's Guide to its case-law on the environment, see ECtHR, *Guide to the case-law of the European Court of Human Rights. Environment*, August 31, 2022, paras. 85 and 86. The Guide is available at: https://www.echr.coe.int/documents/d/echr/Guide_Environment_ENG.

In general, applicants who allege an impact on their health as a result of pollution are required to prove the illness and its causal correlation with the pollution or disturbance; as stated in *Tătar v. Romania*, the adoption of a probabilistic approach - which could not be accepted in that case - should not be generally excluded, but it would require adequate convincing statistics.

[992] A.NOLLKAEMPER, J.D'ASPREMONT, C.AHLBORN, B.BOUTIN, N.NEDESKI, I.PLAKOKEFALOS, collaboration of D.JACOBS, *Guiding Principles on Shared Responsibility in International Law*, in *European Journal of International Law*, Vol. 31, Issue 1, February 2020, pp. 15–72. Applicants relied on Principle 2, which concerns shared

Responsibility of States for Internationally Wrongful Acts (ARSIWA, to which the Court has often relied on). According to the applicants, the recalled Guiding Principles substantiate applicable international law. Therefore, they conclude that the States' contributions to environmental harm, in violation of their respective international obligations (namely the duties under Articles 2, 8 and 14), determine a shared responsibility for that harm[993].

As to jurisdiction[994], the applicants argue that not only are they under the jurisdiction of Portugal, where they reside, but that they are within the extraterritorial jurisdiction of the 32 other respondent States. They observe that there are circumstances where jurisdiction may be established when acts performed within national boundaries produce effects outside such boundaries[995].

In addition, they emphasize that when certain features are present, States' extraterritorial jurisdiction exists as they exercise a "*significant degree of control over a particular ECHR-protected interest or set of interests of a person outside of its territory and as a result of that control the state on whose territory that person was present had a limited ability to protect that interest or those interests*"[996]. Said features, which are grounded on various precedents of the Court, include: the fact that the extraterritorial effect is envisaged by, or a direct consequence of, a law adopted by the State; the fact that the effects outside the territory were foreseeable; the fact that the State's conduct produced extraterritorial effects related to resources under its control; the fact that the extraterritorial effect arises from the implementation of a particular international obligation; the fact that the protection of an interest protected by the Convention requires intervention from more than one contracting State[997]. In the applicants' view, all features exist with regards to climate change and, more generally, all the respondent States exercise significant control over the interest of the applicants protected by the Convention[998].

The conclusion that States exercise jurisdiction under Art. 1 in light of the extraterritorial effects of climate change is further confirmed by IACtHR's 2017 Advisory Opinion, according to which jurisdiction is established when the State exercises effective control over the activities which may violate human rights[999].

With respect to the determination of the State's fair share of emission reductions, the applicants request that the Court rely on the findings of the Climate Action Tracker (CAT), a

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responsibility of international persons, and Principle 4, which addresses shared responsibility arising from multiple internationally wrongful acts.

[993] *Duarte Agostinho*, see supra, Application, Annex, para. 13.

[994] Under Art. 1 of the ECHR "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*".

[995] *Duarte Agostinho*, see supra, Application, Annex, para. 17.

[996] Ibid., para. 19.

[997] Ibid., para. 18.

[998] Ibid., paras. 20-21.

[999] Ibid., para. 24.

scientific analysis that assesses the appropriate mitigation obligations of States in light of the targets set forth in the Paris Agreement, to determine a fair burden share; they underline that, with regards to numerous countries, the CAT has rated the mitigation commitments undertaken by the States as largely insufficient[1000].

During the written phase of the proceeding, numerous third parties intervened (including NGOs and UN Special Rapporteurs with *amicus curiae* briefs).

The Chamber to which the case was allocated decided to address it with priority pursuant to Rule 41 of the Rules of the Court and, in June 2022, it relinquished jurisdiction in favour of the Grand Chamber.

3.5.2 Procedural and substantive hurdles of the Duarte case

The Duarte case is the first climate change case to be brought before the Court, and arguably one of the most important climate cases the Court has ever heard, as well as one of the most ambitious and challenging. Indeed, it is clear that the Court's decision could provide fundamental clarifications on numerous aspects of rights-based litigation and thus influence its future prospects. Suffice it to point out that Articles 2 and 8 of the Convention are constantly invoked by claimants in domestic litigation, so the Court's input on the precise content of the obligations enshrined therein with respect to climate change would be quite valuable. In addition, the Court's decision would certainly have a significant impact on policy making and political processes.

The hearing of the case took place in September 27, 2023[1001]. On that occasion, the Judges posed questions to the Parties, which subsequently provided their answers.

It is, of course, very difficult to predict how the Court will rule. However, it is clear that there are procedural aspects that are of crucial importance (as their consideration comes at a stage prior to the examination of the merits), and this seems to be confirmed by the questions formulated by the Judges at the oral hearing, which only touched on the substantive aspects, focusing instead on the issues of extraterritoriality and prior exhaustion of local remedies[1002].

Regarding extraterritorial obligations, the applicants argue that non-territorial States' control of their own emissions is sufficient evidence to prove jurisdiction under Art. 1. They therefore support an evolution of the previous jurisprudence, also in light of the Sacchi case and the findings of the IACtHR in its 2017 Advisory Opinion.

[1000] Ibid., paras. 31-34.

[1001] The Grand Chamber hearing of September 27, 2023 is available at: https://www.echr.coe.int/w/duarte-agostinho-and-others-v-portugal-and-others-no-39371/20-.

[1002] Judge Koskelo observed that Portugal had pointed out in its defence that the Portuguese Constitution recognizes, in Art. 52, the *actio popularis*, and therefore asked the applicants whether their defence was to argue that, as a general rule, the rule of prior exhaustion did not apply to the present case, or whether Portugal's defence should be considered unfounded, or whether *actio popularis* should not be considered an effective remedy; other questions concerned the feasibility of remedies granted by EU law.

It should be noted that, to date, the Court's jurisprudence is oriented in the sense that jurisdiction is primarily territorial, as stated in the well-known Banković case[1003], although it has recognized some exceptions (as the applicants point out). It is also true that the Court has extended jurisdiction to hypotheses in which the State exercises effective control over an area outside its territory[1004], but these were quite different situations from the one under consideration, in which it would be necessary to show that States, through GHG emissions, exercise effective control over an area outside their territory where the alleged violations occurs. It is clear, therefore, that the very nature of climate change as a global environmental phenomenon greatly complicates the assessment. Moreover, it would be necessary to inquire, as requested by Justice Oyomar during the hearing, whether extraterritorial jurisdiction can extend outside the Convention space.

The Defendants replied that none of the exceptions to territorial jurisdiction exist and that the yardstick for jurisdiction cannot be the criterion of effective connection; they also pointed out that the Applicants did not identify any particular connection between them and the non-territorial States, referring to general features of climate change that could be invoked by anyone. According to the Defendants, the Applicants are not calling for an evolution of case law but for a revolution in case law, which would introduce a new, and ungrounded, model of jurisdiction. The concept of "control" being introduced would not alter the fact that we are dealing with a cause-and-effect association, while causality is an unsuitable foundation for jurisdiction. Additionally, the ECHR should not adopt the Sacchi and the 2017 Advisory Opinion's solutions due to their basis on a jurisdictional concept linked to cause-and-effect.

Another problematic aspect of the case is that the Applicants filed a complaint directly before the ECtHR without first exhausting local remedies, including those available in Portugal. On this point, it is indeed true that individual national courts would not be able to rule on the emissions of the other 32 States, and it is equally true that the EctHR could provide crucial guidance for national courts. However, it is unclear if such exigencies can legally justify the failure to exhaust

[1003] ECtHR, Banković and Others v. Belgium and Others, Application no. 52207/99, December 12, 2001. With regards to the meaning of the words "*within their jurisdiction*" under Art. 1 of the Convention, the court stressed (para. 59) that "*As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States* […]". See also para. 61: "*The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case* […]".

[1004] ECtHR, Loizidou v. Turkey, Application no. 15318/89, December 18, 1996, para. 52; ECtHR, *Cyprus v. Turkey*, Application no. 25781/94, May 10, 2010, paras. 77-80.

local remedies. Already from the above, potential grounds for the inadmissibility of the application become apparent[1005].

In addition, it should be recalled that under Article 34 ECHR, Applicants are required to prove their victim status, and this, too, could be problematic; the Defendants argue, in essence, that applicants are not directly and specifically impacted by climate change, a phenomenon that affects the generality of people. As Pedersen recently observed, "*The rejoinder is of course that taking this line of thinking to its extreme means that the more people that are impacted by environmental harm, the less likelihood there is of anyone being able to impugn the harmful activity before a tribunal*"[1006].

Where Art. 34 is interpreted narrowly – and the causal aspect scrupulously examined – it may be very difficult for applicants to prove their victim status. However, it cannot be ruled out, also in light of the Aarhus Convention's right of access to justice, that the Court may opt for a less stringent assessment of the requirement under consideration[1007].

Mariconda has recently suggested that "*it is legally possible to interpret the ECHR in a way that allows the admissibility of climate applications by individuals, although with some caveats*"[1008] and provided alternative approaches that could avoid some of the hurdles raised by Duarte (and other climate change cases pending before the ECtHR). These include: making the ECtHR's approach to NGOs' standing[1009] more flexible; recourse to the advisory jurisdiction of the Court, which could provide useful guidance for domestic courts; waiting for an amendment or protocol to the ECHR that recognizes the human right to a healthy environment[1010].

It is worth underlining that the Court has recently declared inadmissible, at the preliminary stage, two climate change cases for lack of victim status on the grounds that the applicants were not sufficiently affected by the alleged breach of the Convention[1011], and this might suggest that the

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[1005] For an overview of the Court's jurisprudence on admissibility, see ECHR, Practical Guide on Admissibility Criteria, February 28, 2023, available at: https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

[1006] O.W.PEDERSEN, *Climate Change Hearings and the ECtHR Round II*, in *EJIL:Talk! Blog of the European Journal of International Law*, October 9, 2023, available at: https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr-round-ii/.

[1007] Ibid.

[1008] A.MARICONDA, *Victim Status of Individuals in Climate Change Litigation before the ECtHR Between Old Certainties and New Challenges*, in *The Italian Review of International and Comparative Law*, Vol. 3, 2023, pp. 260–282.

[1009] On the topic, see generally M. SCHEININ, *Access to Justice before International Human Rights Bodies: Reflections of the Practice of the UN Human Rights Committee and the European Court of Human Rights*, in F.FRANCIONI (ed.), *Access to Justice as a Human Right*, Oxford, 2007, pp. 135-152.

[1010] A.MARICONDA, *Victim Status* …, cit., pp. 280-282.

[1011] ECtHR, *Humane Being and Others v. the United Kingdom*, Application no. 36959/22, December 1, 2022, where the NGO Humane Being alleged a violation by UK of rights under Articles 2 and 8 of the ECHR by failing to address the risks of climate change and regulate factory farming; ECtHR, *Plan B. Earth and Others v. the United Kingdom*, Application no. 35057/22, December 1, 2022, where four individuals and a NGO relied on Articles 2, 8 and 14 to claim that the UK Government failed to adopt measures to address the threat of climate change.

Court is leaning in the direction of recognizing the existence of victim status in the other pending cases.

Lastly, a fundamental substantive issue concerns the identification of the precise content of States' positive obligations regarding climate change mitigation. The jurisprudence of the Court clarified that States must adopt suitable administrative and legislative frameworks. The critical question is how to evaluate whether the frameworks implemented are adequate. On this issue, the applicants contend that the Paris Agreement and the CAT scientific panel's technical findings should be consulted to determine each State's equitable contribution.

Associated with this issue is the notion of margin of appreciation. As Hartmann and Willers underlined, a certain margin of appreciation is granted to Member States in implementing the ECHR. In the Court's jurisprudence, said margin narrows as a clear consensus among Member States emerges; in light of the large participation in the Paris Agreement and the wide recognition of the need to tackle climate change, it could be argued that a consensus on the need to address climate change is established and that, therefore, respondent States should not have a broad margin of discretion with regard to mitigation measures[1012].

It seems, therefore, that the Court is at a crossroads: either adopt an innovative – or, in Counsel for the Respondents' words, "revolutionary" – approach with the associated risk of losing legitimacy and trust from the Member States[1013], or take a more stringent path, risking an inadequate contribution to the issue of climate change. The Court may opt for a cautious approach[1014] by examining the merits of one the other crucial climate cases currently pending before the Grand Chamber, such as the KlimaSeniorinnen case (which does not present the same issues of extraterritoriality as the Duarte case). This approach could still allow the Court to provide useful guidance on applying the Convention to climate change. There is no doubt that a ruling on the merits, whether upholding or rejecting the applicants' claim, would offer a chance to clarify the content of States' mitigation obligations under the ECHR, also with reference to the relevance of the EU-Member States relationship. This is particularly important given the significant role of climate policies set at the Union level. Moreover, in domestic litigation, courts have so far taken different approaches: compliance with European-level reduction targets has only sometimes been considered

[1012] J.HARTMANN, M.WILLERS, *Protecting rights through* …, cit., pp. 110-112. The authors also underline the issue of enforcing ECtHR's judgements, noting that "*Judgments from the ECtHR are not always properly enforced by Member States and the CoE's enforcement machinery — the Committee of Ministers — is currently faced with an enormous backlog. Thus, while an ECtHR judgment may put extra pressure on States to comply with their obligations under the Paris Agreement and to protect human rights, a judgment is by no means a panacea*".

[1013] A.MARICONDA, *Victim Status* …, cit., pp. 281-282.

[1014] O.W.PEDERSEN, *Climate Change* ..., cit.

sufficient to exclude individual State liability. In this respect, too, a clarification from the Court could be particularly useful.

3.5.3 Other cases pending before the ECtHR

Beyond the Duarte case, two climate change cases are currently pending before the Grand Chamber: KlimaSeniorinnen v. Switzerland[1015] and Carême v. France[1016]. The oral hearings for the two cases took place on March 29, 2023.

Six cases are pending before the Chambers: the Court adjourned their examination until such time as the Grand Chamber has ruled in pending cases[1017].

In KlimaSeniorinnen, an association of more than 1800 elderly women ("KlimaSeniorinnen Schweiz") lodged a complaint against Switzerland, claiming that the Swiss State violated its obligations under Art. 2 and Art. 8 of the Convention by failing to adequately reduce its GHG emissions and to set targets in line with international commitments and the best available science. Applicants also allege a violation of Art. 13 in conjunction with Articles 2 and 8 and Art. 6, claiming that Swiss domestic courts did not adequately assess the dispute or only did so arbitrarily and incidentally, without examining the substance of the complaint.

Unlike the Duarte case, the applicants in this instance have already exhausted their domestic remedies, as their claims were initially dismissed by the Federal Department of the Environment Transport, Energy and Communications (DETEC) and the subsequent appeals were rejected by the Swiss Federal Administrative Court and the Swiss Supreme Court. According to the Swiss Courts, the plaintiffs were not directly affected by climate change with sufficient intensity[1018].

The applicants claim that they are particularly vulnerable to climate change and associated heatwaves due to their gender and age. They underline that some applicants have already suffered heat-related illnesses and conditions (including cardiovascular conditions, asthma and chronic obstructive pulmonary disease) and restrictions (such as the inability to leave their residence as a consequence of extreme temperatures). Therefore, they allege to be directly affected by climate change and to have the victim status with respect to Articles 2, 8 and 34 of the Convention[1019].

[1015] ECtHR, *KlimaSeniorinnen v. Switzerland*, Application no. 53600/20. The case documents are available at: https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/.

[1016] ECtHR, *Carême v. France*, Application no. 7189/21. The case documents are available at: https://climatecasechart.com/non-us-case/careme-v-france/.

[1017] The press release, which includes the list of all pending cases, is available at: https://www.echr.coe.int/w/chamber-procedural-meetings-in-climate-cases.

[1018] The case documents of the Swiss case are available at: https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/.

[1019] ECtHR, *KlimaSeniorinnen v. Switzerland* …, see supra, Application, paras. 1-6.

The case shares multiple similarities with the Duarte case, as well as some differences. The question of victim status in this instance is unique in that an association is the applicant. Recent commentaries suggest that the Court may be adopting less stringent victim requirements for NGOs, as it has done in the past[1020]. Additionally, during the oral hearing, a Judge queried whether reviewing the Court's guidance on NGO's victim status would be appropriate. These factors may indicate a favourable ruling on the application's admissibility and the possibility for an examination on the merits. However, the defendant State claimed that the application constitutes an *action popularis* and is therefore inadmissible[1021]. Moreover, it should be recalled that the issue of extraterritorial jurisdiction does not arise here.

Nevertheless, the causal aspect remains problematic, especially in view of the fact that it would be very difficult for applicants to prove an etiological link between Switzerland's GHG emissions (which account for a very small portion of global emissions) and the alleged harms.

The most recent jurisprudence of the Court may provide some useful arguments in favour of the applicants[1022]. As previously noted, the Pavlov and others v. Russia case concerned large-scale pollution and, despite the fact that applicants did not live within the surroundings of the source of pollution, the victim required was met; in addition, State's margin of appreciation was assessed quite strictly (recognizing the inadequacy of undertaken efforts) and non-pecuniary damage was granted despite the fact that the applicants did not provide medical evidence of the alleged harmful consequences on their health.

As to the Carême case, the application – which follows an approach similar to previous cases – was filed by a resident (and former mayor) of the municipality of Grande-Synthe in France. The applicant addressed the ECtHR after exhausting local remedies (where domestic Courts eventually ruled in favour of the claimants but rejected his claim as brought individually) and alleged a violation of Articles 2 and 8 as a consequence of insufficient action to tackle climate change by the French Government. According to the applicant, this resulted in potential risks to his home and property in the years to come.

Despite presenting hurdles typical to other climate cases pending before the Court, a problematic aspect lies in the fact that, as emerged during the oral hearing, the applicant does not

[1020] O.W.PEDERSEN, *Climate Change hearings and the ECtHR*, in *EJIL:Talk! Blog of the European Journal of International Law*, April 4, 2023, available at https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr/.

[1021] According to the jurisprudence of the ECtHR, the Convention does not provide for the institution of an *actio popularis*, see ECHR, Practical Guide on Admissibility Criteria, see supra, para. 23.

[1022] Ibid. The author notes that some useful arguments in favour of the applicants may be derived from the *Pavlov and others v. Russia* case.

reside in Grand-Synthe and currently lives in Brussels. This could constitute a determining factor for the inadmissibility of the claim.

3.6 Pending requests for advisory opinions

Three requests for advisory opinions from international courts and tribunals have been recently submitted. The advisory opinions, although non-binding, may provide important guidance on the obligations of States with respect to climate change and the role of human rights in addressing it[1023].

On December 12, 2022, the Commission of Small Island States submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS), requesting the Tribunal to clarify the specific obligations of State Parties to the UN Convention on the Law of the Sea (UNCLOS) to "*prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification* […]" and "*to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification*"[1024].

Although the advisory opinion in question concerns the law of the sea, it could help to foster dialogue between different regulatory regimes: indeed, it is well known that there is a close link between the climate system and the oceans, an aspect that has not so far found a special place in the climate change regulatory framework. It has been suggested, for example, that the Tribunal's input could lead States to include measures to protect the oceans, including measures to address acidification, in their NDCs[1025].

[1023] For an evaluation of the risks and benefits of the three advisory opinions, see D.BODANSKY, *Advisory opinions on climate change: Some preliminary questions*, in *RECIEL*, Vol. 32 Issue 2, 2023, pp. 185-192. The author notes, among other things, that climate change negotiations are "*more likely to be effective in influencing State behaviour than litigation*". Bodansky concludes that "*To be helpful rather than harmful, an advisory opinion will need to thread the needle. The further it goes in spelling out the obligations of States to address climate change, the more likely it will (i) be rejected by some States on grounds of judicial overreach and have little effect on their behaviour; (ii) undermine the legitimacy of the tribunal that issues it; and (iii) disrupt the negotiations*" (p. 192).

[1024] Commission of Small Island States on Climate Change and International Law, *Request for Advisory Opinion*, International Tribunal for the Law of the Sea, December 12, 2022. The request and the case documents (including the written statements submitted by numerous Parties) are available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

For an early evaluation of jurisdiction and admissibility, see Y.TANAKA, *The role of an advisory opinion of ITLOS in addressing climate change: Some preliminary considerations on jurisdiction and admissibility*, in *RECIEL*, Vol. 32 Issue 2, 2023, pp. 206-216.

[1025] R.ROLAND HOLST, *Taking the current when it serves: Prospects and challenges for an ITLOS advisory opinion on oceans and climate change*, in *RECIEL*, Vol. 32, Issue 2, 2023, pp. 217-225, p. 224.

On January 9, 2023, the Republic of Chile and the Republic of Colombia submitted a request for an advisory opinion on climate change and human rights to the IACtHR[1026]. The scope of the opinion is limited as it may only concern obligations arising from inter-American treaty obligations. The questions submitted to the Court concern States' human rights obligations related to climate change and concern multiple aspects. In the first place, the requesting States ask about the scope of States' duties to prevent extreme events and slow onset events in accordance with inter-American treaty obligations in light of the Paris Agreement and scientific consensus; they ask what measures should be adopted to minimize the impacts and to address situations of vulnerability, what considerations a State should take when implementing its obligations and what principles should inspire mitigation, adaptation and response to losses and damages[1027]. In addition, they request clarifications on the scope of procedural and substantive obligations, on the differentiated obligations with regards to rights of children and new generations and on the conventional obligations of protection and prevention for environmental and territorial defenders, women, indigenous peoples and other communities[1028].

On March 29, 2023, the UN General Assembly adopted by consensus resolution n. 77/276 entitled "*Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*"[1029]. The resolution is the result of efforts by the government of Vanuatu, a small island nation that led negotiations to gain broader support among UN member states.

The UNGA requested the ICJ to clarify what are "*the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations*" and what are the legal consequences for States when "*by their acts and omissions,* [they] *have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change? (ii) Peoples and individuals of the*

[1026] IACtHR, *Request for an advisory opinion on the scope of the State obligations for responding to the climate emergency*, January 9, 2023. The request is available at: https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/.

[1027] IACtHR, *Request for an advisory* …, see supra, pp. 8-9.

[1028] Ibid., pp. 9-14.

[1029] UNGA, *Resolution adopted by the General Assembly on 29 March 2023. Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, A/RES/77/276, April 4, 2023.

Constantly updated information on the proceeding is available at: https://www.icj-cij.org/case/187. Numerous parties were authorized to participate in the proceeding and the Court has set time-limits for the presentation of written statements and written comments on those statements.

present and future generations affected by the adverse effects of climate change". The questions in this case are certainly broader than in previous examined requests, as they relate to the obligations of States in general and do not focus on their human rights obligations. However, it is inevitable that such obligations would be relevant in providing an answer.

As Bodansky observed, the ICJ has so far decided a limited number of environmental cases and has adopted a rather moderate approach; although it is very unlikely that the advisory opinion would change the behaviour of States and lead them to strengthen their efforts to tackle climate change, it may still have a wide persuasive effect in the context of climate negotiations, policymaking and litigation[1030].

[1030] D.BODANSKY, *Advisory opinions ...,* cit., pp. 189-190. As mentioned earlier, the author also underlines the potential adverse effects of the advisory opinion on climate change negotiations.

CHAPTER IV

An evaluation of the rights turn

1. Introduction

The early examples of unsuccessful litigation led some authors to question the utility of rights-based litigation in achieving GHG reductions, and to argue that using the human rights framework may not be a good strategy for victims of human rights violations. In 2007, Posner observed that "*there is little reason to believe that international human rights litigation would lead to a desirable outcome*"[1031].

It must be acknowledged that a lot has changed since 2007. Litigation has spiked, opening up scenarios that were previously difficult to imagine and sometimes leading to surprising results.

The analysis of litigation conducted in Chapter III allows for some observations on the phenomenon of the "rights turn". First, the analysis reveals some common themes that are typical of litigation and that, to a greater or lesser extent, always arise in the context of a human rights-based approach. In order to assess how effective the human rights paradigm has been and what its persistent limitations and future prospects are, it is therefore appropriate to focus first on these issues, including whether and to what extent the procedural and substantive obstacles have been overcome (and whether they will be overcome). This will enable us to provide an initial assessment of the shift towards rights-based litigation and its effectiveness, and make reasonable predictions about future developments.

Generally speaking, the analysis conducted has shown that, as to the type of litigation, the most prevalent to date is the so-called mitigation-focused litigation against States. Moreover, it is mainly the substantive obligations of States, rather than procedural ones, that have become relevant. In fact, the alleged inadequacy of mitigation action can be located precisely in the obligation to establish appropriate regulatory frameworks.

One crucial matter in any lawsuit that asserts a violation of human rights or constitutionally protected fundamental rights concerns causation: this is an aspect that not infrequently becomes relevant well before the examination of the merits and already from the standpoint of admissibility. In this regard, it is of interest to consider the relevance that the human right to a healthy environment might have, including its evidentiary value.

[1031] E.A.POSNER, *Climate change and international human rights litigation: a critical appraisal*, in *University of Pennsylvania Law Review*, Vol. 155, Issue 6, 2007.

Another critical topic pertains to the separation of powers and the power of review of the judicial power: again, this is an issue that has been approached very differently across legal systems and jurisdictions.

There is a final issue regarding the precise identification of the content of States' (and private actors') obligations, which is closely related to the importance of climate science and the goals outlined in the Paris Agreement for establishing enforceable standards of conduct.

In exploring these issues, it will be noted how they have been addressed in the litigation examined, and thus what their actual and concrete relevance has been.

Once these aspects have been covered, it will be possible to assess what the added value of a human rights-based approach is, and whether and to what extent the so-called rights turn has produced positive results in combating climate change and protecting human rights.

2. The legal hurdles of rights-based litigation

2.1 Causation

In the context of rights-based climate litigation, causation is one of the best-known and most vociferously emphasized issues. As is well known, climate change is a different and peculiar phenomenon from all other environmental problems. It is not, as in most cases dealt with by courts and tribunals to date, about the pollution or damage of an area as a result of specifically identifiable polluting activities (think of the pollution of a river as a result of a company's spills, air pollution around an industrial area, etc.). All nations, as well as companies and individuals, contribute to climate change by emitting GHGs, which mix indiscriminately in the atmosphere and cause temperatures to rise. Rising temperatures, in turn, cause extreme and slow-onset events (or otherwise affect, to some variable extent, the frequency and intensity of such phenomena); said events may negatively impact the enjoyment of human rights.

It is thus clear that there is a rather complex causal chain linking GHG emissions and the violation of human rights. This question has been posed, with extreme clarity, by Quirico, Bröhmer and Szabò[1032] and has emerged since the earliest cases of climate litigation such as the Inuit petition and the Kivalina case.

[1032] O.QUIRICO, J.BRÖHMER, M.SZABÒ, *States, climate change* …, cit., p. 7 and ff., who indicate the following causal pattern: (1) anthropogenic GHG emissions; (2) rising atmospheric temperatures (climate change); (3) further environmental changes (general causation); (4) legal effects, including breaches of (human) rights of (present and future) generations (specific causation); see also F.E.L.OTTO, P.MINNEROP E.RAJU, L.J.HARRINGTON, R.F.STUART- SMITH, E.BOYD, R.JAMES, R.JONES, K.C.LAUTA, *Causality and the fate of climate litigation: The role of the social superstructure narrative*, in *Global Policy*, Vol. 13, Issue 5, 2022, pp. 736-750, p. 738, where an alternative chain of causality is provided.

Having noted the aforementioned causal complexity, many authors have therefore pointed out the related difficulty for plaintiffs in climate litigation to provide adequate proof of causation. This is clearly a problem that pertains, first and foremost, to mitigation-focused litigation. As will be pointed out, the issue is presented in a different way in litigation focused on adaptation.

Indeed, it is clear that a scrupulous proof of causation (and imputation, but the two elements are strictly intertwined) would require proving that the alleged human rights violations are the consequence of the defendant State's (or company's) GHG emissions. If this is the standard of proof required, it must be acknowledged that it would be almost impossible to meet. Not only would it be quite difficult, in the majority of cases, to prove that the temperature rose as a result of the defendant's specific emissions (or, rather, of the portion of the emissions that were deemed illegal because they exceeded the permissible limit, which is, moreover, difficult to determine, unless emissions were deemed illegal *in re ipsa*), but it would be even more difficult to prove that the specific event that caused the alleged harm occurred precisely as a result of the defendant's specific emissions. Moreover, climate events have multiple causes (think, for example, of a hurricane: how can it be proven that it originated precisely from climate change and, more precisely, a State's specific emissions?).

As some authors have pointed out, as science – particularly attribution science – continues to evolve, it is becoming increasingly plausible to provide evidence of causation by identifying specific emissions attributable to each subject, whether it be a State or a company[1033]. However, it must be stressed that the science of attribution still presents some uncertainties, as recently highlighted by ENI S.p.A. in the context of a lawsuit before the Civil Court of Rome[1034]. In addition, in order to scrupulously prove the causal chain outlined above, it would not be sufficient to ascertain the specific emissions attributable to a subject: the etiology of the specific event should also be investigated.

It is important to note that the causal profile outlined here may have different connotations in each case. This is due to variations in legal systems, types of actions instituted, and measures requested by the plaintiffs. Moreover, even where initiatives are broadly based on human rights, these may be rights enshrined at the supranational level (such as the rights recognized by the ECHR) as well as rights enshrined in national constitutions; in addition, international instruments are not always directly applicable in the national legal system (this is admissible, for example, with regard to the ECHR, in the Netherlands, but not in Italy).

[1033] For a comprehensive analysis of attribution science and its role in climate litigation, see M.BURGER, J.WENTZ, R.HORTON, *The Law and Science of Climate Change Attribution*, in *Columbia Journal of Environmental Law*, Vol. 45, No. 1, 2020, pp. 60-240.

[1034] See Chapter III, para 2.12.2.

In light of all the variables recalled, it is clear that the importance of causation in the context of rights-based litigation can vary greatly. It can be a crucial factor in rejecting a claim or a secondary factor that can be ascertained in a rather superficial way, often by mere reference to the scientific findings. Ultimately, much depends on the applicable evidentiary regime and thus on what (and on whom) the burden of proof rests.

Additionally, the analysis of causation varies depending on whether it pertains to establishing standing or the merits of the claim. It is evident that in cases where plaintiffs seek damages, proof of the injury and its causal correlation with the specific conduct alleged against the defendant cannot be ignored.

Upon examining the litigation cases discussed in Chapter III, it is evident that some claims were rejected due to difficulties in establishing and proving causation. For instance, in the Kivalina case, the claim was preliminarily rejected due to – among other reasons – causal uncertainties. Additionally, causality is often relevant to standing requirements and victim status, as demonstrated by cases currently pending before the ECHR.

However, there are cases where the issue of causation has been positively overcome and deemed adequately proven, as seen in the Urgenda and Klimaatzaak cases.

Before addressing the issue of discharging the evidentiary burden of causation, it is also crucial to understand the content of that burden. Determining the appropriate evidentiary rule to apply in different litigations can be a complex matter. In national litigation, each legal system typically has established evidentiary rules. The question then becomes whether these rules should be strictly applied or subject to derogations or differentiations due to the unique nature of climate change. In supranational litigation, the appropriate evidentiary rules can be even less clear. For instance, let us consider the jurisprudence of ECtHR regarding environmental issues. Although the ECtHR has produced a considerable amount of case law on this topic, it has not yet fully analyzed the exact evidentiary burden on applicants concerning causation. However, the Court has taken steps to ease this burden by allowing the use of a probabilistic approach. In fact, in the recent Pavlov case, the court even recognized compensation in the absence of proof of the injury suffered.

It is nonetheless clear that, on closer examination, the issue of causation is not exclusive to rights-based litigation: in any civil case, even and especially one based on national provisions, it is necessary to provide adequate proof of the causal link. To take the Italian case as an example: in an action brought under Articles 2043 and 2051 of the Italian Civil Code, the plaintiffs have the burden of proving causation – both material and legal – according to the rule of preponderance of the evidence. This can be a significant burden. When comparing this situation to the Urgenda case in the Netherlands, it becomes apparent that the plaintiffs in this case relied on the rights enshrined in

the ECHR, which is directly applicable in the Netherlands, to support their claims under domestic law. This reliance on the ECHR was a decisive factor in the successful outcome of the case. Based on these premises, the Dutch courts found the claim to be founded and held causation to be proven. The evidentiary support was not unsubstantial, in that it was based on a large amount of scientific data, but it would probably not have been sufficient to fully prove causation according to the complex causal chain outlined above, let alone according to the strict civil law rules drawn up under the "more likely than not" rule. It is worth keeping this in mind, because if recourse to international human rights law (where possible) provides access to a more favorable evidentiary regime (from a causal standpoint) than the civil law rules in force in the legal system, then what is commonly characterized as a limitation and obstacle of the rights-based approach, becomes instead a strength.

In jurisdictions that adhere to a particularly onerous evidentiary standard for plaintiffs, the only currently viable solution is to urge the adoption of different or new evidentiary rules that mitigate the rigidity of rules such as the preponderance of the evidence. The viability of such a solution inevitably depends on the persuasiveness of plaintiffs' arguments and the openness of the courts to change their jurisprudence. While it is true that one cannot put too much faith in a radical jurisprudential change of the established rules of evidence, it is worth remembering that in some contexts, Italy being a relevant example, it is precisely the excessive rigidity of some rules of evidence on causation that have led the jurisprudence to develop alternative concepts and evidentiary rules (in the Italian case, for instance, damages for loss of chance arose to counteract the onerous burden of proof on causation, when the standard for proving causation was certainty).

Causation is a crucial factor to be determined in climate litigation, in both civil law and common law jurisdictions. Therefore, several authors have highlighted the insufficiency of current causation rules in the context of climate change and have argued in favor of a new approach to causation and the acceptance of renewed liability systems, such as market share liability[1035]. This system allows for the imputation of a share of liability to each party that has contributed to GHG emissions, parameterized to the amount of pollution produced. Furthermore, plaintiffs in the examined litigation have advocated for the adoption of new liability theories that can account for the unique characteristics of climate change. They have also advocated, and sometimes succeeded, in parameterizing the defendant's partial liability based on the proportion of damage attributable to them. The Urgenda case is a notable example where Art. 47.1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts was applied. The provision reads as

[1035] M.ZARRO, *Danno da cambiamento climatico e funzione sociale della responsabilità civile*, Edizioni Scientifiche Italiane, 2022, p. 190 and ff.

follows: "*Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act* […]".

Another important theme in mitigation-focused litigation – which is strictly associated with causation – is the potential relevance of the human right to a healthy environment.

As previously mentioned, the right to a healthy environment has been acknowledged by both the HRC and the UNGA. This is the latest development in a process that has been ongoing for decades at both the domestic and international levels. While there is no doubt that significant data has emerged in recent years regarding both *diuturnitas* and *opinio iuris*, it is still uncertain and highly debated whether the right to a healthy environment exists under international customary law. This right is recognized domestically in many States. There is also an ongoing discussion about the adoption of an additional protocol to the ECHR that would recognize this right.

The relevance of this issue is particularly evident from a causal perspective. The applicability of this right in the context of litigation would simplify the causal chain that plaintiffs must prove. In this view, the violation of the right to a healthy environment and the causal link could be proven as a mere consequence of excessive GHG emissions. In addition, adaptation-oriented litigation, which is already less affected by questions of causation, could benefit from such a right, which could guarantee preventive protection.

Quirico noted that the importance of the right to a healthy environment in climate litigation is largely determined by the courts' orientation. It is evident that in jurisdictions where less burdensome evidentiary standards are accepted, there may be no need to rely on the right to a healthy environment[1036]. However, in jurisdictions that adhere to more stringent evidentiary standards, the recognition and application of this right could be crucial for the success of cases that would otherwise have little chance of prevailing.

All that has been said so far about causation is highly relevant with regard to mitigation: that is, measures aimed at reducing GHG emissions and their concentration in the atmosphere.

As for adaptation, it is intuitive that this issue arises in very different and undoubtedly less problematic terms. It is one thing to argue that a State, through insufficient reduction of GHG emissions, has contributed to climate change and thus to the resulting weather phenomena, and is therefore responsible for a violation of human rights; it is quite another to argue that the State, within its territory, has not taken adequate measures to prevent violations.

In both cases, the question arises as to what standard of conduct the State can be expected to meet. This includes how much emissions should be reduced and what actions the State can take to protect its citizens from the inevitable impacts of climate change. Under the causal profile, there is a

[1036] O.QUIRICO, *The European Union and global warming: A fundamental right* …, cit., p. 19.

significant difference in adaptation-focused litigation, in that there is no need to provide evidence of the complex causal chain mentioned above. It is no longer a matter of proving a connection between emissions and the violation of rights, but rather of proving the connection between the failure or inadequate adoption of adaptation measures and the violation. Furthermore, the issue of multiple States contributing to the phenomenon would also not arise.

However, it is clear that adaptation-focused litigation has had little uptake to date, despite its great potential. Authors have questioned whether litigation's future will involve adaptation. It is reasonable to presume that litigation challenging the inadequacy of States' adaptation measures is likely to increase as the inevitable impacts of climate change spread. This is especially true for groups that are already suffering dramatic consequences, such as the citizens of the Torres Strait or the residents of Kivalina.

Associated with the causal issue is that of the so-called reactive nature of a rights-based approach, i.e., the fact that only after the injury has occurred would it be possible to provide protection. However, this is certainly not a problem exclusive to a rights-based approach: the need to prove that an injury to a right or legitimate interest has occurred concerns numerous disputes of various kinds, including civil lawsuits. It should also be pointed out that, in this respect as well, the applicability of the human right to a healthy environment would likely provide early protection.

Indeed, there are cases, such as Urgenda, that show that human rights claims can be successful even in the face of generalized consequences and without scrupulous proof of individual harm. In this respect, too, human rights are proving to be an effective tool, at least for encouraging more effective climate action.

2.2 Separation of powers and the political question doctrine

In the context of the examined litigation, a recurring theme is the separation of powers, as well as related concepts such as the political question doctrine and the margin of discretion. The question, broadly understood, concerns whether or not the courts can exercise control (and, if so, how intense) over political power and the decisions it makes, within systems marked by a separation of powers and a division of functions between the executive, legislative and judicial powers.

Based on the reviewed litigation, it is now clear that the judiciary increasingly allows for judicial review of States' climate policies, particularly in relation to mitigation programs. Thus, it is apparent that States do not possess absolute discretion in this area.

This statement is particularly accurate when viewed through the lens of human rights and fundamental rights. If a violation of human rights or fundamental rights is alleged, the courts can

review the actions of other authorities to determine if they are in conflict with these rights. The courts are in a delicate position: on the one hand, they need to avoid being excessively intrusive in political decisions; on the other hand, they still need to assess whether the measures taken are respectful of human and fundamental rights. It is equally clear that the use of rights is a key tool in countering the non-justiciability of State policies, as such an approach broadens the scope of judicial review.

Of course, the approaches followed have proved to be very different in each legal system, with greater or lesser deference to the executive and the legislator.

This has resulted, in some cases, in the adoption of injunctions for more ambitious emission reduction targets than those currently in force, while in other cases, it has led to a recognition of the impossibility of setting specific targets.

Nonetheless, discretion has not prevented the partial upholding of claims. Therefore, it is crucial to carefully consider which claims to bring to court, in light of the fact that overly ambitious requests may not be granted precisely because they are precluded by political discretion. The use of rights is also valuable in this regard, as they not only expand the scope of judicial review but also serve as a fundamental tool for identifying a minimum standard of conduct that complies with such rights. Urgenda is one of the best examples of this.

States have frequently argued that the judiciary cannot make pronouncements on their climate change policies. This argument, as was made by the Dutch state in the Urgenda case, is based on the idea that State policies and the identification of the most appropriate emission reduction plan require consideration of all interests involved, including those of industry, finance, energy provision, healthcare, education, and defence. Not to mention the significant economic implications of rapid emission reductions, especially in a context of economic crisis, and thus the need for a gradual reduction pathway.

In the Kivalina case, for instance, the claim was rejected both because of the principle of separation of powers and because of lack of proof of causation. The Juliana case is another example where the principle of separation of powers has been a significant obstacle for the plaintiffs.

In contrast, political discretion did not preclude the upholding of the plaintiffs' claims in the Urgenda and Klimaatzaak cases.

The latter case, recently decided on appeal, is remarkable. The first instance court, while finding that the mitigation action was inadequate, had not imposed a reduction order to a specific extent, justifying this conclusion on the separation of powers theory. However, this conclusion was reversed by the Brussels Court of Appeal.

The comparison between the two rulings is particularly interesting because it shows that the principle of separation of powers can be interpreted and applied, even within the same legal system, in a more or less stringent manner.

The solution adopted by the Brussels Court of Appeal appears to be logically and legally consistent, despite being more intrusive on the prerogatives of other State powers. If the judge deems the State's conduct illegitimate and substandard, it would be objectionable to halt the review process without specifying a target for reduction. A finding of inadequacy of State action presupposes that a threshold has not been met; legitimate conduct must therefore meet such standard.

In the Klimatická žaloba case, the first instance court adopted an approach similar to the first instance court in Klimaatzaak, upholding the plaintiffs' claim but refusing to impose a specific reduction target. However, the appeal is pending and these issues will therefore be addressed again by a Court of Appeal.

Based on the litigation reviewed, it appears that the separation of powers issue often arises after the causation stage. The issue often becomes relevant in evaluating whether to order certain reduction targets (and if so, how precise and incisive they should be) or to stop at the mere finding of a tort or human rights violation.

The principle posed in this way may therefore be less of an issue than one might think, as the question would then be limited to whether and to what extent a judgment imposing specific and more ambitious reduction obligations is more effective than a mere finding, for the purposes of effective climate action. Moreover, even if an injunction is not granted, the principles established by the judges may still bear relevance, and the positive effects of climate litigation – such as social and media attention and pressure on governments – remain unchanged. It is true that the full recognition of the plaintiff's claim, including a specific order to reduce emissions, is the best conceivable outcome from the plaintiff's perspective. However, it would be overly simplistic to conclude that the success of the plaintiff's claim automatically leads to a better climate policy by the State. Additionally, the enforcement of injunctions can be challenging due to limited instruments.

It is a fact that the adoption and implementation of environmental policies is the responsibility of the States, regardless of whether the courts extensively review the actions of governments and parliaments or limit their review. The States are also responsible for making the complex cost-benefit assessment that underlies these policies. Moreover, it is widely recognized that the goal of reducing emissions must be balanced with other crucial considerations, and it is important to note that emission-producing activities also have positive effects.

At the other extreme, there are jurisdictions in which judges have taken an activist role to the point of devising systems of dialogue between the executive and the judiciary for the purpose of monitoring progress (see the Leghari case in Pakistan). Such activism, however, is certainly no guarantee of (nor has it in fact guaranteed) good climate action. It is clear, therefore, that it would be a mistake to simplistically assume that moving away from the principle of separation of powers in favour of deep judicial scrutiny of political choices would lead to better climate action and greater protection of human rights: in fact, it seems that the most desirable approach is the one followed in some of the European cases mentioned above, where the courts have not given up their task of verifying respect for human and fundamental rights, but have done so with an awareness of the existence of certain limits, and thus with an overall balanced approach that has, nonetheless, not precluded the indication of a specific and binding reduction target to be met[1037].

While greater judicial intervention could improve the process of determining whether human rights are respected, excessive interference in political decisions could lead to ill-reasoned compromises and an overall poor balancing of interests. Therefore, a more balanced check would allow the State a necessary margin of discretion while setting minimum thresholds of protection, as the Urgenda and Klimaatzaak cases demonstrate.

What has been said is further confirmed when one considers that, in order to correctly identify the perimeter of control of the judiciary, one must first assess what obligations the State has assumed at the international level: in the area of climate change, increasingly precise goals have been set over time regarding the reduction of emissions and, at the same time, there has been an increasing participation of States in international agreements, as well as an increasingly broad consensus regarding scientific findings and the need to keep the rise in temperatures within certain limits. These considerations, and more generally the emergence of a diplomatic consensus on the need to address climate change, have in fact often justified more rigorous judicial review and the establishment of minimum mitigation thresholds, which can now be appropriately identified.

2.3 Identifying the content of human rights obligations: the role of science and the Paris Agreement.

The application of human rights obligations to climate change necessarily requires an examination of the precise content of the obligations incumbent on States, both with respect to

[1037] See, on the topic, L.MAGI, *Giustizia climatica e teoria dell'atto politico: tanto rumore per nulla*, in *Osservatorio sulle fonti*, n. 3/2021, pp. 1048-1049, who observes that, although the courts should not supersede the choices of political institutions, they could order political institutions to achieve precise levels of emission reductions, rather than merely ascertaining their insufficiently ambitious nature. The author, upon examining a series of cases, concludes that courts have proven to be well aware of the principle of separation of powers and are applying it correctly.

mitigation and adaptation. Indeed, this is a question that has arisen frequently in rights-based climate litigation, particularly mitigation-focused cases.

Where there are complaints that mitigation policies are insufficient to ensure adequate protection of human or fundamental rights, it follows that there is a need to examine how much the State is obliged to do to ensure such protection. This is a crucial question and one that is constantly the subject of strong disagreement between the parties in domestic litigation.

Courts tasked with evaluating the legitimacy of national policies in light of human rights obligations must establish the criteria for determining the adequacy of a policy aimed at reducing GHG emissions. It is important to consider why a 20% reduction in emissions might not be in line with the human rights standard of due diligence, while a 30% reduction would be.

This issue is critical to the determination of whether there has been a violation and to the determination of the merits of the claims.

From the reviewed litigation, it has become evident that national courts have increasingly relied on human rights to affirm the inadequacy of States' climate change mitigation policies. However, this has not always resulted in the issuance of an injunction against the defendant State or the establishment of a specific reduction target. This is primarily due to the discretion left to political bodies, as discussed above.

It is therefore useful to examine the criteria used by the adjudicating bodies and the arguments put forward by the plaintiffs in support of the claim that the conduct of the defendant States was unlawful.

Human rights norms have been applied in the field of environmental law. It is well known that States have obligations to draft and implement appropriate regulatory frameworks and to prevent foreseeable violations, as affirmed, within the European context, by the ECHR. Since most States have adopted measures to combat climate change, the question remains as to what the minimum content of these measures should be. Climate change is a unique environmental problem that each State participates in to varying degrees, making it difficult to determine the appropriate level of action for each State.

In the famous Urgenda case, the Dutch courts held that the State has an obligation to reduce its emissions to a level compatible with the goal of limiting temperature rise to 2°C as set in the Paris Agreement and suggested by scientific findings, relying on Articles 2 and 8 of the ECHR. The Belgian courts took a similar approach in the Klimaatzaak case.

The examined litigation reveals that the UNFCCC framework, particularly the Paris Agreement, has played a crucial role in both court decisions and plaintiffs' arguments. It is rare to find a case where the plaintiffs have not explicitly referenced the Paris Agreement and its

temperature goals as a parameter to assess the adequacy of defendants' mitigation commitments. This has also been the case in the context of litigation against private actors.

First of all, it is useful to recall that the legally binding (or what are commonly considered to be the legally binding) provisions of the Paris Agreement are those that are essentially procedural in nature: reference is made in particular to the obligations to prepare and report on NDCs, as well as the related disclosure, participation and transparency obligations. However, there are additional provisions of the Agreement that are subject to debate and are not considered to establish obligations of result for the Parties[1038].

In particular, we refer to the provisions of Article 2.1, which established the goal of keeping temperature rise well below 2°C and of pursuing efforts to limit it to 1.5°C above pre-industrial levels, and Article 4, which provides important guidance on how to achieve this goal, by affirming that: "*1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty* […].

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

As some authors have already pointed out, despite the impossibility of qualifying these provisions as obligations of result, and despite the uncertainty about their precise legal relevance, there is no doubt that they have a normative bearing, and the litigation examined is further evidence of this (although, so far, only the temperature objective has usually gained significance)[1039].

If this were not the case, a State could consider itself to be in full compliance with its obligations under the Paris Agreement simply by drafting NDCs, regardless of their content. This would mean that even in the face of almost no mitigation commitments, the State's conduct would be fully legitimate. Therefore, it is undeniable that the Paris Agreement has established crucial normative data for determining the required standard of conduct of States under human rights law.

[1038] C.VOIGT, *The power of the Paris Agreement* …, cit., p. 239.
[1039] Ibid.

Even if it is accepted that the provisions in question are not legally binding, they have nonetheless become relevant in providing specific content to human rights norms.

The Paris Agreement has therefore been a valuable tool in interpreting and identifying the precise extent of human rights law obligations in the context of climate change. There is a clear trend towards interpreting human rights obligations in light of the climate change framework, and a close correlation is emerging between international instruments, including non-binding provisions, and human rights provisions. This pertains not only to the norms of the Paris Agreement but also to other principles enshrined in the FCCC, including the precautionary principle and the principle of CBDR, which have also proven extremely relevant in the Urgenda case. Equally relevant have been – as demonstrated by the recent Klimaatzaak case – the "*diplomatic consensus*" that has developed with regards to temperature goals that should not be exceeded and the general assent to international instruments and the IPCC's findings.

Therefore, the notion that horizontal obligations between States undertaken at the international level do not bear relevance in vertical human rights law relations is beginning to waver.

This phenomenon has occurred in close correlation with the growing importance of scientific data. Therefore, the topic just discussed is closely connected to the role of science. The connection is even clearer when one considers that the Paris Agreement itself provides that GHG reductions should be undertaken in accordance with the best available science. Even when interpreting the State's human rights law obligation in light of the goals set by the Paris Agreement, it is difficult to determine the specific reduction targets that should be implemented. Regarding this issue, plaintiffs have consistently focused on scientific findings, particularly valuing reports from the IPCC and other national institutes.

The scientific findings have proven to be essential not only in confirming the need for significant emission reductions in order to achieve the goals outlined in the Paris Agreement, but also as a demonstration that climate change constitutes a real and imminent threat, with respect to which there is a State obligation to protect its citizens; the IPCC reports have also been referred to as essential tools in guiding decision-making processes, as the foundation of scientific knowledge on climate change. It is important to note that temperature targets have been established based on political decisions, despite claims made by the plaintiffs. The IPCC has only developed various scenarios without providing assessments of the minimum target that must be met.

Most importantly, given the broad participation in the Paris Agreement and the widespread agreement on the temperature targets set therein, as well as the almost unanimous acceptance of the scientific findings (which point to particularly serious scenarios, especially for the hypothesis of an

increase of more than 2°C), it has been possible to assess, also from a human rights perspective, the adequacy or otherwise of the conduct of the defendants (usually States, but sometimes this has been sanctioned with respect to the obligations of corporations). The increasing relevance of soft law has also emerged from the Milieudefensie case, where the Court relied on numerous non-binding sources to reconstruct Shell's due diligence obligation.

This approach has been criticized for blurring the boundaries between binding legal norms and non-binding instruments and statements. Backes and Van Der Veen suggested that the State would no longer be free to pursue climate objectives that are not in line with scientific consensus without risking a human rights violation[1040].

It is also true, however, as Carducci observed, that in the face of a climate crisis, the law cannot disregard the truths ascertained by the natural sciences. A policy that fails to take this into account would be misleading, short-sighted, and even "*suicidal*"[1041]. To this end, it is clear that the law must not contradict the climate system.

The importance of scientific data in identifying human rights obligations is thus undeniable and, to a certain extent, inherent to the nature of human rights obligations in the field of environmental protection. When human rights law mandates the prevention of certain environmental hazards, scientific information is crucial in determining the extent of the phenomenon, the likelihood of adverse events, and the potential injuries. Otherwise, it would be impossible to identify effective preventive measures. The same logic applies to the development of suitable regulatory frameworks: without scientific input, it is impossible to devise and enforce appropriate regulations.

If scientific data is required to adopt and implement measures, it follows that it is also relevant in assessing the appropriateness of such measures. Scientific information is also an essential element for applying environmental principles such as the precautionary and intergenerational equity principles. In the latter case, for instance, it is necessary to assess the available carbon budget to make assumptions about the distribution of the burden among generations (as the Neubauer case has shown).

In addition, it is important to consider the increasingly influential role of attribution science. Ongoing developments in this area have made it possible to identify not only the impact of human

[1040] C.W.BACKES, G.A. VAN DER VEEN, *Urgenda: the Final Judgement* …, cit., p. 314, observing that "*This way, the results of scientific research, having gained broad acceptance, also gain legal momentum and drive. However, this goes at the expense of the latitude and influence that national democratically responsible and elected bodies wield. This, if we interpret it correctly, represents a marked shift in the global balance of power*".

[1041] M.CARDUCCI, *Il diritto alla verità climatica*, in *BioLaw Journal – Rivista di BioDiritto*, n. 2/2023, pp. 364-365.

activities on the global climate system but also the contribution of each actor to climate change and its impact on the frequency and intensity of extreme events[1042].

Equally, it is true that scientific truths have not always been given adequate and detailed consideration in the litigation examined (and it is not far-fetched to speculate that this is at least partly attributable to the complexity and copiousness of IPCC reports). The courts have sometimes considered the findings of IPCC reports in a rather superficial way, accepting only one of the scenarios proposed by the IPCC, as in the case of Urgenda or Milieudefensie, without considering the others. This suggests that even in the presence of technical data such as climate reports, it may be useful to have court-ordered technical consultations as part of the adjudication process in order to gain a clearer understanding of the (numerous and complex) findings involved. To date, this has been quite rare.

In order to strike a reasonable balance between maintaining the distinction between binding and non-binding provisions and giving adequate consideration to scientific findings, it may be beneficial to conduct a comprehensive evaluation of the State's actions towards climate change, taking into account various aspects that are not limited to the specific percentage of GHG reductions.

Several criteria could be used by courts to correctly identify the content of mitigation and adaptation obligations and to assess the adequacy of States' climate commitments, as some authors have recently suggested. These include: assessing whether the State has taken feasible steps to reduce emissions; whether the State has prioritized climate action and devoted sufficient resources to it; whether the State's commitments are sufficiently ambitious compared to the efforts of other peer States; whether there has been a progressive increase in efforts; whether the State's commitments are consistent with global temperature targets[1043]. Other suggested criteria include the State's compliance with procedural obligations under the Paris Agreement, the adoption of long-term targets and monitoring procedures, the consistency of climate policy, its transparency, potential gaps, timeline for implementation, and lack of progression[1044].

The preferred approach would be to evaluate these additional elements, ensuring a virtuous but flexible use of scientific findings. Furthermore, this would allow a more comprehensive

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[1042] See, on the topic, M.BURGER, J.WENTZ, D.J.METZGER, *Climate Science and Human Rights Using Attribution Science to Frame Government Mitigation and Adaptation Obligations*, in C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency …,* cit., pp. 223-238.

[1043] A.KHALFAN, *Litmus Tests as Tools for Tribunals to Assess State Human Rights Obligations to Reduce Greenhouse Gas Emissions*, in C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency …,* cit., pp. 177-186.

[1044] S.MARJANAC, S.H.JONES, *Staying within Atmospheric and Judicial Limits. Core Principles for Assessing Whether State Action on Climate Change Complies with Human Rights*, in C. RODRÌGUEZ-GARAVITO (eds.), *Litigating the Climate Emergency …,* cit., pp. 157-176.

assessment of governmental policies rather than solely relying on one of the many scenarios considered by the IPCC or other institutions.

This is especially true when we consider that scientific knowledge changes and evolves over time, so rigid application can quickly lead to outdated results.

2.4 The role of future generations and intergenerational equity

Any claim based on human rights presupposes that there are specific (and existing) rights holders complaining of a specific violation of their rights. It is thus a view rooted in the present.

In the climate litigation examined, the rights-based approach has instead increasingly taken on a forward-looking connotation. This is not surprising given the nature of climate change as an unprecedented environmental phenomenon that can affect multiple generations, with the need to explore the temporal implications of current climate change policies.

Art. 3 of the UNFCCC provides that "*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities* […]".

Future generations and the principle of intergenerational equity have been increasingly invoked in the litigation examined, and sometimes successfully, as the emblematic cases of Neubauer and Future Generations show.

In the Neubauer case, the German Constitutional Court ruled that it was not permissible for one generation to consume a disproportionate share of the CO2 budget, because this would place a disproportionate burden on future generations, who would be forced to reduce emissions even more drastically and thus suffer a significant restriction of their freedoms. The Court thus raised the issue of the fair distribution of environmental burdens among different generations.

According to the Court, the State's obligation to protect the right to life and health extends to future generations, especially in the face of irreversible phenomena such as climate change, which make it necessary to protect the environment in order to guarantee certain standards for future generations. However, the objective nature of this obligation was clarified in this case, as future generations do not possess rights in the present.

In the Colombian case, the Supreme Court – following an approach that is clearly different from the European context, but rather common in jurisdictions that attach particular importance to the so-called third generation of human rights – pointed out that the protection of fundamental rights concerns not only individuals, but all inhabitants of the planet, including animal and plant species and the unborn, who have the right to enjoy the same environmental conditions that are due to present generations.

In this view, the environmental rights of future generations are understood as a limitation on the freedom of action of present generations, on whom a balanced use of resources is imposed.

Thus, beyond the difference in approach, both cases share the idea of the need to guarantee future generations environmental conditions that are not worse than ours, or at least that do not impose disproportionate burdens on them. The question of future generations is thus essentially a question of intergenerational equity.

More generally, the question concerns the relevance of the protection of future generations in human rights law and its possible future development.

As Saccucci has recently pointed out, the protection of future generations can take place either directly, through the identification of obligations of States that can be invoked by (or in the interest of) future generations, or indirectly, through the adoption of policies that regulate the use of resources also in the interest of future generations. The former is a typical human rights approach, while the latter is what Saccucci defined a "*duty-based approach*"[1045].

It is also clear that, as yet, there is no precise definition, let alone a legal one, of "future generations", although in general it can be said that this term evokes a distinction between individuals who already exist and those who will exist in the more or less distant near future.

It is therefore important to point out that the concepts of intergenerational justice and future generations have operated with certain peculiarities in the context of the examined litigation: future generations have not in fact acquired an autonomous relevance as bearers of rights, and the protection of their interests has largely passed through the protection of the human rights of present generations.

Strictly speaking, future generations can only mean those not yet born, but it is not in this sense that the concept has been often invoked in the context of climate litigation. Indeed, if the concept of future generations were rigidly understood, there would clearly be a problem of legal standing, since generations that have not yet come into existence could not be rights holders (and therefore legitimate litigants)[1046].

The concept of intergenerational justice has thus been understood – and the Neubauer case is emblematic of this, in that it has excluded the ownership of subjective rights in the heads of unborn

[1045] A.SACCUCCI, *La tutela degli interessi delle future generazioni nei trattati sui diritti umani: ambito, limiti e prospettive di sviluppo*, in M.FRULLI (ed.), *L'interesse delle generazioni future nel Diritto internazionale e dell'Unione Europea*, Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea, XXVI Convegno Firenze 9-10 giugno 2022, pp. 158-159.

[1046] For an analysis of the various solutions that have been postulated so that the interests of future generations could be invoked independently (even through the creation of an ad hoc body within the UN), see M.GERVASI, *Equità intergenerazionale, tutela dei diritti umani e protezione dell'ambiente nel contenzioso climatico*, in M.FRULLI (ed.), *L'interesse delle generazioni future nel Diritto internazionale e dell'Unione Europea*, Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea, XXVI Convegno Firenze 9-10 giugno 2022, p. 301; see also A.SACCUCCI, *La tutela* …, cit.

subjects – in an objective rather than a subjective sense (and thus with respect to a mere intergenerational obligation).

The interests of future generations have often been invoked by young people or minors as a link between the present and future generations. It is precisely this approach that allows litigation to maintain a projection into the future in application of the principle of intergenerational equity[1047].

Many people who will be alive in 2080 or 2100 are already alive today, so for the purposes of effective action against climate change, it may well be satisfactory to look at this time perspective without having to resort to the rights of future generations. It seems, therefore, that where the rights of future generations are constantly invoked, reference is often made to rights that are not so futuristic.

Thus, obligations to combat climate change are properly brought back to the present. From this perspective, the usefulness and strength of recourse to future generations and intergenerational justice clearly emerges, especially through lawsuits initiated by young people. Litigation based on existing rights would avoid the hurdle of claiming future and not yet-existing rights. It would also expose the inadequacy of current climate action and its future impacts.

Such considerations, moreover, have stimulated a vigorous debate about the role of future generations in the context of climate change. On this point, Humphreys recently pointed out that, as simple and attractive as the appeal to future generations is – in that it evokes an altruistic image of responsibility for our children and grandchildren – it risks obscuring numerous profiles of present responsibility, stressing that "*the appeal to future generations obfuscates, rendering a series of critical boundaries diffuse, and, in doing so, abjures concrete urgent existing responsibilities towards those alive today in the same gesture that nominally assumes them for an abstract unformed future*"[1048] and concluding that such appeal to future generations "*instead stands to elide numerous existing loci of responsibility in climate matters that are more concrete, more coherent, more demanding, more easily understood and more effectively articulated in law. It tends to fold those to whom responsibility is owed in the present into those owing responsibility and so annihilates the former's claim to a present and a future alike. Responsibilities towards those alive today surround us; they swell, if we choose to see them. And, if acted upon, the consequences will flow into the future, just as future generations themselves flow into our present. As things stand,*

[1047] M.GERVASI, *Equità intergenerazionale* …, cit., pp. 302-304.

[1048] S.HUMPHREYS, *Against Future Generations*, in *The European Journal of International Law*, Vol. 33, No. 4, 2023, p. 1061.

however, the colonizing metabolism of climate consumption is already underway. The future, as Shue writes, is not inaccessible or unborn: 'it is not even future.'"[1049].

The examined litigation has shown that considering the perspective of children and youths can positively influence the actions of governments and parliaments towards long-term and non-myopic planning of environmental policies[1050]. In this sense, a better future from an intergenerational perspective would also be secured by focusing on the obligations of current generations, as Humphreys suggests.

Important insights on this point could come from the advisory opinion requested from the ICJ (and examined in Chapter III), since the question is explicitly extended to the legal consequences for States when "*by their acts and omissions,* [they] *have caused significant harm to the climate system and other parts of the environment, with respect to:* […] *(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change*".

3. An early assessment of the rights-turn and ways forward

Today, the database of cases is large enough to assess whether rights-based litigation has been successful.

An accomplished analysis of the phenomenon should not be limited to the outcome of the litigation. This approach would inevitably be inadequate for the mere fact that there are many areas of the world where little or nothing is known about rights-based litigation (e.g. China, which is also one of the largest contributors to global warming). Evaluating the success of judicial initiatives is a necessary but insufficient first step in assessing the utility of rights-based litigation. This step is limited to a strictly legal perspective, although climate change, more than any other global issue, requires a multidisciplinary approach.

It should be noted that, in the face of disappointing results characterizing early experiences with rights-based litigation (see the Inuit petition), successful initiatives by plaintiffs are steadily increasing, although the favourable outcomes will likely open the door to the problem of the enforcement of the rulings, especially if they pertain to the obligation to implement more effective and ambitious measures.

[1049] Ibid., p. 1092. For an opposed view, see M.WEWERINKE-SINGH, A.GARG, S.AGARWALLA, *In Defence of Future Generations: A Reply to Stephen Humphreys*, in *The European Journal of International Law*, Vol. 33, No. 4, 2023, pp. 651-667.

[1050] As the 2023 Litigation Report reveals, a significant portion of rights-based cases have been brought on behalf of children and youth. See 2023 Litigation Report, supra, p. 40.

Moreover, it is well known that litigation is often strategic in nature, as it is motivated not only by the plaintiffs' interests, but also by the general goal of bringing about social change[1051].

For this reason, too, it is not easy to assess the impact of strategic litigation.

Ultimately, the key question is whether the 'rights-turn' has had a positive impact on climate change policies and human rights protection. In order to scrupulously assess the direct impacts of litigation on GHG emissions, it would be necessary to make a complex counterfactual judgment. This involves comparing the behaviour of States and private actors against whom claims have been brought with the hypothetical behaviour they would have adopted if such initiatives had not been taken. Mayer attempted to do so with regards to the Urgenda case, acknowledging the inevitable methodological uncertainties of such an approach[1052]. It has even been speculated that individual litigation may have led to an increase in GHG emissions or a mere displacement of emissions to other countries.

However, such analyses are often insufficient for an overall assessment, as they may only capture narrow aspects. The impact of a global phenomenon, such as climate change litigation, cannot be evaluated solely on the basis of an initiative in a single State or jurisdiction. Even counterfactual assessments are particularly uncertain in this case.

Nonetheless, it is undeniable that there have been positive results from a human rights and environmental protection perspective.

Many of the judicial initiatives analyzed have led defendant States (and, although more rarely, corporations) to adopt more ambitious measures. The success of these initiatives depended not only on the outcome of the lawsuits, but also on the media and public attention generated by litigation, which put pressure on the States (and on corporations) in the public eye. From this perspective, it is evident that a rights-based approach is particularly effective because the dialectic of human rights, such as the right to life and health, has a strong hold on individuals and captures public attention more than any other tool. Although State efforts may be insufficient to achieve the goals set in the Paris Agreement, they have nonetheless significantly limited the rise in temperatures to date. It is important to acknowledge the progress made while also recognizing the need for further action.

[1051] As Iyengar observed, "*courts are seen by some as 'forums for protest' where it was possible to reveal 'the conflict between the aspirations of the law and its grim reality, or to put public pressure on a recalcitrant government or private institution to take a popular movement's grievances seriously"*, see S.IYENGAR, *Human rights and climate wrongs: Mapping the landscape of rights-based climate litigation*, in *RECIEL*, Vol. 32, Issue 2, 2023, p. 309.

[1052] MAYER B., *The Contribution of Urgenda …*, cit., p. 18, where the author concludes that "*Altogether, Urgenda has likely caused more harm than good from the perspective of international action on climate change mitigation. These observations have implications beyond the case. They justify, in particular, the cautious approach to the exercise of judicial functions that has led to the rejection of comparable cases in other jurisdictions. Courts are ill equipped to devise comprehensive policies on climate change mitigation, and emission-reduction targets are poor substitutes*"

In addition, adaptation-focused litigation has brought attention to urgent issues affecting indigenous and vulnerable populations. This has resulted in the allocation of specific resources and the adoption of protective measures. For example, consider the case of the Torres Strait Islanders: it is reasonable to say that Australia's commitments to this vulnerable group have, at least in part, been influenced by the communication sent to the HRCttee and the subsequent decision.

Moreover, even international cases that have ruled against the plaintiffs have already had positive influence on domestic courts. It is worth noting that the Teitiota case and its application of the principle of *non-refoulement* to climate change have been referenced in Italian jurisprudence. This suggests a trend of judicial cross-fertilization.

In general, defendants have often responded to both mitigation-focused and adaptation-focused litigation by adopting more ambitious measures or, at worst, by openly manifesting their sensitivity to the issue and their commitment to fight climate change more forcefully. This is true regardless of the favourable or unfavourable outcome of the case. It is uncertain whether the announced measures will fully satisfy the stated intentions. Even if we follow a counterfactual logic, it is clear that the recent wave of litigation has prompted many public and private actors to take actions beyond what would have been done without such initiatives, sometimes even resulting in the establishment of legal obligations. Even if it is slow or halting, there seems to be signs of change.

Unfortunately, even assessing the effectiveness of mitigation and adaptation actions is particularly complex due to the cost-benefit analysis that underlies all policy decisions. These actions have impacts on multiple spheres, including the environment, economics, and sociology.

Moreover, mitigation and adaptation measures adopted by a State can themselves have negative impacts on the environment and fundamental rights, even in other areas of the world. Therefore, it is not sufficient to judge a State's environmental policy solely on the basis of meeting GHG emission standards. It is obvious that activities that generate emissions also have benefits, and prioritizing their reduction requires trade-offs in other areas, potentially even compromising other aspects of environmental protection.

The above highlights the complexity of climate change action, which requires a thorough evaluation of costs and benefits and their equitable distribution over time. It is evident that such decisions ultimately lie with the political sphere. If we consider this perspective, litigation can hinder the implementation of environmental policies: for instance, a State may determine that it is reasonable to achieve a certain level of emissions reduction (which may be below the scientific standard) based on a cost-benefit analysis in the medium to long term. However, due to a legal obligation resulting from a court ruling, or due to mere public pressure, the State may be compelled

to achieve more ambitious targets, thereby revising its cost-benefit analysis. It cannot be ruled out that a State, in order to achieve significant mitigation goals, may prioritize certain needs over others, which may be equally important but have not received judicial or media attention. This may result in an overall poorly thought-out balance of interests.

This was also underlined by Mayer, who observed that "*Judges do not ordinarily have the time or the expertise to develop fine-tuned policies on climate change mitigation. Court-imposed emission-reduction targets, despite their apparent simplicity, are poor substitutes because their achievement does not accurately reflect a State's efforts or achievements on climate change mitigation*"[1053].

However, what the State may view as a troublesome constraint also represents a fundamental mechanism of control, which ensures that, within a legitimate margin of policy discretion, environmental action is respectful of minimum standards of human rights protection. It is well known that the State's discretionary decisions not infrequently favour a balance of interests that leaves the protection of fundamental rights in the background and that focuses on the short term rather than the medium to long-term. State action has also often proved inadequate and too slow: it is a fact that action to combat climate change has been largely insufficient for a long time.

As some adaptation-focused cases have shown, only the great attention to the phenomenon given by litigation has led to the implementation of urgent measures for high-risk populations. This would be enough to understand the usefulness of rights-based litigation. Its real strength, which distinguishes it from other types of climate litigation, seems to lie in the fact that it makes it possible to establish minimum standards of conduct and protection, and thus to clearly identify the boundaries within which State policies must remain. This may represent an integral part of establishing an "*environmental minimum framework*"[1054].

It is therefore clear that climate litigation (and thus rights-based litigation) is one of many tools for the protection of the environment and human rights, which undoubtedly has both direct and indirect positive effects, but cannot be relied upon unconditionally as a panacea[1055]. In addition,

[1053] Ibid., p. 17.

[1054] S.THEIL, *Towards the Environmental Minimum. Environmental protection through human rights*, Cambridge University Press, 2021. The author argues that a human rights approach can enhance environmental protection by relying on established regimes and principles and observes (p. 5) that "*Against prevailing scepticism, this book argues that there is a sufficient basis for a comprehensive framework that theorises the relationship between human rights and environmental harm while remaining practically viable in the context of existing protection regimes: that framework is the environmental minimum. In simplified terms, the environmental minimum framework facilitates the practical protection of the environment through existing human rights law. On the one hand, it provides individuals with a claim against states to ensure basic regulations of harmful degradation and pollution (protective function), while on the other hand providing a justification for environmental regulations when they are challenged based on human rights (limitation function)*".

[1055] As Pain observed, "[…] *in order to confront the huge challenge posed by climate change, action in many areas is needed. International and regional human rights laws and systems, in theory and in practice, are part of an*

legal proceedings can take a long time, while the most effective measures need to be implemented immediately or within a few years.

While rights-based climate litigation alone may not be a complete solution to the problem of climate change and its impact on human rights, it proved to be a powerful instrument that can mobilize public opinion and draw attention to important legal issues, acting as a catalyst for engagement and more ambitious climate action. This can help to guide and improve policymaking, encouraging virtuous conduct from both States and the private sector. Thus, the direct and indirect impacts of rights-based litigation have been multiple: from those limited to raising awareness, to more impactful impacts such as policy change and recognition of rights.

To broaden the perspective, it is useful to point out that the experience of rights-based climate litigation helps to understand the potential of a human rights-based strategy in addressing, more generally, numerous other environmental problems that, although very serious, have not yet received the same attention either in the media and public opinion or at the level of legal initiatives. Suffice it to recall that, as Backes and Van Der Veen pointed out[1056], a strategy based on human rights could be a useful tool to combat phenomena such as air pollution, which is one of the main causes of death in many areas of Europe and the world. Knowing how to harness the potential of such an approach now is therefore crucial to effectively addressing current and future environmental challenges (including, among others, plastic pollution, overfishing and biodiversity loss). It is indeed intuitive to realize that these various phenomena have and will have human rights implications – sometimes with a causal chain far less complex than that characterizing climate change – with the consequence that it is not at all premature to ask what the human rights obligations of States are, nor is it premature to ask whether the measures taken are adequate and sufficiently ambitious and incisive.

As for future litigation scenarios, it can be said with good confidence that the wave of rights-based litigation will continue to increase. In all likelihood, there will also be an evolution of the strategies pursued by the plaintiffs; strategies that will inevitably be affected by the indications

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essential response in identifying the enormous human cost of dangerous global warming, and encouraging and requiring state efforts to address it". See N.PAIN, *Human Rights Law Can Drive Climate Change Mitigation*, in B.MAYER, A.ZAHAR (eds.), *Debating Climate Law*, Cambridge University Press, 2021, p. 158. See also, for a radically opposed view, F.THORNTON, *The Absurdity of Relying on Human Rights Law to Go After Emitters*, in B.MAYER, A.ZAHAR (eds.), *Debating Climate Law*, Cambridge University Press, 2021, pp. 159-169, who concludes that "*Absurdities abound in applying human rights law effectively in the context of climate change. They revolve around uncertain causality chains, the scope of human rights provisions and their application, human rights law's subjects and objectives, and significant issues with implementation and enforcement. It is then not surprising to learn that, where climate change makes an appearance in court (or a similar institution), the relevant case law is almost never premised on human rights law. And where it is, it has almost never succeeded, with the exception of the aforementioned Urgenda case (on grounds of limited relevance). This leaves essentially no scope to conclude that human rights law represents a substantive solution when it comes to tackling the causes or consequences of climate chan*ge".

[1056] C.W.BACKES, G.A. VAN DER VEEN, *Urgenda: the Final Judgement* …, cit., pp. 319-320.

coming from important cases pending at the international level (think of the Duarte case before the ECtHR or the pending advisory opinions) as well as by possible normative developments (such as those pertaining to the human right to a healthy environment). Such developments will need to be confronted in order to assess the best legal strategy to follow. Another trend that seems discernible is that, already discussed above, of adaptation-focused litigation, which, for various reasons, has considerable potential and whose spread seems inevitable in light of the worsening of the climate crisis in all countries of the world. Indeed, it is well known that climate change will have a tremendous impact on human mobility, and cases of people displaced by climate change are likely to increase.

As the Engels case suggests, it seems equally inevitable that, in the face of judgments favorable to plaintiffs, the problem of implementation and enforcement of judicial decisions will become increasingly important. This issue will vary greatly depending on the jurisdiction.

Recent developments indicate that private actors may face increased litigation, as seen in the Milieudefensie case and the pending case in Italy against ENI S.p.a. However, applying human rights law obligations to private corporations remains a challenge, so it is possible that litigation against corporations will continue to rely on alternative (and more easily applicable) legal sources. Nonetheless, the limited case law reviewed indicates that even in this type of litigation, various sources of different nature, including soft-law, contribute to ascertaining the standard of conduct and due diligence. This confirms the phenomenon of confusion and mixing of sources that has also been witnessed in litigation against States.

Scholars have recently begun to examine the emerging litigation over loss and damage caused by climate change, where plaintiffs are seeking legal remedies, including monetary compensation[1057]. This is a type of litigation that, although still in a maturing stage and partly overlapping with other types of litigation (such as adaptation-focused litigation), is bound to increase in parallel with the escalation of climate change and its impacts; the interaction between climate litigation and the climate change regulatory framework will be important in this regard, the latter having slowly and steadily evolved into the issue of loss and damage[1058].

Although climate policy has shifted to the local level in recent years, with a growing emphasis on a bottom-up approach and the importance of national-level litigation, it is important to acknowledge that this litigation draws heavily on the international regulatory framework. It is

[1057] For an overview of the phenomenon, see M.WEWERINKE-SINGH, *The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation*, in *Transnational Environmental Law*, 12:3, 2023, pp. 537–566.

[1058] See recently, on the topic, E.SHUMWAY, *Observations from COP28 on the Loss and Damage Fund*, December 20, 2023, available at: https://blogs.law.columbia.edu/climatechange/2023/12/20/observations-from-cop28-on-the-loss-and-damage-fund/.

difficult to find a judicial initiative that has not leveraged the principles enshrined in the Paris Agreement. Although the rights-based approach emphasizes the vertical responsibility of the State rather than horizontal relations, it is clear that in the examined cases, the different obligations often become blurred. International obligations, such as those outlined in the Paris Agreement, also carry significant weight in supporting the claim that human rights have been violated. However, it should be noted that some of the stances that classify international agreements as human rights treaties are innovative, but they may be difficult to replicate and subject to criticism[1059].

In addition, international litigation is becoming increasingly widespread. It thus appears that national and international phenomena are proceeding in parallel, influencing each other. In fact, while it is true that legal arguments adopted in domestic cases are often replicated at international level, it is also true that supranational litigation has influenced – and, through future stances in important pending cases, will influence – domestic litigation strategies.

[1059] See the PSB et al. v. Brazil case, discussed in Chapter III, para 2.11.3.

Conclusion

Climate change is a major challenge of our time and one of the most complex problems the international community has ever faced. There is now overwhelming scientific consensus regarding the existence of global warming and its attribution to human activities, as confirmed by recent IPCC reports. The impacts of climate change are evident in various sectors, including ecosystems, cities and infrastructure, health and food.

The international regulatory framework, from the Framework Convention on Climate Change to the Kyoto Protocol and the Paris Agreement, has been insufficient in countering climate change with the necessary speed and effectiveness.

Over the past few decades, there has been a shift in environmental policy towards the local level. This has been accompanied by a rise in bottom-up approaches and numerous initiatives by individuals and non-governmental organizations to foster more ambitious climate action.

Climate litigation has thus emerged and has become increasingly common. The term refers to various types of litigation, primarily brought before national courts, that are broadly related to climate change and its impacts. The initiatives, which are grounded in various branches of law (including civil, administrative, and human rights law) and are differently characterized in light of the peculiarities of each legal system, have pursued various purposes, which range from the protection of fundamental rights to the enforcement of national laws, corporate responsibility, climate disclosure, and prevention of greenwashing.

Over the past decade, there has been a significant increase in the number of cases related to this phenomenon. In 2017, there were approximately 800 cases in 24 jurisdictions, while by 2023, this number had risen to over 2,000 cases across 65 jurisdictions.

In more recent years, adjudicating bodies have therefore become key players in climate change action.

This work analyzed rights-based climate litigation: this category of litigation relies on fundamental rights guaranteed at constitutional level or enshrined in human rights instruments and aims to challenge the inadequacy of domestic policies and legislation in tackling climate change, with regards to both mitigation and adaptation.

The significant increase in rights-based cases is one of the most noteworthy developments in climate litigation. The number of cases has risen from 20 in 2015 to over 150 in 2022. The focus of this litigation is primarily on mitigation, with cases challenging the inadequacy of GHG reductions undertaken by States and private actors. Recently, there has been an emergence of adaptation-focused cases.

The phenomenon of the rights-turn has been fostered by the realization that climate change is not solely an environmental issue, but also a significant threat to various human rights. The rise in litigation since 2015 suggests that the Paris Agreement has stimulated this process: although human rights are only mentioned in the Preamble, the Agreement encourages a decentralized approach. This raises the question of what obligations States (and private actors) have under human rights law with regards to climate change.

The study initially presented an overview of these obligations, as emerged in the established case law regarding environmental issues. However, it also emphasized the distinctiveness of climate change as an unparalleled global phenomenon that introduces new challenges not present in any other traditional environmental problem.

These issues were illustrated through a detailed analysis of the rights-turn, inclusive of an evaluation of the advantages and disadvantages of a human rights-based approach. So-called rights-based climate litigation was examined from its earliest sporadic manifestations, through the analysis of a few emblematic cases such as the Inuit petition and the Kivalina case, to the recent "explosion" of the phenomenon, which today constitutes one of the most relevant types of litigation. On this basis, the work aimed to shed light on the most innovative aspects and recent trends in litigation, while also assessing its future scenarios.

The most recurrent procedural and substantive issues that have arisen in litigation were also examined. The study focused on several significant cases at both national and international level and addressed the strategies adopted by the plaintiffs and the arguments behind the adjudicating bodies' decisions. The ultimate goal was to assess the usefulness of a rights-based approach in promoting better climate policies and human rights protection.

The analysis revealed the most common obstacles faced by plaintiffs who invoke violations of human and fundamental rights. It also highlighted the potential of this approach.

In terms of domestic litigation, plaintiffs' claims have often been upheld, at least partially, with courts finding that the State's climate action was insufficient, mostly with regards to mitigation obligations. These findings have been occasionally associated with the issuance of an injunction that mandated specific GHG reductions targets. In the European context, the use of Articles 2 and 8 of the ECHR has often been decisive, as demonstrated by the Urgenda and Klimaatzaak cases. Fundamental rights and principles established in national constitutions, such as intergenerational equity, have also frequently been significant at both the European and global levels. Judicial initiatives instituted by youth and minors have often served as a bridge between current and future generations, highlighting the insufficient and unambitious nature of climate action taken by both States and private actors.

Although human rights law is directed at States, lawsuits have recently been instituted against corporations based on their alleged human rights obligations regarding excessive GHG emissions. Such initiatives have sometimes led to unexpectedly favourable outcomes for the plaintiffs, as demonstrated by the Millieudefensie case. However, such arguments may be difficult to replicate in other countries.

In other cases, plaintiffs' claims have been rejected due to procedural barriers, such as difficulties in proving legal standing and causation, as well as the principle of separation of powers. The different outcomes of domestic litigation, however, have often depended on the specific characteristics of each legal system, the applicable sources, both domestic and international, as well as the procedural and evidentiary rules in force.

Procedural hurdles have also arisen in international litigation, which is characterized by additional challenges, such as the prior exhaustion of domestic remedies, the need to prove victim status, and the extraterritoriality of rights; nonetheless, successful cases before international human rights bodies have recently emerged.

After reviewing the extensive litigation, it is now possible to evaluate the main hurdles that have arisen and determine whether they have been resolved or can be resolved.

As to causation, it was demonstrated that the profile has different implications in each system due to various factors. In some cases, the inability to provide meticulous proof of causation has inevitably led to the dismissal of the plaintiffs' claims. This has prompted an examination of the usefulness of alternative rules of evidence (such as market share liability) as well as the potential recognition of the human right to a healthy environment as a factor that could simplify the causal chain that the plaintiffs must prove. In some instances, this aspect has received less scrutiny due to the invocation of human rights: the rights-based approach has proven to be a helpful tool in easing the burden of proof of causation, particularly when compared to the stricter civil law rules in many jurisdictions. Ultimately, the relevance of recognizing the right to a healthy environment depends largely on the approach taken by each court: there are jurisdictions in which such recognition would be crucial to the success of the case, and others in which upholding the plaintiff's claims is not precluded at all, even without recourse to such a right.

Moreover, it has been pointed out that the causal issue arises in less problematic terms with reference to adaptation-focused litigation, whose potential is still partly unexplored but well understood in light of the few cases that have emerged (see, for instance, the Torres Strait Islanders case).

The principle of separation of powers, and thus the associated issues of political discretion and the scope of judicial review, have also arisen frequently. In some cases, the principle has been

strictly applied, resulting in the claim of the plaintiffs not being examined in the merits. In other cases, the issue of separation of powers has arisen at a later stage, to decide whether a specific emission reduction target should be ordered. In this regard, the use of human and fundamental rights has proven to be a valuable tool in expanding the scope of judicial review and tackling the non-justiciability of State policies.

The analysis carried out has also revealed a peculiar phenomenon of interaction and "confusion" in the system of sources, where soft law instruments and scientific data are assuming increasing relevance (to the point that this has been referred to as an example of "hardening" of soft law). Such elements have proved crucial in identifying the precise content of the human rights obligations of States with respect to climate change. Moreover, what is enshrined in the Paris Agreement – which sets out obligations that are, in theory, merely horizontal – has also proved essential in determining the standard of conduct required of the State under human rights law. This suggests a relevance of horizontal obligations undertaken at the international level in vertical human rights relations.

In this context, even the declarations that States consistently made at annual COPs, the consensus they expressed with regard to scientific findings, and the non-binding provisions (at least with regards to achieving specific results) in international agreements have become relevant.

An entirely new element arose from recent litigation against the 'carbon majors': the identification of due diligence obligations incumbent on companies – as set by means of general clauses by national law – has been aided by the use of soft-law tools, scientific indications, human rights norms (which are not addressed to private actors), and obligations undertaken only between States (such as those under the Paris Agreement). This has led to the conclusion that companies have an obligation to mitigate climate change.

Despite widespread (and to some extent justified) criticism of such an "overturning" of sources, the work recognizes that recourse to science is to some extent mandatory and, on closer examination, inherent in human rights obligations in the field of environmental issues.

The analysis conducted has concluded that the rights-based approach has already yielded positive results from a human rights and environmental protection perspective.

Many of the legal initiatives in this study – irrespective of their (often favourable) outcome – have been the impetus for more ambitious action on the part of the defendant States and corporations. In addition, the media and public attention that resulted from the court cases exerted public pressure on the international community and private sector. From this point of view, the dialectic of human rights has proven to be particularly effective.

Furthermore, litigation that focuses on adaptation has drawn attention to pressing issues that impact indigenous and vulnerable populations, such as those threatened by sea level rise. As a result, specific resources have been allocated and protective measures have been adopted. Even international cases that have ruled against the plaintiffs have had a positive influence on domestic courts.

In both mitigation and adaptation cases, the defendants often reacted by adopting more ambitious measures or, at the very least, by publicly demonstrating their sensitivity to the issue and their commitment to tackle climate change.

It is evident that litigation based on rights cannot be a universal solution, but rather one of several available methods to combat the climate crisis. Given the severity of this crisis, it is imperative to utilize all available tools, particularly in light of the inadequate actions taken by States and private actors.

The future of rights-based climate litigation is difficult to predict, but it is undoubtedly a developing phenomenon. This is evidenced by the steady and steep increase in cases from 2015 to the present, as well as the numerous pending cases and new lawsuits filed each year. It is uncertain how litigation will evolve, including the strategies that will be used, and the role that litigation focused on adaptation and on loss and damage will play. However, these types of litigation are very likely to increase as the climate crisis worsens and impacts more countries worldwide.

With respect to the European region – where the phenomenon of the right-turns is most prevalent – the pending applications before the ECtHR, in particular the Duarte and Klimaseniorinnen cases, may provide important insights relevant to both national and international litigation. With respect to global litigation, forthcoming advisory opinions may also provide important clarification.

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Addendum

On April 9, 2024, the Grand Chamber of the ECtHR delivered its rulings in the cases of KlimSeniorinnen v. Switzerland, Duarte Agostinho and Others v. Portugal and 32 Other States and Carême v. France.

In KlimaSeniorinnen v. Switzerland, the Court found, by sixteen votes to one, that there had been a violation of Art. 8 and, unanimously, that there had been a violation of Art. 6. The four individual applicants lacked victim-status under Art. 34 and their complaints were declared inadmissible; in contrast, the applicant association was deemed to have a right to bring a complaint. According to the Court, Art. 8 of the Convention encompasses a right to effective protection by the State from the impacts of climate change on lives, health, well-being and quality of life; in the Court's view, the Swiss Confederation had not acted in a timely and appropriate manner to develop and implement relevant legislation and measures, and thus failed to comply with its positive obligations. As to Art. 6, the Court determined that the Swiss courts had failed to seriously consider the applicant association's complaints and the scientific evidence on climate change.

In Duarte Agostinho and Others v. Portugal and 32 Other States, the Court unanimously ruled that the application was inadmissible. With regard to Portugal, where the applicants resided, the Court found that territorial jurisdiction was established. However, no jurisdiction could be established in respect of all the other respondent States. The Court found that there were no grounds for the extension, by way of judicial interpretation, of the respondent States' extraterritorial jurisdiction. As to prior exhaustion of domestic remedies, it was uncontested that the applicants had not pursued any legal avenue in Portugal. According to the Court, despite the existence of a comprehensive system of remedies in the national legal system, the applicants had failed to enable national courts to fulfil their role in the Convention protection system. The complaint against Portugal was therefore declared inadmissible on the grounds of non-exhaustion of domestic remedies.

In Carême v. France, the Court unanimously declared the application inadmissible. The Court observed that the applicant had no relevant links with Grande-Synthe, as he had moved to Brussels in 2019 and did not own, and no longer rented, any property in Grande-Synthe. The Court therefore concluded that the applicant, who did not currently reside in France, could not claim to have victim status under Art. 34 of the Convention.

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On February 26, 2024, the Italian Civil Court of Rome rendered its decision in the case known as "*Giudizio Universale*". The Court ruled that the plaintiffs' claims were inadmissible due

to the Court's lack of jurisdiction and the referral of the issue to the administrative court, as outlined in the grounds for the ruling. According to the Court, decisions concerning the optimal means to address the phenomenon of anthropogenic climate change, which involve the exercise of discretionary socio-economic and cost-benefit assessments across the full spectrum of human community life, fall within the purview of political bodies and are not subject to judicial review before the civil court.