Suing States for their Responsibility for Climate Change-Related Damage Caused by Non-State Actors in the European Context

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SUMMARY

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1. Introduction

This paper analyses the contribution of national and regional European courts' rulings in climate-related State responsibility claims to bridge the gap of weak traditional international climate change law covering the responsibility and liability for climate-related damage caused by NSAs. This paper answers the question: *to what extent do domestic and regional courts' decisions contribute to establish responsibility and liability of States for climate change damage caused by NSAs in the European context?* It analyses whether national and regional courts' decisions represent a State practice in curbing NSAs harmful climate activities. It assesses whether these decisions contribute to general principles of law as a source of international law to curb NSAs' harmful climate activities.

The paper evaluates whether climate litigation can be an effective climate policy to mitigate climate change and GHGs emissions and whether such litigation can establish an effective surrogate for the governance models or the non-binding international climate change agreements, whether before the Paris Agreement, or thereafter.[1]

No courts specialize in climate change damages. Claimants resort to courts that have competence, *inter alia* in human rights disputes, to resolve claims of climate damages as a possible surrogate for absent specialized courts. The logic is that the adverse climate change outcomes impact on the enjoyment of human rights, such as the right to life, privacy and a clean environment. The relevance of the human rights' argument recently has gained the attention of the international community. Thus, the UNFCCC States Parties included human rights into the Paris Agreement in 2015 as the first agreement in international law to set forth human rights in an instrument related to handling climate change issues; albeit only in its preamble.

Recent lawsuits filed against a State for its responsibility for climate damages reveal that the human rights argument has been raised in most (if not all) of these cases.[2] The human rights argument has been present in regional courts decisions, such as the European Court of Human Rights (ECtHR) (i.e., Duarte Agostinho and Others v. Portugal and Others).[3] Despite the fact that NSAs (e.g., corporate businesses) are considered to be the carbon majors and the main

1 Climate litigation is used here to refer to the judicial proceedings initiated against States or non-State actors aimed at abating the GHGs emissions and averting their consequences by changing relevant laws and policies. See, for example, Carlarne (2021) and Maljean-Dubois, (2021)

2 Paiement, (2020), p. 123.

3 For further details about the effects of climate change on children's rights, see Ruppel-Schlichting/ /Human (2013).

perpetrators, the responsibility of States for climate damages is the major subject of these claims and justified by the position of the State as guarantor for human rights. This paper argues that the human rights' approach can advance the claims against a State for its responsibility for climate damages caused by NSAs before national courts and regional legal bodies in the European context.

To test this argument and answer the research question, section 2 elaborates the relationship between climate change and human rights. Section 3 then tackles the direct climate litigation against NSAs and the justification to focus on the responsibility of States. Section 4 analyses the responsibility claims against States for climate harmful activities of the NSAs as a precursor to section 5 highlighting the rights-based obligations on States to hold these harmful activities under the European system of human rights. Section 6 reflects on States' climate obligations regarding NSAs activities, as read in the domestic courts' rulings in three European Countries. After that, section 7 discusses the limits of State's responsibility for NSAs in the case law of the domestic and regional human rights bodies. The article concludes with remarks in section 8.

2. Climate Change and Human Rights

Until recently, both climate change law and human rights law had their own distinct subject of study. However, recent developments have enhanced their interdependency. The IPCC reports reveal the dire impacts that increasing global warmings have on the enjoyment of human rights.[4] A statement on 9 September 2019 of Michelle Bachelet, the United Nations High Commissioner for Human Rights, declared:

> "[c]limate change threatens the effective enjoyment of a range of human rights including those to life, water and sanitation, food, health, housing, self-determination, culture and development. States have a human rights obligation to prevent the foreseeable adverse effects of climate change and ensure that those affected by it, particularly those in vulnerable situations, have access to effective remedies [*sic*] to enjoy lives of human dignity."[5]

State obligations, besides the responsibilities of NSAs, have been strengthened in a Report of the Special Rapporteur on Human Rights and the Environment

4 Feria-Tinta (2021), p. 311.

5 United Nations Human Rights: Office of the High Commissioner, *OHCHR and climate change.* Available at: https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx (accessed: December 24, 2021).

– David R. Boyd.[6] The report mentions that "[b]usinesses must adopt human rights policies, conduct human rights due diligence, remedy human rights violations for which they are directly responsible, and work to influence other actors to respect human rights where relationships of leverage exist."[7] Moreover, the interconnectedness between human rights and environmental protection is also key to the EU proposal for a directive on Corporate Sustainability Due Diligence.[8] This report sheds more light on States' responsibility, including of NSAs' activities. According to the Special Rapporteur, "States must not violate the right to a safe climate through their own actions; must protect that right from being violated by third parties, especially businesses; and must establish, implement and enforce laws, policies and programmes to fulfil that right."[9]

The climate change impacts have triggered scholars to write about a new generation of human rights besides the fundamental classical rights set forth in the human rights laws. This is nominated as the rights to environmentally sustainable development.[10] More recently, on July 28, 2022, the UNGA adopted a resolution on the human rights to a clean, healthy and sustainable environment.[11] This paper is based on the premise that climate change hurdles the enjoyment of all types (generations) of human rights,[12] not only the right to sustainable development. In international climate change law, the Paris Agreement is the first agreement that strengthens the States' obligation to respect and protect human rights[13] and promotes the linkage between human rights and climate change.[14]

Given the shaky and soft nature of international legal agreements related to climate change, climate litigation has gradually crystallised new human rights applications to this field. This incremental role of climate litigation is prominent at domestic levels before national courts.[15] This paper conducts a multi-case study analysis using human rights approach[16] at the domestic and regional judicial levels in the European context to understand the State responsibility for climate

6 UNGA (2019).

7 *Ibid*. p. 32, para. 71.

8 European Commission, 2022. Proposal for a directive of the European parliament and of the council on corporate sustainability due diligence and amending directive (Eu) 2019/1937. Doc. 52022PC0071.

9 UNGA (2019), p. 30 para. 65.

10 Quirico (2018), p. 204.

11 UNGA (2022).

12 This paper is premised on the indivisibility of human rights, and that climate change affects all types of human rights. For further details about the indivisibility of human rights, see Whelan (2015).

13 Beauregard, Carlson, Robinson, Cobb, Patton (2021), p. 653.

14 *Ibid*. p. 653.

15 Robinson, Carlson, (2021), pp. 1834-1835.

16 This approach has previously been used in other studies. Cf. Beauregard, Carlson, Robinson, Cobb, Patton (2021).

change considering its impact on human rights and how this relationship can be construed.

There are two possible types of defendants in climate change damage-related lawsuits where the subject is the adverse impact that climate change has on human rights.[17] The first type of defendants is that of States; a type referred to as "high-profile" cases or "strategic public climate litigation."[18] The second type of litigation is against NSAs (e.g., corporations of fossil fuel, cement, automobile and industrial production). This type is denominated as "low-profile" cases or "strategic private climate litigation."[19] The remaining sections of this paper focus on the first type. However, first, there is an overview of the second type of defendants (NSAs) in the next section.

3. Litigating NSAs for their Climate Harmful Activities

Climate litigation against NSAs (e.g., gas, oil and electric corporations) aims to influence their behaviour and moderate their activities to be climate friendly. The claims of the plaintiffs in such cases are based on the premise that the activities and the emissions of these corporations have contributed to exacerbating the harmful impacts of the extreme weather events.[20] These climate lawsuits generally aim to affect the behaviour of these NSAs by seeking compensation for the damage they incur.[21] Such claims are institutionalized in their violation of fundamental climate-related rights, such as the right to life, food, health, "safe and healthy environment."[22] Examples are the *Comer v. Murphy Oil* and *Kivalina v. ExxonMobil* in the U.S. These claimants complained that the activities of these energy corporations, through their GHGs emissions, contributed to intensifying and worsening the dire and harmful impacts of Hurricane Katrina (in the Comer Case). Likewise, the plaintiffs in the Kivalina case argued that the GHGs emissions of the energy corporations participated in the destructive climate change impacts on Kivalina, which range from coastal erosion to ice melting and the submergence of their village and to their "displacement and relocation."[23] Traditionally, the destiny of these claims was doomed to failure in the procedural part

17 Doelle, Seck (2020), p. 8.

18 Ganguly, Setzer, Heyvaert (2018), p. 843.

19 *Ibid*.

20 *Ibid*. p. 844.

21 *Ibid*.

22 Kanalan (2016), p. 424.

23 Ganguly, Setzer, Heyvaert (2018), p. 847.

(such as on standing and jurisdiction) and did not transcend to the merit stage of the case (such as the damage caused).[24]

Recently, in May 2021, the judgement of the Hague District Court on the case (*Milieudefensie and others v. Royal Dutch Shell plc)* followed a different pathway by ascertaining that Shell has committed, not only flagrant human rights violations, but also, as indicated in the United Nations Environment Programme, massive destruction of the environment.[25] As such, the Dutch Court ordered Shell group to reduce its CO_2 emissions by 45% by 2030, compared to 2019 levels.[26] This is the first precedent in which a court ruled the responsibility of a NSA to dwarf its CO_2 emissions with enforceable mitigation targets over and above that targets set by the current "cap-and-trade-regulations" and governmental climate policies.[27] The Court underpinned the responsibility of Shell Corporation based on an unwritten standard of care derived from Book 6, Section 162 of the Civil Code in the Dutch Tort Law, which is taken to encompass relevant international guidelines, standards of businesses activities and soft laws.[28] This judgement is still, at the time of writing this paper, under appeal. So, it is too early to assess how positive the pathway of litigating NSAs for their GHGs emissions is.

The international influence of the behemoths of NSAs (e.g., MNCs) is increasing globally. However, there are no international legally-binding regulations governing their conduct related to human rights or climate change compared to States.[29] There are initiatives and principles to regulate the conduct of NSAs in the specific domain of human rights and climate change. Amongst these initiatives is the United Nations Guiding Principles on Business and Human Rights (UNGP).[30] However, these initiatives and principles are perceived as soft law that

24 Ibid. p. 847.

25 Kanalan (2016), p. 425.

26 The Hague District Court Judgement, 26 May 2021, *Milieudefensie and Others v. Royal Dutch Shell plc, no.* C/09/571932/HA ZA 19-379 (English version). Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:53397 (last accessed: January 27, 2022).

27 Macchi, van Zeben (2021), p. 409.

28 The Hague District Court Judgement on the Shell Case, paras 4.2.2, 4.4.10-4.4.21.

29 Riddell (2015), p. 54.

30 The UNGP is a kind of soft instrument providing guidance for corporations to implement human rights due diligence. The UNGP has been unanimously endorsed by the United Nations' Human Rights Council of the Respect, Protect, Remedy Framework. It has been designed by professor John Ruggie. It is the first instrument of the UN Human Rights Council adopted by NSAs and multi-stakeholders other than States for the human rights due diligence representing the pluralistic nature of the international legal regulation of businesses and human rights. See Partiti (2021) p. 135.

cannot establish the responsibility of NSAs.[31] This is why, partly, this paper abandons analysing NSAs as a subject of responsibility in international law, but rather focuses on the responsibility of States (for NSAs) as the lynchpin. Amongst the justifications for this focus is that imputing responsibility and apportioning damage, in case of liability, is more likely to happen between States vs between NSAs.[32] International society is composed of a limited number of States, while it comprise of thousands of NSAs (e.g., corporations and businesses).[33] Thus, it is more doable to identify the share of each State in the GHGs emissions and, in turn, its respective share in the damage caused.[34]

A further reason for precluding the direct responsibility of NSAs in this context is explained by the substantive part pertaining the human rights. Ultimately, for reasons of lacking international legal capacity, among other things, there is no academic or legal consensus on the international responsibility of NSAs for human rights violations,[35] which likely is to include the climate-related rights. This result concurs with the desire of the home (sending) States that have concerns about new forms of liability for NSAs (e.g., MNCs) that may encounter lawsuits beyond their home States.[36] The previous reasons may explain the fact that most of the human rights-based climate change cases in Europe are directed against States.[37]

Alternatively, based on the premise that States have the obligation to protect human rights, this paper analyses whether they bear the responsibility for the GHGs emissions of the NSAs. States can be required to regulate the climate harmful activities of NSAs based on their due diligence obligation.[38] This is what is defined in the literature as "third party regulation."[39] This obligation has been

31 Conversely, the Hague District Court, in its ruling on the Shell case, decided that such soft nature of these initiatives can establish the responsibility of the Shell corporation so far as it represents a "universally endorsed content" regardless of its consent thereto. Moreover, the Court established that Shell corporation, as an NSA, incurs the responsibility to respect human rights as set forth in the ECHR and International Covenant on Civil and Political Rights (ICCPR). The compliance of Shell to these obligations is detached from the States' compliance to their relevant obligations. See the Hague District Court Judgement on the Shell case, paras. 4.4.13-4.4.15.

32 However, the responsibility and liability of corporations for environmental pollution can be established at the EU level if its proposal for a directive on Corporate Sustainability Due Diligence has been adopted. See *European Commission, 2022*. Proposal for a directive of the European parliament and of the council on corporate sustainability due diligence and amending directive (Eu) 2019/1937. *Op. cit.*

33 Quirico (2018), p. 199.

34 *Ibid*. p.199.

35 Clapham (2017), p. 1.

36 *Ibid*. p.2.

37 Spijkers, (2021), p. 240.

38 Riddell (2015), p. 65.

39 Skogly, Gibney (2002), p. 783.

provided in the United Nations (UN) Charter.[40] So, this paper focuses, in the next section, on claiming against a State for climate harmful activities caused by itself or/and by NSAs.

4. Nation State as a Subject for Responsibility Claims

The climate change-related harm lawsuits against States aim to affect public policy decisions that governments take that have implications on the climate system.[41] The plaintiffs in these cases seek attainment of 'injunctive relief' for the States' failure to manage the GHGs emissions of public projects.[42] Some cases target the judicial review of the governmental action (or inaction) and the regulatory powers of some public services that cause a climate change-related harm.[43] The judicial review of the governmental authority to regulate the GHGs emissions have an impact on the activities of NSAs. These judicial reviews are intended to assess governmental permits and licences issued for corporate activities. This may lead, in turn, to more stringent regulations and standards for providing prospective permits (e.g., reporting and disclosure) or even voiding previous licences and permits that may have climate change-related harm.[44]

Current international law is characterised by a two-direction intensive interaction between institutions of international law and domestic law and politics. On the one hand, international law is shaped 'bottom-up' by domestic political and

40 Arts.1(3) and 55 of the UN Charter 1945 established obligations on States Parties to cooperate internationally to achieve human rights.

41 As a matter of exception, there is the judgement of Paris Administrative Court, on 14 October 2021, which ordered the French State to compensate for the ecological consequences resulting from the State's failure to dwarf GHGs emissions. This judgement was established on the administrative law not on an international human rights tort-based law. The second Article of the decision provides that « *Il est enjoint au Premier ministre et aux ministres compétents de prendre toutes les mesures utiles de nature à réparer le préjudice* écologique *et prévenir l'aggravation des dommages à hauteur de la part non compensée d'émissions de gaz à effet de serre au titre du premier budget carbone, soit 15 Mt CO2eq, et sous réserve d'un ajustement au regard des données estimées du CITEPA au 31 janvier 2022. La réparation du préjudice devra* être *effective au 31 décembre 2022, au plus tard.* »
The third Article of the court decision identified the magnitude of the compensation that the State of France has to honour stipulating that « *L'État versera à l'association Oxfam France, à l'association Notre Affaire À Tous, à la Fondation pour la Nature et l'Homme et à l'association Greenpeace France, la somme de 2 000 euros chacune sur le fondement de l'Article L. 761-1 du code de justice administrative*. » See, Tribunal Administratif de Paris (France), Judgement of 14 October 2021. Associations Oxfam France, Notre Affaire à Tous, Fondation pour la Nature et l'Homme, and Greenpeace France. Nos 1904967, 1904968, 1904972, 1904976/4-1.

42 Ganguly, Setzer, Heyvaert (2018), p. 843.

43 *Ibid*. p. 843.

44 *Ibid*. p. 843.

legal choices, including the decisions of national courts.[45] On the other hand, international law affects the trajectory of the conducts of NSAs within States through 'top-down' influence on governmental regulations by strengthening, backstopping and compelling national institutions to meet their international legal obligations.[46] This, in turn, could enhance the butterfly effect of courts' ruling in one State to influence other national and international courts' decisions.[47] In other words, international institutions (i.e., courts and tribunals), in line with regional and national courts, may reinforce each other's rulings in climate change claims.

The next two sections highlight the State human rights obligations to be found in the European regional legal system of human rights, and those implied in domestic court decisions whose violation can lead also to States being liable for climate damage caused by NSAs. Since, thus far, there is no precedent on climate change decided by the European human rights bodies, this paper discusses the perspective of the regional bodies in respect of the State responsibility for NSAs' environmental harmful activities. Therefore, the scrutiny of human rights-related State climate obligations at the European regional level, especially regarding the NSAs' polluting activities, is the subject of the following section.

5. States' Obligations Regarding the NSAs Harmful Activities in the Practice of European Human Rights Bodies

This section addresses the State human rights obligations that can be enforceable in the case of NSAs' activities causing climate change-related damage. Also, it addresses human rights encroachments inflicted by NSAs' climate harmful activities that may trigger both the direct and indirect responsibility of a State, i.e., not only for its inaction, but also for the conduct of NSAs. These are discussed in light of the case law of the European Committee of Social Rights and the European Court of Human Rights.

The European Committee of Social Rights (ECSR),[48] in a complaint against Greece, established Greece's obligation according to the European Social

45 Slaughter, Burke-White (2006). p. 327.

46 *Ibid*. p. 328.

47 *Ibid*. p. 340.

48 The European Committee of Social Rights (ECSR) was established in Strasbourg, in 1965, under the auspices of the Council of Europe to monitor compliance to the 1961 European Social Charter, its 1988 additional protocol, and the revised version of the Charter in 1996. The ECSR complements the European Court of Human Rights (ECtHR) that monitors meeting the civil and political rights under the European Convention of Human Rights (ECHR). See, for further details, European Committee of Social Rights. Available at: https://ijrcenter.org/european-committee-of-social-rights-3/ (accessed: December 31, 2021).

Charter where it has a duty to regulate the polluting activities of the NSAs impeding the right to health.[49] Despite the NSA (i.e. ,the power company) falls under 'private law status' after being privatised by the State, the ECSR upheld that "as a signatory to the Charter, Greece is required to ensure compliance with its undertakings, irrespective of the legal status of the economic agents whose conduct is at issue."[50]

The ECtHR followed the same jurisprudence of the ECSR in its decision upon an accident in a goldmine in a Romanian Municipality (Baia Mare).[51] The plaintiffs claimed that using sodium cyanide by the goldmine company (aka. S.C. Aurul S.A.), that obtained a license to exploit gold in Baia Mare Mine in 1998, caused negative health repercussions for their family members.[52] Despite the polluting leakage, the S.C. Aurul S.A. Company did not stop its extraction process. The ECtHR decided that the Romanian government failed to meet Article 8 of the ECHR protecting the right to respect for private and family life and to comply with the right of the plaintiffs living in vicinity to the goldmine to a healthy environment.[53] The ECtHR further noted that the Company had continued its activities after the leakage accident, violating the precautionary principle. This means any scientific uncertainty does not justify a delay on part of the State (Romania) to take required effective and proportionate measures.[54] According to the ruling of the ECtHR, the Romanian government breached its obligation to review license given to the Company and to assess the risks of the company's activities in the goldmine.

The jurisprudence construed from the environmental case law of the European human rights legal system establishes the responsibility of States, not only for their own (environmentally polluting conducts), but also for the NSAs subject to their control.[55] The general spirit of the decisions of their judicial bodies can enhance a human rights-based climate obligations on States to take precautionary measures to curb the risks of the NSAs, even if they are uncertain.[56]

49 Knox (2009), p. 180.

50 *Ibid*. p. 180.

51 The European Court of Human Rights (ECtHR) was established 1959 by the State Members of the Council of Europe in Strasbourg (France) to address claimed violations of human rights under the European Convention of Human Rights (ECHR). See, European Court of Human Rights, available at: https://hudoc.echr.coe.int/fre-press#_ftn1 (accessed: December 31, 2021).

52 Quirico (2018), p. 300.

53 European Court of Human Rights, Chamber judgment in the case of Tătar v. Romania (application no. 67021/01), on 27.1.2009. Available at: https://hudoc.echr.coe.int/fre-press?i=003-2615810-2848789 (accessed: December 31, 2021).

54 *Ibid*.

55 Knox (2009), p. 169.

56 *Ibid*. p. 163.

The climate change-related damage is classified as an environmental damage. Some elements of the environmental harm-related jurisprudence developed by regional human rights bodies can be extended to climate change.[57] Amongst the principles of international environmental law that can be largely extended to climate change law are the no harm, precaution and sustainable development.[58] Such extension is helpful to bridge a gap in the traditional international climate change law.

Ultimately, it is legally doable to establish either direct or indirect responsibility of the State for the climate change harm to human rights before regional human rights bodies, whether caused by the State itself or by NSAs, basically within the territorial State borders and exceptionally extraterritorially, wherever it has effective control over the NSAs' activities.[59] This is what has been cited in the practice of the European,[60] besides African[61] and InterAmerican,[62] regional human rights bodies. However, resorting to regional human rights bodies for a climate change claims is conditioned, as a principle, upon exhausting domestic remedies before national courts that may have a say in establishing the responsibility of the State for climate harmful activities of NSAs. This is the subject of the next section.

6. State Climate Obligations Regarding NSAs Activities in the Domestic Courts' Rulings

This section performs a multi-case analysis on climate change-related rulings of domestic courts in three European countries (i.e., the Netherlands, Germany and Norway). The reason countries under the European legal system are

57 *Ibid*. p. 195.

58 Rajamani, Jeffery, Höhne, Hans, Glass, Ganti, Geiges (2021), p. 985.

59 Knox (2009), p. 191.

60 Amongst the cases in which the ECtHR followed this territorial limit of exercising their jurisdiction is Soering Case. See, European Court of Human Rights, Judgment on 07 July 1989. *Soering v. The United Kingdom*, (Application no. 14038/88). Amongst the cases in which the ECtHR followed the exceptionally extraterritorial application of State responsibility is: European Court of Human Rights, Judgement 7 July 2011, *Al-Skeini and others v. The United Kingdom* (Application no. 55721/07). The Court has also recognized this exception in the cases of *Öcalan v. Turkey, Issa and Others v. Turkey, Al-Saadoon* and *Mufdhi v. the United Kingdom*, and *Medvedyev and Others v. France.*

61 Oloo, Vandenhole (2021), pp. 140-150.

62 Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, on *the Environment and Human Rights: State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights*. Op cit.; Tiffer (2019).

preferred over a regional human rights system (such as America or Africa) is that European countries are experiencing a boom in climate litigation compared to countries in any other region.[63]

The criteria set for choosing the cases serve to achieve the objective of the paper to assess the contribution of national and regional courts to the legal discussions aiming to hold States responsible for NSAs climate harmful activities when based on human rights law. Firstly, the chosen cases include their relevance to human rights as a substantive part of the climate litigation. Secondly, all the cases target the responsibility of States. Thirdly, the three cases of national courts decisions are influenced by the European Convention of Human Rights (ECHR) Articles 2 and 8, as the three countries are parties to the ECHR. These cases help understanding the influence that regional climate change law and how it can be interpreted and applied.

To highlight the human rights-based climate obligations of States, this section discusses the position of NSAs in the responsibility claims filed against States before domestic courts in sub-section 6.1. Sub-section 6.2 sheds light on how domestic courts perceive the effects of climate change on the human rights provided in Article 2 and 8 of the ECHR.

6.1. The Position of NSAs in State Responsibility Cases Before Domestic Courts

This section reflects on climate responsibility filed against States at the domestic level in three countries (the Netherlands (sub-section 6.1.1), Germany (sub-section 6.1.2) and Norway (sub-section 6.1.3)). Although these cases are filed directly against States, NSAs are not far removed from the three claims.

6.1.1. Urgenda Case in the Netherlands

The first case concerns a claim lodged by a NGO (*Urgenda Stichting*)[64] against the State of the Netherlands (hereinafter: *Urgenda* Case) before the Hague District Court to order directing the State to curb its GHGs emissions

63 As evidenced in the climate litigation database released by the Sabine Centre of Climate Change Law at Columbia University. Available at: http://climatecasechart.com/non-us-climate-change-litigation/ (last accessed: June 22, 2023).

64 The nomination of the '*Urgenda'* came from merger of 'urgent agenda'. It is a foundation that was established in 2008 with the aim of the transformation to a sustainable society starting from the Netherlands. In following the climate litigation tool, it represents the interests of hundreds on Dutch citizens. See, P. Paiement, 2020. Urgent agenda: How climate litigation builds transnational narratives. *Op. cit.* p. 131.

by 25-40% compared to the levels of 1990 by 2020.[65] So, it is an action for an order, not an action for damages.[66] In its ruling in 2015, the District Court allowed this claim ordering the State to reduce their GHGs emissions by at least 25% by 2020 compared to 1990.[67] The court of Appeal upheld the judgment of the District Court in 2018. On 20 December 2019, the Supreme Court of the Netherlands declined the appeal of the State confirming that the judgment of the District Court, supported by the Court of Appeal, will stand as a final order.[68] The Supreme Court, referring to the assessment report of the IPCC and the UNEP, contended that global warming, tethered to the increasing GHGs emissions, has dire impacts, such as extreme weather conditions, droughts, heat waves, floods, disruption of ecosystems that can jeopardise food supply and melting of the glaciers that can lead to rising sea levels.[69] All of these consequences, according to the Supreme Court, jeopardise the lives, welfare and the right to a healthy environment of the people in the Netherlands and all over the world. The Dutch State is, in turn, required to bear the "systematic responsibility" proportionate to its emissions, since it violated its due diligence obligation to protect the interests of the residents in the Netherlands.[70]

*6.1.2. The Federal Climate Protection Act in Germany ("*Bundesklimaschutzgesetz*")*

The second case is related to a group of German youth who lodged a complaint, in February 2020, before the Federal Constitutional Court of Germany to challenge the constitutionality of the Federal Climate Protection Act ('*Bundesklimaschutzgesetz*' or 'KSG').[71] The complainants argued that the 55% reduction

65 Supreme Court of the Netherlands, Judgment on 20 December 2019, *the State of the Netherlands v. Stichting Urgenda*, Case Number: 19/00135. This study depends on the (unofficial) English translation of the verdict, provided by the Grantham Research Institute of Climate Change and the Environment of London School of Economics and Political Science (LSE). Available at: https://climate-laws.org/geographies/netherlands/litigation_cases/urgenda-foundation-v-state-of-the-netherlands (last accessed: January 21, 2022).

66 The Dutch Supreme Court read the term 'effective remedy' provided under Article 13 of the ECHR to refer, in case of serious violation, to both preventing and ending the violation, and redress.

67 The Supreme Court of the Netherlands Judgment, 20 December 2019, *the State of the Netherlands v. Stichting Urgenda*, *Op. cit*.

68 *Ibid*.

69 *Ibid*.

70 *Ibid*. para. 2.2.2.

71 Federal Constitutional Court of Germany, Judgement on 24 March 2021, *Neubauer, et al. v. Germany*, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, paras.1-5. Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2021/03/rs20210324_1bvr265618en.pdf (last accessed: January 25, 2022).

target of the GHGs emissions by the year 2030 comparing to the 1990 levels is not adequate.[72] They contended that, in order for Germany to honour its obligations under the Paris Agreement of 2015, and to curb the increasing global temperature 'well below two degrees Celsius' and preferably to 1.5° C, it is required to reduce GHGs by 70% by 2030 compared to the levels of 1990.[73] The complainants claimed that the KSG violates their human rights under the Basic Law i.e., the German Constitution.[74] This claim was primarily institutionalized on Articles 1, 2, and 20a of the Basic Law that, respectively, protect human dignity, the right to life and physical integrity and the right of future generations.[75] The Court, in 2021, decided that some parts of the KSG (3(1) second sentence and 4(1) third sentence in conjunction with Annex 2) do not conform with the fundamental rights ensured by the Basic Law, since they fall short of providing sufficient GHGs emissions cuts from the year 2031 onwards, "until the point when climate neutrality is reached."[76] The Court concluded that fundamental rights have been violated, since the GHGs emissions currently allowed by the KSG leads, later on, to substantial burden on the shoulder of the future generations.[77] The German Court upheld also that these above aroused rights are also guaranteed by Article 2 and 8 of the ECHR.[78] Ultimately, there was a (partial) lack of the precautionary measures required to be taken by the German legislator.[79]

6.1.3. Nature and Youth Norway and Greenpeace Nordic in Norway

The third case was filed by Nature and Youth Norway and Greenpeace Nordic, on 18 October 2016, against the Norwegian State, represented by the Ministry of Petroleum and Energy, before Oslo District Court to challenge the validity of the decision of issuing ten petroleum production licences for 13 companies

72 *Ibid*. paras. 1-5.

73 *Ibid*. paras. 1-5.

74 A similar case was lodged by the Friends of Irish Environment before the Irish Supreme Court to challenge the lawfulness of the governmental mitigation policy considering that this climate policy does not chime with the Irish Constitution or the ECHR. In this case, the Supreme Court quashed the climate mitigation plan. This judicial decision was inspired by the previous judgement in the *Urgenda* case. See, Irish Supreme Court, Judgement on 31st July 2020. the *Case of Friends of Irish Environment v. the Government of Ireland and others*, [Appeal No: 205/19].

75 Federal Constitutional Court of Germany, judgement on 24 March 2021, *the Case of Neubauer, et al. v. Germany*, *Op. cit.* paras.1-5.

76 *Ibid*. para. 266.

77 *Ibid*. para. 142.

78 *Ibid*. para. 60.

79 *Ibid*. para. 142.

on the continental shelf of Norway.[80] The 13 companies' licensees were not parties to this case. The claimants contend, enhanced by the dissenting opinion of the ruling of the Supreme Court of Norway,[81] that, "although a judgment on the validity of an administrative decision is only aimed at the State, and thus has no legal implications for private parties having benefited from the decision, the public administration may – if invalidity is declared – be forced to consider revoking it."[82] The applicants contested the compliance of the decision to Articles 112, 93, and 102 of the Constitution, concerning the right to a healthy environment, the right to life and the right to respect for private and family life respectively, with the corresponding rights provided in Articles 2 and 8 of the ECHR.

Because the Oslo District Court ruled in favour of the State, their applicants appealed for the judgment before Borgarting Court of Appeal. After their appeal was dismissed, they filed the case before the Supreme Court of Norway. In their file, they contended that Norway, as an affluent country, "must take a proportionally larger share of the climate cuts, both because [it has] produced oil and gas resulting in major emissions[*sic*]. Norway must therefore cut at least 60 percent of the [GHGs] emissions within 2030."[83] The Supreme Court upheld, referring to the Common but Differentiated Responsibilities under the Paris Agreement, that Norway as a rich country "carry a larger responsibility."[84] The Court read the obligation to communicate with "ambitious efforts" as each State being required to do its best without necessarily the equal allocation of responsibility.[85]

NSAs are not parties to any of the three above cases. Although the *Urgenda* does not directly concern a case against NSAs (e.g., corporations), the Dutch Supreme Court recalled the European climate policy, especially the system of emissions trading scheme (ETS). Under this system, companies "may only emit greenhouse gases in exchange for the surrender of emissions rights" that can be "bought, sold, or retailed."[86] According to the Court, an emission reduction of 21% was supposed to be achieved by the ETS companies by the year 2020,

80 Supreme Court of Norway, Judgement on 22/12/2020. *Greenpeace Nordic and others v. Norway* (represented by the Ministry of Petroleum and Energy), Judgment: HR-2020-2472-P – Lovdata. Para 6-7. Available at: https://lovdata.no/dokument/HRENG/avgjorelse/hr-2020-2472-p-eng (accessed: January 12, 2022).

81 *Ibid*. para. 288.

82 *Ibid*. para. 7.

83 *Ibid*. para. 26.

84 *Ibid*. para. 58.

85 *Ibid*. para. 58.

86 Supreme Court of the Netherlands, Judgment on 20 December 2019, *the State of the Netherlands v. Stichting Urgenda. Op. cit*. para. 2.1.

compared to 2005.[87] The Court of Appeal in its reading of Articles 2 and 8 of the ECHR, opined that the State has an obligation to protect the peoples' lives and their rights to their home and private life, respectively. This obligation, according to the Court of Appeal, "applies to all activities, public and non-public, which can jeopardise the rights protected in these Articles, and certainly in the face of industrial activities which by their very nature are dangerous."[88] Thus, the State is required to take the precautionary measures to mitigate the climate change risks posed by the activities of the NSAs (e.g., industrial corporations) even if its magnitude is uncertain.[89] So, such obligation imposed upon the State is to pursue a conduct, not to achieve a specific result.

Likewise, the German Court confirmed that the State has a positive obligation (i.e., an obligation of action) to protect life and physical integrity against any impairment caused by "environmental pollution, *regardless of who or what circumstances are the cause.*"[90] In this context, the State bears the responsibility for human rights violation caused by the climate-harmful activities attributable to itself or/and to NSAs (e.g., companies or industries). That is because it is under the purview of the State to limit the freedom of CO_2 emitting activities, including that of the private activities.[91] Similarly, the Supreme Court of Norway referred to the case law of the ECtHR in strengthening the duty of the State to take necessary measures to protect the environment against damage and secure a healthy climate for current and prospective generations, especially when it comes to "hazardous business activities."[92] This duty of the States was strengthened further in the perceptions of the courts to Articles 2 and 8 of the ECHR discussed in the following sub-section.

87 *Ibid*.

88 *Ibid*. para. 2.3.2.

89 *Ibid*.

90 Federal Constitutional Court of Germany, Judgement on March 24, 2021, *Neubauer, et al. v. Germany*, *Op. cit*. para. 147. [*emphasis added*].

91 In this regard, the Federal Constitutional Court stipulates, in para. 185 of its judgement, that
"any such exercise of freedom is subject to limits that the legislator must impose in order to take climate action in accordance with Art. 20a GG and to fulfil duties of protection arising from fundamental rights. The possibilities for exercising freedom protected by fundamental rights in ways that directly or indirectly involve CO_2 emissions come up against constitutional limits because, as things currently stand, CO_2 emissions make an essentially irreversible contribution towards global warming and, under constitutional law, the legislator may not allow climate change to progress *ad infinitum* without taking action."
See *ibid*. para. 185.

92 Supreme Court of Norway, Judgement on December 22, 2020. *Greenpeace Nordic and others v. Norway (represented by the Ministry of Petroleum and Energy)*. *Op. cit.* paras. 132, 166.

6.2. States' Climate Obligations in Light of Articles 2 and 8 of the ECHR

The three national Courts recalled Articles 2 and 8 of the ECHR that provide protection for the right to life, and private and family life. However, each ruling identified the content thereof differently.

In applying Articles 2 and 8 of the ECHR, the Dutch Supreme Court referred to the case law of the ECtHR requiring the States Parties to have the obligation to take suitable and required measures if there is a 'real and immediate risk' to the lives or the welfare of the peoples.[93] The Supreme Court upheld that the case law of the ECtHR indicates that the States do bear the responsibility for the effects of the "hazardous industrial activities, regardless of *whether these are conducted by the government itself or by others*, and also in situations involving natural disasters."[94]

In its discretion for the threshold (criterion) required under Articles 2 and 8 of the ECHR, "the real and immediate risk,"[95] the Dutch Supreme Court justified the obligation of the State to reduce their GHGs emissions by the "*grave risk* that dangerous climate change" has on the peoples' lives endangering their welfare.[96] Despite the wording 'grave risk' being vague, it is quite clear that the Court promoted the characterization of climate change risk to meet the 'real and immediate risk' threshold mentioned above. In its reading to the immediacy of the risk in the ECtHR judgement in the *Öneryildiz v. Turkey*, the Supreme Court elaborated that:

> "the term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term."[97]

In applying Article 8 of the Convention, the Supreme court upheld that the Convention may not expressly have a provision to protect the right to a healthy environment. However, the case law of the Strasbourg Court implies situations in which Article 8 was violated because of environmental hazards that may affect

93 Supreme Court of the Netherlands, Judgment on 20 December 2019, *the State of the Netherlands v. Stichting Urgenda*, *Op. cit.* para. 5.2.2.

94 *Ibid*. para. 5.2.2 [*emphasis added*].

95 Pedersen (2020) (p. 4).

96 The Supreme Court of the Netherlands Judgment. *Op cit.* paras. 5.2.1-5.5.3.

97 *Ibid*. para. 5.2.2.

the people's lives directly.[98] So, the responsibility of a State to take measures is established if there is a risk, which is not necessarily in a short term, of environmental contamination that may affect the well-being of the peoples negatively, in such a way as to jeopardize their enjoying of homes, and private and family lives.[99] Thus, the Dutch Supreme Court concluded that the adverse effects of climate change constitute a real and immediate risk as set forth in Articles 2 and 8 of the Convention.[100] To justify this conclusion, the Supreme Court contended that these Articles should be interpreted in light of the risks of climate change in such a way as to hold States Parties to be (partially) responsible to take precautionary measures to curb the dangers of climate change.[101]

Thus, the Dutch Supreme Court followed a broad perspective to interpret State obligations. It refers to the 'effectiveness principle', adopted by the ECtHR, through which "the object and purpose of the Convention as an instrument for the protection of individual human beings" is a source of State obligations.[102] The Court contended that ratifying an international law convention (e.g., the UNFCCC and the Paris Agreement) is not a necessary condition by which the State can be held responsible, in so far as this convention reflects commonly grounded norms and principles in the international society.[103] Moreover, the Dutch Supreme Court adopted the effective interpretation principle to confer effective protection on human rights, as ensured in Article 13 of the ECHR.[104] The Court stressed that in order to achieve a further active protection for human rights against the adverse effects of climate change, it is required that these rights have a chance to be invoked against individual States.[105]

The German Federal Constitutional Court followed, as did the Dutch Supreme Court, a broad approach of interpretation for the human rights set forth in the Basic Law and Articles 2 and 8 of the ECHR. The Court decided that the duty of the German State to protect the right to life and physical integrity extends

98 The Dutch Supreme Court cited some precedents of the ECtHR such as its Judgement on 10 November 2004, no. 46117/99, in *Taşkin et al. Case v. Turkey,* paras. 107 and 111-114 (Article 8 ECHR also applies to the threat of environmental pollution that might materialise only in twenty to fifty years), and its Judgement on 27 January 2009, no. 67021/01 in *Tătar Case v. Romania*, paras 89-97 (possible longer-term health risks from heavy metal emissions from gold mining).

99 The Supreme Court of the Netherlands Judgment. *Op. cit.*

100 *Ibid*.

101 *Ibid*.

102 This was provided in the Vienna Convention of the Law of Treaties, and was enhanced in paragraph 87 of the ECtHR judgment on 7 July 1989, no. 14038/88 in *Soering Case v. United Kingdom*. See, also, *ibid*. para. 5.4.1.

103 *Ibid*. para. 5.4.2.

104 *Ibid*.

105 *Ibid*.

to the violations that result in environmental pollution. In promoting this extensive approach, the German Court cited the case law of the ECtHR in its judgements in some cases.[106] In turn, the Court concluded that Germany incurs the responsibility to take the protective measures to avert the climate-related risks to the right to life and health.[107] Therefore, this obligation imposed upon the State is, as inspired by the judgement of the Dutch Supreme Court, an obligation of conduct, not to achieve a specific result.[108]

Confirming the pathway of the Hague district court,[109] the Dutch Supreme Court used the human rights lexica in the (climate change) case.[110] The Supreme Court followed the nonreciprocity principle of human rights obligations and rejected the 'waterbed effect' as claimed by the State.[111] The Court concluded that the Netherlands bears its proportionate (partial) responsibility to do its own part of reducing the GHGs emissions.[112] The German Court, likewise, decided that the global nature of climate change does not ground a basis for the German State to evade its responsibility to do its own part.[113] Thus, the Court, inspired by the judgements of the Dutch Supreme Court and the High Court of New Zealand (2 November 2017), promoted the partial (proportionate) responsibility of the State to follow adequate GHGs reduction target to be achieved within reasonable time.[114] The burden of GHGs reduction is required to be distributed proportionately among generations.

The appellants, in the Norwegian Case, called for invalidating the administrative decision of the government to issue licences before the Supreme Court of Norway, arguing that the judgment of Dutch Supreme Court, on 20 December 2019, in *Urgenda* case is inspiring in how to apply Articles 2 and 8 of the ECHR on climate change.[115] The Court contended that these Articles 2 and 8 of the

106 Such as, *Öneryildiz v. Turkey*, Judgment of 30 November 2004, no. 48939/99, para. 89 ff.; ECtHR, *Budayeva and Others v. Russia*, Judgment of 20 March 2008, no. 15339/02 *inter alia*, para.128 ff.; *Cordella and Others v. Italy*, Judgment of 24 January 2019, nos. 54414/13 and 54264/15, para. 157 ff. See the Federal Constitutional Court of Germany judgement, *Op. cit*. para. 99.

107 The Federal Constitutional Court of Germany, 24 March 2021, *Neubauer, et al. v. Germany*, *Op. cit.* para. 99.

108 *Ibid*. para. 157.

109 Quirico (2018), p. 192.

110 Beauregard, Carlson, Robinson, Cobb, Patton (2021), p. 654.

111 According to this claim, the State argued that the desired reductions of the GHGs emissions in the Netherlands would give other EU countries leeway to increase their emissions. See The Supreme Court of the Netherlands Judgment, *Op. cit*. para. 2.3.2.

112 The Supreme Court of the Netherlands Judgment, *Op. cit*. para. 5.3.4.

113 The Federal Constitutional Court of Germany, 24 March 2021, *Neubauer, et al. v. Germany*. *Op. cit*. paras. 99, 197.

114 *Ibid*. paras. 21-23, 203.

115 The Supreme Court of Norway Judgment. *Op. cit*. para. 29.

Convention may, depending on the case, apply to environmental issues.[116] However, conversely, the Norwegian Supreme Court concluded that "[t]he judgment from the Netherlands has little transfer value to the case at hand."[117] The Court built this conclusion on the fact that the requests of the claimants in the Greenpeace Nordic case are different from that in the *Urgenda* Case.[118]

In assessing an alleged violation of Article 2 of the ECHR, the Supreme Court of Norway also followed the 'real and immediate' risk of life loss criterion set by the judgment of the ECtHR in *Öneryıldız v. Turkey* on 30 November 2004.[119] The Supreme Court, in turn, concluded that, although climate change has dire impacts and may lead to loss of lives, there is no adequate nexus between the decision of the Norwegian State to issue petroleum production licences and the possible loss of human lives.[120] The governmental decision to issue these licences, according to the Supreme Court, does not entail 'real and immediate' risk of losing the Norwegians lives.[121] Therefore, the Court decided that there was no violation for Article 2 of the Convention.

Similarly, the Supreme Court followed the stringent criterion for violating Article 8 of the ECHR set by the ECtHR in its judgment in *Ivan Atanasov case v. Bulgaria* on 2 December 2010.[122] The ECtHR ruled that "the State's obligations under Article 8 come into play in that context *only if there is a direct and immediate link* between the impugned situation and the applicant's home or private or family life."[123] The Supreme Court quoted this strict criterion and referred to cases in which the Strasbourg Court applied this threshold to local environmental harm cases in which the damage is geographically close to the victims.[124] Thus, Article 8, according to the Norwegian Court, is of limited value in climate change lawsuits.[125] Therefore, the Supreme Court of Norway concluded that there is no violation of Article 8 of the ECHR.

As such, although the Supreme Court of Norway referred to the case law of the ECtHR in interpreting Articles 2 and 8 of the ECHR, as did the Dutch

116 *Ibid*. para. 164.

117 *Ibid*. para. 173.

118 *Ibid*. para. 173.

119 European Court of Human Rights, Judgment on 30 November 2004, *Öneryildiz v. Turkey*. Application no. 48939/99. paras 100-101.

120 The Supreme Court of Norway Judgment. *Op. cit*. paras 167-168.

121 *Ibid*. paras 167-168.

122 European Court of Human Rights, Judgement on 2 December 2010, *Ivan Atanasov v. Bulgaria*. Application no. 12853/03.

123 *Ibid*. para. 66. [*emphasis added*].

124 The Supreme Court of Norway Judgement. *Op. cit*. para. 171.

125 Krommendijk (2022), p. 74.

and the German Court, it followed a different perspective of interpretation. The Norwegian Court ruling is based on a stringent identification of the related rights and State obligations, and a higher threshold of possible violations. The Norwegian Court did follow a respondent (State) friendly characterization of the right to environment.[126] In its interpretation of Article 112 of the Norwegian Constitution, the Supreme Court upheld that the right to a healthy environment set forth often belongs to the third generation of human rights, which are more likely to be axiomatic principles, rather than being legally binding obligations.[127] As such, the discretion of each court to the threshold for violating human rights is tethered to its perception for its assessment of the risk of States' climate policies regulating the GHGs emissions of NSAs. Furthermore, the judges' decisions on the responsibility of States are constructed based on their discretion of the adequacy of the measures taken by the State to comply with its precautionary duty to curb climate harmful activities of NSAs.

Given that NSAs perform activities within the ambit of many countries, questions arises around the limitations of the responsibility of a State, and whether its responsibility extends to include corporate emitting activities beyond its territorial borders. This is the subject of the next section.

7. The limits of States' Responsibility for NSAs' Climate Harmful Activities

As for the limits of the State's climate responsibility, it is worth referring to the perceptions of the three domestic courts' rulings to the boundaries of States' jurisdiction. According to the Dutch Supreme Court, each country is responsible for its own share of GHGs emissions.[128] The Court concluded that the State has an obligation to 'do its part' by reducing its GHGs emitted "*from its territory* in proportion to its share of the responsibility."[129] This conclusion confirms the judgement of the Court of Appeal that considers climate change as a global problem that the Netherlands cannot handle alone, "does not release the State from its *obligation to take measures in/on its territory.*"[130] Consistently, the Supreme Court opined that "ECHR protection is afforded to the persons who fall within the *states' jurisdiction*. In the Netherlands this regards, primarily and to

126 The Supreme Court of Norway Judgement, *Op. cit*. para.116.

127 *Ibid*. paras 90, 92.

128 The Supreme Court of the Netherlands Judgment, *Op. cit*.

129 *Ibid*. paras 5.6. 1-5.8 [*emphasis added*].

130 *Ibid*. para. 2.3.2. [*emphasis added*].

the extent relevant in this case, *the residents of the Netherlands.*"[131] Thus, the Supreme Court leans to identify the State's jurisdiction as confined with its territorial borders. This pathway of identifying the State jurisdiction was pursued by the German Court.

The Federal Constitutional Court of Germany, since there are complainants living in Bangladesh and Nepal, had to decide whether the State has obligation to contribute to protect people abroad against human rights breaches caused by climate change.[132] The Court decided that:

> "it can be ruled out from the outset that a violation of their fundamental freedoms might arise from potentially being exposed someday to extremely onerous climate action measures because the German legislator is presently allowing excessive amounts of [GHGs] emissions with the result that even stricter measures would then have to be taken in Germany in the future. The complainants live in Bangladesh and Nepal and are thus not subject to such measures."[133]

In justifying this endeavour, in addition to the implied limits of a causal nature, the Court contended that there is nothing in the Basic Law that restricts protecting fundamental rights to the German territory. Nevertheless, for reasons related to the sovereign rights of each State, it is not conceivable that the German State incurs the responsibility to take measures to protect people living abroad.[134] However, this does not absolve the State from its political or international legal responsibility to take positive steps to protect the people of poor and climate risk vulnerable countries.[135] These territorial confines of the State jurisdiction were also adopted by the Norwegian Court.

The Supreme Court of Norway substantiated the District Court's decision on the territorial scope of Article 112 of the Constitution that "applies to *local environmental damage and [GHG] emissions in Norway, but not to emissions and combustion taking place abroad*."[136] The Court upheld that each State is responsible for petroleum combustion within its own territory.[137] Based on this territorial approach, the Supreme court found that the measures taken by the

131 *Ibid*. para. 5.9.2. [*emphasis added*].

132 The Federal Constitutional Court of Germany Judgement. *Op. cit*. para. 101.

133 *Ibid*. para. 132.

134 *Ibid*. paras 173-178.

135 *Ibid*. para. 179.

136 The Supreme Court of Norway Judgment. Op cit. para.10. [*emphasis added*].

137 *Ibid*. para. 159.

State were adequate to mitigate the GHGs emissions, because the perceived environmental harm and the climate deterioration is limited.[138]

Therefore, the climate responsibility of States is bounded with the State's territorial borders in the rulings of the three domestic courts. This conclusion applies to the cases, whether the State responsibility is based on the precautionary duties regarding the harmful activities of NSAs and/or on the States' climate obligations implied from the interpretation of Articles 2 and 8 of the ECHR.

8. Conclusion

The concluding section of the paper seeks to answer the question: *to what extent do domestic and regional courts' decisions at the EU level contribute to establish responsibility of States for climate change damages caused by NSAs*?

To answer this question, this paper finds that domestic courts are in favour of the nation-State taking partial (proportionate) liability for climate change-related damage, whether caused by the State itself and/or the GHGs emitting activities of NSAs. This is what has been implied in rulings of the domestic courts in the Netherlands, Germany, and Norway.

To reach this answer, the paper discussed the intrinsic relationship between human rights and climate change in litigation against NSAs and States. This paper found that the rights-based litigation against States, thus far, is more fruitful than targeting NSAs in terms of the feasibility of establishing the responsibility for climate change. Furthermore, this paper highlighted how two approaches to rights-based climate change litigation against States are merging. One is based on human rights obligations as a means of enforcing climate change obligations before the European (regional) human rights bodies, the other is established on the municipal enforcement of climate change obligation.

In relation to the first dimension concerning the regional enforcement of human rights obligations, it has been evidenced from the practice of the European regional human rights bodies that the State have a precautionary obligation to take what is necessary against the uncertain risks that NSAs may cause. Moreover, the State can be responsible and liable for being complicit in damage caused by private wrongs, if it fails to punish NSAs for their climate harmful conduct.

As for the second dimension, the paper found that, although the climate responsibility claims against the State in the three cases (the Netherlands, Germany and Norway), the NSAs were the ultimate target of such claiming. That is, the objective in the three cases is either to promulgate a legislation that contains

138 *Ibid*. para. 10.

further caps on GHG emissions to be applied to NSAs' activities (as are the cases in the Netherlands and Germany), or to invalidate prior licenses given to companies on the basis that these licences imply a tolerating behaviour of the State regarding the climate polluting activities of NSAs, as is the case in Norway.

Additionally, this paper found that the reception of national judges to the case law of the ECtHR rulings in interpreting Articles 2 and 8 of the ECHR and their application to the case of climate change, does not merely depend on whether the State's legal system adopts a monist or a dualist approach to international law,[139] but rather how judges of domestic courts perceive the impacts of climate change on the enjoyment of human rights. While German and Dutch courts' rulings followed a broad interpretation of the real and immediate risk that allows climate change to be characterised as having an immediate and real risk to human rights (e.g., the right to life, the right to health), the Norwegian courts followed a strict identification denying, in turn, government climate policies from having such immediate and real risks to human rights.

As such, national courts' rulings can help bridge the gap in the international climate legal regime concerning the State responsibility for NSAs harmful climate activities. For example, the partial liability of States (as ruled by the Dutch and the German Courts) is more applicable (transposable/transplantable) to international law in the State responsibility for climate damages than the joint and several responsibility, where multiple States can be sued independently for the damage caused.[140] This is because the joint and several liability of States implies that any of the several tortfeasor States may be held liable for the whole damages incurred, irrespective of its own contribution to that damage.[141] Thus, the perspective of human rights can promote litigation for climate change as a global challenge. However, as for the boundaries of States' climate responsibility for NSAs, the evidence of jurisdiction becomes complicated in the case of exterritorial activities.

While some argue that the GHGs emitted by NSAs abroad should be the responsibility of the State of nationality of those NSAs, it is an unpalatable premise

139 Monism and dualism are two opposing traditional theories of the relationship between international law and domestic law. In its simplest identification, Monism indicates that international law and domestic law is a single and universal concept of law, in which international law is in supreme position over domestic law in the case of conflict. Accordingly, once a treaty is ratified by a State, it is automatically transferred to national law system. According to dualism, international law can only be applied by domestic courts if it has been integrated into domestic law through enabling legislation. This because dualist domestic systems treat international law and domestic law as separate and independent systems of law. For further details, see Starke (1936), pp. 66-81; Phooko (2021), p. 168-[ii]; and Feldman (1999), pp. 105-126.

140 See Noyes, Smith, (1988), pp. 225-267, and Hylton (2016)

141 Wewerinke-Singh (2019), p. 238.

when these NSAs do not exercise their State legal order rights.[142] The situation becomes more complicated when calls arise to hold a State responsible for the GHGs emissions of a subsidiary of a private national corporation situated abroad that violates human rights obligations in foreign countries.[143] In other words, a collision may emerge between the basically territorial application of human rights and the global effect of the GHGs emissions and climate change. The practice of the domestic courts and the European human rights bodies is inclined to the territorial application of the responsibility of States for rights-based climate violations.

The three discussed courts' rulings tended for the territorial identification of the State climate responsibility for NSAs, even the NSAs' activities have extraterritorial impacts. Regarding the practice of the European regional human rights judicial bodies, they were inclined for the territorial application of the State responsibility, as a general principle. As a matter of exception, in consistency with the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) by the ILC, the extraterritorial responsibility of a State for NSAs can be established if the State has an effective control over the harmful activities of these NSAs.

Therefore, although the partial and proportionate responsibility to decrease GHGs emissions can be established before national courts, there are courts that still count on the argument that the relationship between the State climate policies regarding NSAs and the climate change related damage is uncertain. Hence, their perceptions of the States' precautionary duty and of its due diligence obligation regarding the climate harmful activities of NSAs, based on human rights arguments, are still ill-defined and not sufficiently clear to be enforced.

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143 Quirico (2018), p.195.

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