LIGHTS, CAMERA, (CLIMATE) ACTION: BRINGING CORPORATIONS INTO THE SPOTLIGHT IN HUMAN RIGHTS-BASED CLIMATE LITIGATION

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In recent years, in the face of inadequate responses by governments to climate change, human rights-based climate litigation has been on the rise. Despite the heavy involvement of corporations in the climate crisis, rights-based proceedings are mainly brought against states, while corporations usually remain out of the realm of such proceedings. This creates an accountability gap since adjudicating cases only against states might prove insufficient to hold the most responsible actors to account. This Article addresses this accountability gap by putting a spotlight on the role of corporations in rights-based climate litigation.

Following an examination of the prospects and limitations of an indirect approach to this problem through proceedings brought against states, this Article proceeds to focus on the direct approach against corporations, as demonstrated in a recent landmark ruling in the Netherlands. The Article then offers a novel analysis of the innovative aspects reflected in this ruling and explores their implications with regard to the ability to enforce international human rights norms on corporations while examining the role national courts may play in the evolutionary process of re-conceptualizing international law and adjusting it to the global challenges faced by the world today.

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I. INTRODUCTION

In recent years, in the face of mounting scientific data demonstrating the urgent need for climate action on one hand, and an inadequate response by governments to the climate crisis on the other, climate litigation has been on the rise. Record high global temperatures and frequent extreme weather events serve as a constant reminder of the pressing need for action. In 2023 alone, Storm Daniel caused disastrous floods and fires in Europe and in Africa while a devastating fire swept over the Hawaiian island of Maui. Additionally, according to the National Aeronautics and Space Administration (NASA), the summer of 2023 was the hottest summer

since global records began in 1880.[1] In light of the shortcomings of governments to respond effectively to the climate crisis, individuals and non-governmental organizations (NGOs) have taken the initiative and brought proceedings over climate change issues. Cases have been brought in at least 51 countries from across every region of the globe against different types of defendants and under various causes of action.[2] In some of these cases, there has been a significant increase in the use of human rights-based arguments.

The link between climate change and human rights is a well-established one. International institutions have found that climate change profoundly impacts a wide array of fundamental rights such as the right to life, the right to an adequate standard of living, the right to food and water, the right to private and family life, and the right to self-determination.[3] Given this indisputable connection between human rights and climate change, a recent wave of citizen-led climate litigation has used human rights law as a "gap filler" to compel states to strengthen their climate policies.

At first, these efforts focused on the national level, achieving varied outcomes. Most notable in this regard is the Urgenda case, in which the Supreme Court of the Netherlands ruled, while relying on Article 2 and Article 8 of the European Convention of Human Rights (ECHR), that the Dutch government violated its duty of care by failing to reduce greenhouse gas emissions (GHG) by at least 25% by the end of 2020.[4] These efforts at the national level were later followed by attempts to hold states accountable at the international level. Human rights-based climate cases have been brought before international courts and tribunals, such as United Nations (UN) treaty bodies, the European Court of Human Rights (ECtHR), the International Court of Justice (ICJ), the Inter-American Court of Human Rights (I/A CHR), and the International Tribunal for the Law of the Sea (ITLOS).[5]

Due to the traditional state-centric focus of international law, most of the above-mentioned tribunals were designed to deal with non-compliance with international law norms based on an understanding of international law as a law applying between states. They only have the authority to adjudicate cases arising between states or against states. The aforementioned citizen-led climate litigation therefore has focused on actions (GHG emissions) and inaction by states. Corporations seemingly remain out of the scope of these proceedings.

This raises a fundamental problem with regard to accountability for environmental damage caused by corporations, in general, and with regard to climate change effects caused by them, in particular. As recent scientific data shows, a small

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[1] *NASA Announces Summer 2023 Hottest on Record*, NAT'L AERONAUTICS AND SPACE ADMIN. (Sept. 14, 2023), https://www.nasa.gov/news-release/nasa-announces-summer-2023-hottest-on-record/ [https://perma.cc/QE23-CAEM].

[2] JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2023 SNAPSHOT 12 (2023), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf [https://perma.cc/W7Q9-R2EG].

[3] U.N. High Comm'r for Human Rights, *Rep. on the Relationship Between Climate Change and Human Rights*, ¶ 92, U.N Doc. A/HRC/10/61 (Jan. 15, 2009) (finding that climate change-related impacts "have a range of implications for the effective enjoyment of human rights").

[4] HR 20 December 2019, NJ 2020, 19/00135 m.nt. (Stichting Urgenda/De Staat der Nederlanden) (Neth.) [hereinafter the Urgenda decision] (recognizing the petitioners' claim under Article 2 of the ECHR, which protects the right to life, and under Article 8 of the ECHR, which protects the right to private life, family life, home, and correspondence.)

[5] *See infra* Part III.B.

number of investor-owned, state-owned, and nation-state corporations are responsible for most global GHG emissions.[6] Therefore, adjudicating cases only against states might prove insufficient to hold the most responsible actors to account. Indeed, when the power wielded by corporations is juxtaposed against this lack of an efficient mechanism to deal with corporate externalities in the international sphere, the need to develop a means of accountability is evident.

It is important to note, however, that since corporate emissions are included in state emissions, cases against states may still have broad implications for corporations and serve as an indirect way to push for corporate accountability. For instance, cases brought against a state may allege that the state is not taking adequate measures to prevent the climate change effects caused by corporations incorporated within its jurisdiction. As has already been established, states are obligated to address the adverse impacts of private business activities on human rights.[7] Hence, private actors may bring proceedings against states for failing to do so or for supporting and enabling harmful business activities. Decisions requiring a country's government to cut emissions will also inevitably lead to structural changes in that country's energy system and consequently to major changes for corporate actors. However, all of the above represents litigation against states. As such, the influence of such proceedings on corporations is indirect, limited, and highly dependent on state action.

A different path has been recently explored. In a historic case filed, *inter alia*, by the environmental group Milieudefensie against the oil and gas enterprise Royal Dutch Shell (RDS), the District Court in The Hague held that RDS violated the standard of care under Dutch law and ordered the company to reduce its emissions by 45% by 2030.[8] The Court relied on Article 2 and Article 8 of the ECHR, on corporations' commitments under the U.N. Guiding Principles on Business and Human Rights (UNGPs)[9] and on corporations' commitments as "non-party

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[6] Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATIC CHANGE 229, 234 (2014) (finding that a group of ninety corporate investor-owned and state-owned producers of fossil fuels and cement was responsible for approximately two-thirds of industrial carbon emissions from 1751 through 2010). New data shows that from 1965 to 2017, the twenty largest fossil fuel companies have emitted 35% of all fossil fuel emissions worldwide. Press Release, Climate Accountability Inst., Carbon Majors: Update of Top Twenty Companies 1965–2017 (Oct. 9, 2019), https://climateaccountability.org/pdf/CAI%20PressRelease%20Top20%20Oct19.pdf [https://perma.cc/R2KB-5ETU]. Notably, out of 90 companies, 31 state-owned carbon producers are responsible to 19.84% of global cumulative emissions and nine nation state carbon producers are responsible to 21.50% of global cumulative emissions. RICHARD HEEDE, CLIMATE MITIGATION SERV., CARBON MAJORS: ACCOUNTING FOR CARBON AND METHANE EMISSIONS 1854-2010 24 (2014), https://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf [https://perma.cc/28ZH-A85U].

[7] Human Rights Comm., Gen. Comment No. 36 on Art. 6 of the Int'l Covenant on Civil and Political Rights, paras. 21-22, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter General Comment 36]; Comm. on Econ., Social and Cultural Rights, Gen. Comment No. 24 (2017) on State Obligations Under the Int'l Covenant on Econ., Social and Cultural Rights in the Context of Bus. Activities, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [hereinafter General Comment 24]; Human Rights Comm., Gen. Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 8, U.N. Doc. CPR/C/21/Rev.1/Add.13 (Mar. 19, 2004) [hereinafter General Comment 31] .

[8] Rechtbank Den Haag, 26 mei 2021, C/09/571932 m.nt. (Milieudefensie et al./Royal Dutch Shell, PLC) (Neth.) [hereinafter the Milieudefensie ruling].

[9] John Ruggie (Special Rep.), *Human Rights Council, The U.N. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter the UNGPs].

stakeholders" under the Paris Agreement.[10] This groundbreaking decision may constitute a turning point with regard to the role of corporations in human rights-based climate litigation. This opinion opens the door to future cases arguing that a corporation's failure to combat its adverse effects on climate change constitutes a violation of its international human rights obligations.[11] Moreover, as will be analyzed below, by providing a forum for overseeing corporate compliance with international norms, the District Court in The Hague effectively functioned as a global court, filling the accountability gap created by the absence of such a forum at the international level.

This Article will proceed as follows: Part II presents an overview of the key agreements, declarations, and court decisions that connect human rights and the environment. This Part will additionally analyze the advantages and hurdles associated with linking human rights and environmental protection, especially with regards to climate change. Following that, Part III will explore key human rights-based climate cases that have been filed in recent years. After examining several leading human rights-based proceedings filed in national courts, this Article will examine cases brought before international courts and tribunals. Part IV will follow with a discussion about the indirect influence that cases against states may exert on corporations concerning their obligations to tackle the climate crisis and the extent to which such cases may truly alter corporate behavior. Finally, in Part V, this Article will analyze the approach demonstrated in the Milieudefensie ruling and its innovative aspects: providing a forum for enforcing international human rights norms on corporations, relying on non-binding soft international law instruments as an interpretive tool for filling the corporate accountability gap and offering a global scope. Finally, this Part will also address the extraterritorial application of human rights law in light of the global nature of climate change and the involvement of non-state global private actors. This Article will conclude with final observations on the future prospects of human rights-based climate litigation aimed at holding corporations accountable for their contribution to the climate crisis.

II. THE LINK BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE

A. Background

The link between environmental protection and human rights is unequivocal. This connection has been recognized in the 1972 Stockholm Declaration, which opens with the proclamation that "[m]an is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth . . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself."[12] Additionally, Principle 1 of

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[10] U.N. Framework Convention on Climate Change, Adoption of the Paris Agreement, U.N. Doc. FCCC/CP/2015/10/Add.1, decision 1/CP.21 (Jan. 29, 2016) [hereinafter the Paris Agreement].

[11] *See infra* note 170.

[12] Stockholm Declaration on the Human Environment, 11 I.L.M 1416, pmbl. para. 1, Principle 1 (1972) [hereinafter the Stockholm Declaration].

the Rio Declaration on Environment and Development states: "[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[13]

In July 2022, following the Human Rights Council Resolution 48/13 of October 2021,[14] the U.N. General Assembly (UNGA) recognized the right to a safe, healthy and sustainable environment as a universal right.[15] Symbolically, the passage of this landmark resolution coincided with the 50th anniversary of the 1972 Stockholm Declaration. Indeed, even though an explicit right to a safe, healthy and sustainable environment as a universal right has only been recently recognized, the link between environmental protection and human rights has long been acknowledged.

Along with these declarations, several international courts and tribunals have also recognized this connection between the environment and human rights. For instance, the I/A CHR has recognized "the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights."[16] The I/A CHR made reference to the preamble of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"),[17] which "emphasizes the close relationship between the exercise of economic, social and cultural rights – which include the right to a healthy environment – and of civil and political rights."[18] The Court also referred to the jurisprudence of the African

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[13] United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14, 1992, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) [hereinafter the Rio Declaration].

[14] Hum. Rts. Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13 (Oct. 8, 2021).

[15] G.A. Res. 76/300, (July 28, 2022) [hereinafter UNGA Resolution 76/300]. Additionally, on October 12, 2022, the Committee of Ministers to Member States of the Council of Europe on Human Rights and the Protection of the Environment recommended, *inter alia*, that the governments of the member States "reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law." Recommendation CM/Rec (2022) 20 of the Committee of Ministers to Member States on Human Rights and the Protection of the Environment (adopted by the Committee of Ministers on 27 September 2022 at the 1444th meeting of the Ministers' Deputies). *See also* United Nations Env't Programme, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity, at art. 7(g), U.N. Doc. CBD/COP/DEC/15/4 (Dec. 19, 2022) (referring to UNGA Resolution 76/300 and stating that "[t]he implementation of the Framework should follow a human rights-based approach, respecting, protecting, promoting and fulfilling human rights" and that "[t]he Framework acknowledges the human right to a clean, healthy and sustainable environment"), https://www.cbd.int/doc/c/e6d3/cd1d/daf663719a03902a9b116c34/cop-15-l-25-en.pdf [https://perma.cc/4SRD-JSSU].

[16] Advisory Op. OC-23/17 of the Inter-American Court of Human Rights on the Environment and Human Rights para. 47 [hereinafter the I/A CHR Advisory Opinion OC-23/17]. The Court also mentioned that "the rights especially linked to the environment have been classified into two groups: (i) rights whose enjoyment is particularly vulnerable to environmental degradation, also identified as substantive rights (for example, the rights to life, personal integrity, health or property), and (ii) rights whose exercise supports better environmental policymaking, also identified as procedural rights (such as the rights to freedom of expression and association, to information, to participation in decision-making, and to an effective remedy)." *Id.* para. 64.

[17] Additional Protocol to the Am. Convention on Hum. Rts. in the Area of Econ., Soc. and Cultural Rts. 1988, at the Eighteenth Regular Session of the General Assembly (OAS. Official records; OEA/Ser.A/44) (Treaty Series; no.69) [hereinafter the San Salvador Protocol].

[18] I/A CHR Advisory Opinion OC-23/17, *supra* note 16, para. 47. It should be noted that the San Salvador Protocol expressly recognizes the right to a healthy environment: "1. Everyone shall have the

Commission on Human and Peoples' Rights indicating the close connection between environmental rights and economic and social rights.[19]

Other international courts have also recognized the link between human rights and the environment. The European Court of Human Rights (ECtHR) has a rich record of decisions in which it has addressed environmental concerns through the prism of the human rights protected in the ECHR.[20] In a recent decision by the ECtHR, Judge Serghides noted in a concurring opinion, that "[i]n a real sense, all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment."[21] The U.N. Human Rights Committee (HRC) similarly expressed the view that environmental pollution may constitute a threat to the right to life with dignity[22] and the right to private and family life and the home.[23]

The connection between human rights and environmental degradation is all the more striking when it comes to the climate crisis, which is widely considered the most pressing environmental challenge of human societies in the 21st century. The scientific consensus recognizes that climate change poses a clear and substantial threat to human societies, to the natural system, and to all living creatures.[24] The adverse effects of climate change include, *inter alia*, increased extreme weather events, sea level rise, floods, heat waves, droughts, wildfires, increased air pollution, desertification, water shortages, the destruction of ecosystems and loss of biodiversity.[25] All these effects have "reduced food security; contributed to migration and displacement; damaged livelihoods, health and security of people; and increased inequality."[26] As a result, the climate crisis has a major impact on the most

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right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment." *See also* San Salvador Protocol, *supra* note 17, at art. 11.

[19] I/A CHR Advisory Opinion OC-23/17, *supra* note 16, para. 50. Notably, the African Charter on Human and Peoples' Rights proclaims that "all peoples shall have the right to a general satisfactory environment favourable to their development." *See* Org. of African Unity [OAU], African Charter on Hum. and Peoples' Rts., art. 24 (June 27, 1981).

[20] *See generally* Press Release, The Eur. Ct. of Hum. Rts., Factsheet – Env't and the Eur. Ct. of Hum. Rts. (Oct. 2023), https://www.echr.coe.int/documents/fs_environment_eng.pdf [https://perma.cc/9NJ8-TXCW]; *see also* COUNCIL OF EUR., MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (3rd ed. 2022) (containing principles emerging from the case law of the European Court on Human Rights and the conclusions and decisions of the European Committee of Social Rights), https://rm.coe.int/manual-environment-3rd-edition/1680a56197 [https://perma.cc/PJU9-BFML].

[21] Pavlov and Others v. Russia, App. No. 31612/09, 33 (Oct. 11, 2022), https://hudoc.echr.coe.int/eng#{%22appno%22:[%2231612/09%22],%22itemid%22:[%22001-219640%22]} [https://perma.cc/NPS5-GHWJ].

[22] Hum. Rts. Comm., Portillo Cáceres v. Paraguay: Views Adopted by the Comm. Under Art. 5(4) of the Optional Protocol, U.N. Doc. CCPR/C/126/D/2751/2016, para. 7.3, (July 25, 2019) (noting that environmental pollution "may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity") [hereinafter Portillo Cáceres]. *See also* Gen. Comment 36, *supra* note 7, paras. 26, 62.

[23] International Covenant on Civil and Political Rights art. 17, 999 U.N.T.S. 171 (Dec. 16, 1966); *see also* Portillo Cáceres, *supra* note 22, para. 7.3. (noting that "when the consequences of pollution are serious in terms of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may constitute violations of private and family life and the home.")

[24] *Sixth Assessment Report*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Mar. 20, 2023), https://www.ipcc.ch/assessment-report/ar6/#:~:text=The%20Working%20Group%20I%20contribution,released%20on%2020%20March%02023 [https://perma.cc/9DR5-NUM8].

[25] *Id.*

[26] *Id.*

fundamental human rights such as the right to life, the right to safe and clean drinking water and sanitation, the right to an adequate standard of living, the right to private and family life, indigenous peoples' rights and children's rights.[27]

The international legal system has also acknowledged the threat that climate change specifically poses to the most basic human rights. The 1992 U.N. Framework Convention on Climate Change (UNFCCC) states that "change in the Earth's climate and its adverse effects are a common concern of humankind."[28] The Paris Agreement, which received almost universal recognition, has further made a direct connection between climate change and human rights in its preamble, in which it is acknowledged that "[p]arties 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."[29]

The connection between climate change and human rights has also been acknowledged by the Human Rights Council,[30] the Human Rights Committee,[31] and the Committee on Economic, Social and Cultural Rights (CESCR).[32] This link between human rights and climate change has also been a prominent issue in the work of the Special Rapporteur on human rights and the environment.[33] Additionally, the

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[27] *See* David Boyd (Special Rapporteur), Hum. Rts. Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environ., U.N. Doc. A/74/161 (July 15, 2019).

[28] U.N. Framework Convention on Climate Change at pmbl., 1771 U.N.T.S. 107 (May 9, 1992).

[29] Paris Agreement, *supra* note 10, pmbl. para. 11.

[30] Hum. Rts. Council Res. 50/9, U.N. Doc. A/HRC/RES/50/9 (July 7, 2022);. Hum. Rts. Council Res. 47/24, U.N. Doc. A/HRC/RES/47/24 (July 14, 2021); Hum. Rts. Council Res. 35, Doc. A/HRC/35/L.32 (June 19, 2017); Hum. Rts. Council Res. 38/4, U.N. Doc. A/HRC/RES/38/4 at prmbl. (July 16, 2018) (recognizing that "climate change has already had an adverse impact on the full and effective enjoyment of the human rights enshrined in the Universal Declaration of Human Rights"); Hum. Rts. Council Res. 32/33, U.N. Doc. A/HRC/RES/32/33 (July 18, 2016); Hum. Rts. Council Res. 31/8, U.N. Doc. A/HRC/Res/31/8, pmbl., para. 4(a), (Apr. 22, 2016). In a 2017 resolution, the Human Rights Council acknowledged that climate change contributes "to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, and that these events have adverse effects on the full enjoyment of all human rights." Hum. Rts. Council Res. 35, Doc. A/HRC/35/L.32 (June 19, 2017).

[31] Hum. Rts. Comm., Views Adopted by the Comm. Under Art. 5(4) of the Optional Protocol, Concerning Commc'n No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020) [hereinafter Teitiota]; Hum. Rts. Comm., Daniel Billy et al. v. Australia: Views Adopted by the Comm. Under Art. 5(4) of the Optional Protocol, Concerning Commc'n No. 3624/2019, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022) [hereinafter Daniel Billy]. *See also* Gen. Comment 36, *supra* note 7 (in which the Human Rights Committee noted that "[e]nvironmental 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").

[32] *Climate Change and the Int'l Covenant on Econ., Soc. and Cultural Rts*., COMM. ON ECON., SOC. & CULTURAL RTS., at paras. 1, 4 (Oct. 8, 2018) https://www.ohchr.org/en/statements/2018/10/committee-releases-statement-climate-change-and-covenant [https://perma.cc/YU5G-UE8E] (stating that "climate change constitutes a massive threat to the enjoyment of economic, social and cultural rights" and noting that it is affecting these rights, including "the rights to health, food, water and sanitation; and it will do so at an increasing pace in the future.").

[33] *See* David Boyd (Special Rapporteur), *supra* note 27; John H. Knox (Special Rapporteur), Rep. of the Special Rapporteur on the Issue of Hum. Rts. Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Env't, U.N. Doc. A/HRC/31/52, at paras. 23-39, 65, 68, (Feb. 1, 2016) (noting that the "greater the increase in average temperature, the greater the effects on the right to life and health as well as other human rights"), http://www.srenvironment.org/report/climate-change-report-2016 [https://perma.cc/KK5E-Z25S]; Brief for the Int'l Env't Law and Env't Law All. Worldwide as Amici Curiae Supporting Plaintiffs, Juliana v. United States, 947 F.3d 1159 (2020) (No. 18-36082).

U.N. Human Rights Council at its 48th session in October 2021 established a mandate of the U.N. Special Rapporteur on the promotion and protection of human rights in the context of climate change.[34]

Meanwhile, during its 93rd session in May 2023, the Committee on the Rights of the Child adopted General Comment no. 26 on children's rights and the environment, with a special focus on climate change.[35] General Comment no. 26 recognizes that "[t]he extent and magnitude of the triple planetary crisis, comprising the climate emergency, the collapse of biodiversity and pervasive pollution, is an urgent and systemic threat to children's rights globally"[36] and emphasizes "the urgent need to address the adverse effects of environmental degradation, with a special focus on climate change, on the enjoyment of children's rights."[37]

B. Linking Human Rights and Climate Change: Advantages and Hurdles

As described above, it is undisputed that environmental degradation has a direct influence on the day-to-day life of people and communities, and that it profoundly affects their ability to enjoy the most fundamental of human rights. Therefore, the relationship between environmental protection and human rights is primarily a factual one: if environmental degradation produces the same outcomes as other human rights violations, and if it affects people and communities in the same way, then it should not be treated differently.

This linking of human rights to environmental protection carries some significant advantages that appeal to environmentalists but also presents potential challenges, both of which are explored below.

1. Linking Human Rights and Environmental Protection – Advantages

Contrary to environmental law regimes which tend to focus on balancing environmental protection with other competing interests, the human rights law system offers some tangible benefits. First, viewing environmental concerns through the prism of human rights law serves as a significant statement, emphasizing the importance of environmental protection. Second, framing environmental matters in human rights terms helps place such matters outside of "the political arena of competing interests and policies,"[38] thus clarifying that environmental issues are an integral part of the set of core human rights obligations that need to be respected and protected. Third, and most importantly, a human rights legal system provides individuals and environmental groups with access to judicial and quasi-judicial

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[34] *See* Hum. Rts Council Res. 48/14, U.N. Doc. A/HRC/RES/48/14 (Oct. 8, 2021). *See also About the Mandate*, U.N. HUM. RTS. OFFICE OF THE HIGH COMM'R, https://www.ohchr.org/en/specialprocedures/sr-climate-change/about-mandate [https://perma.cc/L4PT-SGHV] (includes a detailed description of the specific tasks of the Special Rapporteur on the promotion and protection of human rights in the context of climate change).

[35] *See* Comm. on the Rts. of the Child., U.N. Doc. CRC/C/GC/26 (Aug. 22, 2023).

[36] *Id.* at art. 1.

[37] *Id.* at art. 12. It should be noted that General Comment no. 26 also addresses the issue of children's rights and the business sector. *Id.* at art. 78-81.

[38] Daniel Bodansky, *Introduction: Climate Change and Human Rights: Unpacking the Issues*, 38 GA. J. INT'L & COMPAR. L. 511, 515 (2010).

institutions tasked with the role of enforcing and monitoring human rights obligations.[39]

The above-mentioned advantages that pertain to linking human rights and environmental protection in general, are also relevant when it comes to climate change. David Hunter has argued that contrary to the climate regime's approach, which is mostly based on "political compromise, cost-benefit analysis, and risk management," a human rights approach is "based on legal liability, compensation for loss, or the protection of fundamental rights."[40] Additionally, as Hunter noted, "a rights-based approach lends moral authority, and with it, rhetorical power to the victims of climate change. This moral authority can be an effective counterweight to the technocratic approaches that otherwise dominate the climate change debate."[41]

Moreover, a human rights perspective helps bring the issue of climate change to the public eye and build political will, as it "forces us to examine climate change at the individual victim's level. Our focus is placed on those who suffer today from climate change as opposed to some abstract discussion of parts per million or millimeters of sea level rise."[42] In this sense, climate litigation is yet another tool in the global climate movement's toolbox, another strategy aimed at bringing this subject to the forefront and raising public awareness. In this context, it is important to note that even unsuccessful cases may make a difference by prompting social and legal change and by serving as a foundation for subsequent cases.[43]

Additionally, treating climate change as a human rights issue may accelerate climate action. As put by Daniel Bodansky, "if the activities that contribute to climate change violate human rights law, then we do not need to wait for governments to agree to cut their emissions; our current practices are illegal already."[44] Human rights law therefore may serve as a means to force governments to enhance their carbon policies without delay.

Furthermore, the human rights approach to climate change assists in overcoming one of the most significant barriers that stand in the way of addressing the problem of the climate crisis which is the need for cooperation and mutual action. Indeed, cooperation between states has been a central element in international environmental law[45] and has also been a key component in the climate change international regime, as manifested, *inter alia*, in the UNFCCC and the Paris Agreement. Accordingly, one of the recurring arguments made by states is that, as a global phenomenon, the climate crisis cannot be solved by one state alone. This is referred to as the "drop in the ocean" argument, according to which states point out

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[39] *Id.* at 517.

[40] David Hunter, *Human Rights Implications of Climate Change*, 11 OR. REV. INT'L L. 331, 334 (2009).

[41] *Id.* at 343. *See also id.* n.58 (citing Michael R. Anderson: "[o]ften, the real value of a human right is that it is available as a moral trump card precisely when legal arrangements fail." *See* Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview, in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996)).

[42] *See* Hunter*, supra* note 40, at 344.

[43] *See* Brian Preston, *Characteristics of Successful Environmental Courts and Tribunals,* 26 J. OF ENVTL. L. 365 (2014); *See also* Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. OF LEGAL STUD. 841 (2018).

[44] Bodansky, *supra* note 38, at 516–17.

[45] Neil Craik, *The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect*, 30 YEARBOOK OF INT'L ENVTL. L. 22, 23 (2019).

that the GHG emissions of one country amount to only a small part compared to global emissions. With this logic, holding only one state accountable and requiring it to reduce its share of GHG emissions will not provide a proper solution to the problem.[46]

Applying human rights law gets around this collective action argument. Under human rights law, each state has a separate and independent obligation to take positive measures to prevent damage to the environment, regardless of other states' actions. As noted by Bodansky, "human rights obligations do not depend on reciprocity. States owe obligations not only to one another, but also to individuals; moreover, one state's respect for human rights does not depend on, and may not be conditioned on, compliance by other states."[47]

A human rights-based approach to environmental issues in general and to climate change in particular may also present a clear benefit in the context of corporate responsibility. Although not legally binding, corporations have certain human rights obligations.[48] Therefore, treating climate change impacts as human rights violations may have significant implications with regard to the possibility of setting and enforcing GHG emissions reduction goals for corporations. Until recently, most climate-related lawsuits against oil and gas companies have sought to hold them liable for their impacts on the climate crisis by relying, *inter alia*, on tort claims and on consumer and investor protection laws. Applying human rights law represents a different and innovative avenue for holding corporations accountable for their impacts on the environment and opens up new possibilities for effective remedies. Human rights-based proceedings have the potential for giving courts the power to enforce low carbon policies on corporations. Still, a human rights approach to climate change may face some difficulties, which will be detailed below.

2. A Human Rights Approach to Climate Change – Challenges

Several hurdles may stand in the way of claimants who wish to rely on human rights law as a basis for an obligation to reduce GHG emissions. Such issues include the establishment of causation, attribution, shared responsibility, collective action, the use of predictions of future climate change impacts and the extraterritorial application of human rights with regard to climate change.[49] However, with time, issues such as causation and attribution are becoming less and less difficult to show in light of developments in climate science,[50] as well as legal doctrines regarding

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[46] Jacqueline Peel, *Issues in Climate Change Litigation*, 5 CARBON & CLIMATE L. REV. 15 (2011).

[47] *See* Bodansky, *supra* note 38, at 516.

[48] UNGPs, *supra* note 9; *OECD Guidelines for Multinational Enterprises*, ORG. FOR ECON. COOPERATION AND DEV. (June 27, 2000), https://www.refworld.org/policy/legalguidance/oecd/2000/en/31109 [https://perma.cc/S2RE-WU7S] [hereinafter OECD Guidelines].

[49] Jacqueline Peel & Hari Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENVTL. L. 37, 37–67 (2018); *see also* Benoit Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, 115 AM. J. INT'L L. 409, 451 (2021); Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1945 (2007); Alexander Zahar, *Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions,* 23 HUM. RTS. REV. 385 (2022).

[50] *See* Donna Minha, *The Possibility of Prosecuting Corporations for Climate Crimes Before the International Criminal Court: All Roads Lead to the Rome Statute?*, 41 MICH. J. INT'L L. 491, 495

multiple causes of harm.[51] Furthermore, as climate change impacts are already being felt across the globe, hurdles related to future harm are also becoming less relevant.

Another hurdle facing rights-based climate litigation relates to the absence of an independent right to a safe, healthy, and sustainable environment from the different international human rights covenants and the ECHR.[52] In this context, it should be noted that the impact of the recent UNGA recognition of the right to a safe, healthy, and sustainable environment on rights-based climate litigation is yet to be seen. Indeed, it may be well assumed that the recognition of a specific right to a safe, healthy, and sustainable environment as a universal human right may play a key role in future litigation.[53] Still, the practical effects of the resolutions made by the Human Rights Council and the UNGA are probably limited at this point given the non-binding nature of these resolutions. Additionally, as noted above, the right to a safe, healthy, and sustainable environment is not enshrined in the different international human rights covenants, nor is it included in the ECHR. Consequently, human rights treaty bodies and the ECtHR cannot rely on it directly. Having said that, however, the recognition of this right will undeniably serve as an important interpretive tool in climate related proceedings before human rights courts and tribunals.[54] Moreover, it may have important implications with regard to corporations, as the UNGA Resolution of July 2022 recalls "the Guiding Principles on Business and Human Rights, which underscore the responsibility of all business enterprises to respect human rights,"[55] highlighting the connection between the right to a safe, healthy and sustainable environment and the corporate obligation to respect human rights.

In sum, many of the challenges facing climate litigation can be resolved.[56] In this regard, it seems that at this point it is mostly a question of the willingness of the courts to go the extra mile with purposive interpretation of existing law, in the face

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(2020); Annalisa Savaresi & Jacques Hartmann, *Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry, in* CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 73, 78 (Jolene Lin & Douglas A. Kysar eds., 2020).

[51] Comm. on the Rts. of the Child Dec. 104/2019, U.N. Doc. CRC/C/88/D/104/2019 at art. 10 (Sept. 22, 2021) [hereinafter Sacchi]; Nataša Nedeski & André Nollkaemper, *A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation,* EUR. J. INT'L. L.: EJIL:TALK! (Dec. 15, 2022), https://www.ejiltalk.org/a-guide-to-tackling-the-collective-causation-problem-in-international-climate-change-litigation/ [https://perma.cc/8V7T-94JQ].

[52] Corina Heri, *Climate Change Before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, 33 EUR. J. INT'L. L., 925, 925–51 (2022).

[53] *See* Annalisa Savaresi, *The U.N. H.R.C. Recognizes the Right to a Healthy Environment and Appoints a New Special Rapporteur on Human Rights and Climate Change. What Does it All Mean?*, EUR. J. INT'L. L.: EJIL:TALK! (Oct. 12, 2021), https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy [https://perma.cc/6VPT-DVRY] (arguing that "the right provides an additional tool to challenge state and corporate actors for failing to take prompt and adequate action to address the triple environmental crises of climate change, pollution, and nature loss").

[54] Pavlov and Others v. Russia, *supra* note 21 (Krenc, J., concurring).

[55] UNGA Resolution 76/300, *supra* note 15.

[56] *See* Helen Keller, & Abigail D.P, *Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases*, 33 EUR. J. OF INT'L L. 925 (2022); Heri, *supra* note 52; *Compare* Corina Heri, *Legal Imagination, and the Turn to Rights in Climate Litigation: A Rejoinder to Zahar*, EUR. J. INT'L. L.: EJIL:TALK! (Oct. 6, 2022), https://www.ejiltalk.org/legal-imagination-and-the-turn-to-rights-in-climate-litigation-a-rejoinder-to-zahar/ [https://perma.cc/6ZUH-HCVT], *with* Alexander Zahar, *The Limits of Human Rights Law: A Reply to Corina Heri*, 22 EUR. J. INT'L L. 953, 960 (2022), *and* Benoit Mayer, *Climate Litigation and the Limits of Legal Imagination: A Reply to Corina Heri*, NAT'L UNIV. SING. CTR. FOR INT'L. L.: CIL DIALOGUES (Nov. 4, 2022), https://cil.nus.edu.sg/blogs/climate-litigation-and-the-limits-of-legal-imagination-a-reply-to-corina-heri/ [https://perma.cc/33E3-9KBY].

of the imminent threat posed by climate change. The article will now proceed to examine the different human rights-based climate proceedings brought before national and international fora.

III. HUMAN RIGHTS-BASED CLIMATE CASES

This part explores key human rights-based climate cases, some of which have already been decided and some are still pending. After examining several leading human rights-based proceedings that were filed before national courts, the article will look into cases brought before international courts and tribunals: complaints before human rights treaty bodies, proceedings brought before the ECtHR and requests for advisory opinions. It is important to note, that while most of the proceedings examined in the part have been brought against states, they may still have a substantial effect on corporate conduct, an issue that will be discussed in further detail in part IV.

A. National Cases

The first attempt to make the connection between climate change and human rights was a petition filed in 2005 with the I/A CHR on behalf of the Inuit indigenous people of the United States and Canada, against the United States.[57] The I/A CHR found that the information provided in this case "does not enable [the court] . . . to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration."[58] However, a decade later, the attitude of courts started to change. The first manifestation was the Urgenda case that will be discussed below.

1. Urgenda v. Netherlands – a Turning Point in Global Climate Litigation

i. The District Court's Decision

In 2015, a Dutch citizens' group called Urgenda (a contraction of "urgent agenda") filed a lawsuit against the Dutch government before the District Court in The Hague. Urgenda claimed that the State of the Netherlands does not pursue an adequate climate policy and therefore acts contrary to its duty of care under Article 21 of the Dutch constitution, which states that "it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."[59] Urgenda also argued that the current global GHG emissions level "constitutes an infringement of, or is contrary to, Articles 2 and 8 of the ECHR."[60]

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[57] Hunter, *supra* note 40, at 335–37; Peel & Osofsky, *supra* note 49, at 46.

[58] H.M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675, 676 (2007).

[59] GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [CONSTITUTION] 2023, art. 21 (Neth.).

[60] Rechtbank Den Haag 24 juni 2015, 336 m.nt. (Stichting Urgenda/De Staat der Nederlanden) (Neth.), para. 3.2.

In a historic decision, the District Court ordered the State of the Netherlands to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will be reduced by at least 25% at the end of 2020 compared to the level of 1990.[61] The Court analyzed the scientific data and determined that "[d]ue to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the Court concluded that the State has a duty of care to take mitigation measures."[62] The Court added that "[i]t is an established fact that with the current emission reduction policy … the State does not meet the standard which according to the latest scientific knowledge and in the international climate policy is required for Annex I countries to meet the 2°C target."[63]

The Court found that Urgenda lacks standing pertaining to Article 2 and Article 8 of the ECHR, since it cannot be considered as a victim under Article 34 of the ECHR.[64] Therefore, since Urgenda itself cannot directly rely on Articles 2 and 8 ECHR, the Court based its decision on the Dutch duty of care. However, the Court stated that "both articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation" with regard to the standard of care of the Dutch Civil Code.[65] To that end, the court referred to the jurisprudence of the ECtHR pertaining to the interdependence between the effective enjoyment of Convention rights and the environment.

Notably, the Court stressed that "it is not primarily upon the European Court of Human Rights to determine which measures are necessary to protect the environment, but upon national authorities,"[66] in light of the wide discretion afforded to national authorities under the "margin of appreciation" doctrine.[67]

ii. The Court of Appeal's Decision

The Dutch government filed an appeal to the Court of Appeal in The Hague. Urgenda filed a cross-appeal, with regard to the court's interpretation of Article 34 of the ECHR. The court issued its ruling in October 2018.

As for Urgenda's cross-appeal, the Court of Appeal ruled that Article 34 of the ECHR does not concern access to the Dutch courts as opposed to proceedings before the ECtHR, and therefore it cannot serve as a basis for denying Urgenda the possibility to rely on Articles 2 and 8 of the ECHR.[68]

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[61] *Id.* para. 5.51.

[62] *Id.* para. 4.8.3.

[63] *Id.* para. 4.8.4.

[64] *Id.* para. 4.45. *See also* European Convention on Human Rights art. 34, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] ("[t]he Court may receive applications from any person, nongovernmental 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 Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right"), https://www.echr.coe.int/documents/d/echr/convention_ENG [https://perma.cc/4TFZ-JWSX].

[65] *Id.* para. 4.46.

[66] *Id.* para. 4.4.8.

[67] *Id.*

[68] Hof's-Haag 9 oktober 2018, 417 m.nt. (Staat der Nederlanden/Stichting Urgenda) (Neth.), para. 35, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf [https://perma.cc/6292-5D7S].

As for the State's appeal, the Court noted that "[t]he interest protected by Article 2 ECHR … includes environment-related situations that affect or threaten to affect the right to life"[69] and that Article 8 of the ECHR "may also apply in environment-related situations" when "(1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity."[70] The Court of Appeal further noted that "[u]nder Articles 2 and 8 ECHR, the government has both positive and negative obligations relating to the interests protected by these articles, including the positive obligation to take concrete actions to prevent a future violation of these interests."[71] The Court concluded that "the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life."[72] It is important to note that the Court also clarified that "[t]his obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous."[73]

Notably, the Court rejected the state's "drop in the ocean" argument,[74] and stressed that the global nature of the problem "does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change."[75] The Court also rejected the state's claim of a lack of a causal link.[76]

The Court therefore upheld the district court's decision, concluding that by failing to pursue a more ambitious GHG reduction goal, the State is acting unlawfully. The State submitted an appeal to the Supreme Court of the Netherlands.

iii. The Supreme Court's Decision

In a decision issued in December 2019, the Supreme Court analyzed Article 2 and Article 8 of the ECHR, emphasizing that according to established ECtHR case law, these provisions apply to environmental harm. The Court stated that Article 2 "encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction" and that it applies to hazardous industrial activities "regardless of whether these are conducted by the government itself or by others, and also in situations involving natural disasters."[77] The Court further noted that the protection of Article 2 "also regards risks that may only materialise in the longer term."[78]

With regard to Article 8 of the ECHR, the Court noted that "according to established ECtHR case law, protection may be derived from Article 8 ECHR in

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[69] *Id.* para. 40.

[70] *Id.*

[71] *Id.* para. 41.

[72] *Id.* para. 43.

[73] *Id.*

[74] *Id.* para. 61 (referring to the State's argument that it "cannot solve the problem on its own").

[75] *Id.* para. 62.

[76] *Id.* para. 64.

[77] HR 20 december 2019, NJ 2020, 19/00135 m.nt. (Stichting Urgenda/De Staat der Nederlanden) (Neth.), para. 5.2.2.

[78] *Id.*

cases in which the materialisation of environmental hazards may have direct consequences for a person's private lives and are sufficiently serious, even if that person's health is not in jeopardy."[79] The Court added that Article 8 "encompasses the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment" and also emphasized that this risk "need not exist in the short term."[80]

The Court affirmed the Court of Appeals ruling that under Articles 2 and Article 8 of the ECHR, "the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem,"[81] and that "…each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change."[82] Ultimately, the Court rejected the appeal and upheld the court of appeals decision.

No doubt, this groundbreaking case constitutes a turning point for climate change litigation. The Urgenda case was the first instance in which a court set specific targets for GHG emissions reduction for a government, while relying on human rights law and dealing with some of the major challenges presented by climate litigation such as shared responsibility and future harm. Following the District Court's decision, which was later upheld and strengthened by the Court of Appeals and the Supreme Court, cases against states claiming that the government's action with regard to climate change is insufficient have sprouted like mushrooms. Some of these cases will be explored below.

2. National Cases Following the Urgenda Decision

In 2015, twenty-one youth plaintiffs filed a lawsuit against the United States federal government claiming that the government is violating their constitutional rights to life, liberty, and property, by promoting the fossil fuel industry and contributing to climate change and its adverse effects. The plaintiffs also based the case on the public trust doctrine. While the District Court of Oregon recognized that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society,"[83] the Ninth Circuit later reversed the District Court orders for lack of Article III standing (for failing to demonstrate redressability), concluding that the case must be made to the political branches or to the electorate at large.[84] On

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[79] *Id.* para. 5.2.3.

[80] *Id.*

[81] *Id.* para. 5.7.1.

[82] *Id.* para. 5.7.8.

[83] Juliana v. United States, 217 F. Supp.3d 1224, 1250 (D. Or. 2016) [hereinafter the Juliana case].

[84] Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020). In a dissenting opinion, Judge Staton noted that "[i]n these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response-yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation. I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial. I would therefore affirm the district court." *Id.* at 1191.

June 1, 2023, the U.S. District Court Judge Ann Aiken granted plaintiffs' motion to file an amended complaint.[85]

Additionally, on August 14, 2023, the Montana District Court ruled, in a lawsuit brought by sixteen youth plaintiffs, that a provision of the Montana Environmental Policy Act (MEPA) prohibiting the consideration of GHG emissions and climate change in environmental reviews violated the youth plaintiffs' right to a clean and healthful environment under the Montana Constitution.[86]

In a lawsuit filed in Belgium by a citizens-led organization (Klimaatzaak) and 58,000 citizen co-plaintiffs, the Brussels Court of First Instance found on June 17, 2021, that by not adopting an adequate climate policy, the Belgium government was in violation of its duty of care and its positive obligations under Articles 2 and Article 8 of the ECHR. However, the First Instance Court declined to order the government to set specific emission reduction goals, in light of the separation of powers doctrine, and therefore denied the remedy sought by the plaintiffs.[87] On November 30, 2023, the Brussels Court of Appeal confirmed that the government has violated Article 2 and Article 8 of the ECHR. Contrary to the decision of the First Instance Court, the Court of Appeal set targets for GHG emissions reductions, ordering a reduction of 55% by 2030 (compared to 1990 levels).[88]

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[85] *See* Juliana v. United States, 2023 WL 9023339, No. 6:2015cv01517-AA (D. Or. Dec. 29, 2023) (denying defendants' motion to dismiss the amended complaint).

[86] Held v. State, No. CDV-2020-307 (1st Dist. Ct. Mont. Aug. 14, 2023), https://westernlaw.org/wp-content/uploads/2023/08/2023.08.14-Held-v.-Montana-victory-order.pdf [https://perma.cc/PR7F-VFKP]. On January 16, 2024, the Supreme Court of the State of Montana denied defendants' motion for relief from the District Court's orders. *See* Held v. State, No. DA 23-0575 (Mont. Jan. 16, 2024), https://climatecasechart.com/wp-content/uploads/case-documents/2024/20240116_docket-DA-23-0575_order-1.pdf [https://perma.cc/6D8W-MVCR].

[87] Charlotte Renglet & Stefaan Smis, *The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?*, 25 AM. SOC'Y OF INT'L L. 1, 1–2 (2021).

[88] *Belgian 'Klimaatzaak'*, CLIMATE RIGHTS AND REMEDIES PROJECT (June 17, 2021), https://climaterightsdatabase.com/2021/06/17/belgian-klimaatzaak/ [https://perma.cc/Z9Z6-R65Q].

Similar cases have been brought in Germany,[89] Pakistan,[90] Colombia,[91] France,[92] and the Czech Republic.[93] Another case that has been brought before a national tribunal is a petition to the National Commission on Human Rights in the Philippines. Contrary to the aforementioned cases, which have been filed against states, this petition was brought against the world's largest investor-owned fossil fuel and cement producers, building, *inter alia*, on the research demonstrating their major share in global emissions. This petition will be discussed below.

3. The Philippines National Commission on Human Rights Report

In September 2015, several environmental and human rights organizations, together with Typhoon Haiyan survivors, filed a petition to the national Commission on Human Rights in the Philippines, demanding accountability from the world's largest investor-owned fossil fuel and cement producers for human rights violations resulting from the impact of climate change.[94] The petitioners relied on recent

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[89] In a decision published on April 29, 2021, the German Federal Constitutional Court declared the Federal Climate Change Act partly unconstitutional. The court put a considerable emphasis on the allocation of the mitigation burden between different generations. Interestingly, the Court mainly focused on the impact that future reduction measures will have on future generations' fundamental freedoms (as opposed to the impacts of climate change itself). In light of these findings, the Court ordered the legislature to enhance its climate policy. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, 1 BvR 2656/18/1 (Ger.), http://www.bverfg.de/e/rs20210324_1bvr265618en.html [https://perma.cc/URR6-GSS3] [hereinafter the Neubauer case]; Louis J. Kotzé, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, 22 GERMAN L. J. 1423, 1424 (2021).

[90] *See, e.g.,* Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Pak.) (court upheld a petition brought by a farmer for failure to implement the government climate policy. The court ruled that by delaying the implementation of its climate policy, the government offended the fundamental rights of the citizens. The court created, *inter alia*, a Climate Change Commission composed of representatives of key ministries, NGOs, and technical experts to help ensure implementation of the climate laws); David Hunter, Wenhui Ji & Jenna Ruddock, *The Paris Agreement and Global Climate Litigation after the Trump Withdrawal*, 34 MD. J. INT'L L. 224, 236 (2020), https://digitalcommons.law.umaryland.edu/mjil/vol34/iss1/9 [https://perma.cc/BGP6-HTUK].

[91] *E.g.*, Corte Suprema de Justicia [CSJ] [Supreme Court], Sala. Civ. abril 5, 2018, L.A. Tolosa Villabona, S.T.C. 4360-201 (Colom.) (found that deforestation in the Amazon and increasing temperatures violated the plaintiffs' constitutional rights to a healthy environment, life, health, food and water. The Court ordered the government to take action to address deforestation in the Amazon. Nonetheless, the court did not set specific measures. The Court also declared the Amazon to be an entity subject of rights and emphasized "the importance of the Amazon basin to achieving Colombia's international climate change commitments, including those set under the Paris Agreement.") [hereinafter Future Generations v. President of Colombia]; *see also* Hunter, Ji & Ruddock, *supra* note 90, at 237.

[92] *See, e.g.*, Tribunal Administratif de Paris [TA] [Administrative Court of Paris] Paris, 1st chamber, Oct. 14, 2021, 1904967 (Fr.) (four NGOs claimed that the French government's failure to adequately address climate change violated a statutory duty to act. The plaintiffs relied on the French Charter for the Environment, Articles 2 and 8 of the ECHR and the general principle of law providing a right to a live in a preserved climate system. On October 14, 2021, the Administrative court of Paris ordered the Government to take immediate action to comply with its climate commitments by December 31, 2022).

[93] *See, e.g.*, Městský soud v Praze 15.6.2022 (MS) [Decision of the Prague Municipal Court of June 15, 2022], 14A 101/2021 (Czech).

[94] *See* COMM'N ON HUMAN RIGHTS OF THE PHIL., NATIONAL INQUIRY ON CLIMATE CHANGE REPORT 3 (2022) (noting that the 2013 Typhoon Haiyan was one of the strongest typhoons in recorded history and caused the death of six thousand people) [hereinafter the Carbon Majors Report]. The petition named forty-seven corporations as the world's "carbon majors" (initially, fifty-two corporations were identified in the petition). *Id.* at 14.

scientific data demonstrating that corporations are responsible for the majority of global emissions.[95]

The Commission has conducted a thorough inquiry, consisting of a multi-disciplinary consultative process, which included, *inter alia*, interviews, round-table discussions, community dialogues, and public hearings. The Commission has also accepted amici briefs and research papers and engaged with international human rights bodies and organizations. In May 2022 the Commission published its final report. The report is a comprehensive document, which surveys the adverse effects of climate change on a wide array of human rights and details the responsibility of business enterprises to respect human rights in general[96] and particularly in the context of climate change.[97]

The Commission concluded, based on the information presented to it, that "the carbon majors, directly by themselves or indirectly through others, singly and/or through concerted action, engaged in willful obfuscation of climate science, which has prejudiced the right of the public to make informed decisions about their products, concealing that their products posed significant harms to the environment and the climate system"[98] and that "[a]ll these have served to obfuscate scientific findings and delay meaningful environmental and climate action."[99] The Commission also noted that "to this date, climate change denial and efforts to delay the global transition from fossil fuel dependence still persists [sic]" and that "[f]ossil fuel enterprises continue to fund the electoral campaigns of politicians, with the intention of slowing down the global movement towards clean, renewable energy."[100] The report includes a long list of recommendations to various actors such as governments, carbon majors and other carbon-intensive industries, financial institutions and investors, U.N. and other international bodies, the legal profession, and global citizens.

It should be noted that the conclusions of the Commission are not binding, and they have only declarative force. Nonetheless, the Commission's findings, which are based on an in-depth investigation, may still have a substantial role in bringing the issue of corporate accountability for climate change into awareness and may also influence future cases involving carbon majors.[101]

The next part will survey different human right-based climate proceedings brought against countries before international courts and tribunals. To that end, this

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[95] *Id.* at 99.

[96] *Id.* at 88–94.

[97] *Id.* at 94–98.

[98] *Id.* at 108–09.

[99] *Id.* at 109. *See also* CARROLL MUFFETT & STEVEN FEIT, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING BIG OIL ACCOUNTABLE FOR THE CLIMATE CRISIS 36 (Amanda Kistler et al. eds., 2017), https://www.ciel.org/wp-content/uploads/2019/01/Smoke-Fumes.pdf [https://perma.cc/8CSL-HYJC]; Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977–2014)*, 12 ENVTL. RSCH. LETTERS 1 (2017), https://iopscience.iop.org/article/10.1088/1748-9326/aa815f/pdf [https://perma.cc/QH6X-QCHW].

[100] Carbon Majors Report, *supra* note 94, at 110.

[101] *See* Maria Antonia Tigre & Antoine De Spiegeleir, *The Role of Human Rights Institutions In Tackling Climate Change: A Case Study of the Philippines*, COLUM. L. SCH. CLIMATE L. BLOG (Oct. 5, 2022), https://blogs.law.columbia.edu/climatechange/2022/10/05/guest-commentary-the-role-of-human-rights-institutions-in-tackling-climate-change-a-case-study-of-the-philippines/ [https://perma.cc/6G6E-4E8G].

part will examine complaints brought before human rights treaty bodies, cases pending before the ECtHR, and requests for advisory opinions.

B. International Cases

1. Complaints Before Human Rights Treaty Bodies

i. The U.N. Human Rights Committee

In 2020 the U.N. Human Rights Committee (HRC) published its first decision pertaining to climate change,[102] in a case that was brought against New Zealand by Ioanea Teitiota, a citizen of Kiribati whose application for refugee status was rejected by New Zealand. Teitiota argued that due to adverse effects of climate change and sea level rise experienced in Kiribati, removing him to Kiribati is a violation of his right to life under Article 6 of the ICCPR.

The majority of the committee was of the view that the facts before it did not demonstrate a violation of the author's right to life. Nonetheless, the majority of the Committee acknowledged that "without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the covenant."[103] Additionally, the Committee stressed that "given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized."[104]

In another case that was brought before the HRC in 2019, eight Torres Strait islanders and six of their children filed a complaint against Australia, claiming that Australia failed to take sufficient measures to tackle climate change, with regard to both mitigation measures and adaptation measures. The authors of the complaint claimed that by not acting sufficiently, Australia has violated their rights under the Covenant.[105]

The authors claimed that climate change, and in particular sea level rise, may cause the islands to become uninhabitable in 10-15 years, and they also detailed the effects of climate change that are already being experienced by them–all of which have a profound impact on their livelihood, sources of food and their ability to maintain their unique culture. Therefore, the authors argued that the state party has violated their right to life (under Article 6 of the ICCPR) which includes their right to life with dignity; their right to privacy, family and home (under Article 17 of the ICCPR) and their right as a minority to enjoy their culture (under Article 27 of the ICCPR).[106]

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[102] *See* Teitiota, *supra* note 31.

[103] *Id.* paras. 9, 11.

[104] *Id.*

[105] *See* Daniel Billy, *supra* note 31.

[106] *Id.* para. 3.1.

In response, Australia argued that there is no evidence that the authors face any current or imminent threat to the rights invoked by them,[107] and that they merely assert future hypothetical and speculative harm.[108] The State Party has also argued that it is not possible to attribute climate change–which is a global phenomenon–to the State party.[109]

In September 2022, the Committee published its groundbreaking decision. The majority of the Committee concluded that the information presented before it does not constitute a violation of Article 6 of the ICCPR.[110] However, the majority of the Committee was of the view that the State party violated the author's rights under Article 17 and Article 27 of the ICCPR.[111] The Committee concluded that the State party is under an obligation to provide the authors with an effective remedy, including, *inter alia*: making full reparation to individuals whose Covenant rights have been violated; providing adequate compensation to the authors for the harm that they have suffered; engaging in meaningful consultations with the authors' communities and taking steps to prevent similar violations in the future.[112]

ii. The Committee on the Rights of the Child

In September 2019, sixteen children from various countries brought a case before the Committee on the Rights of the Child (CRC) against Argentina, Brazil, France, Germany and Turkey. The authors requested that the Committee find that in disregarding the available scientific evidence pertaining to the measures needed to prevent and mitigate climate change, the States parties were violating petitioners' rights to life, health, the prioritization of the child's best interests and the cultural rights of indigenous communities.[113]

In October 2021, the CRC published its decision. The CRC applied the test for extraterritorial jurisdiction in cases involving environmental harm as set forth by the I/A CHR[114] and concluded, that "the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable."[115] The CRC added that "the authors have prima facie established that they have personally experienced a real

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[107] *Id.* para. 4.2.

[108] *Id.* paras. 4.10–4.11.

[109] *Id.* para. 4.3.

[110] *Id.* paras. 8.3–8.8. It should be noted that in separate opinions, several Committee members expressed the view that the Committee should have found a violation of the right to life.

[111] *Id.* paras. 8.9–8.14.

[112] *Id.* para. 11. Additionally, while the majority of the committee did not specifically address the issue of mitigation, Committee Member Gentian Zyberi noted, in a separate opinion, that "…the Committee should have linked the State obligation to protect the authors' collective ability to maintain their traditional way of life …more clearly to mitigation measures, based on national commitments and international cooperation – as it is mitigation actions which are aimed at addressing the root cause of the problem and not just remedy the effects." *Id.* at Annex IV para. 6 (internal quotations omitted). Committee Member Zyberi also stressed that "[i]f no effective mitigation actions are undertaken in a timely manner, adaptation will eventually become impossible." *Id.*

[113] Sacchi, *supra* note 51.

[114] I/A CHR Advisory Opinion OC-23/17, *supra* note 16.

[115] Sacchi, *supra* note 51, para. 10.14.

and significant harm in order to justify their victim status."[116] However, despite this conclusion, the Committee found the communication inadmissible for failure to exhaust domestic remedies.[117]

2. The European Court of Human Rights

As mentioned above, the ECtHR has developed a rich record of environmental case-law, through broad interpretation of the rights enshrined in the ECHR.[118] In a recent case involving industrial air pollution and the right to respect for private life under Article 8 of the ECHR, Judge Serghides, in a concurring opinion, noted that the Convention "…has been interpreted by the Court as a living instrument to be adapted to present-day conditions, such as to include, apart from negative obligations, also positive obligations relating to the protection of the environment."[119]

To date, the court has not yet rendered a decision in a climate case. However, the Court's attitude towards environmental matters and its willingness to broadly interpret the ECHR in environmental cases may serve as an indication to its future approach towards climate cases.[120] In fact, there are a number of climate cases pending before the ECtHR. In three cases the Chamber of the ECtHR has relinquished jurisdiction in favor of the Grand Chamber.[121] On March 29, 2023, the Grand Chamber of the ECtHR held oral hearings in two of these three cases. The first one was logged by an association of senior women for climate protection and four individual plaintiffs against Switzerland, claiming that the Swiss government has failed to fulfil its positive obligations under Article 2, 6, 8 and 13 of the ECHR. The complainants claim that the State has failed to adopt appropriate and sufficient measures necessary to combat climate change and that it has not provided them with an effective domestic remedy.[122] The second case was filed against France, claiming that the failure of the French authorities to take all appropriate measures in order to meet its maximum emissions targets constitutes a violation of Article 2 and Article 8 of the ECHR.[123]

On September 27, 2023, the Grand Chamber held oral hearings in a third climate case, filed by six Portuguese youth against Portugal and 32 more countries.

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[116] *Id.* para. 9.14.

[117] *Id.* para. 9.20.

[118] Factsheet – Env't and the Eur. Ct. of Hum. Rts., *supra* note 20.

[119] Pavlov v. Russia, *supra* note 21, at 36. Judge Serghides added that "despite the evolutive case-law of the Court, there is a need for the inclusion of a substantive right to a healthy, clean, safe and sustainable environment in the Convention, by a way of a new protocol" and that it would provide, *inter alia*, broader Convention protection. *Id.* at 39.

[120] Climate cases may present additional and unique hurdles. *See* Heri, *supra* note 52.

[121] ECHR art. 30, *supra* note 64 (allows the Chamber to relinquish jurisdiction in favour of the Grand Chamber when "a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.").

[122] Verein Klima Seniorinnen Schweiz and Others v. Switzerland, Appl. No. 53600/20 (Mar. 17, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13649%22]} [https://perma.cc/ZPE5-WZMN].

[123] Carême v. France, Appl. No. 7189/21 (June 7, 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13678%22]} [https://perma.cc/E9LF-UZXZ].

The complainants allege that the states concerned have violated their human rights by failing to take sufficient action on climate change, relying on Articles 2, 8, and 14 of the ECHR (the right to life, the right to privacy, and the right to not be discriminated in the enjoyment of the rights set forth in the ECHR).[124]

In six other climate cases pending before the ECtHR, the Court decided to adjourn its examination until such time as the Grand Chamber has ruled in the climate change cases before it.[125]

3. Requests for Advisory Opinions

i. The International Court of Justice

In November 2022, a group of 18 states led by Vanuatu circulated to U.N. member states a draft resolution requesting the International Court of Justice (ICJ) to render an advisory opinion on the issue of states' obligations with regard to the climate crisis.

In a resolution adopted on March 29, 2023, by the UNGA, it was decided, in accordance with Article 96 of the Charter of the United Nations,[126] to request the International Court of Justice (ICJ), in accordance with Article 65 of the Statute of the ICJ,[127] to render an advisory opinion on the following questions:

> *Having particular regard to* the Charter of the United Nations, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment, and the duty to protect and preserve the marine environment,
>
> (1) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

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[124] Duarte Agostinho and Others v. Portugal and Others, Appl. No. 39371/20 (Feb. 4, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13724%22]} [https://perma.cc/RXG9-MLHM].

[125] Uricchiov v. Italy and 31 Other States, Appl. No. 14615/21; De Conto v. Italy and 32 Other States, Appl. No. 14620/21; Müllner v. Austria, Appl. No. 18859/21; Greenpeace Nordic and Others v. Norway, Appl. No. 34068/21; The Norwegian Grandparents' Climate Campaign and Others v. Norway, Appl. No. 19026/21; Soubeste and Four Other Applications v. Austria and 11 Other State, Appl. No. 31925/22); Engels v. Germany, Appl. No. 46906/22.

[126] U.N. Charter art. 96, ¶ 1 (states that the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question).

[127] Statute of the International Court of Justice art. 65, ¶ 1, June 26, 1945, 33 U.N.T.S. 993 ("[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request").

> (2) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> > (a) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
> > (b) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

On April 20, 2023, the ICJ decided that "…the United Nations and its Member States are considered likely to be able to furnish information on the questions submitted to the Court for an advisory opinion and may do so within the time-limits fixed in this Order" and fixed the time-limit within which written statements and comments on the written statements may be presented to the Court.[128]

ii. The International Tribunal for the Law of the Sea

In December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS), led by Antigua and Barbuda and Tuvalu, submitted a request[129] for an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS),[130] on the following questions:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XJI:
>
> > (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

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[128] Obligations of States in Respect of Climate Change, Advisory Opinion, 2023 I.C.J 187, 2 (Dec. 15, 2023). This order extended the time-limit within which all written statements on the questions may be presented to the Court to March 22, 2024 and to the time-limit within which States and organizations having presented written statements may submit written comments on the other written statements to June 24, 2024. *Id.* at 4.

[129] Letter from Gaston Brown & Kausea Natano, Co-Chairs, Comm'n of Small Island States on Climate Change and Int'l Law, to Registrar, Int'l Tribunal for the Law of the Sea (Dec. 12, 2022) https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf [https://perma.cc/7UZY-RCMB].

[130] Int'l Tribunal for the Law of the Sea Rules art. 138, ITLOS/8 (Mar, 17, 2009), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf [https://perma.cc/YA6E-SMQZ].

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

Oral proceedings were held before the Tribunal in September 2023.[131]

iii. The Inter-American Court of Human Rights

On January 9, 2023, Chile and Colombia jointly asked the I/A CHR to render an advisory opinion in which it would clarify the scope of States' obligations under human rights law to respond to the climate emergency.[132] The request consists of twenty one questions referring to six topics: States' obligations in relation to human rights and the climate crisis; the state obligation to preserve the right to life in the face of the climate emergency; the obligations of states to protect the rights of children and future generations from climate change; procedural rights; protection of environmental defenders and the issue of common but differentiated responsibilities.[133] The case is currently pending before the I/A CHR.

C. Interim Conclusions

In summary, it is evident that human rights-based climate proceedings are filling the courts at both the national and the international level. Many of these cases pertain to mitigation measures, with plaintiffs requesting different tribunals to declare that certain states are not acting sufficiently on climate change and to force GHG emissions reductions on them. Indeed, the vast majority of these proceedings are filed against states, and therefore focus on states' obligations with regard to the climate crisis. Consequently, even successful cases, in which the courts have ordered emissions cuts, deal with the measures needed to be taken by states.

Arguably, though at first glance corporations seem to remain out of the picture, proceedings against states may still have, as a by-product, a considerable influence on corporate conduct. This will be explored below. Following that, the article will examine the direct approach demonstrated in the Milieudefensie case and its innovative aspects.

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[131] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, INT'L TRIBUNAL FOR THE LAW OF THE SEA (last visited Mar. 15, 2024) https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/ [https://perma.cc/NEQ3-Z4CJ].

[132] *Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency*, CLIMATE CHANGE LITIG. DATABASE (last visited Mar. 15, 2024), http://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/ [https://perma.cc/L8D5-QU4L]; Juan Auz & Thalia Viveros-Uehara, *Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights*, EUR. J. INT'L. L.: EJIL:TALK! (Mar. 2, 2023), https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/ [https://perma.cc/LEA6-SQG7].

[133] *Id.*

IV. AN INDIRECT EFFECT ON CORPORATIONS

Under international human rights law, states have a positive obligation to protect individuals from human rights violations, not only by states but also from those caused by private entities.

The HRC's General Comment No. 36 on the right to life addresses the duties of states with regard to corporate activity.[134] It provides that states are "under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State."[135] General Comment No. 36 further stresses that states "must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction are consistent with article 6."[136] The duty of states with regard to corporate activity that poses a threat to the right to life has also been expressed in the jurisprudence of the HRC[137] as well as in its periodic reviews.[138]

The requirement that States parties protect individuals against corporate human rights violations has been expressed by the CESCR in its General Comment No. 24.[139] The CESCR's General Comment No. 24 clarifies that the state's obligation to protect "…means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. This requires that States parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to

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[134] General Comment No. 36, *supra* note 7.

[135] *Id.* art. 21.

[136] *Id.* art. 22.

[137] *E.g.*, Portillo Cáceres, *supra* note 22; U.N. Hum. Rts. Comm., Annakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka, Commc'n. No. 1862/2009, U.N. Doc. CCPR/C/103/D/1862/2009 (2012) (concluding that "States parties have a positive obligation to ensure the protection of individuals against violations of Covenant rights, which may be committed not only by its agents, but also by private persons or entities"); U.N. Hum. Rts Comm., Decision Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2285/2013 (noting that "…there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction") [hereinafter the Yassin case].

[138] U.N. Hum. Rts. Comm., Concluding Observations: Germany, U.N. Doc. CCPR/C/DEU/CO/6 (Nov. 12, 2012), para. 16 (stating that the State party "…is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad"); *see also* U.N. Hum. Rts. Comm., Concluding Observations: Canada, U.N. Doc CCPR/C/CAN/CO/6 (Aug. 13, 2015) (recommending that the State party should, *inter alia*, "enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad" and "consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad"); U.N. Hum. Rts. Comm., Concluding Observations: Republic of Korea, U.N. Doc CCPR/C/KOR/CO/4 (Dec. 3, 2015), para. 11 (recommending that the State party "…stipulate clearly the expectation that all business enterprises domiciled in its territory and/or subject to its jurisdiction respect the human rights standards enshrined in the Covenant throughout their operations").

[139] General Comment 24, *supra* note 7.

business activities, and that they provide victims of such corporate abuses with access to effective remedies."[140] This approach has also been manifested in the CESCR's periodic reports.[141]

The UNGPs also address the issue of states' obligations to protect individuals from human rights violations caused by private entities. According to Principle 2 of the UNGPs, "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[142]

In addition to these obligations, in September 2019, five human rights treaty bodies issued a joint statement with specific regard to states' obligation in the context of human rights and climate change.[143] The joint statement proclaims that "States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially."[144] The joint statement further stresses that "States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk."[145]

Indeed, as the joint statement stresses, the obligation of states to protect against harmful business activity has two aspects: First, states are obligated to supervise, monitor and prevent violations of human rights by private entities; and second, states are required to refrain from supporting infringements of human rights by private entities (e.g., by granting subsidies and permits). These obligations of the

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[140] *Id.* ¶¶ 14, 30 ("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, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective").

[141] Comm. on Econ., Soc. and Cultural Rts., Concluding Observations on the Sixth Periodic Report of Canada, U.N. Doc E/C.12/CAN/CO/6, ¶¶ 15–16 (noting that "[t]he Committee is concerned that the conduct of corporations registered or domiciled in the State party and operating abroad is, on occasion, negatively impacting on the enjoyment of Covenant rights by local populations" and recommending, *inter alia*, that "the State party strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in their activities abroad, including by requiring those corporations to conduct human rights impact assessments prior to making investment decisions"); Comm. on Econ., Soc. and Cultural Rts., Concluding Observations of the Committee on Economic, Social and Cultural Rights Germany, U.N. Doc E/C.12/DEU/CO/5, ¶¶ 9–11 (recommending that the state party "…take measures, including the provision of enhanced legal assistance for victims and the introduction of collective redress mechanisms in civil proceedings, criminal liability of corporations and disclosure procedures, to guarantee that the victims of human rights abuses by companies domiciled in Germany or under the country's jurisdiction have access to effective remedies and compensation in Germany.").

[142] UNGPs, *supra* note 9, Principle 2.

[143] Comm. on the Elimination of Discrimination Against Women, Comm. on Econ., Soc. and Cultural Rs., Comm. on the Protection of the Rts. of All Migrant Workers and Members of their Families, Comm. on the Rts. of the Child, and Comm. on the Rts. of Pers. with Disabilities, Joint Statement on "Human Rights and Climate Change" (Sept. 16, 2019).

[144] *Id*.

[145] *Id*. In this context in should be noted that it has been claimed that "[t]his important state obligation highlighted by the HRTBs in their Joint Statement has not received growing attention in their State reporting procedure." CTR. FOR INT'L ENV'T LAW AND THE GLOB. INITIATIVE FOR ECON., SOC. AND CULTURAL RTS., STATES' HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF CLIMATE CHANGE: GUIDANCE PROVIDED BY THE UN HUMAN RIGHTS TREATY BODIES 14 (2022), https://www.ciel.org/wp-content/uploads/2023/01/HRTB-2022_23Jan23.pdf [https://perma.cc/4S9B-ZHCM].

state to regulate private actors also may extend to the protection of the rights of future generations.[146]

In light of the explicit obligations of states to protect individuals against human rights violations caused by private entities, proceedings brought against states may have a significant impact not only with regard to the states themselves, but also with regard to private actors. While a ruling in a proceeding against a state may not specify the concrete steps that need to be taken by the State in order to cut GHG emissions,[147] it goes without saying that in order to comply with the ruling, a policy change with regard to emissions generated by fossil fuel corporations is also required. Thus, for example, states will need to change their practices pertaining to subsidies to fossil fuel extraction and consumption, to permits granted to new oil and gas projects as well as to the exportation of fossil fuels.

Indeed, in the Juliana case, the petitioners argue that "[R]ather than implement a rational course of effective action to phase out carbon pollution, Defendants have continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation – activities producing enormous quantities of CO2 emissions that have substantially caused or substantially contributed to the increase in the atmospheric concentration of CO2."[148] Therefore, the petitioners requested that the court "order Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO2 emissions."[149]

Similarly, in a case pending before the ECtHR, the complainants (two NGOs and six individuals) argue that the Norwegian Ministry of Petroleum and Energy is violating their rights under Articles 2 and 8 of the ECHR by issuing licenses for oil and gas exploration in new areas in the Arctic (Barents Sea) that will bring new fossil fuels to market from 2035 and beyond.[150]

Another case that is pending before the ECtHR directly targets the connection between states and corporations in the context of international investment law.[151] In this case (which is comprised of five complaints), five individuals from France, Cyprus, Belgium, Germany and Switzerland argue, that the Energy Charter Treaty ("ECT"), which the respondent States are party to, "inhibits the respondent

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[146] RTS. OF FUTURE GENERATIONS, MAASTRICHT PRINCIPLES ON THE HUMAN RIGHTS OF FUTURE GENERATIONS 10–11, no. 17–18 (2023), https://www.rightsoffuturegenerations.org/the-principles [https://perma.cc/YL9B-L8UE].

[147] *See* October 2018 Urgenda Decision s*upra* note 68, para. 67 (the Court of Appeals in the Urgenda case noted that "…the order to reduce emissions gives the State sufficient room to decide how it can comply with the order").

[148] First Amended Complaint for Declaratory and Injunctive Relief para. 7, Juliana v. United States, No. 6:2015cv01517-AA (D. Or. Sept. 10, 2015), https://static1.squarespace.com/static/571d109b04426270152febe0/t/57a35ac5ebbd1ac03847eece/1470323398409/YouthAmendedComplaintAgainstUS.pdf [https://perma.cc/3NP5-KGGT]. For example, the petitioners argued that the United States "provides approximately $5.1 billion per year in tax provision subsidies to support fossil-fuel exploration." *Id.* para. 174.

[149] *Id.* para. 12.

[150] Greenpeace Nordic and Others v. Norway, App. No. 34068/21, 2021 Eur. Ct. H.R.

[151] Soubeste and Others v. Austria and 11 Other States, App. Nos. 31925/22 et al., 2022 Eur. Ct. H.R.; *see also* Linnéa Nordlander, *A New Variety of Rights-Based Climate Litigation: A Challenge Against the Energy Charter Treaty Before the European Court of Human Rights*, EUR. J. INT'L. L.: EJIL:TALK! (Jun. 30, 2022), https://www.ejiltalk.org/a-new-variety-of-rights-based-climate-litigation-a-challenge-against-the-energy-charter-treaty-before-the-european-court-of-human-rights/ [https://perma.cc/F8LK-6CM5].

States from taking immediate measures against climate change, making it impossible for them to attain the Paris Agreement temperature goals"[152] and therefore violates their rights under the ECHR.[153]

One may think of more paths of action that can be taken regarding the state-corporation connection. For instance, proceedings may be brought against states for granting subsidies to the oil and gas industry, or regarding other activities that do not align with the state's obligations to reduce its GHGs emissions. Such proceedings may lead to emission cuts by the fossil fuel industry and encourage the transition to a clean energy economy. This approach is also manifested in Dalia Palombo's proposal to "[empower] human rights victims to bring legal action before the ECtHR against European states for their failure to regulate the overseas activities of European multinational enterprises."[154]

While an indirect approach may potentially lead to a certain change and may minimize environmental harm caused by corporations, it is ultimately limited, for several reasons. First, due to states' limited resources, their ability to monitor and supervise corporate actions that contribute to climate change is by definition subpar. Second, even though states are obligated to protect against harmful corporate activity, they are not necessarily interested in tightening their carbon policies and regulations related to corporations in light of the concern that such actions might drive investments and business activity out of the country.[155]

In addition to these limitations, one may argue that since corporations are dominant actors in the international sphere, they should be directly held accountable for their actions, and not just through states' regulation. As the Human Rights Commission in the Philippines noted: "[a]lthough States have a duty to enact and enforce appropriate laws to ensure that businesses respect human rights, a state's failure to perform this duty does not render business enterprises free from the responsibility of respecting human rights. Private actors, including business entities, must respect human rights, regardless of whether domestic laws exist or are fully enforced domestically."[156]

Indeed, relying on indirect enforcement of low carbon policies by states is unsatisfactory. Therefore, the next part will explore the possibility of applying human rights norms directly to corporations as a means to achieve corporate accountability with regard to climate change.

V. DIRECT ENFORCEMENT OF HUMAN RIGHTS OBLIGATIONS ON CORPORATIONS

This part will begin with an overview of the groundbreaking 2021 decision of The Hague District Court which ordered RDS to reduce its emissions by 45% by

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[152] EUR. CT. H. R. PRESS UNIT, FACT SHEET – CLIMATE CHANGE (2023), https://www.echr.coe.int/Documents/FS_Climate_change_ENG.pdf [https://perma.cc/TEB3-5UWN].

[153] The claimants claim violations of Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the ECHR.

[154] DALIA PALOMBO, BUSINESS AND HUMAN RIGHTS: THE OBLIGATIONS OF THE EUROPEAN HOME STATES 211 (Hart Publishing, 2020).

[155] Naturally, in most cases these considerations are not publicly disclosed.

[156] Carbon Majors Report, *supra* note 94, at 88.

2030. Following that, this part will analyze the different innovative aspects reflected in this case, arguing that by providing a forum for enforcing international human rights norms on corporations and by combining non-binding soft law instruments with the relevant Dutch law, the District Court in The Hague filled the gap created by the lack of international organs tasked with ensuring corporate compliance with international norms. Finally, this part will address issues of extraterritoriality that may rise with regard to such a ruling.

A. The Milieudefensie Case

On April 5, 2019, the environmental group Milieudefensie (Friends of the Earth Netherlands), Greenpeace Nederlands, other NGOs and 17,379 individual claimants filed a lawsuit against RDS in The Hague District Court, claiming that by not limiting the Shell's GHG emissions RDS is violating its duty of care under Dutch law and its human rights obligations. The plaintiffs requested the Court to order RDS "both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group" to limit its annual aggregate annual volume of all CO_2 emissions by at least net 45% by 2030, relative to 2019 levels, in line with the goals of the Paris Agreement.[157]

On May 26, 2021, The Hague District Court ordered Shell to reduce the group's emissions by 45% by 2030, relative to 2019 levels. It should be emphasized, that according to the ruling, the reduction obligation relates to "Shell group's entire energy portfolio and to the aggregate volume of all emissions."[158] The Court based its ruling on the Dutch duty of care. In its interpretation of the unwritten standard of care, the Court relied, *inter alia*, on Article 2 (the right to life) and Article 8 (the right to respect for private and family life) of the ECHR, on the UNGPs and on the Paris Agreement.

The Court emphasized the need for non-state action, explaining that states cannot tackle the climate crisis on their own, and that for that reason the signatories of the Paris Agreement have sought out the help of non-state stakeholders.[159] One of the claims made by RDS was that "private parties cannot take any steps until states determine the frameworks" and that "the energy transition must be achieved by society as a whole, not by just one private party."[160] With regard to this claim, the Court stressed that "The responsibility of business enterprises to respect human rights, as formulated in the UNGP . . . exists independently of States' abilities and/or willingness to fulfil their own human rights obligations" and that "it exists over and above compliance with national laws and regulations protecting human rights."[161] Therefore, the Court concluded that "it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility."[162]

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[157] The Milieudefensie ruling, *supra* note 8, para. 3.1.

[158] *Id.* para. 4.4.55.

[159] *Id.* para. 4.4.26.

[160] *Id.* para. 4.4.51.

[161] *Id.* para. 4.4.13.

[162] *Id.* paras. 4.4.13, 4.4.52.

In this context, the Court also referred to the Corporate Responsibility to Respect Human Rights Interpretive Guide[163] in which it is stressed that "[r]especting human rights is not a passive responsibility: it requires action on the part of businesses."[164] Additionally, the Court noted that while "[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure . . . the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."[165] In light of these considerations, the court was of the opinion that "much may be expected of RDS"[166] given the fact that "RDS heads the Shell group, which consists of about 1,100 companies, and operates in 160 countries all over the world" and that "[i]t has a policy-setting position in the Shell group . . . which is a major player on the worldwide market of fossil fuels and is responsible for significant CO2 emissions, which exceed the emissions of many states."[167]

The Court also noted that "[t]he UNGP are based on the rationale that companies may contribute to the adverse human rights impacts through their activities as well as through their business relationships with other parties" and therefore corporations are "required to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[168] Accordingly, the Court held that the responsibility of RDS extends to the CO2 emissions of the closely affiliated companies of the Shell group including "the business relations from which the Shell group purchases raw materials, electricity and heat" and the "end-users of the products produced and traded by the Shell group."[169]

It should be noted that following the Milieudefensie decision, on May 9, 2023, twelve Italian citizens and two NGOs filed a lawsuit before the Civil Court of Rome against the fossil fuel company ENI S.p.A. ("ENI") and ENI's two majority shareholders, including the Italian Ministry of Economy and Finance.[170] The claimants argue that by not aligning its decarbonization strategy with the goals set in the Paris Agreement and the best available climate science, ENI contributes to climate change and violates human rights protected by the Italian Constitution as well

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[163] U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE (2012), https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf [https://perma.cc/T59V-7YMU].

[164] Milieudefensie ruling, *supra* note 8, para. 4.4.15.

[165] *Id.* para. 4.4.16.

[166] *Id.*

[167] *Id.*

[168] *Id.* para. 4.4.17 (clarifying that "'[b]usiness relationships' are understood to include relationships with business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products or services.").

[169] *Id.* paras. 4.4.17–18.

[170] Greenpeace Italy v. ENI S.p.A., Civil Court of Rome, Italy, 2023, https://climatecasechart.com/non-us-case/greenpeace-italy-et-al-v-eni-spa-the-italian-ministry-of-economy-and-finance-and-cassa-depositi-e-prestiti-spa/ [https://perma.cc/QSF5-DRXY] [hereinafter Greenpeace Italy case]; *see also* Stella Levantesi, *Italian Oil Firm Eni Faces Lawsuit Alleging Early Knowledge of Climate Crisis*, THE GUARDIAN (May 9, 2023), https://www.theguardian.com/environment/2023/may/09/italian-oil-firm-eni-lawsuit-alleging-early-knowledge-climate-crisis [https://perma.cc/8PLF-VW99].

as by international standards and agreements. The claimants seek an order requiring ENI to limit the aggregate volume of all CO2 emissions associated with its operations by at least 45% by the end of 2030 compared to 2020 levels.[171]

The Milieudefensie decision is groundbreaking and innovative for several reasons: first, the decision provides a forum for enforcing international human rights norms on corporations; second, the decision relies on non-binding soft international law instruments as an interpretive tool for filling the corporate accountability gap; third, the decision is revolutionary owing to its far-reaching scope and global nature. These revolutionary aspects will be explored below.

B. The Innovative Aspects of the Milieudefensie Ruling

1. A Forum for Enforcing International Human Rights Norms on Corporations

In recent years, corporations have been recognized, for certain purposes, as subjects under international law. Additionally, international norms aimed at protecting human rights from business activity have been developed and advanced. However, these developments have not been accompanied by an effective enforcement mechanism. Most international courts and tribunals are designed to deal with non-compliance by states and they are not authorized to deal with non-State actors. Consequently, most international courts and tribunals may not adjudicate cases involving corporations.

Obviously, given that corporations are dominant players in the international sphere, the lack of an international forum in which corporations' non-compliance with international norms may be adjudicated raises a substantial accountability problem. Indeed, sanctioning non-compliant behavior is essential for an accountability system so that it generates deterrence and shapes future behavior.[172] Naturally, the lack of a tribunal at the international level, in which human rights claims may be brought against corporations for non-adherent behavior, poses a substantial stumbling block in the quest for corporate accountability.[173] This accountability challenge becomes even more acute when dealing with global challenges such by climate change.

Ralf Michaels defined global problems as problems that "concern the world at large"[174] and "cannot be separated into different sub-problems that can be solved

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[171] Greenpeace Italy case, *supra* note 170.

[172] *See* David Hunter, *Contextual Accountability, the World Bank Inspection Panel, and the Transformation of International Law in Edith Brown Weiss' "Kaleidoscopic World*, 32 GEO. ENVT'L L. REV. 439, 456 (2020) (arguing that in order for an accountability system to be effective, it needs to have: "(1) a normative framework, (2) a process or mechanism for evaluating the actors' behavior against the norm, and (3) consequences for non-adherent behavior."); *see generally* Edith Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 AM. SOC'Y INT'L L. PROC. 477 (2010).

[173] So far, proposals for a designated tribunal for environmental issues that will have jurisdiction over corporations have not been accepted. *See generally* Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (2014); Kenneth F. McCallion & H. Rajan Sharma, *Environmental Justice Without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights,* 32 GEO. WASH. J. INT'L L. & ECON. 351 (2000).

[174] Ralf Michaels, "*Global Problems in Domestic Courts"*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW 165–76 (Sam Muller et al. eds., Oxford Univ. Press 2011).

individually."[175] The climate crisis, undoubtedly, meets both criteria, and indeed, Michaels argued that climate change is "a prime example" of problems that are global by nature.[176] According to Michaels, global problems require world courts, yet "world courts in the institutional sense are largely lacking."[177]

Michaels referred to the general lack of supranational institutions to deal with global problems, given the fact that in today's world, more and more problems are cross-border. This concern is all the more relevant when it comes to corporations acting in the international sphere. In the case of corporations, it is not a problem of insufficient global courts, but rather a problem of an almost complete lack of them.

As a solution, Michaels argued that domestic courts should function, effectively, as global courts. Aware of the fact that such unilateral adjudication by domestic courts may raise issues of legitimacy, Michaels pursues "a better theory of when and how such adjudication is possible."[178] In this context, he distinguishes between two different aspects that categorize global courts. The first one is an "institutional, or constitutional" one, which includes courts that are founded in international law (by treaties or by the United Nations).[179] A different aspect of global, according to Michaels, "concerns the scope of application, the 'reach' if you will, the jurisdiction."[180] In this sense, when the reach of domestic courts is global, they act as world courts–courts for the world. [181]

Arguably, the Milieudefensie court acted as a global court in the jurisdictional sense. Given the lack of a global court (in the institutional sense), that could adjudicate a case against corporations, the domestic court in The Hague picked up the gauntlet and played the role of a global court. Additionally, as will further be explored below, the fact that the ruling applies to the Shell group's entire energy portfolio, including its global chain value, and is not restricted to emissions originating in the Netherlands, also demonstrates its global character.

This view corresponds with George Scelle's *dédoublement fonctionnel* (role splitting) theory. According to Scelle, given the lack of legislative, judicial and enforcement organs at the international level, national actors "alternate between their positions under national and international law: when state representatives engage in treaty negotiations they serve as 'international law makers'; when national courts adjudicate claims relating to the international legal order (e.g., when exercising universal jurisdiction) they comprise part of the international judiciary; and when national authorities undertake self-help actions they act as international enforcement agents."[182] By fulfilling this "dual role," state actors fill the legislative, judicial and

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[175] *Id.* at 7.

[176] *Id*.

[177] *Id.* at 165; *see also* Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 84–85 (2009) (arguing that the enforcement powers of the international judiciary are also lacking, since "[t]he increase in the jurisdictional reach of international courts has not been met by a comparable increase in their enforcement capabilities, which would enable courts effectively to carry out their missions.").

[178] Michaels, *supra* note 174, at 173.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (THE INTERNATIONAL COURTS & TRIBUNALS SERIES) 98 (Oxford Univ. Press 1st ed. 2007).

enforcement gap at the international level.[183] In light of Scelle's theory, the Milieudefensie court filled the gap created by the lack of international organs set with the task of ensuring compliance of international corporate norms, and hence it should be viewed as part of the international judiciary.

Moreover, as Yuval Shany argued, "if national judges apply international law in a credible manner, out of an explicitly or implicitly proclaimed sense of legal obligation, then they can be viewed as part of the international judiciary."[184] Hence, another characteristic according to which a national court may be viewed as functioning as an international court relates to the nature of the law applied. Accordingly, the reliance on international law in the Milieudefensie ruling is yet another indication of the international nature of the ruling.

Arguably, the National Human Rights Commission in the Philippines, which issued the Carbon Majors Report,[185] may also be viewed as functioning, in a sense, as a global court for corporations. As described by René Wolfsteller, National Human Rights Institutions ("NHRIs") "are increasingly addressing rights violations by corporate actors and have been actively involved in the creation of new international norms for the regulation of business and human rights" and they are "widely regarded as particularly promising tools for advancing the implementation of the UNGPs and for holding corporate actors accountable for human rights abuses."[186]

Furthermore, John Ruggie has addressed the essential role of NHRIs as a means to hold the business sector accountable, arguing that:

> The actual and potential importance of these institutions cannot be overstated. Where NHRIs are able to address grievances involving companies, they can provide a means to hold business accountable. NHRIs are particularly well-positioned to provide processes - whether adjudicative or mediation-based - that are culturally appropriate, accessible, and expeditious. Even where they cannot themselves handle grievances, they can provide information and advice on other avenues of recourse to those seeking remedy.[187]

Notwithstanding the importance of the Philippines Commission's report, and the potential embedded in its broad and thorough findings, it is questionable

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[183] Antonio Cassese, *Remarks on Scelle's Theory of "Role Splitting"* (*dédoublement fonctionnel*), 1 EUR. J. INT'L L. 210, 212 (1990).

[184] SHANY, *supra* note 182, at 86.

[185] Carbon Majors Report, *supra* note 94.

[186] René Wolfsteller, *The Unrealized Potential of National Human Rights Institutions in Business and Human Rights Regulation: Conditions for Effective Engagement and Proposal for Reform*, 23 HUM. RTS. REV. 43, 44 (2022).

[187] John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, at 97, U.N. Doc.A/HRC/8/5 Apr. 7, 2008; *see also* Wolfsteller, *supra* note 186, at 55 (arguing that in practice "the UNGPs provide NHRIs with relatively weak legitimacy to engage in the regulation of business and human rights and, especially, to hold corporate actors directly accountable for human rights abuses.").

whether it may be seen as effectively functioning as a global court, given the non-binding nature of the report and the Commission's lack of enforcement powers.[188]

Also notable in this context is the transnational climate case brought in 2015 before a District Court in Germany by Saúl Luciano Lliuya, a Peruvian farmer, against RWE, Germany's largest energy producer.[189] The lawsuit claims that RWE has knowingly been contributing to climate change and therefore partially bears responsibility for the melting of mountain glaciers near the petitioner's town, which have caused flooding and mudslides. The petitioner requested that RWE bear its share in the costs of adaptation measures that needed to be set, which amounted to 0.47% of the total cost. Following the dismissal of his lawsuit by the District Court, Luciano Lliuya appealed this decision to the Higher Regional Court. In May 2022, the judges, together with experts appointed by the Court, conducted a site-visit to Peru.[190] While the German Court is not applying international human rights law, it is addressing a claim brought by a Peruvian citizen in a German court for climate impacts in Peru, thus the Court may be viewed as acting as a global court.

A similar case has been filed in Switzerland, by four residents of the Indonesian island of Pari, against a Swiss-based cement company.[191] Interestingly, the claim combines a request for damages and financial contribution to adaptation measures in Pari and a request for emissions reduction.

2. Reliance on International Soft Law Norms

The second innovative aspect reflected in the Court's ruling is the use of non-binding international soft law norms as an interpretive tool for filling the corporate accountability gap and establishing a corporate duty to reduce CO2 emissions. In its interpretation of the Dutch duty of care, the court relied, *inter alia*, on the UNGPs.

Principle 12 of the UNGPs clarifies that "[t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."[192] Based on Principle 12 and its commentary, the Court stated, "[i]t can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR as well as other 'internationally recognized human rights', including the ECHR."[193] In this context, the court noted that international human rights have

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[188] For a description of the structural gaps in NHRIs' mandates and powers as well as a proposed reform in the Principles Relating to the Status of National Institutions (The Paris Principles) see Wolfsteller, *supra* note 186, at 57–64.

[189] Essen Regional Court (Germany), *Luciano Lliuya v. RWE AG*, Case No. 2 O 285/15 (Dec. 15, 2016), http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/ [https://perma.cc/B4AE-5ZZU].

[190] *Id.*

[191] Isabella Kaminski, *Indonesian Islanders Sue Cement Producer for Climate Damages*, THE GUARDIAN (July 20, 2022), https://www.theguardian.com/world/2022/jul/20/indonesian-islanders-sue-cement-holcim-climate-damages [https://perma.cc/EC8G-2B98].

[192] UNGPs, *supra* note 9, Principle 12

[193] Milieudefensie ruling, *supra* note 8, para. 4.4.14.

been interpreted as providing protection against climate change and referred to the jurisprudence of the HRC as well as to the Urgenda case.[194] Additionally, the court's conclusion that the duty of corporations to respect human rights is an independent one (regardless of states' regulatory action) was based on Principle 11 of the UNGP and on its commentary.[195] By establishing a link between the non-binding UNGPs, on the one hand, and an international human rights treaty, on the other hand, the court innovatively managed to apply international human rights treaty norms–that were agreed upon by states and apply only to states–to a corporation.

In order to determine the concrete and substantive legal obligations that derive from these international norms, the court turned to the non-party stakeholders' commitments under the Paris Agreement, quoting the decision of the parties to adopt the Paris Agreement:

> The Conference of the Parties . . . welcomes the efforts of non-Party stakeholders to scale up their climate actions, and encourages the registration of those actions in the Non-State Actor Zone for Climate Action platform . . . welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities . . . invites the non-Party stakeholders referred to in paragraph 133 above to scale up their efforts and support actions to reduce emissions and/or to build resilience and decrease vulnerability to the adverse effects of climate change and demonstrate these efforts via the Non-State Actor Zone for Climate Action platform referred to in paragraph 117 above.[196]

In light of these commitments, the court turned to the reduction goals of the Paris Agreement and to reports of the Intergovernmental Panel on Climate Change (IPCC) in order to determine the exact reduction target RDS is obligated to achieve. In this sense, as Hunter, Ji and Ruddock argued, while the Paris Agreement mitigation commitments "are not necessarily being enforced directly . . . the Agreement's mitigation framework provides a policy and factual benchmark against which courts are evaluating government or private sector actions."[197] Therefore, Hunter, Ji and Ruddock concluded, "[t]he Paris Agreement's utility in litigation thus extends beyond the legal nature of its mitigation commitments."[198]

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[194] *Id.* para. 4.4.10 (referring to Teitiota, Portillo Cáceres and General Comment 36).

[195] *Id.* paras. 4.4.13, 4.4.15.

[196] U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, ADOPTION OF THE PARIS AGREEMENT, DRAFT DECISION -/CP.21 at 16–17, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop_auv_template_4b_new__1.pdf [https://perma.cc/8D8T-X38G]. Additionally, the court mentioned the Climate Ambition Alliance, in which "both state and non-state actors have signaled their intention to achieve net-zero CO2 emissions by 2050, required to meet the climate goals of the Paris Agreement. The press release on this alliance of state and non-state actors mentions, among other things, that countries cannot take on this task on their own, that non-state action is required for meeting the goal of the Paris Agreement, and that this needs to be done with due observance of the latest scientific findings." Milieudefensie ruling, *supra* note 8, para. 2.4.8.

[197] Hunter, Ji & Ruddock, *supra* note 90, at 225.

[198] *Id.* at 226.

By combining non-binding soft law instruments such as the UNGPs, the OECD Guidelines for Multinational Enterprises and the Paris Agreement non-party stakeholders' commitments, on the one hand, with the relevant Dutch law, on the other, the court managed to give these voluntary non-binding commitments a concrete and substantial role in bridging the corporate accountability gap in the context of climate change.[199] The Dutch domestic law–the duty of care–served in this case as a vessel through which international human rights norms were applied to a corporation. This could prove to be a game-changer for accountability of the private sector with regard to the climate crisis in general, and with regard to mitigation measures in particular. The Milieudefensie case shows how countries could integrate international human rights and climate change obligations into their national duty of care cases. Arguably, this may ultimately be the path for holding companies responsible for rights-based claims where international law supplements the domestic duty of care law.

3. A Global Reach

The third revolutionary aspect of the Milieudefensie ruling lies in its global reach. According to the ruling, RDS is required to reduce its Co2 emissions by 45% compared to 2019 levels, not only with regard to emissions originating from the Netherlands, but also with regard to the Shell group's entire energy portfolio. The court further stressed that this reduction target applies to the aggregate volume of emissions made by RDS's entire value chain including its business partners and "any other non-state or state entity directly linked to its business operations, products or services."[200] Therefore, emissions originating from other jurisdictions, associated with companies not registered or active in the Netherland, are covered by the court's decision.

This additional leap taken by the court contributes even more to the international nature of its ruling. Not only did the court function, effectively, as a global court in applying international norms to corporations that are active in the international sphere, but it also did so in the broadest manner possible. By making its decision applicable worldwide, the court practically functioned as a court for the world.

In this sense, the Milieudefensie ruling may be viewed as reflecting a "planetary perspective" to climate litigation.[201] As described by Louis J. Kotzé, a planetary perspective represents "a more holistic planetary view of climate science, climate change impacts, planetary justice, planetary stewardship, earth system vulnerability, and global climate law, within the context of a human-dominated geological epoch."[202] Kotzé explained that a planetary perspective "offers an opportunity to see and understand that everything is interconnected, that cause-and-effect relationships exist, and that what we do in our own backyards has a much more widely diffused impact than we thought possible."[203]

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[199] OECD Guidelines, *supra* note 48.

[200] Milieudefensie ruling, *supra* note 8, para. 4.4.17 (citing the UNGP commentary on Principle 13).

[201] Kotzé, *supra* note 89.

[202] *Id.* at 1425.

[203] *Id.* at 1428.

Kotzé then argued that "[l]aw and lawyers will therefore have to start re-imagining climate law alongside an earth system perspective" and that such "planetary re-imagination of climate law . . . will have to involve courts as creative judicial actors that have the power to innovatively steer the development of climate law into one direction or another."[204] Kotzé referred to the German court's ruling in the Neubauer case[205] claiming that it demonstrates a planetary stewardship approach, "evidenced by its willingness to draw on the rich body of earth system science and its reliance on international law in its decision."[206]

Similarly, the Milieudefensie ruling may also be seen as reflecting a planetary perspective. Firstly, as the Neubauer case, it is based on sound scientific data and relies on international law norms. Secondly, the fact that the ruling applies to non-state actors, while emphasizing that the climate crisis requires the participation of all relevant actors, highlights its holistic perspective. Finally, the global reach of the emissions reduction requirement makes it truly universal.

In fact, a universal approach is at the heart of the international climate regime. The UNFCCC and the Paris Agreement acknowledge that climate change is a "common concern of humankind."[207] As Judge Antônio Augusto Cançado Trindade wrote, "the great challenges of our times – the protection of the human being and of the environment, disarmament, the eradication of chronic poverty and human development, and the overcoming of the alarming disparities among countries and within them, – have fostered, in a universal dialogue, the revitalization of the very foundations and principles of contemporary International Law, tending to make abstraction of jurisdictional and spacial (territorial) classic solutions and replacing the emphasis on the notion of solidarity."[208] Cançado Trindade specifically addressed the concept of "common concern of humankind" and similar concepts, such as the concept of "common heritage of human kind," noting that "[a]ll these constructions, instead of visualizing humanity from the perspective of the States, recognize the limits of the States from the perspective of the fulfilment of the needs and aspirations of humankind."[209] Naturally, these approaches to international law, that may be seen as reflected in the Milieudefensie case, raise issues of extraterritoriality. These issues will be discussed below.

C. Extraterritoriality, Global Problems and Non-State Actors

The traditional approach to jurisdiction has mainly been based on principles of territory and sovereignty, in the sense that the jurisdictional reach of each state has been viewed as generally limited by its own borders. However, over the past decades, this somewhat simplistic approach has clashed with reality. With profound transformations such as globalization, the increase in interconnectedness, the rise of

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[204] *Id*. at 1432.

[205] *See* Kotzé, *supra* note 89.

[206] *Id.* at 1443.

[207] The UNFCCC, *supra* note 28, pmbl; the Paris Agreement, *supra* note 10, pmbl.

[208] ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM 636 (3rd ed., rev. 2020).

[209] *Id.* at 641; *see also* Tseming Yang, Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615, 616–17 (2009) (portraying "the emergence of 'global environmental law'" as a field of law that is "international, national, and transnational in character all at once.").

multinational corporations and the development of new legal concepts such as universal jurisdiction and international human rights law, a change in the territorial basis of jurisdiction has been inescapable.

Different approaches, theories and explanations have been offered in order to define the criteria for the extraterritorial application of jurisdiction.[210] Yuval Shany offered a functional approach as the basis for extraterritorial applicability and opined that "states should protect human rights wherever in the world they may operate, whenever they may reasonably do so."[211] Similar approaches have been adopted by the HRC in its jurisprudence[212] and in its interpretive work,[213] by the Inter-American Court of Human Rights[214] and by the CRC.[215]

Furthermore, in 2011, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights were adopted by leading international human rights experts.[216] The Maastricht Principles, which are "[d]rawn from international law . . . aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights."[217]

Principle 3 of the Maastricht Principles states that "[a]ll States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially." The Principles also include an obligation with regard to the human rights abuse by non-State actors. According to Principle 24, "[a]ll States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a

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[210] Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 L. & ETHICS HUM. RTS. 47, 67 (2013); *see also* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 263 (Oxford Univ. Press, 2011); Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 3 EUR. J. INT'L L. 481, 484 (2022) (mentioning F.H. Mann's suggestion "to move away from territoriality as the guiding principle and focus instead on 'contacts'. According to this approach, a state could regulate certain acts if its contact with them 'is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law'.").

[211] Shany, *supra* note 210, at 67.

[212] *See id.* at 52–54.

[213] General Comment 36, *supra* note 7, at 22, 63; *see also* General Comment 31, *supra* note 7, at 10; Yuval Shany, *Digital Rights and the Outer Limits of International Human Rights Law*, 24 GER. L. J. 461, 468 (2023).

[214] *See* I/A CHR Advisory Opinion OC-23/17, *supra* note 16.

[215] Sacchi, *supra* note 51.

[216] ETOS FOR HUMAN RIGHTS WITHOUT BORDERS, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Fian International, 2011). According to Principle 5, "[t]he present Principles elaborate extraterritorial obligations in relation to economic, social and cultural rights, without excluding their applicability to other human rights, including civil and political rights." *See also* Yassin case, *supra* note 137, para. 3.7.

[217] *See* ETOS FOR HUMAN RIGHTS WITHOUT BORDERS, *supra* note 216, pmbl.

duty to refrain from nullifying or impairing the discharge of this obligation to protect."[218]

Principle 25, titled "bases for protection" further clarifies circumstances under which "[s]tates must adopt and enforce measures to protect economic, social and cultural rights through legal and other means." These circumstances include, *inter alia*, situations where "a) the harm or threat of harm originates or occurs on [the state's] territory; b) where the non-State actor has the nationality of the State concerned; c) as regard business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory."[219]

Nico Krisch explored some of the challenges for the traditional jurisdictional categories, noting that these challenges especially arise from "unlocalizable acts (especially visible in cyberspace, but similarly in other economic transactions), ubiquitous actors (particularly in regard to multinational companies and global value chains), globalized markets and borderless effects (in environmental as well as economic terms)."[220] In this context, the circumstances in the Milieudefensie case seem like an all-of-the-above kind of situation. First, the relevant acts, i.e., the emissions of GHGs, are unlocalized, since RDS's emissions include its entire global value chain. Second, the actor performing these acts, i.e., RDS, is a multinational corporation that although its headquarters are located in the Netherlands, its value chain can be found all across the globe. Third, these acts take place in a globalized market and have borderless environmental effects: emissions made in one country contribute to the global phenomenon of climate change and cause climate change effects experienced in other countries.

Under these circumstances, one may argue that any attempt to solve the global problem of climate change requires, by definition, applying norms beyond the boundaries of a state territory. Just as the "cannon shot rule"–first termed by the Dutch jurist Cornelis van Bynkershoek–draws "the limit of the sovereignty of the coastal State is the range of space that can be covered by the weapons placed on land,"[221] the jurisdictional boundaries in climate litigation may extend to the range of a state's GHGs emissions, i.e., the whole world. Since GHGs emitted at a certain place spread in the atmosphere and cause climate change impacts even in remote parts of the world, the expansion of jurisdiction beyond state borders may be seen as inevitable.

Furthermore, according to the well-established principle in international environmental law, national sovereignty applies to all environmental actions unless

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[218] *Id.* at 9, Principle 24.

[219] *Id.* at 9, Principle 25. Principle 27 further addresses the need to hold non-state actors accountable and to ensure an effective remedy: "[a]ll States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses and to ensure an effective remedy for those affected." *Id.* at 10.

[220] Krisch, *supra* note 210, at 484.

[221] Tullio Scovazzi, *The Frontier in the Historical Development of the International Law of the Sea*, *in* FRONTIERS IN INTERNATIONAL ENVIRONMENTAL LAW: OCEANS AND CLIMATE CHALLENGES 217, 223 (Richard Barnes & Ronán Long eds., Cambridge Univ. Press 2021).

there is a transboundary impact.[222] However, when applied to the phenomenon of climate change, the exception swallows the rule, since every GHG emission has transboundary impacts. Therefore, one may argue that a national court's approach to the problem of climate change should not be constrained by national sovereignty limits.

Moreover, given the global scope of the problem of climate change, and the deep involvement of global non-state actors, the concept of territory, in its conventional meaning, loses much of its relevance. As Ralf Michaels observed, "[i]n short, because world events are deterritorialised, they do not involve the territorial interests which would trigger complaints that territorial sovereignty is infringed. Without territoriality there is no extraterritoriality."[223]

Indeed, the global challenges faced by humanity today require a change in perception. In his writing, Phillip Allot has advocated for "[a] reconstruction of our understanding of the world in which we live,"[224] arguing that humanity has made a choice "to conceive of itself as a collection of states"[225] instead of conceiving of itself as a society. He offers a new view of the human world, according to which "[i]nternational society is the society of the whole human race" and "[i]nternational law is the law of international society."[226]

Arguably, Allot's call for a re-conception of the way we view international society and international law has become crucially essential given the global nature of the human community in the 21st century and the global issues that need to be addressed. Indeed, considering the global nature of the problems faced by humanity today, the separation that is at the heart of the state-centric system seems somewhat artificial.

Still, the extraterritorial application of law may raise some concerns. Cedric Ryngaert examined extraterritoriality "through the lens of democracy," claiming that "assertions of extraterritorial jurisdiction impose laws on legal subjects who did not participate in the making or changing of these laws. The makers of extraterritorial laws are thus not accountable to the people that are governed by them."[227] Nonetheless, Ryngaert mentions, as an example, the field of universal jurisdiction, noting that states have "consented to the exercise of universal jurisdiction over certain offences, either on a conventional or customary basis."[228] Similarly, the extraterritorial application in the Milieudefensie case was based on international and regional agreements such as the Paris Agreement and the ECHR. These agreements are grounded in the understanding that in order to tackle global problems and to promote values that the international community sees as important, states need to give up some of their sovereign interests. Hence, one may argue that by joining these agreements, states have expressed their consent to this outcome. Arguably, a similar

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[222] The Stockholm Declaration, *supra* note 12, Principle 21; The Rio Declaration, *supra* note 142, Principle 2.

[223] *See* Michaels, *supra* note 174, at 174.

[224] PHILIP ALLOT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 406 (Cambridge Univ. Press 2002).

[225] *Id*.

[226] *Id.* at 420.

[227] *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 188–89 (Oxford Univ. Press 2d ed. 2015).

[228] *Id.* at 189.

logic may apply with regard to multinational corporations, since by endorsing the UNGPs, and accepting the Paris Agreement non-party stakeholders' commitments, they have expressed their consent to the norms reflected in these instruments.[229]

VI. CONCLUSIONS

Due to the heavy involvement of multinational corporations in environmental degradation in general, and with regard to the climate crisis, in particular, the urgent need for clear, robust and enforceable norms that apply to corporate activity is evident. Indeed, there is an abundance of principles, commitments and guidelines establishing the obligations of corporations pertaining to human rights and environmental protection. However, these instruments are in most cases non-binding and lack an enforcement mechanism and therefore remain in the declaratory sphere. In this sense, as Philip Allot argued, multinational corporations may be seen as operating in "a lawless world" and "in a legal vacuum without any clear connection to any legal system."[230]

Human rights-based climate proceedings against states may still have, to a certain extent, an indirect effect on corporations, particularly in cases that are aimed at challenging the state-corporate connection. However, the ability to hold corporations accountable through such proceedings is ultimately limited and is also not consistent with the independent role corporations have in the international sphere.

In light of these difficulties and given the pressing need for an enforcement mechanism that will apply directly to corporations, the domestic court in The Hague rose up to this challenge and assumed the role of a global court. By providing the "missing link" for corporate accountability for climate change, the Milieudefensie ruling may pave the way for more such rulings. Moreover, by not constraining its ruling to national borders and by taking into account international activities and global climate impacts, the Milieudefensie court sets an important precedent for other national courts dealing with the global effects of the climate crisis. Whether or not this will be the first step in an evolutionary process of re-conceptualizing international law and adjusting it to the global challenges faced by the world today is yet to be seen.

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[229] *See* UNGPs, *supra* note 9, Principle 2 (stating that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. The commentary on principle 2 further elaborates: "some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.").

[230] Phillip Allot, *A Lateral View of the International System: Responding to the Collapse of Global Government,* EUR. J. INT'L. L.: EJIL:TALK! (Oct. 14, 2021), https://www.ejiltalk.org/a-lateral-view-of-the-international-system-responding-to-the-collapse-of-global-government/ [https://perma.cc/5UHB-A93Q].