Global Campus Europe

EMA Awarded Theses 2019/2020

Mariana Catalão

Environmental Justice, Climate Change and Human Rights

Different Contributions, Different Consequences and Different Capabilities Should Equal Different Human Rights Obligations

EMA, The European Master's Programme in Human Rights and Democratisation

MARIANA CATALÃO

ENVIRONMENTAL JUSTICE, CLIMATE CHANGE AND HUMAN RIGHTS. DIFFERENT CONTRIBUTIONS, DIFFERENT CONSEQUENCES AND DIFFERENT CAPABILITIES SHOULD EQUAL DIFFERENT HUMAN RIGHTS OBLIGATIONS

FOREWORD

The European Master's Degree in Human Rights and Democratisation (EMA) is a one-year intensive programme launched in 1997 as a joint initiative of universities in all EU Member States with support from the European Commission. Based on an action- and policy-oriented approach to learning, it combines legal, political, historical, anthropological and philosophical perspectives on the study of human rights and democracy with targeted skills-building activities. The aim from the outset was to prepare young professionals to respond to the requirements and challenges of work in international organisations, field operations, governmental and non-governmental bodies, and academia. As a measure of its success, EMA has served as a model of inspiration for the establishment of six other EU-sponsored regional master's programmes in the area of human rights and democratisation in different parts of the world. Today these programmes cooperate closely in the framework of the Global Campus of Human Rights, which is based in Venice, Italy.

Up to 90 students are admitted to the EMA programme each year. During the first semester in Venice, they have the opportunity to meet and learn from leading academics, experts and representatives of international and non-governmental organisations. During the second semester, they relocate to one of the 42 participating universities to follow additional courses in an area of specialisation of their own choice and to conduct research under the supervision of the resident EMA Director or other academic staff. After successfully passing assessments and completing a master's thesis, students are awarded the European Master's Degree in Human Rights and Democratisation, which is jointly conferred by a group of EMA universities.

Each year the EMA Council of Directors selects five theses, which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, potential usefulness in raising awareness about neglected issues, and capacity for contributing to the promotion of the values underlying human rights and democracy.

The EMA Awarded Theses of the academic year 2019/2020 are:

• Caruana, Deborah, *Securitising Children Rights: Victims and Heirs of Terrorism. A Critical Analysis of France's Approach to Children of Foreign Terrorist Fighters.* Supervisor: Heidi Riley, University College Dublin, National University of Ireland, Dublin.

• Catalão, Mariana, *Environmental Justice, Climate Change and Human Rights. Different Contributions, Different Consequences and Different Capabilities Should Equal Different Human Rights Obligations.* Supervisor: Jan Klabbers, University of Helsinki.

• Houssais, Olivia, *Democratic Deficit Theory: A Reversed Approach. Why Radical Political Changes in Member States Affect the Quality of Democracy in the EU*. Supervisor: Anna Unger, Eötvös Loránd University, Budapest.

• Monteiro Burkle, Eduardo. *When Forgetting Is Dangerous: Transitional Justice, Collective Remembrance and Brazil's Shift to Far-Right Populism.* Supervisor: Alice Panepinto, Queen's University Belfast.

• Stockhem, Ophélie, *Improving the International Regulation of Cybersex Trafficking of Women and Children through the Use of Data Science and Artificial Intelligence*. Supervisors: Maria López Belloso and Demelsa Beniso Sánchez, University of Deusto, Bilbao.

The selected theses demonstrate the breadth, depth and reach of the EMA programme and the passion and talent of its students. We are particularly proud of EMA's 2019/20 students: as teachers and students across the world can testify, the COVID-19 pandemic brought many different challenges for teaching and learning. It is fair to say that our students researched and wrote their theses in turbulent times. On behalf of the Governing Bodies of EMA and of all participating universities, we applaud and congratulate them.

Prof. Manfred NOWAK
Global Campus Secretary General

Prof. Thérèse MURPHY
EMA Chairperson

Dr Wiebke Lamer
EMA Programme Director

This publication includes the thesis *Environmental Justice, Climate Change and Human Rights. Different Contributions, Different Consequences and Different Capabilities Should Equal Different Human Rights Obligations* written by Mariana Catalão and supervised by Jan Klabbers, University of Helsinki.

BIOGRAPHY

Before graduating from the European Master´s Programme in Human Rights and Democratisation, Mariana Catalão obtained a bachelor´s degree in Law at the Catholic University of Portugal. Mariana is currently working as Trainee Lawyer in order to officially became a Lawyer. She is most passionate about environmental justice, as a form of social justice, and its link with human rights.

ABSTRACT

The current environmental crisis poses itself as one of the biggest threats to the enjoyment of human rights. Everywhere, people´s human rights are at risk; however vulnerable communities, particularly the ones in poorer countries, are disproportionately in danger.

This higher risk for the poorer population is inversely proportional to contribution towards the environmental crisis, especially focusing on global warming caused by the emission of greenhouse gases that consequently leads to climate change. The disparity between contribution to the issue of climate change, vulnerability to threats to the enjoyment of human rights caused by the effects of climate change and capability to prevent these threats generates an environmental justice problem that highlights the inequity between the Global North and the Global South.

This thesis aims to showcase how human rights law can be used to bridge this gap between developed and developing countries, in order to fulfil environmental justice imperatives. The aspect of human rights law identified as one of the most apt to address this issue is the concept of extraterritorial human rights obligations of states.

The thesis highlights how the use of extraterritorial human rights obligations of states is a legally plausible solution to address climate change and issues arising from environmental injustice, analysing positions of international stakeholders and respected doctrine that support the imposition of these obligations.

Finally, a practical way of operationalising the imposition of extraterritorial human rights obligations, in the field of climate change, is presented, through the proposal of a liability scheme that reverts in favour of those most affected by climate change.

ACKNOWLEDGEMENTS

This Master´s programme has been one of the most unique experiences in my life and I will be always grateful for it. The people that I encountered in EMA were the ones that made this whole year unforgettable and I am truly thankful for sharing this experience with all of you.

I would like to thank Professor Jan Klabbers for his guidance and wise insights during this writing process. To everyone at the Erik Castrén Institute, thank you for your help and warm welcome during my, unfortunately short, stay in Helsinki.

An enormous thank you to my friends, from EMA and from home, for keeping me sane and providing much needed distraction throughout this time. Amongst them, a special thanks goes to Maria Reis, Nina Hermus and Carly Sikina, for their constant support, patience and encouragement.

Lastly, but furthest away from least, I would like to thank my family, especially my mom, Ana, for the endless support and unconditional faith in me and my work. I will never be able to put into words how you have helped me and allowed me to stand where I am today.

Obrigada.

TABLE OF ABBREVIATIONS

CBDR	Common but differentiated responsibilities
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
ETOs	Extraterritorial obligations
EU	European Union
GCF	Green Climate Fund
GHG	Greenhouse gas
IACtHR	Inter-American Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UN HRC	United Nations Human Rights Council
WHO	World Health Organization

TABLE OF CONTENTS

INTRODUCTION

The environmental crisis we are living represents one of the biggest crises we have ever faced, threatening the survival of humanity and life on earth as we know it. The maintenance of a 'business as usual' approach could result in an increase of the earth´s temperature by 4ºC to 8ºC degrees. In the worst-case scenario, this creates unliveable conditions in most areas of the planet, while in the best-case scenario this results in a permanent food deficit.[1]

The crisis will play a role in all aspects of everyday life, from macro-economics and international politics to smaller consumer choices. Since the time to start acting in accordance with the urgency of the matter is shrinking, the solutions must encompass a change in all aspects of life.

According to the works of some philosophers, among which most notable is Timothy Morton, the crisis will even impose a shift in the course of human thinking. This is because, it could be characterised as a hyper object[2] – an object massively distributed in time and space, in relation to humans, making the whole phenomenon impossible to understand as a whole – leading us to question our role in the universe and temporalities beyond the human scale.

The environmental crisis comprehends a complex amount of interconnected aspects, including deforestation, loss of biodiversity, soil detrition, illegal logging, solid waste management, plastic overload, as well as its perhaps most well-known, climate change, as an effect of global warming.

[1] David Wallace-Wells, The uninhabitable earth: life after warming (Tim Duggan Books 2019).

[2] Timothy Morton, Hyperobjects: Philosophy and Ecology after the End of the World (University of Minnesota Press 2013).

With regards to climate change, there is already an existing consensus that human action is the main cause of global warming. This consensus is articulated by the Intergovernmental Panel on Climate Change (IPCC) and the scientific community (being shared by 90% to 100% of climate experts).[3]

The latest assessment report by the IPCC published in 2014 indisputably states that: i) the planet is warming at a fast rate, ii) that the human influence in this process is unquestionable and iii) that further warming could affect all components of the climate system, creating irreversible damages for people and ecosystems.[4]

Additionally, the IPCC determined that even the goal set out by the Paris Agreement[5] of limiting the warming to 2ºC would have a serious and dangerous impact on the lives of individuals. Therefore, the IPCC recommends that this impact could be better managed with a warming to 1.5ºC.[6]

If the words of John Cook are considered, 'the scientific agreement (…) is overwhelmingly high because the supporting evidence is overwhelmingly strong',[7] no doubts should be held regarding the severity of this obstacle and the urging necessity to tackle it.

There are several factors contributing to climate change with the rise of temperatures in comparison to pre-industrial levels being the main measurement criteria. These have already reached 1ºC.[8] The factor with the highest impact on the increase of temperatures is emission of greenhouse gases (GHGs), being indicated by 90% of experts as the primary cause of global warming.[9]

The excessive emission of GHGs started with the industrial revolution and has, ever since, been disproportionally concentrated in

[3] John Cook and others, 'Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming' (2016) 11(4) Environmental Research Letters.

[4] IPCC, 'Climate Change 2014 Synthesis Report Summary for Policymakers' (2014) <www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf> accessed 25 February 2020. This report provides a summary for policymakers of an international authoritative statement and a scientific understanding of climate change contained in the fifth assessment report of the IPCC. A sixth assessment report with more current data is expected in 2021.

[5] UN 'Paris Agreement' (2015)

[6] IPCC, 'Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' (2018).

[7] Cook (n 3) 6.

[8] IPCC, 'Climate Change 2014 Synthesis Report Summary for Policymakers' (n 4).

[9] Cook (n 3) 5.

developed wealthier countries.[10] Despite international efforts, countries are still failing to meet their carbon reduction targets, meaning that further commitments must make emission cuts mandatory and at a fast and deep rate.[11]

However, these cuts are only relevant if they are made in larger amounts, by higher emitters of GHGs. Consequently, to effectively reduce the level of emissions to a safe amount and to net zero by 2050, policies must target the most polluting states, which are the richest ones, with more capacity to adapt and that have benefitted the most from the emission of GHGs.[12]

This disparity in GHG emissions among countries points to the deep injustice entangled in the environmental crisis. Despite contributions from all countries and individuals to this crisis, it is possible to pinpoint who has contributed the most and profited the most from climate-damaging actions.[13]

Ironically, the countries that contributed the most to this crisis are not the ones being most affected by its effects. Instead, poorer countries with less resources to respond to this crisis are feeling the most severe consequences, countries that in the majority of cases have had little impact in contributing to the generation of the crisis, especially when it comes to the emission of GHGs.[14]

In this thesis, I will stress this existing link between environmental justice and climate change. For this purpose, I will initially demonstrate how climate change affects human rights and the role of human rights law in tackling this problem. The effect of climate change on human

[10] According to Oxfam, half of the carbon emissions are produced by just 10% of the world´s richest people, while the poorest 3.5 billion people produced only around a tenth of the emissions, even though they are the most vulnerable to severe weather events related to climate change. Oxfam, 'Extreme Carbon Inequality: Why the Paris climate deal must put the poorest, lowest emitting and most vulnerable people first' (2 December 2015).

[11] UN Environment Programme, 'Executive Summary – Emissions Gap Report 2019' (November 2019) <www.unenvironment.org/resources/emissions-gap-report-2019> accessed 27 February 2020.

[12] UN Human Rights Council (HRC), 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, on Climate Change and Poverty' (2019) UN A/HRC/41/39.

[13] According to the 'Emissions Gap Report 2019', 78% of the global GHG emissions are produced by the G20 members, which means 'they largely determine global emission trends and the extent to which the 2030 emissions gap will be closed'. UN Environment Programme, 'Emissions Gap Report 2019' (n 11) 28.

[14] UN HRC (n 12) para 14. The Maldives is possibly one of the most accurate examples of this disparity between the contribution to global warming (being in this case virtually nothing) and the severity of consequences to be suffered (being one of the countries at risk of becoming inhabitable, due to the rise of sea levels caused by global warming).

rights is not equally distributed amongst the world´s population, with the most harmful effects of climate change being felt by vulnerable groups, including poor populations.

Accordingly, climate change will exacerbate the already existing inequalities between developed countries and developing ones. Considering that harsher consequences are felt by countries that contributed in much smaller amounts to the creation of the problem and which do not have the adequate resources to adapt and respond to this crisis, the situation results in an environmental justice problem.

Primarily, I will establish the need for environmental justice, as an outcome of climate change, due to the disproportionality between pollution production and suffering of consequences (focusing on the emission of GHGs). Secondly, I will argue that the imposition of extraterritorial obligations (ETOs), on states with higher responsibility in the causation of the problem, should play a role in climate action policies.

Thirdly, I will demonstrate how ETOs of states are justifiable, especially in the field of climate action, basing my argument on opinions held by different stakeholders at the international level, on doctrinal legal opinions and on established legal principles.

Lastly, I will analyse the possibility of the creation of a liability scheme for transboundary harm caused by GHGs, as a way of operationalising said ETOs.

I will argue for the possibility of this scheme, based on existing precedent for analogous situations and on practicality reasons, while, at the same time, envisaging possible difficulties that emerge from states´ reluctance in accepting responsibility at an international level, as well as the tension between the impact of states´ actions, their international obligations and what could be acceptable policy-wise at the international level.

1.

THE EFFECT OF CLIMATE CHANGE ON HUMAN RIGHTS AND HUMAN RIGHTS LAW

The relationship between human rights and the environment has been the object of several theoretical discussions, mostly focusing on the nature of this relationship and the possible recognition of a human right to a healthy environment.

The discussion consists of three main and potentially interconnected arguments: i) the environment constitutes a precondition for the enjoyment of human rights, ii) human rights should be used as tools to address environmental issues, ensuring adequate levels of protection and finally, iii) the necessity of integrating human rights and environmental protection in order to achieve sustainable development.[15]

As the consequences of climate change started to be more heavily felt and more accurately predicted, the discussion started to focus on establishing the effect of climate change on human rights and the role of human rights law in tackling this problem.

Again, there are three main relevant positions: i) human rights law should recognise a human right to a healthy environment, ii) climate change violates human rights and iii) climate change affects the enjoyment of human rights.[16]

[15] OHCHR, 'Report of the United Nations High Commissioner on the Analytical Study on the Relationship Between Human Rights and the Environment' (16 January 2011) UN Doc A/HRC/19/34 5-6.

[16] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61; John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477; Marc Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) 38(3) Georgia Journal of International and Comparative Law 543.

1.1 The relation between climate change and human rights law

Despite existing discussions on the topic (including about the possible existence of a human right to a healthy environment in the international order[17]) and the potential utility of recognising a human right to a healthy environment, there are still no formal documents that recognise the human right to a healthy environment at a global level.

Some of the benefits of the recognition of the right to a healthy environment include: contribution to the struggle for environmental protection, by consecrating a justiciable stand-alone right (that victims of environmental damages could use while directly seeking redress both in national and international courts); clarification of the existing norms and policies concerning environmental protection, raising awareness about them and creating a more coherent framework; establishing a cornerstone for further development and obligation setting in the area and finally, granting more general certainty and precision by emphasising the vital importance of this still emerging area of law.[18]

Several states have integrated the right to a healthy environment in their array of protected fundamental rights, either directly in the constitution, in other legislative acts, or through belonging to a regional human rights mechanism.[19] National courts have been relying on this concept to impose obligations on states to protect

[17] As argued by César Rodriguez-Garanito in 'A Human Right to a Healthy Environment? Moral, legal and empirical considerations' in John H Knox and Ramin Pejan (eds), The Human Right to a Healthy Environment (CUP 2018), there is a strong case to affirm that a human right to a healthy environment is already present in the international legal order, either if understood as a moral right or even as a part of customary law, due to the extensive state practice in this matter and current legal trends at regional and even global level.

[18] All these advantages are further developed in John H Knox and Ramin Pejan, 'Introduction' in Knox and Pejan ibid; Sumudu Atapattu, 'The Right to a Healthy Environment and Climate Change: Mismatch or Harmony' in Knox and Pejan ibid.

[19] As analysed by David R Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in Knox and Pejan ibid 19-23, the right to a healthy environment is directly protected by the constitutions of 100 countries, has been ruled as constitutionally protected by the national courts of at least 12 more countries and is being incorporated in the legislation of more than 100 countries. At least 155 nations have recognised this right in a legally binding instrument.

their individuals against environmental degradation[20] and regional human rights systems have endorsed this concept.[21]

However, the lack of political will and the fear of potential obligations that states could have to undertake with the recognition of this right are the two main reasons why this right has yet to be recognised formally at an international level.

Similarly, climate change has also not been recognised as a violation of human rights. The topic was primarily discussed in the 2009 Office of the High Commissioner for Human Rights (OHCHR) report on the 'Analytical study on the relationship between human rights and the environment' which did not attribute this status to climate change.[22]

The report identified three main problems with the qualification of climate change as a violation in a strict legal sense: first, the impossibility of understanding the complex causal relations linking one country's actions to a specific climate change effect.

Second, the difficulty in proving that an event (mainly severe weather events) is caused directly by climate change and the part that GHGs emissions (which are more easily attributed to states) play in that event.

[20] Increasingly, cases where national courts upheld the protection of the environment, through the recognition of the right to a healthy environment or similar, are being observed. Several examples could be presented, but this trend can be seen in cases as Vellore Citizens´ Welfare Forum v Union of India Writ Pet No 914 of 1991 (Supreme Court of India 1996); Shelda Zia v WAPDA PLD 1994 SC693 (Supreme Court of Pakistan 1994); Beatriz Silvia Mendoza v Argentina M 1569 (Supreme Court of Argentina 2008); Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation, and Environment, Mpumalanga Province and Others Case No CCT 67/06 (Constitutional Court of South Africa 2007); Acción de tutela instaurada por Orlando José Morales Ramos, contra la Sociedad Drummond Ltda Decision T-154-2013 (Constitutional Court of Colombia, Sixth Chamber of Appeals 2013).

[21] Either through the adoption (even if as non-justiciable) of the concept in instruments, see The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador'(17 November 1988), the Association of Southeast Asion Nations (ASEAN) 'Human Rights Declaration' (8 August 1967) the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhaus Convention) (25 June 1998) and the African Charter on Human and Peoples´ Rights (27 June 1981) (framing it as a justiciable right); in case law of the corresponding courts or decisions of the commissions, see Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights(CESR) v Nigeria Communication No 155/96 (African Commission on Human and People's Rights 2002); or through the 'greening' of already protected human rights through case law, see Öneryildiz v Turkey App no 48939/99 (ECtHR 2004); Tătar v Romania App no 67021/01 (ECtHR 2009); Di Sarno v Italy App no 30765/08 (ECtHR 2012).

[22] OHCHR, 'Report of the United Nations High Commissioner on the Analytical Study on the Relationship Between Human Rights and the Environment' (n 15).

Lastly, the report found that most of the adverse impacts of climate change are related with predictions for the future, whereas violations are established as a way to attribute responsibility for harm caused in the past.[23]

Many criticisms can be pointed at this line of argumentation. Some include: the possibility of finding that eminent effects justify violations; adverse impacts are not really a future prediction, but a present reality (especially considering the impossibility to forestall them); responsibility needs to be taken by states for their actions; and that there is enough scientific consensus to find a causation link between GHG emissions and global warming as a whole (even if not related to specific events).[24]

However, the undertaking of this position by the OHCHR, in the stated report and by the United Nations (UN), in following discussions on the matter, is not surprising.[25] As an inter-governmental international organisation, its voice is mostly a combination of states' views. Consequently, the strong reluctance of states in accepting that their actions contributing to climate change ought to be considered violations of human rights is politically comprehensible (even if censurable).

Therefore, considering the UN as the main forum of representation of the international community, the main approach taken perceives climate change as a factor that affects the enjoyment of human rights. This conception is a manner of acknowledging the severe impacts of climate change on human rights and the necessity to act, without assuming the heavy political consequences of holding states accountable for their actions.

Although a long time has passed since the adoption of this 2009 OHCHR report, the framing of the problem has not changed. The topic has been more mainstreamed and it is frequently considered as

[23] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (n 16); Knox, 'Linking Human Rights and Climate Change at the United Nations' (n 16); Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (n 16) 554-56.

[24] ibid.

[25] Knox and Pejan, 'Introduction' (n 18); UN HRC, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox' (2013) UN Doc A/HRC/25/53 <http://srenvironment.org/sites/default/files/Reports/2018/A-HRC-25-53-clean-final-version-1-1.doc> accessed 5 March 2020; UN HRC, 'Resolution on Human Rights and the Environment' (14 April 2014) UN Doc A/HRC/Res/25/21.

a priority in the international discourse, but no serious responsibilities have been attributed outside the domestic or regional scope.[26]

The interdependence between human rights and the environment is now more widely accepted since full enjoyment of human rights is not possible without a certain level of environmental stability and health.[27] Within the same line of thought, 'simply put, climate change is a human rights problem and the human rights framework must be part of the solution'.[28]

1.2 The effect of climate change on the enjoyment of human rights

The effect of climate change on the enjoyment of human rights is more severe when it comes to the impact on certain human rights than others, although in the long haul it could affect rights not as obviously linked with climate change.[29]

The human rights pointed out as the ones suffering a more severe impact on their enjoyment as a result of climate change are usually: the right to life,[30] the right to self-determination,[31] the right to development,[32]

[26] As seen in UNEP, 'Compendium on Human Rights and the Environment. Selected international legal materials and cases' (2014) <http://wedocs.unep.org/bitstream/handle/20.500.11822/9943/UNEP_Compendium_HRE.pdf?sequence=1&isAllowed=y> accessed 6 March 2020; OHCHR, 'Understanding Human Rights and Climate Change' (27 November 2015) <www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> accessed 6 March 2020; OHCHR, 'Summary of Recommended Actions on Human Rights and Climate Change from OHCHR Expert Meeting of 6 – 7 October' (7 October 2016) <www.ohchr.org/Documents/Issues/ClimateChange/EM2016/SummaryRecommendations.docx> accessed 7 March 2020.

[27] This relation is now shown in several international instruments, most notably the Paris Agreement on climate change, the UN Framework Convention on Climate Change (1992), the Rio Declaration on Environment and Development (14 June 1992), the Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007) ; the Stockholm Declaration on the Human Environment (16 June 1972).

[28] OHCHR (n 26) 'Understanding Human Rights and Climate Change' 6.

[29] Simon Caney, 'Climate change, human rights and moral thresholds' in Stephen Humphreys (ed), Human Rights and Climate Change (CUP 2009) 69-90; OHCHR ibid 13-20; UN General Assembly (UNGA), 'Report of the Special Rapporteur on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment by David R Boyd' (2019) UN Doc A/74/161 4-5.

[30] From severe weather events (which are reported to multiply with the increase of temperatures), to drought, propagation of diseases, air pollution related conditions or increased heat.

[31] Indigenous peoples have been frequently identified as one of the groups most vulnerable to the impacts of climate change, mostly due to the possible loss of their territories, especially those living in low-lying areas.

[32] As it will be further explored, climate change threatens to push back years of development in vulnerable communities, as they will have to use the scarce resources they possess to implement adaptation to climate change measures.

the right to food,[33] the right to water and sanitation,[34] the right to health[35] and the right to property.[36]

However, even human rights that are not as obviously affected by climate change, as the ones mentioned above, can be potentially affected in the future, especially since all human rights are universal, inalienable, indivisible, interdependent and interconnected.[37]

Deriving from this impact on human rights, despite not recognising that climate change violates them, the international community still imposes legal obligations on states concerning climate change, under human rights law, due to the danger imposed to the enjoyment of rights.[38]

1.3 Human rights obligations of states concerning climate change

States have the obligation to protect the individuals whose human rights are affected by climate change and environmental harm, while fulfilling their international commitments. The obligations regarding climate change, at the international level, derive mainly from the Paris Agreement, the UN Framework Convention on Climate Change (UNFCCC)[39] and human rights law as a whole.

[33] Climate change will be one of the main threats to food security in the future, putting millions at the risk of hunger and death from malnutrition as the main impacts related to agriculture and the food production process.

[34] Due to reduction of renewable surface and ground water resources, river erosion, desertification, change in precipitation patterns and salinity intrusion, water shortages will increase both in rural areas and cities, possibly leading to the outbreak of water related conflicts.

[35] Besides the impacts on health of malnutrition, water shortage, pollution and extreme temperatures, climate change is also predicted to strongly affect water-borne diseases and diseases transmitted through animals (such as malaria and dengue fever) and the it is seen as the biggest threat to health of the 21st century.

[36] Especially concerning the right to adequate housing since vulnerable communities are at risk of being displaced. In general terms, millions of people face the threat of losing their property due to one of the many effects of climate change (with special focus on severe weather events).

[37] As established in the Vienna World Conference on Human Rights of 1993.

[38] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (n 16); Knox, 'Linking Human Rights and Climate Change at the United Nations' (n 16); Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (n 16) 556-59; OHCHR (n 26) 'Understanding Human Rights and Climate Change'; UN HRC, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, on Climate Change and Poverty' (n 12); UNGA (n 29).

[39] UNFCCC (n 27).

According to the conceptualisation of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, it is possible to divide states` obligations into substantive, procedural, and international obligations concerning vulnerable groups.[40]

When it comes to **substantive obligations**, states are obliged to refrain from taking actions that threaten the environment (either within their territory or outside their jurisdiction) and must protect individuals from having their rights violated by the actions of third parties (most importantly businesses).

To fully fulfil their obligations, states must create, implement and enforce measures that protect the environment and individuals from climate-related damages, either through mitigation or adaption measures (or ideally a combination of both). In their efforts to ensure compliance with these obligations, states cannot adopt discriminatory measures, must avoid retrogressive ones and cannot put other human rights at risk of violation.

Special measures should also be adopted to protect those more vulnerable to climate change, such as women, children, young people, indigenous people, local communities, people living in poverty, migrants, displaced people, people with disabilities, older persons or other groups at higher risk.

Procedural obligations mostly require states to provide adequate access to information regarding environmental measures and its effects, consequences of the crisis on constituents and the events leading to climate change, especially to those most affected by the consequences, allowing them to participate in decision-making processes.

States must ensure they adopt inclusive approaches when dealing with climate change, that they offer proper redress and access to justice for victims and that they guarantee the safety and protection of human rights defenders.

[40] Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (n 16) 556-59; UN HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (1 February 2016) UN Doc A/HRC/31/52; UN HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59; UNGA (n 29).

Finally, due to the global scale of climate change, solutions are only viable if taken at a global level, meaning that states have the obligation to cooperate with other states.[41]

Although in certain states some positive examples can be pointed out,[42] the actions necessary to prevent a global climate crisis are nowhere near being implemented and the international community has been failing at demanding that states address this issue.

Without a clear international binding framework, clear instruction on what states should do and the lack of accountability mechanisms that impose consequences for not acting, pressure on states is insufficient to lead them to fully implement their obligations regarding climate change, especially when it comes to the most needed obligation of international cooperation.

[41] These obligations have been comprehensively developed through the work of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in reports such as the ones ibid. Most relevantly, John H Knox drafted Framework Principles on Human Rights and the Environment (in the 2018 report ibid) that should guide states in implementing their obligations.

[42] Several states are implementing policies and laws that could be considered as efforts to comply with obligations regarding climate change and most notably many national courts are stepping up, by forcing states to fulfil their environmental obligations; see Urgenda Foundation (on behalf of 886 individuals) v. The State of the Netherlands (Ministry of Infrastructure) HA ZA 13-11396 C/09/456689 (The Hague District Court 24 June 2015); Gloucester Resources Limited v Minister for Planning 2019 NSWLEC 7 (Land and Environment Court of New South Wales 2019); Asghar Leghari v Federation of Pakistan WP No 25501/2015 (The Lahore High Court 2015).

2.

CLIMATE CHANGE AND THE NEED FOR ENVIRONMENTAL JUSTICE

The impact of climate change on the enjoyment of human rights, besides not being equal on all rights, is also not equal amongst individuals. The consequences of climate change raise particularly serious concerns when we consider that vulnerable groups[43] are at the highest risk of suffering climate-related damages.

Among these vulnerable groups are people living in poverty, especially the ones in developing countries,[44] which are shown to suffer the worst effects.[45] Lack of adequate water, high risk of hunger, poor health conditions, displacement,[46] damages from severe weather events[47] and even climate-induced conflicts are some of the consequences of climate change that threaten people living in poverty most severely.[48]

The pronounced impact on poor populations has been thoroughly analysed and stems from a conjecture of reasons. As mentioned in Philp Alston´s 2019 report and analysed by the World Bank Group in 2016, several factors contribute to this higher impact on poorer populations[49] such as: tendency to

[43] Vulnerable groups usually identified are women, children, young people, older persons, indigenous peoples, local communities, minorities, migrants, rural workers, displaced people, persons with disabilities and persons living in poverty.

[44] Poor households in developed countries or urban areas are also much more prone to suffering more poignant impacts of climate change than wealthier ones.

[45] UN Human Rights Council (HRC), 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, on Climate Change and Poverty' (2019) UN A/HRC/41/39 4-6.

[46] For further information on the significant impact that climate change will have on internal migration see World Bank Group, 'Groundswell: Preparing for Internal Climate Migration' (19 March 2018).

[47] In cases of natural disasters, the number of deaths and losses are usually higher in developing countries than in developed ones, as well as the impact on the country´s GDP, as has been shown in severe weather events as El Niño or the Idai cyclone that hit Mozambique, Malawi and Zimbabwe.

[48] World Bank Group, 'Shock Waves: Managing the Impacts of Climate Change on Poverty' (2016); UN HRC, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, on Climate Change and Poverty' (n 45).

[49] World Bank Group, 'Shock Waves' ibid 37 table 1.1.

live in areas more endangered by climate change; worse housing conditions; more susceptibility to climate-related diseases;[50] higher vulnerability and exposure to natural disasters;[51] higher relative losses;[52] lack of resources for mitigation and adaptation, minimal social support;[53] prioritisation of wealthier areas by authorities; vulnerability to spikes in food prices;[54] higher dependency on eco-system related activities and jobs (namely agriculture)[55] and weakening of infrastructures used by poorer people.[56]

Developing countries are estimated to bear 75 to 80% of climate change costs,[57] seriously threatening their future development, especially since the disproportional effect on poor countries is also worsened by the scarcity of resources for adaptation measures.

As formulated by Philip Alston in the 2019 report, the world is at the risk of a climate apartheid. One of the main contributors for this risk is the lack of capacity for adaptation measures, since although all countries face climate risks (with the poor countries being disproportionally affected, as it was shown before), the resources to overcome and adapt to these risks are significantly different and could determine an even harsher division between north[58] and south.[59]

[50] World Bank Group, 'Shock Waves' 9-11, 111-32.
[51] ibid fig O.6, 8, table 1.2, 37, 79-105.
[52] ibid 91-94.
[53] ibid 11-12, 141-65.
[54] ibid fig O.2 demonstrating decrease of food availability, 4, 49-72.
[55] ibid fig 2.9, 61, table 2.1, 63-64.
[56] ibid 93-95.
[57] World Bank, World Development Report 2010: Development and Climate Change (The International Bank for Reconstruction and Development / The World Bank 2010) <https://openknowledge.worldbank.org/bitstream/handle/10986/4387/530770WDR2010.pdf?sequence=1&isAllowed=y> accessed 29 March 2020 5-10.
[58] Countries as Australia, despite being geographically located in the southern hemisphere, present economic and political characteristics that better include them in what is commonly known as the Global North: wealthy industrialised countries that are seen as developed ones, with important voices in the international community. The conception of Global South is usually used to describe countries in Asia, Africa and Latin America with a history of political and economic domination by the northern nations. However, in current times, countries within the Global North and Global South present more and more heterogeneity and could even be considered to belong to one group or the other depending on the matter at hand. Additionally, more economic elites are appearing in the south and impoverished populations suffering from social, economic and environmental injustices appear in the north, which questions this dichotomy. Nevertheless, it is still considered a useful framework to present the tensions created by an economic conjecture that perpetuates economic, social, political and environmental inequalities.
[59] Margaux J Hall and David C Weiss, 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law' (2012) 37 Yale Journal of International Law 309; Zackary L Stillings, 'Human Rights and the New Reality of Climate Change: Adaptation´s Limitations in Achieving Climate Justice' (2014) 35(3) Michigan Law Journal 637; Damian Carrington, '"Climate apartheid": UN expert says human rights may not survive' (The Guardian, 25 June 2019) <www.theguardian.com/environment/2019/jun/25/climate-apartheid-united-nations-expert-says-human-rights-may-not-survive-crisis?CMP=Share_iOSApp_Other> accessed 23 March 2020.

Developing countries will suffer the most due to this combination of climate and geographical conditions, higher dependency on natural resources and lack of adaptation capacity.[60]

Therefore, climate change has been predicted to push back years of development[61] and to seriously exacerbate the existing inequalities between developed and developing countries, while increasing the gap between the Global North and the Global South.

The gloomy scenario for poorer states is aggravated if we consider the extreme unfairness of these consequences, since besides the uneven distribution of effects there is an extremely uneven distribution of contribution to the problem.[62]

Despite suffering the harshest effects, the contribution of most of these developing states to global warming is comparatively minimal,[63] meaning that even if mitigation measures are strictly followed by them, the impact on the whole crisis will be barely felt. This leaves these states powerless since there are no ways to stop the consequences from hitting them and not enough resources to prevent them.[64]

The states which are estimated to suffer the harshest effects mostly produce low levels of GHGs per capita, whereas the highest emitting states are expected to feel milder consequences of climate change.[65]

[60] World Bank Group, 'Poverty and Climate Change: Reducing the vulnerability of the poor through adaptation' (2012).

[61] Including by pushing back around 120 million people into poverty, namely among the 800 million in South Asia that live in climate hotspots or by determining the permanent reduction of GDPs by 4-5% in certain countries in Africa and South Asia.

[62] This pattern is identifiable in other areas of the environmental crisis, from deforestation in developing countries to satisfy consumers' needs in the Global North, to the dumping of solid waste (plastic for instance) coming from developed countries in least developed ones. See Oxfam, 'Extreme Carbon Inequality: Why the Paris climate deal must put the poorest, lowest emitting and most vulnerable people first' (2 December 2015) 4, fig 1 and 2.

[63] World Bank Group, 'Shock Waves' (n 48) 193, figs 6.3 and 6.4 demonstrating how people in poorer countries have minimal contributions for GHG emissions and showing variations on consumption according to GDP per capita.

[64] Stephen H Schneider and Janica Lane, 'Dangers and Thresholds in Climate Change and the Implications for Justice' in W Neil Adger and others (eds), Fairness in Adaptation to Climate Change (MIT Press 2006).

[65] Oxfam (n 62) 5, fig 3; Lucas Chancel and Thomas Piketty, 'Carbon and inequality: from Kyoto to Paris' (Paris School of Economics 2015).

2.1 Zooming in on GHG emissions

If we analyse the emissions of GHGs in the past years that can be attributed to individual use, the poorest half of the population has only been responsible for 10% to 13% of GHG emissions, while the richest 10% of the population is responsible for almost 50% of emissions. This translates into a carbon footprint 11 times higher than the poorer half.[66]

In fact, to compare the emissions between countries more accurately, per capita numbers offer us a better insight than absolute ones, since they are able to demonstrate in which countries citizens are living above their carbon possibilities and are leading harmful life styles.[67] A combined analysis shows us that G20[68] countries produce 78% of global GHG emissions and correspond to the countries where emissions per capita are the highest.

Despite the necessity for individual efforts and changes in consumption, citizens can only go so far without economic and market restructuration at a global level. This imposes a system-wide alteration of production methods that is only achievable through the action of governments.

The highest emitting states are nowhere near meeting the targets of emissions necessary to prevent disastrous consequences. Despite the scientific consensus, political pressure and the development of technology that would facilitate emission reduction, GHG emissions are still on the rise.[69]

The positive commitments and developments observed are mostly done by smaller countries, which have a positive impact, but not sufficient. Additionally, when it comes to the improvements of developed countries, they mostly take into account domestic territorial emissions and not the importation of embodied carbon, ignoring the flow of carbon from developing countries to satisfy the needs of

[66] If this analysis extends to a broader period, then the contrast is even more poignant, since in the past only a small percentage of the population produced high emissions. However, getting states to take responsibility for their historical emissions seems politically utopic, even though it could be easily justified.

[67] Chancel and Piketty (n 65) 18, fig 4; UN Environment Programme, 'Emissions Gap Report 2019' (n 11) 6 fig ES.2.

[68] International Forum bringing together the world's 20th major economies

[69] UN Environment Programme, 'Executive Summary – Emissions Gap Report 2019' (November 2019) <www.unenvironment.org/resources/emissions-gap-report-2019> accessed 27 February 2020.

developed ones.[70]

Several countries have already made commitments, however only a small amount have presented comprehensive long-term action plans that could actually lead to reaching those commitments.[71] The emissions gap between the real emissions and the necessary ones to prevent a warming to 1.5Cº or 2Cº is significantly large and the states that contribute the most to its enlargement do not face any sanctions or consequences for their actions.

2.2 Mitigation, adaptation and environmental justice

The uneven distribution between actions contributing to global warming and their consequences is intrinsically linked to economic inequality,[72] aggravating it to unbearable levels.

The lack of resources to adapt to the coming consequences and the lack of promising actions to prevent them, due to the impossibility of significant mitigation, leave poorer countries in a completely powerless position, waiting to see its individuals' human rights torn apart thanks to climate change.

Many authors consider it nearly impossible to apply human rights law and rationale to the problem of mitigation, since the higher emitting states that would necessarily be the ones targeted and held accountable would never accept it.[73]

These authors prefer to focus on the necessity for adaptation and aid in adaptation, which is more obviously related with risks for human rights[74] and closer to the logic applied within this field of law.[75] At the

[70] Despite current efforts to conclude studies focused on consumption, the great majority of studies are focused on production, which ignores that a large percentage of emissions in developing countries and even in countries like China are issued through the production of goods consumed in Western countries; UN Environment Programme, 'Emissions Gap Report 2019' ibid 7, 28, table 3.

[71] 65 countries and major subnational economies (eg California) have made the commitment to achieve net zero emissions by 2050, but the majority of these countries has not presented realistic and efficient action plans.

[72] This link with economic inequality is observed both between countries and within countries, which is shown in detail by Chancel and Piketty (n 65) in their 2015 study.

[73] Hall and Weiss (n 59); Stillings (n 59).

[74] Due to the possible human rights violations arising by the lack of adaptation.

[75] Cases such as Budayeva v Russia App no 15330/02 (ECtHR 2008) show us how states have been held accountable for human rights violations by not taking preventive measures in the face of natural disasters.

same time, framing contributions as aid and not as compensation for damages is an 'easier pill to swallow' for rich high emitting states.[76]

However, despite agreeing with some of these arguments,[77] framing solely the issue of adaptation under human rights law poses the risk of solely holding accountable developing states – as the violations of human rights for lack of adaptation would most likely happen there – and increasing the already heavy burden on those states, which is the opposite goal of environmental justice.[78]

I believe that only if both issues are tackled – mitigation and adaptation – through a united solution, there is a realistic chance for human rights to survive in the face of climate change, while at the same time achieving environmental justice.

The conceptualisation of environmental justice is based on four pillars of justice[79] and was partially thought out to tackle intra-state inequalities. However, all pillars can be used to show the unjust situation between the Global North and the Global South, since internal inequality patterns between the 'rich and powerful' and the 'poor and oppressed' are mimicked at the global level, between developed and developing countries.

[76] Hall and Weiss (n 59); Stillings (n 59).

[77] In the model proposed by Hall and Weiss ibid and other scholars alike, states that fail to adapt to the consequences of climate change would be considered to have violated the human rights of its citizens. The human rights law system is thought of as a vertical system, making this logic easier to accommodate. However, in my opinion, regarding this problem the vertical human rights system is not the most appropriate to effectively allot responsibility to the states that created the problem. Instead, human rights should be thought of in a diagonal manner (at least in this matter) as proposed by John Knox and will be analysed further ahead; Stillings (n 59).

[78] Environmental justice refers to all problems relating to the environmental crisis such as water pollution, dumping practices, poor waste management, biodiversity endangerment, deforestation, desertification, water shortages and of course climate change. This means that the term climate justice could also have been used and the references to environmental justice should be understood as a way of including climate justice, but reminding us that climate change is not the only strand of the environmental crisis we face; Upendra Baxi, 'Towards a climate change justice theory?' (2016) 7(1) Journal of Human Rights and the Environment 7 .

[79] Robert R Kuehn, 'A Taxonomy of Environmental Justice' (2000) 30 Environmental Law Reporter 10681; Stillings (n 59); Carmen Gonzalez, 'Environmental Justice, Human Rights and the Global South' (2015) 13 Santa Clara Journal of International Law 151; Baxi ibid; W Neil Adger, Jouni Paavola and Saleemul Huq, 'Multifaceted Justice in Adaptation to Climate Change' in W Neil Adger and others (eds), Fairness in Adaptation to Climate Change (MIT Press 2006).

2.3 The four pillars of environmental justice

The first justice pillar at hand is **distributive justice** and expresses the need for an equal distribution of goods and opportunities. Due to the uneven distribution of costs and benefits related with GHG emissions, this justice pillar is severely at risk.

As it was presented, the production of GHG emissions is contrastingly different between the south and the north, especially if we focus on per capita results, while at the same time, the consequences arising from climate change are more heavily felt in the south, within already vulnerable communities, which are being less protected against climate harms. Additionally, the benefits of emissions[80] and the benefits of protection programmes are mostly concentrated on the Global North and within rich communities.

The second pillar, **procedural justice**,[81] refers to the need for equal treatment and concern when it comes to political decision making (in this case equal say in the allocation of benefits and harms of GHG emissions). The disparity of power between the Global North and the Global South as international actors is seen in practically all fields of international life, as the developing countries never seemed to be seen as equal by the developed ones, in the international playfield.

In the field of climate change, this lack of political power of developing countries is especially worrisome, as they are the ones that suffer the most, contribute the least and have the least resources to tackle this problem. At the same, their voices are still not being heard with the seriousness, urgency and concern they deserve, suffering from procedural unfairness and exclusion from decision making.

Additionally, the largest emitters are countries already seen as powerful, with stronger economies and with high bargaining power in this situation. More importantly, they are the ones that can effectively do something to significantly improve the problematic situation – reduce their emissions and support struggling states (from economic to technological support).

[80] In this case under the form of economic gains achieved by activities and commercialisation of products that imply the emission of a large level of GHGs.

[81] As thought of in Kuehn (n 79); Stillings (n 59); Gonzalez (n 79). For an analysis on the importance of empowerment of the grassroots movements and of those suffering from environmental injustice see Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a "Pillar" of Empowerment' (2008) 10 Environmental Law Review.

The third pillar, **corrective justice**,[82] concerns the necessity of holding accountable those who provoke great harms and compensating the ones who suffer from these harms, based on duties to rectify and of responsibility for one's acts. The necessity for corrective justice somewhat reflects the recognition of the principle of the polluter pays, however its application has only been successful at an intra-state level and requires full global implementation and adequate enforcement.

To fully observe corrective justice in the field of climate change, the states where the worst consequences are being felt and that least contributed to global warming ought to be compensated by the highest emitters.

The fourth and final pillar, **social justice**,[83] refers to the need to achieve a just societal order, striving for social equity, where people´s needs are met, and everyone enjoys the benefits of human life. Social justice implicates the existence of sufficient resources and power for every social class and the accountability of the most privileged classes for the use of their advantages.

Within the issue of climate change, social justice would impose an analysis on the worsening of living conditions in developing countries and the use of advantages by the developed ones. More specifically, this would refer to how the achieved economic benefits, deriving from the production of GHG emissions, could be used to improve societies suffering from these emissions.

The application of social justice to climate change also allows us to have an improved overview on the cause of vulnerability of affected communities, since vulnerability is often not related only with one issue, but to an interconnectedness of deeper structural problems, such as poverty and discrimination. It also demonstrates that lack of justice in the system as a whole can lead to environmental problems, urging for system-wide solutions that tackle social, economic, cultural and political injustices.

Environmental justice is thus supported by basic fairness principles, ethical rationales to prevent the exacerbation of existing vulnerabilities and by justice concerns taking human life and health, security and the integrity of the earth system into account.[84]

[82] Kuehn (n 79); Stillings (n 59); Gonzalez (n 79).
[83] ibid.
[84] W Neil Adger, Jouni Paavola and Saleemul Huq, 'Towards Justice in Adaptation to Climate Change' in W Neil Adger and others (eds), Fairness in Adaptation to Climate Change (MIT Press 2006).

The current state of affairs regarding production of GHGs, suffering of consequences of climate change, participation in climate action plans and ratio between needs being met and distribution of advantages creates inequities that violate the four pillars of environmental justice mentioned.

Accordingly, basic principles of justice and fairness are not being met, due to this disproportionate distribution of environmental burdens and benefits. The differentiated capabilities to respond to climate change and to maintain welfare conditions, as well as the discrepancy between contribution to the problem and likelihood of suffering from it, constitute moral imperatives that justify the necessity of privileging the most vulnerable when taking climate action.[85]

The four justice pillars that form the basis of environment justice are interconnected and mutually influential. This determines that only a response that considers the four of them, encompassing both the necessity of mitigation and the necessity of adaptation, will be able to adequately tackle this crisis.

The lack of environmental justice needs to be approached by the international community as a whole, streamlining both **mitigation measures** for the highest emitting countries (since further heating is still preventable) and **adaptation measures** for the ones suffering the most severe consequences (both the current and future ones, resulting from the installed rise of temperatures).

Measures to tackle the environmental crisis need to be rapid, yet inclusive, counterbalancing the uneven distribution of impacts and uneven distribution of contributions, while protecting the poor in order to achieve a truly sustainable development.

[85] Kirstin Dow, Roger E Kasperson and Maria Bohn, 'Exploring the Social Justice Implications of Adaptation and Vulnerability' in W Neil Adger and others (eds), Fairness in Adaptation to Climate Change (MIT Press 2006).

3.

THE ROLE OF EXTRATERRITORIAL OBLIGATIONS IN ACHIEVING ENVIRONMENTAL JUSTICE

The previous chapters demonstrated how climate change is a problem that creates deeply unjust situations, highlighting the need for environmental justice. Environmental justice is intrinsically connected with the protection of human rights, as they share the same human objectives and the actions necessary to ensure environmental protection also ensure and benefit the human rights agenda.[86]

Without the focus on equality and human dignity, provided by human rights, decision makers would not look beyond their national interests, creating weak responses for the global consequences of climate change, meaning that a vital ethical component of the response to this issue would be missing.[87]

Without environmental justice,[88] the population in developing countries suffering from poverty, aggravated by climate stress, will never achieve full respect, protection and fulfilment of their human rights. One of the main reasons is because the state of the environment surrounding human beings will increasingly become a major factor on the standard of living, especially for these vulnerable populations.

As it was demonstrated, climate change is a human rights problem, thus human rights law has the potential to present a legal solution to the moral and ethical imperatives posed within environmental justice movements.[89] It can be utilised to hold large emitters accountable, to justify aid to countries that are suffering the highest impacts, where

[86] Connor Gearty, 'Do human rights help or hinder environmental protection?' (2010) 1(1) Journal of Human Rights and the Environment 7.

[87] ibid.

[88] Alongside social justice, economic justice, labour justice and procedural justice.

[89] Either through finally recognising the human right to a healthy environment or through the use of existing rights to tackle climate change.

human rights are severely at risk and, finally, to provide standards for what climate action should be achieving.[90]

Institutionalisation is necessary for implementation. However, the use of human rights as an instrument to achieve environmental justice must take into account the deficiencies of the human rights system and overcome them. In order to avoid embeddedness within the relations of power, a human rights approach to the climate crisis must move away from westernised patterns and biases that are criticisable within human rights law and international law in general. However, this can be achieved by taking into account the justice concerns of grassroots movements that are inherent to the battle for environmental justice.[91]

Climate change is a problem that highly accentuates the dependency, constant interaction, power relations and domination between states, mostly through economic models of northern conceptions over southern ones. The impacts of this system has consequences in the human rights framework as a whole, highlighting most of its gaps.[92]

Despite the limitations of the human rights system in dealing with the concerns of vulnerable communities and structural injustice, it still holds the potential to be a powerful emancipatory tool. This system can showcase the problems of the most vulnerable and, in the case of environmental justice, contribute to a global environmental justice campaign by putting a human face to environmental harm.[93]

The impacts of climate change on human rights is one of the areas where the consequences of globalisation are more poignant. This highlights the need to adapt to a world where a state´s government does not have full control over its territory, where consequences of continuous exploitation of poorer states, by industrialised ones, have reached unbearable damages and where global governance is more and more relevant, urging for new conceptualisations of instruments within human rights law.[94]

This problem is only solvable if the international community acts in a

[90] Zackary L Stillings, 'Human Rights and the New Reality of Climate Change: Adaptation´s Limitations in Achieving Climate Justice' (2014) 35(3) Michigan Law Journal 650-58.

[91] Gearty (n 86); Carmen Gonzalez, 'Environmental Justice, Human Rights and the Global South' (2015) 13 Santa Clara Journal of International Law 151.

[92] ibid.

[93] ibid.

[94] Wouter Vandenhole and Wolfgang Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide' in Malcom Langford and others (eds), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (CUP 2012) 332-63.

coordinated manner, since states have little control over the creation of human rights impacts of climate change in their own territory. This means the obligations of international cooperation arising from the human rights system must take a primary role, instead of a secondary one.[95]

One of the human rights law concepts that can be used to address these environmental justice imperatives is the ETOs of states.[96] ETOs can work as a way to counterbalance unjust distribution of climate related damages in order to benefit the ones that suffer the most from it, if they are imposed on the states that contribute the most to the problem.

3.1 Definition and foundations of extraterritorial human rights obligations of states

The concept of ETOs in human rights law has been continuously developing. The draft of the 2011 Maastricht Principles[97] largely contributed to the understanding and clarification of ETOs in the field of economic, social and cultural rights.[98]

This formalisation of ETOs can be partially attributed to the discussions surrounding the right to development, the adoption of the guiding principles on business and human rights by the Human Rights Council, as well as the necessity to adapt human rights law to a new and increasingly globalised world, where states are not the only decisive actors. These principles have the aim of tackling the lack of accountability that a model of obligations centred exclusively in the state´s territory leads to.[99]

[95] John H Knox, 'Climate change and human rights law' (2009) 50(1) Virginia Journal of International Law 163.

[96] From here on extraterritorial human rights obligations of states will be referred to as ETOs.

[97] Extraterritorial Obligation (ETO) Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (18 September 2011). Although the principles have no legally binding force, they have been cited by several UN bodies, including the Human Rights Council, which gives them a higher importance than a regular respected doctrinal opinion.

[98] Despite not being officially internationally recognised, the human right to a healthy environment would be seen as falling within this category. Although not personally agreeing with the civil and political rights-economic, social and cultural rights dichotomy, I will focus on ETOs of states within the ambit of social, economic and cultural rights, due to the major impacts of climate change in the right to an adequate standard of living.

[99] According to the explanations provided by Professor Olivier De Schutter and Siobhan McInerny Lankford in American Society of International Law, 'Human Rights Speaker Series: The Extraterritorial Obligations of States' with Olivier De Schutter, Siobhan McInerney Lankford, and Jessica Evans (2016) <www.youtube.com/watch?v=VOdVadvxOOA&t=1407s> accessed 17 April 2020.

ETOs of states are the obligations arising from a state´s capacity of impacting the enjoyment of human rights outside its territory, through its actions or omissions, within or beyond the state´s territory and arising from the nature of states as international actors, that assume global obligations of cooperation to shape the international legal order in a way that promotes the realisation of human rights.[100]

The moral and legal basis for the imposition of ETOs to states is rather simple. Firstly, states should take responsibility for actions, or omissions, that negatively impact the enjoyment of human rights, independently of where this harm occurs.

The responsibility of the state may be sought whenever a harmful conduct can be attributed to the relevant state, since states (and all entities with legal personality) have the obligation to avoid causing harm and to repair harm that is unjustifiable.[101] States also have the obligation to not allow the use of its territory to cause damage to another state.[102]

Principles of responsibility and accountability for caused harm are basic principles of legal doctrine and consequences of the general obligation to provide effective remedy for human rights violations,[103] which constitutes a general principle of international law.

When it comes to violations of peremptory norms of international law, all states have the obligation to end them, to cooperate to avoid serious breaches and to refrain from supporting, or recognising as lawful, any case of violation of *ius cogens*.[104]

Secondly, the universal character of human rights imposes the duty to respect them, protect them and fulfil them to all states, regarding all people. If states are solely responsible for the enjoyment of human rights in their own territory, the universality and international character of human rights does not go beyond the creation of harmonised

[100] This definition stems from art 8 of the Maastricht Principles (n 97), which is based on the commitments assumed by states to realise human rights at a universal level both in the Charter of the United Nations (UN Charter) (26 June 1941) (and on the various human rights instruments the states may be party to; Olivier De Schutter and others, 'Commentary to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084.

[101] According to the international obligations of states for internationally wrongful acts set out in the Articles on State Responsibility for Internationally Wrongful Acts (12 December 2001).

[102] The negative obligation to do no harm has been recognised in several instruments, especially within the environmental field and there is a growing consensus pointing it out as a principle of customary international law.

[103] Universal Declaration of Human Rights (10 December 1948) art 8.

[104] De Schutter and others (n 100) 1095-96.

standards.[105]

This universality of human rights is embedded in principles of equal dignity and freedom of all human beings,[106] imposing non-discrimination, which can only be achieved if states are not allowed to treat individuals differently, when it comes to their enjoyment of human rights, exclusively due to territoriality.

Lastly, states have recurrently committed themselves, through several human rights instruments,[107] to create an international order where human rights can be fully realised, recognising duties of international cooperation,[108] which in a globalised world where actors exert influence on the enjoyment of human rights worldwide can only be achieved if human rights obligations of states go beyond their own borders and are applicable to all areas of states' policy making.

Apart from these justifications, stemming from general legal principles and human rights law principles, there are specific provisions that sustain the recognition of ETOs of states.[109]

3.2 Existing legal framework concerning extraterritorial human rights obligations of states

The first article of the UN Charter presents international cooperation as one of the UN´s main purposes, including cooperation in promoting and encouraging respect for human rights and fundamental freedoms. The joint interpretation of articles 55 and 56 of the UN Charter holds an

[105] Sigrun I Skogly and Mark Gibney, 'Economic Rights and Extraterritorial Obligations' in Shareen Hertel and Lanse Minkler (eds), Economic Rights: Conceptual Measurement and Policy Issues (CUP 2007) 267-83.

[106] Consecrated in UDHR arts 1, 2 and 7.

[107] In instruments of an almost universal character such as the UN Charter (n 100), the UDHR, the International Covenant on Civil and Political Rights (16 December 1966) and the International Covenant of Economic Social and Cultural Rights (16 December 1966), in regional instruments and in instruments especially created for the protection of certain rights, of certain groups of people or against a certain type of abuse or violation.

[108] Duties of cooperation started to be recognised in the 20th century, mostly due to the phenomenon of creation of international organisations; For a more detailed historical analysis see Malcom Langford, Fons Coomans and Felipe Gómez Isa, 'Extraterritorial Duties in International Law' in Malcom Landford and others (eds), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (CUP 2012) 51-113.

[109] Regional human rights instruments and certain human rights treaties also contain provisions that justify the recognition of ETOs within their ambits, they will not be referred to as this thesis has been adopting a broader scope, however a reference to these provisions can be found in De Schutter and others (n 100) 1107-08.

even stronger argument for the recognition of these obligations, at least within the framework of the UN, since states committed themselves to take joint and separate action to achieve the universal respect for and observance of human rights.[110]

The provisions of the Universal Declaration of Human Rights (UDHR)[111] further strengthen the recognition of these obligations, since a duty of international cooperation is set forth and the right to an international order that enables the realisation of human rights is recognised. In order to achieve such an order, the imposition of this duty for states to cooperate is implied.[112]

Lastly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) consecrates duties and obligations concerning economic, social and cultural rights that can be extended to all human rights. The whole language of the text has a universalist character and a palpable intention to give a global meaning to the duties presented in the ICESCR, as shown in article 14.[113]

Article 2(1) of the ICESCR sets forth the duty of international assistance and cooperation while taking steps to achieve the full realisation of the recognised rights, establishing a commitment to implement these rights not only within the jurisdiction of the states, but also globally.[114]

The ICESCR repeats the notion of international cooperation in relation to the right to an adequate standard of living, in article 11, and when it refers to the adoption of implementation measures, in articles 22 and 23. These articles refer to the necessity of cooperation and assistance within the UN, as one of the possible actions to be taken internationally to achieve the implementation of the rights consecrated in the ICESCR.[115]

The same type of language and intention is applied in other human rights treaties that include provisions of economic, social and cultural rights. Examples include the International Convention on the

[110] Skogly and Gibney, 'Economic Rights and Extraterritorial Obligations' (n 105); American Society of International Law (n 99).

[111] UDHR (n 103). The binding nature has been recognised either as an authoritative interpretation of the UN Charter as containing general principles of law or as a reflection of international customary law.

[112] UDHR arts 22 and 28 respectively.

[113] Langford, Coomans and Isa Gómez (n 108) 57-58.

[114] ibid 73-78; De Schutter and others (n 100) 1101-104.

[115] ibid.

Elimination of All Forms of Racial Discrimination,[116] the Convention on the Elimination of All Forms of Discrimination against Women,[117] the Convention on the Rights of Persons with Disabilities[118] and the Convention on the Rights of the Child.[119] This use of a unified form to describe both territorial and extraterritorial duties and the reference to a global obligation to promote human rights which is general to all UN human rights treaties emphasises the legally binding character of the obligation to cooperate.[120]

Additionally, several instruments with non-binding character or whose binding force is questionable have also referred to the necessity to recognise the existence of ETOs of states within the sphere of human rights law, reinforcing this position as a necessary development of human rights law.[121]

3.3 The extraterritorial obligations to respect, protect and fulfil

ETOs can be divided in the same obligations to respect,[122] protect[123] and fulfil[124] human rights that are recognised within the states´ borders and applied to the territories beyond these borders, over which the states have capability of influencing the enjoyment of human rights.[125]

The obligation to respect human rights imposes a duty to refrain from actions directly or indirectly harmful to the enjoyment of human rights,[126] which should not be dependent on the territory where the

[116] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (21 December 1965)

[117] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (18 December 1979)

[118] Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006)

[119] Convention on the Rights of the Child (CRC) (20 November 1989)

[120] Langford, Coomans and Isa Gómez (n 108) 58-65.

[121] From political declarations such as the ones contained in the UN Millennium Declaration, A/RES/55/2 (18 September 2000), to mentions of ETOs in general comments of treaty bodies reports presented before the UN General Assembly by special rapporteurs referring to ETOs.

[122] Maastricht Principles arts 19 to 22.

[123] Maastricht Principles arts 23 to 27.

[124] Maastricht Principles arts 28 to 35.

[125] American Society of International Law (n 99); Skogly and Gibney, 'Economic Rights and Extraterritorial Obligations' (n 105); Sigrun Skogly and Mark Gibney, 'Introduction' in Mark Gibney and Sigrun Skogly (eds), Universal Human Rights and Extraterritorial Obligations (University of Pennsylvania Press 2010); De Schutter and others (n 100) 1090-96; Ashfaq Khalfan, 'Division of Responsibility Amongst States' in Malcom Langford and others (eds), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (CUP 2012) 299-331; American Society of International Law (n 99).

[126] Which includes the assistance or aid to an action lead by the domestic state that violates its individuals' human rights.

harm takes place.[127]

The territorial character of the obligation to respect human rights is justified since states are more likely to cause harm to the human rights of their own citizens. However, this is not an exclusive possibility, as we increasingly witness conduct of states that has harmful effects outside their borders.[128]

If the extraterritorial obligation to respect human rights is not recognised when it comes to violations, human rights would, in practice, be the same as fundamental rights, negating their universal character and creating spaces for unjustified inequalities of individuals before a state.[129]

As said beforehand, the extraterritorial obligation to respect human rights is a simple consequence of principles of responsibility, minimum standards of doing no harm and even of sovereignty,[130] implying only negative duties, meaning it should be considered the easiest obligation to implement extraterritorially. Unfortunately, due to the constant interactions and complexity of ties created by globalisation, the obligation to refrain from actions that could create harm to human rights outside a state´s territory has not been pacifically accepted.[131]

The obligation of states to protect human rights requires that states take steps to ensure the protection of individuals' human rights from interference by non-state actors, imposing an obligation to regulate the behaviour of these third parties.[132]

[127] Skogly and Gibney, 'Economic Rights and Extraterritorial Obligations' (n 105); Skogly and Gibney, 'Introduction' (n 125); Khalfan, 'Division of Responsibility Amongst States' (n 125) 302-09; American Society of International Law (n 99). The recognition of this obligation in an extraterritorial manner fulfils the stipulation of art 56 of the Charter of the UN.

[128] There are several situations where a national policy can affect the enjoyment of human rights in another state, especially neighbouring ones. These cases can be seen when it comes to issues as diverse as extraordinary rendition, food availability, restriction on water sources, unfair trade conditions and market-distorting subsidies or support of authoritarian regimes.

[129] Unjust inequalities in this case refer to the possibility for a state to behave in a more harmful away towards individuals, just based on territorial considerations.

[130] A state´s sovereignty is one of the main arguments presented to reject the imposition of ETOs. However, in the case of the obligation to respect human rights, ETOs actually protect a state´s sovereignty, since the causation of harmful effects for the enjoyment of human rights of citizens of state A, by state B, constitutes and unjustifiable intervention of state B in the affairs of state A.

[131] Skogly and Gibney, 'Economic Rights and Extraterritorial Obligations' (n 105) 274-76; De Schutter and others (n 100) 1134; American Society of International Law (n 99).

[132] Skogly and Gibney, 'Economic Rights and Extraterritorial Obligations' (n 105) 276-77; Skogly and Gibney, 'Introduction' (n 125); Khalfan, 'Division of Responsibility Amongst States' (n 125) 309-14; American Society of International Law (n 99).

The extraterritorial application of this obligation essentially demands the regulation of activities of transnational corporations, private individuals and organisations over which the state has jurisdiction[133] that are able to affect the enjoyment of human rights outside a state´s territory.[134]

Finally, the obligation of states to fulfil human rights is the one that generates more controversy (due to the possible clash with state sovereignty) and resistance (due to its dependency on resource availability), dividing itself in the obligation to facilitate, provide and promote human rights.[135]

Extraterritoriality of this obligation requires that states create an international enabling environment for the universal fulfilment of human rights[136] and cooperate in view to support foreign countries in the implementation of human rights, for example through measures of international assistance.

The implementation of this obligation gives effective meaning to the obligation of international cooperation,[137] but at the same time depends on the allocation of different responsibilities and division of duties.[138] As opposed to negative duties that fall upon everyone, positive duties of fulfilment of human rights heavily depend on the coordination between states, each states' maximum abilities[139] and states' capability of influencing international governance.

[133] According to arts 12 and 25 of the Maastricht Principles, based on arts 5 and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts, a state is considered to have jurisdiction over a third party when the harm (or its threat) originates or occurs in the state´s territory; when the actor has the state´s nationality; when a corporation has its centre of activity, main place of business or substantial business registered or domiciled in the state concerned; when there is a reasonable link between the state and the conduct or when the conduct constitutes a violation of a peremptory norm of international law.

[134] The impact of transnational corporations in human rights is common, namely in the field of labour rights, being directly connected with business accountability for human rights violations and accountability of states for allowing violations of human rights by non-state actors.

[135] Skogly and Gibney, 'Introduction' (n 125); Khalfan, 'Division of Responsibility Amongst States' (n 125) 314-30; American Society of International Law (n 99).

[136] The creation of an international enabling environment is achieved through the implementation of international standards, multilateral and bilateral agreements and the adoption of measures and policies that contribute to the fulfilment of human rights, regarding each state's foreign relations, concerning all areas of work (Maastricht Principles arts 17 and 29).

[137] Margot Solomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcom Langford and others (eds), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (CUP 2012) 259-96.

[138] Which is often based on the observance of the principle of common but differentiated responsibilities (CBDR), that will be referred to in more detail in the next chapter.

[139] Maastricht Principles art 1(4); De Schutter and others (n 100) 1096-97.

In order to achieve true effectiveness of the system of ETOs, remedies and mechanisms that ensure accountability should be provided. These mechanisms ought to consider complaints and guarantee the provision of appropriate remedies, monitoring the implementation of ETOs in an independent manner, while requiring that the states comply with their obligations (establishing encouragement for compliance and discouragements for non-compliance).[140]

The monitoring of ETOs can be provided through the adaptation of the existing human rights mechanisms to facilitate its implementation. New institutions are not necessarily required, only an enhancement of international institutional frameworks to ensure effective remedies for the violation of ETOs and to monitor their implementation.[141]

Despite the growing academic consensus on the necessity of implementation of ETOs, developments in international organisations regarding this topic and the growing attention of civil society towards states´ behaviour regarding the enjoyment of human rights in other territories, states maintain their low commitment policies when it comes to the extraterritorial issues, hesitating in recognising the possible impacts a state can have outside its borders, the necessity for international cooperation and the legally binding force of obligations to cooperate.

[140] Maastricht Principles arts 36 to 41; Ashfaq Khalfan, 'Accountability Mechanisms' in Malcom Lanford and others (eds), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (CUP 2012) 391-416.

[141] As Ashfaq Khalfan mentions in 'Accountability Mechanisms' ibid there are strategies each of the existing mechanisms could adopt. International human rights mechanisms that already monitor and refer to the ETOs of states in their periodic reports, such as the CESCR, could just carry on referring to them, in a more detailed manner than what they do at the moment. Mechanisms of essentially political character, as the universal periodic reviews and special procedures of the UN HRC, could be used to increase the pressure on the necessity of implementing extraterritorial notions to human rights obligations. International courts and human rights bodies that receive individual complaints could extend their concepts of states' jurisdiction over another territory to include cases where a state is directly capable of affecting the enjoyment of human rights of individuals, even if the state does not have complete control over the territory of the individual. Additionally, the role of international courts, especially of the ICJ, could be determinant, as clarifiers of the rules of international law, with decisions that are in some cases even regarded as authoritative. Similarly, regional treaty mechanisms that already monitor the human rights protected by the corresponding instruments could employ their own mechanisms to monitor ETOs of their state parties. Finally, international bodies whose scope is not the protection of human rights, but that necessarily influence it, such as trade and investment bodies could also prevent the violation of ETOs, requiring a more exigent compliance with human rights under its own mandate.

However, as the world we are currently living in is characterised by relations between states ruled by complexity and interrelatedness and as existing conceptions of territoriality in human rights law make less and less sense, ETOs are no longer mere moral imperatives of solidarity. In addition, an exclusively territorial logic to human rights issues is inefficient to tackle some of its major issues, namely climate change, as we will analyse in the following chapter.

ETOs present themselves as an important missing link in order to allow human rights to assume the role of a legal basis for regulating globalisation and ensuring universal protection of minimum human dignity standards to all people and groups.[142]

[142] Greenpeace and the Center for International Environmental Law, 'The Maastricht Principles in Practice: Extraterritorial Obligations in the Context of Eco-destruction and Climate Change' (FIAN International for the ETO Consortium 2014) 5.

4.

JUSTIFYING EXTRATERRITORIAL OBLIGATIONS FOR ENVIRONMENTAL PURPOSES

The global character of the environmental crisis and the mismatch felt between the production of environmental harm and the suffering of its consequences determine that human rights impacts due to this issue will only be effectively assessed if an extraterritorial nature is recognised to states´ obligations within the environmental protection field.

In fact, climate change is one of the current issues that demonstrate the inadequacy of human rights law in adapting to a modern globalised world. The potential implications of climate change in creating a human rights framework that reflects the interdependency and common causality of some of today´s violations may lead to tackling issues as the responsibility of more than a single state and should be transversal to all human rights areas where extraterritoriality plays an essential role.[143]

Environmental harm is mostly transboundary, meaning that the source of the harm is within a different territory than the one where the harm is felt. This is especially applicable to our case of GHG emissions. This transboundary nature implicates the necessity to adapt the traditional vertical and horizontal approaches inherited in human rights law.

In order to create a framework that adequately tackles transboundary environmental issues, both elements of international environmental law and human rights law must be combined to ensure that human rights violations of individuals and groups are not unscathed.[144] This means

[143] Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 Harvard Environmental Law Review 439.

[144] Referring to the elements of human rights law that attribute rights that are justiciable directly to individuals.

that the states that create harm are responsible,[145] not the ones where victims of environmental damage live.[146]

This combined approach is especially important as most of the environmental harm caused to individuals or groups has been treated within the framework of human rights as a violation of existing human rights, since there is still no formally recognised human right to a healthy environment.

Only a common solution will be able to address the magnitude of the justice claims generated by climate change, combining strong features of each system, such as the flexibility and equity concerns of international environmental law and the accountability and rectitude of human rights law.[147]

4.1 Diagonal environmental rights

An approach to climate change based on human rights law allows for the development of a common law of environmental protection of individuals, complementary to regulatory and more objective environmental treaties, where ethical imperatives are transformed into legal obligations, offering fora to impose these obligations and defining what states must do.[148]

This approach humanises climate change, granting the problem a greater moral urgency, amplifying the voices of the most vulnerable that are being affected in a disproportionate manner, equalising the different stakeholders in the matter and placing the emphasis on international cooperation.[149]

Both within the field of human rights and international environmental law, the conception of diagonal environmental rights has been developed and suggested as a possible solution to tackle the lack of accountability

[145] Referring to the extraterritorial character of international environmental law, imposing horizontal obligations on states.

[146] John H Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrun Skogly (eds), Universal Human Rights and Extraterritorial Obligations (University of Pennsylvania Press 2010) 82-103.

[147] Stephen Humphreys, 'Conceiving justice: articulating common causes in distinct regimes' in Stephen Humphreys (ed), Human Rights and Climate Change (CUP 2009) 299-319.

[148] Daniel Bodansky, 'Climate Change and Human Rights: Unpacking the Issues' (2010) 38 Georgia Journal of International and Comparative Law 511.

[149] Limon, 'Human Rights and Climate Change' (n 143) 450-63; Humphreys (n 147) 315-18; Bodansky (n 148) 516-18.

for transboundary harm. According to John H Knox´s conception, diagonal environmental rights should be held by individuals and groups in place of other states, the ones effectively responsible for the damages they suffered.[150]

The case for the recognition of extraterritorial human rights obligations within the field of environmental protection and the establishment of diagonal environmental rights can be simply summed up by John Knox, 'It is difficult to see why a state that has caused environmental harm that rises to the level of a violation of human rights should avoid responsibility for its actions merely because the harm was felt beyond its borders'.[151]

This diagonal conception of environmental rights could be vital to ensure that human rights are able to constitute a proper legal basis for regulating environmental issues arising from globalisation and protecting its most vulnerable victims. This role will not be fulfilled if human rights obligations are not extended beyond the borders of a state´s territory.

Moreover, this logic can be applied to other fields of human rights that deal with similar problems of extraterritoriality. This leads to a rethinking of human rights in order to adapt to the globalisation context, while tackling some of the main problems pointed out within human rights law such as: false universalism to mask western/northern domination; failure to hold northern states and transnational corporations accountable for complicity with human rights abuses; difficulties in responding to structural inequality issues; lack of redress for systemic harms and an over-individualised logic, dismissing collective human rights.[152]

The recognition of ETOs must be a way to protect the most vulnerable while holding accountable the states that contribute the most for the persistence of the climate crisis, due to their extreme GHG emissions.[153] This focus on the most vulnerable people while imposing ETOs is justified both by moral imperatives and legal principles.

[150] Knox, 'Diagonal Environmental Rights' (n 146).
[151] ibid 86.
[152] Carmen Gonzalez, 'Environmental Justice, Human Rights and the Global South' (2015) 13 Santa Clara Journal of International Law 172-89.
[153] Kirstin Dow, Roger E Kasperson and Maria Bohn, 'Exploring the Social Justice Implications of Adaptation and Vulnerability' in W Neil Adger and others (eds), Fairness in Adaptation to Climate Change (MIT Press 2006) 79-84.

On the moral imperatives side, principles as equality, desert[154], liberty and need[155] justify the special attention that ought to be given to the most vulnerable. Those with already fewer capabilities will suffer primarily from the risks of environmental stress, being the ones who contributed the least to the problem, while the ones who contributed the most are also the ones who have greater capabilities to brace themselves for its effects.

Additionally, property acquisition that implicates the emission of considerable amounts of GHGs can be seen as having been acquired unlawfully as it disrespects the individual freedom of other rights as it poses threats to their integrity.[156]

As seen beforehand, principles of justice are also vital to justify the imposition of ETOs. The failure to respond to the climate crisis might determine an impossibility to meet minimum subsistence standards, resulting in failure to provide for the bare needs of the weak, while at the same time violating cornerstone ethical principles such as solidarity and fairness. The impunity of those responsible for deteriorating the environment violates the most basic principles of state responsibility and liability.[157]

4.2 Established legal principles supporting extraterritorial human rights obligations in the area of climate change

Within the existing legal framework there are several principles that justify the imposition of ETOs while tackling climate change. These principles are identifiable both in human rights law, international environmental law and general international public law.

One of the most important principles that can be applied to the recognition of ETOs, guiding its division and adapting it to the specificity of climate change, is the principle of common but differentiated responsibilities (CBDR).[158]

[154] The philosophic principle of desert corresponds to the condition of deserving something, being treated as one deserves to be treated, as a matter of justice and fairness, which is often used in daily life. This principle constitutes an important component of justice, namely distributive justice.

[155] The economic and justice principle of need, according to which, resources should be allocated according to need

[156] ibid.

[157] Philip Cullet, Differential Treatment in International Environmental Law (Routledge, Taylor & Francis Group 2016).

[158] From here on referred to as CBDR.

CBDR is a guiding principle used to evaluate the responsibility for mitigation and remediation of environmental degradation, according to contribution,[159] impacts and present capabilities.

This principle recognises that all states have a responsibility in the mitigation of environmental harm,[160] as the global character of the issue and the common contribution to the problem require joint cooperative action. However, not all parties should have the same obligations, as they do not contribute equally to the continued creation of environmental harm they are not going to suffer equal consequences of the environmental crisis and they do not have equal capabilities to respond to these consequences.[161]

The imposition of equal obligations, in a situation where the parties are unequal, would only exacerbate existing inequalities and impose unjustifiable burdens on the ones who do not have the capability to support them, creating a situation that would contradict all pillars of environmental justice.[162]

The principle of CBDR can be used to divide burdens in any field where solidarity and international cooperation are essential and to tackle issues that are considered of common concern,[163] however it has been mostly applied in international environmental law.[164]

CBDR is a corollary of the broader principle of differential treatment, which is not only focused on the protection of the environment, but on every field where the formal equality between states does not guarantee equity, urging for solidarity and partnership that mostly favours vulnerable states in order to achieve basic fairness.[165]

[159] The principle often refers to historical contribution to assert responsibility, however, as mentioned beforehand, even if this historical responsibility would be more than justified, I am choosing to focus only on present contribution, as focusing on historical contributions would create even more political difficulties in accepting the imposition of obligations.

[160] Eg all countries must reduce GHG emissions and adapt to the incoming consequences of climate change.

[161] International Council on Human Rights Policy, 'Climate Change and Human Rights: A Rough Guide' (2008) 59-64; Limon, 'Human Rights and Climate Change' (n 143) 463-75; Cullet, Differential Treatment in International Environmental Law (n 157) 56-59, 87-90.

[162] Dinah Shelton, 'Equitable utilization of the atmosphere: a rights-based approach to climate change' in Stephen Humphreys (ed), Human Rights and Climate Change (CUP 2009) 91-125.

[163] Other areas of human rights law where the impacts of globalisation are notorious could benefit from this approach, reshaping this area of law to reflect and accurately respond to the necessities of a globalised world.

[164] Limon, 'Human Rights and Climate Change' (n 143) 463-75; Cullet, Differential Treatment in International Environmental Law (n 157) 87-90.

[165] Shelton (n 162) 112-17; Philip Cullet, 'The Kyoto Protocol and vulnerability: human rights and equity dimensions' in Stephen Humphreys (ed), Human Rights and Climate Change (CUP 2009) 183-206; Cullet, Differential Treatment in International Environmental Law (n 157).

This dimension of substantive equality, inherent to the principle of differential treatment, is directly related with the realisation of distributive justice imperatives, one of the areas highlighted within environmental justice. This can be better achieved through cooperation in implementing the obligation to fulfil human rights threatened by climate change.[166]

The principle of CBDR is referred to as one of the main guiding principles of instruments as the UNFCCC[167] and the Kyoto Protocol.[168] [169] Its importance is also reiterated in the Rio Declaration on Environment and Development[170] and the Stockholm Declaration on Human Environment.[171]

Conceptions of state responsibility justify the recognition of ETOs in general and to tackle climate change in particular. When it comes to transboundary GHG emissions and its consequences, a right to not be harmed can be recognised and utilised to justify the imposition of responsibility.[172]

This right is based on ethical conceptions of censurability of harm caused to others in order to achieve personal gains, which entails attribution of compensation in cases where harm is effectively caused. The right to not be harmed and to be protected from environmental degradation is pointed out as one central element of the environmental justice movement, especially due to its correlation with corrective justice.[173] Additionally, notions of sovereignty grant states the right to be free from transboundary pollution, as these constitute unjustifiable interferences with a state´s affairs.[174]

[166] Cullet, Differential Treatment in International Environmental Law (n 157) 21-28.
[167] UN Framework Convention on Climate Change (1992) arts 3(1) and 4(1).
[168] Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997) Arts 3, 7 and 10(1).
[169] Currently considered the main instruments regulating the issue of climate change, therefore they will be the instruments most highlighted.
[170] Principles 3 and 7 refers to it specifically, while Principles 6 and 7 focus on the special priority of developing countries and on the responsibility for harm and possibility to redress it.
[171] Principles 5 and 9 highlight how environmental problems affect more severely less developed countries, which should receive more assistance.
[172] Paul Baer, 'Adaptation to Climate Change: Who pays whom?' in Stephen M Gardiner and others (eds), Climate Ethics: Essential Readings (OUP 2010) 133-37.
[173] Maxine Burkett, 'Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism' (2008) 56 Buffalo Law Review 170.
[174] Shelton (n 162) 117-18.

According to the no harm principle,[175] recognised as a principle of customary international law, states are bound to prevent, control and reduce the risks of causing environmental harm to other states.[176] This principle has yet to be formally imposed as entailing general obligations to prevent and minimise considerable transboundary harm.

Compensation for caused environmental harm is vastly recognised within domestic systems and even regional ones, both founded in conceptions of strict liability and fault-based liability.[177]

Responsibility for caused environmental harm, especially due to the emission of GHGs, is supported in various instruments of soft law as the Rio Declaration,[178] the Stockholm Declaration of 1972,[179] the Charter of Economic Rights and Duties of States [180]and the World Charter for Nature[181], the preamble of the UNFCCC and the Oslo Principles[182].

International jurisprudence[183] sets forth the obligation of states to prevent the use of their territory to cause harm to other territories, recognising specifically the obligation of states to ensure that the activities within their jurisdiction, or under their control, do not create environmental damage to territories beyond the states' borders.[184]

State responsibility for transboundary harm can additionally be sustained by the recognition of the polluter pays principle. This principles states that the application of the economic principle of internalisation of externalities requires that the states or entities causing environmental harm are the ones bearing responsibility for the costs inherent to the harm.

The polluter pays principle implies a shift of the burden of proof for environmental damages to the defendants, in these cases polluters and dischargers. This is one of the legal elements defended by environmental justice theories.[185] These principles are realisations of conceptions of

[175] A consequence of the right to not be harmed.
[176] International Bar Association, Climate Change Justice and Human Rights Task Force Report, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (2014) 65-66.
[177] ibid.
[178] Principle 2.
[179] Principles 21 and 22.
[180] Charter of Economic Rights and Duties of States (12 December 1974)
[181] World Charter for Nature (28 October 1982)
[182] Oslo Principles on Global Climate Change Obligations (1 March 2015)
[183] The most important cases in this matter are the Corfu Channel case (United Kingdom v Albania) Assessment of Compensation, 15 XII 49 (ICJ 1949) and the Trail Smelter (United States, Canada), International Arbitration (16 April 1938 and 11 March 1941)
[184] Shelton (n 162).
[185] Burkett, 'Just Solutions to Climate Change' (n 173) 188-92.

corrective justice, fulfilling a reparative function.[186]

The urging necessity for action is also supported by the precautionary principle,[187] according to which, whenever there is a threat of serious or irreversible damage, the lack of complete scientific certainty should not be a reason to postpone the adoption of responsive measures, supporting preventive approaches.[188]

In this context, the uncertainties are not concerning whether if climate change is caused by human action, or if states should reduce their GHG emissions, but solely on the available timeframe to do so.[189]

The precautionary principle essentially corresponds to the colloquial 'better safe than sorry', but within a legal framework that requires states and policy makers to act, despite possible uncertainty. This principle has been seen by the European Union (EU) as one of the main guidelines for environmental policy, corresponding in the EU´s vision, to either a principle of customary international law, or to a general principle of law.[190]

Even though the binding force of this principle is questionable, it is one of the framework principles of the UNFCCC,[191] the Rio Declaration[192] and the Oslo Principles.[193] It is often used as a cornerstone of environmental decision making, expressing one of the vital claims of the environmental justice movement: the prioritisation of prevention strategies.[194]

The use of the previous arguments to justify ETOs of states when it comes to the human rights implications of environmental damages is slowly being returned to by different bodies, both within the field of human rights and international environmental law, paving the way for a legal precedent in this area.

[186] Shelton (n 162) 121.

[187] Stated firstly in the UN Conference on Environment and Development (UNCED), Rio de Janeiro Earth Summit (3 June to 14 June 1992) and reinforced in UNFCCC art 3(3) and by the Kyoto Protocol.

[188] International Bar Association (n 176) 45-48.

[189] Oslo Principles Drafting Group, 'Oslo Principles Commentary' (2015).

[190] Elizabeth Tedsen and Gesa Homan, 'Implementing the Precautionary Principle for Climate Engineering' (2013) 7(2) Carbon & Climate Law Review, Special Issue on Climate Change Geoengineering Part 1 90.

[191] Art 3(3).

[192] Principle 15.

[193] Principle 1.

[194] Burkett, 'Just Solutions to Climate Change' (n 173) 188-90.

4.3 Signs of recognition of extraterritorial human rights obligations in the area of climate change

One of the most important instruments establishing the link between human rights and climate change is the previously mentioned OHCHR 2009 report. This report sets the basis of UN´s human rights bodies approach to this issue, identifying states´ human rights obligations in the area of climate change.[195]

One of the obligations identified in the report and repeated in the following OHCHR and UN Human Rights Committee instruments is the obligation of international cooperation in order to achieve the realisation of human rights. The OHCHR recognises the extraterritorial obligation of states to not interfere with the enjoyment of human rights beyond its borders and to assist in the fulfilment of human rights in other countries. This means that states ought to reduce their emissions to safe levels and help the most vulnerable counterparts adapt to the consequences of climate change, in order to fully comply with their human rights obligations.[196]

The approach used by the Human Rights Commission in dealing with the issue of toxic dumping, consisting of appointing a special rapporteur on the matter and recommending that states hold corporations accountable, prosecute perpetrators criminally and provide access to the same remedies for non-resident victims, demonstrate how human rights law and human rights bodies can be used to support diagonal environmental rights and fight transboundary harm, in this case through an approach that could be easily replicated for GHG emissions.[197]

The Committee on Economic, Social and Cultural Rights (CESCR) has often relied on the language from article 2(1) of the ICESCR to state these obligations in the area of the environmental impacts on the enjoyment of economic, social and cultural rights. However, the CESCR jurisdiction to receive complaints from individuals and groups is limited by notions of jurisdiction that prevent a more impactful recognition of ETOs.

[195] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61 3, 7-8; John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 492-96; Marc Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) 38(3) Georgia Journal of International and Comparative Law 556-59.

[196] ibid.

[197] Knox, 'Diagonal Environmental Rights' (n 146) 91-93.

UN human rights treaty bodies are increasingly addressing the influence of climate change in the implementation of their corresponding rights, either in statements, general comments or concluding observations on country reports.[198] The referral to specific emission reduction strategies is one of the trends observed throughout 2018 in the human rights treaty bodies. This includes the protection of human rights of people beyond a state´s border,[199] for example by establishing safeguards to protect all groups from the impacts of fossil fuels,[200] urging for international cooperation.[201]

Regional mechanisms are using their own human rights instruments to develop approaches to this issue that also start to rely on the obligation to cause no harm and to protect individuals from environmental harm.

Within the Inter-American system of human rights, the Inuit petition[202] before the Inter-American Commission on Human Rights (IACHR) combined a claim of internal harm with an extraterritorial one, pushing forward the notion of responsibility for transboundary harm.[203] More recently, in an advisory opinion requested by Colombia,[204] the Inter-American Court of Human Rights (IACtHR) clarified the human rights obligations of state parties that protect individuals from environmental threats to the enjoyment of their human rights.

This advisory opinion imposes on states the duty to prevent causing transboundary harm and reinforces the prohibition of use of a state´s territory to cause damage to another states´ environment. The IACtHR extends obligations to avoid activities that endanger human rights to individuals located outside the state´s territory and adopts a broader conception of 'being under a state´s jurisdiction', by basically accepting

[198] Center for International Environmental Law and The Global Initiative for Economic, Social and Cultural Rights, 'States Human Right´s Obligations in the Context of Climate Change' (2019) 1-9.

[199] CRC, 'Concluding observations on the combined fifth and six periodic reports to Norway', CRC/C/NOR/CO/5-6 (4 July 2018)

[200] ibid; CEDAW, 'Concluding observations on the eighth periodic report of Australia', CEDAW/C/AUS/CO/8 (25 July 2018)

[201] For a detailed analysis on all climate change related mentions made by human rights treaty bodies in 2018 see Center for International Environmental Law and The Global Initiative for Economic, Social and Cultural Rights (n 198).

[202] Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States (2005).

[203] Even though the case was not admitted (due to issues regarding the factual causation link between the actions of the US and the violation of rights of the Inuit population), there were no refusals of the extraterritorial character of the claim.

[204] Advisory opinion OC-23/17 (IACtHR 15 November 2017).

the conception of ETOs of states within the environmental protection context.

The implementation of ETOs under the African Charter on Human and Peoples´ Rights[205] has also been defended by some scholars, since it has no jurisdiction clause and requires cooperation between states to truly implement the envisaged rights.[206] The jurisprudence of the African Commission on Human and Peoples' Rights also indicates that the division of human rights obligations in the obligation to respect, protect and fulfil can be applied extraterritorially.[207]

The European Court of Human Rights (ECtHR) has increasingly considered cases[208] where environmental damage and lack of environmental action is seen as a cause for violation of human rights protected by the European Convention on Human Rights.[209] However, these cases are essentially focused on territorial obligations of states.

The EU has developed a strong environmental action programme and is planning to enforce a European Green Deal that predicts cooperation with states beyond the EU´s territory (especially when it comes to technology transfers), but that is also essentially centred around the impacts of climate change within the EU and the measures the EU can adopt.

Regarding the field of international environmental law, an increasing number of instruments consider the human impact of the actions that are damaging for the environment. The most relevant instrument concerning this matter is the UNFCCC, complemented by the Kyoto Protocol.

The UNFCCC explicitly aims to protect the environment to the benefit of present and future generations of humankind. It demonstrates its human focus by attending to the special needs of vulnerable population

[205] African Charter on Human and Peoples´ Rights (27 June 1981), most importantly arts 60 and 61.

[206] Ademola Oluborode Jegede, 'Indigenous Communities Displaced by Climate Change and Extraterritorial Application of States´ Obligations in Africa' in Lilian Chemui and Bulto Takele Soboka (eds), Extraterritorial Human Rights Obligations in Africa, an African perspective (Intersentia 2018) 207-30.

[207] Especially demonstrated in the Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights(CESR) v Nigeria Communication No 155/96 (African Commission on Human and People's Rights 2002).

[208] López Ostra v Spain App No 16798/90 (ECtHR 9 December 1994); Öneryildiz v Turkey App no 48939/99 (ECtHR 2004).

[209] European Convention on Human Rights (4 November 1950), mostly the right to life (art 1) and the right to respect for the home and private life (art 8).

and developing countries. However, it does not grant individual justiciable rights and does not contain an accountability mechanism, which would convey a more subjective nature.

Moreover, other instruments of international environmental law (ie the Espoo Convention of 1991[210] and the OECD Principles Concerning Transfrontier Pollution[211]) that aim to prevent transboundary harm could be used in order to recognise diagonal environmental rights if they were given a subjective character, granting enforceable and justiciable rights for individuals.

The 1998 Aarhus Convention, on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters,[212] is one of the most solid examples of how international environmental law can be developed to encompass ETOs.[213] The Aarhus Convention should be used as a blueprint in matters of environmental policy since it grants subjective rights to individuals in an extraterritorial manner, focusing on non-discrimination concepts while combining the strengths of both human rights law and international environmental law in a mechanism that ensures compliance.

The imposition of ETOs resulting from climate change has been slowly starting to be outlined by different respected authors and international associations of lawyers and human rights scholars.

The Maastricht Principles on ETOs, in the area of economic, social and cultural rights, drafted by a group of experts in international law and human rights, under the auspices of the International Commission of Jurists, can be directly used to address the issue of climate change.

Principles 13 and 19 to 22, imposing the obligation to respect, can be applied to environmental issues, specifically the necessity to avoid causing harm and reduce the emission of GHGs.[214]

[210] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) (1991)

[211] OECD, 'Recommendation of the Council on Principles concerning Transfrontier Pollution' (14 November 1974)

[212] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhaus Convention) (25 June 1998).

[213] Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a "Pillar" of Empowerment' (2008) 10 Environmental Law Review; Knox, 'Diagonal Environmental Rights' (n 146) 100-03.

[214] Greenpeace and the Center for International Environmental Law, 'The Maastricht Principles in Practice: Extraterritorial Obligations in the Context of Eco-destruction and Climate Change' (FIAN International for the ETO Consortium 2014) 6-7.

The obligations to protect and fulfil, in a manner that goes beyond the borders of a state, as thought out in principles 17, 23 to 27 and 28 to 32 of the Maastricht Principles, can also be adapted to the need to regulate non-state actors´ environmentally damaging actions and the need to cooperate internationally to fulfil the human rights put at risk by climate change.[215]

Additionally, a group of respected scholars drafted the Oslo Principles that define global climate change obligations, providing an important example of what a legally binding route for emission reduction could look like.

The Oslo Principles are based on previously augmented conceptions such as the precautionary principle, the CBDR principle and state accountability. These principles focus on equity between countries in order to ensure that mitigation and adaptation to climate change are not done at the expense of the least developed countries.[216]

The International Law Association has drafted a declaration that proposes legal principles to guide international solutions for climate change, while emphasising the need for international cooperation.[217]

Finally, the work of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has also been fundamental to highlight and clarify how obligations of states within the human rights framework are a vital instrument to tackle climate change. Especially noteworthy are the Draft Framework Principles on Human Rights and the Environment (the Framework Principles),[218] developed by the special rapporteur at the time, John H Knox, that facilitate the implementation of states' human rights obligations concerning the enjoyment of a safe, clean and healthy environment.

The Framework Principles recognise the interdependence between the environment and human rights and emphasise how the obligations

[215] Greenpeace and the Center for International Environmental Law (n 214).

[216] Oslo Principles Drafting Group (n 189).

[217] International Law Association (ILA), Committee on Legal Principles Relating to Climate Change 'Draft Articles of ILA Principles Relating to Climate Change', Resolution 2/2014 (2014).

[218] UN HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59; also supported by the more recent UN HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (15 July 2019) UN Doc A/74/161.

to respect, protect and fulfil fully apply to the environmental context. They also encompass the importance of non-discrimination while fulfilling these obligations,[219] the necessity of accountability mechanisms and remedies for victims of environmental damages, the adoption of additional measures to protect the rights of the most vulnerable and the central role of international cooperation to tackle this issue, according to the CBDR principle, with special focus on reduction, prevention and remedy of transboundary harm.[220]

The mentioned existing principles and soft law instruments showcase how the imposition of ETOs to tackle climate change can be legally justified by a solid panoply of legal principles and commitments agreed to by states that realise environmental justice imperatives. This body of soft law also showcases the possibility to identify concrete legal strategies and courses of work in order to implement these obligations. The only thing missing to implement such concrete climate action is strong political will and leadership to formally adopt the existing legal consensus.

[219] Including non-discrimination on the basis of nationality or domicile when it comes to procedural rights of inquiry relating to transboundary harm.

[220] UN HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (1 February 2016) UN Doc A/HRC/31/52; UN HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59.

5.

OPERATIONALISING EXTRATERRITORIAL OBLIGATIONS THROUGH A LIABILITY SCHEME

The logic of imposing ETOs to tackle climate change follows the tripartite conception of the implementation of human rights, by establishing duties to respect, protect and fulfil.[221]

Within the area of climate change, the duty to respect entails the obligation of states to refrain from activities that directly contribute to climate change. In example these could be activities that produce high levels of GHG emissions.

The duty to protect imposes the necessity to regulate private emitters that contribute to climate change and to possibly undertake adaptation measures to limit the harms of climate change.

Finally, the duty to fulfil implicates a duty for states with more capabilities to contribute and provide assistance to adaption to climate change projects in poorer, more affected countries.[222]

These obligations can be achieved through several strategies and mechanisms. Concretisations of ETOs of states in the area of climate change is a way of addressing environmental justice concerns and tackling this issue in a manner that puts individuals and their human rights concerns at the forefront.[223]

The final chapter of this thesis will present a possible way to operationalise ETOs in the area of climate change. The main proposal is the creation of a liability scheme that works both as a mitigation measure (encouraging states to decrease their GHG emissions and phase out fossil fuels) and as an adaptation measure (since the resources

[221] Daniel Bodansky, 'Climate Change and Human Rights: Unpacking the Issues' (2010) 38 Georgia Journal of International and Comparative Law 519-22.

[222] ibid.

[223] International Council on Human Rights Policy, 'Climate Change and Human Rights: A Rough Guide' (2008) 55-59.

of the scheme should be used in structures and mechanisms that allow developing countries suffering from climate harms to adapt to the already existing harms and to prevent future damages).

Working both as a mitigation and as an adaptation measure, the scheme can be seen as a concretisation of both the obligation to respect human rights (aiming to enforce the obligation to do no harm) and of the obligation to fulfil (creating structures that benefit the most vulnerable using the resources of the ones with more capabilities).

5. 1 Legal basis and precedent justifying a liability scheme for GHG emissions

Ideally, the scheme would be based on the responsibility of the states for caused harm, adequately holding states accountable for their actions as GHG emitters. These should ultimately be considered actions that implicate human rights violations. Relying on the responsibility to create deterrence for harmful conduct is one of the main objectives of tort, which implements corrective justice principles.

State responsibility is well founded under international law and can be fault based or subject to strict liability. Fault-based liability could only be applicable to the damage caused by GHGs emitted after the general recognition of the risks of anthropogenic climate change.[224] On the other hand, strict liability better justifies historical responsibility, since unexpected harms from activities should be borne by the party that benefitted from them and not the victims.[225]

The main grounds for imposing state responsibility in the environmental field are based on the principle of prohibiting states to act in a way that causes damage to the environment of another state or that damages global commons.[226]

[224] A possible date to be appointed could be the adoption of the UNFCCC, as on that date the international community formally identified the harm of climate change. After that day, no state can in good faith claim that they did not have knowledge of the damaging nature of conducts leading to GHG emissions, even if the extent of the damages was unclear.

[225] Paul Baer, 'Adaptation to Climate Change: Who pays whom?' in Stephen M Gardiner and others (eds), Climate Ethics: Essential Readings (OUP 2010) 134-37; International Bar Association, Climate Change Justice and Human Rights Task Force Report, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (2014) 127-37.

[226] Philip Cullet, Differential Treatment in International Environmental Law (Routledge, Taylor & Francis Group 2016) 40-41. This line of reasoning is laid out in the previously mentioned Corfu Channel case (United Kingdom v Albania) Assessment of Compensation, 15 XII 49 (ICJ 1949) and the Trail Smelter (United States, Canada), International Arbitration (16 April 1938 and 11 March 1941), as well as in the Advisory opinion OC-23/17 (IACtHR 15 November 2017).

Establishing the direct responsibility of a state for specific damages is nearly impossible in the case of climate change, however it is more than well-known which actions lead to an increase of GHG emissions and how such emissions create general global warming that then leads to events that are extremely damaging and that jeopardise the enjoyment of human rights. Therefore, the responsibility of states is not justified solely by the creation of a specific damage. Instead the non-compliance of obligations to mitigate carbon emissions[227] determines the non-compliance of the obligations to respect, protect and fulfil human rights.[228]

Liability of states for excessive GHG emissions can be framed as a responsibility based on the contribution to the persistence of a problem, in this case global warming, that leads to climate change. As such, states are considered liable due to a series of actions and omissions that continuously breach international obligations, determining joint and several responsibilities.[229]

Conceptions of joint and several responsibilities have been explored by ICJ´s Judge Simma on the judge´s separate opinion in the 2003 Oil Platforms case.[230] According to Judge Simma, joint and several responsibilities of states constitute a general principle of international law,[231] applicable in cases where the existence of multiple tortfeasors makes measuring the exactitude of negative impacts caused by a sole state, in a common damage, impossible.[232]

These conceptions are also reflected in the UN International Law Commission´s (ILC's) Articles on the Responsibility of States for Internationally Wrongful Acts.[233] According to the articles, actions

[227] Obligations arising from the no-harm principle, the Kyoto Protocol, the Paris Agreement, the UNFCCC and from general international law norms and laws embracing the goal to keep global warming under 2°C.

[228] Ashfaq Khalfan, 'Division of Responsibility Amongst States' in Malcom Langford and others (eds), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (CUP 2012) 309-14; International Bar Association (n 225) 127-37.

[229] Margot Solomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcom Langford and others (eds), Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law (CUP 2012) 263-72, 276-78.

[230] ibid 272-78; Separate Opinion of Judge Simma in Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) General List No 90 (ICJ 6 November 2003).

[231] This allows its use as a source of law in the ICJ.

[232] Simma (n 230)

[233] Articles on State Responsibility for Internationally Wrongful Acts (12 December 2001).

or omissions attributable to states[234] that constitute a breach of an international obligation[235] of the corresponding state are considered internationally wrongful acts,[236] which entails the international responsibility of that state.[237]

Responsibility of the state may include the obligation to cease the act, ensuring non-repetition[238] and the obligation to repair, through restitution, compensation or satisfaction,[239] which can be owed to another state, several states or to the international community as a whole.[240]

In the context of climate change, the type of responsibility that better repairs the caused harm is one of compensation to the international community as a whole since the deterioration of the environment is seen as a global concern and restitution is not possible. Responsibility of each state can be invoked since all states contribute to the creation of harm.[241]

The UN´s ILC has also drafted principles especially concerned with the creation of transboundary harm from hazardous activities[242] and the allocation of loss in these situations.

The principles[243] are based on Principles 13 and 16 of the Rio Declaration,[244] which stress the need to develop national law regarding compensation, anchored on the promotion of internationalisation of environmental costs, in ways that promote the polluter pays principle, considered by the ILC as an essential component of the draft principles.

The principles aim to regulate transboundary damages caused by hazardous activities that are not prohibited by international law but that risk causing these damages through their physical consequences.

[234] According to arts 4 to 11.
[235] According to arts 12 to 15.
[236] Art 2.
[237] Art 1.
[238] Art 30.
[239] Arts 35, 36 and 37.
[240] Art 33.
[241] Art 47.
[242] In 2001, the UN´s ILC issued draft articles on prevention of transboundary harm from hazardous activities, Prevention of Transboundary Harm from Hazardous Activities (2001), which should be the preferred policy, due to the impossibility to restore the situation, however focus will remain on responsibility, therefore these articles will not be addressed, despite their importance in environmental policy-making.
[243] UN´s ILC Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (11 August 2006).
[244] First preambular para of the principles and its commentary in ILC, 'Report of the International Law Commission on the work of its fifty-eighth session' (2006) 59-90.

The regulatory measures have the objective of ensuring adequate compensation for the victims and preservation and protection of the environment, as a common resource of the community, especially through mitigation of damage and its restoration and reinstatement.[245]

Despite the focus on victim compensation, in cases of specific incidents, the draft principles and its commentary by the ILC emphasise the necessity to impose responsibility on states, under international law, for breaching of obligations of prevention of harm. These highlight the general character of the obligation to attribute responsibility for transboundary damage deteriorating the environment and express how the existence of these liability measures for environmental damage at a national level[246] should be replicated at an international one.[247]

As mentioned beforehand, the proposed scheme is based only on present responsibilities, as it is believed that it could be more easily accepted than historical responsibilities, since resorting to historical ones is usually questioned due to the lack of knowledge of creation of harm[248] and is possibly seen as an unjustifiable burden of responsibility in governments that were not in power nor made the decisions at the time of harm.

The envisioned responsibility of states under the scheme is based on the inability to keep emissions within a previously agreed environmental standard, consequently breaching international obligations and threatening the enjoyment of human rights.[249] The protection of the environment leads to benefits that will be enjoyed by the whole international community, which ultimately means the obligations imposing its protection ought to be considered *erga omnes*.[250]

The imposition of responsibility (or its lack thereof) in the area of climate change further enhances the tensions between the Global North and Global South, as the internationally agreed principles and

[245] ILC (n 244), commentaries to Principle 1 and 3.

[246] Having its importance recognised in international instruments as the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (1993).

[247] Especially Principle 7 which encourages states to conclude agreements that regulate matters of compensation, response measures, redress and remedies for a specific category of hazardous activities, in order to provide arrangements that function more efficiently.

[248] Taking into account that historical responsibility conceptions usually refer to periods before 1992, in which it can be claimed that states had not yet committed themselves to implement measures to reduce GHG emissions at an international level.

[249] International Bar Association (n 225) 127-37.

[250] ibid 137.

commitments in the area[251] clearly call for the imposition of compulsory international contributions and the recognition of national remedial liability. However, no measures as such have been imposed so far.[252]

As referred throughout the thesis, responsibility of states for harm caused due to their GHG emissions is a sensitive subject, which is unfortunately not likely to be accepted by developed states. There is enough ethical consensus to justify the imposition of responsibility, however economic and political interests have outweighed ethical norms.[253]

As it was presented, the legal foundations for state responsibility for transboundary harms are solid and have been applied in existing compensation funds and liability regimes for analogous situations. The most relevant international liability regimes are the ones regulating oil pollution and nuclear damages.

The International Oil Pollution Compensation Funds were set up in 1971, framed by the 1969 International Convention on Civil Liability for Oil Pollution[254] and the 1971 International Convention on the Establishment of an International Fund for compensation for Oil[255], which were actualised in 1992, widening the old regime.[256]

The fund provides compensation for damages caused by oil pollution resulting from spills of persistent oil from tankers. Compensation is provided by contributions from entities that receive oil through sea transportation, according to the amount of oil received per year. The compensation is awarded based on strict liability conceptions, including in cases of several tortfeasors, that respond consonantly to the principle of joint and several liability[257] for damages that are not reasonably separable.[258]

[251] Complemented by human rights obligations that are being breached by states for not taking action to prevent severe threats to the enjoyment of human rights due to the effects of climate change.

[252] For a proposal on how to achieve climate protection goals without relying on responsibility from states see Steven Vanderheiden, 'Justice and Climate Finance: Differentiating Responsibility in the Green Climate Fund' (2015) 50(1) The International Spectator 31.

[253] Cullet, Differential Treatment in International Environmental Law (n 226) 40-41.

[254] International Convention on Civil Liability for Oil Pollution Damage (1969)

[255] International Convention on the Establishment of an International Fund for compensation for Oil Damage (1971)

[256] IPOC Funds, 'About us: Funds Overview' <https://iopcfunds.org/about-us/> accessed 19 June 2020.

[257] International Convention on Civil Liability for Oil Pollution Damage (27 November 1992) art IV.

[258] IPOC Funds, 'About us: Legal Framework' <https://iopcfunds.org/about-us/legal-framework/> accessed 19 June 2020.

Within the International Oil Pollution Compensation Funds, the states have a secondary role as they are not the primarily responsible contributors. Instead their obligations are limited to ensuring that anyone that receives oil within a state contributes to the fund[259] or to assuming those contributions[260] in the place of the receivers.

The idea of such a compensation mechanism, where contributions are made to a common fund, based on principles that impose the burden of an activity on those who receive benefits from it, is directly connected to the proposed scheme for GHG emissions. However, in the proposed scheme the primary contributions are from states, as GHG emissions are still strongly dependent on state policy, especially as they are heavily emitted by entities providing public goods as energy.

The liability regime regulating nuclear energy is a bit more complicated, since it depends more heavily on national regulations and there is not only one international instrument tackling the issue.[261]

The main instruments dealing with situations of transboundary nuclear damages are the 1963 IAEA´s Vienna Convention on Civil Liability for Nuclear Damage[262] and the 1960 OECD´s Paris Convention on Third Party Liability in the Field of Nuclear Energy[263], which were later amended in 1997 and 2004 respectively, broadening the definition of nuclear damage to now include environmental damage caused.[264]

These conventions consecrate the guiding principles of nuclear energy law as strict liability of the nuclear operator and exclusive liability of the operator and compensation without discrimination based on nationality, domicile, or residence to situations of transboundary harm that are then implemented by most countries with commercial nuclear programmes, which normally impose financial security requirements.[265]

As in the case of oil pollution, state parties are secondary, as the primary contributors are the operators of nuclear plants, having states

[259] International Convention on the Establishment of an International Fund for Compensation for Oil Damage (n 255) art 15.
[260] ibid art 13(2).
[261] World Nuclear Association, 'Liability for Nuclear Damage' (World Nuclear Association, August 2018) <www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/liability-for-nuclear-damage.aspx> accessed 20 June 2020.
[262] Vienna Convention on Civil Liability for Nuclear Damage (12 September 1997)
[263] Paris Convention on Third Party Liability in the Field of Nuclear Energy (16 November 1982)
[264] ibid.
[265] ibid.

to ensure compensation from the operators[266] and only contributing to the supplementary compensation for nuclear damage fund, on the basis of installed nuclear capacity.

However, nuclear damage liability regimes are relevant to the establishment of GHG emissions liability ones, as they emphasise principles imposing the burden of damages caused by an activity on those who benefit from it[267] and the lack of relevance of nationality, domicile or residence when appointing victims.[268]

The existence of the above-mentioned schemes in international law allows their use as blueprints for the proposed GHG emissions scheme, setting important precedent for liability for transboundary harms.

5.2 Operationalising a liability scheme for GHG emissions

Considering that the reasoning presented above is accepted, the presented examples are followed and that it is possible to obtain a scheme based on responsibility for transboundary harms arising from GHGs emissions, the next step would be to establish criteria for imposing responsibility and developing an adequate index of GHGs liability.

Such a task is a complex one that should take different variations into account in order to ensure it is based on the most just principles possible. The negotiation of these criteria would be an equally difficult task, as countries would try to shield themselves from responsibility through the criteria, 'however if there is to be anything approximating the necessary funding for adaptation (…) a formula will be necessary'.[269]

In the proposed conception, the responsibility would be attributed to states that surpass a certain level of GHGs emissions per capita,[270] calculated by an independent expert panel, based on an equal per-capita entitlement for each individual.[271] In the initial stage, the quantum of

[266] Vienna Convention on Civil Liability for Nuclear Damage (n 262) (the Vienna Convention) art XV; Paris Convention on Third Party Liability in the Field of Nuclear Energy (n 263) (the Paris Convention) art 15.

[267] Vienna Convention art II; Paris Convention art 3.

[268] Vienna Convention art XIII; Paris Convention art 14.

[269] Paul Baer, 'Adaptation to Climate Change: Who pays whom?' in Stephen M Gardiner and others (eds), Climate Ethics: Essential Readings (OUP 2010) 140.

[270] Per capita amounts are considered a better indicative of excessive lifestyles of citizens of a certain state, than absolute ones.

[271] These calculations should ensure the maintenance of rise of temperatures below 2ºC, or 1.5ºC if possible, and the achievement of zero net emissions and carbon neutrality by 2100.

emissions allowed to be lawfully produced would gradually decrease, in order to force states to keep pushing for a decrease of emissions in their territories and not to impose responsibility on less polluting and more vulnerable states.

The use of an objective indicator to attribute responsibility (in this case a quantum of GHG emissions) has the advantage of not clearly targeting the so-called developed countries, or letting developing ones 'off the hook', as potentially all countries could be held responsible and called in to contribute.

After each state´s objective liability is calculated, adjustments could be made in order to ensure a fair attribution of responsibility. These adjustments would take into consideration capabilities to pay,[272] gross domestic product, domestic investment and commitment to climate action, the type of emissions issued,[273] or the amount of emissions owed to the production of goods for exportation and to domestic consumption, considering that the more factors are taken into account the more precisely and fairly exclusion or reductions of responsibility could be determined.[274]

As the attribution of responsibility implicates a decision sanctioning a state´s behaviour, a jurisdictional organ would have to be involved to decide on a final level on the implementation of the considerations expressed by different experts of the environmental and economical field.

In my opinion, the natural choice would be the ICJ, as it is seen as the ultimate entity of international law, having dealt with environmental disputes as well as disputes that clarify state responsibility. Additionally, it is considered by the UNFCCC[275] as the competent body for any dispute arising under the treaty, which could determine a resurrection of its Environmental Chamber, with a more administrative character, aimed at running the jurisdictional section of the scheme.

The nature of the scheme as a responsibility based one, at the international level, aims to overcome notions of market-based international mechanisms and hold states accountable for their actions.

[272] Solomon (n 229) 282-84.

[273] Luxury or subsistence emissions.

[274] Similar schemes from which inspiration was taken are presented in Baer (n 225); Maxine Burkett, 'Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States' (2015) 13(1) Santa Clara Journal of International Law 81; Cullet, Differential Treatment in International Environmental Law (n 226) 31-32, 46-53.

[275] Art 14.

Referring to emissions trading schemes as the main solutions to tackle mitigation strategies and trusting in markets that benefit and profit from pollution will only increase the lack of strong political leadership on this matter. Market mechanisms will likely further enhance inequalities, as only a small number of countries have sufficient capital to deliberately choose to invest in greener mechanisms or clean technologies, penalising the already most vulnerable countries and discriminating against those who cannot afford to pay for emissions.[276]

Additionally, the idea of trading emissions schemes ignores the blatant necessity to simply put a halt on emissions as a whole, ignoring the pressing urgency of addressing the impacts of fossil fuel extraction and the use of fossil fuels as the main source of energy, creating two-thirds of GHG emissions. The lack of focus on fossil fuels and society´s dependency on them also leaves unaddressed the gap between what states have committed themselves to achieve and the measures effectively implemented.[277]

Therefore, by imposing responsibility for a level of emissions higher than a certain quantum, states are forced to readdress their energy policies,[278] cutting down emissions in order to avoid international responsibility, which works as a strong incentive to reduce GHG emissions. Additionally, the body managing the scheme would issue recommendations on how to secure resources to cover the states´ responsibility, monitoring the funding of the scheme to ensure it does not burden the most vulnerable or takes away from human rights fulfilling policies.

States would be recommended to impose measures, at a national level, that target high emitting companies or that cut the states´ investment in the continued use of fossil fuels, with the purpose to finance the liability scheme.

The elimination of subsidies for fossil fuel production, the end of public financing of construction of new extraction locations, increased taxes or royalties on fossil fuel production, implementation of carbon

[276] International Council on Human Rights Policy (n 223) 36-40; Sam Adelman, 'Rethinking human rights: the impact of climate change on the dominant discourse' in Stephen Humphreys (ed), Human Rights and Climate Change (CUP 2009) 159-79.

[277] Julia Dehm, 'Post Paris reflections: fossil fuels, human rights and the need to excavate new ideas for climate justice' (2017) 8(2) Journal of Human Rights and the Environment 280.

[278] As it is the area where a majority of emissions come from, but where at the same time, solutions for green alternatives, as solar and wind energy, are more vastly developed, presenting themselves as a viable source of energy.

pricing initiatives,[279] taxes imposed to air and maritime transportation companies (especially ones used for purposes other than transport of goods), taxes on the purchase of luxury items that entail the emission of a high quantity of GHG emissions in their production or use, or stricter policies for highly polluting industries such as meat and textile are just some of the measures states ought to implement in order to mitigate GHG emissions whilst ensuring financing.

At a national level, one of the main objectives of the scheme would be to phase out fossil fuels, enforcing on states the obligation to seek remedies from companies known as the carbon majors, as there is no ethical justification to keep endorsing these businesses.[280]

States are responsible for seeking remedy, in name of their citizens, from companies that have not complied with obligations to reduce GHG emissions, as the attained economic benefits due to the lack of compliance can be considered a form of unjust enrichment.[281]

At the same time, states have the obligation to adopt frameworks that protect people from and respond to environmental harms, imposing policies designed to reward the option for green technologies, renewable energy investments and consumption of sustainable goods, while sanctioning behaviours leading to health hazards and high polluting consumerist habits, focusing on the decrease of the wealth gap and other measures that protect vulnerable groups. This is because, as seen beforehand, the extremely rich have habits that are highly polluting, while the most vulnerable to environmental harm are the already at risk communities.[282]

The implementation of such a mechanism would entail the approval of international law instruments regulating the scheme. These instruments should not be seen as imposing new obligations on states, but instead ways of effectively implementing international obligations assumed by states, namely under the UNFCCC and extraterritorial human rights obligations.[283]

[279] For a comprehensive analysis on the implementation of carbon pricing initiatives and its revenue raising possibilities see World Bank Group, 'States and Trends of Carbon Pricing' (2019) and World Bank Group, 'Decarbonizing Development: Three steps to a zero-Carbon Future' (2015).

[280] These 90 companies are responsible for 63% of GHGs cumulative emissions, 50 of them being investor owned, 31 state owned and 9 nation-state producers.

[281] Daniel A Farber, 'Adapting to Climate Change: Who Should Pay?' (2007) 23(1) Journal of Land Use & Environmental Law 1.

[282] International Bar Association (n 225) 127-37.

[283] Cullet, Differential Treatment in International Environmental Law (n 226) 107-21.

However, the time to take meaningful climate action is shrinking, meaning that not too much time can be lost with bureaucracies. Therefore, existing structures dealing with climate change ought to be used and improved in order to avoid the unnecessary loss of time we do not have.

The UNFCCC is currently the most appropriate instrument to tackle climate change. It is based on principles defended beforehand as equity, procedural and distributive justice, CBDR and the precautionary principle. The convention emphasises the difference between groups as developed, developing and least developed countries and imposes the necessity to create policy measures that take into account the circumstances of the most vulnerable groups. [284]

Even though the UNFCCC provides a theoretically solid regime to regulate climate change, its implementation has not achieved its potential, even with the complement of the Kyoto Protocol and the approval of the Paris Agreement, and it has been unable to reach the goal of a decline or even a stabilisation of GHG emissions.[285]

Article 4(3) of the UNFCCC predicts the creation of financial mechanisms that provide new and additional resources to help developing countries meet the aims of the convention. This provision was realised partially with the creation of the Green Climate Fund (GCF).

However, although there are many other existing international public financing initiatives,[286] both under and outside the control of the UNFCCC´s mechanisms, currently none of them provide a strong single umbrella body that generates an adequate amount of available resources, with clear instructions for receiving countries on how to access it or with programmatic approaches and strong transparency measures.[287]

A mechanism as the one proposed could present itself as the single umbrella body, supported by strong ethical human rights claims, that creates more significant and consistent revenues to be used in adaptation or technology leapfrogging projects, improving the existing GCF. As

[284] M J Mace, 'Adaptation under the United Nations Framework Convention on Climate Change: the International Legal Framework' in W Neil Adger and others (eds), Fairness in Adaptation to Climate Change (MIT Press 2006) 53.

[285] Adelman (n 276) 162-167; African Partnership Forum, 'Financing Climate Change Adaptation and Mitigation in Africa: Key Issues and Options for Policy-makers and Negotiators' (ECA-CEA 2009).

[286] Such as the Global Environment Facility, the Kyoto Protocol´s Adaptation Fund and the Clean Development Mechanisms.

[287] African Partnership Forum (n 285).

highlighted, the upgrading of already existent institutions facilitates the implementation of mechanisms, with the aim to contour the excessively bureaucratic burdens of international climate financing.[288]

The use of the UNFCCC as the main framework regulating the scheme and not the Paris Agreement is intentional due to the proved inadequacy of the agreement and the fact that one of the highest GHGs emitting states pulled out of the scheme.[289] Despite the importance of the fact that states were able to approve an agreement such as the Paris one, the agreement itself is not meaningful enough to guide the urgent climate action necessary to comply with its own objectives.[290]

The Paris Agreement does not protect the rights of the world´s most vulnerable communities sufficiently, offers no binding guarantees for a liveable future and allows the most responsible states to avoid adequate shares of contribution. Most importantly, the post agreement commitments by states show a wide gap with the agreements objectives, allowing for the consolidation of market-led solutions to tackle climate change and putting forward the implementation of an emissions trading scheme as a key mitigation strategy.[291]

Shifting the focus to a more general instrument, such as the UNFCCC, allows its use as a solid legal basis justifying the scheme (since the convention predicts the creation of financing schemes to assist countries in achieving its objectives), but does not restrict it to a specific type of policy and action, which enables policy makers to drift away from already implemented mechanisms that have proved to not be effective.

The UNFCCC is the most important and inclusive instrument regulating cooperative international action addressing climate change, while defending the assignment of burdens associated with mitigation and adaptation in ways that concretise ideals of environmental justice, especially distributive one, as shown by the consecration of CBDR as one of the convention´s guiding principles. This burden assignment would ideally be made in accordance with remedial international liability criteria, as the proposed scheme predicts.[292]

[288] African Partnership Forum (n 285); Stephen H Schneider and Janica Lane, 'Dangers and Thresholds in Climate Change and the Implications for Justice' in W Neil Adger and others (eds), Fairness in Adaptation to Climate Change (MIT Press 2006) 42-44.
[289] The highest emitter if per capita and not absolute emissions are taken into account.
[290] Dehm (n 277) 281-86.
[291] ibid.
[292] Vanderheiden (n 252) 31-34.

Additionally, as said beforehand, the framing of the mechanism under the UNFCCC grants the opportunity of taking advantage of already existing instruments, mechanisms and even facilities, making the scheme more practical and cost effective.

In fact, the resources gathered through the liability scheme into a global pool would afterwards ideally be distributed recurring to the GCF. Using the GCF allows the scheme to take advantage of the existent structures of the fund, which has the aim to gradually become the primary source of international public climate finance while improving its reach and functionality.[293]

5.3 Allocation of resources and the Green Climate Fund

The proposed scheme aims to have the double function of pushing for the reduction of GHG emissions and financing the needed adaptation measures to be adopted by countries that are more vulnerable to the impacts of climate change. The financing of proactive adaptation measures, instead of paying residual damages, has the advantage of eliminating the difficulties in attributing particular damages to anthropogenic climate change, while concretising the right to not be harmed, resulting in the creation of cost effective solutions and ensuring the fulfilment of human rights.[294]

The need of financing for adaptation is an inevitability and liability of emitters presents itself as the most just and ethical way to obtain it. Financing adaptation through liability concretises the principle of polluter pays and CBDR, while serving social goals such as the reduction of emissions, implementation of distributive justice (since in the international sphere the beneficiaries of the scheme have less economic capabilities than the contributors to it) and accountability of the most responsible through the spread of costs inside each state.[295]

Simultaneously, the attainment of resources through responsibility creates a good and secure basis for considerable monetary quantities that can be saved and made use of according to future needs.[296]

[293] European Centre for Development Policy Management, 'Finance to adapt: Making climate funding work for agriculture at the local level' Briefing note no 111 by Bethany Tietjen, Francesco Rampa and Hanne Knaepen (2019).

[294] Baer (n 225) 137-39; Burkett, 'Rehabilitation' (n 274) 115-18.

[295] Farber (n 281) 29-33.

[296] At least as a short to medium term solution.

The funds gathered ought to be distributed according to the functioning of the GCF, by financing projects that assist developing countries in reducing their own GHG emissions[297] and that enhance their capabilities to respond to damaging effects of climate change.[298]

The GCF was first established under the Cancún Agreement in 2010, started receiving funding in 2014 and financed its first project in 2015, corresponding to an operating entity of the financial mechanism of the UNFCC. The main objective of the fund is to:

> promote the paradigm shift towards low-emission and climate-resilient development pathways by providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change, taking into account the needs of those developing countries particularly vulnerable to the adverse effects of climate change.[299]

Contributions to the fund are voluntarily made by public entities (countries, regions and one city) and private actors (through the private sector facility that offers advantageous financial instruments for private investors).[300]

The resources are then distributed according to the principle of country ownership. Using a targeted bottom up process, this principle aims to align the distribution of funding with the needs expressed and prioritised by the country that will receive the funding, including through a direct access modality, paying special attention to the needs of highly vulnerable societies.[301]

Even though the framework of the GCF aims to achieve environmental justice purposes, working in favour of developing countries, its implementation has failed to increase the use of its direct access modality, to accredit smaller organisations, fund smaller-scale projects and fund adaptation projects in equal amounts as mitigation

[297] For example by financing the implementation of technology leapfrogging projects, guaranteeing that the right to development is concretised referring to sustainable infrastructures and investment, the implementation of measures decarbonising electricity production or improving its efficiency or by financing projects that preserve or increase carbon sinks or that consume GHG in the atmosphere (especially forests).

[298] Green Climate Fund, 'About us: Overview' <www.greenclimate.fund/about> accessed 25 June 2020.

[299] Para 2 of the Governing Instrument for the Green Climate Fund (11 December 2011)

[300] Green Climate Fund (n 298).

[301] ibid; Jonas Bertilsson and Håkan Thörn, 'Discourses on transformational change and paradigm shift in the Green Climate Fund: the divide over financializations and country ownership' (2020) Environmental Politics, Routledge Taylor & Francisc Group, Open Access article

ones. This results in ineffective financing of the needs of the most vulnerable and not taking into account its guiding principle of country ownership, despite the increase of resources available.[302]

To truly work as an environmental justice instrument, with improved serving of the purposes of the proposed liability scheme, the GCF ought to invest in more adaptation projects, prioritise essential sectors as agriculture and food, facilitate access to local actors, especially the ones working with poor, rural communities, that are disproportionately affected by climate change and ensure that African and Pacific Island governments integrate all decisions of climate adaptation planning in a more effective manner, realising procedural justice imperatives.[303]

Associating the GCF with the proposed liability mechanism would overcome some of the criticisms posed to the fund regarding the lack of explicit criteria imposing national remedial liability, which leaves the fund dependant on voluntary contributions, with no secure and exact way of funding, drifting away from the ruling principles of the UNFCCC, most importantly CBDR.[304]

At the same time, the emphasis given to the respect, protection and fulfilment of human rights, namely through the implementation of ETOs of states, that would be explicit in the instruments regulating the scheme and setting its legal foundations would serve as guidance for the allocation of resources, improving the GCF´s current financing activities and ensuring that funds benefit those whose human rights are more at risk.

[302] For an overview of projects financed by the GCF see European Centre for Development Policy Management (n 293) 2-9 and the GCF´s portfolio of August 2019; Bertilsson and Thörn (n 301).

[303] ibid 10-14.

[304] Vanderheiden (n 252) 31-34.

CONCLUSION

Climate change is one of the biggest challenges that humanity is currently facing, threatening every aspect of life, in a web of intricacies that makes it almost too complex to understand and apparently impossible to solve.

Climate change is also one of the main issues pressing for the adaptation of human rights law to a globalised world, imposing a shift from state centred views in human rights. Climate change, especially the suffering of transboundary harm associated to it, exposes the extraterritorial nature of the causation of human rights violations in today´s society and showcases the shortcomings of human rights laws in dealing with matters as such.

The challenge is global and affects everyone. Therefore, only solutions that are adopted by the international community as a whole, considering global impacts, can efficiently contribute to tackle it.

However, the effects of climate change are not felt equally by everyone, were not caused equally by everyone and cannot be combated equally by everyone. Ignoring the disproportionality between impacts, contribution and capabilities is equal to looking away from the injustice of the environmental crisis, allowing for the impunity of the higher contributors and leaving the most vulnerable powerless.

Therefore, only taking into account the environmental justice implications of climate change will determine that the adoption of measures tackling it are inherently fair and contribute to a truly sustainable development.

As I have argued, these measures can be achieved by recurring to the notion of ETOs of states, within the human rights framework, due to the immense impact that climate change has on the enjoyment of human rights.

This thesis aimed to present arguments for the implementation of these ETOs, demonstrating that they are in line with international commitments assumed by states, justified under current human rights law and international environmental law and how they constitute a consequence of legal, ethical and fairness imperatives.

ETOs of states are one of the most effective strategies to combat eco-destruction and halt climate change, without burdening the world´s most vulnerable, while ensuring that responsibility is attributed to the ones that have been causing the threats to the enjoyment of human rights, provoked by climate change.

Additionally, a way of operationalising these ETOs was presented, through the form of a liability scheme for the transboundary harm caused by GHG emissions. The liability scheme could be easily operationalised by implementing consecrated principles, following existent examples and by integrating it in already existing institutions, for purposes such as practicality, cost effectiveness and time saving.

The scheme would function as both a mitigation measure, for the states that contribute the most to climate change, by producing a higher amount of GHG emissions, since they would be the ones obliged to contribute to the scheme and as an adaptation measure, for the states suffering the most from the impacts of climate change, since they would receive the revenues from the scheme, to be used in adaptation measures.

However, when it comes to taking climate action the same problem has been arising since effects of climate change have started to be known: lack of political will. The pertaining high dependency and addiction of our society on carbon has been preventing meaningful change and governmental ties with the carbon lobbies have yet to be completely cut.

In the beginning of writing this thesis, I hoped that, in the near future, the evidence of the disastrous impacts of climate change would be enough to urge states, especially the most responsible states to assume responsibility, or at least take action to change their ways.

Throughout the writing process, the *status quo* suffered an impact with the outbreak of the coronavirus pandemic. The recovery from this tragedy will be vital for the course of environmental action and justice since carbon prices have been at an all-time low and an economic crisis will need to be tackled.

States can either choose to be on the right side of history and 'kill two birds with one stone', by restructuring the economy and recovering it in an environmentally focused way, definitely phasing out fossil fuels,

finally investing significantly in green jobs and industries and diminishing the injustice of a system of global capitalism and consumerism, or instead cut even more our chances of climate stability and human rights enjoyment, by investing in fast production, with complete disregard for environmental consequences and justice concerns.

More than ever, when it comes to the possibility of avoiding climate disaster and the creation of an unliveable environment, uncertain times are ahead of us, meaning that now, more than ever, the discourse on the necessity of environmental justice must also be at the forefront of political discussion and civic engagement.

BIBLIOGRAPHY

BOOKS AND ARTICLES

Adelman S, 'Rethinking human rights: the impact of climate change on the dominant discourse' in Humphreys S (ed), *Human Rights and Climate Change* (CUP 2009)

Adger WN, Paavola J and Huq S, 'Multifaceted Justice in Adaptation to Climate Change' in Adger WN and others (eds), *Fairness in Adaptation to Climate Change* (MIT Press 2006)

— 'Towards Justice in Adaptation to Climate Change' in Adger WN and others (eds), *Fairness in Adaptation to Climate Change* (MIT Press 2006)

Atapattu S, 'The Right to a Healthy Environment and Climate Change: Mismatch or Harmony' in Knox JH and Pejan R (eds), *The Human Right to a Healthy Environment* (OUP 2018)

Baer P, 'Adaptation to Climate Change: Who pays whom?' in Gardiner SM and others (eds), *Climate Ethics: Essential Readings* (OUP 2010)

Baxi U, 'Towards a climate change justice theory?' (2016) 7(1) Journal of Human Rights and the Environment 7

Bertilsson J and Thörn H, 'Discourses on transformational change and paradigm shift in the Green Climate Fund: the divide over financializations and country ownership' (2020) Environmental Politics, Routledge Taylor & Francisc Group, Open Access article

Bodansky D, 'Climate Change and Human Rights: Unpacking the Issues' (2010) 38 Georgia Journal of International and Comparative Law 511

Boyd DR, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in Knox JH and Pejan R (eds), *The Human Right to a Healthy Environment* (OUP 2018)

Burkett M, 'Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism' (2008) 56 Buffalo Law Review 170

— 'Rehabilitation: A proposal for a Climate Compensation Mechanism for Small Island States' (2015) 13(1) Santa Clara Journal of International Law 81

Caney S, 'Climate change, human rights and moral thresholds' in Humphreys S (eds), *Human Rights and Climate Change* (CUP 2009)
Chancel L and Piketty T, 'Carbon and inequality: from Kyoto to Paris' (Paris School of Economics 2015)
Cook J and others, 'Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming' (2016) 11(4) Environmental Research Letters
Cullet P, 'The Kyoto Protocol and vulnerability: human rights and equity dimensions' in Humphreys S (ed), *Human Rights and Climate Change* (CUP 2009)
— *Differential Treatment in International Environmental Law* (Routledge, Taylor & Francis Group 2016)
De Schutter O and others, 'Commentary to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084
Dehm J, 'Post Paris reflections: fossil fuels, human rights and the need to excavate new ideas for climate justice' (2017) 8(2) Journal of Human Rights and the Environment 280
Dow K, Kasperson RE and Bohn M, 'Exploring the Social Justice Implications of Adaptation and Vulnerability' in Adger WN and others (eds), *Fairness in Adaptation to Climate Change* (MIT Press 2006)
Farber DA, 'Adapting to Climate Change: Who Should Pay?' (2007) 23(1) Journal of Land Use & Environmental Law 1
Gearty C, 'Do human rights help or hinder environmental protection?' (2010) 1(1) Journal of Human Rights and the Environment 7
Gonzalez C, 'Environmental Justice, Human Rights and the Global South' (2015) 13 Santa Clara Journal of International Law 151
Hall MJ and Weiss DC, 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law' (2012) 37 Yale Journal of International Law 309
Humphreys S, 'Conceiving justice: articulating common causes in distinct regimes' in Humphreys S (ed), *Human Rights and Climate Change* (CUP 2009)
Jegede AO, 'Indigenous Communities Displaced by Climate Change and Extraterritorial Application of States´ Obligations in Africa' in Chemui L and Soboka BT (eds), *Extraterritorial Human Rights Obligations in Africa, an African perspective* (Intersentia 2018)
Khalfan A, 'Accountability Mechanisms' in Langford M and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012)
— 'Division of Responsibility Amongst States' in Langford M and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012)
Knox JH, 'Climate change and human rights law' (2009) 50(1) Virginia Journal of International Law 163
— 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477

— 'Diagonal Environmental Rights' in Gibney M and Skogly S (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010)
— and Pejan R (eds), *The Human Right to a Healthy Environment* (CUP 2018)
— and Pejan R, 'Introduction' in Knox JH and Pejan R (eds), *The Human Right to a Healthy Environment* (OUP 2018)
Kuehn RR, 'A Taxonomy of Environmental Justice' (2000) 30 Environmental Law Reporter 10681
Langford M, Coomans F and Gómez Isa F, 'Extraterritorial Duties in International Law' in Langford M and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012)
Limon M, 'Human Rights and Climate Change; Constructing a case for political action' (2009) 33 Harvard Environmental Law Review 439
— 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) 38(3) Georgia Journal of International and Comparative Law 543
Mace MJ, 'Adaptation under the United Nations Framework Convention on Climate Change: the International Legal Framework' in Adger WN and others (eds), *Fairness in Adaptation to Climate Change* (MIT Press 2006)
Morton T, *Hyperobjects: Philosophy and Ecology after the End of the World* (University of Minnesota Press 2013)
Nadal C, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a "Pillar" of Empowerment' (2008) 10 Environmental Law Review
Rodriguez-Garanito C, 'A Human Right to a Healthy Environment? Moral, legal and empirical considerations' in Knox JH and Pejan R (eds), *The Human Right to a Healthy Environment* (OUP 2018)
Schneider SH and Lane J, 'Dangers and Thresholds in Climate Change and the Implications for Justice' in Adger WN and others (eds), *Fairness in Adaptation to Climate Change* (MIT Press 2006)
Shelton D, 'Equitable utilization of the atmosphere: a rights-based approach to climate change' in Humphreys S (ed), *Human Rights and Climate Change* (CUP 2009)
Skogly SI and Gibney M, 'Economic Rights and Extraterritorial Obligations' in Hertel S and Minkler L (eds), *Economic Rights: Conceptual Measurement and Policy Issues* (CUP 2007)
— 'Introduction' in Gibney M and Skogly S (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010)
Solomon M, 'Deprivation, Causation and the Law of International Cooperation' in Langford M and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012)
Stillings ZL, 'Human Rights and the New Reality of Climate Change: Adaptation´s Limitations in Achieving Climate Justice' (2014) 35(3) Michigan Law Journal 637
Tedsen E and Homan G, 'Implementing the Precautionary Principle for Climate Engineering' (2013) 7(2) Carbon & Climate Law Review, Special

Issue on Climate Change Geoengineering Part 1 90
Vandenhole W and Benedek W, 'Extraterritorial Human Rights Obligations and the North-South Divide' in Langford M and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012)
Vanderheiden S, 'Justice and Climate Finance: Differentiating responsibility in the Green Climate Fund' (2015) 50(1) The International Spectator 31
Wallace-Wells D, *The uninhabitable earth: life after warming* (Tim Duggan Books 2019)

OFFICIAL DOCUMENTS

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador'(17 November 1988)
African Charter on Human and Peoples´ Rights (27 June 1981)
African Partnership Forum, 'Financing Climate Change Adaptation and Mitigation in Africa: Key Issues and Options for Policy-makers and Negotiators' (ECA-CEA 2009)
Articles on State Responsibility for Internationally Wrongful Acts (12 December 2001)
Association of Southeast Asian Nations (ASEAN), 'Human Rights Declaration' (8 August 1967)
CEDAW, 'Concluding observations on the eighth periodic report of Australia', CEDAW/C/AUS/CO/8 (25 July 2018)
Center for International Environmental Law and The Global Initiative for Economic, Social and Cultural Rights, 'States Human Right´s Obligations in the Context of Climate Change' (2019)
Charter of the United Nations (26 June 1941)
Charter of Economic Rights and Duties of States (12 December 1974)
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhaus Convention) (25 June 1998)
Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (1993)
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) (1991)
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (18 December 1979)
Convention on the Rights of the Child (CRC) (20 November 1989)
Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006)
CRC, 'Concluding observations on the combined fifth and six periodic reports to Norway', CRC/C/NOR/CO/5-6 (4 July 2018)
European Centre For Development Policy Management, 'Finance to adapt: Making climate funding work for agriculture at the local level' Briefing note no 111 by Tietjen B, Rampa F and Knaepen H (2019)

European Convention on Human Rights (4 November 1950)
Extraterritorial Obligation (ETO) Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (28 September 2011)
Governing Instrument for the Green Climate Fund (11 December 2011)
Greenpeace and the Center for International Environmental Law, 'The Maastricht Principles in Practice: Extraterritorial Obligations in the Context of Eco-destruction and Climate Change' (FIAN International for the ETO Consortium 2014)
International Bar Association, Climate Change Justice and Human Rights Task Force Report 'Achieving Justice and Human Rights in an Era of Climate Disruption' (2014)
International Covenant on Civil and Political Rights (16 December 1966)
International Covenant on Economic, Social and Cultural Rights (16 December 1966)
International Convention on Civil Liability for Oil Pollution Damage (1969)
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (21 December 1965)
International Convention on the Establishment of an International Fund for Compensation for Oil Damage (1971)
International Council on Human Rights Policy, 'Climate Change and Human Rights: A Rough Guide' (2008)
International Law Association (ILA), Committee on Legal Principles Relating to Climate Change 'Draft Articles of ILA Principles Relating to Climate Change', Resolution 2/2014 (2014)
ILC, Draft articles on prevention of transboundary harm from hazardous activities (2001)
— Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (11 August 2006)
— 'Report of the International Law Commission on the work of its fifty-eighth session' (2006)
IPCC, 'Climate Change 2014 Synthesis Report Summary for Policymakers' (2014) <www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf> accessed 25 February 2020
— 'Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' (2018)
Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997)
Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007)
OECD, 'Recommendation of the Council on Principles concerning Transfrontier Pollution' (14 November 1974)

OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (15 January 2009) UN Doc A/HRC/10/61
— 'Report of the United Nations High Commissioner on the Analytical Study on the Relationship Between Human Rights and the Environment' (16 January 2011) UN Doc A/HRC/19/34
— 'Understanding Human Rights and Climate Change' (27 November 2015) <www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> accessed 6 March 2020
— 'Summary of Recommended Actions on Human Rights and Climate Change from OHCHR Expert Meeting of 6 – 7 October' (7 October 2016) <www.ohchr.org/Documents/Issues/ClimateChange/EM2016/SummaryRecommendations.docx> accessed 7 March 2020
Oslo Principles Drafting Group, 'Oslo Principles Commentary' (2015)
Oslo Principles on Global Climate Change Obligations (1 March 2015)
Oxfam, 'Extreme Carbon Inequality: Why the Paris climate deal must put the poorest, lowest emitting and most vulnerable people first' (2 December 2015)
Paris Convention on Third Party Liability in the Field of Nuclear Energy (16 November 1982)
Rio Declaration on Environment and Development (14 June 1992)
The Stockholm Declaration on the Human Environment (16 June 1972)
UN Framework Convention on Climate Change (1992)
UN 'Paris Agreement' (2015)
UN Environment Programme, 'Executive Summary – Emissions Gap Report 2019' (November 2019) <www.unenvironment.org/resources/emissions-gap-report-2019> accessed 27 February 2020
UN GA, 'Report of the Special Rapporteur on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (15 July 2019) UN Doc A/74/161
UN HRC, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox' (2013) UN Doc A/HRC/25/53 <http://srenvironment.org/sites/default/files/Reports/2018/A-HRC-25-53-clean-final-version-1-1.doc> accessed 5 March 2020
— 'Resolution on Human Rights and the Environment' (14 April 2014) UN Doc A/HRC/Res/25/21
— 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (1 February 2016) UN Doc A/HRC/31/52
— 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59
— 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, on Climate Change and Poverty' (2019) UN A/HRC/41/39
— 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (15 July 2019) UN Doc A/74/161

UNEP, 'Compendium on Human Rights and the Environment, Selected international legal materials and cases' (2014) <http://wedocs.unep.org/bitstream/handle/20.500.11822/9943/UNEP_Compendium_HRE.pdf?sequence=1&isAllowed=y> accessed 6 March 2020
The United Nations Framework Convention on Climate Change (9 May 1992)
UN Millennium Declaration, A/RES/55/2 (18 September 2000)
Universal Declaration of Human Rights (10 December 1948)
Vienna Convention on Civil Liability for Nuclear Damage (12 September 1997)
World Bank, *World Development Report 2010: Development and Climate Change* (The International Bank for Reconstruction and Development / The World Bank 2010) <https://openknowledge.worldbank.org/bitstream/handle/10986/4387/530770WDR2010.pdf?sequence=1&isAllowed=y> accessed 29 March 2020
World Bank Group, 'Poverty and Climate Change: Reducing the vulnerability of the poor through adaptation' (2012)
— 'Decarbonizing Development: Three Steps to a Zero-Carbon Future' (2015)
— 'Shock Waves: Managing the Impacts of Climate Change on Poverty' (2016)
— 'Groundswell: Preparing for Internal Climate Migration' (19 March 2018)
— 'States and Trends of Carbon Pricing' (2019)
World Charter for Nature (28 October 1982)

Case law

Acción de tutela instaurada por Orlando José Morales Ramos, contra la Sociedad Drummond Ltda Decision T-154-2013 (Constitutional Court of Colombia, Sixth Chamber of Appeals 2013)
Advisory opinion OC-23/17 (IACtHR 2017)
Asghar Leghari v Federation of Pakistan WP No 25501/2015 (The Lahore High Court 2015)
Beatriz Silvia Mendoza v Argentina M 1569 (Supreme Court of Argentina 2008)
Budayeva v Russia App no 15330/02 (ECtHR 2008)
Case Concerning Oil Platforms (Islamic Republic of Iran vs. United States of America) General List No 90 (ICJ 2003)
Corfu Channel case (United Kingdom v Albania) Assessment of Compensation, 15 XII 49 (ICJ 1949)
Di Sarno v Italy App no 30765/08 (ECtHR 2012)
Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation, and Environment, Mpumalanga Province and Others Case No CCT 67/06 (Constitutional Court of South Africa 2007)
Gloucester Resources Limited v Minister for Planning 2019 NSWLEC 7 (Land and Environment Court of New South Wales 2019)
López Ostra v Spain App no 16798/90 (ECtHR 1999)
Öneryildiz v Turkey App no 48939/99 (ECtHR 2004)
Tătar v Romania App no 67021/01 (ECtHR 2009)

Trail Smelter (United States, Canada), International Arbitration (16 April 1938 and 11 March 1941)
Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria Communication No 155/96 (African Commission on Human and People's Rights 2002)
Shelda Zia v WAPDA PLD 1994 SC693 (Supreme Court of Pakistan 1994)
Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure) HA ZA 13-11396 C/09/456689 (The Hague District Court, 2015)
Vellore Citizens' Welfare Forum v Union of India Writ Pet No 914 of 1991 (Supreme Court of India 1996)

INTERNET SOURCES

American Society of International Law, 'Human Rights Speaker Series: The Extraterritorial Obligations of States' with De Schutter O, McInerney Lankford S and Evans J (2016) <www.youtube.com/watch?v=VOdVadvxOOA&t=1407s> accessed 17 April 2020
Carrington D, '"Climate apartheid": UN expert says human rights may not survive' (*The Guardian*, 25 June 2019) <www.theguardian.com/environment/2019/jun/25/climate-apartheid-united-nations-expert-says-human-rights-may-not-survive-crisis?CMP=Share_iOSApp_Other> accessed 23 March 2020
Green Climate Fund, 'About us: Overview' < www.greenclimate.fund/about> accessed 25 June 2020
IPOC Funds, 'About us: Funds Overview' <https://iopcfunds.org/about-us/> accessed 19 June 2020
— 'About us: Legal Framework' <https://iopcfunds.org/about-us/legal-framework/> accessed 19 June 2020
World Nuclear Association, 'Liability for Nuclear Damage' (*World Nuclear Association*, August 2018) <www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/liability-for-nuclear-damage.aspx> accessed 20 June 2020

Global Campus of Human Rights

Monastery of San Nicolò
Riviera San Nicolò, 26
I-30126 Venice Lido (Italy)

www.gchumanrights.org

Global Campus Europe.
The European Master's Programme in Human Rights and Democratisation (EMA)

EMA is a one-year intensive master's programme with participation of 41 prestigious universities representing all EU Member States. It is based on an action- and policy-oriented approach to learning and combines legal, political, historical, anthropological, and philosophical perspectives on the study of human rights and democracy with targeted skill-building activities. As a measure of its success, EMA has served as a model of inspiration for the establishment of EU-sponsored master's programmes in several other regions of the world, all of which are being coordinated and cooperate in the framework of the Global Campus of Human Rights.

The Global Campus Europe - EMA Awarded Theses

Each year the EMA Council of Directors selects five theses, which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, potential usefulness in raising awareness about neglected issues and capacity for contributing to the promotion of the values underlying human rights and democracy.

The present thesis - *Environmental Justice, Climate Change and Human Rights. Different Contributions, Different Consequences and Different Capabilities Should Equal Different Human Rights Obligations* written by **Mariana Catalão** and supervised by Jan Klabbers, University of Helsinki - was submitted in partial fulfillment of the requirements for the European Master's Programme in Human Rights and Democratisation (EMA), coordinated by Global Campus Europe.

This document has been produced with the financial assistance of the European Union and as part of the Global Campus Europe, coordinated by Global Campus of Human Rights. The contents of this document are the sole responsibility of the authors and can under no circumstances be regarded as reflecting the position of the European Union or of Global Campus of Human Rights

2020

Environmental Justice, Climate Change and Human Rights. Different Contributions, Different Consequences and Different Capabilities Should Equal Different Human Rights Obligations

Catalão, Mariana : Seixas Lopes Nunes

Global Campus of Human Rights