THE INTERRELATIONSHIP BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE: AN APPRAISAL

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For my parents

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ABSTRACT

The Interrelationship between Human Rights and Climate Change: An Appraisal

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The increasing impacts of climate change upon a number of human rights of individuals and communities worldwide evidence the need of urgent and radical responses to the crisis. Climate change gives rise to an unprecedented scenario that challenges otherwise unquestioned intrinsic notions within human rights in relation to the environment. This thesis argues that climate change acts as a catalyst of human rights rethinking and potential reforms in the long term. Indeed, the context of climate change exposes conceptual misunderstandings in the human rights' relational approach to the environment. As part of its Western origins, international human rights law has traditionally represented the natural world as an object of instrumental value insofar it satisfies human needs. This (mis)representation of the natural world reflected in international human rights law legitimises rapacious environmental exploitation - or, at least, allows human rights' complicity therein - in a way to meet neoliberal aims of unlimited (and unequal) economic growth, which mostly benefits multinational corporations. Corporations are considered responsible for about two-thirds of global emissions and, hence, the main contributors to climate change.[1] Yet, corporate actors traditionally operate within a favourable regulatory framework that allows them to disproportionally contribute to global climate change through the carbon footprint of their activities.

Global warming must be kept to a maximum of 1.5°C in order to limit catastrophic effects of climate change, for which it is vital to radically drop global carbon emissions.[2] Yet, governments' responses have failed to meet the level of urgency and ambition required to limit climate impacts. As a consequence, civil society is mobilising, *inter alia*, through climate litigation. Using rights-based climate litigation as a case study, this thesis seeks to determine whether or not climate change has the potential to catalyse rethinking and even reforms in international human rights law,

[1] See, for example, Matthew Taylor and Jonathan Watts, 'The Polluters revealed: The 20 firms behind all carbon emissions' (*The Guardian,* 9 October 2019) <https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions> accessed 1 July 2020.

[2] Intergovernmental Panel on Climate Change, 'Global Warming of 1.5°C '(Special Report, 2018).

in a way to gradually nuance its anthropocentric relational approach to the natural world. This does not imply suggesting that human rights should become non-anthropocentric in essence, but rather, I argue, that human rights may trigger a gradual change in their relational approach vis-à-vis the environment such that the natural world would be valued intrinsically. In doing so, this thesis also examines how human rights law operates in the context of climate litigation, whereby complex legal challenges of causation, attribution, extratemporality and extraterritoriality are presented. This thesis argues that, although still at an embryonic state rights-based climate litigation, human rights can, to some extent, assist in overcoming those technical challenges when applied in the context of climate change. Overall, this thesis argues that the cross-cutting and multifaceted global problem of climate change demands 'business *unusual*' responses from different fields, including international human rights law. The context of climate change has the potential to prompt such responses, including structural rethinking and correction of human rights' (mis)understandings on the environment, ultimately, its evolution.

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INTRODUCTION

The Earth, as we know it, is facing a life-or-death situation due to human-triggered climate change. Doomsday climate events, loss of biodiversity, harvest breakdown, vital resources scarcity, climate-related conflicts and ecosystems collapse are a present reality severely affecting peoples and ecosystems worldwide. Yet, governments, at international and national levels, are failing to react with measures quick and radical enough to limit the effects of the climate crisis. One of the human responses generated as a reaction to crises were human rights, a body of laws built on the basis of inherent and inalienable 'rights' that all humans enjoy, solely because of their *human* condition. However, from their origins to the present day, the idea and law of human rights have largely ignored a crucial factor in their anthropocentric rationale: nature.

Human rights have grown and flourished decoupled from nature, despite being an integral part of human life and crucial for the realisation of human rights. Human rights law echoes a (mis)understanding on the relationship between humans and nature enrooted in mainstream law, whereby nature is represented as an object with the instrumental function of satisfying human needs.[1] Humans, on the other hand, are not represented as a unique part of nature from which, just as other components of the natural world, depend for survival. Instead, human rights present humans as external and hierarchically superior to nature and, as such, entitled through law to exploit it.[2] Although it falls beyond the scope of this thesis to analyse the roots and manifestations of this (mis)understanding in the relationship between humans, human rights, and nature,[3] it is important to indicate this as a point of departure of this analysis. The implicit misrepresentation of the natural world in human rights - as a legal field focused on the protection of human beings and their entitlements characterised as 'rights' - has contributed to reinforce a wrong understanding of

[1] For Graham, for example, the 'separation and hierarchical ordering of the human and non-human worlds constitutes the primary assumption from which most Western legal theory begins'. Nicole Graham, *Lawscape: Property, Environment, Law* (1st edn, Routledge 2010) 15.

[2] See, for example, Klaus Bosselman, 'A vulnerable environment: contextualising law with sustainability' (2011) 2(1) Journal of Human Rights and the Environment 43.

[3] For a philosophical analysis of legal anthropocentrism in human rights, see Anna Grear, 'The vulnerable living order: human rights and the environment in a critical and philosophical perspective' (2011) 2(1) Journal of Human Rights and the Environment 23.

nature that facilitates and legitimises environmental exploitation, which is at the core of the climate crisis. Certainly, the consequences of the long-lasting (mis)understanding of the relationship between humans and nature, reflected in laws and extended to other areas of living in society are increasingly being evidenced by the effects of climate change across the planet. That is *why* this thesis focuses on the interrelationship between human rights and climate change. Climate change – understood as 'one of the greatest challenges of our time – an age where our impacts as human societies, have extended beyond our immediate environment and are now affecting entire planetary equilibria',[4] exposes the danger of implicit (mis)conceptions in our relationship with nature as human society, which are reflected in laws, and the need to correct them. This correction implies the evolution of law, in such a way as to recognise nature as a subject of inherent entitlements in the legal system – regardless whether these take the shape of 'rights' or otherwise – just like human beings, as part of the same *whole*.[5] Maintaining traditional assumptions on nature within laws (including human rights law) where it is objectified as an utilitarian means to human ends, supports and legitimises the believes and actions that have led the world, as a global society to climate change, a threat to all forms of life on Earth, including human life which the law of human rights intends to protect.

In that context, this thesis focuses on international human rights law as the 'most putatively anthropocentric of all legal orders of rights',[6] dedicated to the protection of human beings through entitlements defined as 'rights', in contradictory disconnection to their natural environment. This thesis, therefore, argues that the relational approach of human rights to nature prevailing in Western law should be corrected in order to coherently -and likely more effectively- protect human rights, in harmony with nature.[7] As Burdon notes, 'the dominant paradigm of Western law, which

[4] Benoit Mayer, *The International Law on Climate Change* (1st edn, Cambridge University Press 2018) 1.

[5] For Bookchin, 'what makes unity within diversity in nature more than an ecological metaphor for unity in diversity in society is the underlying philosophical concept of *wholeness.* By wholeness, I mean varying levels of actualization, an unfolding of the wealth of particularities that are latent in as-yet-underdeveloped potentiality.' Murray Bookchin, *The Ecology of Freedom – The Emergence and Dissolution of Hierarchy* (Cheshire Book, 2018) 27.

[6] Grear (n 3) 34.

[7] For the purpose of this thesis, the term 'Western' refers, on the one hand, to the 'vast heritage of humanist philosophy and theology [reflected in] western legal concepts [which] reflect anthropocentric values. Peter Burdon, 'The Earth Community and Ecological Jurisprudence' (2013) 3(5) Oñati Social-Legal Series 815, 815. And, on the other hand, in connection with the TWAIL context of this thesis, the term Western also refers to 'the principles recognized in current international law [which] reflect relations of power and the historical dominance of specific Western states and their interests [excluding thus non-Western realities and interests]. As such the current norms of international law are internal to informal (neo)liberal imperialism'. Tony Evans and Alison J. Ayers, 'In the Service of Power: The Global Political Economy of Citizenship and Human Rights' (2010) 10 Citizenship Studies 239, 296.

places humans at the centre of the legal system must be replaced with a conception of humans as part of an Earth community in which all natural beings, systems and the like are considered to be 'subjects, not objects'.[8] Indeed, the Western inception of human rights present a one-sided view of living in society, in which humans are represented as a sort of 'super specie', disconnected from and with inherent 'rights' over nature, which is reduced to an 'object' deprived of 'rights',[9] a 'storage bin of "natural resources" or "raw materials"[10] at humans' service. This (mis)understanding of the natural world reflected in international (human rights) law promotes an imaginary split between the human and natural world, which comes at an enormous cost to life (both human and non-human) and ecosystems across the planet. As Gearty puts it,

> 'the lack of interest in the nonhuman world is …built into the philosophy of human rights, …[which] is also evident in much of international human rights law', thereby equipping governments unconcerned about environmental protection with a human rights-based reason for engaging in damaging activity'.[11]

Under this logic, legal systems have empowered 'humans' to carry out environmentally harmful activities oriented to endless economic growth and, in this sense, have extended humans' authority over nature to a 'personified' legal fiction, the corporation. Corporations personify in legal systems a sort of 'superhuman species' granted by law with owner-like faculties to exploit nature in the name of economic growth necessary for the realisation of human rights. It could thus be said that human rights embed 'the underlying idea that their protection of the human being has generally been accompanied by disregard for the well-being of the non-human animal and by an exploitative attitude towards the environment.[12] This conceptual (mis)understanding of nature and hence not the relational approach of humans to nature, reflected in legal systems, including international humans rights law – as the 'most putatively anthropocentric of all legal orders of rights'[13] – are at the core of the climate crisis.

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[8] Burdon, ibid, 818.
[9] For Burdon, for example, '[theories of law and legal concepts promote human beings as separate to the environment and define frameworks for the exploitation of nature', ibid, 815. See also, for example, Grear (n 3).
[10] Bookchin (n 5) 20.
[11] Conor Gearty, 'Do human rights help or hinder environmental protection?' (2010) 1(1) Journal of Human Rights and the Environment 7, 9.
[12] Grear (n 3) 25.
[13] ibid, 34.

That is *why* this thesis focuses on international human rights law as subject of potential reforms, and climate change as external stressor capable of catalysing the rethinking needed to trigger such reforms, particularly on the human rights' relational approach to nature. This is because climate change - at difference of comparable global challenges with environmental implications (e.g. the ozone layer depletion resulting on the adoption of a complex international legal framework[14]) - is a complex, cross-cutting and multi-faceted global challenge requiring multilateral far-reaching and radical policy responses from a multidisciplinary perspective (whereby human rights is one of them) and, as such, constitutes a *unique*[15] epochal threat to humanity and the planet as a whole. As Bodansky, Brunnée and Rajamani put it:

> 'Climate change poses a complex, polycentric, and seemingly intractable policy challenge … Several factors combine to make climate change an 'issue from hell'.[16] It is planetary in scope and – due to its long-term and potentially irreversible consequences – intergenerational in its impacts. It is caused by a wide range of production and consumption processes. Its causes and effects are global and require complex collective action. It can be managed only if all states, or at least the major GHG emitters, cooperate in undertaking potentially costly, large-scale shifts in their economic and energy systems'.[17]

Certainly, climate change cannot be temporarily or geographically demarcated. Therefore, departing from the recognition of the intrinsic contradictions underpinning human rights in relation to the natural environment, and the *uniqueness* of climate change as an epochal threat, this thesis seeks to find out whether the context of climate change can provoke developments in international human rights law as to propel rethinking and eventual reform of the human rights' relational approach to the environment or natural world. In exploring the terrain of climate litigation in the

[14] See the Vienna Convention for the Protection of the Ozone Layer, adopted on 22 March 1985 and entered into force on 22 September 1988; and the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 16 September 1987; and its subsequent amendments adopted in London on 29 June 1990; in Copenhagen on 25 November 1992; in Montreal on 17 September 1997; and in Beijing on 3 December 1999.

[15] See Section 1.2 of this introduction for a detailed discussion of the 'uniqueness' of climate change and its potential ability to prompt rethinking and potential development in international human rights law.

[16] Al Gore, *The Future: Six Drivers of Climate Change* (New York: Random House, 2013) 314 *cited* in Bodansky et al, *infra* note 17.

[17] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (1st ed, Oxford University Press 2017).

last chapter, this thesis attempts to identify early signs that the traditional (mis)understandings of human rights in relation to the environment are being or could be challenged; and, in this process, it also examines the challenges and performance of international human rights law when applied in a context of climate change.

This thesis argues that the context of climate change has the potential to act as catalyst for the rethinking and gradual expansion of human rights law, in a way to correct its relational approach to nature in the long term. In doing so, this thesis attempts to move discussions on human rights and climate change beyond the current focus on the inclusion of human rights considerations in climate action, by incorporating a critical approach to human rights that recognises the serious pitfalls in the international legal and human rights approach to nature, which are at the root of the climate crisis. As such, this thesis intends to contribute with an alternative way of framing the evolving field of human rights and climate change. By exploring avenues potentially triggering urgent rethinking and ultimate expansion of human rights, particularly with respect to their relational approach to nature, this thesis makes what, somewhat may seem to be a counter-intuitive contribution. It proposes that climate change will alter foundational ideas in human rights law.

1. The Climate Emergency

The increase in the frequency and intensity of climate events has become common news in the last decade. Heatwaves, hurricanes, floods, droughts, wildfires, glaciers melting, mass species extinction, ocean acidification, among other climate-related events, have severely impacted communities and their surrounding environment across the globe in recent years causing enormous and irreparable loss. The 21st century is being characterised by increasing record temperatures. The last decade, from 2010 to 2019, which is considered 'the warmest decade on record',[18] registered a nearly consistent increase of global temperature records. 2016 was 'the third year in a row that a new global temperature record [was] set'.[19] In fact, according to the World Meteorological

[18] Katherine Brown (ed), 'NASA, NOAA Analyses Reveal 2019 Second Warmest Year on Record' (*NASA Press Release 20-003*, 15 January 2020). She also notes that in 2019 'temperatures were second only to those of 2016 and continued the planet's long-term warming trend: the past five years have been the warmest of the last 140 years.' <https://www.nasa.gov/press-release/nasa-noaa-analyses-reveal-2019-second-warmest-year-on-record> accessed 11 May 2020.

[19] NASA Earth Observatory, 'Global Temperature Record Broken for Third Consecutive Year' (*NASA Earth Observatory*, 19 January 2017) <https://earthobservatory.nasa.gov/images/89469/global-temperature-record-broken-

Organization, '2015-2019 … [was] set to be the warmest five-year period on record.[20] Similarly, sea level rise has increased throughout the last decade. According to scientific findings worldwide, '2019 marks the eighth consecutive year that global mean sea level increased relative to the previous year, reaching a new record: 87.6 mm above the 1993 average'.[21] One thus no longer needs to be a climate expert to realise that the global climate is changing, and that it bears catastrophic consequences for humanity *and* the environment as a whole.[22]

It is also increasingly recognised that greenhouse gas emissions ('*emissions'*) released with the burning of fossil fuels such as oil, gas, and coal are the main cause of climate change: 'When burnt, fossil fuels release carbon dioxide into the air, causing the planet to heat up'.[23] This is, to a great extent, the result of human activity, which, despite repeated alarming scientific projections, is *still* leading the world towards climate catastrophe. According to the Fifth Report of the Intergovernmental Panel on Climate Change (IPCC), '[it] is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the *anthropogenic* increase in greenhouse gas concentrations and other anthropogenic forcings together'.[24] In the same vein, the United Kingdom Meteorological Office found that:

> Humans cause climate change by releasing carbon dioxide and other greenhouse gases into the air. Today, there is more carbon dioxide in the atmosphere than there ever has been in at least the past 800,000 years. During the 20th and 21st century, the level of carbon dioxide rose by 40%.[25]

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for-third-consecutive-year> accessed 11 May 2020. See also, Japan Meteorological Agency, 'Global temperature for 2016 to be the highest since 1891 (Preliminary)' (*Tokyo Climate Center*, 21 December 2016) <http://ds.data.jma.go.jp/tcc/tcc/news/press_20161221.pdf> accessed 11 May 2020.

[20] World Meteorological Organization, 'Global Climate in 2015-2019: Climate change accelerates' (World Meteorological Organization, 22 September 2019) <https://public.wmo.int/en/media/press-release/global-climate-2015-2019-climate-change-accelerates> accessed 11 May 2020.

[21] American Meteorological Society, 'Global Oceans' (2020) 101(8) Bulletin of the American Meteorological Society S129, S135.

[22] Putting the humanity *and* the environment as two different concepts in the same sentence might be contradictory to the bottom-line argument of this thesis, as it points out to the differentiation between these two concepts enrooted in human rights law – and, in general, in Western neoliberal culture- while its main argument implies that they both are and should be regarded as a part of a unity. But, for clarity, both concepts are mentioned.

[23] United Kingdom Met Office, 'Causes of Climate Change' (*UK Met Office*, undated) <https://www.metoffice.gov.uk/weather/climate-change/causes-of-climate-change> accessed 11 May 2020.

[24] IPCC, Fifth Assessment Report - Summary for Policymakers 'Climate Change 2013: The Physical Science Basis' (IPCC, 2013) at 17.

[25] United Kingdom Met Office (n 23).

While *humans* in general contribute to climate change through their carbon footprint, bearing in mind the continued interlinked factors of coloniality and neoliberalism, it is important to know that not all *humans* have (historically) contributed *equally* to the problem. In fact, there are huge differences in terms of human contributions to / impacts of, climate change. That is the paradox of climate change: it disproportionally impacts first, and the *most*, those who contributed the *least* to the problem, who, at the same time, are already in disadvantaged positions amongst and within societies / states, such as, for example, small islands states, indigenous peoples, children, future generations, and non-human components of the environment. At the same time, on the other side of the reality of climate change are the multinational corporations ('*corporations*'), which are by far the largest contributors to climate change.[26] Scientific studies indicate that only 100 private and state-owned corporations are responsible for 71% of global emissions, from which only 25 are responsible for 51% of global emissions.[27] Therefore, taking into account the differentiated and disproportionate emissions contributions from corporations, any ambitious (international or national) effort to tackle climate change must principally and urgently target corporate sources as the main contributors to global emissions.[28]

The IPCC has warned that there is a very short time left to dramatically drop global emissions and reduce the effects of climate catastrophe. The IPCC, 'Global Warming of 1.5°C Report', warns that the world has only about a decade to reduce global emissions in such a way to hold global temperature rises below 1.5˚C, in order to avoid dangerous climate change effects. It states that:

> The lower the emissions in 2030, the lower the challenge in limiting global warming to 1.5°C after 2030 with no or limited overshoot (*high confidence*). The challenges from delayed actions to reduce greenhouse gas emissions include the risk of cost

[26] See Richard Heede 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2014) 122 Climatic Change 229.
[27] Paul Griffin, 'The Carbon Majors Database – CDP Carbon Majors Report 2017' (CDP Report 2017) 8. See also, Tess Rilley, 'Just 100 companies responsible for 71% of global emissions, study says' (*The Guardian*, 10 July 2017) <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change> accessed 11May 2020.
[28] See, for example, Climate Accountability Institute, 'Carbon Majors - Update 8 October 2019: Accounting for carbon and methane emissions, Top Twenty investor-owned and state-owned oil, gas, and coal companies 1965-2017' (*Climate Accountability Institute*, 8 October 2019) <https://www.climateaccountability.org/carbonmajors.html> accessed 1 June 2020.

> escalation, lock-in in carbon-emitting infrastructure, stranded assets, and reduced flexibility in future response options in the medium to long term (*high confidence*).[29]

This implies that holding temperature increase below 1.5˚C would require radical efforts and changes at all levels of society. The *1.5°C Report* highlights the need to undertake 'rapid and far-reaching transitions' in order to limit global warming to 1.5°C.[30] Therefore, states have a central and essential role in leading climate action.[31] However, contrary to this, states have not responded with the level of ambition and promptness needed. The *1.5°C Report* warns that the 'current nationally stated mitigation ambitions as submitted under the 2015 Paris Agreement … would *not* limit global warming to 1.5°C, even if supplemented by very challenging increases in the scale and ambition of emissions reductions after 2030'.[32] In particular, responses from governments – particularly from those contributing the most to climate change with carbon emissions - have generally been weak.[33] These responses have failed to meet the level of urgency and ambition needed to face the climate emergency.[34] Considering the level of urgency, special attention should be given to the failure of governments to target emissions from large corporate emitters, through more stringent laws and policies. As Humphreys points out, '[the] weak legal response to climate change means that big polluters are getting off lightly'.[35] This failure to target the largest emitters

[29] IPCC, 'Global Warming of 1.5°C Report: Summary for Policymakers' (IPCC, 2018) [hereinafter, *1.5°C Report*], 20.
[30] ibid, 17.
[31] For the purpose of this thesis, climate action should be understood as the set of measures that governments and/or grassroots movements are or should be taking, based on the '[evidence] of global warming and accelerating greenhouse gas emissions [which] created a new sense of urgency and, despite the consensus on the need for action, the growing failure of international climate policy engendered new political space for social movements. Stuart Rosewarne, James Goodman and Rebecca Pearse, *Climate Action Upsurge: The ethnography of climate movement politics* (1st edn, Routledge 2013).
[32] IPCC (n 29) 20. Note that the *1.5°C Report* was issued in October 2018, which means that, at the time of writing, some Nationally Determined Contributions (NDCs) have been updated, although they still may likely not amount to the level of ambition required to hold global temperatures below the 1.5°C recommended in the report. For an updated track of the NDCs per country, see Climate Action Tracker <https://climateactiontracker.org/countries/> accessed 1 June 2020.
[33] For instance, currently, China has the highest share of global CO2 emissions amounting to 28%, followed by United Sates with 15%, India with 7%, and the Russian Federation with 5%. Union of Concerned Scientists, 'Each Country's Share of CO2 Emissions' (*Union of Concerned Scientists*, 12 August 2020) <https://www.ucsusa.org/resources/each-countrys-share-co2-emissions> accessed 1 June 2020.
[34] According to the Nationally Determined Contributions (NDCs) presented to the UNFCCC by states, their emissions reduction targets are consistent with: China, 3-4% global warming (highly insufficient); United States, more than 4% global warming (critically insufficient), India, 2% (compatible, although not necessarily well below 2°C); and, Russian Federation, more than 4% (critically insufficient). Climate Action Tracker <https://climateactiontracker.org/about/contact-us/> accessed 1 June 2020.
[35] Stephen Humphreys, 'International law stays silent on the responsibility for climate change' (*The Guardian*, 14 December 2014) <https://www.theguardian.com/sustainable-business/2014/dec/11/international-law-silent-climate-change> accessed 1 June 2020.

as a response to the urgent need to dramatically reduce global emissions, is thus pushing the planet closer to the edge of climate collapse.

1.1 Climate change: Ignoring the Alarm Bells?

It appears that the emergency 'alarm' calling for radical steps to be taken by governments to give the world, at least, a better chance to face the imminent and existing impacts from climate change, remains unheard. According to the World Meteorological Organization report, 'The Global Climate in 2015-2019', which includes the immediate years following the adoption and entering into force of the Paris Agreement, global emissions have *only increased* reaching historic records. It says that:

> 2015–2019 has seen a continued increase in carbon dioxide (CO2) emissions and an accelerated increase in the atmospheric concentration of major greenhouse gases (GHGs), with growth rates nearly 20% higher. The increase in the oceanic CO2 concentration has increased the ocean's acidity. The five-year period 2015–2019 is likely to be the warmest of any equivalent period on record globally, with a 1.1 °C global temperature increase since the pre-industrial period…Continuing and accelerated trends have also predominated among other key climate indicators, including an acceleration of rising sea levels, a continued decline in the Arctic sea-ice extent, an abrupt decrease in Antarctic sea ice, continued ice mass loss in the glaciers and the Greenland and Antarctic ice sheets, and the clear downward trend in the northern hemisphere spring snow cover. More heat is being trapped in the ocean; 2018 had the largest ocean heat content values on record…Heatwaves were the deadliest meteorological hazard in the 2015–2019 period, affecting all continents and resulting in new temperature records in many countries accompanied by unprecedented wildfires…The 2019 northern summer saw record-breaking wildfires that expanded to the Arctic regions, setting new records, and wide-spread fires in the Amazon rainforest.[36]

Should these alarming accounts inform climate responses from governments, one would expect the implementation of immediate emergency-like measures, such as shutting coal mines; passing

[36] World Meteorological Organization, 'The Global Climate in 2015-2019' (WMO, 2019) at 3.

(more) stringent legislation to regulate and gradually reduce extractive activities; criminalising fracking and offenses against the environment; taxing proportional to certain activities' emission levels; among others. However, climate breakdown has continued unabated in the past five years; CO2 has accelerated; the oceans have continued to acidify; and the world has warmed to unprecedented levels. We have all witnessed the impact on our television screens – devastating fires in the Amazon and Australia, and, the Arctic, melting ice caps and shocking weather events. Still, despite these flagrant impacts on the planet affecting humans and the environment worldwide, today and in the future, the emergency alarm seems, yet, not to have been heard. This thesis contends that, at least one significant part of the problem and the reasons underpinning this dangerously indolent attitude to the climate crisis is rooted in our *human* understanding of and relational approach to nature, which is reflected in dominant neoliberal laws and consumption patterns, including in international human rights law. Before exploring the existing human and human rights approach to nature, it is first necessary to explain why climate change can be considered a 'unique' global situation capable of triggering otherwise 'impossible' changes in human rights.

1.2 The Uniqueness of Climate Change: a 'Unique' Opportunity to 'Fix' Human Rights?

Climate change entails unprecedented challenges and circumstances for humans and the environment in many respects, including in relation to human rights. It is an urgent problem, unequal in its impacts and uncertain in magnitude. These features make the climate crisis a unique global landscape.

First, climate change is an *urgent* problem. Scientists have repeatedly warned of the urgency of limiting human emissions to mitigate climate impacts. Indeed, scientific studies warn that 'we are deeply within a climate emergency state, but people are not aware of it.'[37] Professor Schellnhuber

[37] Joanna Roberts, '"I would like people to panic" - Top scientists unveils equation showing world in climate emergency' (*Horizon, The EU Innovation & Research Magazine*, 24 September 2019) *citing* Interview with Professor Hans Joachim Schellnhuber, *Director, Potsdam Institute for Climate Impact Research (*Brussels, 24-26 September 2019) <https://horizon-magazine.eu/article/i-would-people-panic-top-scientist-unveils-equation-showing-world-climate-emergency.html> accessed 11 May 2020. See also some scientists' views on the possible counterproductive implications of regarding 2030 as a sort of world deadline to dramatically curve carbon emissions. Bob Berwyn, 'What does '12 Years to Act Climate Change' (Now 11 years) Really Mean?' (*Inside Climate News*, 27 August 2019) <https://insideclimatenews.org/news/27082019/12-years-climate-change-explained-ipcc-science-solutions> accessed 11 May 2020.

illustrates the extent of the problem: '…when it comes to the urgency of decarbonising society and keeping the forests alive, we need at least 20 years. We have only 30 years left to do this. It simply means that we are in a deep state of climate emergency. If you trust the numbers from science'.[38] Recognising climate change as a global emergency is therefore crucial in order that governments and society in general implement ambitious climate action consistent with the level of the emergency.

Second, whilst climate change is *indiscriminate* as a global problem, its impacts are unequal. Climate impacts hit some states, populations, and ecosystems far more than others. That is precisely the big paradox of climate change: it affects *most* those who have contributed the *least* to the problem. For instance, small islands and low-lying states are clearly some of the most disproportionally affected by climate change to the extent that it poses an imminent threat to their very existence. Also, one of the most vulnerable states to climate impacts, Bangladesh, may even lose part of its territory: 'three-foot rise in sea level would submerge almost 20 percent of the country and displace more than 30 million people—and the actual rise by 2100 could be significantly more'.[39] Similarly, for small island states the threat is imminent: '[while] contributing less than 1 per cent to the world's greenhouse gas emissions, these countries are among the first to experience the worst and most devastating impacts of climate change with greater risks to economies, livelihoods, and food security'.[40] The indiscriminate but still unequal character of climate impacts is shown in these countries' present realities, which prove the uneven impacts of climate change. These realities certainly raise climate justice issues, especially if their emission contributions to the problem are compared with those of highest emitting states, such as the United States or China. Yet, climate change is indiscriminate and therefore, albeit to varying degrees, *also* affects those who contributed the *most* to the problem. For instance, **'**[heavy] rainfall is increasing in intensity and frequency across the United States and globally and … [heatwaves]

[38] ibid.

[39] Robert Glennon, 'The Unfolding Tragedy of Climate Change in Bangladesh' (*Scientific American*, 21 April 2017) <https://blogs.scientificamerican.com/guest-blog/the-unfolding-tragedy-of-climate-change-in-bangladesh/> accessed 11 May 2020. See, also, for example, the impacts of climate change the small island state of Tuvalu: Eleanor Ainge Roy, 'One day we'll disappear: Tuvalu's sinking islands' (*The Guardian*, 16 May 2019) <https://www.theguardian.com/global-development/2019/may/16/one-day-disappear-tuvalu-sinking-islands-rising-seas-climate-change> accessed 11 May 2019.

[40] United Nations Development Programme, 'Small Island nations at the frontline of climate action' (UNDP website, 18 September 2017) <https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/09/18/small-island-nations-at-the-frontline-of-climate-action-.html> accessed 11 May 2020.

have become more frequent … since the 1960s, while extreme cold temperatures and cold waves are less frequent.'[41] This is added to extreme weather events that have impacted the United States in the last decades.[42] Likewise, China, the state with the highest emissions, is also seriously affected by climate impacts. It is estimated that 'water scarcity in northern China has been exacerbated by decreasing precipitation, doubling population, and expanding water withdrawal'.[43] Certainly, there is no doubt that some states are by far most vulnerable to and at the forefront of climate impacts, however, climate change still poses a serious threat to *all* states and the Earth as a whole.

These examples, show that climate impacts are received by all, including the two largest emitters states, however, the poorest and most vulnerable are those who experience first and worst the impacts of climate change, both amongst states (e.g. small islands states), and within states, including wealthy states too.

Thirdly, climate change impacts are *uncertain*. Whilst there exist accurate projections on the potential impacts of climate change across the world, uncertainty remains about the timing and extent of its actual impacts given that these can develop over several years or even decades. The aforementioned example of small islands states or Bangladesh challenge the temporality with which climate change is commonly presented. They show that climate change is no longer a *threat* with *future* consequences, but a reality that gets worse (for some states more than others), with continuous sea level rise: '[for] the nearly one-third of all citizens in small island developing states … living in areas no higher than a few meters above sea level, the existential threat of climate change is already here.'[44] Yet, based on climate projections, climate change is often represented as a *future* problem, providing imaginary room for delayed climate action.

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[41] Donald Wuebbles, David Fahey and Kathy Hibbard [coordinating lead authors) *et al*, 'Executive Summary - Highlights of the Findings of the U.S. Global Change Research Program Climate Science Special Report' in Linda Mearns, Ross Salawitch and Christopher Weaver (review eds) *Climate Science Special Report: Fourth National Climate Assessment, Volume I (*U.S. Global Change Research Program, 2017) at 1-2.

[42] For detailed records of extreme climate events in the United Sates, see NOAA Climate.gov., (*Climate Watch Magazine)* <https://www.climate.gov/news-features/category/extreme-events> accessed 13 June 2020.

[43] IPCC, Fifth Assessment Report (n 24) Climate Change 2014: Impacts, Adaptation, and Vulnerability – Part B: Regional Aspects, (IPCC, 2007) at 1337.

[44] Hussain Rasheed Hassan and Valerie Cliff, 'For small island nations, climate change is not a threat. It's already here' (World Economic Forum website, 24 September 2019) <https://www.weforum.org/agenda/2019/09/island-nations-maldives-climate-change/> accessed 11 May 2020.

Overall, the urgent, indiscriminate, and uncertain character of climate change makes it a *unique* problem, unprecedented and with multifaceted impacts. Contrary to more specific events that result in crises-provoked international legal developments,[45] the climate crisis demands and – though time will tell – may even force rethinking of conceptual understandings incept in neoliberal laws, including international human rights law, such as the foundational conceptual flaw in the characterisation of the relational approach of humans to nature. However, as Charlesworth warns with respect to crises-triggered legal developments in international law, international human rights law may risk developing in response to the climate crisis whilst failing to see 'issues of structural justice'[46] and global inequality, which have contributed to a great extent to the climate crisis in the first place. A crisis induced response risks also seeing and dealing with parts of the problem only. Crisis poses, therefore, both risks and opportunities for the evolution of international human rights law. This thesis focuses on the potential catalyst effect of climate change to propel changes in the relational approach of human rights to nature. This will be discussed in the next section.

2. Human Rights, Humans and Nature: The Relational Approach

In a climate changing world, stepping into the Anthropocene is crucial to interrogate our relationship with the natural world and how this is portrayed in the laws that govern us. As a matter of course, the human relationship with nature has been decoupled, whereby the former is a separate entity, which *naturally* exercises dominance over the latter. Grear recognises that '[such] separation between Anthropos and its feminised 'other/s-nature' is fundamental to understanding the foundations of the Anthropocene crisis'.[47] She however notes that:

> … largely absent from the (thus far dominant) standard natural science accounts of the Anthropocene's genesis – is the important idea that the Anthropocene (and its climate crisis) represents a *crisis of human hierarchy* … [Such] hierarchies implicate a systemically privileged juridical 'human' subject whose persistence subtends – to a

[45] Such as, for example, the Kosovo crisis used by Charlesworth as case study. See Hilary Charlesworth, 'International Law: A Discipline of Crises' (2002) 65(3) The Modern Law Review 377.
[46] ibid, 391.
[47] Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on the 'Anthropocentric' Law and Anthropocene 'Humanity'' (2015) 26 Law Critique 225, 235.

> significant and continuing extent – the neoliberal global juridical order as a whole, and that these hierarchical commitments also significantly undermine the ability of the international legal order to respond to climate crisis…'.[48]

This legal exaltation of the human's (subject) over nature (object) reflected in the anthropocentrism incepted 'by default' in neoliberal laws[49] – and, consequently, in our mindset and behaviour – has proven to have potential catastrophic effects on both the natural world and humanity as a *whole*. As Stone said already in the seventies (in the middle of the full blooming of human rights law) in his thought-provoking article *Should Trees Have Standing*, '[natural] objects have traditionally been regarded by the common law, and even by all but the most recent legislation, as objects for man to conquer and master and use'.[50] As a result, the exploitation of the natural world is embedded in and legitimised by existing (human rights) law.

Therefore, one point that should be recognised upfront is the limitedness of neoliberal international law and, specifically, of international human rights law to respond to the climate crisis given their inherent anthropocentrism, which is at the core of the climate crisis. The context of climate crisis exposes the need to expand traditional parameters within which human rights are thought and applied. Climate change exposes the need to reimagine our understanding of the natural world and resulting relationship with it, as reflected in human rights law with its lack of ecological considerations. Therefore, the faith in the human rights' incursion in the climate change arena, as the quintessential anthropocentric legal field,[51] should be accompanied, *inter alia*, by the awareness of its limitations and the need to rethink its structural assumptions in order to be 'fit 'for purpose, notably with respect to their relational approach of humans – and human rights – to the natural world. In this sense, as Bookchin, from the perspective of social ecology theory, reflects:

> In this confluence of social and ecological crises, we can no longer afford to be unimaginative; we can no longer afford to do without utopian thinking. The crises are too serious and the possibilities too sweeping to be resolved by customary modes of

[48] ibid, 227.
[49] Bookchin argues that '…the very *idea* of dominating nature stems from the domination of human by human'. Murray Bookchin, *The Next Revolution: Popular Assemblies & The Promise of Direct Democracy'* (Verso, 2015) at 31.
[50] Christopher D. Stone, 'Should Trees Have Standing? - Toward Legal Rights for Natural Objects' **(**1972**)** 45 Southern California Law Review 450, 463.
[51] Conceived and developed as part of the dominant neoliberal legal system.

> thought - the very sensibilities that produced these crises in the first place… Humanity has passed through a long history of one-sidedness and of a social condition that has always contained the potential of destruction, despite its creative achievements in technology. The great project of our time must be to open the other eye: to see all sidedly and *wholly*, to heal and transcend the cleavage *between humanity and nature* that came with early wisdom.[52]

Certainly, reimagining international human rights law, the flagship anthropocentric legal regime,[53] disassociated from its adhesion to the dominant 'restrictive anthropocentric approach to nature, which sees it mainly as a 'resource' for humans',[54] might be difficult to conceive from an anthropocentric legal perspective. However, the unviability of the existing relational approach to nature prevailing in laws, including in international human rights law, is being exposed by climate change, triggering as a result -I argue- the need to rethink international human rights law. With this in mind it is thus, worth identifying some of the aspects of human rights that would need to be rethought in order to make its contribution more substantial and coherent in the context of climate change.

First, human rights lack an ecological dimension, understood in Bookchin's terms as a concern with 'the dynamic balance of nature, with the interdependence of living and non-living things'.[55] Human rights produce a certain view of living in society that reflects a neoliberal notion of the environment whereby its value lies in its capacity to serve human needs. As Morrow puts it, when reflecting on Plumwood's 'paradigm of mastery' it essentially casts the environment/nature as inherently inferior and a means to privilege humanity's ends, rendering it ripe for what is assumed to be self-evidently justified and thus largely unquestioned exploitation'.[56] In a context of climate change, that increasingly evidences the consequences of this understanding, this view of the natural world is no longer viable. Second, human rights condemn certain forms of violence (such as

[52] Bookchin (n 5) 34.
[53] Grear (n 3) 34.
[54] Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (1st edn, Oxford University Press Scholarship Online 2018) 6.
[55] Bookchin (n 5) 20.
[56] Karen Morrow, "Of Human Responsibility: Considering the Human/Environment Relationship and Ecosystems in the Anthropocene," in *Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017) 269, 271 *citing* Val Plumwood, *Feminism and the Mastery of Nature* (London, Routledge, 1993).

torture) and facilitate others (such as the violence of the market),[57] which means that human rights struggle to get at the root causes of ecological crises in capitalist social relations.[58] In failing to forge the crucial link between capitalism and human rights violations, human rights can install a set of blinders on social movements, concealing from sight the structural violence of global capitalism. As Marks puts it, human rights can, thereby, 'domesticate potentially radical demands on the social structure and bring with it the demobilization of oppositional activity'.[59] In the context of climate change, in a similar vein, the United Nations Special Rapporteur on extreme poverty and human rights sharply upbraids international human rights organisations for their failure to recognise the need for 'deep social and economic transformation' and their subsequent 'deep denial of the real gravity of the situation'.[60] Human rights can thus be a two-sided sword in battles of social justice in the context of climate change.

It falls beyond the scope of this thesis to undertake a critical examination of human rights. Rather, by pointing out these pitfalls in human rights law, which undermine what Knox describes as 'a key promise of human rights law', namely 'that it is possible – without fundamental change – to reach a situation in which human rights are respected',[61] this thesis seeks to identify the conditions that the context of climate crisis generate in propelling the re-examination of human rights law and its inherent notions on the environment. While acknowledging Charlesworth's contention that '[crises] are not of course the only catalyst for the development of international law', due to the risks of taking the elements of crises as 'uncontroversial' and '[diverting] attention from structural issues of global justice',[62] which are certainly a crucial factor of the climate crisis, this thesis relies on the uniqueness of climate change as a crucial distinguishing factor that provides the context for structural changes in international human rights law.

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[57] Belakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2009) 194.
[58] Marlene Payva Almonte and Thomas James Phillips, 'The Kurdish Ecology Movement and Human Rights' in Stephen Hunt (ed) *Kurdish Ecology: Environmental Thought, Challenge and Activism* (Lexington Books 2021) [forthcoming].
[59] Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) The Modern Law Review 57, 77.
[60] UN Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights 'Climate Change and Poverty', A/HRC/41/39, 17 July 2019, para. 19.
[61] Rob Knox, 'A Marxist approach to *R.M.T. v the United Kingdom*' in Damian Gonzalez-Salzberg & Loveday Hodson (eds.), *Research Methods for International Human Rights Law: Beyond the traditional paradigm* (Taylor & Francis, 2019) 17.
[62] Hilary Charlesworth (n 45) 377, 382.

3. The Climate Crisis and International Human Rights Law: a TWAIL Perspective

This thesis interrogates the relational approach of human rights and nature reflected in international law and international human rights law, which legitimises the idea of nature as a set of 'assets or raw materials that can be used for economic production or consumption.'[63] This notion that reduces nature to a mere 'object', apt for environmental exploitation oriented to economic growth, is at the core of the climate crisis.

While the Third World[64] approach to international law does not critique international law and international human rights law from an ecological standpoint, it facilitates such a critique. This is because '[a] TWAIL perspective … helps ... to appreciate how international human rights law can be manipulated to promote and legitimise neo-liberal aspirations'.[65] Certainly, neoliberalism – understood 'in the first instance [as] a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade'[66] – is enrooted in international law. Allegedly, this thesis acknowledges human rights' neoliberal ethos, thereby supporting subjacent (mis)conceptions in the relationship between humans and nature that enable environmental exploitation, particularly in the Third World. Indeed, Mutua, for instance, describes international law as 'a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West'.[67] In this sense, apart from the use of human rights to justify international armed political or economic interventions,[68] human rights are central in the context of climate crisis as they are presented as a *due* path to be followed by (neo-colonised) states in the Third World in order to achieve the realisation of human rights. In this vein, Chimni points out that 'the omnipresence of the discourse of human rights in international law has coincided with increasing pressure on third

[63] Gilbert (n 54) 6.
[64] The 'Third world' for the purpose of this thesis, is understood as: 'a group of states, and populations that have tended to *self-identify* as such-coalescing around a historical and continuing experience of subordination at the global level that they feel they share'. Obioro Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43(2) Osgoode Hall Law Journal 171, 174.
[65] Opeoluwa Adetoru Badaru, 'Examining the Utility of Third World Approaches to International Law for International Human Rights Law' (2008) 10 (4) International Community Law Review 379, 383.
[66] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 2.
[67] Makau Mutua, 'What is TWAIL' 94 *American Society of International Law Proceedings* (2000) 31, 31.
[68] See for example, Anne Orford, *Reading Humanitarian Intervention*: human rights and the use of force in international law (2nd edn, Cambridge University Press 2008).

world states to implement *neoliberal* policies is no accident; the right to private property, and all that goes along with it, is central to the discourse of human rights'.[69] And so are their environmental implications vividly evidenced today by the impacts of climate change, precisely, with the most serious effects, upon the human rights of individuals and communities worldwide.

This thesis does not intend to explore whether or how human rights law have been developed to reflect neo-colonial aims in a way to perpetuate dominance by 'Western cultures'[70] cover the formerly colonised 'Third World'. Rather, it takes this claim from TWAIL as a premise in order to contextualise the legal frameworks in which this thesis is anchored, namely the human rights and climate change regimes.

Accordingly, this thesis relies, first, on the premise that international human rights law endorses a postcolonial neoliberal agenda that, *inter alia*,[71] promotes exploitation of nature. More specifically, TWAIL assists this thesis in understanding the dynamics of economic dominance and exploitation on the basis of which international law – including human rights law and the climate change regime – is developed; and that in turn explain, to some extent, the roots of the climate crisis. In this respect, in writing about law and colonial economies, Anghie notes that:

> …the rule of law, as promoted by the colonial power, became largely a means by which this system of economic development was maintained and furthered … There is nothing objectionable about economic progress as such; but, in this situation, economic progress was equated with the furtherance of a system of economic inequalities specific to colonialism.[72]

In this context, international law played a key role as a normative foundation of the colonial and postcolonial economic order that facilitates the perpetuation of hegemony over the Third World,[73]

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[69] Bhupinder Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 11.
[70] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 (1) Harvard International Law Journal 201, 202.
[71] See, for example, Larissa Ramina, 'TWAIL – "Third World Approaches to International Law" and human rights: some considerations' (2018) 5 (1) Revista de Investigações Constitucionais 261-272.
[72] Anthony, Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2001) 34(3) N.Y.U. Journal of International Law & Politics 513, 603.
[73] In this respect, Anghie argues, 'It is now hardly disputable that classical international law was complicit in the imperial project and the exploitation which accompanied it. If, however, the colonial encounter, with all its exclusions and subordinations, shaped the very foundations of international law'. Anthony Anghie, 'Imperialism, Sovereignty and the Making of International Law (Cambridge University Press, 2005) 8.

that legitimised the top-down imposition of capitalist relations oriented to at-all-cost economic growth, including environmental costs. As a consequence, under this scheme of wealth accumulation supported by international law, its most emblematic neoliberal agent, the (multinational) corporation, is priviliged. As Grear notes, '[the] first result of the corporate colonisation of international human rights discourse is that the most cherished goals of the international human rights movement are being recast in ways that serve a capitalist agenda – this time, a globalized capitalist agenda.'[74] This receptiveness of international human rights law to promote capitalist interests contradicts, however, its rhetorical noble aims of human dignity as these can result in human rights violations, including as a result of environmental exploitation. In other words, as Rajagopal puts it, 'human rights-discourse can ignore/condone certain forms of violence,… [such as, for example], the violence of the market'.[75] With this in mind, one might wonder how international human rights law could meaningfully help to address the challenges presented by climate change, if corporations – the quintessential capitalist person - disproportionately contribute to it through their highly emitting activities, which are the core of the problem[76] Hence, independently of the noble aspirations that inspired the human rights movement since its outset, this 'suggests … that international human rights discourse is ideologically porous, to say the least, to the very same globalized neo-liberal ideology so profoundly implicated in the production of not only intense human suffering, particularly in the Third World, but also of environmental destruction caused by irresponsible corporate exploitation of the living order'.[77]

Indeed, the privileged position of the corporate person in international law illustrates how the dynamics of power are exercised in a way to replicate neocolonial forms of dominance led by wealthy (states or corporations) over the Third World. Such position of privilege in the international legal system also involves a differentiated treatment. For instance, at difference of the legal restraints that 'granting' rights to nature generates,[78] the corporate person enjoys human-like property rights, supported by international laws, including human rights law.[79] As Grear notes,

[74] Grear (n 3) 35.
[75] Balakrishnan Rajagopal, (n 57) 196.
[76] See, for example, Climate Accountability Institute (n 28).
[77] Grear (n 3) 35.
[78] See, for example, Stone (n 50).
[79] This is probably the most visible in the realm of property rights. Baxi observes, for example, that '[individual human incentive and effort stand enriched by sacrosanct freedoms of property and contract that together constitute free

'where corporations have been granted 'victim status' in human rights contexts the 'basis of that protection appears to have been the status of the company as a legal person'.[80] Therefore, the acquisition of this status by corporations seems to operate as 'a conduit for the receptivity of law to the 'human rights' of personified capital'.[81] While the legal fiction of corporate personality is not *per se* the reason for its (neo)colonial dominance, and not all corporations are necessarily engaged with emitting activities disproportionally contributing to climate change, the risks of this legal construction legitimised by neoliberal laws and institutions enabling capital accumulation are sharply illustrated by climate change. The disproportional impacts of climate change put under risk the human rights of individuals and communities that international human rights law aims to protect, as well as the environment. Indeed, 'since human rights remain available to 'persons', legal persons such as corporations and other business associations stand coequally possessed of a certain regime of protection and promotion of human rights'.[82] The 'personification' of the corporation present in international human rights law, thus, reflects a privileged relational approach of human rights vis-à-vis corporations, which clearly contrasts with their relational approach vis-à-vis the environment, whereby the 'objectification' and subjugation of nature to human and corporate capitalist 'needs' is justified and promoted.[83]

Secondly, this thesis also relies on the premise that international human rights law, by reflecting Western anthropocentric views, which often focus on the immediate individualised human experience rather than the wider environment, contribute to the (mis)representation of nature reflected in laws. By doing so, neoliberal laws reinforce the harmful relationship between humans (including 'quasi-human' corporations) and the natural world. In this regard, Grear describes the 'liberal legal person' represented in 'legal anthropocentrism' as having 'characteristics implicating some exclusions or negative moments with profound implications for the problems currently haunting the relationship between humanity, human rights and the environment.'[84] Accordingly, bearing in mind TWAIL's claim regarding the 'role that law plays in creating relations of

markets, this paradise in which human freedoms ultimately flourish' Upendra Baxi, *The Future of Human Rights* (3rd edn, Oxford University Press 2008).

[80] Grear (n 3) 35.

[81] ibid, *citing* Christopher Harding, Uta Kohl and Naomi Salmon, Human Rights in the Marketplace: The Exploitation of Rights Protection by Economic Actors (Ashgate, Aldershot 2008) at 2.

[82] Baxi (n 79) 253.

[83] For example, Anna Grear proposes a condition of embodied vulnerability for human rights. See for example, Anne Grear, *Corporate Human Rights? Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan, 2010).

[84] Grear (n 33) 31.

domination',[85] this thesis takes the view that nature, on the other hand, is represented in anthropocentric laws as fulfilling a mere utilitarian function, whereby its value is determined by its capacity to meet human needs. The 'human' is, therefore, not perceived or represented as *part* of the natural world, in which both human and non-human life coexist as *part* of a *whole*.[86]

Today, in a climate changing world, law is compelled to reimagine itself in a way to question its traditional assumptions and push conventional boundaries, even if ideas seem at first, in Stone's words, 'unthinkable'.[87] For the purposes of this thesis, this means that the relationship of humans vis-à-vis nature should be rethought in law in such a way to incorporate a dimension that takes into consideration the environment and its components. In this process – this thesis argues, the context of climate change, given its unique character, has the potential to act as catalyst of changes in international human rights law, leading to the rethinking of its structural (mis) understandings on the environment and, in the longer term, its reform.

4. The Anthropocene and the Capitalocene

The dominant liberal legal rationality has 'historically [operated] … to privilege the interests of identifiable propertied capitalistic elites and their interests.'[88] The dynamics of power and wealth in which corporations operate are facilitated by a favourable legal framework,[89] which has serious implications for human and non-human species, and ecosystems worldwide. In particular, 'the current global dominance of corporations-driven priorities and practices is having a deleterious impact upon the environment'[90] and the rights of individuals and communities worldwide, particularly in the Third World. No doubt, scientifically identifiable corporate sources play a key role in the current climate crisis due to their

[85] Anghie (n 72) 622.
[86] See Bookchin, (n 5) 27.
[87] On this point, Stone reflects, '[throughout] legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless "things" to be a decree of Nature, not a legal convention acting in support of some status quo.' Stone (n 50) 453. For the purposes of this thesis, this means that the relationship of humans vis-à-vis nature must be rethought in a way to correct its relationship with the environment.
[88] Grear (n 3) 32.
[89] See, for example, Penelope Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 (1) Journal of Human Rights and the Environment 5.
[90] Grear (n 33) 34.

significant emissions levels contributing to climate change.[91] Corporations are thus central actors, in what is a new human-induced geological age, the so-called Anthropocene.

On assessing the term Anthropocene, Mauser notes that:

> The term Anthropocene has been suggested to mark an era in which the human impact on the Earth System has become a recognisable force. Presently there are no signs for a deceleration or reversal of this development. Coping with the consequences of Global Change therefore becomes a challenge of prior unknown dimension for human societies.[92]

In considering this human centrality as a driver of the Anthropocene, Kotzé identifies '[of] all the many drivers that have contributed, and continue to contribute, to the Anthropocene's signatures, two stand out as being particularly troubling: coloniality and neoliberalism'.[93] The historic and interlinked dynamics of power and domination engraved in these two drivers of the Anthropocene should be considered to understand the still prevailing domination (between subjects and objects) and how these have been constructed in law, for example, in such a way as to configure the prototype scheme of relationships of dominance, both between humans themselves and with nature. As Grear puts it, '[the] "subject" at the centre of the Anthropocene trope thus ineluctably reflects hierarchies foundational to European rationalism. *Anthropos* is in a very real sense, the quintessential European (and then 'Western') rational subject — and, accordingly, also law's archetypical subject'.[94] In light of the Anthropocene, it is at the very least necessary to question the sacrosanct supremacy granted in Western neoliberal laws to the 'Anthropos', including the privileged position of the 'quasi-Anthropos' legal person, the corporation - as the dominant 'master' over the 'unintelligent' object of nature.

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[91] Suzanne Goldenberg, 'Just 90 companies caused two-thirds of man-made global warming emissions' (*The Guardian*, 20 November 2013) <https://www.theguardian.com/environment/2013/nov/20/90-companies-man-made-global-warming-emissions-climate-change> accessed 11 May 2020.

[92] Wolfram Mauser, 'Global Change Research in the Anthropocene: Introductory Remarks' in Eckart Ehlers and Thomas Krafft (eds) *Earth System Science in the Anthropocene* (Springer, 2006) 3, 3.

[93] Louis Kotzé (ed), 'Colonialism, neoliberalism and the Anthropocene' (2019) 10(1) Journal of Human Rights and the Environment 1, 1.

[94] Anna Grear, "'Anthropocene, Capitalocene, Chthulucene': Re-encountering Environmental Law and its 'Subject' with Haraway and New Materialism." in Louis J Kotzé (ed), Environmental Law and Governance for the Anthropocene. (Oxford, Hart Publishing, 2017), 86.

In fact, since '[international] law, capitalism and colonialism are all interwoven with Eurocentric (and now Global North) impulses and logics of action fully discernible in the Anthropocene crisis… [it is considered that] the Anthropocene is better understood as the Capitalocene'.[95] In this sense, the notable differences between the common 'Anthropos' would thus be differentiable from the powerful and wealthy forms of ('quasi') Anthropos, the corporation. Given the overriding position (prioritisation) of the market and of the corporation, the Anthropocene is better understood as Capitolocene. Grear defines the 'Anthropocene-Capitalocene [as] an epoch…of eco-violation reflecting well-practised, patterned and predictable global and globalising distributions of intra-species and inter-species injustice.'[96] Therefore, climate change can be considered as the resulting symptom from multiple persisting intertwined factors, notably, coloniality and neoliberalism that are leading the world into the Anthropocene/Capitalocene.

In this sense, the role of corporations as active agents of eco-violation worldwide should be pursued as '[they] are, in terms of their ability to impact on lives and local environments, the dominant institution in global society and yet have the ability to be a transient presence across geographical locations'.[97] As a result, Falk's proposal from the 1970s on 'ecocide'[98] has been revived to 'demand … [making] individuals and corporations accountable for knowingly causing damage to the planet.'[99] Although the crime of ecocide has not yet crystallised in law, the figure of ecocide constitutes a strong case to punish corporate behaviour contributing to climate change. In the meantime, the relatively recent acceptance of human rights in the climate debate has been reflected in the increased use of rights arguments in the field of climate litigation.

Yet, despite this incursion, human rights will have to overcome several challenges in order to be technically fit to operate within the context of climate change. Issues of causation, attribution, extratemporality and extraterritoriality represent serious technical obstacles for the application of

[95] ibid, 85.
[96] ibid.
[97] Sally Wheeler, 'The Corporation and the Anthropocene' in Louis Kotzé (ed) '*Environmental Law and Governance for the Anthropocene (Oxford,* Hart Publishing 2017) 289 *citing* Thomas Gladwin 'The Global Environmental Crisis and Management Education' (1993) 3 Total Quality Environmental Management 109-14.
[98] Falk explains the meaning of the term ecocide by making a parallel with the term 'genocide'. He notes, for example, that '[just] as counterinsurgency warfare tends towards genocide with respect to the people, so it tends toward ecocide with respect to the environment. Richard Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals' (1973) 4(1) Bulletin of Peace Proposals 80, 80.
[99] Steve Tombs and David Whyte, 'The Shifting Imaginaries of Corporate Crime' (2020) 1(1) Journal of White Collar and Corporate Crime, at11.

human rights in a climate change context. However, the emerging human rights trend in climate litigation[100] provides an opportunity not only to address the technical challenges that human rights face in the context of climate change but, more substantially, to prompt initial human rights rethinking and even, in the long term, reform of conceptual (mis)understandings in relation to the environment.

5. The Interrelationship between Human Rights and Climate Change

The relationship between human rights and climate change has been given significant recognition in recent years and, today, it could be considered as widely accepted. However, human rights considerations were not always welcome as part of the climate change debate, led by the United Framework Convention on Climate Change (UNFCCC). Climate change was until recently widely regarded as scientific and technical. It was not until the adoption of the Paris Agreement in 2015 that human rights were expressly invoked in a climate treaty and considered part of the climate debate. This reference in the Paris Agreement consolidated therefore the recognition of human rights in the climate change arena. The Preamble of the Paris Agreement establishes:

> 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.[101]

The 'acknowledgement' of the need to consider human rights considerations in climate action enshrined in the Paris Agreements implies the recognition that climate change adversely impacts the ability to enjoy a wide array of human rights. Indeed, the increase in the frequency and intensity of climate-related events puts at risk, *inter alia*, the right to life, health, water, food, an adequate

[100] See, for example, Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 (1) Transnational Environmental Law 37.
[101] Paris Agreement, UN Doc. UNFCCC/CP/2015/L.9/Rev.1, adopted 12 December 2015, and entered into force 4 November 2016.

standard of living, and 'collective' rights such as the rights of indigenous peoples and even the right of self-determination of individuals and communities worldwide.[102]

Today, despite the fact that human rights are still making their way in the field of climate change governance,[103] the relationship between human rights and climate change can be considered well established and, across the human rights machinery, there has been a proliferation of rights references in respect of climate change. There have been several UN documents making reference to the states' human rights obligations in relation to climate change.[104] In addition, there is a notable emergence of cases invoking human rights considerations in climate litigation, [105] and the scholarship dedicated to human rights and climate change has proliferated in the last years.[106]

Either applied as a central legal basis or collaterally in climate claims, the human rights presence in climate litigation cases before regional and national courts worldwide is growing. Although the trend is still in an early stage and it is too early to assess its impacts, the proliferation of rights-based climate litigation is auspicious considering governments' failure (at multilateral and national level) to advance emergency-like measures to address the climate crisis. Yet, there already exists

[102] See Chapter 2 for a detailed analysis of the rights affected by climate change.

[103] The inclusion of human rights considerations in subsequent implementation documents of the Paris Agreement seems to remain peripheral. For instance, the Paris Rulebook, the outcome document of the 24th UNFCCC Conference of States Parties in 2019 (COP 24), aimed to provide the guidelines for governments to implement their obligations under the Agreement, did not include human rights considerations. See for example, Souparna Lahiri, 'Implications of Katowice: Where human rights were ignored while big business captured the negotiations' (Global Forest Coalition, 2019) <https://globalforestcoalition.org/implications-of-katowice-where-human-rights-were-ignored-while-big-business-captured-the-negotiations/> accessed 1 June 2020.

[104] See, for example, UN Doc. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, A/HRC/37/59, 24 January 2018; UN Doc. Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/40/55, 9 January 2019; UNGA, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161, 15 July 2019; and UN Doc. Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/73/188, 19 July 2019.

[105] See Chapter 4 for a detailed discussion on human rights-based climate litigation cases.

[106] See, for example, Margaretha Wewerinke, 'State Responsibility for Human Rights Violations Associated with Climate Change' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds) *Routledge Handbook of Human Rights and Climate Governance* (1st ed., Routledge 2018) 75-89; Brian Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 Chinese Journal of Environmental Law 131-64; Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37-67; Marylin Averill, 'Linking Climate Litigation and Human Rights' (2009) 18(2) Review of European Community and International Environmental Law 139-48; David Browne, 'Causation and Damages in Climate Litigation: Evaluating the Role of Human Rights Law' in Fiona de Londras and Siobhán Mullally (eds) 6 *The Irish Yearbook of International Law* (1st ed., Hart Publishing 2013) 49-65; Eric Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) University of Chicago Law School, Public Law Working Paper No 148; Annalisa Savaresi and Juan. Auz, 'Climate Litigation and Human Rights: Pushing Boundaries' (2019) 9(3) Climate Law, 244-62; and Joana Setzer and Lisa C. Venhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) Wiley Interdisciplinary Reviews: Climate Change e580.

some ‘successful’ stories, whereby human rights have been invoked as part of the litigation ‘strategy’ used by litigants to ground their claims. One of those ‘success stories’ is the acclaimed *Urgenda* case,[107] whereby a national civil court ordered the Dutch government to ‘limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, such that this volume will have been reduced by at least 25% at the end of 2020 compared to the level of the year 1990′.[108] The judgement was appealed by the Dutch government to the Superior Court[109] and, subsequently, to the Supreme Court[110] and was confirmed in both legal instances. Although the *Urgenda* case was not principally grounded upon human rights arguments, but rather in civil law and other legal principles – articles 2 and Article 8 of the European Convention on Human Rights were initially marginal to the case – it ‘gave a significant boost to the argument that climate change is a human rights issue’.[111] Notably, the case paved the way (and raised hopes) for subsequent rights-based climate claims in which the deployment of human rights arguments is being put to the test. However, the human rights’ incursion into climate change issues is not without obstacles and will have to surmount complex legal barriers pertaining to their extra-temporal and extraterritorial application as well as causation and attribution challenges.

Beyond examining human rights performance in the arena of climate litigation, this thesis attempts to identify therein potential or early signals that the context of climate change provides the circumstances apt to trigger human rights (grassroots-led) rethinking and evolution, particularly with respect to their so far decoupled relationship with the environment. I depart from the position that, despite the human rights recognition in the Paris Agreement, human rights law is not climate change ready. This is because human rights have inherent shortcomings resulting from their neoliberal Western inception, resulting in these concepts being equipped for exploitation. Accordingly, human rights have historically been wielded by the powerful (states, corporations) to exploit natural resources and the environment, which is at the root of the climate crisis. This thesis, nevertheless, also recognises the potential of human rights as an international *lingua franca* and as a noble aspiration for international action, judicial or otherwise. As McNay notes, '[rights]

[107] Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and Environment) [*Urgenda*], ECLI:NL: RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13–1396.
[108] *Urgenda*, ECLI:NL: RBDHA:2015:7196, Rechtbank Den Haag, 24 June 2015, para.5.1.
[109] *Urgenda*, ECLI:NL: GHDHA:2018:2591, Gerechtshof Den Haag, 9 October 2018.
[110] *Urgenda*, ECLI:NL: PHR:2019:887, Hoge Raad Den Haag, 13 September 2019.
[111] André Nollkaemper and Laura Burgers, ‘A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the *Urgenda* Case’ (*EJIL: Talk!*, 6 January 2020) <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/> accessed 1 June 2020.

discourse has a transient strategic utility, which might assist in the mitigation of the climate injustice in a piecemeal way but is certainly far from being an effective or comprehensive approach to overcoming systemic oppression'.[112] In this context, the uniqueness of the climate crisis presents an 'opportunity' for human rights re-examination and potential evolution in the long run, particularly with respect to their relational approach with the environment. In this sense, this thesis explores whether the current conditions of impending climate collapse can produce what Anghie describes as a 'Grotian moment'.

6. Climate Crisis and International Human Rights Law: a 'Grotian Moment'?

Unlike more 'specific' crises, the climate crisis has potentially catastrophic impacts for humanity and ecosystems. As such it is worth asking whether the ongoing climate crisis can be considered a 'Grotian moment' from a legal point of view. Discussing the events of 11 September 2001, which led to drastic changes in United States foreign policy, Anghie explains the '"Grotian moment" [as] one in which the entire character of the international system changed irrevocably. Consequently, the old system of international law and relations appeared inadequate, to many, to deal with these unprecedented challenges.'[113]

The impacts of the ongoing climate crisis, touching all aspects of living in society, including the laws that govern it, make a strong case for the climate crisis to qualify as a 'Grotian moment', a 'phenomenon of profound change'.[114] In this sense, changes brought by climate change would only be comparable, for instance, to those brought by the Industrial Revolution – which, ironically, could be considered the starting point of the causes leading to climate change – or by World War II, in the aftermath of which the human rights movement arose.

Climate change, in an analogous way, has the potential to trigger profound changes, to open up new 'visions' of the (human and non-human) world in international law. Climate change brings to light in a dramatic way the inadequacy of certain concepts, understandings and (neoliberal)

[112] Lois McNay, 'Self as Enterprise: Dilemmas of Control and Resistance in Foucault's The Birth of Biopolitics' (2009) 26(6) Theory, Culture & Society 55, 71.
[113] Antony Anghie, 'International Law in a Time of Change: Should International Lead or Follow?' (2011) 26(5) American University International Law Review 1315, 1334.
[114] ibid, 1318.

objectives on which the international legal system is based. At the very least, it provides a context in which to question this inadequacy. Accordingly, climate change - I argue - will increasingly evidence the *need* to rethink and expand human rights' conceptual (mis)understandings in relation to the environment –the relationship of humans vis-à-vis nature- triggering ultimately its gradual correction. Since this is a mere prediction of a *likely* future, obviously, it cannot categorically be demonstrated beyond identifying the existing initial steps in that direction; yet, I argue, that we are at an embryonic stage in the process of human rights expansion.

This thesis attempts to identify how the reality of climate change impacts individuals, communities and ecosystems worldwide in such a way to provoke civil society-driven initial steps towards rethinking and expansion of human rights and their conceptual foundations, particularly in relation to the environment. In this process, it examines the challenges that international human rights law encounters when applied in a climate change context, (namely, causation, attribution, extratemporal and extraterritorial challenges) and how human rights are used as strategic tool to overcome those challenges within climate legislation Yet, despite the recent proliferation of right-based climate litigation cases and its potential to prompt climate action that governments otherwise would not take, it is important to bear in mind the previously discussed shortcomings that human rights congenitally bear and the crucial need to correct them. In this sense, this thesis argues that the human rights relational approach to the environment needs to be rethought and, ultimately, corrected if human rights are deemed to provide a substantial and long-lasting contribution to address climate change. The climate crisis thus constitutes an externality with the potential of propelling these changes in international law, particularly on the relationship between humans and human laws and the environment, which, as we are vividly witnessing now, is no longer viable in light of the climate crisis.

As Fisher, Scotford and Barritt point out, 'climate change gives rise to situations that are at odds with legal stability, coherence and knowability.'[115] Consequently, given the unprecedented magnitude and scope of climate impacts, legal systems will likely not only need to create and adapt legislation but will be *urged* to do so, creating thereby 'legal disruption'.[116] Human rights law is

[115] Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) The Modern Law Review 173, 177.
[116] Elizabeth Fisher et al. note, for example, that 'climate change causes legal disruption in that it has led to the creation of new legal regimes'. Ibid, 174.

not exempt from climate-provoked disruption. This thesis argues that climate change can act as catalyst of (gradual) rethinking and, in the long run, correction of international human rights law, in such a way to *change* deep-rooted conceptual (mis)understandings, such as those on the environment. This means, therefore, that the reality of climate change entails 'a "Grotian moment" in international law, [which] occurs when novel events compel a new conceptualization of these issues', although,[117] expectedly, this may generate (initial) resistance from law and its operators.

Accordingly, this thesis argues that the context of climate change will increasingly show the inadequacy of human rights' intrinsic concepts in relation to the environment and, as a result, human rights operators will be compelled to rethink and even correct international human rights law in the long term. In this (likely) scenario, human rights would have, at least partly, achieved emancipation from their inherited Western roots compatible with neoliberal endeavours and be opened to incorporate new ones, where the environment is intrinsically respected in laws, independently from its value to humans.[118] Certainly, as Dehm notes, the history of human rights reflects 'struggles over *competing visions* of human rights'.[119] However, it should be recognised that, despite the limitations of human rights, particularly, in its relational approach to the environment, its application in the context of climate change, and, for example, in climate litigation, can, to some extent, contribute to climate action both as a rhetorical language and as a legal regime. Yet, the capacity of human rights to adapt to structural changes remains to be seen.

7. Thesis Overview

This thesis seeks to determine whether the context of climate change can act as a catalyst for the rethinking and correction of foundational notions in human rights law in relation to the environment, in such a way as to expand its inherited limitations because of its Western inception. It attempts thus to identify what is the potential impact of the climate change context upon human rights law concerning its relational approach to the environment. In this process, it examines to

[117] Anghie (n 122) 1319.
[118] For example, Gianolla describes: 'In terms of their relationship to the environment, mainstream human rights approaches construct the protection of the environment as being an implication of the protection of human beings'. Gianolla (n 80) 62.
[119] Julia Dehm, 'Highlighting inequalities in the histories of human rights: Contestations over justice, needs and rights in the 1970s' (2018) 31 (4) Leiden Journal of International Law 871, 873.

what extent human rights law is equipped to be applied in the context of climate change. With the use of primary and secondary literature, and the assistance of TWAIL theory as an overarching premise to contextualise the existing international legal frameworks of human rights and climate change, I attempt to demonstrate that the uniqueness of the context of climate change provides an opportunity for the evolution of human rights law – and human rights, in general. I argue that climate change may gradually force rethinking of the conceptual foundations of human rights, on which the structural notions of rights in relation to the environment are underpinned. Using climate litigation as a case study, I argue that the existing human rights notions in relation to the environment will potentially be rethought and even corrected in the long term because of a climate changing world.

I argue that the uniqueness of the context of climate change has the potential to generate rethinking of human rights' basic (mis)understandings in their relational approach to the environment. To the extent that human rights gradually reconsider and make initial steps towards the correction of their notions on and relational approach to the environment. For example, through the 'work-in-progress' within the climate litigation arena, human rights can potentially make a more substantive and long-lasting contribution to their own evolution and, time provided, to climate action.

Chapter one discusses he international climate change legal framework in order to explain the path that human rights have taken in traditional multilateral mechanisms of climate governance led by the UNFCCC, until the adoption of the Paris Agreement, when they were 'officially' entered into the international legal climate change debate. In doing so, it intends to identify the relational approach of international law to the environment, as reflected in the climate change regime, which in turn portrays the anthropocentric relational approach to the environment also present in human rights.

Chapter two seeks to identify the linkages between human rights and climate change. It contends that climate change adversely impacts a wide array of human rights. In doing so, it presents some of the human rights adversely affected by climate change, including the human right to a healthy environment, as an important step to approach human rights to the protection of the environment in international human rights law. In addition, having recognised the linkages between human rights and climate change, chapter two intends to identify the benefits of adopting a human rights approach in climate action as part of a multidisciplinary approach to the issue. It is, thereby, argued

that a human rights approach to climate change, despite its limitations, offers benefits when applied in the context of climate change, both as a transnational language and as an international legal framework. However, it recognises that human rights should first reconsider, and correct, some of their basic notions with respect to their relational approach to the environment in order to be able to make a more substantive and long-lasting contribution to the problem.

Chapter three examines the role of (multilateral) corporations in the current climate crisis from a human rights perspective. It intends to demonstrate that corporations, despite being sources of the largest emissions contributions to climate change, are central beneficiaries of market-oriented laws that prioritise economic growth over environmental protection and, consequentially, operate in a legal vacuum. Accordingly, chapter three contends that corporations enjoy a 'light' regulatory framework, which allows them to maximise their economic profit at the cost of environmental and human rights harms, especially in the so-called Third World. By analysing several attempts made at international level to regulate corporate activity from a human rights perspective, chapter three seeks to identify to what extent human rights have supported the privileged legal status of corporations. It argues that the dominant neoliberal international legal framework favours a scenario of corporate impunity in which corporations can operate under light regulation, and even engage in environmentally harmful (emitting) activity without serious legal consequences, which is significantly contributing to lead the world to imminent climate catastrophe. It contends that, unless governments introduce strict regulatory frameworks and radical sanctions oriented to regulate corporations and emissions levels, global efforts to address climate change will remain weak.

Chapter four uses climate litigation as a testing ground to assess the role of human rights in the context of climate change. It focuses on identifying how the deployment of human rights considerations can potentially assist in overcoming technical challenges presented by the context of climate change, such as: causation, attribution, extratemporality and extraterritoriality. In doing so, chapter four seeks to determine whether the context of climate change under which the case law presented is framed, is capable of triggering initial steps towards human rights rethinking and expansion in the context of climate litigation, particularly in their conceptual (mis)understandings on the environment. It is argued that the context of climate change will trigger(if not force), rethinking of human rights foundational notions on the environment. Climate litigation thus

constitutes a limited but significant avenue whereby the initial steps towards human rights rethinking can arise.

This thesis concludes that the uniqueness of climate change *has* the potential to act as catalyst of human rights rethinking and even, correction in the long term. It contends that, despite the limitations of *human* rights in their understanding of nature resulting from its Western anthropocentric inception - in which the environment is reduced to an object whose value is determined by its utilitarian capacity to fulfil human (capitalist) needs - the climate crisis amounts to a 'Grotian moment', capable of propelling deep changes in law. Yet, if in light of imminent climate catastrophe swift, radical and ambitious climate action is not undertaken, these potential changes in international human rights law triggered by climate change might be too little, too slow or too late.

CHAPTER 1:

The International Legal Framework on Climate Change and Human Rights

1. Introduction

The disparity among states' approaches to climate change has characterised international climate negotiations. Long debates over the need to reduce global greenhouse gas emissions ('emissions') and states' contributions to that end have dominated climate negotiations for more than a decade. The positions of states with respect to climate negotiations and their level of ambition to contribute to global mitigation efforts vary according to their development level, vulnerability to climate change impacts, relevance of fossil fuels industry to their economies and adaptation needs. These differences play a crucial role in the outcome of multilateral climate negotiations led by the United Nations Framework Convention on Climate Change (UNFCCC). For example, for small island developing states in the Pacific Ocean, climate change is a priority; therefore, they have played an active role in climate policy-making processes and negotiations, leading to the adoption of the Paris Agreement. Accordingly, the governments of small island development states issued the Male' Declaration on the Human Dimension of Global Climate Change,[1] expressing their concern for the 'clear and immediate implications for the full enjoyment of human rights' of climate change'.[2] The Male' Declaration led to the conduct of a study by the Office of the High Commissioner on Human Rights on the effects of climate change on the full enjoyment of human rights, which concluded that climate change 'have a range of implications for the effective enjoyment of human rights'.[3] Subsequently, the Office of the United Nations High Commissioner for Human Rights has issued several resolutions further exploring the relationship between human

[1] Male' Declaration on the Human Dimension of Global Climate Change [Malé Declaration], 14 November 2007. Note that, before the Male Declaration, the Inuit, a community in the Arctic region, filed a petition to the Inter-American Commission on Human Rights. The petition detailed how the effects of climate change in the Arctic environment were adversely impacting a range of human rights of the Inuit as a result – it argued - of United States emissions contributions to climate change. Although it was rejected, the impact of the petition, considered the first human rights-based climate 'case', was significant as an early call of attention to the international community on the human rights dimension of climate change. See 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, 7 December 2005. For a detailed discussion of the Inuit Petition, see Chapter 4.

[2] Malé Declaration, ibid.

[3] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/hrc/10/61, 15 January 2009, para. 92.

rights and climate change, and the state obligations in that regard,[4] which have usefully informed climate negotiations and helped to raise awareness and understanding on the effects of climate change upon human rights, particularly in the most vulnerable communities.[5] These contributions have, thus, played a crucial role in the initial understanding of the linkages between human rights and climate change; and paved the way for the subsequent recognition of human rights considerations in the Paris Agreement.[6] The adoption of the Paris Agreement, irrespective of its shortcomings, constitutes a breakthrough step in the development of the international legal framework on climate change and, indeed, in the recognition of human rights in the climate change debate. Yet, the international climate change regime has extensively been criticised for not being able to effectively tackle the (root causes of the) problem of climate change and, rather, promoting neo-colonial forms of domination by wealthy Western states over the Third World, through policies favouring wealthy states that, far from alleviating the problem, perpetuate human suffering and environmental degradation.[7]

This chapter, in section 1, presents the foundations of international law on climate change regime and the negotiation process within international climate governance leading to the adoption of the Paris Agreement, in order to contextualise the human rights progress into the field of climate change. Section 2 of this chapter looks beyond the incorporation of a human rights provision in the Paris Agreement and, jointly with the human rights approach to climate change recognised in its preamble, recognises the importance of also considering ecosystems and biodiversity (Mother Earth) therein as an opportunity to rethink the human rights' relational approach to the environment.

[4] See for example, Human Rights Council, Resolution 19/10, A/HRC/RES/19/10, 19 April 2012, appointing an independent expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*;* Human Rights Council, Resolution A/HRC/25/53, Mapping report of the Independent Expert on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change, 30 December 2013.

[5]For a more detailed analysis of the OHCHR report, see John Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009)33 Harvard Environmental Law Review 477.

[6] Paris Agreement, UN Doc. FCCC/CP/2015/19, 12 December 2015, entered into force 4 November 2016 [Paris Agreement]. UNFCCC Decision, 1/CP. 21'Adoption of the Paris Agreement', FCCC/CP/2015/10/Add.1, 29 January 2016.

[7] See, for example, Julia Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' 33 Windsor Y. B. Access Just (2016) 129; and Heidi Bachram, 'Climate Freud and Carbon Colonisation: The New Trade in Greenhouse Gases' (2004) 15(4) Capitalism, Nature, Socialism 5.

There is today a set of international norms and policies aimed at tackling climate change. With the endorsement of the UN General Assembly, the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) established the Intergovernmental Panel on Climate Change (IPCC) in 1988 'to provide internationally co-ordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies'.[8] It is composed of 195 member governments, which meet at least once a year in Plenary Sessions of the Panel.[9] It provides governments with 'the most authoritative scientific assessments on climate change', its impacts and future risks, and options for adaptation and mitigation.[10] Since its creation, the IPCC has informed the climate policy-making process and negotiations with assessment reports that cover scientific, technical and socio-economic aspects of climate change. Given that climate science is essential to inform the developments in the climate regime, the IPCC fulfils a fundamental role in this regime.

The basis of the international legal framework on climate change law is the United Nations Framework Convention on Climate Change,[11] adopted in 1992 and entered into force in 1994. Since the entry into force of the UNFCCC, the international community has adopted further implementing treaties that specify states' commitments on climate change, namely the Kyoto Protocol,[12] adopted in 1997, and entered into force in 2005; and the Paris Agreement, adopted in 2015 and entered into force in 2016.[13] In addition to the international treaties on climate change, norms of customary international law also apply in the international climate change regime.[14] The international law on climate change also intersects with other international legal frameworks, particularly with the Montreal Protocol on Substances that Deplete the Ozone Layer,[15] aimed both at protecting the Earth's ozone layer from depletion caused by emissions from certain substances and phasing out their production; and the International Convention for the Prevention of the

[8] UN General Assembly, 'Protection of global climate for present and future generations of mankind' (43rd session), UN Doc. A/RES/43/53, 6 December 1988, para. 5.
[9] IPCC website <https://www.ipcc.ch> accessed 1 June 2020.
[10] ibid.
[11] United Nations Framework Convention on Climate Change, 9 May 1992 [hereinafter UNFCCC].
[12] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997 [hereinafter Kyoto Protocol].
[13] Paris Agreement (n 6).
[14] See, Daniel Bodansky, 'Customary (And Not so Customary) International Environmental Law' 3(1) Indiana Journal of Global Legal Studies (Symposium; International Environmental Laws and Agencies: The Next Generation) (1995) 105; and Benoit Mayer, 'Climate Assessment as an Emerging Obligation under International Customary Law'(2019) 68(2) International & Comparative Law Quarterly 271.
[15] Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987.

Pollution from Ships,[16] and its subsequent amendments;[17] international trade and investment law, international maritime and civil aviation law, and norms of international human rights law and international environmental law.[18]

The international climate regime has been characterised by intricate negotiation processes, reflecting the disparity amongst states' positions with respect to the global efforts needed to tackle climate change, and the underlying issues of climate injustice. The multilateral regime of climate governance initiated by the UNFCCC is, thus, one of the regimes of international law where the division between developing (Third World) and developed (Western) states, and their dynamics of power and domination are most tangible, and as such, is highly contested. As Dehm notes:

> … grassroots movements for climate justice have been questioning not simply the adequacy of action taken under the umbrella of the UNFCCC but also the kind of action being taken: its rationality, its underlying neoliberal market-driven ethos, and the ensuing distributional consequences. From a climate justice standpoint, pertinent critiques have been made of the role played by the UNFCCC in promoting "false solutions" such as carbon trading and carbon offset schemes that more deeply perpetuate the inequalities at the heart of the climate crisis.[19]

Certainly, international climate governance has been questioned, *inter alia,* for the blatant ways in which it has reproduced neo-colonial forms of dominance; and for the alleged political interference from non-state actors, whereby multinational corporations ['corporations'] are able to influence the climate change policy-making processes by putting 'pressure on decision-makers.'[20]

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[16] International Convention for the Prevention of the Pollution from Ships, 17 February 1973, modified by the Protocol of 1978.

[17] 1997 Protocol to Amend the 1973 International Convention for the Prevention of the Pollution from Ships (as modified by the Protocol of 1978), 26 September 1997; and the Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships (1973/78), 15 July 2011.

[18] Since human rights, climate change and the environment are central to this thesis, more detail on different aspects of their interrelationship can be found throughout it. For a detailed analysis on the intersections between the climate change and international trade, and investment regimes see, for example, Rafael Leal-Arcas *Climate Change and International Trade* (Edgar Elgar Pub. 2013); and Shalanda Baker 'Climate Change and International Economic Law' (2016) 43(1) Ecology Law Quarterly 53.

[19] Dehm (n 7) 131.

[20] Irja Vormedal, 'The Influence of Business and Industry NGOs in the Negotiation of the Kyoto Mechanisms: The Case of Carbon Capture and Storage in the CDM' 8(4) Global Environmental Politics (2008) 36, 62.

2. The International Legal Framework on Climate Change and Human Rights

2.1 The UNFCCC

The first talks envisaging the adoption of an international legal framework governing climate change started in the seventies. The WMO held the first World Climate Conference in 1979, but the actual works to develop a legal framework on climate change started in 1990, after the second World Climate Conference in Geneva co-hosted by the WMO and the UNEP, with the aim of reviewing the WMO-UNEP World Climate Programme.[21] The Conference mainly consisted of scientific and technical sessions resulting in recommendations, which included, for example, the significance of greenhouse gases (GHG) for climate change.[22] Subsequently, the UN General Assembly created the Intergovernmental Negotiating Committee for a Framework Convention, which, in 1992, adopted the UNFCCC at the Rio Conference on Environment and Development (also known as the 'Earth Summit'). According to its article 2, the 'ultimate' objective of the UNFCCC is 'to achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'[23] Also, article 4 recognises climate change as a response to anthropocentric activity, in light of article 1(2) and defines climate change: 'Climate change means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.'[24]

This treaty was developed with the aim of addressing the increasing concerns about global climate change. One of its most salient provisions is Article 4, providing for national commitments. It states that, 'taking into account the principle of *common but differentiated responsibility'*,[25] States

[21] For a summary of the outcomes of the conference, see UNEP, 'The Second World Climate Conference (*Information Unity on Climate Change*, 1 May 1993)
<https://unfccc.int/resource/ccsites/senegal/fact/fs221.htm> accessed 1 June 2020.
[22] See, UNFCCC, 'The Second World Climate Conference,' 29 October-7 November 1990
https://unfccc.int/resource/ccsites/senegal/fact/fs221.htm> accessed 13 June 2020.
[23] UNFCCC (n 11) Article 2.
[24] ibid, article 1(2).
[25] The principle of common but differentiated responsibility, enshrined within the UNFCCC, was explicitly formulated in the 1992 Rio Declaration on Environment and Development: It establishes that, i view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. United Nations Conference on Environment and Development, 3-14 June 1992. Rio Declaration on Environment and Development, Principle 7, U.N. Doc. A/CONF. 151/26, 12 August 1992.

Parties, *inter alia*, shall communicate to the Conference of States Parties their 'national inventories of emissions (Article 4.1); regional programmes of mitigation measures (Article 4.2); and cooperate and promote 'adaptation to the impacts of climate change' (Article 4.5). As such, Article 4 attempts to specify states' obligations on climate mitigation and adaptation. However, as Mayer observes, 'these provisions are formulated in a vague, almost incantatory language… [and] do not define any obligation to achieve a particular result, such as quantified targets of emission reduction'.[26] Indeed, the UNFCCC, recognised the need for states to undertake climate commitments to mitigate global emissions and adaptation measures, but it left their content unclear. Instead, the intention during negotiations was to build up the content of the States' obligations in a framework convention with the aim of subsequently having an agreement, such as was the case of the Montreal Protocol (1978), which specified the States' obligations previously delineated in the Vienna Convention on the Protection of the Ozone Layer (1985) in a more general way.[27]

In line with the development of earlier environmental treaties,[28] the international legal framework on climate change has followed a protocol-framed approach which, on the one hand, allows flexibility in bringing scientific developments on climate change to bear on the progress of the climate change regime; on the other hand, it does not provide concrete and clear state obligations under this regime.

2.2 The Kyoto Protocol

The Kyoto Protocol to the UNFCCC was adopted in 1997 with the main objective of 'setting quantified limitation and reduction objectives with specified time-frames'.[29] The Kyoto Protocol became the first international treaty governing climate change with a fixed expiry date.[30] The Kyoto Protocol entered into force in 2005, seven years after its adoption. It was adopted for an

[26] Benoit Mayer, *The International Law on Climate Change.* (Cambridge University Express 2018) 38.
[27] ibid, 35.
[28] For example, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Helsinki Protocol on the Reduction of Sulphur Emissions, and, within the climate regime, the Kyoto Protocol.
[29] UNFCCC, 1st Conference of States Parties (COP1), Decision 1/CP.1, "The Berlin Mandate", 7 April 1995, para. 2
[30] Kyoto Protocol to the United Nations Framework Convention on Climate Change (n 14) Article 3.

initial period from 2008 to 2012, which subsequently was extended for another period from 2013-2020.[31]

In the Kyoto Protocol, States Parties agree to reduce their emissions by at least 5% below their 1990 levels, which can be fulfilled either individually or jointly.[32] The Protocol has a flexible approach whereby States Parties can fulfil their obligations through 'flexibility mechanisms'. First, the joint implementation mechanism (JIM) allows an Annex I party with an emission reduction or limitation commitment to earn Emission Reduction Units from an emission-reduction or emission removal project in another Annex B (developed) state party, each equivalent to one tonne of CO2, which can be counted towards meeting its target under the Kyoto Protocol.[33] Second, the clean development mechanism (CDM) allows an Annex I (developed) state to receive emission reduction units from emission reductions in other (non-Annex I) countries, which generally are developing states. [34] Third, there is the emissions trading mechanism,[35] which allows countries that have emission units to spare (emissions permitted but not 'used') to sell this excess capacity to countries that are over their targets. This mechanism has been considered the 'ultimate neo-liberal market concession to the climate process'.[36] It has been criticised for its counterproductive results, whereby, according to Shah, 'it will be easier to buy credits than to reduce emissions hence it won't really work and will just be a license to pollute'.[37] Certainly, the 'carbon markets' enabled by the Kyoto Protocol have been extensively critiqued.[38] For instance, Dehm argues:

> … some have described the UNFCCC framework as promoting a form of "carbon colonialism" or "CO_2lonialism"… [These mechanisms] 'perpetuate inequalities at the heart of the climate crisis…[These] schemes are an ineffectual response that abrogates

[31] UNFCCC (COP8), Annex of Decision 1/CP.CMP.8, 'Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9' ("Doha Amendment"), 8 December 2012.
[32] Kyoto Protocol (n 14) article 3, para. 1.
[33] ibid, article 6. Note that the 'joint implementation mechanisms' is not explicated used in the text of the Article 6, however, it is widely recognised as such.
[34] ibid, article 12.
[35] ibid, article 17.
[36] Raymond Clémençon, 'The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough' 25(1) Journal of Environment & Development (2016) 3, 4.
[37] Arup Shah, 'Climate Change Flexibility Mechanisms' (*Global Issues*, 2 April 2012) <https://www.globalissues.org/article/232/flexibility-mechanisms> accessed 1 June 2020.
[38] See, for example, Steffen Böhm and Siddhartha Dabhi (eds), *Upsetting the Offset; The Political Economy of Carbon Markets* (MaryFly Books 2009); and Kevin Smith, 'The Carbon Neutral Myth: Offset Indulgences for your Climate Sins' (Carbon Trade Watch 2007).

> responsibility of key polluters while threatening the livelihoods of those communities with limited responsibility for and high vulnerability to climate change.[39]

The Kyoto Protocol mechanisms constitute indeed a leeway for developed states to continue emitting at the cost of developing states. Specifically, the CDM has been criticised because, like the JIM, it allows countries in the North to 'avoid responsibilities at home … [which] will actually increase emissions because the credits earned will allow rich countries to emit more'.[40] The CDM thus undermines the criteria that 'emissions reductions … are real, additional, verifiable, and permanent'[41] for CDM projects in the South. Thus, the CDM, 'in essence, … is criticised for allowing the rich countries to continue using the burning fossil fuel while paying the third world not to'.[42] As a result, the efficiency of the 'flexibility mechanisms' under the Kyoto Protocol remains at least controversial, having not achieved its aim under articles 3 on quantified emission limitation and reduction commitments. Furthermore, these offset mechanisms are not criticised only because of their inability to contribute to global emissions reduction but, also, because they can be purchased and used to legitimate further greenhouse emissions in the North. As a result, environmental groups allege that carbon trading mechanisms are a 'dangerous distraction' that prevents urgently necessary changes in energy production and distribution.[43] Indeed, the role of flexibility mechanisms in legitimising dominance and intensifying North-South inequalities should be understood in the context of climate negotiations as 'they were mainly included on strong United States insistence and to keep [it] in the treaty.'[44] Yet, 'despite getting its way in terms of emissions trading in the Kyoto Protocol', the United States, having signed the Protocol, did not ratify, rather it repudiated the process in 2001;[45] Canada, for its part, officially withdrew in 2011.[46] Unlike Canada, Australia, Japan and Russia remained in Kyoto, but the latter two

[39] Dehm (n 7) 131.
[40] Shah (n 37).
[41] Carbon Market Watch, 'The Clean Development Mechanism: Local Impacts of a Global System' (*Carbon Market Watch*, October 2018) <https://carbonmarketwatch.org/wp/wp-content/uploads/2018/10/CMW-THE-CLEAN-DEVELOPMENT-MECHANISM-LOCAL-IMPACTS-OF-A-GLOBAL-SYSTEM-FINAL-SPREAD-WEB.pdf> accessed 1 June 2020.
[42] Shah (n 37).
[43] Dehm (n 7) 134.
[44] Shah (n 37).
[45] Although the United States was a signatory to the Kyoto Protocol, the Senate did not ratify it, with the result that the 'United States did not become bound by any emission limitation and reduction commitment' … [despite being the largest emitter country back then] …' (now surpassed by China) 'and its … emissions represented a large share of the emissions of developed States that the Kyoto Protocol sought to regulate.' Mayer (n 19) 41.
[46] Clémençon (n 36) 5.

refused to commit to targets for the second commitment period. China, classified as a developing country or non-annex B country in the Kyoto protocol, was not committed to anything.

There is no doubt that the aggressive neoliberal market orientation of the Kyoto Protocol served the interests of developed States. Along with serving the interest of the mentioned states, it also greatly served the interest of these developed states' corporations, leading to 'new' forms of *legal* 'CO_2lonialism'.[47] The European Corporations Observatory points out that states' corporate ventures:

> …that might become eligible for emissions credits - nuclear power plants, so-called 'clean coal' plants as well as industrial agriculture and large-scale tree plantations (including genetically engineered varieties) - have extremely serious negative social and environmental impacts. Investments in carbon' sinks (such as large-scale tree plantations) in the South would result in land being used at the expense of local people, accelerate deforestation, deplete water resources and increase poverty. Entitling the North to buy cheap emission credits from the South, through projects of an often-exploitative nature, constitutes '*carbon colonialism'*.[48]

As such, international climate governance approves 'new' forms of 'CO_2lonialism', which *only* benefit wealthy States and their empowered corporations at the cost of the most disadvantaged countries, triggering thereby human suffering and environmental depletion in the Third World.[49]

2.3 The Human Rights' Path from Kyoto to Paris

Since the adoption of the Kyoto Protocol in the nineties until the adoption of the Paris Agreement in 2015 only slight progress was made in the context of the Conference of State Parties to the UNFCCC (COP) to include human rights considerations in climate change negotiations prior to the adoption of the Paris Agreement. The climate negotiations towards its adoption have been characterised by tensions between different states or states groups' positions such as, the European Union states; the United States and its partners; the BASIC group (Brazil, South Africa, India and

[47] Dehm (n 7) 129.

[48] Corporate Europe Observatory, 'Saving the Kyoto Protocol Means Ending the Market Mania' (July 2001) <http://archive.corporateeurope.org/climate/bonnstatement.html> accessed 1 June 2020.

[49] In part, this has been a factor that triggered bottom-up responses from civil society who is increasingly resorting to the judiciary to resolve issues of climate justice. See Chapter 4, on climate litigation.

China); small island developing states (joined by least-developed states); and the oil-producing states (led by Saudi Arabia).[50] Typically, largest emitters states have shown a lack of political will to undertake significant steps oriented to reducing global emissions so as to hold the Earth's temperature below 2°C above pre-industrial levels.[51] Likewise, highly vulnerable states to climate change impacts (notably, small islands states) have consistently pushed for ambitious mitigation efforts during climate negotiations. It could be considered that human rights have been a peripheral subject which often faced reluctance by states in the negotiation processes prior Paris. This is reflected in the outcome documents of COPs negotiating the post-Kyoto regime whereby explicit references to human rights references appear only sporadically, including in the reduced (but still significant) reference in the final text of the Paris Agreement.[52]

As the end of the first commitment period (2008-2012) of the Kyoto Protocol was coming to an end,[53] it was essential to gain traction towards the adoption of a successor, legally binding document tackling the global problem of climate change. In 2007, the COP13 adopted the Bali Action Plan,[54] which was essentially a point of departure of climate negotiations oriented to build consensus on the adoption of a climate agreement in Copenhagen in 2009. Importantly, based on the findings of the IPCC Fourth Assessment Report,[55] the Bali Action Plan emphasises 'the *urgency* to address climate change'.[56] To that end, the Plan '[launched] a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012 [end year of first period of the Kyoto Protocol], in order to reach an agreed outcome and adopt a decision at its fifteenth session [at Copenhagen]'.[57] Accordingly, the Plan established an Ad Hoc Working Group on Long-Term Cooperative Action

[50] Daniel Bodansky,] Jutta Brunnée and Lavanya Rajamani, 'International Climate Change Law' (Oxford University Press 2017) at 116.
[51] See, for example, Raymond Clémençon (n 36); and Aslak Brun, 'Conference Diplomacy: The Making of the Paris Agreement' 4(3) Politics and Governance (2016) 115.
[52] Discussing the diverse aspects of and positions within climate negotiations leading to the adoption of the Paris Agreement falls beyond the scope of this section. Rather it seeks to provide an overview of the gradual understanding and incorporation of human rights' considerations in the climate regime amidst, at times, diametrically opposed positions around states' mitigation commitments, which reflect the dynamics of power that dominate the climate regime and explain somewhat their outcomes.
[53] The Kyoto Protocol did not count with the ratification from United States, which back then was the largest emitter state.
[54] UNFCCC (COP13), Decision 1/CP. 13 'Bali Action Plan', 14-15 December 2007.
[55] IPCC, 'Fourth Assessment Report: Technical Summary' (IPCC Working Group III contribution to AR4, 2007).
[56] UNFCCC, Bali Action Plan (n 54).
[57] ibid, para. 1.

to carry out that process.[58] The Bali Action Plan was considered an achievement as 'political compromise between developed and developing countries at the end of tortuous political negotiations',[59] over five main categories of its 'shared vision for long-term cooperative action', including mitigation, adaptation, shared vision, technology and financing,[60] whereby mitigation was a central issue. Indeed, as Bodansky notes, '[although] the Bali Action Plan addressed mitigation by both developed and developing countries … it continued to distinguish between the two'.[61] For instance, while the Plan required both developing and developed states to take 'measurable, reportable and verifiable mitigation actions';[62] it provides developed states with the option of including or not quantified emission reduction targets. For Rajamani, '[this] is disappointing given the effort sharing arrangement, their historical and current GHG contributions, and their inability in large part to meet even the modest ambition of the existing climate regime'.[63] This kind of climate policy resulting from multilateral climate negotiations show that the climate regime is porous given that, far from contributing to urgent climate mitigation, it can provide the means to largest emitting states (and their corporations) to continue their emissions business-as-usual, without really contributing to climate mitigation, despite recognising its urgency. In addition, the Bali Action Plan does not make any explicit reference to human rights. It only refers to the participation of relevant stakeholders including civil society in the process of implementation of the Kyoto Protocol.[64] Climate mitigation commitments and their nature as well as the incorporation of human rights considerations in global climate action remained thus matters to be pushed for in subsequent climate negotiations.

Subsequently, the COP15 held in Copenhagen in 2009 sought to implement what was agreed in Bali, consisting in the adoption of an instrument on climate action. The COP15 in Copenhagen was considered 'a very public failure for international negotiations on climate change'.[65] This is

[58] ibid, para. 2.
[59] Mayer (n 26) 43.
[60] See Bali Action Plan (n 54) para. 1(a).
[61] Bodansky, Brunnée and Rajamani, (n 50) 110.
[62] Bali Action Plan (n 54) para. 1(b)(i).
[63] Lavanya Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly' (2008) 57(4) International and Comparative Law Quarterly 909, 939.
[64] Bali Action Plan (n 54) para. 11.
[65] Mayer (n 26) 43. See also, for example, Shamus Cooke, 'Why Copenhagen Failed?' (*Global Research*, 19 December 2009) <http://www.globalresearch.ca/why-copenhagen-failed/16612> accessed 1 June2020; and Ben Lieberman, 'The Copenhagen Conference: A Setback for Bad Climate Policy in 2010' (*The Heritage Foundation*, 19 January 2010) <http://www.heritage.org/research/reports/2010/01/the-copenhagen-conference-a-setback-for-bad-climate-policy-in-2010> accessed 1 June 2020.

because, after long and tedious negotiations, no decision was made until the very last minute with agreement only from 'twenty-eight countries, including all of the major economies and emitters, representative of all of the UN regional groups, and representatives of the most vulnerable and least developed states'.[66] As a result, some countries, led by the United States, adopted the 'Copenhagen Accord',[67] which led to complaints from other delegations that did not participate in the drafting process.[68] In consequence, the Copenhagen Accord, which was basically an agreement based upon voluntary commitments 'to limit global temperature to below 2°C before pre-industrial levels',[69] did not reach consensus during the COP15 and was only agreed upon by more states after its closing.[70] It acknowledged the particularly vulnerable situation of the least developed countries and small island developing states and Africa to climate change impacts.[71] In addition, amongst other aspects, the Copenhagen Accord established the Green Climate Fund for adaptation and mitigation purposes;[72] and recognised the 'crucial role of reducing emissions from deforestation and forest degradation'.[73] Yet, the Copenhagen Accord did not have legal force as it was considered a political agreement 'rather than a full-fledged legal instrument'.[74] It lacked powers of enforcement and clarity on its procedural mechanisms for implementation.[75] The Copenhagen Accord also obviated implicit or explicit references to human rights. In sum, beyond the decisions made, the negotiation process and outcome of the COP15 in Copenhagen posed serious concerns and increased scepticism on the feasibility of achieving a climate agreement to follow the Kyoto regime after 2012; and put the spotlight on the North-South division, particularly evidenced in international regime of climate governance.

The mitigation targets submitted in the Copenhagen Accord were subsequently acknowledged the following year at the COP16 held in Cancun. States developed the approach set by the Copenhagen

[66] Bodansky, Brunnée and Rajamani (n 50) 110.
[67] UNFCCC, COP15, Annex of decision 2/CP.15 'Copenhagen Accord', 18-19 December 2009.
[68] Mayer (n 26) 43.
[69] Copenhagen Accord (n 67) para. 1.
[70] 141 out of the 197 Parties to the UNFCCC agreed upon the text of the Copenhagen Accord during the COP15 and afterwards, through notification to the UNFCCC Secretariat. Mayer (n 26) 44.
[71] Copenhagen Accord (n 67) para. 3.
[72] ibid, para. 10.
[73] ibid, para. 6.
[74] Daniel Bodansky, 'The Copenhagen Climate Change Conference: A Post-Mortem', (2010) 104 American Journal of International Law 1, 4.
[75] ibid, 1.

Accord and built upon them in the Cancun Agreements.[76] These Agreements confirmed the bottom-up approach of the Copenhagen Accord based on voluntary mitigation pledges submitted by states with the aim of holding the temperature rise below 2°C, and even 1.5°C.[77] The Cancun Agreements also established the Climate Green Fund,[78] and the Cancun Adaptation Framework, which incorporated the principles set in Bali, whereby adaptation measures should 'follow a country-driven, gender-sensitive, participatory and fully transparent approach'.[79] Yet, one of the crucial issues that remained unclear in Cancun was the nature of state emission reduction pledges which, '[depending] on the particular circumstances of each communication … could constitute unilateral declarations from which arise international obligations'.[80] Similarly to the Copenhagen Accord, the Cancun Agreements maintained the process towards a second commitment period under the Kyoto Protocol,[81] later achieved at Doha. In relation to human rights, the Cancun Agreements constitutes a symbolic breakthrough in the climate regime. For the first time, explicit reference to human rights was made in the international regime of climate change. In a decision adopted by the COP16 held in Cancun, it was recognised that:

> …the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of *human rights* and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status and disability. [82]

In addition, the Cancun Agreements '[emphasize] that Parties should, in all climate change related actions, fully respect *human rights'*.[83] Although minimal, this explicit reference to human rights in the report of the COP16 in Cancun represents an important step towards the recognition of human rights in multilateral climate negotiations. Nevertheless, the vagueness of the emissions' reduction targets built in the Copenhagen Accord, enshrined by the Cancun Agreements fell short of constituting a solid legal architecture enabling significant mitigation

[76] UNFCCC (COP16), Decision 1/CP. 16, 'The Cancun Agreements: outcome of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' ['Cancun Agreements'], 11 March 2011.
[77] ibid, para. 4.
[78] ibid, paras. 102-11.
[79] ibid, para. 12
[80] Mayer (n 26) 45.
[81] Cancun Agreements (n 76) para. 1.
[82] ibid, Preamble.
[83] ibid, para. 8.

commitments from states, consistent with the level of urgency and ambition needed to limit climate change impacts. As Bodansky notes, '[the] comparatively weak provisions of the Copenhagen Accord and Cancun Agreements are unlikely, in themselves, to produce the necessary level of emissions cuts to prevent dangerous climate change'.[84]

In this context, the COP17 held in Durban the following year was aimed at setting the route 'that govern climate actions in the 2012-2020 time-frame',[85] towards the adoption of a legally binding instrument. To this end, the Ad-Hoc Working Group on the Durban Platform for Enhanced Action ('Durban Platform') was established.[86] The Durban Platform 'provided the mandate for the Paris Agreement negotiations by establishing a new negotiating group …[the Durban Platform]'.[87] The negotiation process in Durban repeated the pattern established in the preceding decade of climate negotiations, where 'states are engaged, not in a negotiation of the text of an agreement, but rather [in] a meta-negotiation about what to negotiate',[88]Indeed, the text of the Durban Platform reflect the tensions during its negotiation. It sets up 'a process to develop a protocol, another legal instrument or an agreed outcome with legal force',[89] which would end in 2015 with the adoption of the 'new' treaty. This provision reflects, for instance, the demand of the European Union, small-island and least-developed countries, of developing 'a fast-start mandate to negotiate a new legally-binding instrument engaging *all* countries, as a condition for its acceptance to a second commitment period under the Kyoto Protocol'.[90] Likewise, reflecting other states' demands, the Platform provides 'that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response'.[91] This provision responded to the United States' demand of having a 'symmetrical' mandate applicable to developing *and* developed states alike, as a condition to 'accept a mandate to negotiate a new outcome of a legal nature'.[92] These 'meta-negotiations', not surprisingly, were

[84] Bodansky (n 74)18.
[85] Lavanya Rajamani, 'Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61(2) International and Comparative Law Quarterly 501, 502.
[86] UNFCCC, COP17, Decision 1/CP.17, 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' ('Durban Platform'), 11 December 2011.
[87] Bodansky, Brunnée and Rajamani (n 50) 113.
[88] Daniel Bodansky, 'The Durban Platform Negotiations: Goals and Options,' (Harvard Project on Climate Agreements Viewpoint, 10 July 2012) <https://ssrn.com/abstract=2102994> at 12, accessed 1 June 2020.
[89] UNFCCC, Durban Platform (n 86) paras. 2-4.
[90] Bodansky (n 74) 1.
[91] UNFCCC, Durban Platform (n 86) para. 1.
[92] Bodansky (n 74) 2.

also dominated by a lack of political will to make ambitious emission reduction commitments and incorporating explicit human rights language. The outcome document of the COPP17 in Durban made no explicit reference to human rights, undermining thereby the achievement made in Cancun, when human rights considerations were for the first time considered in the outcome document of the COP.

As 2012 was the expiry year of the Kyoto Protocol, the COP18 held in Doha gave momentum to the climate change negotiations, as states had the last opportunity to decide upon a post-Kyoto commitment period in the climate regime. Importantly, 'a second commitment period would define mitigation commitments of a clearly binding legal nature'.[93]As in previous COPs, negotiations were marked by big differences between developing and developed countries, which undermined the hopes of finally getting a post-Kyoto climate agreement and fulfilling the commitment made in Bali of having no gap between Kyoto and its succeeding regime.[94] Yet, at the last minute of the COP in Doha, states agreed upon amending the Kyoto Protocol to extend its validity for another eight-year period from 2013 to 2020.[95] This amendment to the Kyoto Protocol implicitly reflects the recognition of the insufficiency of the voluntary reduction emissions pledges from states under the Copenhagen Accord. The Doha amendment, therefore, 'was made with a view to reducing their overall emissions … by at least 18 per cent below 1990 levels in the commitment period 2013 to 2020'.[96] The Doha Amendment needed to be accepted by at least three-quarters of the parties to the Kyoto Protocol, in order to enter into force,[97] which was achieved in 2020, triggering as a result the entry into force of the second commitment period of the Kyoto Protocol.[98] This means that (Annex 1-developed) states that have presented their emissions reduction targets for the second commitment period of the Kyoto Protocol are now legally bound by them. Yet, although the 18% minimum target compared to 1990 levels set in the Doha Amendment represents an increase of 5% in relation to the target established for the first commitment period of the Kyoto

[93] Mayer (n 26) 45
[94] On the COP18 in Doha, see, for example, Center for Climate and Energy Solutions, 'Outcomes of the U.N. Climate Conference on Doha, Qatar' (*C2ES*, December 2012) <https://www.c2es.org/site/assets/uploads/2012/12/outcomes-of-the-u-n-climate-change-conference-in-doha.pdf> accessed 13 June 2020.
[95] Doha Amendment (n 31) para. 4.
[96] ibid, C (Article 3. paragraph.1 bis).
[97] ibid, E. (Article 3, paragraph 1 quarter).
[98] UNFCCC, 'Ratification of Multilateral Climate Agreement Gives Boost to Delivering Agreed Climate Pledges and to Tackling Climate Change' (*UN Climate Press Release*, 2 October 2020) <https://unfccc.int/news/ratification-of-multilateral-climate-agreement-gives-boost-to-delivering-agreed-climate-pledges-and> accessed 2 October 2020.

Protocol; it should be noted that 'the current global emissions pathway would likely result in an increase of global average temperatures of 3˚C or more, which is significantly higher than the temperature limits of less than 2˚C and as close to 1.5˚C as possible as contained in the Paris Agreement.[99] This crucial shortcoming in the emissions reduction levels explicitly reflects the insufficiency of the measures taken under the international climate regime in order to hold global temperatures below the minimum required to limit unprecedented effects of climate change.[100] Therefore, climate action beyond measures stemming from traditional multilateral climate governance under the UNFCCC regime is much needed, for which ambitious climate policies at national and local level are crucial, including initiatives from civil society, like climate litigation.

Focused on defining a clearer path for the final two years of the Durban Platform negotiations, the COP19 held in Warsaw,[101] set the agenda to start drafting the new climate agreement to be negotiated in the next conference. Although the report of the COP19 does not make express reference to human rights, it addressed some of the demands from developing countries, including increased climate finance through the Green Climate Fund and Long-Term Finance,[102] and the framework for REDD-+,[103] and established a mechanism for 'loss and damage' to associated with climate change impacts.[104] Indeed, the focus in these areas implicitly make reference to human rights considerations given that they represent some of the 'areas where potential tensions with the protection of human rights are particularly evident'.[105] Besides addressing those areas, the COP19 report also refers implicitly to human rights by acknowledging that 'climate change represents an urgent and potentially irreversible threat to human societies, future generations and the planet'.[106] Remarkably, this provision not only reflects the increasing recognition of human rights

[99] ibid.

[100] IPCC, 'Global Warming of 1.5°C Report: Summary for Policymakers' (IPCC, 2018) [hereinafter, *1.5°C Report*].

[101] UNFCCC, Report of the Conference of the Parties on its nineteenth session (COP19) held in Warsaw from 11 to 23 November 2013, FCCC/CP/2013/10, 31 January 2014.

[102] For a study on climate finance and human rights see Liane Schalatek and OHCHR, 'Promoting Rights-Based Climate Finance for People and Planet' (Henrich Boell Stiftung 2017).

[103] 'REDD' stands for the 'Reducing Emissions from Deforestation in Developing Countries' scheme. In 2010, at COP-16 (15), as set out in the Cancun Agreements, REDD became REDD-+ to reflect new components. REDD-+ now includes reducing emissions from deforestation; reducing emissions from forest degradation; conservation of forest carbon stocks; sustainable management of forests and enhancement of forest carbon stocks. On the human rights implications of the REDD-+, see Annalisa Savaresi, 'The Human Rights Dimension of REDD' (2012) 21(2) Review of European Comparative & International Environmental Law 102.

[104] UNFCCC, Report 'COP19' (n 101) Decision 2/CP.19.

[105] Annalisa Savaresi, 'Human Rights and Climate Change' in Tuula Honkonen and Seita Romppanen (eds) *International Environmental Law-making and Diplomacy Review 2018* (UNEP Course Series 2019) 31, 35.

[106] UNFCCC COP19, Decision 1/CP.19, 'Further Advancing the Durban Platform', 23 November 2013.

considerations in climate negotiations but, by including 'future generations', it also recognises implicitly the extratemporal nature of human rights impacts, which is increasingly being put in evidence through climate litigation cases invoking the rights of young and future generations.[107] Further, although it did not clarify what would be the legal character (whether legally binding or not) of the future climate change agreement, the COP19 decision on 'Further Advancing the Durban Platform'[108] called states to present their intended nationally determined contributions (NDCs), in advance to the next COP in Lima, where the draft text of the 'new' agreement would be negotiated.

The main outcome of the COP20 held in Lima was the adoption of the 'Lima Call for Climate Action', which called states Parties 'to communicate their intended nationally determined contributions well in advance'[109] of the COP21 in Paris, including an annex with elements of a draft negotiating text. Importantly for the recognition of human rights in the international climate framework, the annex with a draft negotiating text of the instrument, in its preambular part, included explicit reference to human rights in connection with environmental considerations and other rights. It stressed that: '…all actions to address climate change and all the processes established under this agreement should ensure a gender-responsive approach, take into account environmental integrity / the protection of the integrity of Mother Earth, and respect human rights, the right to development and the rights of indigenous peoples.'[110] Despite the connection between the protection of the environment / Mother Earth and human rights was made in the draft negotiating text, it unfortunately did not make its way until the final text of the instrument. However, albeit amended, references to gender issues, the right to development and the rights of indigenous peoples, and even climate migration[111] made their way into the final text of the agreement, setting thereby a milestone in the human rights' trajectory in the international climate change realm and, certainly, in the relationship between human rights and climate change. Yet, one of the most challenging issues left to be resolved in Paris was the legal form of the climate

[107] On climate litigation involving the rights of young and future generations, see Chapter 4. For an analysis of the rights of future generation in the climate regime see, for example, Bridget Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7(1) Transnational Environmental Law 69.
[108] UNFCCC, Report 'COP19' (n 101) Decision 1/CP.19.
[109] UNFCCC, Report of the Conference of the Parties on its twentieth session (COP20) held in Lima from 1 to 14 December 2014, Decision 1/CP. 20, Lima Call for Climate Action, para. 13.
[110] ibid, Annex, of the draft negotiating text.
[111] ibid.

agreement, which was purposely left undefined. However, the COP20 in Lima decided that the final outcome 'shall address in a balanced manner, *inter alia,* mitigation, adaptation, finance, technology development and transfer, and capacity-building, and transparency of action and support.[112] After its closing, several negotiation meetings were conducted to build-up the final draft of the climate agreement to be negotiated in Paris, whose final version was delivered only fifteen days before the COP 21 started. Certainly, although the final draft text left crucial points undecided and pending before further negotiations in Paris, it had a value *per se,* for putting on the table a document to be negotiated upon, especially considering the sharp North-South differences manifested during two decades of climate negotiations,.[113] As Bodansky describes, the UN climate regime, the end game of COPs is typically a process of trench warfare, in which virtually every word is fought over, and gains and losses are measured in brackets and commas'.[114] Tracking the human rights trajectory amidst the 'warfare' of the making-of the climate change regime, whereby states negotiate their commitments towards the common goal of limiting the effects of climate change is relevant to the understanding of the relationship between human rights and climate change. It not only allows to grasp the context in which this relationship has arisen, but also the limitations of the climate regime - and of human rights thereby - to respond to the climate emergency as such and, therefore, the need to resort to other 'avenues' for radical and urgent climate action.[115] Yet, setting the table for the final negotiation of the post-Kyoto framework amidst widely diverse states' positions could be considered an achievement in itself.

2.4 The Paris Agreement: Glass Half Full or Half Empty?

The Paris Agreement was adopted by the COP21 held in Paris in 2015 and entered into force on 4 November 2016,[116] on the thirtieth day after fulfilling the condition that at least 55 Parties to the UNFCCC, accounting for at least 55 % of the total global greenhouse gas emissions, have

[112] ibid, para. 2.
[113] See the 'Draft Agreement and Draft Decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action', 6 November 2015. <http://unfccc.int/resource/docs/2015/adp2/eng/11infnot.pdf>accessed 13 June 2020.
[114] Bodansky, Brunnée and Rajamani (n 50) 115.
[115] Responses from civil society through the 'avenue' of climate litigation is explored in Chapter 4.
[116] Paris Agreement, (n 6).

deposited their instruments of ratification, acceptance, approval, or accession with the Depositary.[117]

The United States ratified the Paris Agreement on 3 September 2019, however, on 4 November 2019, the President Trump administration notified its decision to withdraw from the Agreement which took effect on 4 November 2020 in accordance with article 28 (1) and (2) of the Agreement.[118] However, the President elect, Joe Biden, announced the intention of the United States to re-join the Paris Agreement following his assumption of the Presidency in 2021.[119]

Since the establishment of the UNFCCC in 1992, until the last COP, before the adoption of the Paris Agreement, human rights considerations were largely absent in climate change negotiations. References to human rights have been limited and rarely explicit. The Kyoto Protocol did not make any kind of reference to human rights. Only the final decisions of the COPs held in Cancun (2010) and Lima (2014) included explicit references to human rights in the draft text to be considered in the negotiations of the future climate agreement. Therefore, the adoption of the Paris Agreement by the COP21 in December 2015 is meaningful from a human rights perspective since it is the 'first multilateral environmental agreement to make reference to human rights explicitly'.[120] As such, the Paris Agreement constitutes a treaty-based bridge between the legal fields of human rights and climate change and thus symbolises the 'official' recognition that climate change *has* a human rights dimension. Certainly, it 'includes the strongest human rights language in any environmental treaty'.[121] and, therefore, the preamble of the Paris agreement refers to states' obligations in relation to human rights. It states that:

> 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

[117] ibid, Article 21.
[118] United States of America's withdrawal from the Paris Agreement, C.N.575. 2019.TREATIES-XXVII.7. d (Depositary Notification), 4 November 2019 <https://treaties.un.org/doc/Publication/CN/2019/CN.575.2019-Eng.pdf> accessed 11 November 2020.
[119] Aljazeera, 'Biden vows to rejoin Paris climate deal if elected president' (*Aljazeera news*, 5 November 2020) <https://www.aljazeera.com/news/2020/11/5/biden-vows-to-return-us-to-paris-climate-accord-if-elected> accessed 5 November 2020.
[120] Annalisa Savaresi, 'The Paris Agreement: A New Beginning?' (2016) 34(1) Journal of Energy & Natural Resources Law 16, 25.
[121] Statement of the Special Rapporteur on human rights and the environment to the 31st Session of the Human Rights Council, 'Climate Change and Human Rights; and Implementation of the Human Rights Obligations Relating to the Environment', 3 March 2016, at 3. <http://www.ohchr.org/Documents/Issues/Environment/Knox_presentation_HRC31.pdf> accessed 1 June 2020.

> 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.[122]

Hereby the Paris Agreement implicitly recognised that the impacts of climate change affect a number of human rights and, principally, those from groups most vulnerable to climate impacts. As the Special Rapporteur on Human Rights and the Environment puts it, the Paris Agreement 'signifies the recognition by the international community that climate change poses unacceptable threats to the full enjoyment of human rights and that actions to address climate change must comply with human rights obligations'.[123]

Yet, as it was reflected in the outcome of several Conference of States Parties preceding the adoption of the Paris Agreement where human rights references were absent or indirect, the recognition of human rights considerations throughout climate change negotiations was not exempt from obstacles. In particular, a number of states, namely 'Saudi Arabia, the United States and Norway explicitly objected to any reference to human rights in the operative part of the Agreement, and several Member States of the European Union (EU) expressed non-public objections'.[124] Given the lack of support for the inclusion of human rights' considerations in global climate action, the Paris Agreement can be deemed a 'marginal victory for those advocating for building bridges between the climate regime and human rights law'.[125]

Whilst the human rights reference is 'only' in the preambular part of the Paris Agreement, it should be borne in mind that, even though human rights references were not included in the core text, as had been vigorously advocated by developing countries and civil society groups,[126] any reference to human rights could have been excluded from the final text of the Paris Agreement.[127] In other

[122] Paris Agreement, (n 6) Preamble.
[123] Statement of the Special Rapporteur on human rights and the environment (n 121).
[124] Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late? (2018) 7(1)Transnational Environmental Law 17, 26-27 *citing* Phoenix Tso, 'How a Disagreement over Human Rights Language Almost Derailed the Climate Change Treaty' (*Upworthy*, 16 December 2015) <https://www.upworthy.com/how-a-disagreement-over-human-rights-language-almost-derailed-the-climate-change-treaty> accessed 13 June 2020.
[125] Savaresi (n 120) 24.
[126] See, for example, Indigenous Environmental Network, 'US, European and other states push for exclusion of binding Indigenous rights from agreement'(Indigenous Environmental Network, 6 December 2015) <www.ienearth.org/indigenous-activists-protest-the-removal-of-indigenous-rights-from-the-paris-climate-pact-on-the-seine-river/> accessed 13 June 2020.
[127] See, for example, John Vidal and Adam Vaughan, 'Climate talks: anger over removal of human rights reference from final draft' (*The Guardian*, 11 December 2015) <https://www.theguardian.com/global-

words, the fate of human rights in the Paris Agreement could have been worse. Therefore, despite slightness of the reference to human rights in the preambular part of the treaty, the inclusion of an explicit reference to human rights in the final text of the Paris Agreement 'contributes to the development of a political narrative justifying climate action by reference to human rights.'[128] The incorporation of human rights considerations in the Paris Agreement symbolises thus the human rights 'passage' into the realm of climate change and multilateral climate negotiations. It therefore allows climate change relevant issues such as mitigation and adaptation to be framed in human rights terms. In fact, there is a growing trend of rights-based climate claims emerging in judicial bodies worldwide, in which eminently climate change issues of mitigation and adaptation are being articulated with human rights arguments, even if not necessarily refer to the human rights provision in the Paris Agreement. However, while the human rights reference in the Paris Agreement can assist in building avenues to connect human rights and climate change international regimes, to consider individuals and communities' rights in climate action, 'because it specifies no concrete measures, its direct impact on the protection of human rights in climate action will remain very limited'.[129]

As a legal instrument, the Paris Agreement has been considered the minimum level of consensus that States Parties could have achieved after several years of negotiations.[130] As a result, the Paris Agreement leaves open operational and implementation questions. For example, as Clémençon notes, '[the] Paris Agreement is built entirely around voluntary country pledges -as different as the countries they are coming from – which are still far from adding up to achieving the objectives the agreement defines'.[131] The Paris Agreement provides ample level of discretion to States Parties to determine their emissions reduction targets, thereby posing a good deal of scepticism on how the Treaty will accomplish its measurable goal of:

> …strengthen[ing] the global response to the threat of climate change […] including by holding the increase in the global average temperature to well below *2°C* above pre-industrial levels and to pursue efforts to limit the temperature increase to *1.5°C* above

development/2015/dec/11/paris-climate-talks-anger-removal-reference-human-rights-from-final-draft> accessed 13 June 2020.

[128] Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) 6 Climate Law109, 110.

[129] ibid.

[130] See, for example, Julia Dehm, 'Reflections on Paris: Thoughts Towards a Critical Approach to Climates Law', Revue Québécoise de droit international, Hors-Série (2018) 61.

[131] Clémençon (n 38) 4.

> pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.[132]

This is probably the most remarkable achievement of the Paris Agreement, as, after years of negotiations and pressure, in particular from small island states, this specific science-based target made its way into the final text of treaty. In order to achieve this long-term goal, the Paris Agreement establishes its '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…'[133] In order to do so, it further establishes the States Parties' obligation to 'communicate and maintain successive nationally determined contributions [NDCs] that it intends to achieve',[134] whereby [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'.[135] In this way, 'the Paris Agreement specifies the "ultimate objective" of the UNFCCC, reflecting the consensus which had been reached in the intervening two decades'.[136] In the light of the disparity amongst states' positions with respect to the global problem of climate change, reflected in the climate negotiations preceding the adoption of the Paris Agreement, the consensus achieved, even if modest, should not be dismissed, even if the terms of the Agreement can be credibly criticized.

First, from an international legal perspective, the Paris Agreement is a treaty within the definition of the Vienna Convention and, therefore, is legally binding upon its Parties. However, not all of its provisions create a legal obligation. As Clémençon argues:

> What exactly *legally binding* should mean with respect to the Paris Agreement became a particularly controversial issue on which countries ultimately use different interpretations. The Paris Agreement now is legally binding as far as the process staked out goes, but it does not contain legally binding provisions that require countries to take domestic legal action.[137]

[132] Paris Agreement (n 6) Article 2 (a).
[133] ibid, Article 4(1).
[134] ibid, Article 4(2).
[135] ibid, Article 4(3).
[136] Mayer (n 26) 47.
[137] Clémençon (n 36) 8.

As a result, when it comes to specifying the states' concrete obligations to tackle climate change, the balance of the Paris Agreement is equivocal. While, on one hand, it sets, for the first time, a specific global emission reduction objective of 2°C and even, ideally, 1.5°C above pre-industrial level to limit global temperature increase, on the other hand, it lacks legally binding character with respect to states' emission reduction commitments, contributing to that end. There is no provision in the Agreement specifying the actions that should be taken by the States Parties to fulfil the 2°C threshold objective. Rather, it leaves this point entirely to the discretion of states, which, in turn, leaves uncertainty on the feasibility of achieving the concrete 2°C emissions reduction objective.

Secondly, the Paris Agreement provides a timeframe in which the long-term target of '[achieving] a balance between anthropogenic emissions by sources and removals by sink of greenhouse gases' should be achieved in the second half of this century.[138] This is linked to scientists' insights picked up by many states during the Paris negotiations, such as the European Union, which insisted on the need 'to completely decarbonize the world economy by the year 2100.'[139] The inclusion of a time-bound, long-term objective in the Paris Agreement constitutes a notable achievement; however, it does not necessarily entail actual states' actions oriented to achieve this objective through their voluntary pledges submitted in the form of NDCs. As such, the gravity of the concern is not matched by a binding legal obligation.

Another important achievement in the Paris Agreement, connected to the states' obligations to present their NDCs, is the five-years review mechanism. Accordingly, States Parties commit to 'communicate a nationally determined contribution every five years',[140] which shall 'represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition'.[141] Although the implementation of the review mechanism will need further development, its inclusion has been crucial in ensuring a level of adaptability and operability of the Paris Agreement. Thus, the five-year review mechanism, in conjunction with the requirement that each NDC update should not be lower than the previous one, ensures an increase

[138] Paris Agreement (n 6) Article 4 (1).
[139] Clémençon (n 36) 5.
[140] Paris Agreement (n 6) Article 4(9).
[141] ibid, 4 (3).

in States Parties' 'level of ambition over time, something that was sorely missing in the Kyoto Protocol'.[142]

Thirdly, the Paris Agreement lacks a specific provision to measure the financial support given by developed countries to developing countries. Along with mitigation and adaptation efforts, the Paris Agreement includes the objective of 'making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development'.[143] However, the Paris Agreement does not specify the means through which financial support should be made effective, leaving ample room for discretion to developed states to implement their obligations.[144] In fact, financial support is also enshrined in the UNFCCC, [145] whereby developed states on the basis of the common but differentiated responsibilities principle are required to assume historical responsibility by providing financial support to developing states to implement climate action.[146] However, developed and developing countries 'interpreted this entry differently', over the years, leading to a misinterpretation which 'created gaps in the execution and disbursement of funds where it is most needed'.[147] As a result, the sources, methodologies, channels and extent to which developed states are required to fulfil financial commitments remains unclear. Such uncertainty about financial support poses serious risks to global climate action. Developing countries, despite having contributed the least to climate change, are commonly the first, and most severely, affected by its impacts, to varying degrees, and, therefore, depend on financial support to implement adaptation and mitigation measures. Therefore, the objective of climate finance for mitigation and adaptation remains unresolved under the Paris Agreement.

Fourthly, the Paris Agreement represents a loss for states most affected by climate change - frequently the poorest economies - and a win for industrialized states, led by the United States,

[142] Savaresi (n 120) 7.
[143] Paris Agreement (n 6) Article 2(c).
[144] See, for example, a study on how (questionable) different sources and methodologies can be used by developed countries to claim fulfilment of commitments on financial aid. Michael Westphal, Pascal Canfin, Athena Ballesteros and Jennifer Morgan, 'Getting to $100 Billion: Climate Finance Scenarios and Projections to 2020' (*World Resources Institute*, June 2015) <https://www.wri.org/publication/getting-100-billion-climate-finance-scenarios-and-projections-2020> accessed 1 June 2020.
[145] UNFCCC (n 13) Article 4(3).
[146] Wen Zhang and Xun Pan 'Study on the demand of climate finance for developing countries based on submitted INDC' (2016) 7(1-2) Advance in Climate Change Research 99.
[147] M. Motty, Emmanuel Ackom, 'Climate Finance: Unlocking Funds Toward Achievement of Climate Targets under the Paris Agreement' in Walter Leal Filho, Anabela Azul, Luciana Brandli, Pinar Ozuyar, Tony Wall (eds), *Climate Action. Encyclopaedia of the UN Sustainable Development Goals* (Springer, Cham. 2019) 1.

which throughout the negotiations of the treaty categorically opposed any recognition of a right to compensation for loss and damage for climate change impacts, due to historic emissions. Although the quarrelsome issue of loss and damage is acknowledged in the Paris Agreement, it does not provide any guideline on how to implement this provision. Article 8 states that 'Parties *recognise* the importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage'.[148] Yet, beyond recognising the issue of loss and damage, the Paris Agreement left 'a great deal of ambiguity in the agreement on how this complex issue will be addressed'.[149] Thus, amongst developing states, it remained the expectation that the issue of loss and damage be revisited in the future, particularly to assist climate action in the most vulnerable states, including by, for example, 'providing concrete technical and financial advice'.[150]

Finally, and crucially, the Paris Agreement does not refer to core themes directly linked to its main goal of holding the increase of global temperatures below 2°C-1.5°C above pre-industrial levels. In particular, the Paris Agreement does not address the need to change the current engine of the global economy based on the production, extraction, and commercialisation of fossil fuels, which is at the core of the problem of climate change.

In this vein, the Paris Agreement focuses on the role of States in global climate action but does not address the environmentally harmful role that corporations play in climate change, particularly in certain industrial sectors, as , including private and state-owned corporations from both developed and developing countries.[151] Rather, the Paris Agreement focuses in the position of the state to achieve its goals; and only recognises and encourages the role of corporations, along with a range

[148] Paris Agreement (n 6) Article 8(1).
[149] Savaresi (n 120) 9.
[150] Rebecca Byrnes and Swenja Surminski, 'Addressing the impacts of climate change through an effective Warsaw International Mechanism on Loss and Damage' (*Grantham Research Institute on Climate Change and the Environment*, October 2019) at 1 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/10/GRI_Addressing-the-impacts-of-climate-change-through-an-effective-Warsaw-International-Mechanism-on-Loss-and-Damage-1.pdf> accessed 13 June 2020. Note that, after Paris, still there has not really been progress on the issue of loss and damage. See for example, on UNFCCC COP25 in Santiago-Madrid, Jocelyn Timperley, 'COP25: What was achieved and where to next?' (*Climate Home News*, 16 December 2019) <https://www.climatechangenews.com/2019/12/16/cop25-achieved-next/> accessed 13 June 2020.
[151] Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2014) 122 Climatic Change 229.

of other non-state actors, in contributing to state-led climate action. Indeed, as Streck notes, '[i]nternational climate negotiations remain state-centric'.[152] Yet, corporations have played an active role throughout climate negotiations, and have exerted strong influence on the positions of (some) states, impacting, thereby, the outcome and pace of global climate action. For example, Saudi Arabia, along with other oil producing states, and in close cooperation with large industries in the fossil fuels sector, has had a consistent obstructionist approach in climate multilateral debates. For instance, as Depledge points out, for Saudi Arabia, '"no" is the preferred outcome [which] can have a disproportionately high impact on the negotiations, not only by formally blocking agreements, but on a day-to-day basis by slowing down progress or souring the atmosphere'.[153] A similar approach is also reflected in the influential role that the largest oil and gas corporations, such as, amongst others, Chevron, BP and Exxon Mobil, have in shaping international and domestic climate policy through national governments' positions in climate negotiations.[154]

It is, thus, not surprising that, instead of taking a restrictive approach towards corporate activity which seriously compromises climate action (notably on mitigation), the Paris Agreement takes a general and undifferentiated approach to all non-state actors. Indeed, non-state actors are explicitly recognised in the climate regime. The UNFCCC, for example, encourages that, in order 'to promote the effective implementation of the Convention', the Conference of States Parties *shall* '[seek] and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organisations and intergovernmental and *non-governmental bodies*'.[155] Likewise, the Paris Agreement not only recognises the role of non-state actors in

[152] Charlotte Streck, 'Filling in for Governments? The Role of the Private Actors in the International Climate Regime' (2020) 17 Journal for European Environmental & Planning Law 5, 10.
[153] Joanna Depledge, 'Striving for No: Saudi Arabia in the Climate Change Regime' (2008) 8(4) Global Environmental Politics 9, 9. Also, in a similar vein, see on the influential role that corporations play in the international energy and trade regimes, Naná De Graaff, 'A Global Energy Network? The Expansion and Integration of Non-Triad National Oil Companies,' 11(2) Global Networks (2011)262; and David Levy and Ans Kolk, 'Strategic Responses to Global Climate Change: Conflicting Pressures on Multinationals in the Oil Industry', 4(3) Business and Politics (2002) 275.
[154] It has been reported that '[the] largest five stock market listed oil and gas companies spend nearly $200m (£153m) a year lobbying to delay, control or block policies to tackle climate change'. Sandra Laville, 'Top oil firms spending millions lobbying to block climate change policies, says report' (*The Guardian*, 22 March 2019) <https://www.theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climate-change-policies-says-report> accessed 20 June 2020. See, also, on 'how the oil majors have spent $1Bn since Paris on narrative capture and lobbying on climate': Influence Map Report, 'Big Oil's Real Agenda on Climate Change ' (Influence Map Report, March 2019) <https://influencemap.org/report/How-Big-Oil-Continues-to-Oppose-the-Paris-Agreement-38212275958aa21196dae3b76220bddc> accessed 13 June 2020.
[155] UNFCCC (n 11) Article 7(l). See also, for example, Article 7(6).

climate action but also promotes engagement with non-state actors. In its preamble, the Paris Agreement '[recognizes] the importance of the engagements of *all levels of government and various actors*, in accordance with respective national legislations of Parties, in addressing climate change'.[156] Moreover, Article 6 of the Agreement recognises States Parties' role in pursuing voluntary cooperation in the implementation of their nationally determined contributions, for which it provides that they shall '[enhance] public and *private sector* participation in the implementation of nationally determined contributions'.[157]

Therefore, the Paris Agreement - and the climate regime in general, fails not only to address the root of the problem of climate change by treating in an undifferentiated fashion the role of corporations in climate action, like other non-state actors, without considering the crucial role they play in the outcome of global mitigation efforts and, indeed, in the climate crisis. Similarly, the absence of references to the need to pursue and promote a global transit to the use of alternate sources of renewable energy aimed at phasing out the fossil fuel age prevents to provide the sense of urgency and necessary economic transitions that the whole problem of climate change entails.

The Paris Agreement reflects the fluctuation that the international climate regime has with respect to the legal character and enforcement capacity of its normative frameworks. Climate change requires ambitious commitments with (mainly) high economic costs underneath that states are willing to undertake at a varying degree and, therefore, challenges its potential universality. Therefore, the legal binding character in the international climate change regime plays a crucial role in its effectiveness. As Bodansky, Brunnéé and Rajamani explain:

> For the regime to be effective, it must attract wide, if not universal participation, it must provide for deep cuts in global emissions, and it must be complied with. However, securing universal participation as well as deep cuts has proven difficult because of concerns about reciprocity, economic harm, and fairness or equity in burden sharing.[158]

[156] Paris Agreement (n 6) Preamble.
[157] ibid, Article 6(8) b.
[158] Bodansky, Brunnée and Rajamani (n 50) 17.

On trying to secure both universality and, at the same time, 'deep cuts' from states, the Paris Agreement, 'combines a bottom-up approach to promote flexibility and participation with a top-down system of international rules that to promote ambitions and accountability'.[159] Thus, while ensuring wide participation, through (bottom-up) self-determined NDCs[160], these contributions *shall* be progressive every five-years (top-down).[161] Accordingly, only the latter obligation, ensuring increasing emission reduction targets legally binds states; while the extent of these targets remains at entire discretion of states. Therefore, the enforceability capacity of the Paris Agreement is limited. Article 15 of the Paris Agreement[162] provides a mechanism to facilitate implementation of and promote compliance; however, it does not provide effective means to ensure compliance. It only provides 'minimal guidance on the nature of the compliance mechanism'.[163] Even if developed and implemented, its capacity of enforceability is weak. Among others, it provides that the committee in charge of the mechanism 'shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties'.[164] Thereby, instead of contributing to ensure compliance, the mechanism seems to provide means to justify the lack of it, which makes its enforcement capacity weak. This may partly explain the limited effectiveness of the climate regime to address the urgent need of ambitious climate action oriented to dramatically dropping global emissions. According to the UNEP Emissions Gap Report, '[although] the recent announcements of net zero emissions goals are very encouraging, they highlight the vast discrepancy between the ambitiousness of these goals and the inadequate level of ambition in the NDCs for 2030'.[165]

[159] ibid, 25 *citing* Daniel Bodansky, 'The Paris Climate Agreement: A New Hope? (2016) 11(2) American Journal of International Law 288.
[160] Paris Agreement (n 6) Article 4(2).
[161] ibid, Article 14.
[162] Paris Agreement (n 6) Article 5(1).
[163] Lamanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 62(2) International and Comparative Law Quarterly 493, 498.
[164] Paris Afreement (n 6) Article 5(1).
[165] UNEP, Emissions Gap Report 2020 – Executive Summary (UNEP 2020) at VII.

Overall, the Paris Agreement leaves many issues unresolved. The impact of the Paris Agreement in addressing the effects of climate change remain to be seen in future years. However, for the time being, states commitments to reduce their emissions levels are still inconsistent with the 2°C minimum target set by the Paris Agreement. According to the UNEP Emissions Gap Report, 'the world is still heading for a temperature rise in excess of 3°C this century – far beyond the Paris Agreement goals of limiting global warming to well below 2°C and pursuing 1.5°C.[166] Yet, as a final outcome of years of negotiations and serious drawbacks, the Paris Agreement has an historic relevance as a steppingstone in global efforts to tackle climate change, and as an 'official' recognition of human rights in the field of international climate change law.

3. The Road beyond Paris: Building Bridges between Human Rights and Nature?

Human rights were almost excluded from the climate 'party' in Paris. As such, their inclusion in the preamble of the Paris Agreement, depending on perspectives, can be considered a small success for the development of the relationship between international human rights and the international climate regime. As the Special Rapporteur on Human Rights and the Environment pointed out, shortly after the adoption of the Paris Agreement:

> This is a real achievement and, in this respect as in many others, the Paris Agreement is worth celebrating. In another sense, however, Paris is only the beginning. Now comes the difficult work of implementing and strengthening the: commitments made there. In that effort, human rights norms will continue to be of fundamental importance.[167]

Imagination is needed in finding avenues through which human rights can make the most of their 'passage' into climate action. At the same time, however, it is worth considering pragmatically the potential contribution of human rights in achieving the central issue of climate change, namely

[166] ibid.

[167] UN Human Rights Council, '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, 1 February 2016, para. 22.

reducing global emissions to hold global temperature below 1.5°C, the 'ideal' target established in the Paris Agreement and recommended by the IPCC.[168]

Even if human rights had been included in the operative part of the Paris Agreement, their potential contribution to dramatically drop global emissions remain very limited. As Humphreys puts it: 'Human rights law has apparently little or nothing to say about the key problem facing climate change action: how are we going to bring carbon emissions down, dramatically and urgently, at a rate that will take us off the 4°path?'[169] In a neoliberal global economy that puts capitalist unlimited growth objective as a first priority to the detriment of ecosystems and the rights of individuals and communities worldwide, incorporating thereby historic forms of colonialism, it is necessary to accept that 'human rights are an important but limited means of addressing the injustices caused by anthropogenic global warming.'[170] It could be said that even more concerning than the limitations of human rights in addressing climate justice issues or in contributing to curbing global carbon emissions is their flexibility and thus manipulability within this context of climate action, to the extent that rights can be used to enact 'new forms of global authority over parts of the Global South.'[171]

Nevertheless, despite their neoliberal ethos, human rights and 'contemporary manifestation as trade related, market friendly human rights favourable to corporations, they remain a powerful language of ethics and resistance, and thus a means of addressing climatic harm and injustices'.[172] Their transnational character, indeed, both as a legal framework and as a shared language or rhetoric makes them, to varying degrees, apt to build bridges between initially unrelated areas. In the context of climate change, for instance, the Paris Agreement puts together two apparently unrelated and even, somewhat antagonistic elements. In addition to, and just below, the sole human rights provision in the Paris Agreement, the preamble also notes: 'the importance of ensuring the integrity of *all ecosystems, including oceans, and the protection of biodiversity*, recognized by

[168] IPCC, 'Global Warming of 1.5°C Report: Summary for Policymakers' (IPCC, 2018).
[169] Stephen Humphreys, 'Climate change poses an existential threat to human rights', (Open Democracy, 16 July 2015) <https://www.opendemocracy.net/en/openglobalrights-openpage/climate-change-highlights-fragility-of-human-rights-norms/> accessed 12 June 2020.
[170] Adelman (n 124) 17,18.
[171] Dehm (n 7)131.
[172] Adelman (n 124) 19 *citing* Upendra Baxi, 'The Future of Human Rights' (Oxford University Press 2006).

some cultures as *Mother Earth*, and noting the importance for some of the concept of "climate justice", when taking action to address climate change'.[173]

Just as in the case of human rights, the Paris Agreement recognises the importance of *ecosystems* and *biodiversity* as well as their special meaning for some cultures, which regard these as 'Mother Earth'. In this way, the Paris Agreement makes a 'concession', among others, to indigenous peoples' claims to include a provision recognising the importance of nature. In this recognition, the Paris Agreement does implicitly *other* 'some' cultures by suggesting that the importance of nature or Mother Earth is linked to the value conveyed to it by a given culture. Yet, the recognition of the importance of Mother Earth in the preamble of the Paris Agreement, similarly to its modest reference to human rights, could entail a very early step towards a broader recognition of the intrinsic value of nature, beyond its instrumental worth to satisfy human needs. As Adelman argues on the clauses pertaining to human rights and to nature:

> The first clause calls for an anthropocentric approach that respects and promotes human rights, whereas the second holds out the promise of an ecocentric approach. It alludes to the rights of Mother Earth which, along with climate justice, are recognized to be important albeit – as the preamble somewhat patronizingly puts it – only for 'some'. These perspectives are not intrinsically incompatible, but their juxtaposition does not promote a coherent conception of rights.[174]

The Paris Agreement does connect two different approaches in international law. On one side, it recognises anthropocentric human rights and, at the same time, on the other hand, it implicitly recognises the ecocentric approach to nature, although it makes this approach exclusive to 'some cultures' only. Interestingly, despite both approaches reflecting apparently opposite views with respect to the natural world, they share, at the same time, a peripheral role and place within the Paris Agreement. In this sense, the Paris Agreement may provide an initial point of encounter upon which to build avenues in a way to include considerations of nature in the human rights regime. This is significant as the unique and urgent nature of climate change requires imaginative

[173] Paris Agreement (n 6) Preamble.
[174] Adelman (n 124) 23-24.

approaches to international legal regimes, whose boundaries, sooner or later, and to a varying degree, may need to relax in light of climate change.

4. Conclusion

This chapter has tracked the main legal and policy developments that emerged in multilateral climate governance under the auspices of the UNFCCC (Conference of States Parties, agreements, and negotiations) to show how the incursion of human rights considerations in the international climate change law regime has developed. By doing so, it attempted to identify what the main concerns have been in the making of the international climate legal regime leading to the adoption of the Paris Agreement, and what the politics behind it have been - all of which is important to understand the extent of the problem of climate change, the political will to fix it, and the emergence and ultimate acceptance of human rights therein. Being one of the international legal regimes that most sharply reflect the North-South differences, notably with respect to states' contributions to and impacts from climate change, the international law on climate change legitimises new forms of colonialism in the era of climate change. Contentious climate negotiations reflect the dynamics of power and wealth behind the making of international law on climate change. Thereby, *mutatis mutandis*, states most severely hit by climate impacts, such as, for example, small island developing states, often advocate for ambitious emissions reduction targets (e.g., small island states), whereas largest emitters states often avoid ambitious commitments and rather prefer keeping as much as possible 'business as usual'. This chapter has attempted to show how the outcome of multilateral climate negotiations reflect neo-colonial forms of dominance, which have resulted, at least to some extent, in the adoption of international climate instruments, considered 'false solutions'[175] of the climate problem, such as the carbon trading mechanisms established under the Kyoto Protocol. In this context, the appearance of human rights in the scene of multilateral climate governance provides an initial point of convergence between both legal regimes, and an avenue to integrate the human dimension of climate change in global climate action.

[175] Dehm (n 7) 131.

In this way this chapter sought to identify the relevant international legal frameworks and contextualise the legal and political scenario in which human rights made their entrance into the climate change realm, with the aim of paving the way to understand the increasingly widely recognised relationship between human rights and climate change, to be explored in the next chapter.

CHAPTER 2:

The Relationship between Human Rights and Climate Change

I. Introduction

The adoption of the Paris Agreement by the 21st Conference of States Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in 2015, and its entry into force in 2016, constitutes an important milestone for the international community in facing the challenges posed by climate change. The explicit recognition of human rights in the Paris Agreement as part of the considerations to be considered by States Parties in all their actions aimed at addressing climate change symbolises a breakthrough for the presence of human rights in the climate change arena. Climate change was, not so long ago, mainly regarded as eminently scientific and technical. Yet, the unique and complex nature of climate change poses serious challenges at all levels of society and requires responses from multiple fields, including international human rights law. It could be said then that the adoption of the Paris Agreement represents the point of entrance of human rights into the field of climate change. This chapter steps back from the euphoric assessments of the arrival of human rights into the field of multilateral climate change action to critically assess its role in the field of climate change. To that end, it is important to identify what the linkages between human rights and climate change are as well as the benefits of applying a human rights approach in climate action.

Indeed, the human rights affected by climate change constitute the core of the relationship between human rights and climate change. Therefore, this chapter seeks to interrogate the relationship between human rights and climate change to understand how climate change, and the measures implemented to address it, can adversely affect human rights in section 1 and 2. By doing so, this chapter also seeks to identify what are the states' human rights obligations stemming from the relationship between human rights and climate change. This understanding is a necessary precursor to grasping both the limitations of human rights in the context of climate change and its potential as catalyst of developments in the field of international human rights law. The benefits of a human rights approach are explored in section 3.

2. The Origins of the Human Rights and Climate Change Nexus

With the relationship between human rights and climate change having been recognised at treaty level, it is relevant to identify how human rights law connects with the environment, for example, through international environmental law, which, as Anderson notes, in the last quarter of the last century 'reached a kind of maturity and omnipresence'.[1] However, he states, '[like] human rights, environmental law houses a hidden imperial ambition',[2] which is materialised in the international legal normative order that puts humans at the centre of legal protection and treats non-human species and the natural world in general 'as instrumental means to a distinctly human end'.[3] It is widely acknowledged that the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment,[4] 'adopted by the first UN conference on the environment,'[5] was 'the first marker that signalled the need for the environmental world and the human rights world to come together.'[6] Principle 1 of the Declaration states:

> 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. In this respect, policies promoting, or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.[7]

This early connection between the human rights and environmental fields was subsequently furthered by the 1992 Rio Declaration on Environment and Development,[8] which builds upon the Stockholm Declaration. It provides that 'human beings are at the centre of concerns for sustainable

[1] Michael Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), '*Human Rights Approaches to Environmental Protection'* (Clarendon Press 1996) at 1.
[2] ibid.
[3] ibid, 14.
[4] Declaration of the UN Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1, 5-16 June 1972.
[5] John Knox and Ramin Pejan (eds), 'Introduction' in *The Human Right to a Healthy Environment* (Cambridge University Press 2018) at 2.
[6] Motoko Aizawa, 'Staying human-centric at the intersection of climate change and human rights' (2016) 34(1) Journal of Energy & Natural Resources Law 86, 88.
[7] Declaration of the UN Conference on the Human Environment (n 4) Principle 1.
[8] Rio Declaration on Environment and Development adopted by the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 3-14 June 1992.

development'.[9] Together, the Stockholm Declaration and the Rio Declaration, show the instinctive anthropocentrism of international law. Both environmental provisions clearly 'postulate a corresponding instrumentalist approach to the environment.'[10] Whilst '[avoiding] using a "rights" language', [11] the Rio Declaration further provides that '[human beings] … are entitled to a healthy and productive life in harmony with nature.'[12] In this sense, the Rio Declaration recognises somehow the linkage between humans and nature, however, it leaves the word 'productive' open to wide interpretations, which could be seen as contraposing with the ending statement of 'harmony with nature.'

Despite these developments in relation to the environment, it was not until the early years of the twenty-first century that the linkages between human rights and climate change really started to arise. As Humphreys notes, 'the complexity of climate change was noticed in the field of human rights earlier than in many other bodies of law because of the extraordinary human cost of climate change - and specifically because, by the early years of this century, those costs were beginning to be felt'.[13] Indeed, in 2005 the Inter-American Commission on Human Rights received the first climate case, the so-called 'Inuit case',[14] in which the Inuit, an indigenous community living in the Arctic, brought to public attention the adverse impacts that global warming was having upon their human rights and immediate environment. Later, the adoption of the Male' Declaration on the Human Dimension of Global Climate Change by representatives of small island developing states constituted a landmark step at multinational level in the recognition of the relationship between human rights and climate change. It held that:

> …climate change has clear and immediate implications for the full enjoyment of human rights including inter alia the right to life, the right to take part in cultural life,

[9] ibid, Principle 1.
[10] Günther Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration of Environment and Development, 1992' (*United Nations Audio-visual Library of International Law*, 2012) at 3<https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf> accessed 13 June 2020.
[11] Knox and Pejan (n 5) 2.
[12] Rio Declaration on Environment and Development, (n 8) Principle 1.
[13] Stephen Humphreys, 'Climate change: too complex for a special regime' (2016) 34(1) Journal of Energy & Natural Resources Law 51, 53.
[14] 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 [*Inuit* case], 7 December 2005. See chapter 4 for analysis on this case.

> the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.[15]

In this way, small island developing states brought, for the first time, attention to the fact that climate change has a *human* dimension and requested to the UN Office of the High Commissioner on Human Rights 'to conduct a detailed study into the effects of climate change on the full enjoyment of human rights'.[16] This led to the adoption of the first resolution on human rights and climate change by the UN Human Rights Council in 2008, providing that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[17] Subsequently, the UN Human Rights Council appointed in 2012 an Independent Expert to conduct a study on 'the human rights obligations related to the enjoyment of a safe, clean healthy and sustainable environment',[18] whose mandate was extended in 2015 and renamed as Special Rapporteur on Human Rights and the Environment; leading to several studies on the issue of human rights and the environment.[19]

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[15] Malé Declaration on the Human Dimension of Climate Change, 14 November 2007, Preamble, para 4.
[16] Human Rights Council, Resolution 7/23 'Human Rights and Climate Change', 28 March 2008.
[17] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights', U.N. Doc. A/HRC/ 10/61, 15 January 2009.
[18] Human Rights Council, Resolution 19/10, 20 March 2012.
[19] See, for example, John Knox [subsequently reappointed as Special Rapporteur on Human Rights and the Environment], Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report, UN Doc. A/HRC/25/53, 30 December 2013; Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Compilation of Good Practices, UN Doc. A/HRC/28/61, 3 February 2015; Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Implementation Report, UN Doc. A/HRC/31/53, 28 December 2015; Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report, UN Doc. A/HRC/31/52, 1 February 2016; Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, on the human rights obligations relating to the conservation and sustainable use of biological diversity, UN Doc. A/HRC/34/49, 19 January 2017; Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, on the relationship between children's rights and environmental protection , A/HRC/37/58, 24 January 2018; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, on the framework principles on human rights and the environment, A/HRC/37/59, 24 January 2018; among others. See also, for example, the Reports of David Boyd [subsequently appointed as Special Rapporteur on human rights and the environment since 2018 until present], Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, recommending to recognise the human right to a safe, clean, healthy and sustainable environment, A/73/188, 19 July 2018; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: 'Safe climate report', A/74/161 , 15 July 2019; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, on good practices, A/HRC/43/53, 30 December 2019; among others.

In parallel, the Inuit case was followed by several cases which, by now, more than a decade after, have become a growing climate litigation trend with dozens of cases brought to courts worldwide. Those cases relate climate change impacts to human rights' violations or threats suffered by individuals and communities worldwide. Likewise, in the contemporary era, many states have incorporated the right to a healthy environment in their constitutions or other national legislation. Today, 'at least 155 nations have recognised the right to a healthy environment in legally binding instruments, at the national and/or the international level'.[20]

All these developments, along with the human rights reference in the Paris Agreement,[21] demonstrate, in different terms and to varying degrees, the relationship between human rights and climate change, which is increasingly evidenced by climate-related events affecting the rights of individuals and communities worldwide. Indeed, climate change adversely affects a range of human rights, including the right to life, the right to health, the right to adequate housing, the right to food, the right to water, the rights of indigenous peoples and even the right of self-determination, among other rights. The latter right, for example, is particularly under threat in the small islands states in the Pacific Ocean, where sea level rise is putting at risk the right to self-determination of entire nations. Human rights are not only put at risk as a result of climate-related events, but they can also be adversely affected by climate change mitigation and adaptation measures. For instance, carbon offset mechanisms, implemented under the Kyoto Protocol, have raised criticism not only for authorising carbon colonialism,[22] but also because they can put at risk human rights, particularly in the Global South,[23]

[20] David Boyd, 'Catalyst for Climate Change: 'Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) at 18.
[21] See Paris Agreement, UNFCCC Decision, 1/CP. 21 'Adoption of the Paris Agreement', FCCC/CP/2015/10/Add.1 adopted 12 December 2015 (entered into force 4 November 2016), Preamble.
[22] See, for example, Julia Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33 Windsor Yearbook of Access to Justice 129.
[23] For example, climate policies such as the Reducing Emissions from Deforestation and Forest Degradation (REDD+) framework, have been claimed that, far from tackling deforestation and forest degradation, have put at risk the human rights from indigenous peoples. On the impacts of the REDD+ scheme under the Kyoto Protocol in the Third World, see, for example, Naomi Johnstone, 'Indonesia in the 'REDD': Climate Change, Indigenous Peoples and Global Legal Pluralism' (2010) 12(1) Asian-Pacific Law & Policy Journal 93. See also, Randall Abate and Elizabeth Ann Kronk (eds), 'Commonality among unique indigenous communities: an introduction to climate change and its impacts on indigenous peoples' (2013) 26(2) Tulane Environmental Law Journal 179.

Overall, there is a level of consensus that human rights and climate change are interrelated. Whilst the effects of climate change upon human rights can seem rather obvious, it is important to highlight that the rights adversely affected by climate change are at the core of the relationship between human rights and climate change. Actual and projected climate impacts to human rights, such as the right to life, right to health, right to an adequate standard of living, and collective rights, such as the rights of indigenous peoples, right to self-determination, among other rights are what initially garnered attention to the relationship between human rights and climate change – a relationship that only a decade ago was still widely unnoticed and that was a matter of concern only for those who started to first feel the impacts of climate change on their lives and surrounding environment. Peoples living in the Artic or on small islands were the first to flag the potentially catastrophic effects of a changing climate to the world and, as a result, the first to deal with the scepticism and disregard around the relationship between climate change and human rights. In this respect, the (second appointed) Special Rapporteur on Human Rights and Environment stated, at the start of his Mandate in 2018:

> In the past decade, the relationship between human rights and climate change has received increasing attention from the UN Human Rights Council, special procedures, Governments, and international bodies, including the Conference of the Parties to the UNFCCC. An important milestone was the Malé Declaration on the Human Dimension of Global Climate Change, adopted by representatives of Small Island Developing States in 2007. The Male' Declaration was the first intergovernmental statement explicitly recognizing that climate change has "clear and immediate implications for the full enjoyment of human rights", including the right to life.[24]

Certainly, the early signals given to the international community on the adverse impacts of climate change upon human rights in the most vulnerable areas to its effects were what initially raised awareness of the human dimension of the problem. The initial signals like the Male' Declaration, gave traction to subsequent legal, policy and literature developments on the subject of human rights and climate change. Human rights thus emerged as a legal and rhetoric 'tool' to articulate how the early signals of climate change put at risk the ability to

[24] UN Special Rapporteur on Human Rights and Environment, 'Mandate of the Special Rapporteur on human rights and the environment: Statement on the human rights obligations related to climate change, with a particular focus on the right to life', 25 October 2018, para. 7.

enjoy several human rights which, back then, over a decade ago, and even now, were less than obvious and were particularly hard to evidence, for example, in the context of technical climate litigation.

3. Connecting Human Rights and Climate Change

Climate change adversely affects several human rights both directly and indirectly. The increasing frequency and intensity of climate events as well as the gradual change of natural landscapes increasingly evidence the short and long-term impacts of climate change upon the ability of individuals and communities to enjoy human rights worldwide. In this context of a climate changing world, states are obliged by international human rights law to protect human rights of people, not only from actual rights' harms resulting from climate events, but also in relation to the climate measures put in place to address the problem. The Paris Agreement makes that connection by requiring states to consider human rights considerations in the climate measures they take to address climate change. In order to identify how human rights are impacted by climate change and to see how those rights are developing in response to this challenge, I zoom in on some of the various rights that are manifestly impacted. This facilitates an understanding of the linkages between human rights and climate change and resulting states' obligations within that relationship.

In particular, it is important to bear in mind the premise that states, as duty bearers, have the obligation to preserve the rights of all human beings, the rights holders. Therefore, in the context of climate change, states are obliged to take positive actions to avoid climate impacts upon human rights. That means that states, under international human rights law are obliged to prevent climate impacts by undertaking climate mitigation measures oriented to reduce global emissions. Likewise, states, in the context of climate emergency, are obliged to take positive steps aimed at ensuring that rights holders can adapt to the inexorable impacts of climate change.

3.1 The Right to a Life Lived with Dignity

The impacts of climate change upon the so called 'supreme right'[25] to life are indisputable. Climate events like hurricane Maria in Puerto Rico, typhoon Haiyan in the Philippines, storm Sandy in the United States, wildfires in the United States and Australia, or heat waves across Europe remind us how devastating climate impacts can be in terms of human deaths. General Comment 36 provides that '[the] right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation'.[26] As such, in the context of climate crisis, it could go without saying that the right to life cannot be derogated from.

Besides, climate change also impinges on the right to life as a result of protracted climate events affecting other rights as well, particularly as a result of the effects on those already vulnerable to climate impacts. The report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, found that 'States have heightened duties with respect to members of certain groups that may be particularly vulnerable to environmental harm, including women, children and indigenous peoples'.[27] The Office of the UN High Commissioner for Human Rights (OHCHR), acknowledging the Intergovernmental Panel on Climate Change (IPCC) findings, held that climate change will affect the right to life in various ways:

> A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. IPCC … projects with high confidence an increase in people suffering from death, disease and injury from heat waves, floods, storms, fires, and droughts. Equally, climate change will affect the right to life through an increase in hunger and malnutrition and related disorders impacting on child growth and development; cardio-respiratory morbidity and mortality related to ground-level ozone. Climate change will exacerbate weather-related disasters which already have

[25] UN Human Rights Committee, General Comment 6, Right to Life, UN Doc. A/37/40, 30 April 1982, para. 2.
[26] UN Human Rights Committee, General Comment 36, Right to Life, CCPR/C/GC/36 (replacing General Comment 6), 3 September 2019, para. 2.
[27] UN Human Right Council, 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, 1 February 2016, para.81.

> devastating effects on people and their enjoyment of the rights to life, particularly in the developing world.[28]

This reflects the indiscriminate character of climate change and its intrinsic paradox; that is, whilst climate change is a global problem with global impacts, it disproportionally hits first and the most those who have contributed the least to the problem, whilst the largest contributors to climate change, like corporations, continue to benefit from a benign international normative framework that allows them to continue their activities in a 'business as usual' way.

The right to life is widely protected in international human rights law. Article 3 of the Universal Declaration of Human Rights establishes that '[everyone] has the right to life, liberty and security of person'.[29] Similarly, Article 6 of the International Covenant on Civil and Political Rights established that 'every human being has the inherent right to life'.[30] Indeed, as General Comment 6 of the UN Human Rights Committee observes, the right to life is 'a right which should not be interpreted narrowly'.[31] According to the Committee, 'the right to life has been too often narrowly interpreted'.[32] The Committee also found, that the 'expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures'.[33] Therefore, as General Comment 36 highlights, [states] parties are … under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State'.[34] In the context of climate change, the positive obligation to protect the right to life is especially relevant since potential climate impacts upon the right to life can be reduced by taking preventive measures. As Koivurova, Duyck and Heinämäki observe '[there] appears to be a general understanding that the right to life itself requires a precautionary approach by governments, which means that government

[28] UN Human Rights Council, Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 January 2009, paras. 22-23.
[29] Universal Declaration of Human Rights, UN Doc. A/810, 10 December 1948, Article 3
[30] International Covenant on Civil and Political Rights, 16 December 1996 (in force 23 March 1976), Article 6.
[31] General Comment 6, Right to Life, (n 25) para. 1.
[32] ibid, para. 5.
[33] ibid.
[34] General Comment 36, Right to Life (n 26) para. 21.

officials must prevent harms or threats to human life in cases where they may be foreseen'.[35] This is particularly relevant in a climate crisis context whereby climate impacts can significantly be reduced by taking preventive (adaptation) measures to protect the right to life, also in connection with other rights.

The Human Rights Committee, in General Comment no. 36, has fleshed out how the right to life applies in the context of climate change. The Committee recognises climate change as a threat to the right to life. It recognises that climate change threatens the right to life of present and future generations, and it also treats climate change on a continuum with environmental degradation and unsustainable development: 'Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.[36] The Committee also refers to the interdependence of rights, by extending the applicability of the general comment beyond the right to life to a life lived with dignity and, importantly, the Committee emphasises that states have a duty to take measures to protect the right: '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'.[37]

The Committee proposes a range of measures that must be taken by the state in its protection of the right to life and a life lived with dignity. This includes measures to protect the environment and to deal with more immediate threats:

> States parties should…ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and

[35] Timo Kuivurova, Sébastien Duyck, and Leena Heinämäki, 'Climate Change and Human Rights' in Erkki J. Hollo, Kati Kulovesi, Michael Mehling (eds) *Climate Change and the Law* 21 Ius Gentium: Comparative Perspectives on Law and Justice (Springer 2013) at 292.
[36] General Comment 36, Right to Life (n 26) para. 62.
[37] ibid.

cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[38]

In this way, the Committee reflects the indivisibility and interdependence of international human rights law, the right to life and international environmental law and measures. Certainly, the right to life is intrinsically connected with other rights, whose impingement in the context of climate change can also affect the right to life, such as the right to health, water, or food. Therefore, states are obliged to take preventive measures to protect the right to life along with other rights, being one of them the right to health.

Health 'is a fundamental human right indispensable for the exercise of other human rights'.[39] Article 25(1) of the Universal Declaration establishes that '[everyone] has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'.[40] Similarly, the International Covenant on Economic, Social and Cultural Rights recognises 'the right to the highest attainable standard of physical and mental health'.[41] General Comment 14 of the UN Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health provides an inclusive interpretation of the right to health,[42] and points out that it 'is not to be understood as a right to be healthy'.[43] In addition to recognising health as a fundamental right indispensable for the exercise of other rights, the Committee on Economic, Social and Cultural Rights, in its General Comment 14, also emphasises the significance of health for a life lived with dignity: 'Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity'.[44] In this way, the right to health can also be connected with

[38] ibid.
[39] CESCR General Comment No. 14 (Art.12): The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, (adopted at the 22nd Session of the Committee on Economic, Social and Cultural Rights), 11 August 2000, para 1.
[40] Universal Declaration of Human Rights (n 29) Article 25(1).
[41] International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966 (in force 3 January 1976) Article 12(1). See also other international instruments that recognise the right to health: American Declaration of the Rights and Duties of Man, OEA/Ser. L.V/II.82 doc.6 rev.1, Article XI; and the European Social Charter, 18 October 1961, (revised in May 1996, entered in force in 1999) Article 11.
[42] This means 'extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and *environmental* conditions, and access to health-related education and information, including on sexual and reproductive health'. CESCR General Comment No. 14 (n 39) para 11.
[43] ibid, para. 8.
[44] ibid, para. 1.

other rights particularly affected by the impacts of climate change and closely connected to the right to health, such as the right to food or water.

The right to health is particularly sensitive to the impacts of climate change. Temperature rise, heat waves, floods, storms, wildfires, among other climate-related events, put at serious risk the health and wellbeing of people worldwide. Climate change can cause or exacerbate the effects of tropical and waterborne diseases, either through direct impact upon health or, indirectly, through its impact on closely related rights, such as the right to water or food. The IPCC 1.5°C Report projects with 'high confidence [that any] increase in global warming is projected to affect human health, with primarily negative consequences.[45] Similarly, the IPCC Fourth Assessment Report projects that 'the urban poor, the elderly and children, traditional societies, subsistence farmers, and coastal populations' are likely to feel the most the climate impacts to the right to health.[46] Certainly, the adverse impacts of climate change upon the right to health are projected to hit low-income countries and the most vulnerable in societies most severely.

With respect to the states' duties to respect, protect and fulfil rights, General Comment 14 also provides a comprehensive interpretation of these obligations. It states that:

> [The] obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right to health.[47]

Accordingly, states are required not only to refrain from interfering with the right to health but also - bearing in mind the 'progressive realisation' of the right to health[48] - to take active

[45] IPCC, 'Global Warming of 1.5°C' [1.5°C Report], Summary for Policymakers (2018), at 11 <https://www.ipcc.ch/site/assets/uploads/2018/10/SR15_SPM_version_stand_alone_LR.pdf> accessed 13 June 2020.
[46] IPCC, Fourth Assessment Report 'Climate Change 2007: Impacts, Adaptation and Vulnerability' (IPCC Working Group II contribution to AR4, 2007) at 43.
[47] CESCR General Comment No. 14 (n 39) para. 33.
[48] ibid, para. 30.

steps to protect the right to health. The Committee has clarified that this extends the application of the right to health 'to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions'.[49] The right to health is thus connected to the right to a healthy environment enshrined in many constitutions and which 'serves as a bridge between the domains of the environment and human rights'.[50] General Comment 14 thus provides a strong basis to protect the right to health from 'third parties' interferences, which could aptly provide a basis for states to pass stringent legislation to regulate industries with high levels of carbon emissions that directly and disproportionally interfere with the right to health and other rights of people worldwide.

Along with adequate food and clothing, the right to adequate housing is an integral part of the right to an adequate standard of living. Article 11 of the Covenant on Economic, Social and Cultural Rights states that:

> States Parties recognise 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 for the realization of this right.[51]

As with other economic, social, and cultural rights, this right is to be progressively realised by states, taking appropriate steps. The Committee on Economic, Social and Cultural Rights has pinpointed the importance of the right to adequate housing to a life lived with dignity. General Comment 4 provides that 'the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head…Rather it should be seen as the right to live somewhere, in security, peace and dignity'.[52]

There is ample evidence that climate change adversely impacts the right to adequate housing of millions worldwide, especially of those who are already in a disadvantaged position within

[49] ibid, para.11.
[50] Paul Hunt and Rajat Khosla, 'Climate change and the right to the highest attainable standard of health' in Stephen Humphreys (ed) *Human Rights and Climate Change* (Cambridge University Press, 2010) at 256.
[51] International Covenant on Economic, Social and Cultural Rights (n 42) Article 11(1).
[52] CESCR, General Comment 4: The Right to Adequate Housing (Art. 11.1), UN Doc. E/1992/23, 13 December 1991, para. 7.

societies. This is because climate-related events exacerbate the situation of vulnerability of individuals and communities already suffering from poverty, marginalisation, and precarious housing. Climate change, among other effects, accentuates issues of migration from rural to urban centres or across state borders.[53] The 2018 report of the UN High Commissioner for Refugees also recognises that 'climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements'.[54] Indeed, about 26.4 million people per year were displaced by climate or weather-related events between 2008 and 2015.[55] For the coming years, the IPCC Fifth Assessment Report predicts with '*high confidence'* urban risks associated with housing with a 2°C rise by 2080-2100, as 'poor quality and inappropriately located urban housing is often most vulnerable to extreme events'.[56] This puts at further risk the situation of people living in informal human settlements commonly built with precarious infrastructure on the outskirts of cities or on river banks, which are at the front line of exposure to increasingly extreme climate events.

In a similar vein to the IPCC report, the Special Rapporteur on the right to adequate housing observes that climate change-induced extreme weather events pose risks to the right to adequate housing not only in urban settlements, but also in small island states. In her mission to the Maldives, the Special Rapporteur on the right to adequate housing cautioned that climate change will significantly impact the enjoyment of many human rights related to protecting the right to adequate housing for Maldivians, including by the loss of or contamination of freshwater sources; the total or partial destruction of houses and properties because of the rise in the sea level and natural disasters such as floods and cyclones; and the loss of livelihoods. Since many economic activities depend on the coastal ecosystem, climate change will affect communities' livelihoods,

[53] See, for example, on external migration from smalls island states to neighbouring countries, Ben Doherty and Eleanor Ainge Roy, 'World Bank: let climate-threatened Pacific islanders migrate to Australia or NZ' (*The Guardian*, 8 May 2017) <https://www.theguardian.com/environment/2017/may/08/australia-and-nz-should-allow-open-migration-for-pacific-islanders-threatened-by-climate-says-report> accessed 13 June 2020.
[54] Report of the UN High Commissioner for Refugees 'Global Compact on Refugees', Supplement No. 12 A/73/12 (Part II), (United Nations, New York 2018) para. 8.
[55] Gulrez, Shah Azhar, 'Climate change will displace millions in coming decades Nations should prepare now to help them'. (*The Conversation*, 31 August 2017). <https://theconversation.com/climate-change-will-displace-millions-in-coming-decades-nations-should-prepare-now-to-help-them-89274> accessed 30 June 2020.
[56] IPCC Fifth Assessment Report, 'Climate Change 2014: Impacts, Adaptation and Vulnerability' (Working Group II), March 2014, at 561-562.

including through loss of land, and environmental changes affecting fisheries and agriculture and other livelihood activities.[57]

This connects the right to adequate housing with other rights critically affected by climate change such as the rights to water, food, property, livelihood, private and family life, among others. It is, thus, crucial not to interpret rights 'in a narrow or restrictive sense',[58] particularly in the context of climate change which has intricate and often overlapping implications for rights. State's obligations in relation to the right to adequate housing, and other connected rights, include undertaking climate adaptation measures oriented at preventing severe climate impacts, especially upon those who already are in situations of vulnerability.

This obligation also connects with States' adaptation commitments under the Paris Agreement. Its Article 7 provides that: 'Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the [2°C-1.5°C] temperature goal referred to in Article 2'.[59] Accordingly, climate adaptation measures may need to include, where applicable, and in consultation with, and with the participation of, the population affected, 'relocating people from vulnerable areas' as well as 'disaster preparedness, educating people on what to do in an emergency, emergency evacuation, providing disaster relief and temporary housing, and giving assistance to rebuild will be part of this right'.[60] In this respect, it has been made clear that states will need to pay particular attention to ensure that vulnerable groups within societies, such as indigenous peoples are also included in the implementation of climate adaptation measures as they are 'more likely to suffer inadequate housing and negative health outcomes, as a result, they have disproportionately high rates of homelessness and they are extremely vulnerable to forced evictions, land-grabbing and the effects of climate change'.[61] The report of the UN Report of the Special Rapporteur on adequate housing

[57] Addendum to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik (Mission to Maldives), UN Doc. A/HRC/13/20/Add.3, 11 January 2010, para. 14(c).
[58] CESCR, General Comment 4: (n 52) para. 7.
[59] Paris Agreement (n 20) Article 7(1).
[60] Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge Taylor and Francis group, 2015) at 80.
[61] UN General Assembly, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/74/183, 17 July 2019, summary.

as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, provides a clear example of the cross-cutting character of the human rights harms resulting from climate change, involving also 'collective' rights of indigenous peoples.

Like the right to adequate housing, the right to food is a component of the right to an adequate standard of living. The Universal Declaration establishes that '[everyone] has the right to a standard of living adequate for the health and well-being of himself and of his family, including *food*, clothing, housing and medical care and necessary social services'[62] In a similar vein, Article 11(2) of the Covenant on Economic, Social and Cultural Rights recognises the right to food as the 'fundamental right of everyone to be free from hunger'.[63] The Committee on Economic, Social and Cultural Rights has, in addition, affirmed that 'the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights'.[64] This affirmation is self-explanatory – food is essential to a life, lived with dignity.

However, despite these pronouncements under international human rights law, the recognition of the right to food has not really helped – at least not substantially – to mitigate starvation and malnutrition. According to the World Food Programme, '[there] are about 821 million people - more than 1 in 9 of the world population - who do not get enough to eat'.[65] This dramatic situation is further aggravated by the effects of climate change. The World Bank estimated that the 2°C increase in average global temperature would put 100 to 400 million more people at risk of hunger and could result in over 3 million additional deaths from malnutrition each year.[66] These projected impacts, as in the case of other rights, will more acutely affect the right to food in low-income states, not only in relation to 'direct' access to food, but also in relation to the states' obligations

[62] Universal Declaration of Human Rights (n 29) Article 25(1).
[63] International Covenant on Economic, Social and Cultural Rights (n 41) Article 11(2). See also other human rights treaties recognising the right to food: Convention on the Elimination of all Forms of Discrimination against Women, Article 12(2); the Convention on the Rights of the Child, Article 24(2)(c); and 27C (3); the Convention on the Rights of Persons with Disabilities, Articles 24(f) and 28(l).
[64] UN Committee on Economic, Social and Cultural Rights General Comment 12, Right to adequate food (Article 11) UN Doc. E/C.12/1999/5, 12 May 1999, para. 4.
[65] World Food Programme, '2019 Hunger Map' <https://www.wfp.org/publications/2019-hunger-map> accessed 13 June 2020.
[66] World Bank, 'World Development Report 2010: Development and Climate Change' (Washington DC, 2010), at 3-5.

of '[improving] methods of production, conservation and distribution of food'.[67] For instance, the IPCC Fourth Assessment Report estimates:

> Agricultural production, including access to food in many African countries and regions is projected to be severely compromised by climate variability and change. The area suitable for agriculture, the length of growing seasons and yield potential, particularly along the margins of semi-arid and arid areas, are expected to decrease. This would further adversely affect food security and exacerbate malnutrition in the continent.[68]

Indeed, the right to food is closely related to the effects of climate change upon food availability, access, security, and production, which in turn connects with the right to a livelihood as climate change also impacts livelihoods like fisheries and agriculture, resulting from unpredictable rain patterns, expanding droughts and floods. Climate change will, thus, make less attainable the realisation of the right to food. General Comment 12 of the Committee on Economic, Social and Cultural Rights establishes the realisation of the right to adequate food as 'when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement'.[69]

The right to food and its realisation is certainly complex: on the one hand, states are obliged to ensure everyone adequate food access and security to have a healthy life but, on the other hand, emissions should be dropped. However, 'industrial agriculture is a major contributor to climate change', which in turn threatens the availability of food production worldwide.[70] Therefore, the adoption of climate measures and new technologies aimed at reducing emissions from the agricultural industry and adapting to more extreme weather conditions is crucial. The potential of agroecology has been consistently advocated to mitigate the effects of climate change on the ability to realise the right to food. The Special Rapporteur on the Right to Food presented several reports

[67] International Covenant on Economic, Social and Cultural Rights (n 44) Article 11(2) a.
[68] IPCC, Fourth Assessment Report (n 46) - *Summary for Policymakers* (Cambridge, Cambridge University Press 2007) at 13.
[69] CESCR, General Comment 12, Right to Adequate Food (n 67) para. 12.
[70] Chelsea Smith, David Elliott and Susan Bragdon, 'Realizing the right to food in an era of climate change: The importance of small scale farmers' (Quaker United Nations Office Geneva, May 2015) at 3 <http://www.quno.org/sites/default/files/resources/Realizing%20the%20right%20to%20food%20in%20an%20era%20of%20climate%20change.pdf> accessed 13 June 2020.

calling on states to adopt agroecology as a way to address the food needs in relation to climate change and poverty challenges.[71] Similar initiatives should be considered by states to limit the impacts on the right to food associated with climate change.

A crucial part of a right to life, lived with dignity is the emerging right to water, which like the right to adequate housing and the right to food is a component of the right to an adequate standard of living. Despite the importance of water for human and non-human life and its interconnectedness with the ability to enjoy other human rights, the right to water is still making its way into full recognition in international human rights law. As McCaffrey notes, 'the notion of a right to water emerged largely from non-binding documents adopted within the context of the United Nations, and … there does not yet appear to be a consensus among states on the existence of the right'.[72] The International Covenant on Economic, Social and Cultural Rights does not recognise explicitly the right to water. In fact, there are no express references to the 'right to water' as such in human rights treaties. Only the Convention on the Elimination of All Forms of Discrimination Against Women[73] and the Convention on the Rights of the Child[74] refer to the importance of access to water.

General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights acknowledges, however, the right to water as 'a prerequisite for the realisation of other human rights'.[75] It provides that '[the] human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[76] In a

[71] UN Report of the [former] Special Rapporteur on the Right to Food, Olivier De Schutter, 'Agroecology and the Right to Food' presented at the 16th Session of the United Nations Human Rights Council', A/HRC/16/49, 20 December 2010, at 12-13.
[72] Stephen McCaffrey, 'The Human Right to Water: A False Promise' (2016) 47 University of the Pacific Law Review 221, 232.
[73] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (in force 3 September 1989), Article 14(h).
[74] Convention on the Rights of the Child, 20 November 1989 (in force 2 September 1990), Article 24 (c). See also Convention on the Rights of Persons with Disabilities (Optional Protocol), 13 December 2006 (in force 3 May 2008) Article 28.2(a). See also UN General Assembly recognised 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.' United Nations General Assembly, the human right to water and sanitation, UN Doc. 64/292, 3 August 2010, Article 1; and following UN General Assembly resolution on the "human right to safe drinking water and sanitation", A/RES/74/141, 18 December 2019, which focuses on the human right to water and sanitation in the context of crises, including climate change.
[75] CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11, 20 January 2003, para. 1(1).
[76] ibid, para. 2.

similar way to the previously discussed rights to housing and food, the right to water is part of the right to an adequate standard of living. General Comment 15 establishes:

> The right to water is also inextricably related to the right to the highest attainable standard of health … and the rights to adequate housing and adequate food … The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.[77]

Due to the intrinsic connection between the right to water and other human rights such as the right to life, health, adequate housing and food, climate impacts upon the ability to enjoy the right to water also put at risk the realisation of those related rights. In this vein, the report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights found that the '[p]rotection of the right to life, generally and in the context of climate change, is closely related to measures for the fulfilment of other rights, such as those related to food, water, health and housing'.[78] This interconnectedness between rights has also been noted by the UN General Assembly, which recognised 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and *all* human rights'.[79] In the same vein, the Human Rights Council has recognised the 'right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights'.[80] Yet, as Singh points out, '[while] water is yet to be explicitly recognised as an independent self-standing human right in international treaties, … international human rights law already entails specific obligations related to access to safe drinking water'.[81]

The IPCC Fifth Assessment Report warns that climate change is projected to reduce renewable surface water and groundwater resources in most dry subtropical regions intensifying competition for water among sectors.[82] Also, the World Bank foresees that even in a 2°C warming above preindustrial temperatures scenario, 1 billion to 2 billion more people may no longer have enough

[77] ibid, para. 3.
[78] Human Rights Council (n 28) para. 24.
[79] United Nations General Assembly, 'The human right to water and sanitation', UN Doc. 64/292, 3 August 2010, Article 1. Also, General Comment 15 extends the interpretation of the International Covenant on Economic, Social and Cultural Rights to cover the right to water and connect it with other rights.
[80] Human Rights Council Resolution 16/2 'The human right to safe drinking water and sanitation', A/HRC/RES/16/2, 16 April 2011.
[81] Nandita Singh (ed), The *Human Right to Water: From Concept to Reality* (Stockholm, Springer 2019) at 5.
[82] IPCC, Fifth Assessment Report (n 56) Summary for Policymakers at 13.

water to meet their needs.[83] Moreover, climate change is projected to cause water scarcity: many 'semi-arid areas (for example, Mediterranean basin, western United States, southern Africa and north-eastern Brazil) will suffer a decrease in water resources due to climate change'.[84] In regions particularly prone to water scarcity, such as the Middle East and North Africa, which 'is already very short of fresh water and faces difficulty in meeting the needs of fast-growing population',[85] the climate impacts upon people's right to water are striking. The IPCC has stated: 'An additional 155 to 600 million people may suffer an increase in water stress in North Africa with 3°C rise in temperature … Competition for water within the region and across its borders may grow, carrying the risk of conflict'.[86] Therefore, climate change impacts upon the right to water can generate additional social tensions and exacerbate conflicts.

Climate change requires protection of the right to life and the right to a life lived with dignity. Grasping this means really recognising the interdependence of human rights. This is particularly challenging in the case of people who already are marginalised within society and for whom climate impacts posit them in an even more vulnerable situation such as, for example, indigenous peoples, who often live in disadvantaged areas within states, facing water pollution and scarcity. This is *inter alia* because, similarly to Third World states (and within them), 'many indigenous peoples have a similar history of colonization and oppression, which has resulted in their increased vulnerability given their physical locations and limitations on potential adaptation'.[87] Therefore, states' (climate) action aimed to protect the rights of indigenous peoples and their lands is essential. In fact, in light of the climate crisis, human rights may greatly benefit from incorporating non-Western views in its relational approach to nature, which may embrace a relational approach more harmonised with the environment, especially in light of the emergence of the right to a healthy environment.

[83] World Bank (n 66) at 5.
[84] IPCC, Fourth Assessment Report Technical Summary (n 46) at 44.
[85] ibid.
[86] ibid.
[87] Randall Abate and Elizabeth Ann Kronk, 'Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples' (2013) 26(2) Tulane Environmental Law Journal' 179

3.2 Collective Rights in a Healthy Environment

Indigenous peoples are the 'subject' of rights in international human rights law that probably best reflect the Western approach of domination to nature. Indigenous peoples share a 'history of oppression,'[88] whose knowledges, which embrace a special relationship with nature, have traditionally been ignored in the development of international law. Amid a humanly made climate crisis, a non-capitalist approach to the environment could contribute to a much-needed reimagination of the human rights approach to nature, by connecting climate change impacts with harms to (collective) rights of indigenous peoples and their unique approach to the natural world. Paradoxically, despite their minimal emissions contribution to climate change and ancestral connection to nature, indigenous peoples are among those first and most severely affected by the effects of climate change, which 'has the potential to impact all of [their] … rights, as climate change threatens indigenous land, which is often uniquely connected to indigenous identity and cultural and natural resources'.[89]

The rights of indigenous peoples have gradually been recognised in international instruments. The International Labour Organization Conventions No 107[90] and No 169[91] are the only legally binding treaties (for ILO member states[92]) especially dedicated to indigenous peoples. Both Conventions recognise the right of indigenous peoples to property and to not be removed from the lands where they reside. However, Convention No 107's protection in this regard is more limited as it provides room to remove indigenous peoples from the lands where they traditionally reside based on national security or the national interest of economic development.[93] Convention No 169 embeds

[88] ibid, 180.
[89] ibid, 190.
[90] International Labour Organization [ILO], Indigenous and Tribal Populations Convention, 1957 (Convention No 107), adopted 26 June 1957 (in force 2 June 1959), remains in for 17 countries but is no longer open to ratification. ILO, Sustainable Development Goals – Indigenous Peoples in Focus, p.1.
[91] ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No 169) is the only international treaty on indigenous peoples open to ratification so far ratified by 22 countries.
[92] Article 31(1) of the Convention No 107 states: 'This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General'. ILO Convention 107 (n 90). Similarly, Article 38(1) of the Convention No 169 states: "This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General", ibid.
[93] ILO Convention 107 (n 90) Article 12(1).

a wider protection in this regard allowing removal of indigenous peoples from their habitual lands only if it is consensual and as an exceptional measure.[94]

More recently, the UN Declaration on the Rights of Indigenous Peoples,[95] which, '[although it] 'is not legally binding, has helped to create and extend international legal norms and standards around the treatment of indigenous peoples'.[96] The Declaration recognises the right of indigenous people to enjoy all recognised human rights collectively or individually.[97] The preamble of the UNDRIP acknowledges the rights of indigenous peoples to sustainable and equitable development and management of the environment.[98] The Declaration provides for the right to the conservation and protection of the environment.[99] In addition, the preamble of the Paris Agreement calls upon states to respect, promote and consider the rights of indigenous peoples in taking climate change action;[100] and, in Article 7(5), specifically acknowledges the importance of indigenous peoples' traditional knowledge in combating climate change.[101]

Such advancements in the recognition of the rights of indigenous peoples, even if only in the preamble, and the recognition of the knowledge of indigenous peoples in the operative part is crucial, because their rights, along with those of other groups, are disproportionally impacted by the effects of climate change. Generally, given their close relationship with the environment and dependence of its natural resources, indigenous peoples tend to experience the effects of climate change earlier and more profoundly. Climate change disproportionally threatens their existence and their identity as a community, given that 'many indigenous communities. share a unique legal and spiritual connections to their environment'.[102] Therefore, natural resources depletion resulting from the over-exploitation of marine resources in many areas or environment degradation resulting

[94] ILO Convention 169 (n 91) Article16 (1-2).
[95] Declaration on the Rights of Indigenous Peoples [UNDRIP], General. Assembly Resolution 61/295, Annex, UN Doc. A/RES/61/295, 2 October 2007.
[96] Ben Farkas, Allana Kembabazi and Stephanie Safdi, 'Human Rights and Climate Change Obligations, Draft Memorandum for the Experts' Group on Climate Change Obligations' (Yale University Law School, April 2013). 24-25 <https://law.yale.edu/sites/default/files/documents/pdf/Climate_and_Human_Rights__Memo.Final.pdf> accessed 13 June 2020.
[97] UNDRIP (n 95) Article1.
[98] ibid, Preamble.
[99] ibid, Article 29.
[100] Paris Agreement (n 21) Preamble.
[101] ibid, Article7(5).
[102] Rendall and Konk (n 87) 180.

from, for example, the contamination of rivers by mining extraction or oil production activities, put under direct and severe threat the survival of indigenous peoples.

The traditional ways of life, livelihoods and practices of indigenous peoples are under threat owing to various factors. In addition to climate change, indigenous peoples are often already in a very disadvantaged position within societies. Indigenous peoples constitute about 5% of the world's population, but they account for nearly 15% of the world's poor.[103] Among other factors, indigenous peoples are 'more likely to lower incomes, poorer physical living conditions, restricted health care, education and other services ….[104] Climate change thus exacerbates the already existing situation of vulnerability of indigenous people. They become even more vulnerable and prone to unemployment, poverty and migration to urban areas resulting, in turn, in discrimination and marginalisation.[105] For all these reasons, climate change poses an additional threat to the survival of indigenous peoples, the maintenance of their traditional livelihoods and their cultural and spiritual practices. Accordingly, states should take concrete steps to ensure indigenous people's participation in policy-making processes that affect their ancestral environment, including measures aimed to adapt or mitigate climate effects. Such participation is also crucial part of the wider collective, and contested, right to self-determination.

The Charter of the United Nations enshrines the self-determination of peoples.[106] The right of self-determination is also explicitly provided for in Article 1 of both the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights: Shared article 1 states: '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'.[107] Further, both Covenants provide that 'States Parties…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'.[108] States have, therefore, the obligation to ensure that peoples keep the political

[103] Rishabh Kumar Dhir, 'Indigenous Peoples in the World of Work in Asia and the Pacific: A Status Report' (ILO, 2015) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_438853.pdf> accessed 13 June 2020.
[104] ibid, 1.
[105] See, for example, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (n 61).
[106] UN Charter, 26 June 1945 (in force 24 October 1945), Article 1(2).
[107] International Covenant on Civil and Political Rights (n 30); and International Covenant on Economic, Social and Cultural Rights (n 42), Common Article 1(1).
[108] ibid, Common Article 1(3).

status they have determined and have the necessary means for their subsistence at their disposal.[109] According to General Comment 12 of the Human Rights Committee, '[t]he right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.[110] The right to self-determination is, therefore, a preliminary right, whose realization will allow in turn the realisation of all other rights.

However, climate change poses a serious threat to the realisation of the right to self-determination for several states, particularly small island and low-laying states, whose very existence is under threat due to the rapid rise of sea levels causing the loss of territory and potentially complete submergence under water in a matter of years. The inhabitants of these states are greatly dependent on coastal life and marine ecosystems as a mean of subsistence and of maintaining their livelihoods and traditions, and therefore, other rights associated with those climate impacts are also affected. The right to self-determination can be thus understood, as collective in essence because its respect or threats to it affects the rights of peoples as a community. In addition to the potential threat that climate change poses to the ability of entire states to realise their right to self-determination, climate change can have collateral effects such as climate change-induced migration, conflicts for resources and displacement of peoples within a country or from one country to another.[111] This would not only cause the violation of the right to self-determination but also the potential violation of other rights severely affected by climate change.

The IPCC Fifth Assessment Report projects with *very high confidence* that'[due] to sea level rise projected throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion'.[112] Alarmingly, for some coastal nations and low-laying states, the impingement to the right to self-determination seems to be only a matter of time with nothing in place to avert the human-generated effects of climate change. The President of Kiribati has reflected this by stating that 'we have to reconcile ourselves with the reality that our islands will be under water, unless we

[109] ibid, Common Article 1(2) states "In no case may a people be deprived of its own means of subsistence."
[110] Human Rights Committee General Comment 12: Article 1 (Right of Self-Determination), Right of Self-Determination of Peoples, UN Doc. HRI/GEN/1/Rev.9, 13 March 1984, para. 1.
[111] See, for example, Autumn Skye, Bordner, 'Climate Change & Self-Determination' (2019) 51(1) Columbia Human Rights Law Review 183; and Jörgen Ödalen, 'Underwater self-determination: Sea-level rise and deterritorialized Small Island States' (2014) 17(2) Ethics, Policy & Environment 225.
[112] IPCC, Fifth Assessment Report, (n 82) at 13.

do something very significant and substantial'.[113] Certainly, the IPCC report foresees *with high confidence* that '[c]oastal systems and low-lying areas are at risk from sea level rise, which will continue for centuries even if the global mean temperature is stabilized'.[114] This means that even if far-reaching climate measures are undertaken now, the impingement to the right to self-determination of peoples from (some) small island states along with other rights would be somewhat inevitable, challenging thereby the human rights' ability to address climate change.

Indeed, the situation of small islands states, among others severely impacted by human-induced climate change, reflects most clearly the paradox of climate change, whereby those who contributed the least to the problem of climate change, principally through carbon emissions, are those who are experiencing most severely its effects. The threat to the rights of individuals and communities of states disproportionally affected by climate change impacts, including the rights of indigenous peoples and self-determination, require a human rights' participatory approach that allows them to be informed of and participate in the decision-making process of measures affecting them, as well as having access to justice.

Stemming from international environmental law, 'participatory' rights, which include the right to information, the right to participate in the decision-making process and the right to access to justice, if well implemented, can support individuals and communities in dealing with the challenge of climate change. In the context of climate change, procedural rights are relevant as a means of facilitating the participation of local population in the planning, development and implementation of climate change measures that affect them.

Principle 10 of the Rio Declaration on Environment and Development establishes these participatory rights. It provides that:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public

[113] Submission of the Office of the UN High Commissioner for Human Rights to the 21st Conference of States Parties to the UNFCCC (COP21), 'Understanding Human Rights and Climate Change', Statement of the President of the Republic of Kiribati, (2015) at 19 < https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> accessed 13 June 2020.
[114] IPCC, Fifth Assessment Report (n 82) Summary for Policymakers, 17.

> authorities, including information on hazardous materials and activities in their communities, and the opportunity to *participate in decision-making* processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective *access to judicial* and administrative proceedings, including redress and remedy, shall be provided.[115]

Irrespective of their implementation, these procedural rights foresee the participation of impacted populations in climate-decisions undertaken in a given community. In the context of climate change, such participation generally relates to adaptation measures. Such procedural or participatory rights, thus rely on an 'approach [that] promises environmental protection essentially by way of democracy and informed debate'.[116] These rights have the potential to prevent counterproductive effects of climate adaptation measures in a given area by 'creating legal gateways for participation',[117] which can help in particular to prevent conflicts arising from the implementation of environmentally sensitive projects or adaptation measures, often unilaterally decided by states.

The report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights, recognises that '[awareness-raising] and access to information are critical to efforts to address climate change. For example, it is critically important that early-warning information be provided in a manner accessible to all sectors of society'.[118] Likewise, the report also recognises that '[participation] in decision-making is of key importance in efforts to tackle climate change'.[119] It states that before decisions are made, there should be 'adequate and meaningful consultation with affected persons'.[120] Indeed, procedural rights are particularly relevant in the context of climate change, whereby controversial projects, potentially affecting human rights, could be presented by governments as part of their climate adaptation efforts,[121] given that, as Grecksch and Klöck note '[climate] change adaptation is a political process

[115] Rio Declaration on Environment and Development (n 8) Principle 10.
[116] Anderson (n 1) 9.
[117] ibid.
[118] Human Rights Council (n 28) para. 78.
[119] ibid, para. 79.
[120] ibid.
[121] In connection with water, cultural and other rights, see for example Kevin Grecksch and Beatriz Barreiro Carril, 'Call for inputs for a report: Cultural rights and climate change' (OHCHR, 1 May 2020) <https://www.ohchr.org/Documents/Issues/CulturalRights/Call_ClimateChange/KGrecksch.pdf> accessed 13 June 2020.

and reflects power constellations and does not always include all affected stakeholders'.[122] Yet, despite the fact that 'the actual state of their realization domestically' remains a matter of concern, the procedural rights to information, participation in the decision-making process and access to justice are considered to 'arguably represent [today] established human rights'.[123] At the end of the day, however, the recognition of collective and participatory rights is a moot point, if there is not a change in attitude to the environment itself. In this regard, the right to a healthy environment might be key.

Considered the 'most far-reaching case for environmental rights',[124] the right to a healthy environment aptly reflects the interconnectedness between human rights and the environment. One could say that, irrespective of its level of recognition, the human right to a healthy environment implies an acknowledgement of the dependence of humans - and human rights - on the natural world. However, while the importance of the environment to human life is undisputable, there remain several aspects to be clarified on the scope of the right to a healthy environment and the state obligations it generates in the context of climate change.[125] Yet, although the actual usefulness of its recognition and its legal basis are still disputed, the right to a healthy environment is widely accepted and 'is now a firmly established legal principle' in legislations across the world,[126] to the extent that it is even considered 'an emerging norm of international customary law'.[127]

What is already beyond doubt is that climate change poses a serious threat to a number of recognised rights and, consequently, the right to a healthy environment provides a point of convergence that connects rights with environmental harms resulting from climate change. Notably, the right to a healthy environment, even if from an anthropocentric perspective, relates climate impacts suffered by humans with those suffered by the environment and its components, positing both as part of the same *wholeness* affected by climate change. In this sense, the right to

[122] Kevin Grecksch and Carola Klöck, 'Access and allocation in climate change adaptation' (original paper) (2020) 20 International Environmental Agreements: Politics, Law and Economics 271, 275.
[123] Handl (n 10) 6.
[124] Alan Boyle, 'The Role of International Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996) at 48.
[125] Sumudu Atapattu, 'The Right to a Healthy Environment and Climate Change: Mismatch or Harmony?' in John Knox and Ramin Pejan (eds) The Rights to a Healthy Environment (Cambridge University Press 2018) 252, 253.
[126] Boyd (n 20) 252, at 40.
[127] Atapattu (n 125).

a healthy environment would provide an avenue for an advanced anthropocentric interpretation of the *human* right. In other words, it is not necessary to deprive human rights from their innate anthropocentric approach to nature for them to gradually move away from their instrumentalist approach where this is seen as 'storage of raw materials',[128] towards one in which the natural world is valued on its own. As Anderson, referring to Redgwell, notes:

> …it is entirely possible to exercise human rights with a view to protecting the intrinsic, rather than instrumental, value of other species. It should be equally possible to enforce environmental rights in a non-instrumentalist way, and thereby diminish although not eliminate the human-centred quality of the rights. The crucial point is that the anthropocentric nature of human rights may be a matter of *degree* rather than a simple binary question.[129]

The right to a healthy environment, despite criticisms which question its very existence or effectiveness,[130] could, therefore, work as an initial point for the reimagination of rights. With the right to a healthy environment, 'the dam of anthropocentrism has clearly been breached'.[131]

A definite advantage to the right to a healthy environment is its wide and fast-paced recognition in national constitutions and other domestic legislation. According to Boyd, 100 countries have constitutionally recognised the right to a healthy environment and about 100 have incorporated it explicitly in national legislation.'[132] Yet, at the global level, there is still no legally binding global instrument that includes this fundamental right.[133] This wide recognition of the right, despite its shortcomings with respect to its effectiveness and the corresponding state obligations it

[128] Murray Bookchin, *The Ecology of Freedom – The Emergence and Dissolution of Hierarchy* (Cheshire Book, 2018) at 20.
[129] Anderson (n 1) at 14 (commenting Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in the same book).
[130] See Boyd (n 20) 17.
[131] Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights, in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press 1996) at 87.
[132] Boyd (n 20) 18.
[133] Atapattu (n 60) 257.

generates,[134] will likely continue growing in national and international law, and as part of the proliferating rights-based climate ligation trend in courts worldwide.[135]

3.3 The Impact of Climate Change Measures on Human Rights

Human rights and climate change are also linked through the responses given at local, national, and international level to the challenges presented by climate change. The measures taken by states and implemented at different levels, while developed as a response to tackle climate change, have the potential to threaten and violate human rights causing then a contrary effect. The measures taken to protect people and ecosystems from the effects of climate change can have a negative impact on the human rights of people who such actions intend to protect. There is wide consensus on the split of climate change action between mitigation and adaptation measures, whose implications on the realisation of human rights will be discussed in the next sub-sections.

3.3.1 Mitigation

According to the United Nations Environment Programme website, mitigation 'refers to efforts to reduce or prevent the emission of greenhouse'.[136] This should be done in a way 'consistent with limiting warming to 1.5°C above pre-industrial levels'.[137] The IPCC Special Report, on the severe impacts of global warming of 1.5°C above pre-industrial levels, projects with '*high confidence*' that: '[under] emissions in line with current pledges under the Paris Agreement (known as Nationally Determined Contributions, or NDCs), global warming is expected to surpass 1.5°C above pre-industrial levels, even if these pledges are supplemented with very challenging increases in the scale and ambition of mitigation after 2030'.[138] Mitigation efforts are thus a prerequisite to substantially reduce global emissions, for which climate action at every scale of society is needed,

[134] See, for example, Boyd (n 20).
[135] See Chapter 4 for a detailed discussion on rights-based climate litigation.
[136] United Nations Environment Programme (UNEP) website: <http://www.unep.org/climatechange/mitigation/> accessed 13 June 2020. The website also provides some examples of mitigation: 'Mitigation can mean using new technologies and renewable energies, making older equipment more energy efficient, or changing management practices or consumer behavior. It can be as complex as a plan for a new city, or as a simple as improvements to a cook stove design. Efforts underway around the world range from high-tech subway systems to bicycling paths and walkways.'
[137] IPCC, 1.5°C Report (n 45) Chapter 2, 95
[138] ibid.

and where states' action play a central role at the domestic and international level, through multilateral climate governance.

Mitigation measures against climate change have been diversified in different programmes. Under the umbrella of the Kyoto Protocol[139] the Clean Development Mechanism (CDM) 'allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol (Annex B Party) to implement an emission-reduction project in developing countries. Such projects can earn saleable certified emission reduction (CER) credits, each equivalent to one tonne of CO2, which can be counted towards meeting Kyoto targets'.[140]

However, the CDM mitigation programme has been widely criticised for, far from helping to address climate change,[141] having contributed to human rights violations, especially in the Third World. For example, in the cases of Bajo Aguán in Honduras and Olkaria in Kenya, CDM projects have been related to pre-existing conflicts of land ownership.[142] Both cases indicate that 'responsibilities of host governments for human rights infringements in the context of CDM projects might range from direct and gross violations by state security forces as in Bajo Aguán to dubious behaviour of companies as in Olkaria and the failure of a host state to sufficiently regulate this'.[143] Climate mitigation measures, therefore can have an adverse impact on the enjoyment of rights of individuals and communities of the least developed areas, who not only suffer the increasing threat and, in many cases, violations of their human rights resulting from climate change impacts, but also from the negative impact of climate mitigation measures taken at international and national level.

Similarly, the Reducing Emissions from Deforestation and Forest Degradation (REDD/REDD+) programme[144] has been questioned for its potential impact on the human rights of communities,

[139] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, Article 12.
[140] UNFCC website. <https://unfccc.int/process-and-meetings/the-kyoto-protocol/mechanisms-under-the-kyoto-protocol/the-clean-development-mechanism > accessed 13 June 2020.
[141] See Chapter 1 on the finance mechanisms under the Kyoto Protocol.
[142] For a detailed study of these cases, see Jeannette Schade and Wolfgang Obergassel, 'Human Rights and the Clean Development Mechanism' (2014) 27(4) Cambridge Review of International Affairs 717.
[143] ibid, 730.
[144] 'The idea behind REDD is simple: REDD promotes forest protection by establishing economic incentives so that forests are worth more money standing than they are when cut down and sold as timber or when land is cleared for agriculture or other land uses'…' REDD was expanded [in 2009]to include the role of conservation of existing carbon

whose livelihoods and culture depend on forests.[145] Particular concern exists in relation to the effects of this programme on the human rights of indigenous peoples. Potentially, indigenous peoples can lose their traditional territories and suffer restrictions of their rights over their lands under REDD/REDD+ projects. As Savaresi points out, '[access] to forests and their resources has implications for the enjoyment of numerous human rights, including the right to life, the right to respect for private and family life, the right to peaceful enjoyment of possessions and property, as well as the prohibition of discrimination'.[146] Accordingly, mitigation projects like REDD/REDD+ can also generate migration, displacement, and discrimination against displaced communities, who may be forced to abandon their traditionally occupied lands and the culture intrinsically connected to it.[147] In consequence, other fundamental rights could also be potentially jeopardised as a result of the implementation of mitigation projects such as, the right to water, right to food, right to health and right to culture, among other human rights.[148] Certainly, states should take into account human rights considerations when implementing mitigation measures to avoid harms to the rights of individuals and communities affected by them, which often are already in disadvantaged positions within society. That is the case of indigenous peoples in particular, whose rights, including their participatory rights, can potentially be put at risk by climate mitigation projects. A similar situation occurs in the case of climate adaptation measures.

stocks and the enhancement of carbon stocks and was renamed REDD+'. Kassandra Lang, 'Making Standing Forests Fungible: Overcoming the Definitional Problems in Developing a REDD Mechanism' (2013) 30 Wisconsin International Law Journal 855, 857-8.

[145] Annalisa Savaresi, 'REDD+ and human rights: addressing synergies between international regimes' (2013) 18(3) Ecology and Society Journal 5.

[146] Annalisa Savaresi, 'The Human Rights Dimension of REDD' (2012) 21(2) Review of European Community & International Environmental Law 702, 704.

[147] For example, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights found that the state of Nicaragua had violated the right to judicial protection and the right to property of the members of the community, by issuing titles, granting concessions, and authorising the use of the lands by third parties in areas where the community have traditionally inhabited. See Inter-American Court of Human Rights, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Ser. C) No. 79, 31 August 31, 2001, See also, for example, *Maya indigenous community of the Toledo District v. Belize,* Inter-American Court of Human Rights, Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 120 12 October 2004.

[148] For example, the Special Rapporteur on the right to food, stated that 'climate change mitigation and adaptation policies further reduced food availability: bio-fuel as a clean energy alternative and clean development mechanisms like forest preservation shifted land use from agriculture, threatening the right to food '. Human Rights Council, 'Discussion on the adverse impacts of climate change on States' efforts to realize the right to food', 6 March 2015 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15661&LangID=E> accessed 13 June 2020.

3.3.2 Adaptation

Alike mitigation, climate adaptation measures aimed to prepare for, and limit climate change impacts can also put at risk the ability of enjoyment of human rights. Adaptation refers to preparation for and adjustment to the unavoidable effects of climate change. According to the Special Rapporteur on Human Rights and the Environment, '[b]oth the failure to adapt and the implementation of adaptation measures can interfere with human rights, particularly for the most vulnerable'.[149] In contrast to mitigation policies, the area of action and impact of adaptation policies is mostly circumscribed to the local or regional level. Therefore, adaptation is generated with the central or regional government at the core of initiatives which in turn are applied at local and community levels.

Adaptation projects are developed with funds –allocated through the Adaptation Fund, which is oriented to finance projects in developing countries or areas vulnerable to climate change impacts.[150] The contributions to the Adaptation Fund are gathered at international level, however, adaptation projects are commonly implemented at local level, often in developing states, thereby, increasing the chance of violating the human rights of the most vulnerable within societies. This is because '[vulnerability] to climate change can be exacerbated by the presence of other stresses. Non-climate stresses can increase vulnerability to climate change by reducing resilience and can also reduce adaptive capacity because of resource deployment to competing needs'.[151] The IPCC Fourth Assessment Report found that, 'residents of already vulnerable regions and communities confront a range of stresses that affect their sensitivity to climate change events as well as their ability to adapt. These stresses include poverty, inadequate access to basic resources, food and water insecurity, high incidences of diseases such as HIV/AIDS, and conflict'.[152] In addition, as Hall and Weiss observe, 'adaptation practices, in comparison to mitigation, have the potential to infringe on particular rights in particular ways, implicating unique and corresponding human duties'.[153] Therefore, human rights analysis can better address issues related to adaptation than it

[149] United Nations Environment Programme, 'Climate Change and Human Rights' (UNEP 2015) 22.
[150] The Adaptation Fund was established in 2001 to finance concrete adaptation projects and programmes in developing country Parties to the Kyoto Protocol that are particularly vulnerable to the adverse effects of climate change. UNFCC website < https://unfccc.int/Adaptation-Fund> accessed 16 June 2020.
[151] IPCC, Fourth Assessment Report (n 46) Summary for Policymakers at 19.
[152] ibid.
[153] Margaux Hall and David Weiss, 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law' (2012) 37(2) The Yale Journal of International Law 309, 324.

can issues related to mitigation.[154] Thus, in addition to countering several of the logistics based objections to applying a human rights framework to climate change, an adaptation framework can incorporate important human rights considerations.[155]

Overall, human rights considerations are relevant in the design and implementation of climate adaptation programmes. Particular attention should be paid to the exercise of collective procedural human rights by the inhabitants of local communities where adaptation programmes often take place. The right of information, right of access to justice, right of participation in the policy-making process, among other collective human rights, should be a central part in the adoption and execution of adaptation projects to protect affected communities and its environment.

4. The Human Rights Approach to Climate Change

As it has been discussed, climate change puts at risk the ability to enjoy a number of recognised human rights of individuals and communities worldwide, which can also be adversely affected by climate measures put in place to tackle the problem. In this sense, unlike a purely scientific approach to respond to the challenges posed by climate change, a human rights approach, despite its limitations, provides several benefits when applied in the context of climate change. First, human rights provide a powerful rhetorical language that helps to understand the human dimension of climate change. Certainly, human rights put the 'human face' to the problem.[156] As Obokata notes, 'first and foremost, a human rights framework puts individual human beings at the centre of any action against climate change'.[157] Irrespective of the extent of human rights realisation worldwide, the language of human rights helps, thus, to understand the human dimension of the problem, and put the victims and potential victims of human rights violations at the centre of the climate debate. The wide acceptance of human rights helps to realise the human cost of no action or, of implementing climate measures without considering the people directly affected by them.

[154] ibid.
[155] ibid.
[156] Sumudu Atapattu, 'Global Climate Change: Can Human Rights (and Human Beings Survive this Onslaught?' (2008) 20(1) Colorado Journal of International Environmental Law and Policy 35, 45.
[157] Tom Obokata, 'Analysis of Climate Change from a Human Rights Perspective' in Stephen Farrell, Tawheda Ahmed and Duncan French (eds) *Cosmological and Legal Consequences of Climate Change* (Oxford and Portland, Hart Publishing 2010) at 114.

As the most international legal language, human rights bring the weight of law to climate action by drawing attention to the climate's 'new' realities arising worldwide because of the effects of climate change that reflect its impacts upon the rights of individuals and communities worldwide.

Second, human rights provide a well-developed normative and institutional framework, including a network of national, regional, and international human rights judicial, and quasi-judicial, bodies that can help to understand and develop the relationship between human rights and climate change. In this sense, human rights '[provides] a conceptual framework for policies on climate change'.[158] Human rights institutional frameworks thus provide human rights-based guidance for the development and implementation of climate change policies. Indeed, human rights are equipped with a pre-existing robust body of international instruments that legally bind states, which facilitates identifying states' obligations arising in the context of climate change. Through their judicial 'branch', human rights can aptly provide 'avenues for those affected by climate change to seek a remedy'.[159] This is proved by the increasing number of human rights-based climate cases being brought to courts across the world.[160] In this sense, although still at an embryonic stage, 'human rights law … [provides] an 'accountability framework for damages associated to climate change',[161] which can facilitate redress to the victims of climate-related human rights violations. The various human rights treaty bodies are also supplemented and informed by a host of international human rights mechanisms, including the special procedures of the Human Rights Council. The appointment of the role of the Special Rapporteur on Human Rights and the Environment shows a human rights approach to the climate change can contribute to address the problem by advancing understanding, *inter alia*, on the relationship between human rights and climate change, its implications, and the states' obligations thereby.

Third, human rights provide a forum of discussion and point of cohesion between different fields in relation to the multifaceted challenge of climate change. In that sense, human rights help to break down silos between fields, which, particularly in the context of climate change, can be unnecessary and even obstructive. For example, the wide recognition of the right to a healthy

[158] Atapattu (n 156).
[159] Obokata (n 157) 115.
[160] See Chapter 4, for a detailed analysis of the human rights-based climate litigation.
[161] Franziska Knur, 'The United Nations Human Rights-Based Approach to Climate Change' in Sabine von Schorlemer and Sylvia Maus, *Climate Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity* (Peter Lawn AG 2014) at 47.

environment, despite criticism for its ambiguity regarding its content and implications, provides a strong point of connection between human rights, the environment, and the context of climate change. The wide recognition of the right to a healthy environment in national legislation provides an opportunity to address climate change comprehensively.

Importantly, from a long-term perspective, increasing synergies between the human rights and environmental legal fields can provide an opportunity to gradually incorporate an ecocentric dimension to anthropocentric human rights. This does not imply a complete break with the innate anthropocentric approach of human rights to nature, but it nuances it in a way to help rethinking of the human y human rights relational approach to nature, which is also a central dimension of the problem of climate change. Whether climate change will allow time for human rights and human rights operators to 'digest' that transition is a different matter.

However, despite its benefits, human rights application in the context of climate change poses several technical challenges. Issues of causation, attribution, extratemporality and extraterritoriality are obstacles that human rights will have to surmount in order to be 'fit' to be applied in the context of climate change. Moreover, human rights, as a state-centric framework, excludes to a significant extent from their radar of action, at least in terms of legally binding obligations, crucial actors in the context of climate change, namely corporations. Corporations remain largely unimpacted and unregulated by international human rights law, which appears to be unable to address corporate climate-sensitive activity.

5. Conclusion

This chapter zoomed-in on the relationship between human rights and climate change. It presented the human rights that are adversely affected by climate change and explored how climate change violates and threatens a number of rights, including the rights to life, right to the highest attainable standard of health, right to adequate housing, right to adequate food, and right to water of millions worldwide because of the effects of climate change. It demonstrated that these rights are required for a life, lived with dignity and, as such, are indivisible and interdependent. The chapter also examined the collective rights, including the rights to self-determination, of indigenous peoples,

participatory rights, and the right to a healthy environment, which are put at risk due to climate change.

Undoubtedly, climate change impacts disproportionally the rights of the most vulnerable worldwide who, paradoxically, have contributed the least to the problem and, yet feel first and worst the impacts of climate change. In addition, climate change measures aimed to combat climate change can also adversely impact human rights, having a counterproductive effect in climate action. This chapter discussed how mitigation and adaptation measures put in place have the potential to endanger fundamental human rights, particularly of those most disadvantaged in societies, such as indigenous peoples affected by climate measures. As a way to prevent this, human rights norms should comprehensively inform the design and implementation of states' climate actions, as provided for in the Paris Agreement. Finally, this chapter also identified some of the significant benefits of applying a human rights approach in the context of climate change. Certainly, human rights help in understanding climate change from a human perspective, which, recognised or not, implies an environmental dimension too. However, as long as the environment continues being portrayed in legal systems as instrumental to capitalist interests of humans and, particularly, 'quasi-human' corporations, human rights can offer little to tackle climate change in a meaningful way, as will be discussed in the next chapter.

CHAPTER 3:

Corporations, Climate Change and Human Rights

1. Introduction

It could be said that whilst there is a relatively recent but well-recognised relationship between human rights and climate change, there is - at least within traditional multilateral climate governance institutions - a less well-established relationship between climate change and corporate behaviour. As previously discussed, climate change is an urgent and multi-faceted problem that, as such, requires urgent responses from different fields (including human rights) and from all actors of society. Corporations, as main contributors of carbon emissions leading to climate change, have a central role in global efforts to dramatically reduce emissions in a way to limit global temperature increase above the 1.5°C maximum target of the Paris Agreement. Therefore, far-reaching climate action should address disproportional corporate emitting activity as a central measure to tackle climate change. A number of scientific reports provide comprehensive evidence of the compelling emissions' contribution of corporations - especially from those in the fossil fuels sector[1]- to climate change and its acceleration in the last decades. According to 'The Carbon Majors Database':

> Fossil fuels are the largest source of anthropogenic greenhouse gas emissions in the world. The fossil fuel industry and its products accounted for 91% of global industrial greenhouse gases ['emissions'] in 2015, and about 70% of all anthropogenic greenhouse gases emissions. If the trend in fossil fuel extraction continues over the next 28 years as it has over the previous 28, then global average temperatures would be on course to rise around 4ºC above preindustrial levels by the end of the century. This would entail substantial species extinction, large risks

[1] 'Since [1988], the fossil fuel industry has doubled its contribution to global warming by emitting as much greenhouse gas in 28 years as in the 237 years between 1988 and the birth of the industrial revolution. Since 1988, more than half of global industrial GHGs can be traced to just 25 corporate and state producers. Paul Griffin, 'The Carbon Majors Database: CDP Carbon Majors Report 2017*'* (*Climate Accountability Institute*, 2017) at 2. <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1499431371> accessed 30 June 2020.

> of regional and global food scarcity, and could cross multiple tipping points in the Earth's climate system, leading to even more severe consequences.[2]

Accordingly, any effort oriented to significantly limit the impacts of climate change should target corporate activity in the first place. Nevertheless, despite the increasing evidence of the catastrophic effects of climate change upon the environment and people across the world and the key role of corporations therein, corporate actors have continued to disproportionally contribute to global carbon emissions leading to climate change. Indeed, only 100 companies were responsible for more than 70% of the global greenhouse gases emissions between 1988 and 2015.[3] Yet, establishing accountability of corporations for their disproportional emitting activity contributing to climate change leading to human rights and environmental impacts has hardly been put at the centre of climate mitigation efforts. As Simons notes, '[while] it may be possible to discern at least a rhetorical willingness among powerful corporate actors to consider binding legal obligations to address some of the environmental impacts of commerce that contribute to climate change, any discussion of binding international human rights obligations still meets with strong resistance, if not vehement opposition'.[4] In light of the urgent need of far-reaching and effective mechanisms to tackle climate change, establishing corporate legal accountability can help not only to determine the responsibility of corporations for human rights harms resulting from climate change, but may also help to deter, at least to some extent, dangerous 'business as usual' corporate emitting activity of contributing to climate change.

This chapter therefore focuses on accountability gaps as legal challenge - and not merely as a moral or economic fact - where corporate human rights obligations are not enforceable. In this vein, this chapter attempts to explain why the contribution of human rights law in limiting climate change by addressing corporate activity, as the main source of the problem, is so limited. To that end, section two of this chapter interrogates why corporations enjoy a benevolent regulatory framework that fails to hold them accountable for harmful emitting activities contributing to climate change, which in turn facilitates exploitation of nature,

[2] ibid, at 7.

[3] 'The highest emitting companies since 1988 that are investor-owned include: ExxonMobil, Shell, BP, Chevron, Peabody, Total, and BHP Billiton. Key state-owned companies include Saudi Aramco, Gazprom, National Iranian Oil, Coal India, Pemex, and CNPC (PetroChina). Coal emissions from China are represented by the state, in which key state-owned producers include Shenhua Group, Datong Coal Mine Group, and China National Coal Group.' ibid, at 8.

[4] Penelope Simons, 'International law's invisible hand and the future of corporate accountability for violations of human rights' (2012) 3(1) Journal of Human Rights and the Environment 5, 1.

particularly, in the Third World. In section three, this chapter discusses the role of corporations in the global problem of climate change from a TWAIL perspective in order to understand their privileged position as central capitalist agents in achieving unlimited economic growth, all the while contributing disproportionately to climate change. Subsequently, in section four, this chapter explores some of the reasons behind the difficulty to establish corporate legal accountability, including: the state-centrism of human rights; the elusive corporate form, which facilitates corporations to escape liability; the corporate power to influence efforts (or lack thereof) to hold them accountable; and the often advantageous position of corporations vis-à-vis host states, particularly in the Third World. In section five, this chapter discusses the attempts to establish legal instruments regulating corporate activity from a human rights perspective, which are mainly voluntary-based and, as such, are largely ineffective in limiting corporate emitting activity. Finally, this chapter discusses some hard-law attempts to regulate human rights corporate behaviour. Overall, this chapter argues that the flexible approach of human rights to corporate regulation, helps to legitimise the exploitation of nature which is at the core of the climate crisis and, at the same time, perpetuate (neo)colonial relationships between powerful states and corporations and the Third World. Despite its general benefits, soft law regulation does not help but rather may contribute to corporate impunity for human rights and environmental harms in the context of climate change. It concludes that, due to its cross-cutting and multi-faceted character, climate change provides a unique and unprecedented global scenario that pushes for changes in the way that (human rights) law regulates corporate (emitting) behaviour. International law and, indeed, international human rights law are not exempt from the climate's emergency call for radical measures to tackle climate change and the need for evolution in their relational approach to nature. In this sense, as this thesis argues, the urgency and uniqueness of climate change could be a decisive factor in generating much needed international human rights law reform and in overcoming some of its structural weaknesses.

2. The Problem: Corporate (Un)accountability

In light of the increasingly frequent and severe impacts of climate change upon human rights and the environment, to which corporations significantly contribute, establishing corporate legal accountability for the impacts of the actions of corporations disproportionally contributing with carbon emissions to climate change is a matter of urgency. According to Schedler,

Diamond and Plattner, the concept of accountability 'implies subjecting the power to the threat of sanctions; obliging it to be exercised in transparent ways; and forcing it to justify its acts'.[5] They identify two dimensions of accountability: enforceability and answerability. Answerability 'indicates that being accountable to somebody implies the obligation to respond to nasty questions.'[6] On the other hand, enforceability 'implies the idea that accounting actors do not just 'call into question' but also eventually 'punish' improper behaviour and, accordingly, that accountable persons not only tell what they have done and why, but also bear the consequences for it, including eventual negative sanctions'.[7]

In the context of the climate crisis, the lack of corporate legal accountability entails the absence of means to enforce obligations to corporations. Recognising the factors involved in the lack of effective mechanisms to establish corporate legal accountability could thus help at least to partly understand how the planet as a whole reached the current situation of nearly climate collapse. In this sense, seeking regulatory paths to hold corporations accountable for emissions contributing to climate change, particularly those in the extractive sector, could work as a disincentive to ongoing and future disproportional corporate emission activity and, in turn, gradually contribute to climate mitigation.

At the same time, examining some of the reasons for the absence, of corporate accountability can assist on understanding how the structures of power embedded in the system of international law and institutions are reflected, with particular attention to the international climate change and human rights regimes. As Newell points out, 'accountability is essentially about power: the division of rights and responsibilities between state, market and civil society actors and the means for realizing these'.[8] In this vein, the privileged legal position of corporations as powerful market actors within the structures of power that distribute rights and obligations, as well as the consequences thereof should be scrutinised. This is because as Newell notes, a 'framework of power allows us to raise critical questions about who is served by particular (global) governance arrangements: on whose behalf is power exercised'.[9] Accordingly, scrutinising (some of) the factors underpinning the lack of corporate accountability helps also to identify how the

[5] Andreas Schedler, Larry Jay Diamond and Marc Plattner, *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO Lynne Rienner 1999) at 14.
[6] ibid.
[7] ibid, 15.
[8] Peter Newell, 'Civil Society, Corporate Accountability and the Politics of Climate Change', (2008) 8(3) Global Environmental Politics 122, 126.
[9] ibid.

structures of power serve particular capitalist interests personified by the corporate actor in the context of climate change.

It is hence essential to understand the relationships amongst the corporation, climate change and human rights, in such a way as to identify channels to develop corporate legal accountability for human rights impacts related to climate change. These relationships are mainly based on the fact that emissions released from corporate activity disproportionally contribute to human-induced climate change, whose effects in turn adversely impinge on numerous recognised human rights, protected under international human rights law. This means that corporate legal accountability in the context of climate change should address corporate action or series of actions that generate emissions leading to the effect of climate change. It should thus be borne in mind that 'accountability is not an end in itself. Rather it is a means to an end and requires, therefore, that the end be specified'.[10]

Article 2 of the United Nations Framework Convention on Climate Change states the end of the international regime of climate governance, namely 'to achieve …stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[11] However, there is a clear discrepancy between this objective and the lack of mechanisms put in place to address the main obstacle to achieve that end: corporate emitting activity. As Newell puts it, 'governance gaps and accountability deficits, especially with regard to the central, but often unregulated, role of market actors in the governance of climate change, undermine the effectiveness of global responses to this pressing threat'.[12] Therefore, the lack of weakness of a legal accountability framework oriented to regulate climate-sensitive corporate behaviour blatantly undermines global efforts to tackle climate change, which so far have been ineffective to meaningfully address the main source of the problem. Or, put differently, corporate emitting activity, to a great extent, leads to climate change, and the lack of means to hold corporations legally accountable for their actions results in harmful corporate behaviour remaining unaddressed, which in turn maintains the problem of disproportional corporate emissions leading to climate

[10] ibid, 129.
[11] United Nations Framework Convention on Climate Change [UNFCCC], adopted 9 May 1992 (entered into force 21 March 1994), Article 2.
[12] Newell (n 8) 129.

change and its consequential harmful impacts upon human rights and the environment as a whole.

3. Corporate (Un)accountability from a TWAIL Perspective

In TWAIL accounts, it is well established that international legal and institutional frameworks facilitate the means to perpetuate neo-colonial forms of dominance over the Third World, which facilitate the corporate aim of generating unlimited economic profit, even at the cost of activities contributing to climate change, and it's devastating impacts worldwide, particularly in the Third World. Indeed, as Simons, notes, '[international] law has been used progressively since colonial times to protect and facilitate foreign investment and trade activity while at the same time undermining the ability of Third World states to control and regulate transnational corporate actors'.[13] In the context of the climate crisis, the TWAIL claim of neocolonialism is clearly manifested. It holds that the 'new' international economic order to which the newly sovereign states must integrate themselves has conveniently established a system of international laws and institutions that, despite *formal* sovereignty and independence, helps to maintain the dominant paradigm of colonialism. As Anghie argues:

> … international law and institutions nevertheless proclaim themselves intent on bridging that division [between advanced and backward states], on promoting global equality and justice. This … [is] inherently problematic because it is precisely the international system and institutions that exacerbate, if not create, the problem that they ostensibly see to resolve.[14]

Brought to the realm of climate change, this would imply that international laws and institutions conforming the system of international climate governance, far from tackling the main sources of the problem of climate change – for instance, by regulating highly emitting activities of states and corporations – they, to a great extent, promote the main sources of the problem they seek to resolve, perpetuating thereby neocolonial relationships between Third World and wealthy states and corporations. For instance, the effectiveness of the implementation of the 'flexibility

[13] Simons (n 4) 35.

[14] Anthony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) New York University Journal of International Law & Politics, 513, 627.

mechanisms', under the Kyoto Protocol,[15] have been criticised as 'dubious' because 'many of these claimed reductions do not represent "real emission" reductions … given [that] these offsets can be purchased and used to legitimate further greenhouse gas emissions in the North'.[16]

Such systemic asymmetry endorsed by neoliberal legal and institutional frameworks enables thus favourable soft regulation of corporate activity, which is at the heart of the problem of climate change and its human rights and environmental consequences. As a result, the lack of effective mechanisms to establish corporate legal accountability authorised by the international legal and institutional system, including but not limited to the international regime of climate governance, reflects the normality of the *status quo*, which protects the interests of powerful states and corporations, and legitimises the exploitation of nature in the name of economic growth, particularly in the Third World. Indeed, as Anghie reflects, the 'non-European sovereignty suffered – and continues to suffer – a particular vulnerability that arises from the system of economic power into which it was integrated even as it became sovereign'.[17] In this context, the economic essence of the problem of climate change and its unviability becomes evident.

Certainly, the climate crisis evidences that the capitalist system pursuing unlimited economic growth based on an extractive fossil fuels economy is no longer viable. Clearly, direct legal action to control corporate activity that is causing climate change is a priority. As Humphreys suggests, 'in order to keep more oil in the ground, as we must, concrete drastic action is needed: banning it; phasing it out; putting a moratorium on exploration; fining overproduction; criminalising it'.[18] However, meaningful climate action entails a drastic shift in the international legal and institutional apparatus, which would undermine the very structures over which it has been built. As Simons interrogates, one might ask whether international law is an appropriate means by which to address this imbalance and to protect individuals effectively from the

[15] See Kyoto Protocol to the United Nations Framework Convention on Climate Change [Kyoto Protocol], UN Doc. FCCC/CP/1997/7/Add.1, adopted 11 December 1997 (in force 16 February 2005), Article 17 (carbon trading), Article 6 (joint implementation) and Article 12 (Clean Development Mechanism).

[16] Julia Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33 Windsor Y. B. Access Just 129, 134.

[17] Anghie (n 14) 632.

[18] Stephen Humphreys, 'Climate change poses and existential threat to human rights', (*The Guardian*, 16 July 2015) https://www.opendemocracy.net/openglobalrights/stephen-humphreys/climate-change-highlights-fragility-of-human-rights-norms> accessed 30 June 2020.

activities of corporate actors.[19] Yet, climate change represents a unique and cross-cutting global challenge that calls upon unprecedented action, including in international (human rights) law. Even if reforms are resisted at first, it may only be a matter of time before initial steps involving radical measures targeting corporate activity are taken by governments. But there is no time in the context of climate crisis. As Mickelson reflects, governments, as well as industry and individuals, 'have resisted the unpalatable prospect of re-evaluating many of our assumptions at a fundamental level'.[20] However, the 'disastrous implications of maintaining the status quo are invoked with increasing frequency and urgency. The ramifications are increasingly difficult to ignore'.[21] Indeed, the absence of mechanisms to establish corporate legal accountability is some of the main reasons behind the *status quo*, which will be discussed in the next section.

4. Unpacking the Lack of Corporate Accountability

This section seeks to unfold some of the reasons explaining why there are limited or no means to establish corporate legal accountability, particularly in relation to human rights harms, resulting from climate change. With the aim of understanding the limits of human rights in the context of climate change by addressing the key aspect of the problem of climate change, which is largely result of disproportional and extended release of carbon emissions associated in big part to corporate emitting activity, I point out to: the state-centric nature of human rights obligations; the elusive corporate form; the corporate power to influence efforts to hold them accountable for human rights harms; and the corporate position vis-à-vis Third World host states, as some of the main factors leading to the *status quo* of corporate (un)accountability.

4.1 The State-centric Nature of Human Rights

Since its emergence, human rights have been thought of as a state-centered field. International human rights law arose as a response from states to other states in order to avoid abuses against their own citizens. As Koskenniemi notes, the Universal Declaration of Human Rights was 'written as part of the establishment of a new system of global peace-making in the aftermath

[19] Simons (n 4) 40.
[20] Karin Mickelson, 'Beyond a Politics of the Possible? South-North Relations and Climate Justice' (2009) 10(2) Melbourne Journal of International Law 411, 422.
[21] ibid.

of the horrors of the Second World War'.[22] In that context, human rights were developed on the basis of a vertical and bilateral structure composed by the state, as 'guarantor' of human rights (the duty bearer), and the individual as the 'recipient' of human rights (the rights holders). However, 'the relationship between the state and the individual under international human rights law is non-reciprocal in character'.[23] As Karavias explains, 'the State, as the traditional bearer of obligations, has no claim to human rights protection. Inversely, individuals, as the exclusive rights holders, have no human rights obligations'.[24] At the same time, states play a dual role in relation to their human rights obligations towards individuals. On the one hand, states can play a positive or active role where they are obliged to take 'positive' actions to guarantee individuals' rights. And, on the other hand, states can also play a negative or passive role where they are required to refrain from actions that impinge on the ability of individuals to enjoy a human right.[25]

In theory, according to the existing human rights framework, corporations are excluded from that vertical relationship between duty bearers (states) and rights holders (individuals), whereby the first have duties to protect, respect and fulfil obligations with respect to the latter. Accordingly, corporate actors are not part of this 'legal relationship between the human rights obligor and an individual under international law [which] is bilateral in nature'.[26] This bilateral scheme would imply that, at least in principle, corporations are technically unable to hold human rights obligations. Karavias, in this respect points out that obligations under international law, notwithstanding their source, address 'in principle the conduct of sovereign States. Lack of sovereignty meant lack of capacity to bear obligations'.[27] However, he also notes that corporate activity can interfere with human rights and such interference can trigger 'the responsibility of the state for breaches of its positive obligations'.[28] Accordingly, the state-centred nature of international human rights law strengthens the notion that corporations have only indirect human rights obligations. This is because states are deemed primary holders of

[22] Martti Koskenniemi, 'Foreword: History of human rights as political intervention in the present' in Pamela Slotte and Miia Halme-Tuomisaari (eds) *Revisiting the Origins of Human Rights* (Cambridge University Press 2015) xiii.
[23] Markos Karavias, *Corporate Obligations under International Law* (Oxford Scholarship Online 2014) at 177.
[24] ibid.
[25] In delimiting the scope of potential human rights obligations, Karavias notes that: [conceptually], 'this obligation evokes a duty of omission and therefore overlaps with what has traditionally been perceived as a 'negative' right'. Ibid, 168.
[26] ibid, 176.
[27] ibid, 164.
[28] ibid, 166.

human rights obligations towards individuals, regardless of the gradual (yet limited) acknowledgement of corporate obligations under international human rights law. As Karavias observes with respect to establishing corporate human rights obligations, the 'establishment of one or more human rights obligations binding upon the corporation results in the elevation of the corporation to the status of an obligor under international human rights law'.[29] Certainly, the establishment of corporate obligations would 'give rise to a relationship between the individual as the human rights beneficiary and the corporation as the bearer of the corresponding obligation'.[30] In this sense, the relationship between the corporation and the individual would thus 'essentially mirror that of the State. Thus, a corporation would owe an obligation to respect the right of an individual beneficiary, and this obligation would also operate in a bilateral non-reciprocal manner'.[31]

In consequence, determining corporate human rights obligations towards the goal of achieving corporate accountability for human rights harms, including those resulting from climate change impacts is problematic, at least conceptually. In words of Baxi, this is 'because the eminently state-centric human rights discourse extends primarily to state actors, and is thus not entirely open to translocation to the real world of trade, business and industry'.[32] Thus, establishing corporate legal accountability for human rights abuses would have to deal first – at least to some extent – with 'relaxing' the state-centrism of human rights in such a way that corporations, in a similar way to the state relationship vis-à-vis individuals, act as duty bearers under international human rights law, despite the state maintains its primary role as guarantor of human rights. This is reflected in some corporate human rights duties that are already recognised either explicitly or implicitly in some international law instruments, including human rights and environmental treaties.[33] For example, common Article 5.1 to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights states that: 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided

[29] ibid, 176-177.
[30] ibid.
[31] ibid, 196.
[32] Upendra Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 5 (1) Human Rights Law Review 1, 14.
[33] International Covenant on Civil and Political Rights, UN GenRes. 2200A (XXI), 16 December 1966 (entered into force 3 January 1976), and International Covenant on Civil and Political Rights, Res. 2200A (XXI), 16 December 1966 (entered into force 3 January 1976).

for in the present Covenant'. In a similar vein, other human rights treaties explicitly establish the application of their provisions to states and non-state actors, without leaving room for doubt on their applicability to corporations and the role of states in ensuring corporate observance of their provisions. For example, Article 2(e) of the Convention on the Elimination of All Forms of Discrimination Against Women requires states: 'To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'.[34] Yet, human rights instruments clearly establishing corporate obligations are limited as well as the enforceability mechanisms available. Therefore, corporate (un)accountability remains being a challenge to address harmful corporate activity contributing to the effect of climate change and its human rights and environmental implications. In a context of climate crisis, urgent state action should involve enacting national legislation aimed at implementing and enforcing international treaties involving corporate activity. This is a complex step for states, lacking institutional and legislative capacity as well as political will to adopt strict measures to prevent and sanction corporate human rights harms at the domestic level.

4.2 The Elusive Corporate Form

The multinational character of large corporations makes establishing corporate accountability problematic. Corporations are often registered within a home jurisdiction while operating at the same time through multiple branches either at home or abroad, and with different legal relationships between their multiple branches and the headquarters. Da Costa points out that multinational corporations 'have legal autonomy of their subsidiaries and affiliates from the parent corporation (each one is covered by the legal regime of the country where they are registered/incorporated). This gives MNCs considerable advantage'.[35] Indeed, the intricate network between parent corporations and its branches often regulated under different legal frameworks makes it difficult to determine the applicable law or jurisdiction when it comes to establishing corporate liability for misconduct in any of the places where they operate. This complexity makes the corporate form intrinsically elusive of liability mechanisms capable to establish corporate accountability for their wrongdoings. This is especially manifested in the

[34] Convention on the Elimination of All Forms of Discrimination of Women. Res. 34/180. 18 December 1979, (entered into force 3 September 1981), Article 2(e).
[35] Karen Da Costa, 'Corporate accountability in the Samarco chemical sludge disaster' (2017) 26(5) Disaster Prevention and Management 540, 545.

context of environmental and human rights harms perpetrated by corporations operating outside their home state, particularly in the Third World.[36]

Indeed, the elusive character of the corporate form helps to avoid their liability in cases of corporate harmful behaviour and, in fact, favours the existing lack of corporate accountability. This does not imply to say that the corporate form *per se* is responsible for corporate emissions disproportionally contributing to climate change; but rather, that the elusive corporate form provides the legal conditions facilitating unaccountability of corporations for the harmful consequences of their behaviour, especially when this occurs abroad. Blumberg, for instance, points out to the 'inherent limitations of the American legal system (and of other Western legal systems as well) in achieving corporate accountability on the international level and in effectively enforcing legal restraints on corporate behaviour abroad'.[37] He finds that these 'fundamental structural problems largely arise from the widespread use by American and other multinational parent corporations of foreign-owned subsidiary corporations to conduct the overseas business of the enterprise'.[38] Certainly, this practice puts additional difficulty to determine the liability of parent corporations for the wrongdoings of their subsidiaries abroad, resulting, in the worst case scenario, in corporate impunity.[39]

In the context of climate change, the lack of corporate accountability poses a major obstacle to deter potentially harmful corporate behaviour in the long term, given the significant emissions contribution from corporations. If the call from science to hold global temperatures below 1.5°C[40] (as per the highest goal of the Paris Agreement)[41] is seriously considered, the need to stop harmful corporate emitting behaviour, particularly in the fossil fuels extractive sector

[36] See, for example, on the mining sludge disaster caused by Samarco corporation in Brazil (2015), Da Costa, ibid, 540-552; and, on the Bhopal gas tragedy occurred in India (1984), see Eileen Wagner, 'Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations' (1991) 16(3) North Carolina Journal of International Law & Commercial Regulation 541-586.

[37] Phillip Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2001) 24(3) Hastings International & Comparative Law Review 297, 298.

[38] ibid.

[39] See, for example, Julio Prieto Mendez and Gabriela Espinoza Plua, 'A Binding Treaty on Corporate Responsibility: A Global Solution to Address the Problem of Corporate Impunity – Lessons learned from *Aguinda v. Chevron'* (2017)1(2) *Homa Publica* Human Rights and Business Centre 1.

[40] Intergovernmental Panel on Climate Change (IPCC) 'Global Warming of 1.5°C' (Special Report, 2018).

[41] Paris Agreement, UNFCCC Decision i/CP. 21, 'Adoption of the Paris Agreement' FCCCC/CP/201510/Add.1, 29 January 2016 (entered into force 4 November 2016), [hereinafter, Paris Agreement] article 2.

substantially contributing to global carbon emissions,[42] should be a matter of urgency. To that end, it is important to highlight the primary role of states (both home and host states) in developing mechanisms to hold corporations accountable through international and domestic regulatory frameworks for their high emissions levels leading to climate change, which adversely impact human rights and the environment worldwide.

However, the problem of corporate (un)accountability has a deeper dimension, as Blumberg further notes, 'the major source of the problem arises from the ancient concept of the corporate juridical entity that, particularly in the case of large public corporations, departs sharply from the economic reality of modern business enterprise'.[43] Accordingly, in order to overcome 'the limitations inherent in traditional concepts of entity law [which] present a major challenge to national corporation law and to international law',[44] it is essential to put in place innovative and non-traditional approaches to corporate accountability, particularly in relation to breaches of their human rights obligations. Otherwise, there is an imminent risk of continuing in the, climate-wise, 'business as usual mode', with foreseeable devastating consequences for the planet and its inhabitants.

4.3 Corporations' Position vis-à-vis Third World (host) States

Related to the elusive form of the corporate entity, another factor contributing to the lack of corporate accountability is the position of corporations as potential investors in relation to host states, keen to receive foreign investments, especially in the Third World. As Wagner puts it in respect to chemical corporations, 'Third World countries, out of a desperate need for hard currency, are trying hard to attract multinational chemical corporations to enter joint ventures.'[45] In a context in which foreign investment is seen as the door leading to the goal of economic development, which often leads (Third World) governments to downplay or disregard potentially harmful business activity. In this respect, Rajagopal observes how a 'standard repertoire of legal changes recommended through law and development initiatives' is initiated to facilitate such development and foreign investment, to the extent that, as he puts it, 'any changes deemed necessary in the Third World are now justified in the name of

[42] Matthew Taylor and Jonathan Watts, 'The polluter revealed the 20 firms behind a third of all carbon emissions' (*The Guardian,* 2019) <https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions> accessed 30 June 2020.
[43] Blumberg (n 37).
[44] ibid.
[45] Wagner (n 36) 541.

development'.[46] In this scenario, corporations hold an advantageous position vis-à-vis host states, where low-income states are willing to facilitate corporate investments, even despite potential internal opposition often resulting in human rights violations.[47] For instance, projects in the mining extractive sector, one of the most 'attractive' investment sectors in the Third World often go hand-in-hand with tensions between government authorities, supportive of foreign investments, and local communities opposing the mining project 'out of fear that if the project is allowed to continue, the local environment will suffer irreparable harm'.[48] Indeed, as Wagner notes, manufacturers are 'eager to set up their plants in relatively unregulated third world countries. These third world countries, delighted to have large multinational manufacturers located within their borders, are often willing to turn a blind regulatory eye to the multinationals' activities'.[49] It is thus not surprising that, under this scenario, national regulatory frameworks oriented to hold corporations accountable for environmental and human rights harms resulting from their activities, particularly in the Third World, sounds more like an utopia.

However, within the context of the climate crisis, Third World states may likely be increasingly under pressure to impose more stringent environmental and human rights requirements or constraints to corporate investors, which in turn would imply additional challenges to attract foreign investments. This because on the one hand, governments are expected to attract foreign investment to 'inject' cash flow into their economies and, on the other hand, they are obliged to protect human rights from potential harms by third parties' corporations. Indeed, the increasing impacts of climate change might gradually act as a reminder of the risks embedded in capitalist endeavours of at all cost economic growth first, even at the expense of the environment and its components. Yet, while the existing structural forces behind neoliberal economic laws and policies persist, host (Third World) states , will likely continue in the

[46] Balakrishnan Rajagopal, 'Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy' (2006) 27 Third World Quarterly 767, 779.

[47] For example, in June 2009, nearly 40 civilians, including indigenous peoples and Peruvian police forces died and dozens were injured as a result of the escalation of violence near Bagua, in the Peruvian Amazon region, during protests against two governmental decrees implementing a United States-Peru Free Trade Agreement. The decrees entailed the opening and use of ancestral indigenous lands by oil and gas extractive corporations. Protests included the blockading of highways and obstruction of the foreign companies' operations for almost two months by nearly 5000 natives belonging to 65 Amazon etnias. Jaime Cordero, 'Matanza de policías en una protesta indígena en Perú', (*El País*, 7 June 2009), <https://elpais.com/diario/2009/06/07/internacional/1244325608_850215.html> accessed 1 September 2020.

[48] Sara Seck, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2001) 3(1) Trade Law and Development 164, 171.

[49] Wagner (n 36) 575.

recurrent 'dilemma' of attracting foreign investments through, for example, lose regulatory frameworks, whereas home states of the parent corporation are unable to establish regulatory control over subsidiaries hosted abroad. As Da Costa frames the issue:

> A sort of dilemma in this context is that states seeking to host MNCs subsidiary companies try to lure them to come and operate in their territories (often with generous tax breaks, combined with minimal monitoring of human rights and environmental issues).[50] On the other hand, the domestic regulation of the parent company by its home state will normally not apply to its subsidiary companies abroad.[51]

These dynamics between corporate investors and host states, in addition, lead to ineffective environmental and social impact assessments to determine the viability of corporate projects; absent or weak legal and institutional frameworks regulating corporate activity in host states; corruption; among other domestic problems that add on to the disadvantaged position of Third World states vis-à-vis corporate investors.[52] Altogether these factors make the task of establishing corporate accountability for human rights harms complex. As Simons argues, 'powerful states have used international law and international institutions to create a globalised legal environment which protects and facilitates corporate activity',[53] which, in turn, can 'also [contribute] to the erosion of human rights governance capacity'.[54] This structural dysfunctionality of the international and institutional legal system has serious consequences for the environment worldwide, to which the realisation of human rights is inextricably connected and becomes increasingly evident in the context of climate change.

[50] Da Costa (n 35) *citing* Nicolás Zambrana Tévar, 'Shortcomings and disadvantages of existing legal mechanisms to hold multinational corporations accountable for human rights violations', (2012) 4(2) Cuadernos de Derecho Transnacional 398-410.
[51] Da Costa (n 35).
[52] See, for example Julia Anaf, Fran Baum, Mathew Fisher, and Sharon Friel, 'Civil society action against transnational corporations: implications for health promotion' (2020) 35(4) Health Promotion International 877.
[53] Simons (n 4) 12.
[54] ibid, 29.

4.4 Corporations: Powerful Non-state Actors

Another factor that adds on to the lack of effective mechanisms to establish corporate accountability is the economic power and influence of the corporate 'quasi-person', which, in fact, can be comparable to that of states. As Karavias notes:

> On the one hand, corporate entities have managed to muster enough economic power to dwarf the power of certain States.[55] On the other hand, apart from the quantitative aspect of economic capacity, corporations have begun to exercise functions comparable to those of the State… Corporations have entered 'what used to be in many countries "reserved" state businesses in the "public service fields".[56]

This level of empowerment that goes beyond the economic, and is comparable to state power, has been granted to corporations by international law and institutions.[57] As a consequence, the 'rights and protections enjoyed by these powerful actors were created by international law and facilitated by the interventions of international financial institutions and these 'rights are often enforceable in international arbitral tribunals'.[58]

However, when we look at the other side of the coin, that is, at the level of duties acquired by empowered corporations, it does not minimally correspond with those of the state, for instance, in relation to human rights obligations. Corporate actors have consistently opposed attempts of developing legally binding human rights obligations applicable to them. As Simons observes, '[this] resistance has characterised the debate on business and human rights for decades'.[59] Therefore, it could be said that, corporations — and the neoliberal system of laws and institutions supporting them — have managed to construct a (super) legal person with powers alike states, but without their legally binding duties, such as human rights obligations. This privileged position of corporations is endorsed by international legal and institutional

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[55] Karavias (n 23) 2 *citing* Sarah Joseph *Corporations and Transnational Human Rights Litigation* (Oxford, Portland, Oregon, Hart Publishing 2004) 1; and August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human* Rights (Oxford University Press 2005) 37.

[56] Karavias, ibid.

[57] See, for example, Michael Ogwezzy, 'Globalisation: Multinational Corporations, State Sovereignty and Human Rights Challenges in the 21st Century' (2015) 1 Sri Lanka Journal of International & Comparative Law 111.

[58] Simons (n 4) 12.

[59] ibid.

frameworks that enable asymmetrical relations of power; and whose exercise can have deleterious implications for human rights and the environment, particularly, in the Third World. Certainly, while 'national governments, even the most powerful among them, face growing difficulty in controlling the activities of business … The issue, rather, is what significance it has for the emergence of a global system of power'.[60] In particular, it is important to determine what the implications of corporate power are for Third World states as well as for human rights and the environment. As Simons points out, 'it is the Third World states which face the greatest challenges … [as] a significant proportion of corporate violations of human rights or complicity in such abuses take place within these states'.[61] The Report of the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises found the gap in the governance of corporations to lie at the heart of the problem:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[62]

Indeed, globalization provides the perfect scenario for the neoliberal forces to work at their best, meaning that the quintessential capitalist corporate person is able to maximises economic growth while adjusting discretionally human rights, and environmental considerations, particularly in the Third World. According to Chimni, '[i]n the era of globalization, the reality of dominance is best conceptualized as a more stealthy, complex and cumulative process. A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favour of transnational capital and powerful States'.[63]

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[60] Susan Marks, 'Empire's Law' (2003) 10 (1) Indiana Journal of Global Legal Studies 449, 461.

[61] Simons (n 4) 20.

[62] UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie,' UN Doc A/HRC/8/5/Add 2, 7 April 2008, para. 3.

[63] Buphinder Chimni (ed), 'Third World Approaches to International Law: A Manifesto' in Anthony Anghie, Karin Mickelson, and Obiera Chinedu Okafor (eds) *The Third World and International Order: Law Politics and Globalization* (Boston, Martinus Nijhoff Publishers 2003) 72.

In this context, corporate power has implied that their 'legal rights have been expanded significantly over the past generation. This has encouraged investment and trade flows, but it has also created instances of imbalances between firms and States that may be detrimental to human rights'.[64] In effect, the expansion of corporate privileges reaffirms the position of corporations in the international legal order and strengthens their power vis-à-vis (Third World) states, which results in an imbalance between corporate rights and their actual obligations, creating the conditions for dangerous corporate activity leading to climate change and its resulting impacts upon human rights and the environment.

All in all, the state-centeredness of human rights law, the elusive corporate form, its position vis-à-vis (host) states, and the corporate power are some of the factors that influence the existing lack of corporate legal accountability for human rights harms. Considering the climate crisis, this acquires additional relevance. Indeed, corporations have traditionally operated under a minimal international human rights framework, whereby 'soft law has been a principal default mechanism for connecting human rights and business in recent decades'.[65] The lack of effective mechanisms to ensure corporations' greater legal standing for non-compliance of human rights obligations and their enforceability not only undermines the realisation of human rights but also puts at risk the environment as it leaves at discretion of corporations to undertake a form of voluntary self-regulation and its actual extent.[66] In this scenario, the low regulation of corporate activity, particularly in the Third World and the absence of mechanisms to ensure accountability of corporation for misconduct, provides the pervasive conditions for potential human rights and environmental harms, configurating thereby neocolonial relationships. As a result, a plethora of attempts to establish corporate human rights obligations, either through 'soft' or 'hard' law instruments largely considered within the UN system and outside it, have proliferated, yet with little success, as will be discussed in the next section.

[64] UN Human Rights Council (n 62) para. 12.

[65] Justine Nolan, 'The Corporate Responsibility to Respect Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) at 1.

[66] As a result, states and corporations often resort to international arbitration to resolve legal disputes, commonly relating to foreign trade and international contracts. For examples on international arbitration, see Julian Lew, 'Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards', (Oceana Publications 1978).

5. Corporate Human Rights Obligations: is 'Soft-law' enough?

The absence of effective means to establish corporate legal accountability reflects the disparity between the rights and obligations of corporations. In the last decade, there have been several initiatives from intergovernmental organisations as well as from industry to develop norms that regulate corporate human rights activity, which so far have mainly been based on voluntary corporate commitments. Early attempts to regulate business activity and human rights started in the 1970s. The Draft Code of Conduct on Transnational Corporations,[67] which emerged after nearly one decade of negotiations under the auspices of the UN, was one such early attempt. Although the Draft Code failed, largely because it was not welcomed within the industry sector,[68] it included relevant provisions related to the protection of the environment, which, back then, would have signified a notable step towards addressing corporate activity with human rights and environmental implications. The Draft Code, for instance, provided that:

> Transnational corporations shall/should carry out their activities in accordance with national laws, regulations, administrative practices, and policies relating to the preservation of the environment of the countries in which they operate, and with due regard to relevant international standards. Transnational corporations shall/should, in performing their activities, take steps to protect the environment, and where damaged to [restore it to the extent appropriate and feasible] [rehabilitate it] …[69]

This provision emphasises the environmental considerations that corporations should consider when operating abroad which, along with the Draft Code's provision on international cooperation — requiring that 'corporations…be prepared where appropriate to co-operate with international organisations in their efforts to develop and promote national and international standards for the protection of the environment'[70] — were a progressive attempt for its time.

[67] Draft UN Code of Conduct on Transnational Corporations, UN Doc. Resolution E/1990/94, 12 June 1990 [*Draft Code*].
[68] For details on this process, see Karl Sauvamt, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 The Journal of World Investment & Trade 11-87.
[69] Draft Code, para 41. For instance, the existence of this code would have timely helped to bring claims for remedies in cases of human rights harms and environmental damage resulting from corporate activity. This may have helped to support the claims for environmental reparation to the German company Samarco, which in 2015 caused a massive human rights and environmental tragedy in the Amazon region of Brazil. For details on the case, see, for example, Da Costa (n 35).
[70] Draft code (n 66) para. 43.

Considering the low or non-recognition of the relationship between human rights and the environment back then, the Draft Code provisions on the environment and international cooperation could have been an important initial step to address corporate responsibility in cases of human rights and environmental harms resulting from corporate activity in host states.[71]

In addition to the initiatives developed within the UN system, which were generally 'less intrusive' in corporate activity and, instead, sought to establish partnerships with them;[72] other international organisations also developed similar initiatives but taking a different approach. The International Labour Organisation (ILO) developed its Tripartite Declaration of Principles Concerning Multinational Enterprises and Socials Policies in 1977, which has subsequently been updated.[73] This Declaration connects the role of business and human rights with the environment and, with its update in 2017, it makes reference to important developments in the field of climate change such as the Paris Agreement.[74] In a similar way, the Organisation for Economic Cooperation and Development also developed a set of Guidelines for Multinational Enterprises,[75] however, unlike the ILO initiative, it dedicates a chapter to the protection of the environment based on international environmental legal instruments as well as private standards.[76]Altogether, these developments reflect the diversity in the role and approaches taken in the long process towards developing human rights norms regulating corporate activity. These developments have also included private and more specific initiatives oriented to regulate

[71] The Draft Code may have helped at least to identify corporate obligations for claims for remedies in cases of human rights harms and environmental damage resulting from corporate activity and Third World states. See, for example Dom Phillips, 'Samarco dam collapse: one year on Brazil's worst environmental disaster' (*The Guardian*, 15 October 2016) <https://www.theguardian.com/sustainable-business/2016/oct/15/samarco-dam-collapse-brazil-worst-environmental-disaster-bhp-billiton-vale-mining> accessed 30 June 2020.

[72] Since the 1990s the UN started adopting partnership agreements with the private sector. For an overview of the modalities of the UN engagements with the private sector, see Alicia Grant 'The United Nations and the Private Sector: Working Together for Development' (*The North-South Institute*, Policy Brief 2013) <http://www.nsi-ins.ca/wp-content/uploads/2013/11/2013-The-United-Nations-and-the-Private-Sector-Working-Together-for-Development-Policy-Brief2.pdf> accessed 30 June 2020. See also, United Nations Global Compact, 'Coming of Age: UN-Private Sector Collaboration since 2000' (*UN Global Compact*, Report 2010) <https://www.unglobalcompact.org/library/202> accessed 30 June 2020.

[73] ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Socials Policies' (5th edition, Geneva 2017) at 1.

[74] ibid, at 1.

[75] Organisation for Economic Cooperation and Development (OECD), 'Guidelines for Multinational Enterprises' (OECD Publishing 2011) <http://www.oecd.org/investment/mne/1922428.pdf> accessed 30 June 2020. See also, OECD 'Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (3rd edition, OECD Publishing 2016) <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf> accessed 30 June 2020.

[76] ibid, part I (VI).

corporate activity at geographical or sectorial level, which in turn reflect the engagement of specific industry sectors with the so-called issue of 'business and human rights'.[77]

Subsequently, the UN rebooted its efforts to regulate corporations through voluntary corporate commitments in the early 2000s with initiatives such as the UN Global Compact,[78] and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises.[79] The Global Compact, on the one hand, is a corporate-led initiative consisting of a set of guiding principles on different themes, including human rights and the environment. On the environment, for instance, the Global Compact provides that businesses 'should support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; and encourage the development and diffusion of environmentally friendly technologies'.[80] Although this set of overarching principles would hardly amount to corporate legal accountability for environmental damage, or human rights harms, they provide legal language, through the 'precautionary' approach and environmental 'responsibility', which can help as a basis of claims seeking remedies for environmental or human rights harms. The Norms on the Responsibilities of Transnational Corporations, on the other hand, were adopted unanimously by the UN Sub-Commission on the Promotion and Protection of Human Rights.

However, the UN Commission on Human Rights only noted it as a draft proposal with no legal standing.[81] Yet, the Draft Norms constituted an important step towards the regulation of human rights corporate activity. They made express recognition of the potential harmful impacts on human rights and the environment of business operations;[82] and made clear linkages between international and national environmental law to this end.[83] Both initiatives, despite galvanising

[77] See, for example, The Sullivan Principles, A Code of Conduct of US Companies Operating in South Africa (1977); or, The Mac Bride Principles (1984), to regulate US firms operating in North Ireland.

[78] UN Global Compact (2000) <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 30 June 2020.

[79] UN Sub-Commission on the Promotion and Protection of Human Rights, Working Group, 'Draft Norms on the Responsibilities of the Transnational Corporations and Other Business Enterprises with Regard to Human Rights,' [hereinafter, *Draft Norms*]. UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003.

[80] Global Compact (n 68) Principles 7, 8 and 9.

[81] UN Sub-Commission on the Promotion and Protection of Human Rights, 'Draft report of the Sub-Commission on the Promotion and Protection of Human Rights', Resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11, 13 August 2003.

[82] The Preamble of the Draft Norms provided: '*Noting* that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities'. See Draft Norms (n 79) Preamble.

[83] In Section G the Draft Norms state that: 'Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant

multilateral and private efforts to integrate rules applicable to corporate activity on human rights, environment protection, labour rights, among other themes, lacked capacity to be enforced. Particularly, the Draft Norms, despite its innovative and comprehensive approach in dealing with the contentious issue of 'business and human rights' through something more than the 'classical' approach based on voluntary commitments, they proved the dominant reluctance from states and corporations to 'share' human rights obligations.[84]

More recently, one of the most renowned developments in the debate on 'business and human rights' is the UN Guiding Principles on Business and Human Rights,[85] issued in 2011 by the UN Special Representative on the Issue of Human Rights, Transnational Corporations and Other Business Enterprises (SRSG).[86] The Guiding Principles is a soft-law framework on 'business and human rights' grounded on three pillars: the state duty to protect (Pillar I), the corporate responsibility to respect (Pillar II), and the access to remedy (Pillar III). Contrary to previous soft-law attempts to regulate human rights-related corporate behaviour, at difference of the Draft Norms, the Guiding Principles were endorsed by the UN Human Rights Commission,[87] which somehow granted the Guiding Principles with 'extra' authority as a soft-law instrument. The long awaited Guiding Principles were thus expected to be an operational instrument that would clarify the content of corporate human rights obligations.[88] However, although the Guiding Principles received 'wide praise from business leaders and many non-governmental organisations', they have also been criticised as 'too weak'.[89] As Nolan puts it, the intended practicality of the Guiding Principles 'has resulted in the extension of a consensual regime of softly developed regulation that encourages but does not require (in a legally binding

international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development', ibid, para. 14.

[84] For a detailed analysis of the *Draft Norms*, see Pini Pavel Miretski and Sascha Dominik Bachmann, 'The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights": A Requiem' (2012) 17 (1) Deakin Law Review 5-41.

[85] Office of the UN High Commissioner on Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (OHCHR, 2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 30 June 2020 [hereinafter, *Guiding Principles*].

[86] Upon request of the UN Human Rights Commission (UN Doc. E/CN.4/RES/2005/69, from 15 April 2005), the UN Secretary-General appointed Professor John Ruggie as Special Representative on Issue of Human Rights, Transnational Corporations and Other Business Enterprises, UN Doc. SGA/A/934, 28 July 2005.

[87] UN Human Rights Council, A/HRC/RES/17/4, 16 June 2011.

[88] Steven Ratner, 'Introduction to the Symposium on Soft and Hard Law on Business and Human Rights' (2020) 114 American Journal of International Law 163.

[89] ibid.

sense) corporations to respect human rights'.[90] Yet, the Guiding Principles provide a set of norms that corporations are due to observe to respect human rights, which include provisions particularly relevant in the context of climate change, such as, for example, the principle of 'human rights due diligence'.[91]

In the context of the climate crisis, the principle of due diligence is key to legally grounding the duty of corporations to take steps to reduce their emissions levels contributing to climate change. The Guiding Principles also recognise the 'independent' existence and application of human rights obligations to states and corporations;[92] and, consequently, recognise that these should be observed by states *and* corporations independently. This recognition is important because it explicitly stipulates that this provision is not exclusive in such a way that its compliance, either by States or corporations, does not exclude the other of observing its human rights obligation.

In relation to human rights linked to the environment, the Guiding Principles, as part of the first pillar – the state duty to protect – recognise that the 'failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice'.[93] While this clearly points out to a number of areas where the human rights obligations of states apply unambiguously, such as property and labour laws, it should also be implied to extend to the obligation to regulate corporate emissions. The context of climate change provides a scenario where the applicability of the General Principles could be materialised and its effectiveness 'as an authoritative instrument of soft-law'[94] put to the test. In this sense, the uniqueness of climate change as an urgent problem that requires emergency-like responses can accelerate or facilitate their 'maturity' as law and, in turn, as a legally binding instrument capable of eventually triggering corporate liability. As Orchard argues, 'a central property of soft-law as a norm-generating mechanism is its ability to contribute to the internalisation of new norms within states by becoming entrenched in domestic legislation. Internalisation increases norm robustness'.[95] This process of maturation of soft law norms may be accelerated in the context of climate change. In fact, the Guiding Principles are gaining

[90] Nolan (n 65) 154-155.
[91] Guiding Principles (n 85) Principle 17.
[92] ibid.
[93] ibid, Principle 3 (Commentary).
[94] Nolan (n 65) 159.
[95] Phil Orchard, 'Protection of internally displaced persons: soft law as a norm-generating mechanism' (2010) 36 (2) Review of International Studies 281, 286.

presence in climate change debates.[96] Accordingly, in connection with Principles 18 and 19 of the Guiding Principles, the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, endorsed the Principles, holding that:

> Business enterprises should conduct human rights impact assessments in accordance with the Guiding Principles on Business and Human Rights, which provide that businesses 'should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships', include 'meaningful consultation with potentially affected groups and other relevant stakeholders'.[97]

The context of climate change indeed can potentially contribute to the 'internalisation' of the Guiding Principles in a way to gradually trigger their evolution, for example, in national climate legislation. Besides, the increasing recognition of the relationship between human rights and climate change may also accelerate the process of internalisation of soft-law on business and human rights. In other words, the application of the Guiding Principles in the context of climate change may facilitate their 'maturation' in law.

Orchard, in examining the evolutionary process of the normative guiding principles of internal displacement, asks: 'how is it possible to tell if these guiding principles, as soft law, have contributed to the formation of a new norm? How can we tell if the principles have contributed to a change in state practice that one would anticipate from a new norm?'.[98] Bringing these questions to the 'business and human rights' debate, how can we tell if the Guiding Principles have contributed to a change in corporate practice that one would anticipate from a new norm? Only time will conclusively tell. In the meantime, it is hoped that corporations would meticulously observe the Guiding Principles in their regular operations, 'even' as soft law. As Nolan points out, soft law can often be 'more attractive to the relevant stakeholders (in this case particularly to business and governments alike) because it may contain aspirational goals that aim for the best possible scenario with few constraints if such goals are not met'.[99]

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[96] Ratner (n 88) 164.

[97] UN Human Rights Council, '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/37/59, 24 January 2018, para. 22.

[98] Orchard (n 95) 284.

[99] Nolan (n 65) 142.

Yet, all in all, the practical effectiveness of the General Principles as the current *main* international normative framework regulating human rights business activity is very limited and does not necessarily contribute to establishing corporate legal accountability for human rights and environmental abuses – which, despite conceptual separations, in practice, go hand in hand.[100] Specifically, its non-legally binding character leaves ample room for corporations to elude responsibility for human rights and environmental abuses caused by its operations, especially in the Third World. Consequently, the legal comfort zone where corporations operate, far from helping to establish corporate legal accountability instead, can potentially contribute to corporate impunity, in cases of human rights violations and environmental damage caused by corporations. Certainly, as Clémençon summarizes, '[private] sector voluntarism has been invoked for the last two decades, yet it has never amounted to measurable shifts away from business-as-usual'.[101] The plethora of 'soft law' instruments arisen in the last decades proves the absence or insufficiency of mechanisms to hold corporations accountable for human rights abuses and environmentally harmful behaviour. Yet, there have also been some recent attempts to achieve a normative binding instrument addressing this problem, which will be discussed in the next sub-section.

6. Hard-law: the Key to Corporate Accountability?

There have been some initiatives oriented to addressing the limitations previously discussed and developing a stronger regulatory framework establishing human rights obligations of corporations. At the multilateral level, efforts to develop a legally binding instrument articulating corporate human rights obligations have been developed within the UN system for some years. In 2014, an Open-Ended Intergovernmental Working Group was established upon the initiative of a group of developing states (Ecuador, South Africa, Bolivia and Venezuela), which proposed to the Human Rights Council the elaboration of a legal instrument to regulate

[100] See, for example, some cases on human rights-environmental tragedies caused by corporate activity: on the Samarco case (Brazil, 2015), Da Costa (n 29); on the Bhopal case (India, 1984) Wagner (n 36); on the oil spill in the Niger delta (Nigeria, 2008-2009), Esther Hennchen, 'Royal Dutch Shell in Nigeria: Where Do Responsibilities End?' (2015) 129(1) Journal of Business Ethics 1-25.

[101] Raymond Clémençon, 'The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough' (2016) 25(1) Journal of Environment & Development 3, 19.

transnational corporations.[102] The Working Group was established with the mandate 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[103] However, the establishment of the Working Group generated opposition from 'home states of many multinationals, including the European Union and the United States'.[104] Despite opposition, some years after its establishment, the Working Group issued in 2018 the first draft of the future legally binding instrument called 'Zero Draft'.[105] It included relevant provisions for the protection of human rights from business activity. Notably, it included a provision on legal liability, which is addressed comprehensively. Article 10 of the Zero Draft provided that states 'shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of transnational character'.[106]

Further, the Zero Draft tackles the problem of corporate liability from its roots while still recognising the primary role of states in human rights protection, including from corporate activity. In a comprehensive manner, the Zero Draft provides for a wide application of liability, in which corporations and natural persons can be held liable for human rights abuses. For instance, Article 10 distinguishes between different types of liability - civil and criminal - and persons possible to be held liable, and expressly provides that one form of liability does not exempt liability from the other. It states that: '[civil] liability of legal persons shall be independent from any criminal procedure against that entity'.[107] In a similar way, it provides that: '[criminal] liability of legal persons shall be without prejudice to the criminal liability of the natural persons who have committed the offences'.[108] This wide approach to liability in a legally binding human rights instrument would provide a strong point of departure to establish corporate legal accountability in the context of climate change for human rights harms and, even environmental damage in connection to human rights, such as, for example, the right to a healthy environment. Moreover, Article 10 also includes the 'criminal liability of the natural

[102] UN Human Rights Council, Res. 26/9 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', UN Doc. A/HRC/RES/26/9, 14 July 2014 [hereinafter, *Working Group*].
[103] ibid, para. 1.
[104] Ratner (n 88) 165.
[105] UN Human Rights Council, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises - "Zero Draft",' 16 July 2018 < https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf> accessed 30 June 2020.
[106] ibid, Article 10.
[107] ibid, Article 10 (7).
[108] ibid, Article 10 (9).

persons who have committed offences,'[109] which entails the possibility of establishing individual liability of corporate decision-makers, such as Chief Executive Officers (CEOs).[110] In this way, the Zero Draft pens up the possibility of holding CEOs of large corporations in the extractive sector, responsible for at least one third of global emissions, criminally liable at domestic level. This adds to the existing debate on the individual responsibility for crimes related to the environment in the domain of international criminal justice.[111]

The Zero Draft also takes an innovative approach to prevention by requiring states to enact legislation where corporate operators 'shall undertake due diligence obligations throughout such business activities'.[112] This reaffirms the primary authority of the state to ensure corporations observe their obligation of due diligence. The Zero Draft also goes a step further by proactively providing a non-exhaustive list of states' obligations of due diligence.[113] Yet, the absence of developed states, home of most of the largest corporations to whom an eventual legally binding instrument would apply, undermines the treaty-making process itself and its prospects of success. Subsequently, in an effort to address some of the concerns raised, the Working Group produced a reviewed version of the Zero Draft in 2019, which maintained its original wide approach to legal liability.[114] Although the challenges of producing a legally binding instrument regulating the contested issue of 'business and human rights' will likely persist, efforts in that direction may already provide relevant insights for the regulation of corporate activity through national legislation.

Indeed, relatively recent legislative developments in France and Germany provide early insights for the regulation of corporate activity with human rights implications. Based on UN Guiding Principles on Business and Human Rights (General Principle 1 on the Duty to Protect), both countries have developed their National Action Plans. These 'are designed to assess the actual as well as the potential adverse human rights impacts with which a business entity may be involved'.[115] The National Action Plans are thus part of the national legislation implementing

[109] ibid.

[110] See, for example, Taylor and Watts (n 42).

[111] See, for example, Tara Smith, 'Why the International Criminal Court is right to focus on the environment?' (*The Conversation*, 23 September 2016) < https://theconversation.com/why-the-international-criminal-court-is-right-to-focus-on-the-environment-65920> accessed 30 June 2020.

[112] Zero Draft (n 105) Article 9.

[113] ibid, Article 9(2).

[114] Open-Ended Intergovernmental Working Group, Chairmanship Revised Draft, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', OEIGWG chairmanship revised draft, 16 July 2019.

[115] Guiding Principles (n 85) Principle 18 (Commentary).

the Guiding Principles. For its part, Germany enacted its Nation Action Plan in 2016.[116] Similarly to the Zero Draft proposal, 'the German National Action Plan incorporated a provision on corporate civil liability applicable to corporations and the principle of due diligence'.[117] The plan identifies the core elements of due diligence in the field of human rights[118] and establishes that due diligence applies 'to all enterprises, regardless of their size, sector …, operational context within a supply or chain an international dimension'.[119] By identifying the components embedding the principle of due diligence and its scope, the German provision takes a preventive approach of human rights harms resulting from corporate activity. Remarkably, the German provision also contemplates the use of remedies in cases of human rights harms resulting from corporate activity abroad.[120] In a similar move, France also sought to implement its soft-law obligations based on the Guiding Principles and enacted its *loi de vigilance* in 2017.[121] This legislative development on human rights and corporations has been 'considered to be the most advanced national instrument, which holds corporations responsible for human rights violations, due to its relatively high standard for due diligence, that can be penalized quite strongly'.[122] In its Principle 17, for instance the French law enshrines that 'business enterprises should carry out human rights due diligence',[123] and recognises its 'ongoing' character as 'human rights risks may change over time'.[124] In addition, on access to remedies, the French National Action Plan contemplates the possibility of 'extraterritorial jurisdiction of French criminal courts … [in cases of] offences committed abroad by French companies'.[125] This advancement in national legislation may reflect the first signs in direction towards establishing the liability of corporations for their wrongdoings, even when they operate through subsidiary companies abroad. In this way, the French provision provides avenues to hold corporations accountable for human rights harms, which could also have environmental implications, through national legislation.

[116] Federal Government of Germany 'Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020', adopted by the Federal Cabinet, 16 December 2016.
[117] Julia Bialek, 'Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?' (2019) 9 (3) Goettingen Journal of International Law 501, 511.
[118] These include a human rights statement, procedure for the identification of actual or potential adverse impacts on human rights, measures to ward off potentially adverse impacts, and review of the effectiveness of these measures, reporting and a grievance mechanism. Federal Government of Germany (n 116) 8.
[119] ibid, 7.
[120] ibid, 25.
[121] French Republic 'National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights', Law n° 2017-399,27 March 2017.
[122] Bialek (n 117).
[123] LOI n° 2017-399 (n123) Principle 17.
[124] ibid.
[125] ibid, 46.

Although relatively new, these developments constitute early examples showing that national legislation can provide the easiest and, perhaps, the most effective means to establish corporate legal accountability. These developments, also show that, even if corporate obligation 'mature' into 'hard law', states remain central in efforts to hold corporations accountable for human rights violations. German and France newly legislation on business and human rights reflects the prevailing primary role of the state in actions oriented to establish liability of corporations for human rights violations, including in relation to climate change impacts.[126] Yet, similar instruments regulating corporate emitting activity may be harder to implement in developing states, as they are often keen to attract foreign corporate investment, particularly in the extractive sector. Further developments in this direction in the context of climate change may usefully provide complementarity between National Action Plans and climate change legislation at the national level, and pave the way for initial developments to establishing corporate legal accountability. Certainly, developments in Germany and France do provide something of a breakthrough to hold corporations accountable for human rights and environmental harms through legally binding legislation.

7. Conclusion

Often states find themselves in a conflict of interests in regulating corporate activities in such a way to hold corporations accountable for human rights and environmental harms. On the one hand, states are duty bearers of the obligation to protect the human rights of individuals and, on the other hand, states need to attract and facilitate foreign investment as a source of economic growth and development. Therefore, states remain in a key and, at the same time problematic position to direct the efforts to hold corporations accountable for human rights harms resulting from corporate emitting activity leading to climate change. However, even in the absence of an international legally binding instrument enshrining the human rights obligations of corporate actors, it does not mean that such obligations and resulting corporate accountability for their inobservance do not exist. Corporations hold human rights obligations and are, at the least indirectly, accountable for human rights violations caused by the impact of their activities. Corporations are accountable on the basis of the obligations acquired through states, in

[126] The French National Action Plan, for example, contemplates and build upon international instruments as part of the business and human rights framework, including, the Millennium Development Goals, which comprises among its goals to tackle climate change. Ibid, 13.

fulfilment of the duty to respect human rights where they operate, and the existing body of 'soft law' human rights obligations regulating corporate activity, such as the UN Guiding Principles on Business and Human Rights.

The plethora of multilateral and private-led initiatives seeking to regulate corporate activity through different types of soft-law instruments reflects the need to set a minimum normative framework regulating corporate behaviour. Notably, despite their limitations as legal instrument guiding corporate behaviour, the UN Guiding Principles represent the prevailing and most widely recognised approach to the issue. Certainly, the Zero Draft constitutes a potential point of departure from the existing non-legally binding approach to corporate activity towards a more stringent regime. On the whole, the international apathy towards achieving corporate accountability and, in particular, the reluctance of powerful states to establish any kind of legally binding instrument to achieve corporate accountability appears to bode badly for the achievement of meaningful international climate action. Yet, there may be some cause for optimism in light of developments in national legislation in France and Germany, which in light of the developments drawing from the principle of 'due diligence', recently enshrined in national legislation of France and Germany to regulate corporate activity.

In addition, the lack of mechanisms to establish corporate accountability and 'soft' approach to corporate human rights obligations seem to be increasingly challenged in the context of climate litigation, where a growing number of lawsuits are being brought against corporations by individuals and groups adversely affected by climate change impacts resulting of disproportional emitting activity. In this sense, the magnitude and uniqueness of the impacts of climate change in the ability of enjoyment of human rights and the environment, directly linked to the enjoyment of rights, may prove their potential to challenge the traditional state-centric approach of human rights. In turn, it opens new avenues to establish corporate accountability by prompting rethinking and eventual correction of human rights weaknesses, including by developing mechanisms to establish corporate accountability for human rights abuses, favouring the position of power of corporations, especially in the Third World.

All in all, however, states remain and likely will maintain a primary and crucial role in establishing and enforcing corporate accountability for human rights harms, especially in a climate change scenario. However, thanks to bottom-up initiatives from grassroots movements, corporations, in addition to states, are increasingly being asked to answer for their emissions contributions to climate change through climate litigation cases grounded in human rights.

Emerging rights-based climate litigation will be used in the next chapter to explore avenues that may catalyse rethinking and developments of human rights in the context of climate change in the judicial arena.

CHAPTER 4

Rights-based Climate Litigation: An Avenue to Tackle Climate Change?

1. Introduction

Government responses to address the ongoing climate crisis as a global emergency,[1] both domestically and through traditional multilateral institutions, have outright failed.[2] Rights-based climate litigation is arising as an avenue to prompt far-reaching climate responses from governments.[3] Governmental climate action entails the implementation of mitigation and adaptation measures. These include enacting more stringent policies that regulate, in particular, corporate activity with the aim of holding corporations accountable for human rights violations, resulting from the impact of their activities upon the environment. As discussed in the previous chapter, however, there is a lack of legally-binding mechanisms to establish corporate accountability for human rights and environmental harms resulting from (corporate) activities significantly contributing to climate change. Particularly, there are no well-established mechanisms reflecting clear corporate human rights obligations related to the environment. In a dramatically climate changing world this is problematic. This makes it technically challenging to hold corporations accountable for rights violations resulting from the impact of their activities upon the climate, which, in practice, can result in corporate impunity. This by no means implies an absence of corporate human rights obligations.

These claims can be grounded, fully or partially, in human rights terms. In this sense, human rights emerge as an innovative climate litigation strategy increasingly being deployed in courts worldwide by individuals or groups adversely affected by the impacts of climate change.

This chapter aims, first, to identify how the deployment of human rights considerations in climate claims can contribute to global climate action through climate litigation. Specifically, with the help of rights-based litigation cases, this chapter examines human rights as a tool to overcome the legal challenges posed by the context of climate change, including causation,

[1] For example, the relatively rapid and radical responses similar to those taken by governments in light of the Covid-19 pandemic in 2020, like locking down certain areas, regions or even whole countries, measures considered unthinkable otherwise.
[2] See, for example, Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 5(1) Carbon and Climate Law Review 1, 15.
[3] See, for example, Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation' (2018) 7(1) Transnational Environmental Law 37.

attribution, and the extra-temporal and extraterritorial dimensions of human rights. By doing so, this chapter also seeks to determine whether the context of climate change can potentially act as a catalyst for the fundamental rethinking of the human rights' relational approach to the environment, as to potentially generate their expansion or reform.

Indeed, human rights are 'often understood to be the quintessence of an anthropocentric legal domain'.[4] Anthropocentrism, 'in its original connotation in environmental ethics, is the belief that value is human-centred and that all other beings are means to human ends',[5] which, from an environmentalist perspective, is considered 'ethically wrong and at the root of ecological crises'.[6] As a result, the Anthropocene, embeds 'the idea that the Earth has been capitulated into a new geological era as a result of extensive human modification of the Earth System, primarily in the form of climate change.'[7] Climate change is, therefore, a consequence of a legally liberal and anthropocentric relationship between human beings and the environment, whereby human beings lie at the core as a supreme and privileged component of it, for which all the rest of the components of the natural world serve an utilitarian purpose. As it is now increasingly evident, such an anthropocentric approach to the environment, supported by law, including human rights law, is unsustainable. Climate litigation thus provides a platform that somewhat evidences the inherent problems of the anthropocentric approach of human rights law to nature, such as the exclusion of elements neglected at its inception (e.g., the environment, future generations).

For instance, the environment and future generations traditionally fall outside the scope of legal protection and consideration under human rights law. They are not considered, as human beings are, as part of a unity on Earth,[8] beyond time and space. Rather, human rights law focuses on the protection of *present* human beings as independent entities and overlooks both their environment and their future generations. Therefore, by neglecting such fundamental notions as the environment or future generations, the exploitation of the environment to satisfy the needs of *actual* human beings, without care for nature or future generations is validated. In this

[4] Anna Grear, 'The vulnerable living order: human rights and the environment in a critical and philosophical perspective' (2011) 2(1) Journal of Human Rights and the Environment 23, 29.
[5] Helen Kopnina, Haydn Washington, Bron Taylor and John Piccolo, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31 Journal of Agricultural and Environmental Ethics 109, 109.
[6] ibid.
[7] Anna Grear, 'Anthropocene, Climate Change and the Dominance of Transnational Corporate Form: Time to Ask Akward Questions?' (*University of Cardiff Blogs*, 8 July 2015). <https://blogs.cardiff.ac.uk/sustainableplaces/2015/07/08/anthropocene-climate-change-and-the-dominance-of-the-transnational-corporate-form-time-to-ask-awkward-questions/> accessed 30 April 2020.
[8] See, for example, on the 'unity' and 'wholesome' of the natural world, Murray Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (AK Press 2005).

context, rights-based climate litigation allows thus the exposure of 'human stories'[9] of harms to rights– that include and relate to the harms against the environment resulting from climate change impacts. Therefore, potential, or actual human rights harms presented in the form of rights-based claims, as it is argued, evidence the wrongfulness or, at least, the incompleteness of human rights law's neoliberal and anthropocentric approach because it facilitates environmental *exploitation* instead of *protection*, which ultimately also impacts the prospects of the very existence of future generations. Notably, corporations have a main role in such a scenario, given that corporate 'global dominance is perhaps as much a key marker of Anthropocene trajectories as is the climate crisis itself".[10]

The context of climate change, I argue, has the potential to catalyse rethinking or even, in the long term, the correction of certain intrinsic notions in human rights law. I argue that the context of climate change has the potential to trigger human rights law rethinking in such a way as to drive the field beyond its traditional anthropocentric approach and towards a more integrated one, which also considers elements like the environment and future generations as equivalents with present human beings, in the universe. Climate litigation constitutes, in this line of argument, a sort of testing ground that can potentially trigger rethinking and even initial reform of human rights foundations. I further argue that human rights law contributes to climate action by providing an international legal framework under which rights violations resulting from the impacts of climate change can be articulated as legal strategies in, for instance, climate litigation. Either deployed as a basis or complement of climate claims, human rights language can help to overcome the challenges presented by the climate change scenario to establish accountability for rights violations. Human rights law thus offers avenues to start addressing complex issues such as causation, attribution, and the extra-temporal and extraterritorial dimensions of human rights in the context of climate change.

Although rights-based claims will be the main focus of this analysis, cases that are not explicitly or primarily grounded in human rights law are not excluded as they may, and do, have rights implications, and help to understand the general climate litigation spectrum. Human rights law has only recently emerged as one among several strategies in which to ground claims and improve odds in climate litigation. Consequentially, only preliminary projections can be made on the performance and impact of human rights considerations in the climate litigation arena

[9] Marilyn Averill, 'Linking Climate Litigation and Human Rights' (2009) 18(2) Review of European, Comparative & International Environmental Law 139, 142.
[10] Grear (n 7).

and wider climate action at this point in time. Indeed, it is too early, and the case law is still limited.[11] However, the increasing deployment of rights considerations in climate cases and the expanding recognition of the linkages between human rights and climate change are being reflected in the growing attention to this field in scholarly work.[12]

In Section 1, this chapter explores the global landscape of climate litigation. It provides an overview of the main features and trends of climate litigation and discusses the potential litigation scenarios based on the nature of the parties to a case as well as the role of climate science therein. Section 2 presents climate litigation case law, with special focus on cases grounded in human rights law in order to examine how rights considerations are being deployed in an attempt to overcome complex issues of causation, attribution, extra-temporality and extraterritoriality presented by the climate change context. Section 3 reflects on the effect of the context of climate change as a catalyst for rethinking and ultimately reforming human rights law to consider elements previously neglected and /or misrepresented, such as the environment and future generations. This chapter concludes, first, that human rights can contribute to global climate action as an 'umbrella' legal framework that helps in overcoming legal challenges presented in the context of climate change, thereby, contributing to global climate action *in the long term*; and, second, that the context of climate change can potentially generate human rights evolution by generating rethinking of fundamental notions and, eventually, reforms in human rights law, particularly, in its relational approach to nature.

[11] At the time of writing, only 47 cases are categorised as human rights claims in the Database of the Sabin Center for Climate Change Law and Arnold & Porter (University of Columbia School of Law), 'Climate Change Litigation Databases' [hereinafter '*Climate Litigation database'*], <http://climatecasechart.com> accessed 20 October 2020.

[12] See, for example, Joana Setzer and Lisa Venhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' in Mike Hulme (ed), 10(3) *Wiley Interdisciplinary Reviews: Climate Change e580* (Wiley Periodicals Inc. 2019); Annalisa Savaresi and Juan Auz, 'Climate Litigation and Human Rights: Pushing Boundaries' (2019) 9(3) Climate Law 244; Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (1st edn, Hart Publishing 2018);Brian Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2(2) Chinese Journal of Environmental Law 131; Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (n 3); David Browne, 'Causation and Damages in Climate Litigation: Evaluating the Role of Human Rights Law' in Fiona de Londras and Siobhán Mullally (eds) 6 *The Irish Yearbook of International Law* (Hart Publishing 2013); Eric Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155(6) University of Pennsylvania Law Review 1925.

2. Climate Litigation and Human Rights

Indeed, nothing short of radical and far-reaching action -which current measures do not provide- can constitute an adequate reaction to imminent climate catastrophe. Government responses continue to be inefficient in implementing measures to dramatically reduce global emissions. In this context, climate litigation provides an avenue for civil society to prompt the mitigation and adaptation measures to address the climate crisis. In this vein, Fisher, reflects on litigation as a response to institutional failure.[13] She points out that:

> [The] story of the institutional response to climate change has been primarily a story of institutional failure. Initially that story was a 'tragedy of the commons' in which private actors failed to act collectively to deal with the problem they created.[14] Added to this has been the failure at the international level to develop a globally binding regime and at the national level to develop robust regulatory regimes. This is not to say that action has not been taken, but that most action taken has been presumed to fall short of what is needed.[15]

In this context, contrary to the traditional multilateral climate governance, rights-based climate litigation constitutes, to a great extent, a source of civil society-driven responses to the climate crisis. Climate litigation emerges as an alternative path to the traditional mechanisms of international climate governance led by the UN Framework Convention on Climate Change (UNFCCC) and typified, initially, in the Kyoto Protocol and, later, in the Paris Agreement. In fact, the adoption of the Paris Agreement signified the consolidation of the recognition of the relationship between human rights and climate change. As a result, the number of rights-based claims in climate litigation has been invigorated since its adoption.[16] Indeed, as Bouwer points out, 'rather than obviating any need for citizen action on climate change, [the Paris] Agreement opens the door to significantly more litigation about climate issues, not less.'[17]

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[13] Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*' (2013) 35(3) *Law & Policy* 236, 1.
[14] ibid, 240 *citing* Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 (3859) *Science* 1243.
[15] ibid,240.
[16] In the same vein, Preston also notes that 'the growing recognition of role of human rights in dealing with climate change was [ultimately] recognised in the 2015 Paris Agreement. In turn this has engendered greater reliance on rights […].' Preston, (n 12) 134. See also, Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) American Journal of International Law, 679.
[17] Kim Bouwer, 'The Unsexy Future of Climate Litigation' (2018) 30(3) Journal of Environmental Law 483, 486.

In addition, the recognition of the right to a healthy environment has been enshrined in numerous constitutions[18] and other national legislations of the world in the last decades -'about two-thirds of … constitutions refer to a healthy environment;'[19] and will likely be increasingly deployed in rights-based climate litigation. One of the characteristics of the emerging climate litigation trend[20] is that it includes an increasing number of claims targeting corporations, for their significant emissions levels, contributing to climate change effects.. . As Ganguly, Setzer and Heyvaert point out, 'the turn to private litigation targeting corporations is, furthermore, consistent with the transnationalisation of climate change governance in response to inadequate international regulation by states under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC)'.[21] Climate litigation thus, *inter alia,* serves to fill the void caused by ineffective climate regulation addressing disproportional emitting activity by public and private actors. Nevertheless, it should be noted that climate litigation is open to all kind of non-state actors, including corporations. In fact, corporations are the largest group of litigants with a wide range of claims generally filed against states.[22] This chapter, however, focuses on claims filed by individuals and civil society representatives, which are partly or fully based on human rights arguments.

The objectives of climate litigation, thus, vary depending on who the claimants are in a given dispute. On one hand, corporate claimants mainly challenge governments' regulatory and procedural decisions. On the other hand, claims from individuals or civil society groups can seek compensation for human rights harms or, in light of the climate crisis, seek to prompt increased climate action from governments. In the latter case, the aim of claims can take different shapes. Cases range from claims seeking more ambitious emission reduction targets and more stringent climate policies from governments; claims seeking to avoid or challenge

[18] '[The] right to a healthy environment enjoys direct constitutional protection in 100 countries.' David Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' (2018) *Wake Forest University, North Carolina* 17, 18.

[19] John Knox, 'The Global Pact for the Environment: At the crossroads of human rights and the environment' (2019) 28(1) Review of European Comparative & International Environmental Law 40, 42.

[20] This is considered a 'second wave' of climate litigation by some scholars. 'The first wave of private climate litigation spanned 2005 to 2015 and was mainly concentrated in the United States. Several lawsuits filed in state district courts were dismissed on the grounds of non-justiciability of a political question… The second wave is characterised by a broader range of arguments and litigation strategies than its predecessor, and unfolds within a rapidly evolving scientific, discursive and constitutional context [in the years preceding and following the adoption of the Paris Agreement]'. Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You don't Succeed: Suing Corporations for Climate Change', (2018) 38(4) Oxford Journal of Legal Studies 841, 842-6.

[21] ibid, 845-6.

[22] Michal Nachmany and Joana Setzer, 'Global trends in climate change legislation and litigation: 2018 snapshot' (*Grantham Research Institute on Climate Change and the Environment; and Centre for Climate Change Economic and Policy*, May 2018) at 5 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2018/04/Global-trends-in-climate-change-legislation-and-litigation-2018-snapshot-3.pdf> accessed 20 April 2020.

licensing of projects with high environmental impacts; claims seeking court adjudication of corporate accountability for behaviour leading to climate impacts; claims seeking compensation for adaptation costs; among others.[23] Despite its limited effect so far, the emerging case law have the potential to foster political will needed to increase mitigation and adaptation efforts, raising awareness about the risk that climate change impacts pose upon human rights and the environment, and exposing the role of states and private actors therein. Climate litigation, therefore, helps to develop a narrative whereby there is *they* (corporations and/or the state apparatus) and an *us* (individuals and communities, now and in the future, who will be devastated by climate change). Millner and Ruddock, for example, observe that '[e]ven unsuccessful cases can expose weaknesses in the law and highlight the need for law reform'.[24] Certainly, the 'disclosure of the truth and punishment of wrongdoers serve to address the structural causes of climate change and resulting human rights violations'.[25] This 'punishment' can come not only from a court's decision in a climate case, but also from the public opinion which, as a result of a case may opt for reducing or condemning the consumption of certain goods or services.

From a rights perspective, climate litigation provides an avenue to bring to the attention of courts cases of actual or potential rights violations resulting from climate impacts. In this context, the deployment of rights-based arguments in climate litigation arises as a legal tool that usefully helps to articulate with a human rights framework the adverse effects of climate change upon individual and group rights across the world. More ambitiously and in the long term, rights-based climate litigation can potentially be a source of structural rethinking and reforms in human rights, in a way to consider elements neglected by their neoliberal ethos,[26] such as the environment and future generations. Importantly, climate litigation, in general, and rights-based climate litigation, in particular, opens the opportunity to hear, understand and, ultimately, expand international human rights law's understanding on the environment. The unprecedented contributions garnered in Third World societies have thus the potential to trigger rethinking and even to correct the anthropocentric relational approach of human rights to the environment.

[23] See Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (*Grantham Research Institute on Climate Change and the Environment*, July 2019) <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> accessed 20 April 2020.

[24] Felicity Millner and Kirsty Ruddock, 'Climate Litigation: Lessons learned and future opportunities' (2011) 36(1) Alternative Law Journal 27, 27.

[25] Margareta Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change', (2019) 9 (3) *Climate Law* 224, 242.

[26] See, for example, Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019).

This does not mean converting human rights into a non-anthropocentric field which would certainly seem to deprive them from their essence. Rather, it may gradually help human rights to recognise the environment and its components as a subject (not object), with inalienable rights to be respected – irrespective whether these are called so or recognised as such - and, in consequence, change humans' and human rights' relational approach to the natural world.[27]

Rights-based litigation also provides an opportunity to generate potentially far-reaching responses from governments to the climate crisis, including enabling stricter regulation of corporate activity and, as a result, facilitating the means to establish corporate accountability for rights violations resulting from climate impacts. In this way, climate litigation emerges as a sort of 'alternative avenue' to shape not only traditional human rights understandings, but also traditional climate governance mechanisms. The proliferation of climate litigation worldwide and the emergence of right-based climate litigation thus provides a path to reaffirm the cruciality of human rights in the climate debate, often disregarded in the context of global climate governance.

Moreover, rights-based litigation also provides a tool to raise public awareness of the historic contributions made by large emitters states and corporations. In this sense, civil society would be empowered to symbolically sanction corporations (e.g. from consumers). This can affect corporate reputation and, as a result, potentially lead to positive changes in the behaviour of some corporations, even if these 'win' a case. As Preston points out, '[even] if the applicants do not succeed in court, these cases will contribute to the evolution of climate change jurisprudence and place public pressure on legislators and major emitters to reduce GHG emissions'.[28] Climate litigation thus could also serve a 'didactic function' towards society on climate change-related issues, whose effects could only be identified in an extended period.

The didactic function of climate litigation has amply been discussed in the context of international criminal trials.[29] Douglas regarded these trials as 'exercises in collective pedagogy, [that] claimed to provide detailed and accurate representations of the larger sweep

[27] See, for example, Christopher Stone. 'Should Trees have Standing? Law, Morality and the Environment' (Oxford University Press 2010).
[28] Preston (n 12) 509.
[29] Yet, there has been criticism to the neutrality of trials' lessons, for example, in the context of international criminal trials. See, for example, in the context of international criminal law, Tor Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 Leiden Journal of International Law 701.

of historical forces that issued in acts of mass atrocity.'[30] Put back in the context of climate litigation, rights-based climate cases also have the potential to raise awareness on the *real* impacts of climate change on the lives of individuals and groups beyond scientific projections and, also, on the role that states and corporations have played thereon.[31] Ineluctably, such awareness could in turn generate responses from society outside the courtrooms that can influence global climate action in the mid and long term.

2.1 The Geography of Climate Litigation

The increased visibility of climate change impacts upon the environment and the ability to enjoy recognised human rights by individuals and communities is, to a great extent, mirrored in the increase of climate litigation cases worldwide. According to the Climate Change Litigation database of the Sabin Center for Climate Change Law and Arnold & Porter, at the time of writing, more than 1700 climate cases have been filed so far worldwide, including pending decision cases.[32] The large majority of these cases, over 1300, were filed in the United States; whereas over 400 cases were filed outside it.[33] According to the Grantham Research Institute on Climate Change and the Environment, amongst jurisdictions outside the United States, Australia (over 100 cases) has the highest number of cases followed by the United Kingdom (over 70 cases).[34] Although the number of cases is still limited in jurisdictions outside these three states, the pace and geographical distribution of cases being filed worldwide indicate that climate litigation activity will continue growing in other jurisdictions, including the Third World.[35] This may trigger opportunities to incorporate developing countries' climate experiences and knowledges, like those from indigenous peoples, into (rights-based) climate jurisprudence. For instance, recent groundbreaking cases taken in courts in Colombia, South Africa and The Philippines demonstrate that the Third World is increasingly taking part of this trend. In addition, corporations also play a key role both as claimants and defendants in the

[30] Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom' (2006) 14(4) *European Review* 513, 514.
[31] Other factors that can likely influence the public awareness process also include where, when or who the parties of a case are. For a detailed discussion, see *ibid*; and Mark Wolfgram 'Didactic war crimes trials and external legal culture: the cases of the Nuremberg, Frankfurt Auschwitz, and Majdanek trials in West Germany' (2014) 26(3) *Global Change, Peace & Security* 281.
[32] Climate Litigation Database (n 11).
[33] ibid.
[34] Climate Change Laws of the World database\ <https://climate-laws.org/litigation_cases?geography%5B%5D=9> accessed 30 October 2020.
[35] According to the 2019 policy report of the Grantham Research Institute on Climate Change and the Environment, "[climate] change litigation continues to see a geographic expansion. There are now cases in the Americas, Asia and the Pacific region, and Europe. Several cases are being brought in low- and middle- income countries." Setzer and Byrnes (n 23) at 1.

current climate litigation 'wave'. Certainly, climate litigation 'is increasingly viewed as a tool to influence policy outcomes and corporate behaviour'. But, although corporations remain 'the single most represented group of claimants',[36] their participation in climate litigation cases as such 'has fallen'.[37]

When pieced together, this reality of climate litigation pours cold water on the idea of climate litigation as a path to accelerate climate action. It should be kept in mind that climate litigation remains a complementary and emerging avenue to significantly influence global climate action by *inter alia*, contributing to global mitigation efforts. This is not to say that it does not have the potential to contribute towards that end. Certainly, the use of human rights considerations in climate litigation is at an embryonic stage yet. According to the Climate Litigation database, out of the whole spectrum of climate litigation cases registered worldwide, at the time of writing, only 47 are categorised as human rights climate cases,[38] although human rights considerations can still be captured under other categories, either implicitly or explicitly. Indeed, the growth of rights-based climate cases reflects, as Peel and Osofsky note, 'a trend towards petitioners increasingly employing rights claims in a climate change context, and a growing receptivity of courts to this framing…[and, moreover] with worsening impacts from climate change…, linkages between climate change and rights protection are likely to become even more salient, attracting further litigation on this basis'.[39] Therefore, while the use of human rights based arguments in the climate litigation scene is still limited, its potential should not be dismissed. Furthermore, rights-based climate litigation also provides opportunities to rethink basic understandings of human rights such as its relational approach to the environment and future generations, and it provides the chance to explore the capacity of human rights law to adjust and correct itself accordingly.

2.2 Who are the Litigants?

Although climate claims can be categorised in multiple ways, depending on the litigant parties to a case, climate litigation can essentially present three different scenarios: inter-state claims, claims between a state and non-state actor, and claims between non-state actors.

[36] Michal Nachmany and Joana Setzer (n 22) at 5.
[37] Setzer and Byrnes, (n 23) at 4.
[38] Climate Litigation Database (n 11).
[39] Peel and Osofsky (n 3) 40.

2.2.1 Inter-State claims

So far, no interstate climate case has been filed before a court. However, given the increasingly harmful impacts of climate change globally, it seems it will be only a matter of time until that happens. There is enough evidence of the tremendous impact of climate change on entire states, especially on those most vulnerable to climate impacts, to suggest that in the near future a state could sue another state for its carbon emitting activities that have contributed to climate change. Indeed, 'the rapid ice melting and resulting sea level rise in the Pacific Ocean will likely prompt small islands states, particularly vulnerable to the effects of the climate crisis, to file an interstate climate claim'.[40] For example, in the aftermath of cyclone Pam, which severely hit Vanuatu in 2015, a government representative stated that the country was 'exploring all avenues to utilise the judicial system in various jurisdictions – including under international law – to shift the costs of climate protection back onto the fossil fuel companies, [and] governments that actively and knowingly created this existential threat'.[41] In a similar vein, in 2002, the Prime Minister of Tuvalu stated that his government was considering bringing a contentious case against the United States and Australia to the International Court of Justice in response to their refusal to ratify the Kyoto Protocol.[42] Similarly, the President of Palau announced that his government, along with Marshall Islands, was planning to seek an Advisory Opinion from the International Court of Justice on the states' legal responsibility 'to ensure that any activities on their territory that emit greenhouse gases do not harm other States'.[43] Although no climate case has been filed so far, the possibility of inter-state climate litigation remains reasonable, especially for the most vulnerable states, which are increasingly and disproportionally suffering the impacts of climate change. In such a (yet) hypothetical scenario, the traditionally cautious approach of the International Court of Justice might be tested to address complex legal challenges posed by the context of climate change.

[40] See Keely Boom, 'See you in court: the rising tide of climate litigation' (*The Conversation*, 28 September 2011) <https://theconversation.com/see-you-in-court-the-rising-tide-of-international-climate-litigation-3542> accessed 20 September 2020.
[41] Lisa Cox, 'Vanuatu says it may sue fossil fuel companies and other countries over climate change' (*The Guardian*, 22 November 2018) <https://www.theguardian.com/world/2018/nov/22/vanuatu-says-it-may-sue-fossil-fuel-companies-and-other-countries-over-climate-change> accessed 20 September 2020.
[42] Rebecca Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14(1) Pacific Rim Law & Policy Journal 103, 114.
[43] UN News website ('Palau seeks UN World Court opinion on damage caused by greenhouse gases' *UN News* 22 September 2011) <https://news.un.org/en/story/2011/09/388202> accessed 20 September 2020.

2.2.2 Claims between States and Non-State Actors

Claims against states can be brought by a wide range of non-state actors, including corporations. Almost 75 per cent of cases have been brought against governments, typically by corporations or individuals',[44] although 'the number of corporations as plaintiffs has fallen'[45] Claims brought by corporations against governments often seek to overturn administrative decisions that include the denial of licenses such as 'a coal-fired power plant or water extraction' or the allocation of allowances, for example, for the 'production of renewable energy'.[46] At the same time, individuals and civil society groups are increasingly active actors in climate litigation as they represent the actual or potential victims of climate impacts.

In addition, litigation between states and individuals or groups of non-state actors will likely increase as climate impacts are growing in number and intensity worldwide (e.g., for adaptation measures). However, since litigation between states and non-state actors can also involve corporate non-state actors challenging governments' decisions on licensing, environmental impact assessments and regulatory measures, which may also increase as governments' regulatory measures become more stringent.[47]

2.2.3 Claims between Non-State Actors

There exists also climate litigation between non-state actors, in which states are not involved. Corporations have also filed claims against other non-state actors, although to a lesser degree than against states. Some corporations, for instance, have sued environmental activists or scientists involved in acts aimed at preventing the development of projects considered environmentally harmful. In these cases, corporations have sought preventive measures or criminal liability of individuals for attempts to block the course of their projects.[48] For example,

[44] Setzer and Byrnes (n 23) 9.
[45] ibid, 4.
[46] Nachmany and Setzer, (n 22) 5.
[47] ibid, 6.
[48] For example, back in 2008, in the so called '*The Kingsnorth Trial*', six environmental activists, who used climate change arguments in their defence, were acquitted by the Maidstone Crown Court (England and Wales, 2008) for trespassing and causing criminal damage to a coal-fired power station. Maidstone Crown Court, 2008. See, John Vidal, 'Not guilty: the Greenpeace activists who used climate change as a legal defence' (*The Guardian*, 11 September 2008) <https://www.theguardian.com/environment/2008/sep/11/activists.kingsnorthclimatecamp> accessed 20 April 2020.

the company Shell filed claims (more than once) against environmentalists for blocking its drilling activities in the Arctic.[49]

These cases help to raise public awareness about climate change impacts upon people and the environment worldwide, including identifying who are the actors behind activities leading to such effects and the urgency of taking action at every level of society to mitigate them. In this context, some of the challenges that human rights face when applied in the context of climate change will be explored.

2.3 The Role of Climate Science: An Asset to Overcome Causation and Attribution

There exists a connection between human rights, climate change and science in the context of climate litigation. Climate science plays an increasingly important role in climate litigation by informing litigants about the continuous findings in climate science. According to Setzer and Byrnes, the ongoing trend of climate litigation has benefitted 'from the growth and consolidation of climate science in the last decade'.[50] Indeed, findings in the field of climate science have provided evidence of the decisive role that current and past emissions resulting from human activities have played in in global climate change and their potential effects in the near future.[51] The continuous insights of the Intergovernmental Panel on Climate Change (IPCC) have been essential to trigger wide recognition of the links between human activity and climate change. In this respect, Godwin points out that '[through] a series of five reports starting in 1990, the IPCC has managed to establish as a political "given" that the earth is warming, and

[49] See *Shell Offshore v. Greenpeace*, Shell presented a complaint before the District Court of Alaska against Greenpeace for 'stalking and chasing' Shell's Artic drilling vessel and sought injunction to prevent interference with 'oil and gas exploration drilling in the United States Outer Continental Shelf'. The Court granted a preliminary injunction to Shell. Some months later, the Court found Greenpeace to be in contempt of its order barring interference by hanging suspended activists from bridge in Portland preventing the transit of a Shell vessel and imposed increasing hourly penalties for the time that activists remained blocking the vessel's transit. Federal District Court of Alaska District, Case No 3:15-cv-00054 SLG HRH, 30 July 2015. Similarly, in 2012, Shell Offshore sought injunction from the Court of Appeals for the Ninth Circuit of Alaska, to prevent protesters blockage of its activities by occupying its drilling vessels in the Artic. *Shell Offshore v. Greenpeace*, Court of Appeals for the Ninth Circuit for the District of Alaska, No. 12-35332, 12 March 2013.

[50] Setzer and Byrnes, (n 23) 8.

[51] In the context of climate litigation, one of the most recurrent sources of climate science are the findings of the IPCC. See, for example, on the growing recognition of climate science insights from the IPCC, Ganguly, Setzer and Heyvaert (n 20) 851-2. In addition to the IPCC findings, there are also renowned works focused on the role of corporate activity in climate change. See, for example, Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 Climatic Change 229; Peter Frumhoff, Richard Heede and Naomi Oreskes, 'The Climate Responsibilities of Industrial Carbon Producers' (2015) 132 (2), Climatic Change 157; and B. Ekwurzel, J. Boneham, M. Dalton, R. Heede, R. Mera, M. Allen and P. Frumhoff, 'The Rise in Global Atmospheric CP2, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' (2017) 144 (4) Climatic Change 579.

that human activity is a significant cause'.[52] This reliance on findings in climate science, particularly from the IPCC, has been reflected in in climate litigation to support technical aspects of claims, such as causation and attribution issues. For instance, in *Urgenda Foundation v the State of the Netherlands*,[53] climate science was strategically used to assist judges in overcoming causation issues. In its judgment, The Hague District Court relied heavily on the Fourth and Fifth reports of the IPCC to conclude that the 'Dutch reduction target is…below the standard deemed necessary by climate science and the international climate policy.'[54] However, reliance on IPCC climate science by courts to scientifically ground their findings has not gone without criticism on several grounds.

First, uncertainty is still one of the factors most resorted to by defendants and judges to deny or be wary of the use of climate science as a basis to establish the causal link in climate litigation. This is, for instance, reflected in *Massachusetts et al v. Environmental Protection Agency et al*,[55] in Judge Scalia's dissenting opinion. Relying on the 2001 National Research Council report, he held that: 'The science of climate change is extraordinarily complex and still evolving. Although there have been substantial advances in climate change science, there continue to be important uncertainties in our understanding of the factors that may affect future climate change and how it should be addressed.'[56]

Certainly, courts have traditionally been reluctant to base their findings on science. This is added to the burden of proof that claimants should overcome, which in part 'stems from gaps and uncertainties in relevant climate science'.[57] As Peel notes, the 'The casting of climate change as a "global" problem has fostered the development of scientific and legal institutions

[52] Jean Goodwin, 'The authority of the IPCC First Assessment Report and the manufacture of consensus' (*Iowa State University Digital Repository* 2009) at 1 < https://lib.dr.iastate.edu/engl_conf/3/> accessed 20 September 2020. Thereby, for example, Godwin illustrates the progressive recognition of the findings of climate science by United States (one of the largest emitters) as follows: "The fourth report was the occasion for the Bush II administration's shift from statements like this: 'We do not know how much effect natural fluctuations in climate may have had on warming. We do not know how much our climate could or will change in the future. We do not know how fast change will occur, or even how some of our actions could impact it" in 2001, with its typical assertions of 'uncertainty' as a reason for inaction, to statements like this: "[The IPCC report] reflects the sizeable and robust body of knowledge regarding the physical science of climate change, including the finding that the Earth is warming and that human activities have very likely caused most of the warming of the last 50 years', in 2007."

[53] *Urgenda Foundation v the State of the Netherlands*, ECLI:NL: RBDHA:2015:7196, Rechtbank Den Haag 24 June 2015 [hereinafter, *Urgenda*].

[54] ibid [4.31] (vi).

[55] *Massachusetts et al v. Environmental Protection Agency et al,* No 05-1120, 549 US, US Supreme Court, 2 April 2007.

[56] ibid, Scalia dissenting opinion, 549 (2007) at 7.

[57] Peel (n 2)19.

addressing the problem at the international level with less attention paid, until recently, as to how climate change might manifest at the local level… Scientific uncertainties in the available evidence regarding the localised impacts of global warming are easily exploitable by defendants seeking to deny that GHG emissions can be linked to global warming or specific climate change impacts'.[58] Therefore, despite the increased receptivity to climate science-based arguments in claims shown by courts in subsequent cases like *Urgenda,*[59] its use as a strategy should still be taken cautiously or, at least, not as a guarantee for claimants to overcome the burden of proof in climate litigation.

A second factor that has triggered criticism of the use of climate science by courts in climate litigation has been the undesirability of placing under the scrutiny of judges scientific arguments about which they have limited or no technical expertise in order to decide on a climate claim. In fact, it could be considered too much risk for judges to justify their findings on scientific arguments, when their capacity to decide upon a given matter can potentially be challenged, even more where a judgement is considered to have climate policy implications. Accordingly, on 'the merits of climate policies in the courtroom',[60] Bergkamp and Hanekamp argue that:

> [Even] if the court is authorized under the applicable laws of procedure and evidence to examine a whole body of science in relation to a broad area of government policy, it would not be able to complete the task, given the resources required. Courts are not equipped to address broad policy issues and weigh the conflicting interests involved in setting targets for any particular area. They do not have advisory bodies to advise on the relevant scientific, economic, and financial issues … Moreover, courts cannot quickly and regularly adapt their opinions to reflect the latest science or changed public priorities; judicial policymaking would produce entrenched, counter-productive, and costly risk regulation. Consequently, courts should refuse to hear these kinds of cases, or deny the remedy sought, on the ground that the issue raises a 'political question'[61] or its judgment would have

[58] ibid.
[59] See *Urgenda* (n 53).
[60] Lucas Bergkamp and Jaap Hanekamp, 'Climate Change Litigation against States: The Perils of Court-Made Climate Policies' (2015) 24 European Energy and Environmental Law Review 102, 105.
[61] ibid, 107 *citing* Nada Mourtada-Sabbah and Bruce Cain, 'The Political Question Doctrine and the Supreme Court of the United States' (Lexington Books 2007).

> implications for unrepresented third parties that the court cannot even begin to assess.[62]

However, while it is true that judges may lack specialized knowledge in climate science, it cannot be expected that courts refrain from hearing those cases on the basis of their lack of specific knowledge on a matter. Certainly, climate science is not the only highly complex area where judges lack or have limited technical expertise. If the lack of expertise in certain areas was a reason to prevent courts from hearing a case, courts would not be able to hear cases in many other specialised and evolving areas, which also may have political and other implications. Instead, cases involving specialised technicalities in climate litigation should continue to increase as well as the reliance on climate science in the judiciary, in particular, on the IPCC findings, as the IPCC is the only internationally agreed scientific body endorsed by states.[63] As in *Urgenda,* for instance, judges can make use of their judicial expertise to assess elements of proof and arguments provided by the parties as well as to select the most reliable sources available to reach their conclusions.

In this sense, *Urgenda* demonstrates the Dutch court's willingness 'to embrace the IPCC assessment reports as incontrovertible evidence of climate change as a serious humanitarian and planetary threat'.[64] However, despite the growing receptivity and reliance on climate science by courts and 'the existence of robust scientific consensus on anthropogenic climate change',[65] litigants should keep in mind that, at least for now, climate science might continue to face certain reticence from courts in the near future. Yet, this should not be a reason to dismiss its potential to contribute in overcoming some of the challenges that human rights face in the context of climate change, particularly, to address causation and attribution hurdles in climate litigation (to be discussed later in this chapter). Also, to a broader extent, the use of climate science in climate litigation helps to simplify key scientifically proven facts for non-specialized audiences, including judges, litigants, and society in general. As Averill points out, 'lawsuits bring complex climate science to an understandable level and explain how causes such as

[62] Bergkamp and Hanekamp (n 60) 107.
[63] For details on the creation and institutional history of the IPCC, see Justine Sullivan, 'The Intergovernmental Panel on Climate Change: 30 Years Informing Global Climate Action' (*Climate, Energy, and Environment*, 13 March 2019) <https://unfoundation.org/blog/post/intergovernmental-panel-climate-change-30-years-informing-global-climate-action/> accessed 20 September 2020.
[64] Ganguly, Setzer and Heyvaert (n 20) 851 *citing Urgenda*.
[65] ibid.

greenhouse emissions can results in injuries to human rights and ecosystems far away in time and space'.[66]

3. Rights-based Climate Litigation: Examining the Human Rights Performance in the Context of Climate Change

The context of climate change presents complex challenges, which, so far, have been difficult to overcome in the context of climate litigation. These challenges include issues of causation, attribution, and the extratemporality and extraterritoriality of human rights. While climate litigation is 'already drawing upon the advancements in climate attribution science, and courts might be more open to the notion of individual corporate responsibility for climate change harm, provided that partial or contributory causation can be scientifically proven with respect to the defendant's conduct';[67] establishing accountability for rights violations resulting from climate impacts is still problematic. As a result, rights-based arguments are increasingly being used either to articulate actual or potential climate-related rights violations, or as a complementary tool in other type of claims, mainly oriented to challenge regulatory frameworks. As Preston points out, '[the] basis of the litigation remains the constitutional rights … that are infringed',[68] which, added to the wide recognition of the right to a healthy environment in national constitutions, has led, for example, in South Asian countries, to 'an increase in litigation …claiming that governmental action and inaction has infringed this right'.[69] As part of this rights litigation trend, there is also an increasing number of cases grounded in international or regional human rights instruments attempting to overcome technical challenges in climate litigation, that are starting to prove a level of success, either within or outside the courtrooms.

3.1 Establishing the Causal Link

The problem of causation applied in the context of climate change refers to the 'difficulty of establishing a direct link between GHG emissions and human rights violations, including issues

[66] Averill (n 9) 144.
[67] Ganguly, Setzer and Heyvaert, (n 20) 854-5.
[68] Preston (n 3) 134.
[69] ibid 135.

of rising atmospheric temperatures and consequent environmental implications'.[70] The problem is that the way from point A (emissions) to point B (human rights violations) is not straightforward. As Quirico notes, the 'link between GHG emissions and first- and second-generation rights is indirect and includes two more steps, that is, rising atmospheric temperatures (climate change) and further environmental changes (general causation)'.[71] Since the big share of global GHG emissions comes from human-produced CO2 emissions, from which 'fossil fuel burning alone is more than half the net force',[72] contributions to human-produced GHG emissions are controllable. Also, this means that the causal link between a public or private (human) action contributing to global GHG emissions leading to climate change - the cause of the problem - and its harmful effects upon individuals' rights and the environment is, even if complex, traceable.[73] However, given that the sources of GHG emissions are multiple and cumulative throughout time, the burden of proof on the claimants' side to establish the causal link between an action causing GHG emissions and its indirect effects upon rights is (still) very difficult to overcome. As a result, causation is considered, at least for now, 'the most important hurdle to be taken in a climate change suit'.[74] Yet, the increasing evidence from science of the effects of humanly produced emissions on the climate, added to the increasing impacts of climate change across the planet, will likely push courts to handle science findings in the least 'compromising' way while still hearing claims based on rights violations resulting from climate impacts.

In addition, proving causation is essential in a climate claim as it is the basis to resolve other legal challenges such as attribution and apportionment, among those who executed the action contributing to climate change and its resulting impacts. In this context, the deployment of human rights considerations in climate litigation contributes a path to overcome causation obstacles. However, whereas this could reasonably work in the case of defendant states as their human rights obligations are clearly established in international and national legislation, in the case of corporations -which are responsible for about two thirds of the current global

[70] Ottavio Quirico, 'Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation' (2018) 65 Netherlands International Law Review 185, 188.
[71] ibid, 190.
[72] Penn State College of Earth and Mineral Sciences, Department of Meteorology and Atmospheric Science, 'From Meteorology to Mitigation: Understanding Global Warming / Anthropogenic Greenhouse Emissions' (Meteo 469, online course) <https://www.e-education.psu.edu/meteo469/node/181> accessed 20 April 2020.
[73] See, for example, Heede, 'Tracing…' (n 51); and Frumhoff et al, 'The Climate…' (n 51).
[74] Michael Faure and Marjan Peeters, 'Concluding remarks' in Michael Faure and Marjan Peeters (eds) *Climate Change Liability* (Edward Elgar Publishing 2011) at 267. See also, Michael Faure and Marjan Peeters (eds), in *Climate Change Liability – New Horizons in Environmental and Energy Law*, (Edward Elgar Publishing 2011), at 182.

emissions,[75] it is more uncertain as there is not yet consensus on the content and extent of their human rights obligations.[76] In the absence of legally-binding corporate human rights obligations, it is obviously more difficult to establish liability for corporate behaviour leading to climate-related rights violations. Therefore, in short, in order to prove causation, claimants would have to demonstrate, at a minimum, that the following four elements are present within a claim: First, an action by the defendant that generates (or allows to generate, in the case of states) GHG emissions; second, a human rights obligation held by the defendant; third, a climatic impact resulting from the (cumulative) defendant(s) action of generating GHG emissions (e.g. sea level rise); and, fourth, a harm upon individuals or groups (or ecosystems), which affects their ability to enjoy one or several human rights.

There have been several attempts to overcome these sorts of *de facto* requirements to establish causation in climate claims, with limited success. However, the contributions of climate science, and increasing receptivity towards relaxing causation hurdles by courts, along with the growing frequency and intensity of climate impacts, upon people and the environment, provide some room to expect a gradual lessening of causation barriers.[77]

3.1.1 The First Alarm Bells: the Inuit Petition

The first attempt to overcome causation issues with the use of human rights legal arguments is illustrated by the 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.[78] In 2005, the Inuit Circumpolar Conference, a non-governmental organization representing the Inuit residents in the Artic region,[79] filed the petition claiming that the effects of global warming were adversely impacting a range of human rights of the Inuit.[80] These include the right to enjoy the benefits of their culture,[81] the right to use and enjoy the lands they

[75] Paul Griffin, 'The Carbon Majors Database, CDP Carbon Majors Report 2017 - 100 fossil fuel producers and nearly 1 trillion tonnes of greenhouse gas emissions' [*CDP Report*] (Driving Sustainable Economies, 2017).
[76] See, for example, Surya Deva, 'Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles' in Surya Deva and. David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 78-104.
[77] See, for example, the *Urgenda* (n 53).
[78] 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, 7 December 2005 [hereinafter, *Inuit*].
[79] The Artic region encompasses Inuit people residing in Alaska, Canada, Greenland, and Chukotka (Russia). See website Inuit Circumpolar Council < https://www.inuitcircumpolar.com/> accessed 20 April 2020.
[80] *Inuit* (n 78) at 1-8.
[81] ibid 74-78.

have traditionally used and occupied,[82] the right to use and enjoy their personal property,[83] the right to the preservation of health,[84] the right to life, physical integrity and security,[85] the right to their own means of subsistence,[86] and the rights to residence and movement and inviolability of the home.[87] Specifically, the petition asks the Inter-American Commission, *inter alia*, to recommend the United States 'to adopt mandatory measures to limit its emissions …, [and take] into account the impacts of U.S. greenhouse gas emissions on the Arctic and affected Inuit in evaluating and before approving all major government actions'.[88]

The *Inuit* petition was grounded in several international and regional human rights instruments, such as the American Declaration of Human Rights and Duties of Man,[89] the Charter of the Organization of American States,[90] the American Convention on Human Rights,[91] the Universal Declaration of Human Rights,[92] the International Covenant on Civil and Political Rights,[93] and the International Covenant on Economic Social and Cultural Rights.[94] The Inuit petition sought to 'obtain] relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States';[95] and that the Commission asserted the negative obligation of the United States 'to abstain from interfering with fundamental rights'.[96] The Inuit Petition stated that 'the United States … has a clear duty not to degrade the Arctic environment to an extent that infringes upon the Inuit's human right to enjoy the benefits of their culture.[97] Also, the petition engaged with other regional instruments, such as the European Convention on Human Rights[98] and the African Charter on

[82] ibid 79-83.
[83] ibid 83-85.
[84] ibid 85-89.
[85] ibid 89-91.
[86] ibid 92-94
[87] ibid 94-96.
[88] ibid 7.
[89] American Declaration of Human Rights and Duties of Man, adopted 2 May 1948.
[90] Charter of the Organization of American States, adopted 27 February 1967 (entered into force 27 February 1970).
[91] American Convention on Human Rights, adopted 22 November 1969.
[92] Universal Declaration of Human Rights, adopted 10 December 1948.
[93] International Covenant on Civil and Political Rights, adopted 16 December 1966 (entered into force 23 March 1976).
[94] International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 (entered into force 3 January 1976).
[95] *Inuit* (n 78) at 1.
[96] Quirico (n 70) 189.
[97] *Inuit* (78).
[98] European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] 213 U.N.T.S. 221 (ECHR), Protocol 1, art. 1.

Human and Peoples' Rights,[99] which could help to demonstrate the connection between climate change impacts and, for example, the violation of the Inuit right to property.[100] Moreover, with the use of available climate science, the petition argues that 'the United States is the largest contributor to global warming and its damaging effects on the Inuit'.[101] Whilst recognising some degree of uncertainty in relation to climate science, the claimants alleged that:

> The dominant role of the United States in carbon emissions correlates well with the country's estimated contribution to the global temperature increase. U.S. greenhouse gas emissions between 1850 and 2000 are responsible for 0.18ºC (30%) of the observed temperature increase of 0.6ºC during that period... Although the actual correlation between cumulative emissions and temperature increase is subject to some uncertainty, there is no doubt that the United States has contributed far more to global warming than any other country.[102]

The petition, therefore, relies 'on the negative obligation to abstain from interfering with fundamental rights'.[103] At the same time, it claims that the United States observes its positive obligations to take measures to reduce its GHG emissions as per its international obligations, *inter alia*, under the UNFCCC.[104] The petition, thus, strategically uses climate science not only to demonstrate the causal link between the United States' actions and the resulting Inuit's rights violations, but also to demonstrate the disproportionality between its GHG emissions and those from other emitters, which explains the rationale of addressing the United States' actions in particular.

The petition was not admitted by the Inter-American Commission on Human Rights. The Commission found it insufficient 'to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration'.[105] However, the petition has a significant value beyond its 'no win' outcome.

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[99] African Charter on Human and Peoples' Rights [1981] OAU Doc. CAB/LEG/67/3 (ACHPR) rev. 5, 21 I.L.M. 58 [1982], art. 14.
[100] *Inuit* (n 78) 79.
[101] ibid 68-69 and 103.
[102] ibid 68-69.
[103] Quirico (n 70) 189.
[104] *Inuit* (n 78).
[105] *Inuit*, Inter-American Commission on Human Rights response to Inuit Petition - letter from Ariel E. Dulitzky, Assistant Executive Secretary, Organization of American States, to Paul Crowley, Legal Representative, 16 November 2006. Available at <https://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> accessed 20 April 2020.

The petition has the merit of pioneering arguments before the judiciary showing the 'human' implications of climate change. By attempting to prove causation, the petition illustrates the complexity of establishing the causal link - the challenge of connecting, scientifically, geographically, and temporally the United States emissions to Inuit rights violations. This proved to be an argument that the Inter-American Commission on Human Rights was not ready to support at that point in time. As Osofsky notes, 'they must persuade the Commission to crosscut not only different types of law, but also multiple disciplines'.[106] As such, the Inuit petition entails an early 'example of creative lawyering'[107] in climate litigation to address challenges of causation, attribution and extraterritoriality by deploying human rights considerations.

In addition, beyond its adverse outcome, the *Inuit* petition could be considered a successful case. It drew public attention to the potentially catastrophic effects of climate change upon peoples' rights and ecosystems worldwide.[108] As such, the *Inuit* case was the first time that the human dimension of the problem of climate change was raised before a human rights institution, which, back at the beginning of this century, did not have the level of attention that it has now. Certainly, it 'generates publicity that helps to raise awareness about the way in which climate change is impacting the Inuit and about international human rights tribunals as appropriate institutions for addressing cross-cutting problems'.[109] Considering that the linkages between human rights and climate change were far from clear by then and, instead, they were mainly regarded as two unrelated areas, the impact of the Inuit petition in climate litigation is significant. It paved the way to subsequent climate cases pursuing government action, including through rights-based claims.[110]

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[106] Hari Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2006/2007) 31(2) American Indian Law Review, Symposium 'Lands, Liberties, and Legacies: Indigenous Peoples and International Law' 675, 689.

[107] ibid (n 676).

[108] See, for example, Paul Brown, 'Global warming is killing us too, say Inuit' (*The Guardian,* 11 December 2003) < https://www.theguardian.com/environment/2003/dec/11/weather.climatechange> accessed 28 July 2020. For an analysis on the remedies aspect of the *Inuit* case, see Wewerinke-Singh (n 28), and Martin Wagner and Donald M. Goldberg, 'An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change' (Paper presented at UNFCCC COP10, 15 December 2004).

[109] Osofsky (n 106) 696.

[110] See Osofsky, ibid; and Marguerite Middaugh, 'Linking Global Warming to Inuit Human Rights' (2006) 8(1) San Diego International Law Journal 179. For an analysis on the remedies aspect of the *Inuit* case, see Wewerinke-Singh (n 28), and Martin Wagner and Donald M. Goldberg, 'An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change' (Paper presented at UNFCCC COP10, 15 December 2004).

3.1.2 The Athabaskan Peoples Case

Following the path paved by the *Inuit*, a new petition to the Inter-American Commission was filed in 2013 on behalf of the Athabaskan Peoples, settled in the Arctic areas of Canada and the United States, which, at the time of writing, is still pending a decision.[111] The petition requested the assistance of the Inter-American Commission in obtaining relief from rights violations resulting from the acts and omissions of Canada.[112] It argued that 'Canada's failure to implement available black carbon emissions reduction measures that could slow the warming and melting that causes these harms violates many rights guaranteed to the Athabaskans in the Inter-American human rights system'.[113] These include the right to enjoy the benefits of their culture,[114] the right to property,[115] the right to the preservation of health,[116] and the 'right to their own means of subsistence,[117] recognised by the American Declaration of the Rights and Duties of the Man.[118] Further, the petition argues that Canadian legislation 'does not provide an adequate or effective remedy for the harms caused by the emission of black carbon'.[119] Contrary to its predecessor, the *Inuit* petition, the *Athabaskan Peoples* petition strategically focuses on the remedies for rights' harms, rather than on the source of the problem (carbon emissions) in order to prove causation. The *Athabaskan Peoples* petition relies on the lack of 'adequate or effective' legislation within the existing national environmental, tort and constitutional legislation to support the claim of remedies for the harms caused by Canada's black carbon emissions.[120] In this way, the petition anchors the claim in Canada's 'obligation to fulfil human rights, which has a positive content and compels states to act and take measures so as to mitigate GHG emissions',[121] which also applies in relation to adaptation measures.[122] Still, the Athabaskan Peoples' petition must overcome the technical difficulties of proving causation. As de la Rosa Jaimes reflects: '[T]he petitioners will have to prove legally sufficient causation between the harm resulting from climate change and the acts or omissions of the Canadian

[111] Petition to the Inter-American Commission on Human Rights seeking relief from violations of the rights of Arctic Athabaskan Peoples resulting from rapid arctic warming and melting caused by emissions of black carbon by Canada, 23 April 2013 [hereinafter, *Athabaskan Peoples*].
[112] ibid, 1.
[113] ibid.
[114] ibid, 58-63.
[115] ibid, 63-69.
[116] ibid, 69-74.
[117] ibid, 74-78.
[118] American Declaration of the Rights and Duties of Man (n 89) Articles 13, 23, 11 and 37, respectively.
[119] ibid, 81.
[120] *Athabaskan Peoples*, (n 111) at 17-21 and 83-84.
[121] Quirico (n 70) 189.
[122] ibid, 193.

government. The crucial element to success will be that the petitioners demonstrate how environmental degradation, due to anthropogenic climate change, can violate their human rights'.[123]

Accordingly, despite the fact that individuals and groups (particularly, indigenous peoples) are the most disproportionately affected by climate impacts and given the multiplicity of emissions sources, the burden of proof of causation remains on their side. In justifying not resorting to Canadian tort law,[124] as it offers 'no reasonable chance of success',[125] the Athabaskan Peoples' petition captures the high threshold required to overcome the burden of causation:

> Those emitters that have statutory authorization to emit these contaminants would be protected from liability. Regarding those that do not, the petitioners would need to bring an incalculable number of claims to include all such emitters and such claims would encounter difficult challenges addressing the issues of causation and apportionment of liability. Given the number of sources of black carbon emissions, Arctic Athabaskan peoples would face considerable difficulty establishing causation with respect to a particular harm, particularly given that the chain of causation may be long and complex, and the types of harm very widespread.[126]

Similarly to the Inuit petition, in order to overcome causation, the Athabaskan Peoples' petition also relies on climate science to build the causal link between Canada's black carbon emissions, the climate change effects in the Arctic environment, and its impact upon Athabaskans Peoples' rights.[127] The petitioners have argued that emissions cuts are essential to the viability of their environment. They note that:

> '…deep cuts in carbon dioxide remain the backbone of efforts to limit long-term adverse consequences of climate change in the Arctic and globally, reductions in emissions of the short-lived climate pollutants black carbon, tropospheric ozone

[123] Verónica De la Rosa Jaimes, 'Climate Change and Human Rights Litigation in Europe and the Americas' (2015) 5(1) Seattle Journal of Environmental Law 165, 194.
[124] This is because, according to the Inter-American Commission on Human Rights, Rules of Procedure, petitioners are required to exhaust domestic remedies first before submitting a case to its jurisdiction. Organization of American States, Rules of Procedure of the Inter-American Commission on Human Rights, October-November 2009 (modified 2 September 2011) article 31.
[125] *Athabaskan Peoples* (n 111) 82.
[126] ibid.
[127] ibid, 14-24.

> and methane have been identified by scientists as the best, and perhaps only, strategy to reduce near-term warming and melting in the Arctic…'[128]

As such, the petition aims to scientifically demonstrate that 'Canada's failure to sufficiently regulate black carbon emissions is violating Arctic Athabaskan peoples' human rights'.[129] In Consequently, Canada would be breaching its 'positive obligation to protect human rights',[130] which involves the states' duty to 'take effective steps to ensure the conservation and sustainable use of the ecosystems and biological diversity on which the full enjoyment of human rights depends'.[131] Accordingly, on the basis of the states' duty to protect, the Athabaskan Peoples' petition argues that 'Canada is obligated to protect Arctic Athabaskan peoples from harm to their human rights resulting from rapid Arctic warming and melting, particularly where Canada has contributed to that harm by failing to adequately regulate black carbon emissions'.[132]

The Athabaskan Peoples' petition is, thus, another example of 'creative lawyering', which follows in the footsteps of the *Inuit* petition, but intends to overcome causation barriers by building a stronger causal link between Canada's actions (releasing black carbon emissions) and the resulting rights harms (climate change effects in the Arctic). As De la Rosa Jaimes notes, '[without] a strong link, it will be difficult for the Inter-American Commission on Human Rights to conclude that Canada's failure to implement more effective regulation of black carbon emissions amounts to a human rights violation'.[133] It is likely, she further notes, that the absence of the scientific link scuppered the Inuit Petition before the Inter-American Commission.[134] However, subsequent advancements in the field of climate science and the proliferation of rights-based climate cases across judicial systems worldwide, including in the Inter-American system of human rights provide some room for expectation in the Athabaskan Peoples' case.

Today, more than a decade after the Inuit petition, causation remains a complex challenge in climate litigation. However, subsequent developments in climate science and litigation worldwide, as well as the widespread recognition of the right to a healthy environment,

[128] ibid, 6.
[129] ibid, 21.
[130] Quirico (n 70) 189.
[131] Human Rights Council, 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/37/59, 24 January 2018.
[132] *Athabaskan Peoples,* (n 111) 54.
[133] Verónica De la Rosa Jaimes, 'The Arctic Athabaskan Petition: Where Accelerated Warming Meets Human Rights' (2015) 45 (2) California Western International Law Journal 213, 259.
[134] ibid.

including within the Inter-American system,[135] provide grounds for increased hopes for a (more) favourable outcome in the Athabaskan Peoples' petition than that the Inuit petition had in its day. Its outcome is of particular relevance, given the numerous indigenous peoples across several states[136] that are particularly vulnerable to climate change impacts. As such, the petition's outcome 'will set the course for protecting the rights of indigenous peoples in the future'.[137] The Athabaskan Peoples' petition thus provides an opportunity to see how the Inter-American Commission's approach to climate change as a threat for the enjoyments of human rights evolves within the climate change context, through revisiting, *inter alia*, causation issues. In this sense, the Athabaskan Peoples' petition provides the Inter-American Commission's with a refreshed opportunity to 'make advancements regarding human rights claims related to the negative effects of anthropogenic climate change',[138] and, thus, develop the approach taken in the Inuit petition.

Such advancements include the subsequent Advisory Opinion issued by the Inter-American Court of Human Rights in 2018, in response to a request made by Colombia on the interpretation and scope of the obligation to respect rights, under article 1, the right to life, under article 4. and the right to humane treatment and personal integrity, under article 5 of the American Convention.[139] The Inter-American Court of Human Rights Advisory Opinion represents a milestone in rights-based climate litigation as it provides potential leeway to ease some of the legal challenges that human rights law faces in the context of climate change. The Inter-American Court of Human Rights, on setting the interpretation criteria of its opinion, sheds light on critical issues including the interrelationship between human rights and the environment, and the human rights impacted by environmental degradation, including, notably, the right to a healthy environment.[140] By doing so, the Inter-American Court of Human Rights recognises the right to a healthy environment as a 'fundamental right for the existence of

[135] See, for example, the Inter-American Court of Human Rights, Advisory Opinion requested by the Republic of Colombia, 'Environment and Human Rights', OC-23/17, 15 November 2017 [hereinafter, *Advisory Opinion*] (in Spanish only). All excerpts in this chapter are unofficial translations.
[136] It is estimated that there are more than 370 million indigenous people spread across 70 countries worldwide. United Nations Permanent Forum on Indigenous Peoples Issues, 'Who are indigenous peoples?' (Factsheet) <https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed 20 April 2020.
[137] ibid, 217.
[138] Veronica De la Rosa Jaimes, 'Climate Change…' (n 123) 195.
[139] Request for an Advisory Opinion Presented by the Republic of Colombia Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights, 14 March 2016 [hereinafter, *Advisory Opinion*].
[140] ibid, Section 1.

humanity',[141] and 'as a right in itself'.[142] Furthermore, the Inter-American Court of Human Rights acknowledged that other human rights, such as the right to life, health, food, water, housing and self-determination, are also vulnerable as a consequence of environmental degradation, which implies the existence of states' environmental obligations to comply with under the Convention.[143] In this way, the Advisory Opinion builds bridges which could be strategically interpreted towards the relaxation of causation hurdles in future climate litigation.[144]

The Inter-American Court of Human Rights engages in-depth with the issue of causation in its Advisory Opinion to Colombia. As Atapattu and Campbell-Duruflé note, causation is complemented 'by the formulation of preventive duties and obligations of conduct that are most relevant to the climate challenge'.[145] The Advisory Opinion does provide an exhaustive account of the 'State obligations in the face of potential environmental damage in order to respect and to ensure the rights to life and to personal integrity'.[146] This includes the 'obligation of prevention'[147] of rights violations resulting from damage to the environment, the observance of 'the precautionary principle',[148] the obligation of cooperation,[149] and 'procedural obligations to ensure the rights to life and to personal integrity in the context of environmental protection'.[150] In this sense, by identifying the specific state duties and their content in relation to the protection of human rights in the context of environmental protection, the Advisory Opinion may contribute to climate action by inspiring the development of a flexible approach to causation both within the Inter-American system and in other jurisdictions, in ongoing and future rights-based climate litigation. As Atapattu and Campbell Duruflé reflect, 'many climate lawsuits currently ongoing before national and international bodies that rely on international human

[141] ibid para. 59.
[142] ibid, para. 54-55.
[143] ibid.
[144] See also, for example, the *'Tutela'* case before a Colombian national court discussed in section 3.3.2. this chapter.
[145] Sumudu Atapattu and Christopher Campbell-Duruflé, 'The Inter-American Court's *Environment and Human Rights* Advisory Opinion: Implications for International Climate Law' (2018) 8 Climate Law 321, 326.
[146] *Advisory Opinion* (n 135) paras. 123-243.
[147] ibid, paras. 127- 174.
[148] ibid, paras. 175- 180. The Court established that 'the precautionary principle, in] environmental matters, refers to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment'. Ibid, para. 175.
[149] ibid, paras. 181- 210.
[150] ibid, paras. 211- 241.

rights law in one form, or another are likely to feel the ripple effect of this important development as well'.[151]

3.1.3 The Landmark case of *Urgenda*

A powerful example of the potential impact of the deployment of human rights arguments in climate litigation is represented by the recent landmark case of *Urgenda*.[152] More than in any other case, *Urgenda*, demonstrates the potential for courts to make advancements on the question of causation. The Urgenda Foundation, an environmentalist NGO, and 886 individuals, filed a case against the Netherlands in 2015. The High District Court of The Hague ordered the Dutch State to limit its carbon emission levels by to at least 25% by 2020, in comparison to its 1990 levels.[153] Although this was not a human rights case, as such, the right to life, and the right to private and family life, enshrined in articles 2 and 8 of the European Convention on Human Rights, respectively, were used to ground the claim in relation to the potential violations resulting from climate impacts.[154] The District Court upheld the claim on the basis of constitutional and civil law,[155] the hazardous negligence doctrine,[156] and principles under the United Nations Framework Convention on Climate Change, particularly the precautionary principle.[157]

When addressing causation, the District Court found that a sufficient causal link could be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the present and future effects on the Dutch climate. The Court also found that even though 'current Dutch greenhouse gas emissions' are limited on a global scale, this does 'not alter the fact that these emissions contribute to climate change'.[158] The District Court's view provides a factual approach to addressing causation issues. It overrides the defence argument that it is not possible to establish causation for climate impacts due to the global and multiple-sourced character of emissions. In this regard, the role of climate science was crucial in informing the District Court findings on causation. The District Court relied on the Fourth and Fifth reports of the IPCC to reach its finding that the Dutch carbon emissions reduction target was 'below the standard

[151] Atapattu and Campbell-Duruflé (n 145) 336.
[152] *Urgenda* (n 53).
[153] ibid, para. 5.1.
[154] The District Court was of the view that "Urgenda itself cannot directly rely on Articles 2 and 8 ECHR" (nor in the UNFCCC either). Ibid, para 4.45.
[155] Dutch Constitution, Article 21 and Dutch Civil Code, Book 5, Section 34, 4.51.
[156] *Urgenda* (n 53) para. 4.54.
[157] ibid, paras. 2.53 and 4.56- 4.61.
[158] ibid, para 4.90.

deemed necessary by climate science and the international climate policy'.[159] This led the Court to the conclusion that, in order to prevent dangerous climate change, the Netherlands would need to reduce greenhouse gas emissions by 25-40% by 2020 in order to realise the 2°C target.[160] Climate science was thus critical for the District Court to determine specifically whether or not the Dutch emissions reduction target was sufficient.[161]

However, the decision was not favourable for the claimants on all fronts. The District Court was of the view that *Urgenda* was not eligible to rely on articles 2 and 8 of the European Convention on Human Rights as the claimants could not be considered as direct or indirect victim, within the meaning of Article 34 of the European Convention.[162] Article 34 establishes that the Court 'may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth' in the Europena Convention.[163] The decision was appealed by the government in 2018. The Appeals Court upheld the District Court decision and *Urgenda's* cross-appeal regarding its eligibility to rely on the rights protected under articles 2 and 8 of the European Convention, thereby overturning the initial decision on victim status; and, was against the state's argument about the lack of a causal link because, it found that there was a real risk of the danger of climate change for which measures have to be taken now.[164] By asserting that the only element necessary to establish causation is the existence of 'a real risk', the Appeals Court provided an approach to surpass recurrent causation barriers in climate litigation.

The Appeal Court upheld *Urgenda*'s claims under the European Convention on Human Rights and, therefore, overturned the District Court's arguments based on article 34 of the European Convention on Human Rights. The Appeal Court found that Article 34 of the European Convention could not serve as a basis for denying *Urgenda* the possibility of relying on articles 2 and 8 of the Convention, as Dutch law entails access to Dutch courts.[165] Accordingly, the Appeal Court found that the state has positive obligations under both articles 2 and 8 of the European Convention on Human Rights 'to protect the lives of citizens'.[166]

[159] ibid, 4.31.
[160] ibid, para 4.31.
[161] ibid, para 4.33.
[162] ibid, para 4.45.
[163] ECHR, Article 34.
[164] *Urgenda*, ECLI:NL: GHDHA:2018:2610, No C/09/456689 / HA ZA 13-1396, The Hague Court of Appeal, 9 October 2018 (English unofficial translation) para 71.
[165] ibid, para 35-36.
[166] ibid, para 43.

Following the District Court's approach, the Appeal Court, relying on the IPCC findings on climate science to reach its decision, found that the government was acting unlawfully, in contravention of the duty of care under Articles 2 and 8 European Convention on Human Rights, 'by failing to pursue a more ambitious reduction as of end-2020, and that the state should reduce emissions by at least 25% by end-2020'.[167] Given that what was at stake in the case was the 'right' level of ambition of the target appropriate for the Dutch government to effectively contribute to global emissions reductions, the use of climate science was crucial in informing both the District Court and the Appeal Court's decisions.

Subsequently, the Supreme Court, in cassation appeal by the government, upheld the previous judgements and confirmed their reliance on climate science to reach their findings.[168] The Supreme Court affirmed that the state's human rights obligations under Article 2 and Article 8 of the European Convention on Human Rights are engaged in relation to the risks associated with climate change, including when such violations occur over a protracted period of time.[169] Accordingly, it found that '[the] European Court of Human Rights has on multiple occasions found that Article 2 of the European Convention on Human Rights was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster'.[170] No less importantly, the Supreme Court decision also set a risk criteria to determine the existence of a state obligation under Article 2 European Convention on Human Rights , in the context of climate change. It was of the view that the state 'is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk'.[171] The Court determined 'real and immediate risk' to mean 'a risk that is both genuine and imminent' and it clarified that 'the term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved'. The Court found then that Article 2 of the Convention also entails protection from risks that 'may only materialise in the longer term'.[172]

Similarly, in relation to Article 8 of the European Convention on Human Rights, on the right to private and family life, the Supreme Court reiterated its risk criteria to determine the existence of a human rights obligation under its scope. It found that the positive obligation under article

[167] ibid, para 76.
[168] *Urgenda*, ECLI:NL:HR:2019:2007, Supreme Court of The Netherlands, No 19/00135 (English unofficial translation), 20 December 2019.
[169] ibid (n 168), paras 5.2.2 and 5.2.3.
[170] ibid, para 5.2.2.
[171] ibid.
[172] ibid.

requires the state 'to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment'.[173] The Court specified that the positive obligation, like under article 2 applies in the context of longer term risk and the state is required to take measures if serious environmental contamination risks individual well-being or enjoyment of their homes 'in such a way as to affect their private and family life adversely'.[174]

The Supreme Court, by confirming the applicability of Article 2 and 8 European Convention on Human Rights, affirmed that the risks 'caused by climate change are sufficiently real and immediate' to bring them within the scope of those provisions of the Convention.[175] In this way the Court recognises climate change as a threat to human rights. The Court's decision sets a precedent for the deployment of human rights considerations in climate litigation. The decision also serves to strengthen the fairly recent recognition of the relationship between human rights and climate change. In doing so, it builds upon European Court of Human Rights jurisprudence involving the application of human rights law in cases where there have been rights harms related to the environment.[176] The Supreme Court thus develops the application of human rights law in cases where rights violations are not necessarily the direct result of climate impacts, but the result of insufficient or inexistent climate measures by the state. Accordingly, the Supreme Court was of the view that obligations under articles 2 and 8 of the European Convention on Human Rights to take appropriate steps to counter an imminent threat may encompass both mitigation and adaptation measures.[177] In other words, this means that the absence or insufficiency of such climate measures by the state may entail non-compliance with human rights obligations under the European Convention on Human Rights.

In order to assert the obligation of the Dutch State under articles 2 and 8 of the European Convention on Human Rights, the Supreme Court introduced the risk criteria, which can work

[173] ibid (n 168) para 5.2.3.
[174] ibid (n 168) para 5.2.3.
[175] Andre Nollkaemper and Laura Burgers, 'A new Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the *Urgenda* Case. (Blog of the European Journal of International Law, 6 January 2020) <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/> accessed on 10 November 2020.
[176] See, for example, the following judgments in which [*inter alia*] the ECtHR held that the requirements set out here were met: *Öneryildiz v. Turkey* no. 48939/99 (ECtHR, 30 November 2004), paras 98-101 (gas explosion at landfill; the risk of this occurring at any time had existed for years and had been known to the authorities for years); *Budayeva et al./Russia* no. 15339/02 (ECtHR, 20 March 2008), paras. 147-158 (life-threatening mudslide; the authorities were aware of the danger of mudslides there and of the possibility that they might occur at some point on the scale it did); and *Kolyadenko et al. v. Russia* no. 17423/05 (ECtHR, 28 February 2012), paras. 165 and 174-180 (necessary outflow from the reservoir because of exceptionally heavy rains; the authorities knew that in the event of exceptionally heavy rains evacuation might be necessary). *Urgenda*, (n 53) at 44.
[177] *Urgenda* (n 168) para 5.3.2.

as an effective benchmark to determine state compliance with their human rights obligations in the context of climate change. According to the Supreme Court, those criteria are fulfilled when, first, there is 'a real and immediate risk to persons' and when, second, the state in question is aware of the risk, even if the risk only materialises in the longer term.[178] It should be noted that the Supreme Court raised the threshold of the risk criteria established by the Appeal Court, which only required a real risk. The Supreme Court added the 'immediateness' criteria. Accordingly, the mere existence of a risk does not suffice to establish liability for human rights violations under articles 2 and 8 of the European Convention on Human Rights, according to the Supreme Court. It is necessary that such risk *actually* exists and *will* produce its effects, regardless of the actual time that that risk will take to materialise. In this sense, the Supreme Court pertinently added that 'the term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved'.[179] The focus is on the person impacted by the risks of climate change rather than on the point in time when that person may actually suffer the materialisation of a risk. The Supreme Court supported its findings through the precautionary principle, rejecting the government's argument that articles 2 and 8 of the European Convention on Human Rights do not entail states obligations to protect against risks of climate change as these 'would not be sufficiently specific'.[180] The Court found that:

> The fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons, but large parts of the population does not mean – contrary to the state's assertions – that Articles 2 and 8 ECHR offer no protection from this threat … This is consistent with the precautionary principle … The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken.[181]

In this way, the Supreme Court held that the Dutch State holds precautionary or positive human rights obligations in the context of climate change. Such obligations consist of taking appropriate steps under articles 2 and 8 of the European Convention on Human Rights and of undertaking preventive measures 'to counter the danger, even if the materialisation of that danger is uncertain'.[182] The Supreme Court concluded, in the human rights maximum point of

[178] ibid, para 5.2.2.
[179] ibid.
[180] Nollkaemper and Laura Burgers, (n 175).
[181] *Urgenda* (n 168) para. 5.6.2.
[182] ibid, 5.3.2.

its judgement, that '…the Netherlands is bound by the European Convention on Human Rights and the Dutch courts are obliged under … the Dutch Constitution to apply its provisions in accordance with the interpretation of the European Court of Human Rights. The protection of human rights it provides is an essential component of a democratic state under the rule of law.'[183]

This recognition of the state's obligations grounded in human rights law paved the way for the Supreme Court to assert in turn the obligation of the Dutch government to take mitigation measures, thereby linking both fields, human rights, and climate change. The Supreme Court accepted the dangers of, and the urgency of, climate change and held that the state was obliged to do its part in the interests of the residents of the Netherlands. The Court rooted that duty of the government in articles 2 and 8 and in the internationally recognised view that the Netherlands, as an Annex I country, under the UNFCC, was required to reduce its emissions.[184]

Accordingly, it was on a human rights basis that the Supreme Court upheld the *Urgenda* claim and affirmed the previous Appeal and District Courts' decisions of ordering the Dutch State an emission reduction 'of at least 25% by 2020. Also, following the previous Courts' reliance on climate science, the Supreme Court considered the 25% target to be the 'common ground.'[185] This target is based on the 'large degree of consensus in the international community and climate science that at least this reduction by the Annex I countries, including the Netherlands, is urgently needed'[186] The Court went even further by setting the 25% target 'as an absolute minimum', again, with the assistance of human rights considerations related to the positive obligations under Articles 2 and 8 European Convention on Human Rights to take appropriate measures to prevent dangerous climate change.[187]

Having resolved the state obligation to reduce its emissions, in order to establish causation, the Supreme Court relied, *inter alia*, on Article 47 of the Draft Articles on Responsibility of states for Internationally Wrongful Acts.[188] This article provides that 'where several states are responsible for the same internationally wrongful act, the responsibility of each state may be invoked in relation to that act'.[189] Accordingly, the Supreme Court took the approach, in line

[183] ibid, 8.3.3.
[184] ibid, 8.3.4.
[185] ibid, 5.4.2 and 7.2.11.
[186] ibid, 7.5.1.
[187] ibid.
[188] Yearbook of the International Law Commission (2001) vol. II, part 2, at 125.
[189] *Urgenda* (n 168) para. 5.7.6.

with the 'no harm principle',[190] that 'partial causation'[191] justifies partial responsibility: 'each country is responsible for its part and can therefore be called to account in that respect'.[192] In this vein, as the Supreme Court summarises: 'partial fault' also justifies partial responsibility'.[193] The legal value of this finding is that it partly removes the burden of proof on the claimant to demonstrate the causal link as it relies on the fact that the state has *partly* contributed to climate change, regardless of its *actual* contributions to global emissions, and its *actual* effects upon individual human rights. In this way, the Supreme Court discards the (common) defence argument that its 'own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale'.[194] This approach can facilitate other courts in relaxing causation barriers in subsequent claims and, at the same, as Nollkaemper and Burgers note, assist as a 'basis for the allocation of responsibility for the harmful *effects* of climate change to multiple contributing actors'.[195]

Urgenda provides significant insights for overcoming the causation challenges and will potentially be considered in future claims to establish liability for contributions to climate change.[196] Non-compliance with these obligations, either due to absence or insufficiency of adequate mitigation and adaptation measures would trigger state liability for human rights harms resulting from climate impacts. Indeed, *Urgenda* represents an early example of the potential of human rights considerations - even if these are not central in a case - to prompt more ambitious climate action, which can be developed in future claims, including, aspects limitedly addressed in *Urgenda*, such as extraterritoriality issues. For instance, *Urgenda* takes a restrictive approach to extraterritorial challenges when establishing the causal link. This is especially relevant in the context of climate litigation given the transboundary nature of climate change. For instance, the District Court was of the view that '*Urgenda* can partially base its claims on the fact that the Dutch emissions also have consequences for persons outside the

[190] ibid, 5.7.5.
[191] Nollkaemper and Laura Burgers (n 175).
[192] *Urgenda* (n 168) para. 5.7.5.
[193] ibid, 5.7.6.
[194] ibid para. 5.7.7.
[195] Nollkaemper and Laura Burgers (n 175).
[196] In fact, there are already several cased filed in courts worldwide somewhat adapting and replicating the *Urgenda* formula. See, for example, *Friends of the Irish Environment v. Ireland*, The High Court Judicial Review 2017 No. 793 JR, 19 September 2019; and *Maria Khan et al. v. Federation of Pakistan et al*, Writ Petition to the Lahore High Court No. 8960, 15 February 2019.

Dutch national borders, since these claims are directed at such emissions'.[197] In this way, it differentiates between the consequences of Dutch emissions in and outside borders and, accordingly, implicitly restricts its view to a territorial scope. Further, as Nollkaemper and Burgers observe, the Supreme Court judgement does not explicitly follow the Inter-American Court of Human Right's approach to extraterritorial jurisdiction.[198] The Inter-American Court of Human Rights held that "jurisdiction," … is not limited to the national territory of a state but contemplates circumstances in which the extraterritorial conduct of a state constitutes an exercise of its jurisdiction'.[199] Nevertheless, although *Urgenda*'s impact in terms of contribution to global mitigation efforts may be 'very minor', as the Dutch State argued in its defence;[200] its wider effect to limit states' emissions levels, regardless how minimum these could be in comparison to those from other states, can be expanded through subsequent climate litigation.

'Successful' cases, like *Urgenda* and the *Advisory Opinion,* and even 'unsuccessful' ones, like the *Inuit* petition play an important role in shaping the development of human rights performance in the context of climate change, thereby contributing to overcoming causation and other legal challenges in climate litigation. As such, they represent steppingstones towards establishing responsibility for climate-led harms to rights and the environment, not only by states but also potentially by corporations. The latter are probably the hardest to find liable for their contributions to climate change as they continue to operate in something of a 'legal vacuum'. Developments on attribution science and climate litigation addressing attribution hurdles may also help to this end.

3.2 Attributing Emissions to its Sources

Causation and attribution are distinctly linked to climate science. While causation focuses on identifying the causal link between human activity and its effect on the climate, attribution aims to trace the sources of the actions contributing to the climate *change* effect. The multiplicity of sources contributing to climate change raises the question of the extent to which each source has contributed to climate change, and the question of the share of responsibility which must be apportioned between the different contributing sources. For claimants, in order to establish liability in rights-based climate litigation, it may be required to prove that a specific actor, either

[197] *Urgenda* (n 53) District Court Judgement, para. 4.7.
[198] Nollkaemper and Burgers (n 175).
[199] *Advisory Opinion* (n 135) para 78.
[200] See *Urgenda*, (n 53) para 4.78.

a state or corporation, has contributed to climate change to a given extent causing human rights violations. The complexity of attribution and apportionment lies then in, first, specifying the actors contributing to the problem out of multiple sources over a long period of time, given the cumulative character of climate change; and second, determining the corresponding share between each of those sources during a certain timeframe. In rights-based claims, claimants would have to prove that climate change impacts result from the emissions generated by a specific emitter, which have impacted an individual or group in such a way as to cause a violation of rights.[201] In addition, given that global emissions are produced by multiple sources, the added challenge is to determine the share of the total of global emissions between specific contributors, either states or corporations, and its link to a specific human right violation.[202]

Developments in climate science are helping to overcome those attribution challenges with increasing accuracy.[203] This has helped to elucidate *where* the main responsible sources of the problem are. As a result, claims are increasingly being directed at seeking the liability of those sources. For instance, Heede's scientific study[204] shows that 'only 90 corporations caused two-thirds of man-made global warming emissions',[205] leading to climate change effects, which in turn adversely impact human rights. Yet, the multiplicity of emitters contributing on different scales to climate change creates serious legal attribution challenges to determine the liability of a specific contributor. In this regard, Faure and Nollkaemper, in discussing individual, joint and several liability, query whether a joint and several liability rule could be applied or whether individual liability would apply thereby requiring victims to take a high number of lawsuits:

> [By] assuming that the damage to the victim is proportional to the emissions by particular states or actors, the question still arises of what the consequence will be when the particular contribution of each actor has been determined: is each held liable separately for his own emissions (with the consequence that the victim has to

[201] Jacques Hartmann, Annalisa Savaresi and Ioana Cismas, 'The Impacts of Climate Change and Human Rights: Some Early Considerations on the Carbon Majors Inquiry' Climate Change Litigation in the Asia Pacific workshop (*University of Singapore*, June 2018) <https://ssrn.com/abstract=3277568 or http://dx.doi.org/10.2139/ssrn.3277568> accessed 20 April 2020.

[202] It could also be argued that where multiple polluters are involved, or in situations of cumulative causation, each actor should only be held responsible for its 'share' of the wrong. R. Verheyen, "Beyond Adaptation – The legal duty to pay compensation for climate change damage", (WWF UK Climate Change Programme discussion paper 2008) at 23. <http://assets.wwf.org.uk/downloads/beyond_adaptation_lowres.pdf> accessed 20 April 2020.

[203] See for example, Paul Griffin, 'The Carbon Majors Database – CDP Carbon Majors Report 2017' (CDP Report 2017), 8.

[204] See Heede, 'Tracing Antropogenic ...' (n 51).

[205] Suzanne Goldenberg, 'Only 90 corporations caused two-thirds of man-made global warming emissions'(The Guardian, 20 November 2013) < https://www.theguardian.com/environment/2013/nov/20/90-companies-man-made-global-warming-emissions-climate-change> accessed 20 April 2020.

bring a high number of lawsuits) or can a joint and several liability rule be applied?[206]

If establishing states' liability for contributions to climate change is a complex exercise, then establishing corporate liability for climate-led harms may be considered almost impossible at this stage, given the existing lack of consensus on the content and scope of corporate human rights obligations. However, the several liability rule could help to address liability obstacles: 'if it cannot be established who of the many tortfeasors contributed to a certain loss to a specific extent, *all* of them will be held jointly and severally liable. The effect is that the victim can choose to sue *any* of the injurers falling within the joint and several liability regimes and claim full compensation from any of them'.[207] In fact, this is partly the reasoning used by the Supreme Court in *Urgenda* where the Court rejected the defendant's argument relying on the multiplicity of sources and the minimal amount that the Dutch State's emissions represent compared to the total of global emissions.[208]

The criteria to establish attribution and apportionment of responsibility for rights harms resulting from climate change remains underdeveloped. However, recent innovative rights-based claims targeting corporations have started to crop up on the climate litigation scene providing new insights to overcome these challenges. This is exemplified by the renowned '*Carbon Majors'* case,[209] targeting corporations for climate-led impacts on human rights.

3.2.1. The Carbon Majors Case

In the aftermath of Typhoon Haiyan, which severely hit The Philippines,[210] in 2015, a group of Filipino individuals and a group of civil society organisations led by Greenpeace South Asia

[206] Michael Faure and André Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2008) Standford Journal of International Law 124, 165.
[207] ibid, 166. Faure and André Nollkaemper further note that '[t]he injurer who had to fully compensate the victim can then in turn reclaim from the other tortfeasors the amount which they contributed to the loss. In this recourse action, the amount which the individual tortfeasors contributed to the loss may then play a role again'. Ibid.
[208] *Urgenda* (n 53) para 4.78.
[209] Petition to the Commission on Human Rights of the Philippines to the Commission *on Human Rights* of The *Philippines* submitted by Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement [hereinafter, *Carbon Majors*] 12 May 2015. Available in the Sabin Center for Climate Change Law and Arnold & Porter Climate Change Litigation Database [hereinafter, '*Climate Litigation database'*], <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150512_Case-No.-CHR-NI-2016-0001_petition.pdf> accessed 15 June 2020.
[210] 'Typhoon Haiyan hit the Philippines in November 2013 and left more than 7,360 people dead or missing. It damaged or swept away more than 1.1m houses and injured more than 27,000 people. More than 4 million were displaced.', Ted Aljibe, 'Philippines: five years after Typhoon Haiyan' (*The Guardian*, 6 November 2018) < https://www.theguardian.com/artanddesign/2018/nov/06/philippines-five-years-after-typhoon-haiyan> accessed 20 June 2020.

presented an inquiry to the Commission on Human Rights *of The* Philippines (the 'Commission') to investigate the responsibility of 50 fossil fuel, gas and coal corporations (the '*Carbon Majors*') for 'human rights violations or threats of violations resulting from the impacts of climate change'.[211] The petition was mainly grounded on Filipino constitutional rights and the 'relevant international human rights instruments'.[212] It inquired about the Carbon Majors' responsibility for the climate impacts to the Filipinos' rights to life, to the highest attainable standard of physical and mental health; to food; to water; to sanitation; to adequate housing; to self-determination; and it addressed 'those particularly likely to be affected by climate change',[213] including certain environmental rights, such as the rights to health and a balanced and healthful ecology.

The inquiry was accepted by the Commission based on its constitutional mandate, which establishes that the Commission has the power to '[i]nvestigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights'.[214] However, the Commission is not a judicial body per se and has only declaratory power,[215] therefore, its findings are not legally binding upon the 'parties' to the inquiry. Yet, some respondent corporations challenged the Commission's authority to investigate the case in their response to its invitation to provide their views.[216] The Commission, however, decided to proceed with the investigation **'**[w]ith or without the participation of the respondents, in respect of its constitutional mandate'.[217]

After several years of investigation and hearings with the participation of Filipino victims of climate change, scientists, lawyers and experts, the Commission announced its findings in the

[211] *Carbon Majors* (n 209) at 31.
[212] ibid, at 5-10. The Petition states that: 'human rights violations or threats subject to the Petition, include a number of rights, including "environmental rights not listed under the Bill of Rights", such as the rights to health and a balanced and healthful ecology'. Ibid, at 6.
[213] Including 'women; children; persons with disabilities; those living in extreme poverty; indigenous peoples; displaced persons; and workers; as well as the right of Filipinos to development. Ibid, at 5.
[214] The Constitution of The Philippines, 2 February 1987, Article XIII, S.18 (1)
[215] Hartmann, Savaresi and Cismas, The Impacts of Climate Change and Human Rights: Some Early Considerations on the Carbon Majors Inquiry. (n 201).
[216] For example, Exxon Mobil presented a motion to dismiss alleging that the Petition request this Honourable Commission to act beyond the scope of its authority […and] lacks subject matter jurisdiction over the Petition.' See the response to the Commission by Exxon Mobil: <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Corporate_Responses_and_Comments/Exxon_Response.pdf> accessed 20 April 2020.
[217] Environmental Science for Social Change 'New approaches to climate justice: Framing climate change as a human rights issue in a global dialogue'(Institute of Environmental Science for Social Change, 13 September 2018) <https://essc.org.ph/content/new-approaches-to-climate-justice-framing-climate-change-as-a-human-rights-issue-in-a-global--dialogue> accessed 20 April 2020.

Carbon Majors inquiry, in the margins of the UNFCCC Conference of States Parties (COP25), in December 2019. Although, at the time of writing, the Commission has not yet released its final report, according to the Chair Commissioner, Roberto Cádiz, the Commission found that the *Carbon Majors* 'could be found legally and morally liable for human rights harms to Filipinos resulting from climate change'.[218] The Commission also found that 'relevant criminal intent may exist to hold companies accountable under civil and criminal laws, in light of certain circumstances involving obstruction, wilful obfuscation and climate denial'.[219] These preliminary findings suggest potential avenues that can be explored by litigants to establish accountability of corporations for disproportionate emissions' contributions leading to climate change, which may benefit from increasing developments in the field of climate science.[220] In fact, the *Carbon Majors* case raises important questions about corporate liability for rights harms resulting from climate impacts to which they contribute through disproportional emitting activity. Given that claims alleging human rights violations associated with climate change- may likely continue to grow in the near future, the application of the 'joint liability but individual accountability' notion may increasingly be explored in climate litigation.

At the same time, other forms of liability may be explored such as criminal prosecution of CEOs of corporations historically and disproportionally contributing to climate change. For example, US Senator Sanders proposed in a Democratic Presidential debate to criminally prosecute fossil fuels executives 'because they have lied and lied and lied when they had the evidence that their carbon products were destroying the planet'.[221] Likewise, in scholarly work, the notion of ecocide has been suggested in order to prosecute the Chief Executives of corporations for their responsibility in their corporations' conduct contributing to climate change.[222]

Overall, despite the Commissions' limited power, the *Carbon Majors* case opens the door for the initial scrutiny of the responsibility of corporations for rights violations resulting from climate impacts in the context of climate litigation. Yet, the ability of claimants to creatively

[218] Greenpeace Philippines 'The Climate Change and Human Rights Petition' (Greenpeace Philippines, 9 December 2019) <https://www.greenpeace.org/philippines/press/3950/greenpeace-reactive-on-philippine-commission-on-human-rights-announcement/> accessed 20 April 2020.
[219] ibid.
[220] See, for example, Heede, 'Tracing Antropogenic ...' (n 51).
[221] Umair Irfan, 'Bernie Sanders wants to take fossil fuel companies to criminal court' *The Guardian* (20 November 2019) <https://www.vox.com/2019/11/12/20959293/bernie-sanders-climate-lawsuit-exxon-juliana-sinnok> accessed 20 April 2020.
[222] See, for example, Rob White 'Ecocide and the Carbon Crimes of the Powerful' (2018) 37(2) The University of Tasmania Law Review 95; John Braithwaite, 'Regulatory Mix, Collective Efficacy, and Crimes of the Powerful ', (2020) 1 Journal of White Collar and Corporate Crime, 62 and David Whyte 'Ecocide, kill the Corporation before it kills us' (Manchester University Press 2020).

ground claims in the blurred zone of corporate human rights obligations, and the receptivity of courts to this kind of claims remains to be seen.

3.2.2 Lliuya v RWE

Indeed, the receptivity of courts to claims alleging rights harms caused by corporations' emissions contributing to climate change has started to be tested. In *Lliuya v. RWE AG,*[223] for example, a Peruvian farmer filed a claim against a German corporation, RWE, the largest energy corporation in Europe, before the Essen Regional Court of Germany in 2015. The claim sought the court's adjudication on RWE's responsibility for its contributions to climate change as well as reimbursement for damages for the impairment of the claimant's property rights under German Civil Law.[224] The claimant argued that the high emissions levels from the corporation were causing the melting of glaciers in the Andes region, where Huaraz, his home city, is located. Specifically, he alleged that the melting of glaciers near Huaraz are causing a notable increase in the water-levels of the Palcacoha glacial lake, which poses an imminent threat of flooding and would negatively impact his family life and property rights as well as his home city.[225] The claimant also sought reimbursement from RWE for adaptation costs incurred to protect his property and home city from potential floods and costs for damages based on RWE's emissions contribution per year.[226] Based on emissions contributions from RWE, the claimant provided the amount of share attributable to it out of the total emissions[227] in order to calculate compensation costs.

Lliuya relied on German Civil Law, property rights legislation,[228] and recent climate jurisprudence to support his claim. This included the renowned findings of the The Hague District Court judgment in *Urgenda*, as well as 'joint liability'[229] arguments in order to address causation and attribution challenges. *Lliuya* argued that, '[with] regard to the impairment through multiple disturbers [joint liability], the owner can take action against each one according to its causational contribution',[230] thereby reserving his ability to sue other polluters.

[223] Lliuya v. RWE AG, No 2 0 285/15 Essen Regional Court, 24 November 2015.
[224]German Civil Code, Section B.I(3), para. 1004.
[225] ibid, B.II(1-2).
[226] ibid, at 2.
[227] Lliuya (n 223)
[228] German Civil Code (n 224) at 28, 33- 37 and Annex K28.
[229] See Faure and Nollkamper (n 206).
[230] *Lliuya* (n 223) at 31.

The Essen District Court dismissed the claim. It found it was 'impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage'.[231] This reflects the prevailing difficulty in overcoming causation and attribution to establish the link between the act generating emissions by a specific 'major' emitter and the rights harms resulting from that act. Accordingly, the Court was of the view that 'every emission may be causational for the state of the climate as it presents itself today, but this assessment has no bearing on the question of legal attribution to individual emitters'.[232] The claim also would not have satisfied attribution as the Essen District Court found that '[irrespective] of the fact that equivalent causation is negated in the context of cumulative damages, the contribution of individual … emitters to climate change is so small that any single emitter, even a major one such as the defendant, does not substantially increase the effects of climate change'.[233]

The decision was appealed and admitted by the High Regional Court of Hamm, which requested the parties to provide expert opinion in order to evidence causation and risks associated to it as well as the 'defendant's share in the contributory causation [accounting] for 0.47%'.[234] At the time of writing, the decision is still pending. However, the admission of the case, the call to parties to provide additional evidence, and overturn of the Essen District Court's judgement by the High Court of Hamm already represents an important achievement. The Court found that 'it is enough that [RWE] emissions are partially responsible for the actual, present risk [of flood in Huaraz]. There is no basis in the law to argue that partial causation does not exist in this case'.[235] Certainly, given the multisource nature of climate change, causation will *always* be partial and trigger the use of attribution science in order to apportion the share of emissions contribution corresponding to each source. So, not only is there no reason to rule out corporate responsibility but, also, *partial* responsibility will *always* be the case as a premise. This, transferred to *Lliuya*, means that while RWE is not wholly responsible for emissions causing climate-led impacts to rights, RWE is still partially responsible for them and, as such, should be held accountable for its share of responsibility. Consequently, irrespective of its outcome, *Lliuya* may set a precedent in rights-based claims targeting corporations and prompt more cases

[231] *Lliuya*, District Court Essen 45117, 15 December 2016 (Unofficial English translation).
[232] ibid, at 6.
[233] ibid, at 7.
[234] *Lliuya* (n 223) Order of the Regional Court of Hamm, 1 February 2018.
[235] Germanwatch, 'General Ruling of the Civil High Court in Hamm' (*Germanwatch*, 14 November 2017) <https://germanwatch.org/sites/germanwatch.org/files/announcement/20810.pdf> accessed 20 April 2020.

arguing impingement to rights by them using rights language.[236] Ganguly, Setzer and Heyvaert, noting the proliferation of such arguments, remark on the possibility of climate change 'no longer being represented before the court as a diffuse and general problem caused by myriad unknown and unidentifiable sources' rather, it could be represented 'as the consequence of a specific set of choices and actions, undertaken by a discrete group of well-informed actors, which causes particular and measurable damage'.[237]

Lliuya, certainly, provides positive insights in the effort to overcome attribution challenges in future climate litigation as well as causation and extraterritoriality challenges. So far, the admission of the case by the High Court of Hamm implies opening the door for consideration of the possibility of establishing corporate responsibility for their emissions contributions to climate change leading to rights harms, regardless if they amount only to a (small) portion of the total amount of emissions contributions, or if the effects of climate change are felt thousands of kilometres distance from the emitting corporation's jurisdiction. That is the complexity of climate change. It challenges traditional understandings, including those related to the implications of individual actions and, in consequence, the understanding of the application of laws that challenge unquestioned territorial and temporal notions in law and, in particular, in human rights law. This entails, *inter alia*, the reconsideration of intergenerational rights in human rights law, so relevant in the context of climate change, and increasingly present in emerging rights-based climate litigation, discussed hereby.

3.3 Extratemporality: Climate Change, Human Rights and Future Generations

In the context of climate change is worth to consider the temporal dimension of implicit (legal understandings): whilst the behaviour causing climate change is, generally, conceived as an action performed in the past, its effects upon rights and the environment only become recognisable over time, meaning in the present and in the future.[238] As a result, under this understanding, climate change can be considered as a slow form of violence. As Nixon states: 'slow violence is often not just attritional but also exponential, operating as a major threat

[236] In *Lliuya*, the claim was grounded on the right to property enshrined in the German Civil Code, rather than in human rights law. However, this does not rule out the possibility of using human rights law for a similar claim alleging rights' threats or violations.
[237] Ganguly, Setzer and Huyvaert (n 20) 855.
[238] In this regard, Julia Dehm, *citing* Gary Saul Morson's 'Narrative and Freedom: The Shadows of Time' (Yale UP, 1994), notes that narratives of the climate crisis 'construct a way of 'thinking of time as a straight line [where] past events only existed to lead us to this point' and the future is only 'that line continuing' as 'the present stretched out ahead of us'. Julia Dehm, 'International law, temporalities and narratives of the climate crisis' (2016) 4(1) London Review of International Law167, 171.

multiplier; it can fuel long-term, proliferating conflicts in situations where the conditions for sustaining life become increasingly but gradually degraded.'[239] In the case of climate change, future victims of climate impacts, as rights' holders, seem to be always out of view. This is in part because law and, specifically, international human rights law does not recognise the rights of future generations, in a comparable way to present existing human beings. As Fisher argues, 'there might be no appropriate claimant to vindicate the rights of groups of people affected by climate change, particularly those of future generations. Climate change has widely dispersed social impacts and so does not fit easily into the individualised legal paradigm of human rights'.[240]

Nixon provides an illuminating framework for understanding these dispersed impacts. He coins the phrase slow violence to distinguish between highly visible and newsworthy forms of violence 'immediate in time, explosive and spectacular in space…erupting in to sensational visibility' and 'violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attrition violence that is typically not viewed as violence at all'. [241] He argues that 'the temporal dispersion of slow violence affects the way we perceive and respond to a variety of social afflictions….in particular, environmental calamities'.[242] Nixon argues that we urgently need to rethink how we see the slow violence that animates climate change. As he notes: 'Stories of toxic build-up, massing greenhouses gases, and accelerated species loss due to ravaged habitats are all cataclysmic, but they are scientifically convoluted cataclysms in which casualties are postponed often for generations'.[243] Nixon's examination of slow violence provides a useful language which can help to illuminate the blind-spots in human rights law, such as future generations and the environment. Human rights law tends to prioritize the immediate and the spectacular and fails to see the slow violence that characterizes climate change, environmental calamity, and the lives of future generations. Impacts that are dispersed widely over time and space and slow violence pose a real challenge for the existing human rights law framework which is largely concerned with the here and now.

In the context of climate litigation, it is already complex to prove imminent or actual climate impacts on the rights of present individuals and groups; our existing tools and priorities make

[239] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011) at 3.
[240] Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legal Disruptive Nature of Climate Change' (2017) 80(2) The Modern Law Review 173, 189-90.
[241] Rob Nixon, *Slow Violence, and the Environmentalism of the Poor* (Harvard University Press, 2013) at 2-3.
[242] ibid 3.
[243] ibid 3.

it doubly difficult to imagine how we legally represent rights violations which will materialise in the future, impacting future generations rights. In a similar vein to how Nixon urges a reimagining of slow violence, it is necessary to challenge human rights law temporalities. Lewis remarks on both the necessity and the difficulty of seeing future generations within the international human rights framework:

> [A] number of legal, practical, and political challenges remain to be overcome before international human rights can be employed effectively to address climate change. These challenges exist when the rights holders concerned are members of contemporary generations but are even more problematic when attempting to extend the application of the law to future generations.[244]

In this sense, the context of climate change has the potential to push human rights law boundaries, triggering its evolution in a way to capture elements *a priori* ignored, such as future generations and the as yet unrecognized, in international human rights law, right to a healthy environment. Tremmel defines 'future generation' as a generation where 'none of its members is alive at the time the reference is made'.[245] The idea of the rights of future generations exemplifies how human rights law fails to embrace the rights of future generations in the same way as present generations; as such, only existing human beings are considered to fall under its scope of protection.[246] Atapattu remarks that international human rights law does not yet recognise a right to a healthy environment as a human right, despite the close link between environmental degradation and the enjoyment of rights.[247]

In the context of climate change, its extra-temporal character of climate change and its effects trigger fundamental questions about the applicability of human rights law to future generations. As Browne identifies, 'the effects of climate change are not linear and may materialise or be realised over different time scales and spatial scales. This raises the question of whether a plaintiff might sue on behalf of future generations who may not yet even be born but who may

[244] Bridget Lewis, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation' (2016) 21 Tilburg Law Review 69, 78.
[245] Joerg Chet Tremmel, 'A Theory of Intergenerational Justice' (1st edn, Earthscan 2009) 24. See also, Rachel Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation' (2016) 21(1) Tilburg Law Review 31, 33.
[246] Therefore, it falls beyond the scope of this work the conceptual analysis of future generations' rights and/or theories of intergenerational justice. For a detail analysis of these, see for example, Tremmel, ibid; Ori J. Herstein, 'The Identity and (Legal) Rights of Future Generations' [2009] 77 The George Washington Law Review 1173.
[247] Sumudu Atapattu, 'An Idea Whose Time Has Come' on an emerging right to a healthy environment (Verfassungsblog on matters constitutional, 29 October 2019). "An Idea Whose Time Has Come" (verfassungsblog.de) accessed 29 November 2020.

suffer the consequences of climate change as a result of current activities'.[248] However, it should be borne in mind that the challenge presented by the extra-temporal dimension of climate change also affects the rights of currently young generations which, along with *future* generations, will be less able than current generations to enjoy, for instance, their right to food due to the increasingly long and intense droughts in some areas of the planet, which may only be aggravated in the future.[249] In this regard, Tremmel argues for an inclusive understanding of intergenerational justice, through the term 'succeeding generations':

> Unlike the term 'future', the term 'succeeding' generations includes not only unborn generations but also present children and adolescents. In many respects, it makes no difference for a theory of an intergenerationally just distribution of resources and life-chances whether a child was born yesterday or will be born tomorrow. In both cases, it has a life to live and should be protected against intergenerational injustice. [250]

This need to account for succeeding generations has been reflected in a number of recent claims brought by or on behalf of children before courts worldwide,[251] enabling the rights of future generations as a matter of intergenerational justice. These cases have brought attention to extra-temporal challenges to the application of human rights in the context of climate change.

Current climate policies and human rights provisions are inadequate protection for the rights of future generations. For instance, the Paris Agreement makes very limited and generic references 'to intergenerational equity' and it excludes a specific reference to future generations.[252] However, as Lewis has noted, the Paris Agreement does not specify, in its human rights

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[248] Browne (n 12) at 52 *citing* Hari Osofsky, (n 106).

[249] See, for example, Penny Marshall 'The worst drought in 40 years is driving Zimbabwe's parched land into crisis and climate change is at the heart of it' (*ITV news*, 2 December 2019) < https://www.itv.com/news/2019-12-02/food-crisis-in-zimbabwe-as-the-country-endures-its-worst-drought-in-40-years/> accessed 20 April 2020; and, Anne Davis, Ben Smee and Lorena Allam, 'I don't know how we come back from this': Australia's big dry sucks life from once-proud towns' (*The Guardian*, 13 September 2019) <https://www.theguardian.com/environment/2019/sep/14/i-dont-know-how-we-come-back-from-this-australias-big-dry-sucks-life-from-once-proud-towns> accessed 20 April 2020.

[250] Tremmel (n 245) 59.

[251] See, for example, *Sacchi et al v. Argentina, Brazil, France, Germany and Turkey*, Petition to the UN Committee on the Rights of the Child, 23 September 2019; *Maria Khan et al v. Pakistan et al* (2019) No 8960 Lahore High Court; *ENVironment JEUunesse v. Canada* (2018) 500-06-000955-183 Québec High Court; *La Rose v. Her Majesty the Queen* (2019) T-1750-19 Federal Court of Canada; *Armando Ferrão Carvalho and Others v. The European Parliament and the Council* (2018) No. T-330/18 EU General Court; and *Pandhy v. India*, National Green Tribunal of India, No (unnumbered) of 2017, 25 March 2017.

[252] Such references are in the Preamble (intergenerational equity) and Article 2.2 of the Paris Agreement. Bridget Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7(1) Transnational Environmental Law, 69, 73.

reference in the Preamble, that it applies to current generations only; accordingly, it could be argued that it 'makes space for the rights of future generations'.[253] Yet, as Lewis further notes, 'the preambular statement is vague … the language is not especially demanding –and its position in the Preamble leaves it without much legal force'.[254] As a result, it can be inferred that neither human rights law nor the climate regime are equipped to protect future generations' rights. It is thus necessary to rethink human rights law to embrace the respect and protection of the rights of future generations, a group especially vulnerable and disproportionally affected by climate change impacts resulting from decisions and actions taken by past and present generations; decisions in which they did not have a say at all. In this context, rights-based climate litigation may provide an avenue to develop innovative approaches to address such limitations in human rights law. One such innovation, as Johnston argues, is to grant future generations legal standing in climate change litigation. Climate litigation could, then, provide a means to challenge, as Johnston puts it, 'the "intergenerational buck passing" of the current generation who benefits from passing on the costs and harms of their behaviour to future ones due to the time lag effect of climate change'.[255] Recent climate litigation addressing intergenerational issues from a rights perspective has opened the door to this approach of making claims on behalf of young and future generations.

3.3.1. Intergenerational Climate Justice in the United States: Not Quite Ready?

Juliana et al v. the United States is one such case which revolves around the rights of future generations.[256] When the case was filed in 2015, it was novel. This was the first time that a case involving children and young claimants invoking the rights of future generations was brought before a national court. Since then, several cases invoking the rights of future generations have been filed in different jurisdictions. These cases, irrespective of their outcome, have garnered wide public attention.[257]

[253] ibid, 75-6.
[254] ibid, 76.
[255] Johnston (n 245) 36.
[256] *Juliana v the United States*, Federal District Court of Oregon, Case 6:15-cv-01517-TC, amended 10 September 2015 [hereinafter, *Juliana*].
[257] See, for example, some cases filed in the United States: *Sinnok v. Alaska* (2017) Superior Court for The State of Alaska Third Judicial District at Anchorage; Petition for Rulemaking to Limit North Carolina's Carbon Dioxide Emissions to Protect a Stable Climate System and Preserve the Natural Resources of North Carolina (2017) North Carolina Department of Environmental Quality, letter of 14 November 2017; *Reynolds v Florida* (2018) Circuit Court of the Second Judicial Circuit in and or Leon County, Florida; *Aji P. v. State of Washington* (2018) Letter sent to Washington governor by plaintiffs' attorney, 16 February 2018. See also, for example, cases outside the United States (n 251).

In *Juliana*, a group of twenty-one young claimants, filed a claim against the government of the United States and other government agencies before the District Court of Oregon. The claimants sought declaratory relief, arguing that defendants have violated and are violating claimants 'fundamental constitutional rights to life, liberty, and property. Defendants' acts also discriminate against these young citizens, who will disproportionately experience the destabilized climate system'.[258] The claim also sought an injunctive relief order for the government to undertake various actions aimed at drastically reducing its emissions.[259] The claimants argued that government actions in support of fossil fuel activities 'have knowingly endangered Plaintiffs' health and welfare by approving and promoting fossil fuel development, including exploration, extraction, production, transportation, importation, exportation, and combustion, and by subsidizing and promoting … fossil fuel exploitation… These deliberate actions by Defendants [they further argued] 'have cumulatively resulted in dangerous levels of atmospheric CO2, which deprive Plaintiffs of their fundamental rights to life, liberty, and property'.[260] The claim was based, then, on the constitutional rights to life, liberty, and property and on due process rights under the Fifth Amendment,[261] as well as the public trust doctrine.[262] The claimants claimed that they are holders of the 'inherent, inalienable, natural, and fundamental rights [to] a stable climate system and an atmosphere and oceans that are free from dangerous levels of anthropogenic CO2'.[263] By doing so, the claimants alleged that the government 'dangerously interferes with a stable climate system and violates Plaintiffs' constitutional rights'.[264]

The defendants made several attempts to dismiss or delay the case. They, for instance, filed a motion to dismiss, challenging the Court's authority to hear the claim on the basis of the separation of powers doctrine.[265] They argued that the claimants had failed 'to allege

[258] *Juliana* (n 256) at 8.
[259] ibid, 94.
[260] ibid, 86, para. 280.
[261] Under which, no person can be 'deprived of life, liberty, or property without due process of law.' Constitution of the United States, Fifth Amendment (1791).
[262] The public trust doctrine entails 'Governments must manage trust resources for the exclusive benefit of their citizens, both current and future, and if they fail to do so, citizens can seek remedy in the courts." Raphael Sagarin and Mary Turnipseed, 'The Public Trust Doctrine: Where Ecology Meets Natural Resources Management' (2012) 37 Annual Review on the Environment 473, 474. Also, Wood annotates that Nature's Trust presents the antithesis of the discretion model that has bred corruption and cover-up in many environmental agencies. It draws from the ancient yet enduring public trust principle, which safeguards crucial natural resources as common property of all citizens. The doctrine holds government, as trustee of ecological assets, to a quintessential duty of protection.' Maria Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (1st edn, Cambridge University Press 2014) 125.
[263] *Juliana*, [93] [para. 304].
[264] *Juliana*, [39] [para. 99].
[265] *Juliana* [2015] Civil No. 6:15-cv-01517-TC

particularized harm traceable to defendants' acts',[266] thus, they argued the claimants lacked standing. However, the claimants were able to overcome some of those attempts.[267] For instance, in response to a motion to dismiss from the industry as intervenors, Judge Aiken from the District Court of Oregon ordered rejection of the motion. She found that 'the right to a climate system capable of sustaining human life is fundamental to a free and ordered society' and she held that 'a stable climate system is quite literally the foundation "of society without which there would be neither civilization nor progress"'.[268]

In addition, in relation to the claimants' lack of standing alleged by the defendants, Judge Aiken, reasoning on the imminence requirement for standing, found convincing the youth plaintiffs arguments that harm was ongoing and was likely to continue in the future and that this was sufficient to satisfy the imminence requirement: 'By alleging injuries that are concrete, particularized, and actual or imminent, plaintiffs have satisfied the first prong of the standing test'.[269] This recalls the 'present and imminent risk' criteria developed in *Urgenda* as the admissibility threshold in rights-based claims. In addition, Judge Aiken found that the claimants 'have adequately alleged harm to public trust assets' because some of their 'injuries relate to the effects of ocean acidification and rising ocean temperatures',[270] developing in this way the causal link between climate harms and their actual impacts on individuals' rights.

Judge Aiken's reasoning provides a sign of willingness to hear, or at least, openness to hearing, young and future generations' claims by the judiciary. She pointed out that 'Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.'[271] This kind of view may help to overcome additional standing obstacles that young and future generations face in climate litigation, despite being the most vulnerable and disproportionally affected by climate impacts. While rights-based claims technically cannot be filed by members of *future* generations *per se*, as they technically do not exist yet, claims filed by children and youth are made 'on behalf' of young and future generations.

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[266] ibid, [8]-[1].
[267] See for example, Judge Coffin's findings and recommendation to deny government's motion to dismiss, *inter alia,* on the basis that 'the plaintiffs differentiate the impacts by alleging greater harm to youth and future generations', [and that] the allegations, which must be taken as true, establish action/inaction that injures plaintiffs *in a concrete and personal way*.' *Juliana* [2016] (Judge Coffin Order and Findings & recommendation) No. 6:15-cv-1517-TC 8].
[268] *Juliana* [2016] (District Judge Aiken Opinion and Order) No. 6:15-cv-01517-TC [32].
[269] ibid [21].
[270] ibid [42].
[271] ibid [at52].

Subsequently, the defendants appealed the District Court's decision. They requested to dismiss the case on the grounds that the plaintiffs lacked standing. Thus, the request was denied and the District Court's decision stayed.[272] In 2020, in a divided order by the Ninth Circuit Court of Appeals, two of the three judges found that, while recognizing the need for 'adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change … it was beyond the power of the court to order, design, supervise, or implement the plaintiffs' requested remedial plan'.[273] As a result, the Ninth Circuit found that 'any effective plan would necessarily require … the wisdom and discretion of the executive and legislative branches'.[274] Accordingly, it concluded that whilst the plaintiffs had made a compelling case, the issue was one for the political branches and not the court. The Court was unambiguous about the need for climate action. The Court recognised the weak record of governmental climate action and noted: 'it will be increasingly difficult in light of that record for the political branches to deny that climate 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'.[275] The Court also recognised the political value of the plaintiffs' case which could 'well goad the political branches into action'.[276] But the Court, nevertheless, found the claim nonjusticiable: We reluctantly conclude…that the plaintiffs' case must be made to the political branches or to the electorate at large...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'.[277]

With this decision the Ninth Circuit reversed the decision taken by the District Court and 'preserved' the separation of powers doctrine, despite acknowledging the need for climate action and the potential impact of the claim in generating climate action within the United States. Contrary to this view, Judge Staton, in his dissenting opinion, disagreed with the decision to dismiss on the grounds of the questions of justiciability, holding that the 'mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution'.[278] He did not hold back both on his ire at governmental inaction and the decision to dismiss, arguing that the 'government accepts as fact that the United States has reached a tipping point crying out for a concerted response - yet presses ahead toward

[272] *Juliana*, [2017] No 17-71692 (Ninth Appeals Court) [1].
[273] *Juliana* [2020] No. 18-36082 [25].
[274] ibid.
[275] ibid [at 31]-[32].
[276] ibid [at 31]-[32].
[277] ibid [at 31]-[32].
[278] ibid [32]-[33].

calamity... Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation'.[279]

This view, in addition to the previous District Court's findings, only confirm the increasing receptivity of judges to rights-based claims, including those brought by children or youth on the basis of ongoing and future rights harms, even if this implies pushing to its limits the sacredness of the separation of powers. Considering the significant role that the United States plays as a contributor to climate change through its emissions,[280] the potential impact of these types of claim, which are cropping up in different courts,[281] is not insignificant. Despite the reversal at the Ninth Circuit Court, the case may trigger further climate litigation, especially of claims involving future generations' rights. In addition, the youth claimants continue to push ahead with their claims in this case. Following the Ninth Circuit decision, the claimants filed a petition for rehearing *en banc* their claim,[282] the outcome of which is, at the time of writing, still pending.

3.3.2 Intergenerational Climate Justice in Colombia: Rethinking Time and Environment

In Colombia, in 2018, in the *Future Generations v. Ministry of the Environment and Others* case,[283] children and youth filed an injunction claim to protect fundamental rights, a *tutela or* legal guardianship, in the Superior Tribunal of Bogota. The claimants alleged that the grievous deforestation in the Colombian Amazonia, the source of 89% of Colombia's total emissions,[284] is causing global warming,[285] which violates their constitutional right to enjoy a healthy environment.[286] With the use of constitutional rights arguments, the claimants alleged that the violation of their right to enjoy a healthy environment threatens 'their rights to life, health, food, water as members of the future generation who will face the effects of climate change in our country'.[287] The *Tutela* was denied by the Tribunal as it found that *acción popular,* a collective rights-based injunction was the most 'idoneous and efficient' means to obtain the protection

[279] ibid [32]-[33].
[280] After China (with 28%), United States is the largest contributor to global emissions, accounting for 14% of them as of May 2020. Union of Concerned Scientists, 'Each Country's Share of CO2 Emissions' (May 2020). <https://www.ucsusa.org/resources/each-countrys-share-co2-emissions> accessed 1 June 2020.
[281] See, for example, *Sinnok v. Alaska* (n 257), which, as Juliana, is supported by Our Children's Trust and framed with similar arguments.
[282] *Juliana*, Petition for Rehearing *en banc* of Plaintiffs-Appellees, No. 18-36082, 2 March 2020.
[283] *Future Generations v. Ministry of the Environment and Others* [hereinafter, *Tutela*] STC4360-2018 Tribunal Superior of Bogota, 4 April 2018.
[284] ibid [17].
[285] ibid [12].
[286] Constitution of Colombia, Article 79.
[287] *Tutela* [27].

claimed.[288] On appeal, the Supreme Court, instead, revoked the previous decision and granted the legal guardianship to the youth claimants.

This innovative judgement develops the linkages between the need for a healthy environment, the realization of fundamental rights and the rights of future generations. The Supreme Court upheld the interdependence of both rights and rights in relation to the environment, arguing that 'the fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem'.[289] The Court then linked this interdependence of rights to intergenerational climate justice: 'Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed'.[290]

In noting this dependency of subjects of law and sentient beings on a healthy environment and in understanding 'sentient beings', as comprising all other living beings, the Supreme Court took a novel step towards the recognition of the importance of 'sentient' beings, otherwise neglected as legal subjects. The Court, thus, moves away from the traditionally anthropocentric notion of human rights law in which human beings occupy a central and overarching place in relation to the elements of the environment; in which the environment and its components fulfil a utilitarian function only.

Whilst the Court remains unavoidably anthropocentric in essence provides insights to rethink the human rights' relational approach to the environment and its elements, which can gradually evolve in a way to consider human beings as *part* of the environment, an environment, whose components could also be subjects of rights. This does not mean that the rights of the environment should mirror the rights of humans. As Stone highlights, 'to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the environment should *have* the same rights as every other thing in the environment'.[291] The *Tutela* case shows, however, that courts are starting to accept what, in the words of Stone, was the 'unthinkable', by recognising sentient beings, other than humans, as interdependent on a

[288] *Tutela* [20] (unofficial English translation).
[289] *Tutela* [13]
[290] *Tutela* [13]
[291] Christopher Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects' (1972) 45 Southern California Law Review, 450, 458.

healthy environment. Such an approach is, thus far, at least, uncommon and time can only tell if other courts and actors will follow suit.

The Colombian Supreme Court acknowledged the inextricable connection between the deforestation of the Amazon and the resulting 'short, medium, and long term imminent and serious damage'[292] to the rights of present and *future* generations. It found that:

> The increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights; it gradually depletes life and all its related rights. The inability to exercise the fundamental rights to water, to breathe pure air, and to enjoy a healthy environment is making Colombians sick. [293]

The Court observed that this was an exceptional proceeding but the invocative connection it made between fundamental rights and the environment facilitated the Court's decision: '…in this case, the exceptional proceeding of the *Tutela* is sufficiently demonstrated to resolve in depth the problems raised, because the jurisprudential assumptions for this purpose are met, given the *connectedness* of the environment with fundamental rights.[294] By connecting the harms to the environment with harms to rights, both of present and future generations, the Supreme Court adopts a temporal logic which projects human rights to cover the rights of as *yet* inexistent humans. In this way, as in the case of the environment, it develops the traditional application of human rights.

Reflecting on our obsession with the present and short-termism of human rights, Humphreys notes: 'We seem addicted to a present that we are unable to conceive of as our past, while the future seems to recede further and further out of reach'.[295] Humphreys argues that we need to rethink time. The need to rethink time also applies to human rights law. It is necessary to rethink the temporal application of human rights law, to include future rights holders now. As such, the Colombian Supreme Court's acknowledgement that the protection of fundamental rights involves not only protecting the existing individual but also the 'other' including the unborn, who will also need to have the ability of enjoyment of the rights that human beings in the present have., represents an evolution towards a wider understanding of the temporalities of human

[292] *Tutela* [11] at 34 (unofficial English translation).
[293] ibid.
[294] ibid.
[295] Stephen Humphreys, 'Climate Justice: The Claim of the Past' (2014) 5 Journal of Human Rights and the Environment 134, 136.

rights law, in light of the protracted temporality of climate change. Accordingly, as Setzer and Benjamin have noted 'the decision applied the same constitutional provisions used for the protection of the environment for current generations, but this time to protect future generations, thereby substantially expanding the limits of such rights'.[296]

It is thus in light of these developments of traditional human rights notions, including the explicit acknowledgement of the environment and future generations as 'subject' entities falling under the scope of human rights protections, that the Supreme Court concludes that 'in order to protect this ecosystem vital for our global future, just as the Constitutional Court declared the Atrato river, the Colombian Amazon is recognized as a "subject of rights," entitled to protection, conservation, maintenance and restoration led by the State and the territorial agencies'.[297] Accordingly, the Supreme Court upheld the claimants petition and ordered the Colombian government to prepare, within five months, 'an "intergenerational pact for the life of the Colombian Amazon'. It ordered the government 'to adopt measures aimed at reducing deforestation to zero and greenhouse gas emissions, and …, directed towards climate change adaptation'.[298] However, the ability to enforce the decision is a different story, and this remains to be seen. According to Dejusticia, the environmental non-governmental organisations that supported the young claimants' *Tutela* petition, one year after the decision, deforestation in Colombia continues at a high level, with only minimal responses from the Colombian government.[299]

Nevertheless, the recognition of a relationship between human beings, the environment, and future generations, as developed in *Tutela*, is significant step towards overcoming the challenges of the extra-temporal dimension of human rights, particularly in the context of climate change. In order to overcome legal technicalities of standing, *present* young generations can act 'as surrogates for *future* generations'.[300] For the environment, the designation of an authority, for instance, an Ombudsman for the environment or an indigenous group traditionally

[296] Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints & Innovations' (2019) Transnational Environmental Law (Symposium Article) 1, 16 *citing* P. Alvarado and D. Rivas Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court (2018) 30(3) *Journal of Environmental Law* 519, 524.
[297] Dejusticia, 'Gobierno está incumpliendo las órdenes de la Corte Suprema sobre la protección de la Amazonía colombiana' (Dejusticia, 5 April 2019) < https://www.dejusticia.org/gobierno-esta-incumpliendo-las ordenes-de-la-corte-suprema-sobre-la-proteccion-de-la-amazonia-colombiana/> accessed 20 April 2020.
[298] *Tutela*, (n 286) 49 (unofficial English translation).
[299] Dejusticia, (n 297).
[300] Everaldo Lamprea and Daniela García, 'Recent Trends in Climate Litigation: Colombia's Amazon and Juliana v U.S' *Oxford Human Rights Hub* 13 April 2018 < https://ohrh.law.ox.ac.uk/recent-trends-in-climate-change-litigation-colombias-amazon-and-juliana-vs-u-s/> accessed 20 April 2020.

linked to an ecosystem, to act as 'guardians' of the environment or its components, can overcome the problem of achieving standing before courts.[301]

This does not dispel the very real challenges. As Lewis, reflects, 'challenges exist when the rights holders concerned are members of contemporary generations, but are even more problematic when attempting to extend the application of the law to future generations'.[302] *Tutela*, however, sets an important precedent in climate jurisprudence, which will likely trigger similar claims seeking recognition of rights for other components of the environment, whose conservation 'is a national and global obligation',[303] for the good of present and future generations, and all sentient beings. In the case of the Amazon, the obligation to protect is pressing; it is 'the main environmental axis of the planet…the "lung of the world..."'.[304]

3.4 Extraterritoriality: Pushing the Borders of Human Rights

Clearly, the temporalities of climate change pose a challenge to the temporal dimensions of human rights law – as we have seen, climate change demands human rights law to take a leap in to the future. The geographic scope of climate change poses yet an additional challenge. Climate change is oblivious to borders and territorial limits. Its impacts, whilst uneven, are transnational and global. International human rights law, however, whilst universal in aspiration, has prescribed territorial jurisdictional limits. Simply put, the applicability of human rights law outside the jurisdiction of a given state is complex and is far from settled, even in the context of the common and 'universal' concern of climate change.

Whilst human rights treaty bodies and courts have to some extent recognised the extraterritorial application of human rights, in certain circumstances, that application remains 'controversial, because it is usually assumed that the obligations to respect, protect and fulfil human rights have territorial application'.[305] Article 2(1) International Covenant on Civil and Political Rights, for example, can be interpreted narrowly as applying only '*within* [a State] territory *and* subject to its jurisdiction'.[306] So, while the word *and*, from a grammatical point of view, can be

[301] See, for example, Catherine Iorns Magallanes, 'From Rights to Responsibilities using Legal Personhood and Guardianship for Rivers' in Betsan Martin, Linda Te Aho, Maria Humphries-Kil (eds), *Responsibility: Law and Governance for Living Well with the Earth* (Routledge, London & New York, 2019).
[302] Lewis (n 244) 78.
[303] *Tutela* [30].
[304] ibid.
[305] Ottavio Quirico, (n 70) 185, 193.
[306] International Covenant on Civil and Political Rights, Article 2(1).

interpreted restrictively, as Milanovic points out, 'the object and purpose of a treaty are considerations that *must* be taken into account when interpreting it', as such, Milanovic argues that an interpretation of the Covenant on Civil and Political Rights 'which favours universality and human dignity is within the limits of textual vagueness or ambiguity by definition preferable to an interpretation which runs against the grain of the treaty'.[307] Yet, although it is technically possible to interpret human rights provisions in a more or less restrictive way, there seems to be a 'general consensus …that civil and political rights operate territorially.[308] The widely debated *Banković v Belgium*[309] case before the European Court of Human Rights provides a 'classical' example of narrow territorial interpretation of Civil and Political Rights. [310] Thereby, the Court developed the 'effective control' criteria, whereby 'an obligation arises where a State is in effective control of a particular territory in a sense of exercising some sort of public power…(i.e. acts of State agents abroad)'.[311] In the context of climate crisis, a narrow interpretation of human rights obligations is problematic because climate change, at difference of a 'classical' 'crisis, which is generally circumscribed to a given geographical area where the crisis arises or develops; the context of climate change is borderless. The actions leading to climate change as well as the victims who feel its effects are disperse.

On the other hand, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that the Parties '[undertake] to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant'.[312] The provision does not make reference to territory or jurisdiction. General Comment 24 of the Committee on Economic, Social and Cultural Rights finds, however, that 'extraterritorial obligations of States under the Covenant follow from the

[307] Marko Milanovic, 'Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy' (Oxford University Press, 2014) 224.
[308] Sumudu Apattu. 'Human Rights Approaches to Climate Change: Challenges and Opportunities' (New York, London, Routledge 2016) at 89.
[309] *Banković v Belgium*, App no 52207/99, Decision, 12 December 2001, paras 74–82.
[310] For Ress, for example, in the *Banković* case '[the] Court has taken the view that the Convention should be interpreted as narrowly as possible in the light of rules and principles of public international law'. Georg Ress, 'Problems of Extraterritorial Human Rights Violations - The Jurisdiction of the European Court of Human Rights: The *Banković* Case' 12(1) The Italian Yearbook of International Law (2002) 51, 51.
[311] Tom Obokata, 'Analysis of Climate Change from a Human Rights Perspective' in Stephen Farrell, Tawhda Ahmed and Duncan French (eds) in Cosmological and Legal Consequences of Climate Change (Oxford and Portland, Oregon, Hart Publishing 2012) at 127.
[312] International Covenant on Economic, Social and Cultural Rights, Article 2(1).

fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction'.[313]

Yet, the extraterritorial application of human rights continues being problematic and contested and it is not clear how this can be overcome in the climate change context. In his report on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the former UN Special Rapporteur on Human Rights and the Environment, has noted the complexity of the application of human rights given the geography of climate change:

> Apart from questions of causation and responsibility, the nature of climate change also requires us to consider how human rights norms apply to a global environmental threat. Most human rights bodies that have examined the application of human rights norms to environmental issues have examined harm whose causes and effects are felt within one country. Climate change obviously does not fit within this pattern.[314]

He notes further, however, that attempting 'to describe the extraterritorial human rights obligations of every state in relation to climate change would be of limited usefulness'.[315] Indeed, in principle, international human rights law operates territorially, even though there is some level of recognition of its extraterritorial application by various human rights Committees and Courts. The Special Rapporteur concluded that the extraterritorial approach is not a useful one in the climate change context due to the 'practical obstacles' of making the jurisdictional link and proving individual contributions to climate change extraterritorially.

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[313] Committee on Economic, Social and Cultural Rights Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017. See, for example, also the Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, UN Doc. E/C.12/1/Add.27, 4 December 1998, para. 8. It says that '[the] Committee is of the view that the State's obligations under the Covenant, apply to all territories and populations under its effective control.'

[314] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John Knox 'Human Rights Obligations Relating to Climate Change', UN Doc. A/HRC/31/52, 1 February 2016, paras. 40-41.

[315] ibid.

3.4.1 Recognising Nature in a Climate Changing World: the Colombia Advisory Opinion

In the Inter-American system, the Inter-American Court takes 'a relatively liberal approach to the question of state responsibility for extraterritorial human rights violations'.[316] This is exemplified by the new approach the Inter-American Court has taken in its recent *Advisory Opinion* to Colombia.[317] Contrary to the restrictive approach of the Inter-American Commission in the *Inuit* petition, which, like in the *Athabaskan Peoples* case, addresses extraterritoriality issues by assuming that emissions 'by the United States and Canada, are in breach of individual human rights';[318] the Inter-American Court, in the *Advisory Opinion*, instead, develops a preventive approach, based on the state duty to prevent transboundary damage. As such, the Inter-American Court shifts the focus from the reception place of the resulting impacts of climate change, where the victims of climate impacts are, to the place of origin of the activities leading to climate change, where the emitting activities take place for the purposes of determining jurisdiction. In this sense, the Inter-American Court was of the view that the state from which environmental harms emanate has extra-territorial human rights obligations under the Convention, if the case for causation can be made:

> States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.[319]

This reasoning in the Inter-American Court *Advisory Opinion* may likely help to clarify questions of jurisdiction in future climate claims, at least, within the Inter-American system. Yet, a possible side-effect of the 'legal presumption of jurisdiction',[320] due to its conditional aspect based on establishing causation, is that it may trigger additional hurdles to prove the causal link between a conduct within a state and the harm to rights outside of it. As Atapattu and Campbell-Duruflé note, in the light of 'the uncertainty inherent in climate science, the

[316] Gondek, at 381.
[317] See Advisory Opinion (n 135).
[318] Quirico (n 70) 193.
[319] Advisory Opinion (n 135) para. 101.
[320] Atapattu and Campbell-Duruflé (n 145) 333.

presumption of jurisdiction may well be difficult to apply to cases of transboundary climate change harm'.[321] Nevertheless, this approach developed by the Inter-American Court can potentially help to resolve standing and admissibility obstacles, as in the *Inui*t and *Athabaskan Peoples* petitions, and, in turn, increase the odds of a successful outcome.

However, aside from this development by the Inter-American Court, extraterritoriality remains as one of the most difficult challenges for claimants to overcome in holding a state responsible for extraterritorial climate-related impacts on human rights. As Quirico identifies, 'from the angles of external State action, there is a limited possibility of envisaging extraterritorial extension of jurisdiction in order to hold a State responsible for human rights breaches'.[322] This limitation is particularly problematic in climate cases on mitigation because, contrary to adaptation claims, 'the causal link between governmental action (or inaction) and climate change impacts on citizens that implicate their rights is generally easier to establish than in cases involving failure to mitigate'.[323] In *Urgenda*, for instance, whereas the District Court tackled challenges of extraterritoriality and extratemporality by accepting the claimants standing 'on behalf of individuals and future generations *outside* the Netherlands',[324] the Court of Appeal accepted standing only 'on behalf of current Dutch nationals [as this] was undisputed between the parties'.[325] And, consequentially, this restricted approach to extraterritoriality was also adopted by the Supreme Court. It held that 'the parties do not dispute that Urgenda has standing to pursue its claim to the extent it is acting on behalf of the *current generation* of Dutch nationals against the emission of greenhouse gases *in Dutch territory*.[326] In this way, as Nollkaemper and Burgers note in comparing the Dutch Supreme Court decision to the Inter-Amercican Court of Human Rights' *Advisory Opinion*, the Supreme Court 'neither rejected nor supported the conclusion of the IACHR relating to jurisdiction'.[327]

On the other hand, in rights-based adaptation cases, extraterritoriality challenges 'do not arise, given that petitioners would be taking action against their own governments to force greater adaptation efforts in order to safeguard their rights'.[328] This is exemplified by the *Leghari*

[321] ibid, 334.
[322] Quirico (n 70) 195 *citing* Joanna Harrington, 'Climate Change, Human Rights, and the Right to be Cold' (2007) Fordham Environmental Law Review 513, 524.
[323] Peel and Osofsky (n 12) 63.
[324] *Urgenda,* The Hague District Court (n 53) paras. 34-35.
[325] Nollkaemper and Burgers (n 175).
[326] *Urgenda,* Dutch Supreme Court (n 168) para. 2.3.2.
[327] Nollkaemper and Burgers (n 175).
[328] Peel and Osofsky (n 3) 63.

case,[329] whereby the Lahore High Court upheld the claim of a Pakistani farmer against its government, for failing to implement climate adaptation measures. Accordingly, it ordered several government agencies, *inter alia*, to designate 'climate change focal persons' to carry out the Framework for Implementation of Climate Change Policy (2014-2030), and create a Climate Change Commission to oversee the development of the national climate action plan.[330] Indeed, the ambitious approach of the Lahore High Court was probably facilitated by the domestic character of adaptation claims, although it recognized the extraterritorial dimension in the context of climate change, whereby 'the identity of the polluter is not clearly ascertainable and by and large falls *outside* the national jurisdiction'.[331]

Yet, irrespective of whether climate cases involve mitigation or adaptation claims, the extraterritorial application of human rights law remains problematic. This is particularly important in order to address the climate impacts suffered by the most vulnerable states and communities, such as, small island states.

It is certainly useful to ground the obligation on states doing more in human rights law. However, relying on the assumption that human rights law will persuade states to act and cooperate in good faith, is something at least questionable. Indeed, the human rights approach to state cooperation side-lines the dominant role of transnational corporations both in the international legal order and in causing climate change. As Grear and Weston argue, 'in light of … widespread human and environmental abuse at the hands of TNCs and other corporate actors, the need of individuals, groups and states to be able to assert extraterritorial jurisdiction to hold globally powerful corporate human rights violators to account is now incontrovertible'.[332] Given that transnational corporations are responsible for most of the global emissions contributing to climate change, some form of accountability is urgent.[333] However, as discussed in the previous chapter, their intricate legal nature with multiple branches

[329] *Leghari v. Pakistan*, (2015) W.P. No. 25501/20, Lahore High Court, 4 and 14 September 2015.
[330] ibid, paras. 8(i) and 8 (iii). Note that, on a later order, the Climate Change Commission was dissolved by the Lahore High Court after rendering a 'remarkable' service … in developing a valuable resource on climate change which can be useful for the Government in the years to come. *Leghari*, Stereo. H C J D A 38. Judgment, Lahore High Court, 25 January 2018, para. 24.
[331] ibid, para. 21.
[332] Anna Grear and Burns Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel* Lawscape' (2015) Human Rights Law Review 21.
[333] Corporations are the largest emitters and responsible for the largest share of global warming emissions.' See, for example, Suzanne Goldenberg, 'Just 90 companies caused two-thirds of man-made global warming emissions' (*The Guardian*, 20 November 2013) <https://www.theguardian.com/environment/2013/nov/20/90-companies-man-made-global-warming-emissions-climate-change> accessed 10 April 2020. See also above, Heede, 'Tracing anthropogenic …' (n 51).

established in different countries poses additional problems to the extraterritorial application of human rights, and makes it especially cumbersome to establish liability for climate-related impacts. Grear and Weston note that, in international human rights law, there is 'an almost complete absence of any effective way of holding corporations directly accountable for human rights abuses, or of preventing such abuses or even of ensuring redress for the victims of such abuses'.[334] In this context, climate litigation emerges as a legal avenue to address complex jurisdictional issues presented by transnational corporate activity in cases involving extraterritorial impact to rights.

3.4.2 Inquiry on the Human Rights Responsibility of the Largest Emitters: The Carbon Majors Case

The *Carbon Majors* inquiry[335] submitted to the Commission on Human Rights of The Philippines had to address first jurisdictional issues in order to initiate its investigation on the responsibility of corporations with large contributions to global emissions, for rights violations or threats resulting from climate impacts. Some corporations challenged the Commission's authority to admit the petition on a jurisdictional basis, arguing that they were not headquartered in the Philippines.[336] For instance, Shell, one of the *Carbon Majors*, relied on the well-established 'effective control' approach to jurisdiction to challenge the Commission's authority to carry out the investigation.[337] It was of the view that 'the 'extraterritorial application of human rights obligations is limited to *exceptional* circumstances, such as for example, where the state exercises "effective control" over the territory of another'.[338] The corporation invited to present their views also challenged the Commission's jurisdiction on the basis that 'any attempt by the Commission to apply the Philippines' human

[334] Grear and Weston (n 332).
[335] See *Carbon Majors* (n 209).
[336] See, for example, some (others) of the 'Carbon Majors' responses challenging the Commission's jurisdiction to carry out the investigation: Exxon Mobil alleged that 'this petition Petition is outside this Honourable Commission' jurisdiction under the Philippine Constitution, as the Petition does not allege "human rights violations involving civil or political rights." *Carbon Majors*, Exxon Mobil Motion to Dismiss *Ad Cautelam*, 13 September 2016, para. 20. <https://storage.googleapis.com/planet4-philippines-stateless/2020/06/76b0db45-exxon-response.pdf> accessed 1 May 2020.
[337] ibid.
[338] *Carbon Majors*, Shell Motion to Dismiss *Ex Abundanti Ad Cautelam*, 19 September 2016, at 6. <https://storage.googleapis.com/planet4-philippines-stateless/2020/06/0bb74924-shell.pdf> accessed 1 May 2020. See also, for example, Exxon Mobil response. It alleged that 'this petition Petition is outside this Honourable Commission' jurisdiction under the Philippine Constitution, as the Petition does not allege "human rights violations involving civil or political rights." *Carbon Majors*, Exxon Mobil Motion to Dismiss *Ad Cautelam*, 13 September 2016, para. 20. <https://storage.googleapis.com/planet4-philippines-stateless/2020/06/76b0db45-exxon-response.pdf> accessed 1 May 2020.

rights extraterritorially to actions of foreign corporations on the territory of another state without legal basis will amount to an incursion of the sovereignty and independence of that other State.'[339]

Likewise, Cemex, alleged that 'the jurisdiction of a state is limited only to the confines of its physical boundaries' and, accordingly, the Commission has no jurisdiction.[340] Nevertheless, the Commission was firm in accepting the petition, in accordance with its 'general mandate to uphold the human rights of all Filipinos and, towards this end, to investigate and monitor all matters concerning the human rights of the Filipino people'.[341] The *Carbon Majors* responses to the Commission, accordingly, failed to consider the fact that 'states frequently exercise adjudicatory and legislative jurisdiction over persons or events outside their territory, as long as there is a clear connecting nexus between that state and the person or conduct that it seeks to regulate'.[342] Contrary to, for instance, Repsol's view alleging that the Commission did not have jurisdiction because it is 'not doing/transacting, and has never done/transacted, business in the Philippines',[343] there is a nexus between the Philippines and the *Carbon Majors'* conduct in generating emissions, leading to climate change. This nexus is based on the impacts that corporate activity resulting in climate change effects had over the rights of the people of the Philippines. The Commission, therefore, had jurisdiction to accept the *Carbon Majors* petition filed by Filipino citizens. Savaresi, Cismas and Hartmann point out to the general acceptance of the application of the protective principle of jurisdiction, though they note the lack of consensus on how this principle might apply. Noting that the principle authorises states 'to protect themselves by regulating and adjudicating over conduct carried out abroad that may damage their essential interests. They observed that it 'can only be justified by the need to protect 'essential' or 'vital interests' of the state, but there is little consensus on how these should be defined.'[344] Given what was at stake in the *Carbon Majors* case, that is, the fundamental rights of the people of the Philippines, which represent 'vital interests' of the

[339] ibid.
[340] *Carbon Majors*, The Philippines Commission on Human Rights, Case No CHR-NI-2016-0001, Cemex Entry of Special Appearance with Motion to Dismiss, 14 September 2016, para. 11. <https://storage.googleapis.com/planet4-philippines-stateless/2020/06/d070bcb9-cemex-response.pdf> accessed 1 May 2020.
[341] The Philippines Commission on Human Rights, Press Release, 12 December 2017. <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171212_Case-No.-CHR-NI-2016-0001_press-release-1.pdf> accessed 1 May 2020.
[342] Savaresi, Cismas and Hartmann (n 201).
[343] *Carbon Majors*, Repsol / Repsol Oil & Gas Special Appearance and Manifestation, 22 September 2016, para. 2.
[344] Savaresi, Cismas and Hartmann (n 201).

Philippines, the Commission's jurisdiction to accept the *Carbon Majors* petition was indisputable.[345]

The Commission thus was oriented to determine the responsibility of corporations for rights violations resulting from climate impacts by asserting its jurisdiction, within its mandate, to uphold the *Carbon Majors* petition.[346] A similar approach is taken elsewhere. For example, General Comment 24 of the Committee on Economic, Social and Cultural Rights, states, in accordance with the principles of prevention and 'effective control' that the 'extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control.[347]

The Commission, in the *Carbon Majors* case made a notable development by admitting the petition to investigate the responsibility of multinational corporations, regardless whether they were or not headquartered in The Philippines or where they conduct their operations. As Savaresi, Cismas and Hartman reflect, the Commission 'achieved an important result, by demonstrating that national human rights institutions may look at the responsibilities of corporations, even when these are not headquartered in the territory of the state where the investigation takes place, as long as the exercise of their powers can be justified under one of the principles of jurisdiction'.[348] This interpretation of jurisdiction in the field of human rights in the context of climate change may trigger an increasingly active role of national human rights institutions to clarify question of human rights associated with climate change impacts. Within their national legal frameworks and scope, such national human rights institutions can potentially explore avenues to determine (corporate) responsibility for climate-led impacts to human rights in parallel with the judiciary, for instance, through investigation or monitoring mechanisms.[349]

[345] See also the *Lliuya* case for another example of the challenging issues brought by not only the extraterritorial application of human rights, but also its application in relation to corporate activity (n 223).
[346] Savaresi, Cismas and Hartmann (n 201).
[347] Committee on Economic, Social and Cultural Rights. General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017) para. 30.
[348] Savaresi, Hartmann and Cismas (n 201). 15.
[349] The Danish Institute for Human Rights says, for example, that 'it is likely that more complaints or petitions, similar or in line with the complaint in the Philippines, will be filled with NHRIs'. Jan Van de Venis and Birgitte Feiring, 'Climate Change – A Human Rights Concern' (2016) The Danish Institute for Human Rights at 19.

Overall, extraterritoriality remains one of the most challenging barriers to be surmounted by claimants in rights-based climate litigation. Traditionally, courts have followed a restrictive approach when dealing with the extraterritorial application of human rights. The European Court of Human Rights has taken a particularly stringent approach to the issue. As Shelton notes, the European Court 'has several times indicated that jurisdiction in international law is 'primarily territorial'.[350] The Inter-American system of human rights was, not all that long ago, not so different. The Inter-American Commission, for instance, took a cautious approach when confronted with the first rights-based climate claim in the Inuit petition. However, recent developments indicate that extraterritoriality hurdles are no longer insurmountable and could be gradually overcome. The Inter-American Court's *Advisory Opinion* provides an innovative avenue to addressing extraterritoriality issues based on the place of origin of actions leading to human rights violations instead of the general view focused on the place where rights violations are felt. Similar avenues in that direction may be developed in order to meaningfully addressing corporate activity disproportionally contributing to climate change.[351] In this vein, the *Carbon Majors* case provides an opportunity to explore how human rights bodies can overcome the question of the extraterritorial application of human rights in the context of climate change in relation not only to state, but also corporations, given their crucial emissions contributions to climate change. Therefore, as Shelton foresees, 'international human rights bodies may face innovative claims and efforts to expand jurisdiction well beyond what is conferred by the relevant legal instruments'.[352]

4. Rights-Based Climate Litigation: Opportunities and Challenges

Recent climate litigation has been characterized by the use of innovative strategies that include the resort to constitutional rights and human rights arguments, either on their own or in combination with other litigation 'tools' such as the public trust doctrine, the precautionary principle or civil law.[353] Moreover, the increasing severity and frequency of climate-related events worldwide, in conjunction with alarming projections from climate science, has meant a

[350] Dina Shelton, 'Complexities and Uncertainties in Matters of Human Rights and the Environment: Identifying the Judicial Role. in J. Knox & R. Pejan (Eds) (2018) Cambridge University Press; *Bankovic and Others v. Belgium and Others* (Admissibility), No. 52207/99 (European Court of Human Rights, 2001), para. 59; *Issa and Others v. Turkey*, No. 31821/96 (European Court of Human Rights, 2004).
[351] See, for example, Committee on Economic, Social and Cultural Rights (n 347) para. 33.
[352] Shelton. (n 350).
[353] See, for example, Peel and Osofsky (n 3).

growing reliance on science in climate claims. On the one hand, claimants are more willing to push the borders of traditional limitations in climate litigation, such as the separation of powers doctrine, standing hurdles or jurisdictional issues. On the other hand, courts appear to be more receptive to complex claims that challenge the application of human rights law in the context of climate change and, accordingly, are open to relaxing standing barriers. From a general perspective, the deployment of rights-based arguments in climate litigation facilitates the legitimate demand for climate justice from claimants, but also, purposefully, or not, brings 'public and political attention to the detrimental human consequences of climate change'.[354] Framing climate claims through rights language translates into law what was previously confined to the climate news or scientific articles. The existential threat of climate change to ecosystems and communities worldwide, whether to the Inuit or Athabaskan Peoples in the Arctic or peoples in small island states in the Pacific Ocean, has become tangible as a result. Most importantly, rights-based climate litigation helps the public and, particularly, governments to realise that climate change is not only Arctic peoples' or small island states' problem, but a global one that threatens humanity existentially and the environment as a whole and, as such, requires urgent action. As Knox notes, 'applying human rights rhetoric to climate change may draw attention to its effects on particular communities, convince those not yet directly affected that it threatens environmental disaster on an unprecedented scale, and make individuals and states more willing to make the hard choices needed to combat it'.[355]

However, the persuasiveness of rights-based climate litigation is still limited considering that most parts of the world are not (yet) active in climate litigation and that, litigation activity is concentrated in the Western world. This might be explained by the fact that large corporations are mainly headquartered in so-called developed states and they represent the biggest group of claimants.[356] In contrast, only a small portion of climate litigation worldwide can be considered rights based. According to the Climate Litigation Database, at the time of writing, only 47 cases are categorised as human rights claims.[357] These facts indicate that most climate litigation activity is not oriented to enhancing governments' climate mitigation or adaptation efforts, protecting the rights of the most vulnerable to climate impacts, or establishing state or corporate liability for climate-related rights violations. However, despite the limited number of rights-

[354] ibid, at 40.
[355] John Knox, 'Climate Change and Human Rights Law' (2009) 50(1) *Virginia Journal of International Law* 163, 166.
[356] From which 90% are claims against governments. Michal Nachmany and Joana Setzer (n 22) 5.
[357] Climate Litigation Database (n 11).

based climate claims, compared either with claims filed by corporations or non-rights-based claims in general, this type of claim is growing steadily. In 2016, for example, there were only 24 cases registered in the Climate Change Litigation database.[358] This is likely in part due to the influence of 'successful' outcomes like *Urgenda* and innovative strategies, such as those used in *Juliana*,[359] the potential of rights-based climate litigation should not be dismissed.

Rights-based claims originating in the Third World still represent a minority of cases within the (already) narrow universe of rights-based climate litigation. The development of climate litigation in the Global South provides an opportunity to develop rights-based climate litigation strategies from the perspective of those most vulnerable communities in the context of climate change. Setzer and Benjamin highlight that claims in the Global South are not focused on developing new legislation.[360] They rather focus on addressing 'poor enforcement of existing planning and/or environmental legislation, possibly acknowledging the capacity constraints involved in passing new legislation on climate change in some jurisdictions', as well as 'on efforts to protect important native ecosystems'.[361] Significantly, rights-based climate litigation from the Global South also provides an opportunity to incorporate realities previously ignored by human rights law. Particularly, the relational approach of human rights law to 'abstract' notions like the environment and future generations can be envisaged in rights-based claims, in general and, in particular, in claims originating in the Global South. For instance, in the *Tutela* case,[362] the declaration of legal personhood to a vital ecosystem for the world, like the Amazon region represents an important step in rethinking the relational approach of human rights to the environment.[363]

Nevertheless, despite this seemingly auspicious emergence of rights-based climate litigation, its limitations should not be overlooked. First, while rights-based climate litigation emerges as an avenue through which technical issues posed by the complex nature of climate change can potentially be overcome, it is also a challenge for courts - traditionally conservative institutions.

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[358] ibid.
[359] See, for example, *Milieudefensie et al. v. Royal Dutch Shell plc*, The Hague District Court, 2019, which replicases over the basis of *Urgenda* case: and *Sinnok v Alaska*, which builds up over the basis of *Juliana* case.
[360] Setzer and Benjamin, (n 296) 9.
[361] ibid, 10.
[362] See above, *Tutela* (n 283).
[363] See also, for example, the Ganges and Yamuna river in India (*The Guardian*, 2017) <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> accessed 1 May 2020, or the Whanganai river in New Zealand, after over 140 years battle by the Maori tribe, sought by Maori tribe (*The Guardian*, 2017) <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> accessed 1 May 2020.

Depending on the national or regional legal culture, courts can be more or less accommodating to the legal challenges presented by climate change. Even in the limited range of rights-based climate case law so far, it is clear that there is still a reluctant attitude from courts to hear unconventional stories of climate-related human rights violations or threats. As Fisher, Scotford and Barritt point out, given the varied courts and tribunals, in which these cases are heard, we are yet to see an overarching response to climate change cases. They observe, further, that we are still at the early and disruptive state of climate litigation and courts are still trying to make 'legal sense of climate change:

> …climate change often presents a disruptive challenge to courts and tribunals in recognizing cases or litigants within their jurisdiction and legal traditions. It is not a case of whether courts should say 'yes' or 'no' to hearing climate change cases, but how they can make legal sense of climate change as a problem when relevant disputes appear before them. This problem does not go away once climate change is legally recognized by courts.[364]

'Successful' cases like *Urgenda* or *Leghari* should thus be greeted cautiously. While those courts' receptivity in those claims provide a positive outlook for subsequent claims inspired in those cases, it is too early to posit them as part of a pattern of success. National factors such as the legal culture or the particular vulnerability of certain states to climate impacts might influence the judicial approach to claims. For instance, the position of the Netherlands in terms of vulnerability to climate impacts may have been taken into account by the Supreme Court in *Urgenda*. It 'specifically singled out the risk of a sharp rise in sea level, which may make the low-lying Netherlands partly uninhabitable'.[365] Likewise, in addition to its particularly vulnerable position to climate change,[366] Pakistan has an 'established track record of judicial activism in public interest environmental cases'.[367] The specificities of states and their legal cultures may, therefore, be an important factor in the receptivity of courts in hearing these often technically complex claims.

Second, the enforcement of judgements represents another challenge after litigation has been concluded, even in 'successful' cases, in which courts have made far-reaching decisions. As

[364] Fisher, Scotford and Barritt (n 240) 188.
[365] Nollkaemper and Burgers (n 175). See also *Urgenda,* (n 53) para. 5.6.2.
[366] Pakistan is the 5th most vulnerable country to climate change. David Eckstein, Vera Künzel, Laura Schäfer and Maik Winges, 'Global Climate Risk Index 2020' (2020) Germanwatch Briefing Paper, at 9.
[367] Peel and Osofsky (n 3) 62.

Boyd notes, the enforceability of constitutional rights 'vary markedly between countries.'[368] Regardless of the outcome, if enforceability is unlikely, then it is necessary to consider the impact of climate litigation as an avenue to foster climate action. For instance, in the *Tutela* case, the Colombian Supreme Court ordered the government to formulate an intergeneration pact for the life of the Colombian Amazon, within five months of the decision. In addition, the decision required the adoption of measures aimed at ending deforestation and greenhouse gas emissions.[369] Despite this essentially positive outcome, the decision leaves unanswered questions as to how the government could be compelled to implement the decision, in the short period of time decided by the court. Lamprea and García remark, in this respect:

> How to credibly implement the Court's orders in such a short period of time is a nagging question…crafting a policy plan for the effective protection of the vast Amazonian basin in only five months is an exceedingly ambitious goal, not to mention the objective of achieving zero deforestation and zero emissions of greenhouse gases in the next few years.[370]

Arguably, such ambitious targets would be difficult for any government to achieve. As such, when assessing the competent court in which to file a case, claimants should also consider the enforcement capacity of that court as it varies across judicial systems. If the enforcement capacity within a judicial regime is weak, ambitious decisions may risk becoming paper tigers, without actual impact in global climate action.

Third, as discussed in the previous chapter, there is a lack of legal mechanisms to hold corporations accountable for climate-related human rights violations and threats, despite their significant emissions contributing to climate change. The emergence of cases filed against corporations claiming their responsibility for past and current conduct contributing to climate change may prompt the development of legal mechanisms to establish corporate accountability for human rights harms resulting from climate impacts. Particularly, as well as the common challenges presented in climate litigation, rights-based claims targeting corporations help to address extraterritoriality obstacles given their complex relationship and their multiple branches in different jurisdictions across the world. Cases like the *Carbon Majors* may represent a step towards establishing corporate accountability for human rights harms through the use of

[368] David Boyd, 'The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment' (UBC Press, 2012) [cited in Peel and Osofsky: A Rights Turn in Climate Litigation].
[369] *Tutela* (n 283) at 49.
[370] Lamprea and García (n 300).

strategic litigation against corporations [which] 'is on the increase'.[371] This type of litigation also helps to raise public awareness about the role of corporations in the current climate crisis and the need for mechanisms to establish corporate accountability for climate change impacts upon rights and the environment worldwide.

Fourth, the 'rights-turn'[372] in climate litigation provides not only opportunities to address challenges presented in the context of climate litigation, amongst them, causation, attribution, extratemporality and extraterritoriality, but it also helps to build bridges between previously unrelated fields such as human rights and climate science, including within the same or multiple claims. Notably, the deployment of human rights considerations in conjunction with climate science-based arguments reflects the ability of human rights language to break down silos between often disassociated fields in order to inform judges' decisions. As Averill notes, climate change is often 'viewed as primarily a matter of science. Human rights framing can help people to focus on the human stories about how climate change will impact people and communities. Emphasizing such human stories may help to move the discussion beyond the scientific debates that often mask important underlying values disputes'.[373] Accordingly, the use of human rights language in climate litigation as a legal framework for climate stories may also facilitate accessibility and understanding of the urgent calls from climate science to reduce global emissions.[374]

Fifth, the deployment of human rights arguments in climate litigation also helps to raise public awareness on the real impacts of climate change upon individuals and the environment all around the planet. However, it should be noted that claimants who reach the courts will not likely represent those most vulnerable to climate impacts within societies. Often, the most affected victims of climate impacts may not be willing or able to spend their efforts and money in costly and lengthy lawsuits,[375] whose potential results may not directly reach them, at least in the short term.

Sixth, rights-based climate litigation brings to the attention of judges and public opinion 'climate stories' of rights harms affecting disproportionally the rights of present and future

[371] Savaresi and Auz (n 12)7.
[372] Peel and Osofsky (n 3).
[373] Averill (n 9)142.
[374] See, for example, the IPCC 1.5ºC Report.
[375] Bergkamp and Hanekamp, (n 60) p. 12.

generations.[376] Innovative future generations' claims like *Juliana*, certainly, represent one of the clearest examples of the benefits of the human rights 'turn' in climate litigation. As Lewis notes, the benefit of the 'human rights-based approach is that it focuses attention on those who are most affected by climate change, giving them a voice and equipping them with a language to help in articulating their claims.[377] In this sense, future 'rights holders' must be accounted for as they clearly will bear the burden of climate impacts,[378] which is a consequence of 'action taken (or not taken by current generations'.[379] In light of this, the claims of future generations have the potential not only to prompt climate action from governments but also, more fundamentally, to expand temporal notions of human rights law.[380] Similar to environmental law, human rights law has 'a lopsided temporality, framed around a "present future" outlook in which the priority is governing contemporary activities that pose future risks such as climate change'.[381] Certainly, the long-term value of current rights-based claims brought by children and youth has the potential to generate rethinking of human rights temporalities in a way to encompass the protection of the rights of future generations. Those claims portray the undeniable current and *future* realities of human rights violations resulting from climate change. Specifically, these realities, due to the cumulative nature of climate impacts, will continue to affect the young and future generations even if emissions could be completely and immediately stopped. Climate litigation involving young and future generations rights thus provides the opportunity to showcase otherwise ignored realities from one of the most vulnerable and disproportionally affected groups by climate change.

[376] For example, Greta Thunberg, a young environmental activist, has gotten significant public and media attention worldwide, Sandra Laville *and* Jonathan Watts, 'Across the globe, millions join biggest climate protest ever' *The Guardian* (21 September 2019)< https://www.theguardian.com/environment/2019/sep/21/across-the-globe-millions-join-biggest-climate-protest-ever >accessed 25 June 2020. Also, jointly with other children, she filed a complaint before the United Nations Committee on the Rights of the Child, Sacchi et al. V. Argentina et al, Communication to the Committee on the Rights of the Child, 23 September 2019. See also related media release, Juliette McIntyre, 'With 15 other children, Greta Thunberg has filed a UN complaint against 5 countries. Here's what it'll achieve', (*The Conversation*, 25 September 2019) < https://theconversation.com/with-15-other-children-greta-thunberg-has-filed-a-un-complaint-against-5-countries-heres-what-itll-achieve-124090> accessed 1 May 2020.

[377] Lewis (n 244) 70.

[378] See the theoretical analysis of Caney arguing that future generations can be conceived as rights holders with respect to current generations as duty holders. Simon Caney, 'Cosmopolitan Justice, Rights, and Global Climate Change', (2006) 19 *Canadian Journal of Law and Jurisprudence* 2, 536. See also, Derek Bell, 'Does Anthropogenic Climate Change Violate Human Rights?' (2011) 14 Critical Review on of International Social and Political Philosophy, 99.

[379] Lewis (n 244) 70.

[380] See, for example, *Pandhy v India* (n 286), which used arguments raised in other cases, such as *Juliana, Urgenda* and *Leghari*.

[381] Benjamin Richardson, 'Doing Time – The Temporalities of Environmental Law' in Kotze (ed), Environmental Law and Governance for the Anthropocene (1st ed., Oxford, Portland, Oregon, Hart Publishing, 2017) 55, 73.

Presently, the 'international community does not adequately recognize the links between human rights and climate change and failures in protecting the rights of current generations are common'.[382] The relatively rapid proliferation of this type of claim involving future generations includes a number of cases taken in the Global South. In the longer term, this may help to capture the realities experienced in the Global South, which are often overlooked in human rights law.

Although catalysing a rethinking of human rights law – by challenging the temporality of human rights, for example - may not have been the intention of the Colombian Supreme Court, its judgement, that case does facilitate room to rethink the relational approach of human rights law to the environment. In this newly conceived relationship, human rights law would recognize its central subject, the human, as *part* of the environment, instead of as a sort of superior entity under which the environment serves in a subordinate and instrumental capacity. The *Tutela* case thus symbolizes an early step in that direction, where human rights law was rethought in a way to reconsider the basic human rights and environment nexus. Stone, reflecting presciently on the need to extend rights thinking beyond the status quo, observed:

> We are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo ... The fact is, that each time there is a movement to confer rights onto some new 'entity', the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a *thing* for the use of 'us'-those who are holding rights at the time.[383] There is something of a seamless web involved: there will be resistance to giving the thing 'rights' until it can be seen and valued for itself; yet it is hard to see it and value it for itself until we can bring ourselves to give it 'rights'.[384]

The environment and future generations are examples of 'rightless things'. With time, developments in climate litigation may catalyse rethinking, maybe even reform, of human rights law, to integrate notions originally neglected. These reforms may entail reconsidering the relational approach of human rights to the environment and future generations or bringing the rights of future generations under the scope of its protection. Although it is still in an embryonic

[382] ibid, 71.
[383] P. 455 *citing* Goddell in 1·e Goddell, 39 Wise. 232, 245[and 246, 2nd sentence] (1875)
[384] Christopher Stone, (n 291) 456.

stage, rights-based climate litigation can gradually prove that climate change has the potential to catalyse the rethinking of fundamental human rights law notions. In fact, ongoing and future claims grounded in human rights arguments will likely further consolidate such 'trends and emphasize the extent of the nascent "rights turn".[385]

5. Conclusion

It could be said that it is in climate litigation that the previously disassociated areas of human rights and climate change are increasingly interacting with each other and developing 'stronger linkages'.[386] Rights-based climate cases can help to test the ability of human right to assist claimants in overcoming the challenges of causation, attribution, extra-temporality and extraterritoriality. Irrespective of the outcomes of cases, the emergence of rights-based climate litigation demonstrates that human rights will likely play an increasingly important role in climate action, both inside and outside the courtrooms to the extent of potentially expanding basic human rights notions.

The use of human rights law in climate litigation as an avenue to generate climate action is *still* very limited. However, the deployment of human rights considerations in climate litigation emerges as a promising litigation strategy, either applied on its own or in combination with other strategies. Framing climate claims with human rights arguments can effectively help to illustrate and inform public opinion in general on the actual or potential impacts of climate change upon the rights of individuals and communities worldwide and their surrounding environment. Most importantly, the application of human rights considerations in climate litigation shows that the context of climate change has the potential to catalyse fundamental rethinking and even reforms of basic human rights notions and their relational approach with, for example, future generations and the environment. This may trigger the gradual evolution of human rights law towards a more integrated notion that embraces the protection of the environment and the rights of future generations under its scope.

[385] J. Peel and H. Osofsky, (n 3).
[386] ibid 40.

CONCLUSION

The ongoing global climate emergency is putting all forms of life on Earth under serious threat. Storms, droughts, floods, heat waves, droughts, hurricanes, glaciers melting, sea level rise, wildfires among other increasingly frequent and severe climate events adversely impact ecosystems and the human rights of individuals and communities across the planet. Yet, despite the numerous warnings from science to limit carbon emissions in order to hold global temperature increase to 1.5C above pre-industrial levels, as per the most ambitious target of the Paris Agreement, efforts in that direction have been limited. The commitments of governments at both national and multilateral level have failed to meet the level of urgency and ambition required to tackle climate change. As has been shown in this thesis, there is an unprecedented climate emergency, however, it appears that the 'alarm bells' are being ignored or, at the very least, they are not being responded to through the level of action required to limit the impacts of a changing climate. This governmental inaction has led to bottom-up responses from individuals and civil society; their responses are often grounded in human rights arguments and they seek better responses from state and non-state actors to the climate crisis. One area where we can see such bottom-up responses is climate litigation.

This thesis has argued that the climate crisis can act as catalyst of human rights rethinking and expansion in such a way as to gradually correct intrinsic (mis)understandings of the environment or natural world that are built into international human rights law, as a result of its Western inception reflecting neoliberal economic objectives; objectives which led to this climate crisis in the first place. In that sense and informed by Third World Approaches to International Law theories, this thesis has been premised on the understanding that international law and, specifically, international human rights law, echo a neoliberal global 'agenda' that promotes and legitimises neocolonial dynamics of economic dominance over the so-called Third World, and which facilitates the exploitation of nature in the name of economic growth at-any-cost.

As a consequence of this understanding, this thesis has been premised on the argument that the natural world has been misrepresented in international law, specifically, in the two legal frameworks that are the subject of thesis, namely the international legal regime on climate change and international human rights law. As a consequence, this thesis has taken as a point

of departure that climate change is in essence an economic problem resulting, to a great extent, from the capitalist orientation of international law, which is also mirrored in international human rights law, and has facilitated neocolonial relations with the Third World including the thorough exploitation of nature. The natural world or environment, I have claimed, in this thesis, is portrayed in international law, also in international human rights law, as a 'storage of raw materials,'[1] at the service of human needs.

In this context, corporations, as the main agents of capitalism, have been empowered through a favourable international regulatory framework that facilitates their economic growth objectives at the cost of environmental exploitation and human suffering, particularly in the Third World. Representing about one-third of the sources of global emissions, corporations are considered, in this thesis, as having had a crucial role in leading the Earth into this new epoch of the Anthropocene and, more specifically, the Capitalocene. They are, now and historically, the largest contributors to climate change.

This thesis has sought to demonstrate that the uniqueness of climate change – a global problem, that threatens the habitability of the Earth and its living species, including the human species – amounts to a 'Grotian Moment.' In Anghie's words, a Grotian moment entails 'one in which the entire character of the international system changed irrevocably. As a consequence, the old system of international law and relations appeared inadequate, to many, to deal with these unprecedented challenges.'[2] In this vein, this thesis has argued that, indeed, the uniqueness of the context of climate change will trigger rethinking and, ultimately, correction of international human rights law's original (mis)understandings in its relational approach to nature. As a result, in light of the climate crisis and through structural reforms that incorporate an ecocentric dimension to international human rights law, international human rights law could make a more substantial contribution to the protection of human rights in the long-term.

From this perspective, this thesis has, first, sought to understand the dynamics of power and dominance that wealthy states exert over the 'so-called' Third World, which reverberate colonial forms of subjugation and promote environmental exploitation. To that end, chapter one examined the making of the international law on climate change under the auspices of the

[1] Murray Bookchin, *The Ecology of Freedom – The Emergence and Dissolution of Hierarchy* (Cheshire Book, 2018) at 20.

[2] Antony Anghie, 'International Law in a Time of Change: Should International Lead or Follow?' (2011) 26 (5) American University International Law Review 1315, 1334.

UNFCCC. In this process, it has tracked the significant legal and policy developments that emerged from the establishment of the Intergovernmental Panel on Climate Change, through to the entry in to force of the United National Framework Convention on Climate Change right up to the most recent international treaty on climate change in the form of the Paris Agreement. Chapter one attempted to draw awareness to what the main concerns of states have been in light of their own experiences of climate change. It considered state responses to the climate crisis bearing in mind throughout the view of dominant states, which have defined the course of global climate action. In doing so, chapter one acknowledged the paradox of climate change, whereby those who contribute the least to the problem –- such as, small island states and the most vulnerable within societies –- suffer first and worst the disproportional effects of climate change, whereas the largest emitting states, which contribute most significantly to the problem, while and which do feel the impacts of the crisis albeit to different degrees, are least willing to undertake meaningful commitments contributing to global climate action. These dynamics of power and dominance have blatantly been exhibited throughout climate negotiations and they have been reflected in the outcomes of the hose negotiations. In this respect, the Kyoto Protocol and its 'market-friendly' mechanisms which legitimise neocolonial forms of dominance and environmental exploitation is particularly noteworthy. Overall, chapter one contextualized the emergence of human rights considerations in the multilateral climate change debates and assessed their peripheral role throughout. They remained largely absent until the breakthrough in the Paris Agreement, when human rights were given explicit recognition in the preamble, this marked a 'new' stage in the relationship between human rights and climate change.

In the light of the appearance of human rights in the international climate change negotiations and, finally, in an international climate change treaty – the Paris Agreement, chapter two aimed at demonstrating and discussing how human rights are affected by climate change. As such this chapter focused on identifying both the linkages between human rights and climate change and how a human rights approach to climate change can benefit understanding of the human dimension of the problem. In this vein, chapter two contended that climate change harms and puts at risk a number of human rights, in particular, the right to life, health, adequate housing and food, water, and the collective rights of indigenous peoples, the rights to self-determination, the participatory rights of individuals and communities and the right to a healthy environment as a whole. In addition, the chapter argued that climate mitigation and adaptation measures, such as Reducing Emissions from Deforestation in Developing Countries - REDD and REDD+ measures, undertaken to address the problem, also impact the protection and enjoyment of

human rights. Chapter two also identified the key role of the right to a healthy environment, as an early avenue to incorporate environmental considerations into international human rights law, even if the right to a health environment remains a very anthropocentric approach to the environment, prioritizing, as it does, the human vis-à-vis the environment. In this sense, chapter two pointed to the significant presence of the right to a healthy environment in constitutions or national climate legislation around the world. This signifies an early yet important step towards incorporating and ultimately correcting the human rights' relational approach to the natural world.

This thesis sought to examine the crucial role of corporations in the climate crisis, Corporations are the largest contributors to climate change, and they are responsible for at least two-thirds of global carbon emissions leading to climate change. Chapter three assessed, therefore, the existing international regulatory framework under which corporations operate. Chapter three examined the main 'soft-law' instruments that guide corporate human rights behavior, also in the context of climate change. In that sense, chapter three found that there is a lack of stringent norms that legally bind corporations and that regulate their human rights and environmentally sensitive behaviour. Rather, chapter three found that corporations have traditionally enjoyed a favourable and voluntarism-based legal framework that legitimizes both the exploitation of nature and the human rights harms which result from corporate activity, particularly in the Third World. As a result, chapter three concluded that, unless far more stringent and legally binding regulations, to control corporate activity impacting human rights and the environment are introduced, little can be done to limit the impacts of climate change upon human rights and the environment.

Consequentially, given that governments have fallen short both on regulating corporate activity and on taking radical steps to limit climate change impacts, individuals and civil society movements have attempted to fill the gap. In particular, there has been a proliferation in climate litigation. Youth activists, civil society activists and others have been filing climate claims before courts worldwide. Chapter four sought to examine this emerging climate litigation trend. It examined how climate claims can be grounded in human rights arguments and, thus, brought to consideration of judiciaries worldwide. Either as a main argument or as peripheral consideration, human rights legal arguments are increasingly being deployed in the context of climate litigation. Therefore, by using rights-based climate claims as a case study, chapter four sought to examine the performance of human rights in the context of climate change, in such a

way as to identify early signs of the potential for human rights to expand its horizons with respect to the relational approach to the environment. In doing so, chapter four sought to assess how human rights are being applied in the climate litigation arena in order to overcome complex challenges of causation, attribution, and the extratemporal and the extraterritorial dimension of human rights law. Thereby, chapter four has found that human rights deployment in the context of climate litigation has the potential to build avenues to progressively surmount those legal challenges, and, just as importantly, to trigger rethinking of the boundaries of human rights law and its (mis)understandings with respect to the nature.

One can thus consider the disappointing outcome of the *Inuit* case before the Inter-American Commission on Human Rights at the beginning of this century and compare it with current rights-based climate litigation outcomes, such as the *Urgenda* case in the Netherlands, or indeed in same human rights regional system, the *Tutela* case, and we can see evidence of the growing receptivity of various judicial bodies to claims connecting climate change impacts with human rights. Chapter four concluded that, whilst at an embryonic stage, the context of climate change is already triggering - or even forcing- human rights rethinking in such a way to prompt reconsideration or expansion, indeed evolution, of the human rights relational approach to the environment. This suggests a move towards the recognition of the rights of nature as exemplified by the *Tutela* case, and the rights of future generations, as exemplified in *Juliana*. There has also been a move towards recognising the responsibility of corporations for their disproportional emissions contributions leading to climate change, as exemplified in the case of *Carbon Majors*. All these unusual legal claims, at least earlier this century, would have probably led to a simple 'no chance' response from judges in the 'climate as usual' conditions. The changing judicial attitude is arguably a worrying reflection of the worrying reality, in which business as usual is no longer viable.

Altogether these findings have led me to conclude that, indeed, climate change has the potential to act as a catalyst for the rethinking of human rights law and for the gradual correction, in the longer term, of human rights law, leading ultimately to the expansion of its relational approach to the environment. Should this expansion materialise in positive international human rights law in such a way that human rights law would value the environment or natural world intrinsically rather than for its instrumental value in satisfying human needs, it will likely be because of developments beyond the various judicial bodies. The decisions discussed in this thesis, however, do sow the seeds. The ultimate goal would be the progressive emancipation of

human rights from its innate neoliberal roots, which resulted from their Western origins. This would, in turn, help to truly, at least in a more meaningful way than currently exists, universalize human rights.

As an overall consequence, this thesis argues that, indeed, the ongoing climate crisis amounts to a ‘Grotian moment’ in international law. Whether climate change will allow time for this evolution, only time can tell.

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