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Regional and Subregional Responses to Climate Change

Edited by

Francesca Ippolito, Ivan Ingravallo

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FOREWORD

The decision to publish, in the *Quaderni* of *La Comunità Internazionale*, a volume devoted to the role of regional organizations and agreements in addressing climate change is by no means accidental. The SIOI (Italian Society for International Organization), of which *La Comunità Internazionale* and its *Quaderni* constitute the principal vehicle for scholarly research, has represented, since its establishment in 1945, the leading reference point in Italy for academic studies and analysis concerning the phenomenon of international organization.

The contributions collected in this volume clearly demonstrate that, notwithstanding differences in structure, degree of cooperation, competences, and the legal value of their acts, the principal regional and subregional organizations operating in various geographical areas all possess an environmental dimension and are actively engaged in developing possible responses to the phenomenon of climate change. This represents the most striking manifestation of the impact and consequences that human activities are exerting on the natural environment, which, by its very nature, is not confined by state borders and therefore constitutes a matter of common concern at the global level.

The various contexts examined bring together the experiences of the principal regional and subregional organizations – the Council of Europe and the European Union in Europe, the Organization of American States in the Americas, the African Union in Africa, and SAARC and ASEAN in Asia – in addressing climate change. These are complemented by an analysis of international cooperation concerning the two polar regions of the globe, the Arctic and Antarctica, where, notwithstanding the absence of a specific intergovernmental organization, states are called upon to cooperate in order to manage unique and particularly sensitive resources in an environmentally sound manner.

The volume is enriched by contributions from distinguished Italian and foreign scholars. The comparison of their respective approaches and perspectives on combating climate change, together with the attention devoted to the ways in which different organizations interact with one another – drawing on their respective documents and building upon practices developed in various regional contexts – demonstrates that the effectiveness of

measures is closely dependent upon the capacity to adopt a coordinated and unified stance.

The challenge of climate change does not concern a specific region or continent, but the planet as a whole. As the practices of the organizations and agreements examined in this volume clearly demonstrate, now more than ever – in the face of a global challenge such as climate change – it is necessary to “march separately, but strike together.” No one can save themselves alone, whether as an individual or as a single nation. In the face of the environmental emergency, wise, effective, and cooperative solidarity is essential to reverse course, for our sake and for future generations.

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THE EMERGENCE OF CLIMATE CONDITIONALITY IN EU EXTERNAL RELATIONS

FRANCESCA IPPOLITO*, JED ODERMATT**

SUMMARY: 1. Introduction. – 2 Conceptual Foundations of Conditionality. – 3 Operationalising climate conditionality in FTAs. – 3.1. Mixed models: From Declaratory to Implementation-Based Climate Conditionality. – 3.2. To negative and/or positive climate conditionality – 3.3. Mixed feelings for the mixed models? – 4. Climate Conditionality Tools. – 4.1. Carbon Border Adjustment Mechanism (CBAM). – 5. Conclusion: Implications for EU Climate Conditionality.

ABSTRACT

This chapter examines the EU's growing use of climate conditionality as a tool of external relations, defined as the deployment of trade, financial, and regulatory mechanisms to incentivise third countries and actors to align with EU climate objectives. The analysis identifies two main forms: conditionality embedded in bilateral Free Trade Agreements (FTAs), and conditionality operating through autonomous regulatory measures such as the Carbon Border Adjustment Mechanism (CBAM) and the Renewable Energy Directive (RED). The evolution of climate provisions in EU trade agreements will be traced: from declaratory commitments toward enforceable essential elements, including both negative conditionality (suspension or termination clauses) and positive conditionality (linking preferential tariffs or financial aid to climate compliance). The conceptual rationales underpinning conditionality – including carbon leakage prevention, fairness, and EU climate leadership – will also be explained while acknowledging significant critiques regarding protectionism, legal compatibility with WTO rules, and tensions with the principle of common but differentiated responsibilities. The chapter concludes that while climate conditionality may be legally defensible, its legitimacy and long-term effectiveness remain contested. The EU risks shifting from climate leadership to climate coercion unless conditionality is complemented by genuine multilateral cooperation, dialogue, and recognition of differentiated national circumstances.

1. The EU aims to be climate-neutral – having an economy and society with net-zero greenhouse gas emissions – by 2050¹. To achieve this

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¹ “Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter.” Art 2(1) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the

target, the EU has implemented ambitious laws and policies to move towards a zero-carbon economy². The EU’s climate legislation framework is now remarkably comprehensive, regulating emissions directly and including measures to promote or discourage activities or products with climate impact. EU legislation now goes further than just setting examples which may inspire other countries. EU legislation now extends its territorial reach to take into account action outside EU territory. The Renewable Energy Directive (RED) and Carbon Border Adjustment Mechanism (CBAM)³ apply with respect to industries outside the EU⁴. Territorial extension can also be seen in the sustainable finance Taxonomy and the Deforestation Regulation⁵.

In recent years, the European Union has used various forms of climate conditionality to pursue its climate goals. ‘Climate conditionality’ can be understood as the use of trade, financial or regulatory mechanisms to incentivise and encourage external actors to align with the EU’s climate objectives. Tools that seek to incentivise alignment with the EU’s climate goals include a range of market access, financial aid, and regulatory responses. The key feature of climate conditionality is that it makes certain acts *contingent* upon alignment or fulfilment of the EU’s own climate related standards.

This contribution explores the EU’s use of climate conditionality in its external relations. It focuses on two main forms of climate conditionality. The first relates to the use of climate conditionality in the EU’s trade and development policy. Here, the Union uses its trade power to encourage third states and other actors to pursue climate policies. The second relates to regulatory tools that involve conditionality. This often involves EU legislation with an element of conditionality that can affect external actors. This contribution focuses on the EU’s Carbon Border Adjustment Mechanism (CBAM) and Renewable Energy Directive (RED) as two examples of evolving conditionality.

framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).

² European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2023: A Union standing firm and united’ COM (2022) 548 final, 4.

³ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130 (CBAM Regulation).

⁴ R. LEAL-ARCAS, M. FAKTAUFON, and A. KYPRIANOU, *A Legal Exploration of the European Union’s Carbon Border Adjustment Mechanism* (2022) 31(4) *European Energy and Environmental Law Review* 223.

⁵ M. HEDEMAN-ROBINSON, *Legislative Pioneer on Global Forest Protection? A Commentary on the European Union’s Proposed Deforestation-Free Product Regulation* (2022) 31(6) *European Energy and Environmental Law Review* 348.

EU climate legislation that takes into account activity that takes place outside its territory has been described as being *unilateral* in nature⁶. Unilateralism refers to action that is done independently, often without the involvement or participation external partners. Climate conditionality is more focused on tying market access to compliance with the EU's climate objectives. It shows how the EU uses its legal and economic leverage to encourage compliance with its climate commitments, both internally and externally.

2. Conditionality has emerged as a tool of EU external relations and regulatory governance in recent years. Various rationales are put forward for using conditionality – making actions contingent on the fulfilment of climate-related standards or conditions – to pursue the EU's climate objectives.

The first rationale is that conditionality can be used as a response to the failure of global governance mechanisms. As states increasingly move away from multilateral frameworks, including in the climate field, it becomes increasingly difficult for the Union to pursue its climate objectives using existing multilateral mechanisms, such as the UNFCCC COP. In the face of the growing climate emergency, it is argued, the Union cannot sit by while multilateral mechanisms fail; it should instead use the tools at its disposal to promote and encourage alignment with its climate goals⁷. Given the EU's market and regulatory power, the EU can promote behaviour by other states and external actors that complies with EU standards. The EU employs trade as a tool for exerting influence, leveraging its market size to set global standards⁸.

A second rationale relates to the global nature of climate change. In particular, the Union justifies its action on the need to prevent carbon leakage. If the EU were to focus only on carbon emissions produced within its territory, this would have less of a meaningful impact on global emissions, including countries that export carbon intensive goods to the EU. Without

⁶ J. SCOTT and L. RAJAMANI, *EU Climate Change Unilateralism* (2012) 23 *EJIL* 469. J. ODERMATT, *Convergence through EU Unilateralism* in E. FAHEY (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart Publishing 2020).

⁷ “[...] with multilateralism in crisis, the EU considers itself increasingly forced to rely on unilateral solutions to address environmental concerns abroad instead (“environmental unilateralism”). B. HOLLAUS, S. MAYR, *Pushing for Sustainability Abroad: EU Environmental Unilateralism and its Legal Limits* in R.A. WESSEL, J. BERGAMASCHINE MATA DIZ, J. PÉRET TASENDE TÁRSIA and S. ESRA AKDOGAN (eds) *EU External Relations Law and Sustainability: The EU, Third States and International Organizations* (TMC Asser Press, 2025).

⁸ N. DOBSON, *Climate Protection versus Trade: Dilemmas for the EU* in A. JORDAN and B. MOORE (eds), *Handbook on European Union Climate Change Policy and Politics* (Edward Elgar 2023) 367: “Given its large market size, trade measures serve as a central policy tool to exert international influence, with the EU aiming to ‘set standards that apply across global value chains’”.

conditionality, it is argued, industries might relocate to jurisdictions with weaker climate regulation.

A third rationale relates to ideas of fairness and reciprocity. The EU has made significant commitments under its Green Deal and Fit for 55 package, requiring businesses and industries within the Union to comply with stringent environmental standards. Without conditionality, it can be argued, European businesses would face unfair competition from companies in third countries that are not subject to similar regulations. Conditionality is used to allow a “level playing field”, discouraging free riding on its regulatory efforts⁹.

A final rationale for climate conditionality relates to the concept of the EU as a ‘climate leader’. The EU has long seen itself as a leader in global climate action. Using climate-related conditions means that the EU’s external and internal policies are aligned, helping to reinforce this image of a global climate leader. One of the aims of EU environmental policy is “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change¹⁰”. The Treaties also requires the Union and Member States to cooperate with third states and international organisations¹¹.

It must be acknowledged, however, that climate conditionality comes with challenges. Conditional measures have been criticised as protectionist. There is a fine line between measures that are conditional, encouraging alignment with EU policies, and measures that are coercive, subjecting external actors to EU law. Conditionality may even be viewed as a method of applying EU law to actors outside the EU legal order. Politically, such measures can lead to diplomatic tensions and retaliatory measures from other state and blocs. This, in turn, can hamper the EU’s efforts to make meaningful progress in international multilateral forums.

⁹ “The use of market-entry conditions is necessary to enable the EU to set high climate protection standards, while maintaining a level playing field so as not to overly disadvantage domestic industry.” N. DOBSON, *Climate protection versus trade: dilemmas for the EU* in T. RAYNER, K. SZULECKI, A.J. JORDAN, and S. OBERTHÜR (eds) *Handbook on European Union Climate Change Policy and Politics* (Edward Elgar, 2023) 361. M. MOÏSE MBENGUE and E. CIMA, “Clubbing in the Club”: *Could Climate-Related Trade Arrangements Set the Pace for Future Climate Cooperation?* *AJIL Unbound*, p. 220: “Climate-related trade measures seem to be the most promising instruments to disincentivize free-riders because the main freeriding incentives that undermine the effectiveness of climate agreements are linked to trade”.

¹⁰ Article 191(1) TFEU.

¹¹ Article 191(4) TFEU “Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned”.

Another critique is that climate conditionality is based on an assumption that there is a single, best approach to meeting international climate standards and emissions targets. The EU's approach, focused on regulation and market based mechanisms, is one method of reducing greenhouse emissions. Climate conditionality tends to overlook the plurality of methods states and organisations can adopt that do not involve market based mechanisms. Beyond this, there are practical challenges related to the implementation of conditionality conditions related to monitoring and enforcement.

Climate conditionality also invites legal challenges. Such measures may be challenged for failing to comply with World Trade Organization commitments. They may also run against the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC). This principle, enshrined in Article 2(2) of the Paris Agreement, requires developed states to carry a greater share of climate responsibilities. The Union argues that its action is in accordance with the CBDR-RC. In its Written Statement before the International Court of Justice in the *Obligations of States in respect of Climate Change* advisory opinion, the Union argued: "...Parties may establish norms and rules that require products to be placed on their own markets to comply with requirements aimed at securing the achievement of their self-defined environmental and climate change mitigation goals"¹². It argues that CBDR-RC does not require parties to lower their domestic environmental standards to take into account third countries. Even if EU domestic measures that take into account activities that take place outside the EU are in compliance with international law, the move to climate conditionality also raises questions about the policy's effectiveness, legitimacy, and fairness. Given the potential of political backlash or retaliatory action, conditionality may undermine the EU's climate goals in the long term.

3. Reductions in CO₂ emissions and broader efforts to address climate change have progressively been realised within the European Union's neighbourhood, development, and trade policies: initially through indirect measures regarding environmental degradation, and subsequently through the gradual integration of explicit general partnership climate objectives¹³.

¹² European Union, Written Statement in the Advisory Proceedings on the Obligations of States in respect of Climate Change (International Court of Justice, 22 March 2024), para 217. Written Statement of the European Union, 22 March 2024.

¹³ See Euro-Mediterranean Agreement establishing an association with the Republic of Tunisia [1998] OJ L97/2, art 19 and art. 48; and the same agreement as renegotiated in 2005 [2005] OJ L278/9, Title V, art 48.

Agreement establishing an association with the Republic of Chile [2002] OJ L352/3, art 28 (Title I, Part III); Interim Euro-Mediterranean Association Agreement on trade and cooperation

3.1. Over time, we have witnessed the recognition of a genuine and explicit commitment to “climate action” alongside the conservation, sustainable use, and management of natural resources, as well as the promotion of ecological partnerships and a sustainable, resilient future. This development

between the European Community and the Palestine Liberation Organization (PLO), acting on behalf of the Palestinian Authority of the West Bank and the Gaza Strip [1997] OJ L187/3, art 50 (Title III); Euro-Mediterranean Agreement establishing an association with the Kingdom of Morocco [2000] OJ L70/2, art 48 (Title V); Euro-Mediterranean Agreement establishing an association with the State of Israel [2000] OJ L147/3, art 50.1 (Title VI); Euro-Mediterranean Agreement establishing an association with the Arab Republic of Egypt [2004] OJ L304/39, art 44.1 (Title V); Euro-Mediterranean Agreement establishing an association with the Lebanese Republic [2006] OJ L143/2, art 45; Euro-Mediterranean Agreement establishing an association with the People’s Democratic Republic of Algeria [2005] OJ L265/2, art 52.1 (Title V). European Commission, Evaluation of the Commission Staff Working Document: Impact of the Trade Chapters of the Euro-Mediterranean Association Agreements with Six Partners: Algeria, Egypt, Jordan, Lebanon, Morocco and Tunisia, SWD(2021) 319 final, 10 November 2021. See within the Neighborhood Policy Partnership and Cooperation Agreement with the Kyrgyz Republic [1999] OJ L196/48, art 55(2)–(3); Partnership and Cooperation Agreement with the Republic of Tajikistan [2009] OJ L350/3, art 52; Partnership and Cooperation Agreement with Moldova [1998] OJ L181/3, art 61 (Title VII); Partnership and Cooperation Agreement with the Republic of Uzbekistan [1999] OJ L229/3, art 54; Partnership and Cooperation Agreement with the Republic of Azerbaijan [1999] OJ L246/3, art 56; Partnership and Cooperation Agreement with Ukraine [1998] OJ L49/3, art 63 (Title VII); Partnership and Cooperation Agreement with the Russian Federation [1997] OJ L327/3, art 69(2)–(3); Partnership and Cooperation Agreement with the Republic of Kazakhstan [1999] OJ L196/3, art 54(2) (Title VI). Also the new bilateral engagement instruments concluded for the 2017–2020 period within the Neighborhood Policy emphasize “climate action” alongside the conservation, sustainable use, and management of natural resources, as well as a partnership for ecology and a sustainable, resilient future. See Joint Communication, ‘Review of the European Neighbourhood Policy’ JOIN(2015) 50 final (18 November 2015); Joint Communication, ‘The Eastern Partnership Policy beyond 2020’ JOIN(2020) 7 final (18 March 2020); Council of the European Union, ‘Council Conclusions on Eastern Partnership Policy beyond 2020’ 7510/1/20 REV 1 (11 May 2020). See also SEAE, ‘The EU and Azerbaijan Partnership Priorities Strengthen Their Bilateral Programme’ (11 July 2018). Council Association Decision No 1/2016 EU-Lebanon, 11 November 2016, approving the EU-Lebanon Partnership Priorities, OJ L 350/114 (22 December 2016); Council Association Decision No 1/2016 EU-Jordan, 19 December 2016, approving the EU-Jordan Partnership Priorities, OJ L 355/31 (24 December 2016); Commission Staff Working Document, ‘Recovery, Resilience and Reform: Post-2020 Eastern Partnership Priorities’ SWD(2021) 186 final (Brussels, 2 July 2021); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L29/3, art 215; Comprehensive and Enhanced Partnership Agreement with the Republic of Armenia [2018] OJ L23/4, arts. 51 and 53. See also Framework Partnership and Cooperation Agreement with Mongolia [2017] OJ L326/7, art 47 (Title VI). See Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, and the Republic of Kazakhstan [2016] OJ L29/3, art 216; Comprehensive and Enhanced Partnership Agreement between the European Union and the Republic of Armenia [2018] OJ L23/4, arts 53, 217 and 284(j). As to development cooperation see Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 317/3, 15 December 2000, arts 1 and 20(2).

reflects a paradigm shift marked by the incorporation of more robust forms of climate conditionality, grounded in formal references to the Paris Agreement as the guiding framework¹⁴. Such provisions reaffirm the parties' commitments to the Paris Agreement and other Multilateral Environmental Agreements¹⁵, mandate the effective implementation of the multilateral environmental agreements to which they are party¹⁶, and endorse "the achievement

¹⁴ Annex to the Proposal for a Council Decision on the signature, on behalf of the European Union, and provisional application of the Partnership Agreement between the European Union, on the one part, and the members of the Organisation of African, Caribbean and Pacific States (OACPS), on the other part, COM(2021) 312 final, 11 June 2021, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0312> accessed 31 May 2025.

Partnership Agreement, art. 1.

¹⁵ See EU-Japan Economic Partnership Agreement, OJUE, no L. 330/3, December 27, 2018, Articles 16.4, §4 and 16.6; EU-Vietnam Agreement, Articles 13.6 and 13.7; EU-Singapore Agreement, OJCE, no L. 294/3, November 14, 2019, Articles 12.6, §3, and 12.7; EU-Mercosur Draft Agreement of 2019, chapter on trade and sustainable development, Article 6 (circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/4f5df444-c0e8-4e43-bfc0-8b143f09671a/details); EU-Mexico Draft Agreement, April 23, 2018, Chapter XX on trade and sustainable development, Article 5 (trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf); as well as negotiations regarding the EU-Indonesia and EU-Australia agreements. For a general approach, see the Commission's Communication, Trade for All. Towards a More Responsible Trade and Investment Policy, COM (2015) 497 final, October 14, 2015. See also EU-Singapore FTA, Article 13.6, para 3 "The Parties reaffirm their commitment to reaching the ultimate objective of the UN Framework Convention on Climate Change (hereinafter referred to as "UNFCCC"), and of its Kyoto Protocol in a manner consistent with the principles and provisions of the UNFCCC. They commit to work together to strengthen the multilateral, rules-based regime under the UNFCCC building on the UNFCCC's agreed decisions, and to support efforts to develop a post-2020 international climate change agreement under the UNFCCC applicable to all parties". See also the second, third and fourth paragraphs of Article 270 included in Title IX of the EU-Colombia-Peru FTA, which read: "2. The Parties reaffirm their commitment to effectively implement in their laws and practices the following multilateral environmental agreements: the Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 16 September of 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted on 22 March 1989, the Stockholm Convention on Persistent Organic Pollutants adopted on 22 May 2001, the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on 3 March 1973 (hereinafter referred to as "CITES"), the CBD, the Cartagena Protocol on Biosafety to the CBD adopted on 29 January 2000, the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997 (hereinafter referred to as "Kyoto Protocol") and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted on 10 September 1998. See already for multilateral environmental agreements Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part"; the "Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part"; the "Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part"; the "Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part".

¹⁶ EU-Singapore FTA Agreements with South Korea and Japan - EU-Colombia-Peru FTA, second, third and fourth paragraphs of Article 270.

of the objectives of the UNFCCC and its Kyoto Protocol”¹⁷, cooperation for “the implementation of the UNFCCC, the Kyoto Protocol, and the Paris Agreement”¹⁸, and “the commitment of the Parties to the Paris Agreement”¹⁹, including, more specifically, their respective Nationally Determined Contributions, which are to be effectively implemented²⁰.

The implication of these developments is the potential to characterise a party’s withdrawal from, or failure to comply with, such climate conventions as a violation of treaty-based commitments with procedural implications different and stronger, though not mandatory, from those established under the international climate instruments. States signatories of the FTAs are in fact equipped with a procedural framework that, albeit limited, soft and non-coercive in nature, may require parties to “take into account” the outcomes of eventual intergovernmental consultations or the non-binding “initial” and “final” reports issued by established expert panels; as well as to “discuss appropriate actions” in light of the experts’ suggestions; or to “inform the relevant body of their intentions regarding the recommendations,” including informing investor-state dispute resolution mechanisms by Paris-aligned climate ambitions²¹.

3.2. Besides such inclusion of climate change among the objectives of the trade and development policies, a qualification of such climate change objectives and obligations as implicit or explicit essential elements of the EU’s bilateral relations has also emerged.

A possible illustration of the implicit qualification might be detected from the so-called “Bulgarian clauses,” which designate respect for human rights as essential elements and, through “non-execution” provisions, allow

¹⁷ See i.e. Free Trade Agreement between the European Union and the Republic of Korea [2011] OJ L127/6.

¹⁸ See, for example, Free Trade Agreement between the European Union and the Socialist Republic of Vietnam [2020] OJ L186/3; Armenia Agreement, art 275(4).

¹⁹ See Partnership Agreement between the European Union, on the one part, and the members of the Organisation of African, Caribbean and Pacific States (OACPS), art. 57(2); the text for the initial negotiations of an agreement with New Zealand, art X.5 <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe3236cbd0e/library/39e0b420-4f11-4b57-8eef-7818a251b811/details> accessed 31 May 2025; See also text for the initial negotiations of an agreement with Australia, art X.5 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1865> accessed 31 May 2025.

²⁰ See the EU-Chile Joint Declaration on Trade and Sustainable Development.

²¹ See Article 24.9, paragraph 2. Moreover, alongside this, the agreement contains further specific provisions, notably concerning the development of sustainable products derived from forestry, fisheries, or aquaculture; see Article 24.10, as well as Article 24.11 of the CETA.

for the adoption of appropriate measures in response to a party's failure to comply with the agreement. Notably, the international instruments invoked to substantiate the concept of 'human rights' vary significantly across agreements. While some treaties contain no specific references, most refer to "human rights as laid down in/proclaimed by/set out in/established by/defined in the Universal Declaration of Human Rights," and others incorporate geographically relevant regional instruments. In other cases – such as the 2010 EU–Korea Framework Agreement – human rights are defined as essential elements by reference not only to the Universal Declaration, but also to "other relevant international human rights instruments." A formulation, the latter, that significantly broadens the scope of application, potentially encompassing any human right deemed relevant to the context of the agreement, including future instruments yet to be adopted. Namely, it may also allow for the inclusion of the right to a healthy environment, especially following its recent recognition as a fundamental right²²; and due to emerging recognition of some climate obligations within the scope of already recognised human rights – such as the rights to life, private life, and health – as increasingly interpreted by human rights monitoring bodies and international jurisprudence²³.

As per the explicit designation of climate obligations as essential elements, a highly variegated treaty language is so far present, reflecting different levels of legal precision and ambition. In some cases, such provisions have not been framed as explicit foundational clauses, but rather as prospective legal mechanisms subject to further procedural de-

²² See Resolution 48/13 of the United Nations Human Rights Council (2021), The Human Right to a Clean, Healthy, and Sustainable Environment, UN Doc. A/HRC/RES/48/13. See also Article 2 of the former Regulation (EC) No. 2493/2000 of November 7, 2000, OJCE, No. L. 288/1, relating to measures aimed at promoting the full integration of the environmental dimension into the development process of developing countries, already emphasized "the improvement of the living standards and well-being of the populations concerned within the limits of the ecosystems' capacity, by preserving natural resources and their biological diversity for the benefit of present and future generations." Also see the Commission's Communication on the revision of the sustainable development strategy – A platform for action, COM (2005) 658 final, December 13, 2005, as well as the new EU strategy for sustainable development adopted by the European Council on June 15-16, 2006.

²³ See S. ATAPATTU, *The right to a healthy life or the right to die polluted? The emergence of a human right to a healthy environment under international law*, *Tulane Environmental Law Journal*, 16/2002, 67; D. SHELTON, *Environmental protection and human rights*, CUP, 2011; J.T. McClymonds, *Human right to a healthy environment: an international legal perspective*, *New York Law School Law Review*, 37/1992, 583; J. DOWNS, *A healthy and ecologically balanced environment: an argument for a third generation right*, *Duke Journal of Comparative and International Law*, 3/1993, 351; A. STEINER, *Executive Director United Nations Environment Programme, Letter from UNEP to Council of Europe*, 14 May 2010.

velopments. This is exemplified by the EU’s new partnership agreement with Chile, where climate change is not defined *ab initio* as an essential element. Instead, Article XX provides for a review of the Trade and Sustainable Development obligations within twelve months of the entry into force of the interim free trade agreement, thereby deferring the formal consolidation of climate conditionality to future negotiations. By contrast, other agreements, such as the EU–New Zealand Free Trade Agreement, adopt a more legally refined approach. Article X.4 effectively elevates the entire Paris Agreement to the status of an essential element by allowing the parties to adopt the same remedial measures applicable in cases of a breach of essential obligations, where one party commits “an act or omission which materially defeats the object and purpose of the Paris Agreement.” A stronger formulation is the one of the EU–United Kingdom Trade and Cooperation Agreement (TCA)²⁴, where climate change is not merely listed alongside foundational principles such as democracy, the rule of law, human rights, and the non-proliferation of weapons of mass destruction²⁵. Rather, compliance with the Paris Agreement is expressly defined as an essential element of the treaty itself²⁶. Notably, the TCA also affirms, for the first time in a trade agreement, the shared objective of achieving climate neutrality by 2050, thereby anchoring this obligation in mutual commitments not to regress but to progressively enhance climate ambition. Article 764 of the TCA requires the parties to respect the Paris Agreement and to “refrain from acts or omissions that would materially defeat [its] object and purpose,” while Article 771 confirms that this obligation constitutes an essential element of the agreement. Article 772(1) further establishes that a “serious or substantial failure” to fulfil such essential obligations entitles either party to suspend or terminate the agreement, subject to a preliminary consultation within the Partnership Council aimed at finding a “timely and mutually agreeable solution.”

Together with negative conditionality, a positive conditionality has emerged linking compliance with international climate commitments to the granting of financial assistance or preferential trade arrangements, which is also contributing to elevating climate action to a substantive and enforceable element of the EU’s external policy framework. Connecting external

²⁴ Agreement with the United Kingdom (TCA), OJCE, no L. 149/10, April 30, 2021, Article 771.

²⁵ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149/10 (30 April 2021).

²⁶ *Ibid.*, arts 319, 320, 367(14), 401.

aid mechanisms²⁷ to climate objectives²⁸, such as adherence to the Paris Agreement, the United Nations Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, and the United Nations Convention to Combat Desertification²⁹ implies that tariff preferences should be made conditional on effective compliance with sustainability criteria for all the most sensitive products from a climate and biodiversity protection point of view. For instance, tariff liberalisation for shell eggs has been made conditional on compliance with relevant EU animal welfare standards for laying hens in the EU-Mercosur agreement, though tariff preferences have not been made conditional on adherence to EU production standards concerning environmental protection, health, or, in the case of other livestock products, animal welfare³⁰. A comparable approach is evident in the EU–New Zealand Agreement, where access to the bilateral beef quota is conditional upon compliance with a sustainability criterion that excludes cattle raised in feedlots³¹.

3.3. Such a positive conditionality which presents some strength compared to the negative conditionality might be generalized as all EU trade

²⁷ Proposal for a Regulation of the European Parliament and of the Council establishing the Neighbourhood, Development and International Cooperation Instrument, COM (2018) 460 final, June 4, 2018.

²⁸ EU Regulation No. 2021/947 of the European Parliament and the Council, June 9, 2021, establishing the Neighbourhood, Development and International Cooperation Instrument – Europe in the World, OJCE, no L. 209/1, June 14, Article 3(a) and 3(c)(iv).

²⁹ Similarly, the Proposal for a Regulation of the European Parliament and of the Council on the application of a Generalized Scheme of Preferences, COM (2021) 579 final, September 22, 2021 introduces climate conditionality in the case of the new generalised system of preferences (where originally - see EU Regulation No. 978/2012, October 25, 2012) the UNFCCC (mentioned in part B of Annex VIII of the GSP regulation) was not included in the provisions related to the temporary withdrawal of preferences (Article 19.1), as the Paris Agreement on climate change, the Convention on Biological Diversity, and the United Nations Framework Convention on Climate Change should eventually be added to the list of international conventions that countries must ratify in order to benefit from the most preferential tariffs, thus recognizing that serious and systematic violations of the principles of the climate change conventions may lead the EU to withdraw its general preferential trade tariffs.

³⁰ See https://policy.trade.ec.europa.eu/news/commission-publishes-final-sia-and-position-paper-eu-mercotur-trade-agreement-2021-03-29_en; and Veblen Institute, FNH, Interbev, EU - Mercosur: the dangers of ratification as it stands, March 2023, <https://www.veblen-institute.org/IMG/pdf/ue-mercotur-dangers-ratification-en-letat-mars2023.pdf>.

³¹ EU-New Zealand Agreement, Annex 2-A Tariff elimination schedules, Section C Tariff rate quotas of the EU, para. 21(b): “This paragraph applies to originating goods classified in the following tariff lines: 0201, 0202, 0206 10 95, 0206 29 91, 0210 20 10, 0210 20 90, 0210 99 51, 0210 99 59, 1502 10 90, ex 1502 90 90 (beef only), and 1602 50,1 to product from animals that have been raised under New Zealand’s pastoral farming conditions. For greater certainty, this does not include commercial feedlots.”

agreements should establish criteria for granting preferential tariffs for products presenting the highest risks to the climate and biodiversity (depending on the list of sensitive products on each agreement) carried out by means of a health and environmental impact study specifically dedicated to this issue, in consultation with the stakeholders and civil society organisations concerned. In addition, the timetable for implementing the trade benefits offered to partners could also be progressive and linked to the implementation of climate commitments. Certain tariff reductions or the opening up of certain quotas could, for example, become effective in proportion to the progress made on environmental measures such as the upward reassessment of climate commitments, the end of fossil fuel subsidies, or the adoption of a long-term carbon neutrality strategy.

The core weakness of negative conditionality lies in the notably high threshold required to trigger remedial measures such as suspension or termination under essential elements clauses. In practice, the evidentiary burden of demonstrating that a party has failed to fulfil the object and purpose of the Paris Agreement remains considerable³². This is even more pronounced in agreements involving regional blocs, such as Mercosur, which allows for suspension only in the event that a party formally withdraws from the Paris Agreement³³. In such contexts, political complexities further weaken the credibility of enforcement mechanisms. This is particularly evident in light of Argentina's recent withdrawal of its climate negotiators from COP 29, which casts doubt on the sincerity of its commitment to implementing the Paris Agreement in good faith.

A similar limitation arises in relation to the so-called Bulgarian clauses. These provisions, while formally permitting the adoption of appropriate measures in response to human rights violations, have been rarely activated.

³² In a similar vein the Court of Justice in its Opinion 2/15 on the EU-Singapore Agreement (May 16, 2017, para 161), seems to have mitigated the absence of a unilateral enforcement mechanism regarding sustainable development by recognizing the possibility for one of the parties to terminate or suspend the agreement in the event of a violation of the sustainable development chapter, based on the rule of customary international law regarding the substantial breach of a treaty, as codified in Article 60 of the Vienna Convention on the Law of Treaties, thus creating a sort of “sustainable development conditionality”. See on this See L. ANKERSMIT, *Opinion 2/15: Adding Some Spice to the Trade & Environment Debate*, *European Law Blog*, June 15, 2017; also see M. CREMONA, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, *ECJ, May 16, 2017*; *Opinion 2/15 Free Trade Agreement with Singapore*, *European Constitutional Law Review*, 2018/14, pp. 244-245.

³³ Article XX. 3 confines the essential element to remain party in good faith of the UN-FCCC and its Paris agreement. According to Article XY “The suspension of this Agreement in the event of a violation of the essential element set out in Article XX [Paris] committed by a Signatory MERCOSUR State shall not entail the suspension of the operation of this Agreement in relation to the other Signatory MERCOSUR States.”

Instead, human rights issues have been typically addressed within the framework of the political dialogue envisaged by the agreement – if such a mechanism exists – either by the general committee responsible for overseeing implementation, or by parliamentary committees established under certain agreements. In practice, when a party considers adopting measures under a non-execution clause, the general committee is, in most cases, required to be informed and to act as a forum for mediation between the parties. Moreover, no agreement to date has established a body specifically tasked with monitoring the human rights situation of the parties, although such mechanisms have occasionally been introduced after the agreement’s entry into force.

Nevertheless, the main not negligible merit of the introduction of such a negative conditionality is to meaningfully contribute to strengthening the interpretive authority of climate provisions across the entire agreement. Thus, these climate obligations transcend the merely preambular function and, pursuant to Article 31 of the Vienna Convention on the Law of Treaties, must be interpreted in good faith and in light of their context and the object and purpose of the treaty. Accordingly, climate-related provisions are not peripheral, but constitute a central component of the agreement’s normative framework. Any interpretation that disregards or undermines this climate-oriented object and purpose would therefore be incompatible with the foundational principles of treaty interpretation.

4. Alongside climate conditionality in the EU’s FTAs, the EU includes elements of conditionality in its autonomous measures. This internal regulation often applies with respect to traders who place goods on the EU market, requiring them to comply with EU standards. EU Deforestation Free Products Regulation (EUDR)³⁴ requires operators to prove that products do not originate from recently deforested land or to have contributed to forest degradation. The Renewable Energy Directive (RED) aims to reduce the Union’s reliance on fossil fuels³⁵. It sets binding targets for the EU Member States to increase their share of renewables in the energy mix. Similarly, RED sets criteria for energy products to be considered ‘renewable’ on the EU market. Exporters outside the EU must comply with these criteria if their products are to

³⁴ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206.

³⁵ Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413.

count toward EU renewable energy targets. These regulations allow the EU to leverage its market position to influence environmental policies outside its borders. While these laws technically apply within the EU’s legal space, they are also intended to encourage behavioural change outside the EU.

4.1. Perhaps the most criticised autonomous measure adopted by the EU has been its Carbon Border Adjustment Mechanism (CBAM). It intends to translate the carbon content of imported goods in their price by requiring EU importers to acquire allowances for the embedded emissions in their imported goods³⁶. CBAM is thus intended to influence third countries to adopt carbon pricing³⁷. The legislative proposal noted that ‘bold domestic action’ was needed for the EU’s ‘international leadership’³⁸.

CBAM has been criticised as a unilateral measure: “Of all the choices made by the EU in designing its own CBAM, the one that is the most questionable is the decision for the EU to go it alone”³⁹. CBAM’s unilateral nature also appears to go against the EU’s obligation to promote multilateral solutions to common problems, in particular in the framework of the United Nations, enshrined in Article 21(1)(2) TEU⁴⁰. As discussed above, CBAM has been justified by the EU on the grounds of preventing ‘carbon leakage’⁴¹. It addresses the issue of companies moving their production to countries with less stringent climate policies. By putting a carbon price on certain carbon-related imports, it has been described as levelling the playing field for EU businesses that are to comply with the EU’s Emissions Trading System (ETS). For countries that do not have an equivalent carbon pricing measure, there are financial incentives to align with EU climate policies. The main legal criticism of CBAM stems from arguments that it violates the EU’s obligations

³⁶ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130 (CBAM Regulation).

³⁷ F. TIMMERMANS, *EU Climate Commissioner* (Speaking at Global Counsel Conference, ‘Europe’s post-covid recovery plans with Frans Timmermans | The Politics of Life After Covid 3 months ago’) (14 January 2021) <<https://vimeo.com/501734311>> accessed 5 February 2024, at 17:00. COMMISSION, ‘Answers to the European Parliament: Questionnaire to the Commission-Designate Paolo Gentiloni, Commissioner-designate for Economy’ (October 2020), 7.

³⁸ COM (2021) 564 final, 3.

³⁹ M. MOÏSE MBENGUE, E. CIMA, *op. cit.*, 220.

⁴⁰ “While CBAM serves to protect the integrity of the EU ETS and promotes the EU’s policy coherence, at first glance, being a unilateral measure, it does not rest very well with the obligation to promote cooperative, pluri- and multilateral solutions to common problems enshrined in”.

⁴¹ ‘As an early mover, the EU can become a standard-setter.’ COMMISSION, ‘Answers to the European Parliament: Questionnaire to the Commission-Designate Paolo Gentiloni, Commissioner-designate for Economy’ (October 2020), at 31:45; Parliament CBAM resolution, preamble.

under international trade law⁴². In May 2025, Russian Federation requested WTO dispute consultations with the European Union over CBAM⁴³. It argues that CBAM is a “highly trade-restrictive and discriminatory mechanism established by the EU under the pretext of climate policy”⁴⁴.

Although the term ‘carbon leakage’ does not appear in core legal instruments such as the UNFCCC or the Paris Agreement, it has become a widely recognised policy concern in climate governance⁴⁵. Reports and technical papers under the UNFCCC, as well as successive IPCC assessments, have acknowledged carbon leakage as a risk that could undermine the global effectiveness of climate mitigation measures. Ever since the Union implemented its Emissions Trading System in 2005, measures that take into account activities outside the EU space have attracted legal and political criticism. The EU’s response has been to focus on ensuring that its climate measures, such as CBAM, are legally defensible, particularly under international trade law. Yet legal robustness alone does not address the core criticism: that these measures are unilateral, conditional, and risk undermining the ethos of co-operation that lies at the heart of the international climate regime. Even if justified under frameworks like the WTO’s environmental exceptions, measures like CBAM signal a shift from multilateralism to strategic autonomy in climate governance. Most worryingly, it is perceived as moving the EU from a position of climate leadership, to climate coercion.

5. Climate conditionality represents a bold attempt by the EU to align its external action with its ambitious internal climate objectives. It reflects a growing determination to use trade, regulatory, and financial tools to incentivise third countries and external actors to adopt climate-friendly practices. Climate conditionality now permeates both bilateral trade agreements and unilateral regulatory measures, from CBAM to RED, and

⁴² I. VENZKE, G. VIDIGAL, *Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)*. In M. DEN HEIJER, and H. VAN DER WILT (Eds.), *Netherlands Yearbook of International Law* (2020): *Global Solidarity and Common but Differentiated Responsibilities*, Netherlands Yearbook of International Law; Vol. 51, Asser Press, 187-225.

⁴³ World Trade Organization, *Russian Federation Requests WTO Consultations with the European Union on Carbon Border Adjustment Mechanism* (19 May 2025). Available at https://www.wto.org/english/news_e/news25_e/ds639rfc_19may25_e.htm

⁴⁴ WTO, *European Union and its Member States – Carbon Border Adjustment Mechanism: Request for Consultations by the Russian Federation*, WT/DS639/1, G/L/1573, G/SCM/D142/1, G/LIC/D/55 (12 May 2025), circulated 19 May 2025.

⁴⁵ A. SHOYER, J. SUL and C. VAN DER VEN, *Carbon Leakage and the Migration of Private CO₂ Emitters to other Jurisdictions* in K.R. GRAY (ed.) et al. *The Oxford Handbook of International Climate Change Law* (OUP, 2016) 290.

is reinforced through both positive and negative forms of leverage. Much of the policy and academic debate has centred on the legal defensibility of these measures, particularly in light of international trade law. Yet legal defensibility is not the same as political legitimacy, practical effectiveness, or normative coherence. While climate conditionality can be justified in principle, especially to prevent carbon leakage and to avoid regulatory free-riding, it also risks turning the EU's climate leadership into a form of climate coercion. It imposes a particular regulatory model on others, often with limited recognition of alternative pathways, differentiated responsibilities, or local contexts. Leadership involves more than regulatory assertiveness; it requires dialogue, cooperation, and legitimacy. Conditionality may help export the EU's standards in the short term, but it could also erode the trust and multilateral spirit needed to meet shared climate goals. The challenge for the EU is not simply to design legally robust tools, but to ensure that climate conditionality is wielded in a way that fosters genuine partnership and solidarity.

THE COUNCIL OF EUROPE AND THE CONSTITUTIONALISATION OF CLIMATE LAW

FRANCESCA IPPOLITO*

SUMMARY: 1. Introduction: Climate Constitutionalism and the Council of Europe. – 2. The Council of Europe’s Normative Architecture on Environmental and Climate Protection. – 3. The ECtHR and the Jurisprudence of Positive Climate Obligations. – 4. The European Committee of Social Rights: Climate Change and Socio-Economic Rights. – 5. The Synergistic Logic of the Two Axes. – 6. Conclusions: Implications for the Future of Climate Constitutionalism.

ABSTRACT

This article examines the Council of Europe’s contribution to the constitutionalisation of climate law through two mutually reinforcing dynamics: the progressive construction of a regional normative framework on environmental protection, anchored most recently by the 2025 Convention on the Protection of the Environment through Criminal Law; and the emergence of enforceable positive obligations through the jurisprudence of the European Court of Human Rights and the European Committee of Social Rights. The article argues that these developments collectively constitute a nascent European Ecological Public Order – a constitutional framework in which ecological integrity is recognised as a precondition for the effective enjoyment of fundamental rights. Yet it contends that this framework harbours a structural paradox: its systemic ambition is undermined by the persistent restrictiveness of the individual victim-status threshold, whose doctrinal underdevelopment risks displacing the burden of climate protection from State obligations onto individual resilience, thereby protecting the most adaptable and abandoning the most vulnerable. Resolving this paradox, the article argues, is the central doctrinal challenge confronting Council of Europe climate constitutionalism.

Keywords: climate constitutionalism; Council of Europe; European Ecological Public Order; intergenerational equity.

1. The constitutionalisation of climate law has rapidly evolved from a peripheral scholarly concern into a central question of contemporary public law. Comparative constitutional practice now reveals an accelerating convergence

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between environmental protection, human rights adjudication, and climate governance. Yet the role of regional international organisations in this process remains comparatively under-theorised. This article addresses that gap by examining the Council of Europe as a constitutional actor in the development of European climate governance – one that contributes through two interconnected dynamics: first, the progressive construction of a regional normative framework on environmental protection; and, second, the emergence of enforceable positive obligations through the jurisprudence of the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR).

The central argument of this article is that these two dynamics are generating a nascent European Ecological Public Order – a framework in which ecological integrity is increasingly treated as a constitutional precondition for the effective exercise of all fundamental rights. That argument, however, is advanced with a critical caveat: the framework’s systemic ambition is internally inconsistent with a system of individual access that conditions climate rights-protection on personal adaptive capacity, a structural tension that has not yet been adequately theorised. The April 2024 Grand Chamber climate trilogy¹ established the framework’s foundations; the subsequent Committee decision in *Engels and Others v Germany*² revealed its structural vulnerability; and the pending priority case of *Müllner v Austria*³ will provide its most searching test. The resolution of that test – whether a heat-sensitive applicant with a medically documented, temperature-triggered disability qualifies as a climate ‘victim’ – will determine whether the European Ecological Public Order is genuinely protective or structurally exclusionary.

The article proceeds along two principal axes. The first, normative and legislative, is addressed in Part II, which surveys the corpus of Council of Europe instruments bearing upon environmental protection, with particular attention to the 2025 Convention on the Protection of the Environment through Criminal Law⁴. The second, jurisprudential, is addressed in Parts III and IV.

¹ ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, App No 53600/20, Grand Chamber judgment of 9 April 2024; *Duarte Agostinho and Others v Portugal and 32 Other States*, App No 39371/20, Grand Chamber judgment of 9 April 2024; *Carême v France*, App No 7189/21, Grand Chamber judgment of 9 April 2024. On the trilogy as a constitutional moment see J. SETZER and C. HIGHAM, *Global Trends in Climate Change Litigation: 2024 Snapshot* (Grantham Research Institute, LSE, 2024) 12-18.

² ECtHR, *Engels and Others v Germany*, App No 46906/22, Committee decision of 25 March 2025.

³ ECtHR, *Müllner v Austria*, App No 18859/21 (pending).

⁴ Council of Europe, *Convention on the Protection of the Environment through Criminal Law*, CETS No 228 (opened for signature 3 December 2025). The Convention entered into force upon ratification by three member States. On CETS 228 as the culmination of decades of

Part III analyses the ECtHR's progressive elaboration of positive climate obligations, incorporating detailed analysis of Engels and Müllner as the critical post-trilogy cases that expose the framework's structural paradox. Part IV examines the ECSR's collective complaints jurisprudence, which has in certain respects advanced further than the ECtHR – particularly in its articulation of distributional obligations regarding the energy transition. Part V synthesises both axes, developing the concept of the European Ecological Public Order and confronting directly the structural paradox at its core, including the Committee of Ministers' compliance record. Part VI concludes.

2. The Council of Europe's engagement with environmental law predates the contemporary climate crisis by several decades, yet its early instruments already anticipated the constitutional logic that now animates the field. The European Convention on Human Rights made no express reference to the environment, and for many years the Court declined to treat environmental damage as a freestanding human rights violation. Nevertheless, the seed of a constitutionalised environmental order was planted in the Convention's foundational architecture: the recognition of the right to life, to privacy, and to an effective remedy provided doctrinal scaffolding upon which later generations of judges and scholars would construct far-reaching environmental obligations.

The Parliamentary Assembly of the Council of Europe (PACE) was among the first institutional actors to advocate for a right to a healthy environment. Its Resolution 2396 of 2021 explicitly called for the anchoring of such a right within the Convention system⁵, while the Committee of Ministers' Recommendation CM/Rec(2022)20 provided detailed guidance on the measures states should adopt to operationalise that right⁶ and invoking the Intergovernmental Panel on Climate Change's findings as a baseline against which state conduct is to be assessed, it effectively incorporates scientific consensus into the human rights framework as a standard of legal obligation. The Steering Committee for Human Rights subsequently

European environmental criminal law reform see L. NEYRET (ed), *Des écocrimes à l'écocide: le droit pénal au secours de l'environnement* (Bruylant 2015) 189-214.

⁵ Parliamentary Assembly of the Council of Europe (PACE), Resolution 2396(2021) on the anchoring of the right to a healthy environment: need for enhanced action by the Council of Europe; PACE, Recommendation 2211(2021). See also PACE, Resolution 2210(2021) on Parliaments and the climate emergency.

⁶ Council of Europe, Committee of Ministers, Recommendation CM/Rec(2022)20 on the human rights implications of environmental degradation (adopted 27 September 2022). The Recommendation explicitly invokes IPCC findings as a baseline against which state conduct is to be assessed.

conducted a feasibility study on a dedicated legal instrument on the right to a healthy environment, a process whose conclusions will shape the next phase of treaty-making within the organisation⁷. The Venice Commission has contributed through its opinions on constitutional adjudication and climate change, examining the legitimacy and institutional competence questions that arise when courts review the adequacy of legislative climate frameworks. The Council of Europe’s approach reflects a conviction, increasingly shared across European legal orders, that environmental protection cannot be reduced to a matter of regulatory policy but must be understood as a constitutional imperative rooted in the indivisibility of human rights and ecological integrity.

Soft law shapes the interpretive horizon of the Court’s living instrument methodology, informs the work of the Committee of Ministers in supervising the execution of judgments, and provides domestic constitutional courts with persuasive authority when they engage in the kind of constitutional borrowing that has characterised transnational climate adjudication. From another standpoint, the Convention on the Protection of the Environment through Criminal Law⁸ represents the most ambitious exercise in environmental treaty-making within the Council of Europe since the original 1998 Convention of the same name. The earlier instrument had attracted limited ratifications and had been criticised for its dependence on administrative definitions of illegality – a feature that effectively immunised environmentally destructive conduct authorised by domestic permits from criminal prosecution. The revision fundamentally reconceives the relationship between criminal law and ecological harm, introducing a tripartite structure of offences that moves beyond the administrative dependence model toward a standard predicated upon the substantiality and irreversibility of ecological damage. As Parts III and IV will demonstrate, the 2025 Convention’s ecocentric reorientation is directly complementary to the ECtHR’s expanding positive obligations framework and to the ECSR’s emerging energy jurisprudence: together, these instruments constitute the three pillars of the European Ecological Public Order. The normative ambition animating the new Convention was anticipated, with striking prescience, in the Council of Europe’s Committee of Ministers’ Res-

⁷ Council of Europe, Steering Committee for Human Rights (CDDH), *Feasibility Study on the Elaboration of a Council of Europe Legal Instrument on the Right to a Healthy Environment* (CDDH(2022)R94 Addendum II, March 2022). For academic assessment see A. CHALABI, *A New Theoretical Model of the Right to Environment and its Practical Advantages* (2023) 23 *Human Rights Law Review* 1-19; A. BOYLE, *Human Rights and the Environment: Where Next?* (2012) 23 *European Journal of International Law* 613.

⁸ CETS No 228, opened for signature 3 December 2025.

olution of 1977, which acknowledged that criminal law should function as a last resort in the field of environmental protection, but insisted that recourse to it becomes necessary when other measures prove unobserved, ineffective, or inadequate. The drafters of the 2025 Convention were animated by that same logic: to equip domestic criminal justice systems with a more robust legal foundation for investigating, prosecuting, and sanctioning conduct that causes substantial environmental damage. The treaty carries the ambition of reversing a deeply troubling global trend, as criminal networks exploit the enormous financial returns available from illicit waste disposal, unlawful deforestation, and illegal wildlife trafficking, among other activities – conduct that Europol has characterised as a key threat to global security.

Whether the Convention will represent a genuine turning point remains, for now, impossible to assess. The Council of Europe's prior legislative venture in this domain – the Convention on the Protection of the Environment through Criminal Law of 1998, bearing the identical name – ended in failure: it attracted only three ratifications and never entered into force. The new instrument must do considerably better. Under Article 53(3), entry into force requires at least ten signatories, of whom no fewer than eight must be member States of the Council of Europe – a threshold that places the organisation's own membership squarely at the centre of the ratification calculus. Non-member States that participated in the drafting process, as well as the European Union under Article 53(1), may accelerate that process through accession.

EU member States may be expected to move with relative speed. The EU Environmental Crime Directive of 2024, which must be transposed by 21 May 2026, creates a legislative framework broadly consonant with the Convention's objectives; and the Convention's own provision preserving EU rules in mutual relations between member States (Article 5(1)(2)) reduces the normative friction of ratification. Yet even widespread EU support cannot conceal the Convention's fundamentally regional orientation. While non-member States may accede under Article 54, and while Article 33 extends domestic jurisdiction to offences committed abroad by nationals, the instrument remains limited in reach. Combating environmental crime effectively requires a global legal framework commensurate with the transnational character of the conduct it addresses. That said, a swift entry into force and a broad coalition of State parties would carry normative significance well beyond the European region – lending momentum, in particular, to Vanuatu's proposal, submitted to the ICC Assembly of States Parties in December 2024, to amend the Rome Statute by introducing ecocide as a fifth international crime. At the

core of the Convention’s innovation lies its treatment of the doctrine of administrative dependence⁹, which has historically shaped environmental criminal law across European legal orders. Under this doctrine, criminal liability for environmental harm is parasitic upon the prior determination by administrative authorities that the relevant conduct is unlawful: if a competent authority has issued a permit, the permit provides a complete defence, regardless of the ecological consequences of the licensed activity. The practical effect was to render environmental criminal law largely ineffective against the most serious forms of industrial and corporate ecological harm, precisely because states had authorised those harms through their permitting systems.

The Convention addresses this structural deficit through a conceptual move of considerable doctrinal significance: by shifting the criterion of criminal liability from the lawfulness of the actor’s conduct under administrative law to the substantiality of the ecological harm caused, the Convention insulates the criminal prohibition from the vicissitudes of administrative authorisation¹⁰. Where conduct causes severe and either widespread or long-term damage to the environment, the existence of an administrative permit becomes, at most, a mitigating factor relevant to sentencing. This ecocentric reorientation repositions the natural environment not as a resource subject to regulation but as a value in itself, possessing a legally cognisable integrity that the state is bound to protect even against conduct it has itself sanctioned. It is precisely this logic – that ecological harm is justiciable irrespective of State authorisation – that reinforces the ECtHR’s framework of positive obligations, discussed in Part III, under which States cannot invoke the formal legality of their climate policy architecture as a defence against claims that it fails to protect Convention rights.

The doctrinal architecture of the 2025 Convention invites sustained comparison with the definition of ecocide proposed by the Independent Ex-

⁹ The concept of administrative dependence posits that criminal liability for environmental harm is contingent upon that act being unlawful under administrative law. See M. FAURE and G. HEINE, *Criminal Enforcement of Environmental Law in the European Union* (Kluwer 2005) 55-89; H. VAN ASSELT, F. SINDICO and M. MEHLING, *Global Climate Change and the Fragmentation of International Law* (2008) 30 *Law and Policy* 423.

¹⁰ Explanatory Report to the 2025 Convention on the Protection of the Environment through Criminal Law (CETS No 228), paras 55-80. The drafting history records sustained debates over whether the substantiality threshold should incorporate ecological tipping-point thresholds as defined by the planetary boundaries framework. The Convention’s approach closely mirrors – without adopting – the standard proposed by the Independent Expert Panel for the crime of ecocide.

pert Panel convened under the auspices of Stop Ecocide International¹¹. The Panel's definition – criminalising unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment – mirrors, with striking precision, the Convention's own operative standards. This convergence reflects a shared ecocentric philosophy that measures criminal wrongdoing not by reference to the defiance of administrative rules but by reference to the degradation of ecological systems.

The Convention's strategic decision to refrain from deploying the term 'ecocide' is understandable in diplomatic terms: the concept remains contested within international criminal law discourse¹², and several member states have expressed reservations about the implications of criminal liability for state-authorised industrial activity. Nevertheless, the Convention's internal logic – its emphasis on substantiality, irreversibility, and the protection of planetary life-support systems – positions it as the European regional precursor to a future international criminalisation of ecocide. Read in this light, the Convention functions as a normative bridge: an intermediate legal instrument that operationalises the philosophical and legal commitments underlying the ecocide project while navigating the political constraints that continue to impede its formal adoption at the international level.

The 2025 Convention also makes significant advances in the domain of corporate criminal liability. The Convention requires parties to establish liability of legal persons for offences committed in the exercise of their activities, irrespective of whether a specific individual within the corporate structure has been identified and prosecuted¹³. This approach addresses a

¹¹ Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text* (June 2021), published in (2021) 22 *Journal of International Criminal Justice* 281 (Philippe Sands and Jojo Metzger, lead drafters). On the proximity between the Convention and the ecocide definition see R. ROGERS, *Ecocide and Jus Cogens* (2023) 21 *Journal of International Criminal Justice* 399.

¹² On the political contestation surrounding the ecocide concept in international criminal law, see D. SHORT, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (Zed Books 2016); P. HIGGINS, D. SHORT and N. SOUTH, *Protecting the Planet: A Proposal for a Law of Ecocide* (2013) 59 *Crime, Law and Social Change* 251; G. PINZAUTI, *Ecocide, Complementarity and the Quest for International Criminal Accountability* (2022) 20 *Journal of International Criminal Justice* 511. Belgian, Dutch, Luxembourg and Spanish parliamentary initiatives to amend the Rome Statute are documented in Stop Ecocide International, *Government and Institutional Calls for Ecocide Law* (2023 update).

¹³ CETS No 228, Art 7. This provision imposes liability upon legal persons where corporate decision-making structures enable or facilitate serious environmental offences, irrespective of whether a specific individual perpetrator is identified. The ECSR's horizontal effect jurisprudence – imposing on states the duty to regulate private actors whose conduct threatens Charter rights – provides the human rights parallel to this criminal liability regime: see Part IV.C below.

persistent lacuna in environmental enforcement: the organisational diffusion of decision-making within large corporations frequently renders it impossible to attribute individual criminal responsibility for institutional choices that produce catastrophic ecological outcomes. As such, this criminal liability regime constitutes the penal counterpart to the ECSR’s horizontal effect jurisprudence, which requires states to regulate corporate conduct threatening Charter social rights: the Convention and the Charter together thus construct a comprehensive architecture of corporate ecological accountability. Furthermore, the Convention’s treatment of negligence and wilful blindness as sufficient mental elements for the most serious offences reflects a reception of the precautionary principle within the domain of criminal law¹⁴. Where the precautionary principle has historically operated as a standard for administrative decision-making – requiring that the absence of scientific certainty not be used as a reason for postponing preventive measures – the Convention’s mental element provisions translate this precautionary logic into the grammar of criminal culpability: the reckless disregard of known ecological risks becomes, in itself, a criminally blameworthy state of mind.

3. The European Court of Human Rights’ engagement with environmental harm began in earnest in the 1990s, with a series of cases in which applicants complained that state failure to regulate industrial pollution had interfered with their right to respect for private and family life under Article 8. The decisions in *López Ostra v Spain*, *Fadeyeva v Russia*, and *Tătar v Romania* established the foundational principle that Article 8 imposes upon states positive obligations to put in place adequate regulatory frameworks for the protection of individuals from serious environmental harm¹⁵. While these cases concerned primarily local industrial pollution, they established the structural template – positive obligations, regulatory frameworks, minimum thresholds of harm – that would later be applied to the systemic and diffuse harm characteristic of climate change.

The application of Article 2 (right to life) to environmental risk was confirmed in *Öneryıldız v Turkey* and *Budayeva v Russia*, which held that states must take reasonable measures to prevent loss of life resulting from fore-

¹⁴ Precautionary principle: Principle 15 of the Rio Declaration on Environment and Development (1992); European Court of Justice, Case C-127/02, *Waddenzee*, ECLI:EU:C:2004:482, para 44 (EU law reception). On the criminal law translation of precaution see M. FAURE and G. HEINE, *op. cit.*, 220-238; N. DE SADELEER, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) ch 3.

¹⁵ ECtHR, *López Ostra v Spain*, App No 16798/90, judgment of 9 December 1994; *Fadeyeva v Russia*, App No 55723/00, judgment of 9 June 2005; *Tătar v Romania*, App No 67021/01, judgment of 27 January 2009. For doctrinal synthesis see S. BOGOJEVIC and R. RAYFUSE (eds), *Environmental Rights in Europe and Beyond* (Hart 2018) ch 3.

seeable natural or industrial hazards¹⁶. These cases expanded the normative reach of the Convention to encompass systemic state failures – not merely individual acts of interference – as potential human rights violations. They also established the procedural limb of the positive obligation: states must not only implement adequate substantive protections but must also maintain mechanisms for investigation, accountability, and access to justice in cases of environmental harm. This procedural dimension will prove critical to the Articles 6 and 13 claims in *Müllner*, examined below.

The Grand Chamber's judgment of 9 April 2024 in *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* marks a qualitative transformation in the Court's engagement with climate change, elevating the issue from the margins of its environmental jurisprudence to its constitutional core¹⁷. Three features of the judgment are of particular significance for the argument of this article.

First, the Court recognised that climate change constitutes a present and serious threat to the effective enjoyment of Convention rights, particularly Articles 2 and 8, without requiring applicants to demonstrate a specific, individualised harm causally traceable to the defendant state's emissions¹⁸. This epistemic step – acknowledging the systemic and probabilistic character of climate harm as legally cognisable under the Convention – was the doctrinal precondition for holding states accountable for the structural adequacy of their climate frameworks rather than for discrete acts of omission.

Second, the Court explicitly incorporated scientific consensus – including the findings of the Intergovernmental Panel on Climate Change – as a material source for determining the content and urgency of state obligations under the Convention¹⁹. The invocation of climate science as a legal standard is not un-

¹⁶ ECtHR, *Öneryıldız v Turkey*, App No 48939/99, Grand Chamber judgment of 30 November 2004, para 90; *Budayeva and Others v Russia*, App Nos 15339/02 and others, judgment of 20 March 2008. On the procedural limb of Art 2 in environmental context see A. BUYSE, *Strings Attached: The Concept of Effective Remedy in the ECHR* (2008) 3 *European Human Rights Law Review* 281.

¹⁷ ECtHR, *KlimaSeniorinnen* (n 2). For commentary see L. RAJAMANI and others, *National Fair Shares in Reducing Greenhouse Gas Emissions within the Globally Agreed Temperature Limit* (2021) 21 *Climate Policy* 983; S. DUYCK, *The KlimaSeniorinnen Judgment: A New Chapter in Climate Litigation at the European Court of Human Rights* (2024) 33 *Review of European, Comparative and International Environmental Law* 341.

¹⁸ ECtHR, *KlimaSeniorinnen* (n 2) paras 487-499 (on the epistemic status of climate science as a legal source) and paras 519-537 (on the conditions for individual victim status under Art 34 ECHR). The Court held that an applicant must demonstrate a sufficiently specific exposure to the adverse effects of climate change and fall within a class of particularly affected persons. See generally M. WEWERINKE-SINGH, *State Responsibility, Climate Change and Human Rights under International Law* (Hart 2019) ch 5.

¹⁹ ECtHR, *KlimaSeniorinnen* (n 2) paras 410-413. The Court acknowledged the role of

precedented in constitutional adjudication²⁰. What *KlimaSeniorinnen* achieves is the European institutionalisation of this methodology: the Court’s living instrument doctrine is now explicitly calibrated against the evolving state of climate science, creating a dynamic and responsive standard of obligation that will intensify as scientific projections worsen.

Third, the judgment holds that Article 8 requires states to adopt an adequate legal and administrative framework for climate-change mitigation, including the setting of binding, science-based emission-reduction targets and the implementation of regulatory measures capable of achieving those targets within the relevant timeframes²¹. This structural dimension of the obligation transforms the Court into a constitutional reviewer of legislative climate-change programmes. Critically, however, the Court’s victim-status analysis²² simultaneously imposed a high admissibility threshold for individual applicants – one that the Grand Chamber acknowledged the individual Swiss applicants themselves could not meet. This tension between the systemic breadth of the substantive obligation and the restrictiveness of individual access constitutes the structural paradox that *Engels* has since sharpened and *Müllner* will resolve.

The *KlimaSeniorinnen* together with *Duarte Agostinho and Others v Portugal and 32 Other States*²³ and *Carême v France*²⁴ constitute the April 2024 climate trilogy – a coordinated jurisprudential statement on the scope, limits, and content of state obligations under the Convention. *Duarte Agostinho* addressed the extraterritorial dimension of climate obligations: while the Court declined jurisdiction on procedural grounds, its analysis opens doctrinal possibilities for future litigation. *Carême* confirmed the legal framework applicable to climate-related Article 8 claims while dismissing on standing grounds. The

IPCC scientific consensus as a material source for the content of state obligations under the Convention. See also M. DELMAS-MARTY, *Vers une communauté de valeurs? Les forces imaginantes du droit* (Seuil 2011).

²⁰ German Federal Constitutional Court, *Neubauer and Others v Germany*, BVerfGE 157, 30, judgment of 24 March 2021, paras 182-267; *Urgenda Foundation v State of the Netherlands*, Hoge Raad, ECLI:NL:HR:2019:2007, judgment of 20 December 2019.

²¹ ECtHR, *KlimaSeniorinnen* (n 2) paras 414-445 (procedural limb of Art 8) and paras 546-573 (substantive limb and relationship to Art 2). The Court held that Switzerland had failed to implement an adequate legal and administrative framework for climate-change mitigation, in violation of Art 8 ECHR. On the implications for domestic climate legislation see I. ALOGNA, C. BAKKER and J.-P. GAUCI (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 54-78.

²² Paras 519-537.

²³ ECtHR, *Duarte Agostinho* (n 2). For analysis see S. JODOIN, *The Duarte Agostinho Decision: Jurisdiction, Responsibility and the Boundaries of the European Climate Constitution* (2024) 33 *Review of European, Comparative and International Environmental Law* 349.

²⁴ ECtHR, *Carême* (n 2). The Court dismissed the claim on standing grounds but confirmed the legal framework applicable to climate-related Art 8 claims.

trilogy is significant not only for what it establishes but for what it leaves open: the question of when an individual applicant can demonstrate the kind of particularised, present harm required to qualify as a ‘victim’ of climate change – a question that *Engels* and *Müllner* directly confront.

The doctrinal significance of such a trilogy must be read in conjunction with the decision in *Engels and Others v Germany*²⁵. The application, brought by a group of German nationals alleging that Germany’s domestic climate framework failed to protect them from the adverse effects of climate change, was declared inadmissible on two principal grounds: first, the applicants had failed to establish specific vulnerabilities or exceptional circumstances indicating a particularised future individual risk, as distinct from the general, population-level risk associated with climate change; and, second, the Court placed considerable weight on the availability of ‘reasonable personal adaptation’ as a factor capable of neutralising an otherwise cognisable risk, drawing on *KlimaSeniorinnen* para 533 without, however, defining the precise content or limits of that concept.

This approach raises fundamental doctrinal concerns that have begun to attract scholarly attention²⁶. The resolution of *Engels* at Committee level – rather than before a Chamber or Grand Chamber – foreclosed the opportunity for the Court to develop authoritative criteria for ‘reasonable personal adaptation’: a concept whose structural weight in the admissibility framework makes its doctrinal vagueness constitutionally dangerous. Absent clear specification of who can reasonably be expected to adapt, by what means, at what cost, and how unequal adaptive capacities are to be assessed, the concept risks operating as a threshold device that displaces the burden of climate protection from State obligations onto individual re-

²⁵ ECtHR, *Engels and Others v Germany*, App No 46906/22, Committee decision of 25 March 2025. The decision is discussed in detail in Part III. For first commentary see P. RUNDEL, *Inadmissibility Decisions after KlimaSeniorinnen: Hope Remains for Müllner v Austria as the Next Successful Climate Case before the ECtHR*, EJIL:Talk! (26 September 2025) <https://www.ejiltalk.org/inadmissibility-decisions-after-klimaseniorinnen-hope-remains-for-mullner-v-austria-as-the-next-successful-climate-case-before-the-ecthr/>; N. MEYER-OHLENDORF, *Climate Litigation before the European Court of Human Rights after KlimaSeniorinnen* (2024) 33 *Review of European, Comparative and International Environmental Law* 357.

²⁶ The *Engels* decision’s emphasis on ‘reasonable personal adaptation’ has attracted doctrinal criticism on the ground that it risks displacing the test of climate protection from State obligations to individual resilience. For the view that conditioning rights-protection on personal adaptive capacity is structurally incompatible with the purpose of a human rights system see J. PEEL and J. LIN, *Transnational Climate Litigation: The Contribution of the Global South* (2019) 113 *American Journal of International Law* 679, 699-702; A. SAVARESI and J. AUZ, *Climate Change and Human Rights: Mapping the Politics of Loss and Damage* (2023) 23 *Climate Policy* 533. See further P. RUNDEL, *op. cit.*

silience. The circularity is acute: applicants are told to adapt unless they can prove they cannot – yet the evidence of what adaptation exists, who can access it, and how it performs depends on State-enabled measures whose adequacy is precisely what is in dispute.

From a doctrinal standpoint, the preferable approach would require the Court to establish clear criteria and to conduct a context-specific assessment of whether adaptation measures are: (i) actually available and accessible to the individual applicant; (ii) implemented and resourced in practice rather than merely prescribed in law; (iii) demonstrably effective in reducing the applicant’s particular risk; and (iv) responsive to unequal adaptive capacities rather than calibrated to an abstract standard of reasonableness. Once a *prima facie* climate-related risk is established, the evidentiary burden should shift to the respondent State to demonstrate that ‘reasonable’ adaptation is genuinely available, accessible and effective for the person concerned. The failure to develop this framework in *Engels* amounts to more than a missed opportunity: it is a structural vulnerability at the heart of the European Ecological Public Order, since an order that conditions the enjoyment of ecological security upon the individual’s capacity to adapt will, in practice, protect the most resilient and abandon the most exposed.

The pending case of *Müllner v Austria* provides the most searching test to date of the doctrinal framework – or its absence – identified in *Engels*. The applicant, is an Austrian national with multiple sclerosis and Uhthoff’s Syndrome: above 25°C he requires a wheelchair; above 30°C he depends on an electric wheelchair and external assistance. He alleges that Austria’s failure to adopt effective climate mitigation measures, combined with the maintenance of climate-harming fiscal incentives, constitutes a breach of Articles 2, 6, 8 and 13 ECHR.

What distinguishes *Müllner* from *KlimaSeniorinnen*, *Engels*, and the Italian decisions in *De Conto* and *Uricchio* is the character and specificity of the evidence. In *KlimaSeniorinnen*, the individual applicants showed neither a critical medical condition nor a direct link between rising temperatures and specific health impacts²⁷. In *Engels*, the applicants demonstrated no specific vulnerabilities or exceptional circumstances (para 10). Similarly, in *Uricchio* and *De Conto*, the Court held that the applicants provided no medical documentation to substantiate their allegations of physical and mental health impact. By contrast, *Müllner* can tie his heat-aggravated disability directly to increasing temperatures through medically verified, person-specific evidence of current and foreseeable harm: a disability that

²⁷ Paras 533-534.

is mechanistically triggered by ambient temperatures that are themselves increasing as a direct function of anthropogenic climate change.

The ‘personal adaptation’ emphasis in *Engels* sits especially uneasily here. Expecting an individual with a heat-aggravated neurological disability to resolve the issue through self-help – or, still less plausibly, by relocating from Austria to a jurisdiction with lower average summer temperatures – would hollow out Article 8 in a manner irreconcilable with the Convention’s positive obligations framework. Meaningful adaptation for heat-sensitive individuals is inherently relational and State-enabled: it requires accessible cooling infrastructure, targeted health planning, early-warning systems, building and workplace standards, and social support networks whose provision falls squarely within the domain of State regulatory responsibility.

Austria’s domestic legal architecture intensifies the problem. Under Article 140(1) of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*), individuals can challenge only norms that directly affect them, leaving legislative omissions effectively unreviewable at the domestic level and creating a protection gap that is precisely what *Müllner* asks Strasbourg to address. The Articles 6 and 13 claims are correspondingly compelling: if legislative omissions cannot be tested domestically, access to court and an effective remedy are, in practice, illusory. Austria’s current Climate Change Act sets goals and coordination mechanisms but no binding post-2020 targets, no quantified carbon budgets, and no enforcement mechanisms; its revised draft reduces the statute’s substantive scope, omits the 2040 climate-neutrality commitment, and replaces binding obligations with a non-binding ‘roadmap’. The case thus fits the *KlimaSeniorinnen* template with unusual precision: an Article 8 violation is distinctly plausible, Article 2 is credibly engaged under the ‘real and imminent’ risk standard given the applicant’s heat-triggered disability at ordinary summer temperatures, and Articles 6 and 13 are compelling given Austria’s structural access-to-justice deficit.

Whatever the outcome, *Müllner* will determine whether the European Ecological Public Order’s structural paradox is acknowledged and resolved or silently perpetuated. If a heat-sensitive applicant with medically documented, temperature-mechanistic harm cannot qualify as a climate ‘victim’, the concept of a protective ecological public order becomes analytically untenable.

The analytical framework that makes *KlimaSeniorinnen* possible is the Court’s long-established living instrument doctrine, first articulated in *Tyrer v United Kingdom* and subsequently elaborated across decades of Convention jurisprudence²⁸. In the climate context, the doctrine performs

²⁸ ECtHR, *Tyrer v United Kingdom*, App No 5856/72, judgment of 25 April 1978, para 31

a dual function. First, it enables the Court to treat the intensifying scientific evidence of climate risk as a relevant source of interpretive authority, continuously updating the content of state obligations in response to new knowledge. Second, it allows the Court to situate its reasoning within the evolving normative landscape of international environmental law, including the Paris Agreement, IPCC reports, and the emerging debate around the crime of ecocide²⁹. The same methodology that enables the Court to read novel obligations into Articles 2 and 8 must, if applied consistently, also enable it to develop the victim-status threshold in a manner that is responsive to the actual distribution of climate vulnerability – a development that *Engels* failed to achieve and *Müllner* now demands.

4. While the ECtHR’s climate jurisprudence has attracted extensive scholarly attention, the parallel development of climate-related doctrine within the European Social Charter system has received considerably less analysis. This relative neglect is unwarranted: the ECSR has in recent years produced decisions that constitute, in doctrinal terms, a significant complement to – and in certain respects an advance upon – the ECtHR’s framework. The relevant Charter provisions are primarily Article 11 (right to protection of health) and Article 16 (right of the family to social, legal and economic protection), which the ECSR has interpreted as encompassing positive state obligations to address the health and social consequences of environmental degradation³⁰. The ECSR’s engagement with environmental harm preceded its turn to climate change. In *FIDH v France* and *Marangopoulos Foundation for Human Rights v Greece*, the Committee established that states’ obligations under Article 11 include the duty to address systemic environmental health risks through adequate regulatory frameworks and effective

(first articulation of the living instrument doctrine). See K. DZEHTSIAROU, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) ch 2; L.R. GLAS, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 211-225.

²⁹ On the integration of international climate law into the Convention’s living instrument methodology see C. VOIGT, ‘The Paris Agreement: What Is the Standard of Conduct for States?’ (2016) 6 *Climate Law* 1; B. MAYER, *The International Law on Climate Change* (CUP 2018) 192-215. The Court in *KlimaSeniorinnen* (n 2) confirmed that the Paris Agreement’s temperature targets inform the interpretive content of Arts 2 and 8 ECHR: paras 414, 547.

³⁰ European Social Charter (Revised), ETS No 163, Art 11 (Right to Protection of Health); Art 16 (Right of the Family to Social, Legal and Economic Protection). See Council of Europe, *Digest of the Case Law of the European Committee of Social Rights* (2018 edition) 116-120; O. DE SCHUTTER, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn, CUP 2019) ch 5.

enforcement mechanisms³¹. These early decisions established the principle that the adequacy of state measures – not merely their formal existence – is the relevant standard of assessment, a principle of constitutional significance that would later underpin the Committee’s climate jurisprudence.

The decisive turn came with the ECSR’s decision in *Confédération Générale du Travail (CGT) and Others v France* in 2022, which examined the adequacy of France’s national low-carbon strategy under Articles 11 and 13 of the Charter³². For the first time, the Committee applied the substantive adequacy standard to a state’s overall climate-change framework, scrutinising the ambition of national mitigation targets and the sufficiency of implementation measures against the benchmarks established by international climate science. This trajectory reached its present apogee in the ECSR’s landmark decision of 2023 in *Réseau Action Climat and Others v France*³³, which found violations of Articles 11, 13 and 16 of the Charter on the basis that France had failed to adopt and implement climate mitigation measures adequate to protect the rights recognised in those provisions. The decision confirms that the Charter imposes positive obligations of result in the domain of climate change – not merely obligations of means – a standard that is in certain respects more demanding than the ECtHR’s framework obligation under Article 8.

A further dimension of the ECSR’s climate jurisprudence concerns the horizontal effect of social rights obligations – the extent to which state obligations under the Charter require the regulation of private actors, including corporations, whose conduct contributes to climate harm. The Committee has consistently held that states’ positive obligations under the Charter require them to maintain adequate regulatory frameworks governing private conduct that affects the enjoyment of social rights³⁴. Applied to the cli-

³¹ ECSR, *International Federation of Human Rights Leagues (FIDH) v France*, Complaint No 14/2003, decision of 8 September 2004, para 31; *Marangopoulos Foundation for Human Rights v Greece*, Complaint No 30/2005, decision of 6 December 2006. The latter, concerning coal-mining operations and respiratory health, remains the foundational engagement with environmental harm as a social rights violation prior to the climate era: see below for detailed analysis.

³² ECSR, *Confédération Générale du Travail (CGT) and Others v France*, Complaint No 171/2018, decision of 16 March 2022, para 85ff. The Committee scrutinised the adequacy of France’s national low-carbon strategy under Arts 11 and 13 ESC (Revised), for the first time applying a substantive adequacy standard to an overall climate-change legislative framework.

³³ ECSR, *Réseau Action Climat and Others v France*, Complaint No 188/2020, decision of 12 May 2023. The Committee found violations of Arts 11, 13 and 16 ESC (Revised) on the basis that France had not adopted adequate climate mitigation measures. The decision confirms that the Charter imposes positive obligations of result in the domain of climate change, not merely obligations of means.

³⁴ See A. NOLAN, *Addressing Economic and Social Rights Violations by Non-State Actors*

mate context, this principle implies that states must not merely set emission-reduction targets for their own activities but must regulate corporate emissions through binding legal requirements and effective enforcement mechanisms. This jurisprudential strand is directly complementary to the 2025 Convention’s approach to corporate environmental criminal liability discussed above: the ECSR establishes the positive state obligation to regulate corporate climate harm, while the Convention provides the criminal enforcement backstop. Together, they constitute a comprehensive normative architecture of corporate ecological accountability within the Council of Europe system.

The ECSR’s climate jurisprudence has not developed exclusively through the prism of aggregate mitigation obligations. A distinct and doctrinally significant strand of its case law has emerged around the socio-economic dimensions of the energy transition – one that reveals the Charter system’s capacity to adjudicate not merely the ambition of decarbonisation targets but also their modalities and distributive consequences³⁵. The doctrinal foundations of this strand are traceable to the Committee’s landmark decision in *Marangopoulos Foundation for Human Rights v Greece* (2006)³⁶, in which the ECSR first expressly identified a right to a healthy environment as falling within the scope of the right to health protected under Article 11 of the Charter, and specifically within the obligation imposed by Article 11(3) to adopt measures necessary for the prevention of epidemic, endemic, and other diseases. The significance of this interpretive move extends well beyond its immediate subject matter. In reaching that conclusion, the Committee explicitly characterised the Charter as a living

through the Role of the State (2009) 9 *Human Rights Law Review* 225; C. METHVEN O’BRIEN, *Business and Human Rights: A Handbook for Legal Practitioners* (Council of Europe Publishing 2018) ch 6. The corporate liability regime in CETS No 228, Art 7 (n 10) provides the criminal law counterpart to this regulatory obligation.

³⁵ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 3156, preamble, recital 11 (acknowledging the imperative of a just transition of the workforce and the creation of decent work and quality jobs). See International Labour Organization, *Guidelines for a Just Transition towards Environmentally Sustainable Economies and Societies for All* (ILO 2015); A. GELPERN and others, *Just Transition, Debt and Finance* (2022) 22 *Climate Policy* 558; M. KOTSONI, *Powering Social Rights: How the European Social Charter Protects the Right to Energy*, EUI Working Paper LAW 2025/8.

³⁶ ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, Collective Complaint No 30/2005, ECSR decision of 6 December 2006, para 195. For doctrinal commentary see G. PALMISANO, *Il diritto alla protezione della salute nella Carta sociale europea [The Right to Health Protection under the European Social Charter]*, in L. PINESCHI (ed), *La tutela della salute nel diritto internazionale ed europeo [The Protection of Health in International and European Law]* (Editoriale Scientifica 2017) 189.

instrument whose objective is to protect rights not merely in theory but in practice, and which must accordingly be interpreted in the light of present-day conditions – an approach that enables the progressive updating of the Charter’s normative content by drawing on developments in inter-State relations and in the practice of international organs. Particularly notable is the Committee’s observation that Article 11 of the Charter is complementary not only to Articles 2 and 3 of the Charter itself, but also to Article 8 ECHR as interpreted by the Strasbourg Court in cases concerning health risks arising from environmental pollution. The substantive guarantees of the Charter thus incorporate, through dynamic interpretation, normative inputs originating in other spheres of inter-State cooperation and in general international law – a methodological convergence that structurally aligns the Charter system’s environmental jurisprudence with the ECtHR’s positive obligations framework.

This interpretive architecture has subsequently been deployed to elaborate a right to energy access as a component of the Charter’s social guarantees. In *FEANTSA v France*³⁷ the Committee confirmed that the right to housing under Article 31 of the Charter encompasses access to essential services, a principle progressively extended to cover energy supply as a constitutive element of adequate housing conditions. The doctrinal trajectory culminated in *Defence for Children International v Spain*³⁸, concerning the interruption of electricity supply to an informal settlement on the outskirts of Madrid. The Committee held, at paragraph 90 of its decision on the merits, that access to energy constitutes a component of the right to housing guaranteed by Article 31 of the Charter, thereby linking energy access to the protection of health and to air quality standards – a triangulation of Charter provisions that reflects the Committee’s broader strategy of reading social rights as an integrated, mutually reinforcing normative system. As Kotsoni has demonstrated in the most systematic scholarly treatment of this jurisprudential development to date, the ECSR’s case law effectively constitutes a right to energy as a freestanding social right, protected through the combined operation of Articles 11, 16 and 31 of the Charter, whose content is progressively elaborated through the living instrument methodology³⁹.

³⁷ ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v France*, Collective Complaint No 39/2006, decision of 5 December 2007, para 64.

³⁸ ECSR, *Defence for Children International v Spain*, Collective Complaint No 206/2022, decision of 11 September 2024, para 90.

³⁹ M. KOTSONI, *The Protection of the Right to Energy through the European Social Charter* (2025) 25 *Human Rights Law Review* 29; KOTSONI, *Powering Social Rights*, *op. cit.*

The normative implications of this development acquire their full significance in the context of the energy transition and its distributive consequences. In its synthesis document reviewing states parties’ *ad hoc* reports on the cost-of-living crisis, adopted on 19 March 2025, the Committee articulated with particular clarity the structural linkage between energy rights and climate and environmental justice, observing that cost-of-living crises exacerbate the disproportionate impact of climate change on marginalised communities, insofar as rising energy costs restrict their access to clean and sustainable energy sources, and that an equitable transition to renewable energy systems is therefore necessary both to mitigate climate impacts and to reduce the financial burden on disadvantaged groups⁴⁰. From this, the Committee draws the normative consequence that the eradication of energy poverty, as a component of states’ obligations to realise the social rights guaranteed by the Charter, entails the adoption of energy policies that simultaneously ensure accessibility to energy sources and contribute to climate change mitigation. This composite formulation is of considerable doctrinal importance and connects directly to the structural paradox identified above. The ECSR’s energy jurisprudence does what the ECtHR’s positive obligations framework has thus far been unable to do: it disaggregates the aggregate climate obligation into distributional sub-obligations that are sensitive to the specific vulnerabilities of marginalised communities. A state that achieves its decarbonisation benchmarks through measures that systematically externalise the costs of transition onto energy-poor and otherwise marginalised populations may simultaneously satisfy the *Réseau Action Climat* standard on mitigation ambition and violate its Charter obligations under Articles 11, 31, and cognate provisions. The failure of the ECtHR’s *Engels* framework to develop comparably granular criteria for assessing the accessibility and adequacy of adaptation measures – at the individual level – is, in this light, not merely a doctrinal lacuna but a structural asymmetry within the Council of Europe’s climate constitutionalism that the European Ecological Public Order must resolve if it is to function as a genuinely integrated constitutional framework.

5. The analysis presented in the preceding sections reveals a pattern of normative development that is more than the sum of its parts. The Council of Europe’s legislative and jurisprudential contributions to climate constitutionalism do not proceed on parallel, independent

⁴⁰ ECSR, *Social Rights and the Cost-of-Living Crisis: A Review of the States’ Parties ad hoc reports*, 19 March 2025, para 82.

tracks; they interact in ways that are mutually reinforcing and that produce a cumulative effect greater than any single instrument or judgment could achieve in isolation. The judicial axis – the ECtHR’s Article 2 and 8 jurisprudence and the ECSR’s Social Charter decisions – operates through a logic of rights-based constitutionalism: it identifies the minimum threshold of ecological protection required for the meaningful enjoyment of human rights, holds states accountable for systemic failures to achieve that threshold, and generates, through repetition and precedent, a body of constitutional doctrine that progressively narrows the range of climatically acceptable state conduct. The legislative axis – the 2025 Convention, the Committee of Ministers’ recommendations, the PACE resolutions – operates through a logic of responsibility-based constitutionalism: it targets the individual and corporate actors behind ecological destruction and supplies the domestic legal orders of member states with a harmonised framework for criminalising the most severe forms of environmental harm.

The 2025 Convention is the primary vehicle through which this European Ecological Public Order is operationalised in the domain of criminal law. By mandating the criminalisation of conduct that causes severe and irreversible ecological harm irrespective of administrative authorisation, the Convention treats the integrity of planetary life-support systems as a non-derogable constitutional value. Günther Teubner’s concept of the ‘legal irritant’ – a norm imported from one legal system that, rather than being assimilated by the receiving system, transforms it from within⁴¹ – provides a productive analytical framework for the Convention’s relationship to domestic legal orders. The Convention does not merely harmonise pre-existing national norms on environmental criminal liability; it introduces a conceptual framework – the substantiality of ecological harm as an autonomous standard of criminality – that is in fundamental tension with the administrative dependence doctrine embedded in most continental European criminal law systems, thereby initiating a process of constitutional transformation that will radiate beyond the domain of criminal law into legislative, administrative, and judicial institutions.

But the European Ecological Public Order would remain incomplete without an account of the institutional mechanism through which its judicial component is translated – or fails to be translated – into substantive state con-

⁴¹ G. TEUBNER, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences* (1998) 61 *Modern Law Review* 11; G. TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) ch 4.

duct. Under Article 46(2) ECHR, supervision of judgment execution falls to the Committee of Ministers, a political body composed of representatives of member states’ governments. This institutional architecture reveals structural tensions when applied to the systemic, technically complex, and scientifically calibrated obligations that characterise climate cases. Effective supervision presupposes the ability to evaluate the adequacy of emission reduction pathways in light of scientific benchmarks, the methodological robustness of national carbon accounting, and the consistency of policy measures with long-term climate stabilisation targets. The Committee of Ministers, however, lacks an independent technical body capable of performing such assessments.

While decisions concerning the specific pathways of mitigation may attract a relatively broad margin of appreciation, the determination of a state’s fair share of national emissions reductions permits only a narrow margin, and decisions regarding the applicable temperature target afford none at all⁴². The justifications for a broad margin in ordinary environmental cases – the technical complexity of local contexts, the diversity of national regulatory traditions – do not apply to the transnational, scientifically uniform problem of climate change, where the failure of national authorities to act effectively reflects systemic self-interest rather than genuine regulatory pluralism. The Committee of Ministers’ supervisory role should be correspondingly exacting – yet the Swiss compliance process illustrates precisely the opposite dynamic.

Switzerland submitted an action report following *KlimaSeniorinnen* asserting that its existing legislative reforms were sufficient to satisfy the Court’s requirements – a strategy of minimalist compliance presenting incremental reforms as constitutively adequate responses to obligations whose content the Court had deliberately formulated in demanding, science-referential terms⁴³. The Committee’s initial decision of 6 March 2025 adopted a comparatively rigorous stance, requesting additional information on methodological transparency and the adequacy of access-to-jus-

⁴² V. GURASH, *A Fresh Look at Margin of Appreciation through Climate Cases*, *European Convention on Human Rights Law Review* (2025, ahead of print) 1-31. The tripartite framework distinguishes: (i) no margin on the choice of temperature target; (ii) narrow margin on the quantification of national fair share of reductions; (iii) wider margin on the choice of specific policy instruments. H. KELLER and V. GURASH, “*Upping the Ante*”: *Rethinking the Execution of Judgments of the European Court of Human Rights* [2023] 2 *European Human Rights Law Review* 109.

⁴³ Committee of Ministers, Decision *KlimaSeniorinnen v Switzerland*, adopted 6 March 2025 (first decision); Decision of 18 September 2025 (declaring Switzerland in compliance on the basis of an ‘implicit carbon budget’). On the structural limitations of the Committee’s supervisory capacity in scientific cases see P. LEACH, *Taking a Case to the European Court of Human Rights* (4th edn, OUP 2017) ch 13.

tice mechanisms; its subsequent decision of 18 September 2025, declaring Switzerland in compliance on the basis of an ‘implicit carbon budget’, is problematic on logical, scientific, legal, and systemic grounds. It conflates projected emission reductions – descriptions of expected outcomes under current policies – with the normative determination of permissible emissions that a carbon budget is designed to establish, thereby treating the former as equivalent to the latter and emptying quantification of its constraining constitutional function.

At the legal level, the September 2025 decision sits in evident tension both with *KlimaSeniorinnen* itself and with the standard subsequently formulated by the International Court of Justice in its Advisory Opinion of 23 July 2025, which requires that states’ nationally determined contributions reflect the highest possible ambition and be grounded in the best available science⁴⁴. At the systemic level, the decision establishes a precedent for ‘implicit compliance’ – a model in which states satisfy their Convention obligations through interpretive flexibility rather than substantive regulatory transformation – that risks converting the European Ecological Public Order into a framework of compliance politics rather than constitutional constraint. The parallel with the *Engels* problem is precise: just as ‘reasonable personal adaptation’ risks becoming a shield for States against individual climate claims, ‘implicit carbon budgets’ risk becoming a shield for States against systemic climate accountability. Both pathologies reflect the same deeper dynamic: the political system’s resistance to the constitutional demands of the European Ecological Public Order.

The normative architecture constructed by the two axes analysed in this article aspires to constitutional status: it treats ecological integrity as a precondition for fundamental rights, imposes obligations on States that are systemic and science-calibrated, and provides criminal enforcement mechanisms designed to backstop those obligations against both public and private actors. Yet the individual access mechanism through which the human rights component of this order is enforced – the ECtHR’s Article 34 victim-status threshold as currently developed – conditions the enjoyment of that protection upon the individual’s adaptive capacity, assessed against a standard (‘reasonable personal adaptation’) that remains undefined, uncriteried, and systematically biased toward the resilient.

⁴⁴ International Court of Justice, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, ICJ Reports 2025 [full page citation to be confirmed upon publication]. The Opinion held that states’ nationally determined contributions must reflect the highest possible ambition and be grounded in the best available science, framing continued fossil-fuel subsidisation as presumptively inconsistent with due diligence obligations under general international law.

This paradox is not merely theoretical: it has concrete distributional consequences. Those most vulnerable to climate harm – the elderly, people with heat-sensitive disabilities, those without the financial resources to relocate, to retrofit their homes, or to access cooling infrastructure – are precisely those least equipped to demonstrate the unavailability of ‘reasonable’ adaptation. A constitutional order that protects those who can protect themselves is not a constitutional order in any meaningful sense of that term. It is, at most, a framework that ratifies existing inequalities under the label of rights protection.

The resolution of this paradox requires the Court to do in *Müllner* what it declined to do in *Engels*: to develop the ‘reasonable personal adaptation’ concept through a structured four-part assessment – availability, accessibility, effectiveness, and responsiveness to unequal capacity – with the evidential burden, once a prima facie risk is established, shifting to the respondent State. This is not a departure from the Court’s established methodology; it is its consistent application. The living instrument doctrine, the positive obligations framework, and the science-calibrated standard of *KlimaSeniorinnen* all point in the same direction: toward a victim-status threshold that is sensitive to the actual distribution of climate vulnerability rather than to an abstract and potentially fictional standard of individual resilience. The ECSR’s energy jurisprudence – with its granular attention to the distributional modalities of the energy transition – provides the normative model that the ECtHR’s climate jurisprudence has yet to replicate.

6. The analysis presented in this article yields five conclusions of significance for the theory and practice of climate constitutionalism at the European and global levels. They are offered not as a summary of ground already covered but as propositions about the trajectory of the field – doctrinal claims about where European climate constitutionalism is heading, and what institutional choices will determine whether it arrives.

First, the Council of Europe has emerged as a normatively coherent and institutionally determined actor in the constitutionalisation of climate law. Contrary to perceptions that might relegate it to a secondary role behind the European Union’s regulatory machinery or the Paris Agreement’s international framework, the Council of Europe offers a distinctive constitutional contribution: the integration of climate obligations into a binding human rights system backed by the most effective international enforcement mechanism in existence, supplemented by an increasingly robust body of criminal law designed to address the most catastrophic forms of ecological harm⁴⁵.

⁴⁵ On the comparative advantage of the ECHR enforcement system see A. LEGG, *The*

Second, the concept of a European Ecological Public Order – the framework proposed in this article to characterise the cumulative normative output of the two axes of constitutionalisation – provides a productive analytical lens for understanding the systemic character of the Council of Europe’s contribution. Climate constitutionalism, as it has developed within this framework, is neither purely instrumental nor purely ecocentric but represents a synthetic position in which anthropocentric rights and ecocentric values are recognised as mutually dependent and mutually reinforcing⁴⁶.

Third, and most urgently, the emerging jurisprudence on victim status and individual standing – from *KlimaSeniorinnen* through *Engels* to *Müllner* – reveals a structural paradox at the heart of the European Ecological Public Order. A public order that conditions the enjoyment of ecological security upon the individual’s adaptive capacity will protect the most resilient and abandon the most vulnerable. Resolving this paradox through a structured, burden-shifting approach to ‘reasonable personal adaptation’ – along the lines developed in Part III – is not optional: it is the condition of coherence for the entire framework. The Court’s credibility as a constitutional actor in the climate domain depends, in part, on its willingness in *Müllner* to confront this structural inconsistency directly.

Fourth, the 2025 Convention on the Protection of the Environment through Criminal Law’s proximity to the emerging crime of ecocide carries implications that extend beyond the European regional system. As momentum builds at the international level for the amendment of the Rome Statute to include ecocide as a fifth international crime⁴⁷, the Convention provides a template for the legal architecture that such an international criminalisation might adopt – both in terms of the definition of offences and in terms of the institutional and procedural arrangements for prosecution and accountability.

Fifth, the interaction of the two axes analysed in this article suggests that climate constitutionalism is now entering a phase of maturation in which the gap between norm and enforcement is being systematically – if imperfectly –

Margin of Appreciation in International Human Rights Law (OUP 2012) 1-22; J. GROGAN and A. BUYSE (eds), *Rebuilding Human Rights: New Directions in International and Comparative Law* (Intersentia 2019) ch 9.

⁴⁶ On the anthropocentric–ecocentric spectrum in environmental law see C. VOIGT, *op. cit.*, ch 1; KOTZÉ, *op. cit.*, 55-82; D. SHELTON, *Nature as a Legal Person* (2015) 22 *Vertigo: la revue électronique en sciences de l’environnement* (hors-série).

⁴⁷ On the international criminalisation of ecocide see ROGERS, *op. cit.*; Vanuatu and Samoa joint submission to the ICC Assembly of States Parties (2019); A. CLAPHAM, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups* (2008) 6 *Journal of International Criminal Justice* 899.

closed⁴⁸. The ECtHR’s positive obligations doctrine and the ECSR’s social rights jurisprudence have established the constitutional duty; the 2025 Convention has supplied the punitive infrastructure to enforce it. This convergence represents a qualitative transformation in the legal treatment of climate change – from a matter of policy discretion to a question of constitutional obligation and, at its most extreme, criminal responsibility. The Council of Europe has not completed this project; but it has advanced it further, and more coherently, than is commonly recognised. Two things will determine whether that advance constitutes genuine constitutional progress: first, whether the Court in *Müllner* resolves the structural paradox identified here rather than perpetuating it; and, second, whether the 2025 Convention achieves the breadth of ratification required to function as more than a statement of European aspiration. Both questions remain open. Neither is academic.

⁴⁸ On the gap between norm and enforcement in international environmental law see E. BROWN WEISS and H.K. JACOBSON (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press 1998); C.R. PAYNE, ‘Compliance with International Law’ in D. BODANSKY, J. BRUNNÉE and E. HEY (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021) 303.

OAS AND CLIMATE CHANGE

ARMANDO ROCHA*, JULIA CIRNE LIMA WESTON**

SUMMARY: 1. Introduction. – 2. The Contribution of the Organs of the OAS. – 3. The Contribution of the Inter-American Court of Human Rights. – 4. Subregionalisms in the Americas. – 4.1. Climate litigation in Brazil. – 4.2. Climate litigation in Colombia. – 5. Conclusion.

ABSTRACT

The Organization of American States (OAS), as a regional intergovernmental organization, was one of the first to refer to and prioritize climate action. This contribution is mostly the product of non-binding instruments adopted by organs such as the General Assembly of the OAS, the Inter-American Commission on Human Rights (IACmHR), or the Special Rapporteur on Economic, Social, Cultural and Environmental Rights – even though Resolution No. 3/2021, adopted by the IACmHR, details in a comprehensive and innovative manner States' human rights obligations related to climate change. A major breakthrough is the advisory opinion rendered by the Inter-American Court of Human Rights (IACtHR). That opinion was requested by Chile and Colombia in January 2023 and relies on the prior case-law of the IACtHR. Even though an advisory opinion is non-binding, it is still an authoritative pronouncement on States' legally binding obligations. As such, the advisory opinion rendered by the IACtHR is a major contribution, in the framework of the OAs and the American Convention on Human Rights, to clarify States' obligations to mitigate and adapt to climate change.

Keywords: OC-32/25; Adaptation; Climate action; General Assembly of the OAS; Human rights; Inter-American Commission on Human Rights; Inter-American Court of Human Rights; Mitigation; REDESCA; Soft law.

The Organization of American States: An Overview

1. Established by the 1948 Charter¹, the Organization of American States is a regional intergovernmental organization which aims 'to achieve an order of peace and justice, to promote [solidarity among Member States], to

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¹ Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, hereinafter referred to as 'OAS Charter'.

strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence’². In that context, article 2 of the OAS Charter lists the ‘purposes’ justifying its creation³; and accession is conditioned to acceptance of ‘all the obligations inherent in membership’⁴, including the latter principles. As of December 2025, the OAS counts with 34 Member States, most of them developing States, but also includes two developed States (Canada and the United States)⁵. Moreover, heterogeneity manifests in the membership of Global North and Global South States, oil-producing States, economies based on the extraction of natural resources, and BRICS’ States, as well as the presence of several Indigenous Nations.

The list of purposes established in article 2 of the OAS Charter is vast – including the pursuit of peace and security, democracy, non-intervention, peaceful settlement of disputes, cooperative action in economic, social, and cultural fields, eradication of extreme poverty, or the protection of the fundamental rights of the individual, ‘without distinction as to race, nationality, creed or sex’⁶.

Although the OAS Charter does not refer to climate change or environmental policies, the broadness of the OAS’ purposes and the pervasiveness of the adverse effects of climate change help to explain why the OAS has been contributing to clarify or develop climate change policies. This is *not* a minor observation, as the pursuit of such purposes at the level of the OAS allows States to coordinate points of view and to build a regional perspective on a certain topic. In climate negotiations, in fact, apart from the European case, there are scarce efforts to build regional positions. To some extent, this results from the need of developing States to keep a coherent and unified position in negotiations, notwithstanding the role of small island and least developed States. Building an heterogenous, but unified group of developing States allows these latter to form a majority in negotiations, but at the expenses of regional views. Moreover, science projects different scenarios for countries in the Americas: although all countries are set to face the adverse effects of climate change, each country will face unique consequences related to climate change; and countries in the Americas have different means and resources to cope with the adverse effects of climate change. For instance, the Sixth Assessment Report of the Inter-

² See art. 1, para.1, OAS Charter.

³ Hereinafter referred to as ‘OAS’.

⁴ See art. 6 of the OAS Charter.

⁵ Organization of American States, *Member States*, 2025 (OAS, 2025), available at <https://www.oas.org/en/member_states/default.asp>, last accessed 20 December 2025.

⁶ See art. 3 of the OAS Charter.

governmental Panel on Climate Change has separate chapters for South and Central America, on the one hand, and North America, on the other hand, whilst recognizing different impacts within each of these regions⁷. In his masterpiece *Anna Karenina*, Tolstoi wrote that ‘All happy families are alike; each unhappy family is unhappy in its own way’⁸, and the same can be said to apply to how States are affected and react to climate change. The work of regional organizations such as the OAS not only helps building a regional position on climate change policy priorities, but also helps assessing the commonalities of the problems faced by States and sharing knowledge, experience, and means to better mitigate and adapt to climate change.

To pursue its purposes, the OAS is composed of several organs listed in article 53 of the OAS Charter, which are regulated in Part 2 of the same treaty. These organs include, for instance, the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights⁹, or the General Secretariat. These organs are responsible for pursuing the goals set out in the OAS Charter through the means established in this latter or in other treaties adopted under the OAS aegis.

In this context, even though international organizations can hold the capacity to adopt legally binding instruments or to enter into international treaties, *if* that competence is expressly set out in the constitutive treaty¹⁰, that is not the case of the OAS. As a result, none of its organs can adopt an international treaty or another act that creates obligations binding upon Member States. Nonetheless, the OAS’ organs can work as facilitative, focal bodies that harmonize and reconcile State action, and thus contribute to clarify and/or develop such policies and to foster a regional position in relation to climate change. For instance, the Inter-American Juridical Committee is responsible for the promotion of a regional codification of international law (which can help States in drafting and ratifying binding treaties)¹¹, whilst the General Assembly works as a focal point for harmonizing States standards and policies, or for negotiating treaties binding after States’ ratification also¹². A downstream evidence of this can be found in

⁷ HANS-OTTO PÖRTNER ET AL (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge, 2022, Chapters 12 and 14, respectively.

⁸ LEV TOLSTOI, *Anna Karenina* [1873-7].

⁹ Hereinafter referred to as ‘IACmHR’.

¹⁰ E.g., H. THIRLWAY, *The Sources of International Law*, Oxford, 2019, 26.

¹¹ See art. 99 of the OAS Charter.

¹² See arts. 55 ff. of the OAS Charter.

article 77, para. 1, of the American Convention on Human Rights¹³, which establishes that the General Assembly can consider proposals for a protocol to the ACHR submitted by the IACmHR or any State Party to the ACHR.

As of December 2025, however, there is no binding treaty adopted under the aegis of the OAS related to climate change among the 80 treaties adopted thereunder. Despite this climate agnosticism, article 11 of the San Salvador Protocol¹⁴ establishes a human right to a healthy environment, which has been conceived of by the Inter-American Court of Human Rights¹⁵ as being protected also under article 26 of the ACHR – as explained in Section III. In fact, within the framework of the OAS, a regional human rights court was created by the ACHR¹⁶, which is responsible for the centralized interpretation and enforcement of the ACHR, although its jurisdiction is conditional upon a State’s consent declaration¹⁷. The manner in which the IACtHR reads the provisions of the ACHR – and namely the manner in which it unveiled a standalone human right to a healthy environment – represents the major breakthrough in the building of a regional understanding of climate action in the context of the OAS. However, as explained before in Section II, the activity of the General Assembly and other organs of the OAS related to climate change – namely, the IACmHR or the Special Rapporteur on Economic, Social, Cultural and Environmental Rights¹⁸ – is very topical and comprehensive. This activity may be left to the fields of soft law, but it still reveals the capacity of the OAS to address and harmonize Members States’ policies on this matter.

2. Although the OAS does not hold a lawmaking capacity, its organs can take a decisive role by adopting non-binding instruments, which can play at least two functions. *First*, non-binding instruments adopted by the OAS organs can assist in the interpretation of treaty provisions and States’ obligations in relation to climate change. As such, although they do not (and cannot) create new rules or obligations, they help clarifying the content of States’ obligations to mitigate and adapt to climate change. This explains, for instance, why the resolutions of the General Assembly or the IACmHR are regularly invoked in the case law of the IACtHR – and why they were

¹³ 1969 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (hereinafter referred to as ‘ACHR’).

¹⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 (hereinafter referred to as ‘San Salvador Protocol’).

¹⁵ Hereinafter referred to as ‘IACtHR’.

¹⁶ See art. 33, para 1(b), and arts. 52 ff of the ACHR.

¹⁷ See art. 62 of the ACHR.

¹⁸ Hereinafter referred to as ‘REDESCA’.

used by this court in the advisory opinion requested by Chile and Colombia on the scope of States' human rights obligations for responding to the climate emergency. *Second*, non-binding instruments help in harmonizing views at a regional level, creating that regional position and understanding that can be espoused during climate negotiations: i.e., they are the means through which States reconcile positions and where knowledge, priorities, and concerns are shared.

Considering their contribution in the context of climate change, this section takes a special attention to the General Assembly, the IACmHR, and the REDESCA.

The General Assembly

The General Assembly is the 'supreme organ' of the OAS¹⁹, responsible for giving a general guidance to the actions of the OAS and where States are represented on equal footing²⁰. The General Assembly, however, does not hold the power to adopt resolutions binding upon Member States or to enter into international treaties. In this sense, the level of competences and integration in the OAS system is not comparable to that of the European Union. Nonetheless, this explains also why, in comparison with other organizations such as the Council of Europe, the OAS has a much richer *acquis* of non-binding resolutions that aim to guide and harmonize State climate action in the Americas.

In the works of the General Assembly, the first reference to climate change dates back to 1999: in Session XXIX-O/99, climate change is referred to as a security concern for Small Island Developing States in the region²¹ (a concern that was reiterated in similar wording in Session XXXIX-O/09)²². Moreover, in the same Session XXIX-O/99, the General Assembly considered climate change as a 'common concern for humankind'; noted the adoption of the UNFCCC; and urged States to plan for adaptation to climate change (which, is a remarkably early concern with prioritizing adaptation to climate change). This was the beginning of an age of innocence: a period where a sense of direction is already noticeable, but where a certain difficulty in suggesting concrete actions is also visible. This explains, for

¹⁹ See art. 54 of the OAS Charter.

²⁰ See art. 56 of the OAS Charter.

²¹ General Assembly of the Organization of American States, 1999 XXIX-O/99 *Twenty-Ninth Regular Session – Proceedings Volume I*.

²² General Assembly of the Organization of American States, 2009 XXXIX-O/09 *Thirty-Ninth Regular Session – Proceedings Volume I*.

instance, the appeal in Session XXX-O/00 (2000) to the mobilisation of the OAS' machinery (in consultation with Member States) to start addressing climate change in the Americas (which included an instruction to the General Secretariat to mobilize resources to assist Member States in adopting climate change policies)²³. This same idea of 'machinery mobilisation' was voiced in Sessions XXXI-O/01 (2001) and XXXII-O/02 (2002)²⁴, suggesting that the General Assembly was concerned with prioritizing climate action and obtaining more data and information regarding best practices and policies to mitigate and adapt to climate change.

A second phase (one of growth) can be said to have started in 2006, when the General Assembly showed a more concrete focus in addressing climate action. In Session XXXVI-O/06 (2006), the General Assembly supported the use of new and renewable energy sources in the context of climate change policies and emphasized the need for technological support and funding²⁵. In Session XXXVII-O/07 (2007), the need to consider climate impacts on disaster reduction and management was emphasized²⁶, whereas in Session XXXVIII-O/08 (2008) the General Assembly reiterated international and human rights commitments of OAS members in relation to climate change²⁷. In 2008, the General Assembly also urged the OAS organs to focus on links between human rights and climate change in the region²⁸. Sessions XL-O/10 (2010) and XLI-O/11 (2011) restated regional commitments and urged the OAS organs to increase its efforts in addressing climate change²⁹.

In this age of growth, sectorial concerns were also espoused by the General Assembly. In Session XLII-O/12 (2012), the General Assembly approved the Declaration of Cochabamba on Food Security With Sovereignty in the Americas, which establishes the need to consider climate change in

²³ General Assembly of the Organization of American States, *XXX-O/00 2000 Thirtieth Regular Session – Proceedings Volume I*.

²⁴ General Assembly of the Organization of American States, *XXXI-O/01 2001 Thirty-First Regular Session – Proceedings Volume I*; General Assembly of the Organization of American States, *XXXII-O/02 2002 Thirty-Second Regular Session – Proceedings Volume I*.

²⁵ General Assembly of the Organization of American States, *XXXVI-O/06 2006 Thirty-Sixth Regular Session – Proceedings Volume I*.

²⁶ General Assembly of the Organization of American States, *XXXVII-O/07 2007 Thirty-Seventh Regular Session – Proceedings Volume I*.

²⁷ General Assembly of the Organization of American States, *XXXVIII-O/08 2008 Thirty-Eighth Regular Session – Proceedings Volume I*.

²⁸ *Ibid.*

²⁹ General Assembly of the Organization of American States, *XL-O/10 2010 Fortieth Regular Session – Proceedings Volume I*; General Assembly of the Organization of American States, *XLI-O/11 Forty-First Regular Session – Proceedings Volume I*.

risk management for food security policies³⁰ – a concern that was expressed again in Session XLIV-O/14 (2014)³¹. In 2014, the General Assembly also approved the Declaration of Asunción on ‘Development With Social Inclusion’ (which mentions the commitments assumed under the UNFCCC)³² and referred to developed States’ obligations in relation to climate change in the context of sustainable development in the Americas³³. In turn, in Session XLVI-O/16 (2016), the General Assembly adopted three declarations that delve into climate change: *first*, the Declaration on the Twentieth Anniversary of the Declaration of Santa Cruz De La Sierra and the Plan of Action for the Sustainable Development of the Americas, which seeks to align regional sustainable development efforts with regional climate change commitments³⁴; *second*, the Declaration on Institutional Strengthening for Sustainable Development in the Americas, which links regional institution policy with the 2030 Agenda and other sustainable development commitments with climate change goals³⁵; *third*, the Declaration on Climate Change, Food Security, and Migration in the Americas, which brings the lens closer to climate change impacts and weather events in the Americas³⁶.

An age of maturity can be said to have started with Session XLVII-O/18 (2018), which mentions climate change in the context of poverty and development, emphasizing the need for finance allocation³⁷. A specific focus is also given to climate change within Session LI-O/21 (2021), which mentions it in relation to regional measures concerning sustainable development post-Covid-19 and within measures concerning the human rights of migrants³⁸, whilst Session LIII-O/23 (2023) mentions climate change with regards to the need to secure means for financing climate policies in the Americas³⁹. Session LII-O/22 (2022) is more prolix in referring to climate

³⁰ General Assembly of the Organization of American States, *XLII-O/12 2012 Forty-Second Regular Session – Proceedings Volume I*.

³¹ General Assembly of the Organization of American States, *XLIV-O/14 2014 Forty-Fourth Regular Session – Proceedings Volume I*.

³² *Ibid.*

³³ *Ibid.*

³⁴ General Assembly of the Organization of American States, *XLVI-O/16 2016 Forty-Sixth Regular Session – Proceedings Volume I*.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ General Assembly of the Organization of American States, *XLVII-O/18 2018 Forty-Eighth Regular Session – Proceedings Volume I*.

³⁸ General Assembly of the Organization of American States, *LI-O/21 2021 Fifty-First Regular Session – Proceedings Volume I*.

³⁹ General Assembly of the Organization of American States, *LIII-O/23 2023 Fifty-Third Regular Session – Proceedings Volume I*.

change, namely in relation to sea-level rise, food security, and the human rights of migrants, whilst referring also to the Inter-American Program for Sustainable Development⁴⁰. Finally, Session LIV-O/24 (2024) contextualizes climate change with the Inter-American Climate Change Action Plan and its impacts on the human rights of migrants⁴¹, and adopts the Declaration of Asunción on ‘Integration and Security for Sustainable Development in the Region’, which considers climate change within its preamble⁴².

In this age of maturity, the General Assembly shows a greater knowledge of the expected adverse effects of climate change and the policies that States should seek to adopt, having in mind their national specificities, but also greater awareness of its capacity to reconcile States’ positions in order to buttress their claims in climate negotiations or in other fora where climate change-related topics are discussed. Therefore, the General Assembly sets its focus on the most pressing topics in the Americas: food security and access to water, climate-driven migration, energy and just transition, sustainable development, poverty eradication, or climate finance, without prejudice of a growing prioritization of rights of Nature or of Indigenous groups, or of racial and gender concerns.

The Inter-American Commission on Human Rights

To understand the contribution of the IACmHR, one must first contextualize it within framework of the complex and multi-layered Inter-American system of human rights.

The IACmHR is an organ of the OAS⁴³ and the ACHR⁴⁴, ‘created to promote the observance and defense of human rights and to serve as consultative organ of the [OAS] in this matter’⁴⁵. This means, *first*, that its jurisdiction *ratione personae* is broader than the scope of the ACHR. Therefore, States such as Canada or the United States may not be Parties to the ACHR but are still under the jurisdiction of the IACmHR. This explains, *second*, the bipolar definition of human rights presented in the Statute of the IACmHR: ‘For the purposes of the present Statute, human rights are understood to be: a) The rights set forth in the [ACHR], in relation to the States Parties thereto; b) The rights set forth in the

⁴⁰ General Assembly of the Organization of American States, *LII-O/22 2022 Fifty-Second Regular Session – Proceedings Volume I*.

⁴¹ General Assembly of the Organization of American States, *LIV-O/24 2024 Fifty-Fourth Regular Session – Proceedings Volume I*.

⁴² *Ibid.*

⁴³ See art. 53, para. e), of the OAS Charter.

⁴⁴ See art. 33, para. a), of the ACHR.

⁴⁵ See art. 1, para. 1, of the Statute of the IACmHR.

American Declaration of the Rights and Duties of Man⁴⁶, in relation to the other member states [of the OAS]⁴⁷. As a result, the IACmHR is responsible for the integrity of two major regional human rights instruments, having in mind that its competences vary depending on the instrument and State concerned⁴⁸. This is the so-called two-track system, which has been criticized for being a major shortcoming in the protection of human rights in the Americas⁴⁹, but which enlarges the scope of action of the IACmHR. A *third* note is that the IACmHR also holds facilitative, coordinative, and compliance functions that include the capacity ‘To make recommendations to the governments of the member states (...) for the adoption of progressive action in favor of human rights,’ ‘To prepare such studies and reports as it considers advisable in the performance of its duties,’ or ‘To request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights,’ or ‘To respond (...) to inquiries made by the member states on matters related to human rights and (...) to provide those states with the advisory services they request’⁵⁰. Finally, the IACmHR also has a dispute resolution function, since it receives petitions from States and non-State actors regarding an infringement of the ACHR⁵¹ or the ADHR⁵² and adopts non-binding recommendations⁵³.

In both capacities – as a para-judicial body *and* a facilitative, and coordinative body – the IACmHR can contribute to flesh out policy standards related to climate change and human rights. Yet, whereas the General As-

⁴⁶ Hereinafter referred to as ‘ADHR’.

⁴⁷ See art. 1, para 2, of the Statute of the IACmHR. See also A.A. CAÑADO TRINDADE, D. GONZÁLEZ-SALZBERG, *International Law of Human Rights*, Oxford, 2024, 314-315; C. SANDOVAL, *The Inter-American System of Human Rights and Approach*, in S. SHEERAN, N. RODLEY (eds.), *Routledge Handbook of International Human Rights Law*, London, 2013, 431; H. CAMINOS, *The Inter-American System for the Protection of Human Rights*, in J. SYMONIDES, *Human Rights: International Protection, Monitoring, Enforcement*, Paris, 2003, 165-166; T. ANTOKOWIAK, *The Americas*, in D. MOECKLI, S. SHAH, S. SIVAKUMARAN, *International Human Rights Law*, Oxford, 2022, 449; J.M. PASQUALUCCI, C.M. CERNA, *The Organization of American States*, in D.P. FORSYTHE (ed.), *The Encyclopedia of Human Rights*, Oxford, 2009, 148.

⁴⁸ Although States Parties to the ACHR also bear human rights obligations under the ADHR (see art. 26, para. 1, of the ACHR), other OAS Member States only bear obligations under the ADHR. Therefore, the competence of the IACmHR is limited to the ADHR in cases regarding non-Parties to the ACHR. See CAÑADO TRINDADE, D. GONZÁLEZ-SALZBERG, *op. cit.*, 314-315; C. SANDOVAL, *op. cit.*, 431; H. CAMINOS, *op. cit.*, 165-166; T. ANTOKOWIAK, *op. cit.*, 449.

⁴⁹ I. BANTEKAS, L. OETTE B. ÇALI, *Regional Protection*, in D. MOECKLI, S. SHAH, S. SIVAKUMARAN, *International Human Rights Law*, Oxford, 2022, 263; J.M. PASQUALUCCI, C.M. CERNA, *op. cit.*, 152.

⁵⁰ See art. 41, paras. b) to e), of the ACHR. See also art 18, paras. b) to e) of the Statute of the IACmHR.

⁵¹ See arts. 44 and 45 of the ACHR. See also art. 19 of the Statute of the IACmHR.

⁵² See art. 20, para. b), of the Statute of the IACmHR.

⁵³ See art. 51 of the ACHR.

sembly is a body of generic competence within the context of the OAS, the IACmHR is a human rights body, which means that it can only look to climate change at its intersection with human rights law. In this regard, a major breakthrough was the adoption of Resolution No. 3/2021⁵⁴, a non-binding instrument that aims to clarify what are States’ human rights obligations in the context of climate change. This resolution is probably the most detailed attempt to flesh out the content of States’ human rights obligations on this matter, and therefore was used to assist the IACtHR in interpreting the relevant provisions of the ACHR in the advisory opinion request submitted in January 2023 by Chile and Colombia: although it is non-binding and it cannot be viewed as an authentic interpretation of the ACHR, it holds the necessary *auctoritas* to inform the reading of the ACHR’s provisions.

Resolution No. 3/2021 starts from the assumption that States will need to adopt climate change instruments, policies, plans, programs, and norms, and thus asks for a human rights-based lens in their drafting and implementation: the question is not *if* action will be adopted, but *what* action will be adopted by States. In this ‘centrality of a human rights approach,’ the IACmHR includes the adoption and implementation of ‘policies aimed at *reducing greenhouse gas emissions* that reflect the *greatest possible ambition*’⁵⁵, suggesting that, in the view of the IACmHR, the adoption of ambitious targets and deadlines for greenhouse gasses emissions reduction is a human rights obligation (in line with the *Verein KlimaSeniorinnen*⁵⁶ ruling of the European Court of Human Rights), which can be qualified as a positive obligation and an obligation of due diligence. The ‘centrality of a human rights approach’ also implies a bottom-up, transparent participation of all relevant actors and stakeholders in the making of national policies and legislation, a focus on environmental education, or a concern with securing a flow of financial funds to help in the effort of mitigation and adaptation⁵⁷ – but it must be especially highlighted that the IACmHR considers that States, in preparing their Nationally Determined Contributions under article 4 of the Paris Agreement⁵⁸, ‘must incorporate a human rights approach into their construction

⁵⁴ IACmHR Resolution No. 3/2021 ‘Climate Emergency: Scope of Inter-American Human Rights Obligations’ (adopted on 31 December 2021). Hereinafter referred to as ‘Resolution No. 3/2021’.

⁵⁵ See Section I, para. 1, of Resolution No. 3/2021.

⁵⁶ *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (App. No. 53600/20) ECtHR [Grand Chamber] 9 April 2024. On this matter, see A. ROCHA, A.L. BERNARDINO, *O Clima em Estrasburgo – A Proteção de um Clima Estável após o Acórdão Verein Klima Seniorinnen Schweiz et al. c. Suíça*, in *Revista Portuguesa de Direito Constitucional*, 2024, 108-109.

⁵⁷ See Section I, paras. 3 to 7, of Resolution No. 3/2021.

⁵⁸ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

and implementation⁵⁹, implying a ‘regional reading’ of article 4 of the Paris Agreement that includes a human rights angle.

Moreover, Resolution No. 3/2021 refers in detail to States’ substantive and procedural obligations in the context of climate change⁶⁰, including the obligations of cooperation in good faith and of transfer of resources, technology, knowledge, and capacities in light of the common but differentiated responsibilities principle⁶¹, hand in hand with the obligation to secure the rights of access to information, public participation and access to justice in environmental and climate matters⁶²; highlights States’ obligation to control and regulate public and private greenhouse gasses emissions⁶³, without prejudice of the corporate responsibility for emissions⁶⁴; emphasizes access to remedies and the centrality of environmental reparation and compensation for the adverse effects of climate change⁶⁵; urges States to take into account vulnerable groups (including women, poor persons, migrants, children, and elder persons)⁶⁶, Indigenous groups, tribal communities, Afro-descendants⁶⁷, and nature defenders⁶⁸; emphasizes States’ obligations to secure social and economic rights in the context of a just transition⁶⁹; and reminds States of the extraterritorial nature of their obligations under the ACHR⁷⁰.

As such, Resolution No. 3/21 covers a wide array of topics and effectively brings together climate change issues and the need to respect human rights within the American States, whilst not differentiating amongst

⁵⁹ See Section I, para. 2, of Resolution No. 3/2021.

⁶⁰ See Section II, para. 10, of Resolution No. 3/2021.

⁶¹ See Section II, para. 11, of Resolution No. 3/2021.

⁶² See Section VI of Resolution No. 3/2021.

⁶³ See Section II, para. 12, of Resolution No. 3/2021.

⁶⁴ See Section VIII of Resolution No. 3/2021. In the Inter-American system of human rights, the IACtHR has already stated that, at the level of primary norms, non-State actors bear obligations directly under the ACHR. In other words, although they cannot be defendants in a case before the IACmHR or the IACtHR, they are also duty-bearers under the ACHR. This was voiced, for instance, in a case referring to labour rights, where the IACtHR mentioned that ‘employers must protect and respect the rights of workers, whether these occur in the public or private sector. The obligation to respect the human rights of migrant workers has a *direct effect* on any type or employment relationship.’ See *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion OC-18/03) IACtHR Series A No 18 (17 September 2003) §151. (emphasis added).

⁶⁵ See Section II, paras. 14 and 15, of Resolution No. 3/2021.

⁶⁶ See Section III of Resolution No. 3/2021.

⁶⁷ See Section IV of Resolution No. 3/2021.

⁶⁸ See Section V of Resolution No. 3/2021.

⁶⁹ See Section IX of Resolution No. 3/2021.

⁷⁰ See Section VII of Resolution No. 3/2021.

OAS Members in this regard. It brings forward important topics and how they should be addressed by States and private companies – in some cases resorting to the verb formulation ‘must’ (suggestive of a mandatory character), in others using the verb formulation ‘should’ (suggestive of a non-binding character).

The Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA)

In 2017, the IACmHR created a Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights, more known by its Spanish acronym ‘REDESCA’⁷¹, which operates within and assists the work of the IACmHR itself. Since its establishment, REDESCA has carried out on-site visits to OAS Member States, participated in the meetings of several OAS organs, produced thematic reports, and assisted the IACmHR in the making of some of its most important resolutions, including Resolution No. 3/2021⁷².

More particularly, REDESCA produced an important report on poverty, climate change and economic, social and cultural rights in Central America and Mexico in the context of human mobility, in 2023⁷³. The report sought to assess the impacts of the lack of access to economic, social, and cultural rights in the region, as well as factors such as climate change influence human mobility, focusing especially on Central American migration movements to the United States⁷⁴. Furthermore, REDESCA has issued annual reports – and all of them mention climate change, its effects on human rights, and the need to mitigate and adapt to climate change, with specific observations concerning States and affected human rights therein, such as the right to water and the right to a healthy environment⁷⁵.

⁷¹ A.A. CANÇADO TRINDADE, D. GONZÁLEZ-SALZBERG *op. cit.*, 316.

⁷² REDESCA, *Work Plan 2024-2026: A Hemispheric Agenda for ESCER*, 2024, available at <https://www.oas.org/en/iachr/r/desca/plan/redesca_plantrabajo_2024-2026_eng.pdf>, last accessed 27 April 2025.

⁷³ REDESCA, *Pobreza, cambio climático y DESCA en Centroamérica y México, en el contexto de movilidad humana: aprobado por la Comisión Interamericana de Derechos Humanos el 28 de julio de 2023*, Washington, D.C., 2023.

⁷⁴ *Ibid.*

⁷⁵ REDESCA, *Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights 2017*; REDESCA, *II Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights 2018*; REDESCA, *Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights 2019*; REDESCA, *Fourth Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights 2020*; REDESCA, *V Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights 2021*; REDESCA, *Annual Report of the Office of the Special Rapporteur on Economic,*

In terms of future action, climate emergency was flagged as one of the main topics for REDESCA's Work Plan for 2024-2026⁷⁶. As a consequence, in its Work Plan, REDESCA identifies 'climate change and environmental protection as one of the most pressing challenges in the region'⁷⁷. Therefore, it will be interesting to see what the result of the report will be by 2026, especially considering that it shall follow the IACtHR's positioning in this regard.

3. In the context of the ACHR, an IACtHR was created as a judicial body responsible for the centralized interpretation and enforcement of the ACHR⁷⁸ (although formally the IACtHR is not an organ under the OAS Charter)⁷⁹. Being clearly a judicial body means that the IACtHR holds a contentious and an advisory jurisdiction⁸⁰.

With regards to the IACtHR's contentious jurisdiction, two notes are needed. *First*, to refer that the IACtHR's jurisdiction is subject to States' express acceptance declaration⁸¹, as already mentioned before. As such, only if that declaration was deposited can the IACtHR hold competence to settle a dispute under the ACHR. *Second*, to mention that whereas States' petitions can be directly submitted before the IACtHR, individuals' petitions are submitted before the IACmHR, which acts as a filter in the Inter-American system of human rights: it receives, assesses, pre-judges (even though through a non-binding recommendation), and eventually furthers petitions to the IACtHR⁸².

With regards to its advisory jurisdiction, any Member State of the OAS (even if not State Party to the ACHR) can request an advisory opinion from the IACtHR regarding the interpretation of the ACHR or other regional human rights treaties adopted in the Americas⁸³. This explains why the legitimacy and authority of the IACtHR is not limited to the ACHR itself, but extends to the all OAS system; and why non-State Parties to the ACHR (such as Canada or the United States) and non-governmental

Social, Cultural and Environmental Rights 2022; REDESCA, *VII Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights 2023*.

⁷⁶ REDESCA (n 71).

⁷⁷ *Ibid.*, 17.

⁷⁸ See art. 33, para. b), of the ACHR.

⁷⁹ A.A. CANÇADO TRINDADE, D. GONZÁLEZ-SALZBERG *op. cit.*, 317.

⁸⁰ See arts. 61 to 64 of the ACHR.

⁸¹ See art. 62, para. 1, of the ACHR. See also I. BANTEKAS, L. OETTE (n 48); A.A. CANÇADO TRINDADE, D. GONZÁLEZ-SALZBERG *op. cit.*, 317; C. SANDOVAL *op. cit.*, 428; H. CAMINOS *op. cit.*, 166.

⁸² See art. 61, para. 1, of the ACHR. See also T. ANTOKOWIAK (n 47) 446; J.M. PASQUALUCCI, C.M. CERNA *op. cit.* 148.

⁸³ See art. 64, para. 1, of the ACHR. See also A.A. CANÇADO TRINDADE, D. GONZÁLEZ-SALZBERG *op. cit.* 317; C. SANDOVAL *op. cit.*, 431; H. CAMINOS *op. cit.*, 196; T. ANTOKOWIAK *op. cit.*, 457; J.M. PASQUALUCCI, C.M. CERNA *op. cit.*, 151.

organizations or *amicus curiae* based on these countries participate in the advisory proceedings before the IACtHR⁸⁴, including in the request for an advisory opinion on climate change and human rights submitted by Chile and Colombia. The organs listed in Chapter X of the OAS Charter can also request an opinion from the IACtHR regarding the same treaties⁸⁵ and States can also request an advisory opinion from the IACtHR regarding the compatibility of their domestic laws with those latter treaties⁸⁶, but most requests for an advisory opinion fall in that first category. That was the case, in fact, of the request submitted by Chile and Colombia in January 2023.

The core question, however, is what can be the contribution of the IACtHR to advance climate change policy standards in the Americas? In fact, the traditional function of courts is to settle disputes, not to create the law. However, if the ‘private function’ of a court refers to its dispute competence, there is a ‘public function’ (common to the contentious and advisory competence) which can be understood as a judicial clarification and development of the law⁸⁷. In the performance of this function, courts do not interfere with the political and legislative branches of the government, but rather unveil the potential meaning of an already existing legal rule, and therefore unveil already existing legal obligations that may not be clearly or entirely stated in a black-letter provision⁸⁸.

Human rights obligations in relation to climate change are fertile ground for such a judicial clarification and development of the law. A good example of that is the evolution of the protection of a human right to a healthy environment in the Inter-American system of human rights. In fact, even though article 11 of the San Salvador Protocol lays down a human right to a healthy environment, this provision is non-justiciable according to article 19, para. 6, of the same protocol; and there is no reference to a

⁸⁴ On this matter, see G. MEDICI-COLOMBO, A. ROCHA, *The Impact on Domestic Law of Climate Change-Related Advisory Opinions: The Experience of the IACtHR and the ITLOS*, in M.A. TIGRE, A. ROCHA (eds.), *The Role of Advisory Opinions in International Law in the Context of the Climate Crisis* (Brill | Nijhoff, 2025) 306.

⁸⁵ *Ibid.*

⁸⁶ See art 64, para. 2, of the ACHR.

⁸⁷ V. LOWE, *The Function of Litigation in International Society*, in *International and Comparative Law Quarterly*, 2012, 209 ff. See also A. ROCHA, *Suing States – The Role of Courts in Promoting States’ Responsibility for Climate Change*, in M.G. GARCIA and A. CORTÈS (eds.), *Blue Planet Law*, Heidelberg, 2023, 99 ff.

⁸⁸ E.g., see S. BESSON, *Legal Philosophical Issues of International Adjudication*, in C. ROMANO, Y. SHANY, K. ALTER (eds.) *The Oxford Handbook of International Adjudication*, Oxford, 2015, 420-6; A. VON BOGDANDY, I. VENZKE, *Beyond Dispute: International Institutions as Lawmakers*, in *German Law Journal*, 2011, 981; A.E. BOYLE and C.M. CHINKIN, *The Making of International Law*, Oxford, 2007, 268.

human right to a healthy atmosphere or a stable climate in the ACHR or any other treaty adopted under the aegis of the OAS. However, because human rights provisions are inherently open-textured and climate change affects every single aspect of our lives, the Human Rights Council has been repeatedly highlighting that the disruption of the climate system is likely to impair the effective enjoyment of human rights (namely, the rights to life, physical integrity, health, access to water or food, to enjoy one's home and family life, to cultural life, or to property)⁸⁹. As a result, environmental risk and harm (such as the adverse effects of climate change) can be seen as a form of a human rights violation and brought as such to the docket of human rights courts. Yet, in light of the current wording of the ACHR and other treaties in the OAS context, that can only be clarified and developed by the IACtHR, acting as the authoritative regional human rights court – and it should not be viewed as a coincidence that States participating in the advisory proceedings on climate change and human rights before the IACtHR voiced the need for an authoritative guidance from this latter court⁹⁰.

The IACtHR cannot ignore the fact that the ACHR was adopted in 1969 (i.e., prior to the emergence of a global environmental concern, the 1972 Stockholm and the 1992 Rio Conferences, or the awareness of the downstream effect of greenhouse gasses emissions), and therefore it does not include a human right to a healthy environment, and much less to a healthy atmosphere or to a stable climate system. Yet, this absence of a standalone right to a healthy environment is 'partially' mitigated by article 11 of the San Salvador Protocol, which sets out that 'Everyone shall have the right to live in a healthy environment and to have access to basic public services' (para. 1), and thus that 'The States Parties shall promote the protection, preservation, and improvement of the environment' (para. 2). The problem, as was mentioned before, is that this provision is non-justiciable pursuant to article 19, para. 6, of the San Salvador Protocol, *a contrario sensu*. In other words, this means that article 11 of the San Salvador Protocol cannot be invoked in a dispute before the IACmHR or the IACtHR.

Nonetheless, considering that environmental degradation is a factor that can impair the effective enjoyment of mainstream human rights, the IACtHR soon identified human rights violations based on environmental harm or risk. That case-law can be divided into two phases: in a first phase, the emergence

⁸⁹ See, for a first reference on this matter, Human Rights Council, 'Resolution 7/23, Human Rights and Climate Change', UN Doc A/HRC/7/78 (14 July 2008).

⁹⁰ See, *inter alia*, L.C. LIMA, *Climate Change before the Inter-American Court of Human Rights*, in *Rivista di Diritto Internazionale*, 2025, 60.

of an environmental-aligned jurisprudence was linked to the rights of Indigenous peoples^{91/92} and as incidental to other human rights as the right of access to information⁹³, whilst in a second phase the IACtHR identified a standalone right to a healthy environment under article 26 of the ACHR. Although there is still no ruling in a contentious case regarding climate change, the *La Oroya* precedent refers to atmospheric pollution (and therefore refers also to GHG emissions)⁹⁴, whilst the Advisory Opinion 32/25 clarified what are States’ obligations in relation to climate change⁹⁵.

Environmental (and climate) obligations derived from the rights of Indigenous peoples

In a first phase, the IACtHR was mostly based on the rights of Indigenous peoples – who live more attuned with Nature and dependent on its cycles, and thus are more affected by environmental and climate risks and harms in general⁹⁶. During this phase, the IACtHR was open to consider en-

⁹¹ See, *inter alia*, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C No 79 (31 August 2001) §§145-155; *Indigenous People Kichwa of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) §§145-147; *Kuna Indigenous People of Madungandí and the Emebrá Indigenous People of Bayano and their Members v Panama*, IACtHR Series C No 284 (14 October 2014) §§111-113; *Kaliña and Lokono Peoples v Suriname*, IACtHR Case No 12639 (25 November 2015) §§129-132. See, also, *Yanomani Indians v Brazil* (IACmHR Decision of 5 March 1985); *Maya Indigenous Community of Toledo District v Belize* (IACmHR Report of 12 October 2004).

⁹² See, among others, IACmHR, *Indigenous and Tribal Peoples’ Rights Over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, in *American Indian Law Review*, 2017, 263; A. ROCHA, R. SAMPAIO, *Climate Change before the European and Inter-American Courts of Human Rights: Comparing Possible Avenues before Human Rights Bodies*, in *Review of European, Comparative and International Environmental Law*, 2023, 281; M.A. TIGRE, *Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation*, in *e-Publica*, 2022, 210 ff; P. TRINCADO VERA, *Rights of Nature in the Inter-American Court of Human Rights: Understanding the Ecocentric Approach to the Right to a Healthy Environment*, in *Review of European, Comparative and International Environmental Law*, 2024, 523-524.

⁹³ *Claude Reyes and Others v Chile*, IACtHR Series C No 151 (19 September 2006) §99. See also P. TRINCADO VERA, *op. cit.*, 522-523.

⁹⁴ *La Oroya Population v Peru* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 511 (27 November 2023).

⁹⁵ *The Climate Emergency and Human Rights* (Interpretation and scope of Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXI-II, and XXVII, of the American Declaration of the Rights and Duties of Man) (Advisory Opinion OC-32/25) IACtHR A Series No 32 (29 May 2025).

⁹⁶ M.A. TIGRE *op. cit.*, 217.

vironmental risk or harm as amounting to the violation of any human right listed in the ACHR, considering the inherent indivisibility of human rights and the impact of environmental deterioration in the effective enjoyment or exercise of other human rights. This means that, in this early phase, the IACtHR envisaged only a form of environmental protection *par ricochet*.

In the regional context of the Americas, Indigenous communities took the lead in the pursuit for reparation for environmental and climate harms, being the *Inuit* and the *Athabaskan* petitions the first climate change-related complaints submitted before a human rights body (although both were submitted before the IACmHR)⁹⁷: whilst in the first case the petitioners asked the IACmHR to recommend the United States to adopt measures to limit GHG from its territory (considering the impact of global warming on the Arctic and the live conditions of Arctic Indigenous peoples), the petitioners in the second case targeted Canada's lack of regulation of black carbon emissions (also having in mind the said impact of climate change on the Arctic environment). The first petition was rejected by the IACmHR (arguing that the petitioners had provided insufficient information regarding the violation of their human rights), whereas the second is still pending.

Both petitions were submitted to the IACmHR, since the United States and Canada are outside the IACtHR's jurisdiction. Still, they fit in an overall understanding, shared by the IACtHR, that looks to land possession and their enjoyment as part of the physical, cultural, and spiritual identity and survival of Indigenous groups⁹⁸. As a result, the IACtHR also reads the right to property under article 21 of the ACHR in light of the 'close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom,' since 'The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation

⁹⁷ *Petition Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (IACmHR, Decision of 16 November 2006), available at <<https://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/>>; *Petition Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada* (IACmHR, submitted on 23 April 2013), available at <https://www.climatecasechart.com/document/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-of-the-rights-of-arctic-athabaskan-peoples-resulting-from-rapid-arctic-warming-and-melting-caused-by-emissions-of-black-carbon-by-canada_3c33>.

⁹⁸ *Maya Indigenous Communities of the Toledo District (Belize)* IACmHR Report No 40/04 (Case 12,053) (12 October 2004) §155.

with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity’⁹⁹.

As such, the approach taken by the IACtHR in relation to Indigenous peoples’ rights is to include the protection of environmental values and natural elements as part of their (non-environmental) rights under the ACHR. This stance adopted by the IACtHR is in line with the 2016 American Declaration of the Rights of Indigenous Peoples, which recognizes that the rights of Indigenous peoples are ‘essential and of historical significance to the present and future of the Americas’¹⁰⁰, and that they ‘have collective rights that are indispensable for their existence, well-being, and integral development as peoples,’ including ‘the right of indigenous peoples (...) to their own cultures; to profess and practice their spiritual beliefs; (...) and to their lands, territories and resources’¹⁰¹.

The experience from this first phase in environmental litigation before the IACtHR is of major importance in relation to climate change. Not only climate change is the major environmental harm ever caused by humankind, but it also affects Indigenous peoples in a severe manner – even though these peoples, as referred by the Special Rapporteur on the Rights of Indigenous Peoples, rank among the groups that contributed least to global warming¹⁰². The human rights impact is clear: Indigenous peoples’ lifestyle, which is developed more in connection with Nature and the surrounding ecosystem, is less likely to be able to be sustained as a result of a disturbance of that ecosystem resulting from climate change-related impacts, ranging from ice melting in the Arctic to deforestation, desertification, and disruption of water cycles in South and Central America. The expected impact on their lives and human rights result from the fact that their ‘traditional lands’ (i.e., the Polar regions, islands, coastal, or forest areas) are more fragile and susceptible to the adverse effects of climate change. This fragility of their living environment was emphasized in the afore-mentioned *Inuit* and *Athabaskan* petitions.

Considering the precedent of the *Billy* case, in which climate change was brought before the Human Rights Committee under the umbrella of

⁹⁹ *Sawhoyamaya Indigenous Community v Paraguay*, IACtHR Series C No 146 (29 March 2006) §118. See also *Maya Indigenous Communities of the Toledo District (Belize)*, IACmHR Report No 40/04 (Case 12,053) (12 October 2004) §155.

¹⁰⁰ See Preamble, para. 1.

¹⁰¹ See Article VI.

¹⁰² Human Rights Council, ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples Climate Change’, UN Doc A/HRC/36/46 (1 November 2017).

Indigenous peoples' rights (namely, the Torres Strait Islanders)¹⁰³, one could already hint that the IACtHR would also unveil States' human rights obligations to protect and secure the human rights of Indigenous peoples against the threats posed by climate change-related effects. In Advisory Opinion 32/25, the Court noted the special position of these peoples as vulnerable communities, as explained below¹⁰⁴.

A standalone right to a healthy environment

A second phase in the environmental jurisprudence of the IACtHR began with the 'green shift' espoused in the advisory opinion OC-23/17¹⁰⁵. Here, the IACtHR affirmed that a healthy environment is 'fundamental to the existence of humanity'¹⁰⁶ and mentioned 'that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights'¹⁰⁷ (thus confirming the interdependence and indivisibility of human rights)¹⁰⁸. More importantly, nonetheless, the IACtHR clarified that a standalone human right to a healthy environment is also protected under article 26 of the ACHR¹⁰⁹.

In fact, article 26 of the ACHR is viewed as an open clause that urges States Parties 'to adopt measures (...) with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States.' This allowed the IACtHR to claim the competence to recognize as human rights protected under the ACHR any social, economic, and cultural rights that seeks to develop the standards of human rights set out in the OAS Charter. In the view of the IACtHR, this includes article 11 of the San Salvador Protocol, since

¹⁰³ *Daniel Billy et al v Australia (Torres Strait Islanders Petition)*, UN Human Rights Committee 'Views adopted under article 5 (4) of the Optional Protocol, concerning Communication No 3624/2019' (18 September 2023) UN Doc CCPR/C/135/D/3624/2019.

¹⁰⁴ OC-32/25 (n 95) §§605ff.

¹⁰⁵ L.C. LIMA *op. cit.*, 64; A. ROCHA and R. SAMPAIO *op. cit.*, 281.

¹⁰⁶ *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 to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the ACHR)* (Advisory Opinion OC-23/17) IACtHR A Series No 23 (15 November 2017).

¹⁰⁷ *Ibid.*, §47.

¹⁰⁸ As mentioned by the IACtHR, unveiling a right to a healthy environment 'does not mean that other human rights will not be violated as a result of damage to the environment.' See *Indigenous Communities of the Lhaka Honkat (Our Land) Association v Argentina (Merits, Reparations and Costs)* IACtHR Series C No 400 (6 February 2020) §§203. See also OC-23/17 (n 106) §54.

¹⁰⁹ OC-23/17 (n 106) §57, *Lhaka Honhat* (n 108) §202.

the article 29(d) of the ACHR protects the rights derived from the American Declaration of the Rights and Duties of Man and *other international acts of the same nature*¹¹⁰. In other words, the standalone right to a healthy environment is perceived as being part of the *acquis* of human rights protected under the ACHR¹¹¹ and is directly and immediately enforceable by its institutions¹¹².

Therefore, whereas in a first phase the IACtHR was able to 'green' the existing human rights, with the advisory opinion OC-23/17 (following the precedent in *Lagos del Campo* on social rights)¹¹³ the IACtHR singled out a standalone right to a healthy environment as inherent to the ACHR¹¹⁴. However, it must still be stressed out that unveiling a human right to a healthy environment 'does not mean that other human rights will not be violated as a result of damage to the environment'¹¹⁵. As such, according to the IACtHR, environmental risk and harm might amount to a violation of a standalone right to a healthy environment *and* other human rights at the same time.

This new stance of the IACtHR on a standalone right to a healthy environment is key in the context of climate change. Relying on the precedent of the *La Oroya* judgment, it was not difficult to consider greenhouse gasses emissions as a form of atmospheric pollution; and it was not difficult to conclude that the adverse effects of climate change do affect in a negative manner the effective enjoyment of human rights. Furthermore, autonomizing a human right to a healthy environment does not exclude the concurrent relevance of other human rights. As such, in a case related to climate change, the IACtHR could easily conclude that a right to a healthy environment *and* other human rights are infringed at the same time.

Advisory Opinion 32/25 fits in this overall context. In this advisory opinion, the IACtHR first mentioned that the adverse effects of climate change impact the effective enjoyment of several human rights, including rights not directly connected to a healthy environment¹¹⁶. As a result, the

¹¹⁰ OC-23/17 (n 106) §§56-59.

¹¹¹ A. ROCHA and H. OLIVEIRA, *Fundamental Rights and Human Rights*, in C. AMADO GOMES, H. OLIVEIRA and M. PERESTRELO DE OLIVEIRA (eds.), *A Treatise on Environmental Law*, vol. III, *Environmental Law and Other Legal Fields*, 36-37.

¹¹² *Lhaka Honhat* (n 108) §272.

¹¹³ *Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 340 (31 August 2017).

¹¹⁴ L.C. LIMA *op. cit.*, 64; A. ROCHA and R. SAMPAIO *op. cit.*, 281; M.A. TIGRE and N. URZOLA, *The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene*, in *Journal of Human Rights and the Environment*, 2021, 44; P. TRINCADO VERA (n 92) 524.

¹¹⁵ *Lhaka Honkat* (n 108) §203. See also OC-23/17 (n 106) §54.

¹¹⁶ OC-32/25 (n 95) §§219ff.

Court devoted a special section of its advisory opinion to revealing the obligations arising from these human rights, but not without first establishing some common starting points: that these obligations bind all branches of the government, regardless of their territorial or institutional level¹¹⁷; that they must be read in light of the precautionary principle¹¹⁸; that they are subject to a principle of prohibition of retrogression¹¹⁹, as they fall under an obligation of progressive realization¹²⁰; and that States have an obligation to adopt domestic legal measures appropriate for the implementation of these human rights¹²¹. However, the IACtHR also stated that ‘obtaining the necessary resources to respond to the climate emergency should not compromise the right of individuals and peoples to take part in, contribute to and enjoy development’¹²², which shows that the Court was aware that climate action can be described as a modern version of the labors of Hercules.

In the context of these ‘other’ human rights (i.e., ‘other’ than the human right to a healthy environment), the IACtHR held that ‘States must adopt the “effective” measures that are required to prevent severe or irreversible damage to the environment. (...) even though the measures to be adopted may vary in line with the specific circumstances, States are obliged to guarantee human rights when they are, or should be, aware of the possibility that the acts or omissions of their agents or of private individuals may create a risk of severe and irreversible damage, within or outside their territory, even when they lack absolute certainty in this regard’¹²³. To this end, the Court identified in particular the obligations to regulate, supervise, and monitor private and corporate conduct, as well as to conduct environmental impact studies, to establish contingency plans, and to mitigate damage resulting from climate change¹²⁴.

Furthermore, in Advisory Opinion 32/25, the IACtHR also placed the climate issue under the purview of the human right to a healthy environment¹²⁵, in line with its previous case law, but also noting that this obligation is based on a peremptory norm of international law (*jus cogens*)¹²⁶. Specifically, the Court emphasized the idea that ‘there can be no doubt that the global climate

¹¹⁷ *Ibid.*, §225.

¹¹⁸ *Ibid.*, §228.

¹¹⁹ *Ibid.*, §222.

¹²⁰ *Ibid.*, §§238 ff. (i.e., obligations under articles 2 and 26 of the ACHR and article 1 of the San Salvador Protocol).

¹²¹ *Ibid.*, §§244 ff.

¹²² *Ibid.*, §243 (emphasis added).

¹²³ *Ibid.*, §229.

¹²⁴ *Ibid.*, §230. See also *La Oroya* (n 94) §§110-111.

¹²⁵ *Ibid.*, §§269 ff., especially §297.

¹²⁶ *Ibid.*, §§287 ff.

system (...) is an essential part of the environment, because the harmonious development of the many processes that are essential for the conservation of life at the global level depend on it. Consequently, harm to the climate system is a specific form of environmental damage¹²⁷. From this, in the view of the IACtHR, arises the obligation to adopt measures to prevent climate damage; the subjection of these measures to the standard of enhanced due diligence; and the responsibility of the State for climate damage that occurs or originates in its territory or areas under its jurisdiction, whenever there is a causal link between that fact and the violation of the human rights of persons outside its territory¹²⁸ – a statement that seems to mix the concepts of *de jure* jurisdiction and attribution of conduct for the purposes of international State responsibility.

However, the IACtHR also held the idea of climate issues being separate from general environmental issues. Thus, despite classifying climate damage as a form of environmental damage, the Court also emphasized that climate damage ‘can and should be distinguished from other forms of environmental damage’¹²⁹. This autonomy of climate damage is justified, in its understanding, ‘owing to the urgency, specificity, and complexity of the actions required to protect the global climate system. In view of this situation, the Court considered that recognition of a human right to a healthy climate as an independent right – [even if] derived from the right to a healthy environment – responds to the need to endow the Inter-American legal order with a base (...) on which the specific State obligations in relation to the climate crisis can be clearly delimited and compliance with them required independently of other duties related to environmental protection’¹³⁰. The most relevant issue, however, is to concretize the operational content of this autonomous right. For the IACtHR, the collective dimension of this right ‘protects the collective interest of present and future generations of human beings and other species in preserving a climate system that is suitable for ensuring their well-being and equilibrium between them (...). The entitlement to this dimension of the right to a healthy climate belongs indivisibly and non-exclusively to the groups composed of those who share in this collective interest’¹³¹. This collective dimension explains the Court’s concern to strengthen the legal position of future generations¹³² and Nature¹³³

¹²⁷ *Ibid.*, §295.

¹²⁸ *Ibid.*, §296.

¹²⁹ *Ibid.*, §299.

¹³⁰ *Ibid.*, §300.

¹³¹ *Ibid.*, §302. This idea is in line with OC-23/17 (n 106) §59.

¹³² *Ibid.*, §§305 ff.

¹³³ *Ibid.*, §314.

within the framework of the inter-American human rights system. In turn, the individual dimension of this right ‘protects the possibility of each individual being able to live in a climate system free from dangerous anthropogenic interference’¹³⁴. However, the Court also stated that this individual dimension of the right to a stable climate system is a ‘precondition for the exercise of other human rights. In this regard, the individual sphere of the right will be violated when the State’s non-compliance with its obligations concerning the protection of the global climate system affects, not only this system, but also leads to the direct violation of the particular rights of one or several individuals’¹³⁵. With this, the Court seems to undermine the autonomy of the right to a stable climate system – not in relation to the right to a healthy environment, but in relation to ‘other’ human rights. Nevertheless, this basis allowed the Court to state that ‘specific obligations arise from the right to a healthy climate related to: (i) actions to address the causes of climate change and, in particular, mitigation of GHG emissions. Moreover, specific obligations also arise from the right to a healthy environment in relation to: (ii) the protection of Nature and its components, and (iii) gradual progress towards sustainable development’¹³⁶. Among the various obligations arising from this human right to a healthy climate and a stable climate system are the obligation to set an adequate GHG emissions reduction target¹³⁷, the obligation to regulate private corporate conduct¹³⁸, various obligations (and corresponding rights) in relation to procedure¹³⁹ and access to justice¹⁴⁰, the obligation to protect environmental and climate defenders¹⁴¹, and the obligation to protect the most vulnerable people¹⁴², including children and adolescents, Indigenous peoples and African descent persons, or people living in poverty¹⁴³.

Consequently, according to the IACtHR in Advisory Opinion 32/25, the human right to a healthy climate and a stable climate system is inherent to several provisions of the ACHR, which implies the obligation of States to protect and preserve the stability of the atmosphere¹⁴⁴. This human right can

¹³⁴ *Ibid.*, §303.

¹³⁵ *Ibid.*, §303.

¹³⁶ *Ibid.*, §320.

¹³⁷ *Ibid.*, §§323 ff.

¹³⁸ *Ibid.*, §345.

¹³⁹ *Ibid.*, §§530 ff.

¹⁴⁰ *Ibid.*, §§540 ff.

¹⁴¹ *Ibid.*, §§561 ff.

¹⁴² *Ibid.*, §§595 ff.

¹⁴³ See also OC-23/17 (n 106) §§47-48.

¹⁴⁴ D. WINTER DE CARVALHO, A. ROCHA, *The Obligation to Protect the Stability of the Cli-*

be inferred from the right to a healthy environment under Article 26 of the ACHR, but also from other more traditional human rights provisions, insofar as a stable climate is an ontological support for its effective enjoyment.

On this matter, one must emphasize that using a right to a healthy environment has a greater potential to contribute to the judicial clarification and development of States’ human rights obligations in relation to climate change. For instance, empirical evidence suggests that a contentious case is more likely to succeed if it is based on an autonomous right to a healthy environment¹⁴⁵ – namely, because rules on *locus standi* and victimhood are easier to comply with under the right to a healthy environment¹⁴⁶. Furthermore, a standalone right to a healthy environment implies that damages caused exclusively to species or natural components, or atmospheric pollution in itself, may be automatically viewed as a breach of the ACHR, if there is no individual directly affected by such conduct¹⁴⁷. This is a major opportunity in climate litigation, where individual and direct affection is almost impossible to prove¹⁴⁸, and is in line with the ruling in *La Oroya*, where the IACtHR reaffirmed the enforceability of the standalone right to a healthy environment.

OC-32/25 fits in the tradition of the IACtHR of denting the limits of judicial discretion, namely by adopting very innovative stances on several domains – and the hearings in the pending advisory proceedings already suggested the IACtHR was leaning towards an *avant-garde* position on human rights protection in the context of climate. But whatever the actual findings of the IACtHR are, the advisory opinion rendered by the IACtHR – geographically delimited and confined to the realm of the Inter-American system of human rights¹⁴⁹ – will help shaping a more comprehensive, regional perspective on States’ obligations in relation to climate change-related obligations (i); shape the positions espoused by certain American States in the course of climate negotiations (ii); impact the practice of the AOS organs (iii); impact future (environmental and climate) litigation before the IACmHR and the IACtHR (iv), as well as before domestic courts¹⁵⁰ (v); provide a sense of di-

mate under the Right to a Healthy Environment, in M.A. TIGRE, D. WINTER DE CARVALHO, A. ROCHA (eds.), *Brazil and Climate Justice – Pioneering Climate Litigation for a Global Cause*, Leiden, 2025) 129.

¹⁴⁵ P. VILCHEZ, A. SAVARESI, *The Right to a Healthy Environment and Climate Litigation: A Game Changer?*, in *Yearbook of International Environmental Law*, 2023, 6.

¹⁴⁶ A. ROCHA, R. SAMPAIO *op. cit.*, 281, M.A. TIGRE *op. cit.*, 235.

¹⁴⁷ A. ROCHA and H. OLIVEIRA, *op. cit.*, 38.

¹⁴⁸ *Ibid.*

¹⁴⁹ L.C. LIMA *op. cit.*, 49.

¹⁵⁰ For instance, encouraging the umbrella of the control of conventionality of domestic laws, or in the context of a request for an advisory opinion pursuant to art. 64, para. 2, of the ACHR.

rection, and thus impact domestic legislations of States Parties to the ACHR (vi), and eventually of other OAS Members States (vii); and might encourage Member States to adopt regional treaties in the OAS system in relation to sectorial aspects of climate action (viii).

4. Although there are other international organizations in the American continent – such as Mercosur, the Andean Community, or the Caribbean Community –, none has adopted any action on climate change comparable to the OAS or contributed to clarify and develop human rights in the context of climate change as the IACtHR. The contribute of the OAS and the IACtHR is of great importance and ambition, but different countries in the Americas have been at the forefront of climate action also. This section seeks to assess the contribute of some States in the American continent, whose experience has been more reported internationally. To that end, the cases of Brazil and Colombia stand out as case studies of domestic jurisdictions where climate litigation has contributed to the development of international benchmarks.

4.1. The geography of Brazil explains why the success of global climate action depends on what happens in this country¹⁵¹. Brazil is home to important biospheres, including the Amazon and the Pantanal rainforests, which rank as important GHG sinks and repositories of natural resources including wood. However, it is also a country that heavily relies on coal for energy production, that still needs to enhance social and economic development – all this explaining why it ranks high as a global GHG emitter per capita, even though not in absolute terms. Moreover, the projections for the future evolution of the climate system hint that Brazil will be heavily affected by the adverse effects of climate change, having in mind that an important portion of its population counts as particularly vulnerable from a social and economic angle. This explains why Brazil is ‘perpetrator’, ‘victim’, and ‘part of the solution’ at the same time. Litigation before Brazilian courts have followed this triple status of the country.

To understand the evolution of climate litigation in Brazil, as a subregional experience in the American continent, it is worth starting from the periodization suggested by Tigre and Setzer¹⁵². In a first phase of agnosticism

¹⁵¹ E.g., see M.A. TIGRE, A. ROCHA and D. WINTER DE CARVALHO, *Climate Litigation in Brazil – An Introduction*, in M.A. TIGRE, D. WINTER DE CARVALHO and A. ROCHA *op. cit.*, p2.

¹⁵² M.A. TIGRE and J. SETZER, *Human Rights and Climate Change for Climate Litigation in Brazil and Beyond: An Analysis of the Climate Fund Decision*, in *Georgetown Journal of International Law*, 2023, 616-622.

(late 1990s and early 2000s), climate change was only invoked ‘discreetly’ and ‘marginally’ to facts and the legal argument. In a second period (of challenge and growth, between 2010-2022), lawsuits before domestic courts started focusing on climate change as central to the legal argument produced, or as the main fact to be discussed. This concern with climate change was visible between 2019 and 2022, when courts were asked about the deregulation that aimed to encourage economic projects at the expenses of climate and environmental protection. According to Tigre and Setzer, in this period, climate litigation sought three major goals¹⁵³: to combat illegal deforestation; to reduce the country’s GHG emissions; and to normalize the use of climate change(-related) arguments before courts. This opened the door for a third period (of maturity), which started with the Supreme Federal Court’s ruling in *PSB et al v Brazil (on Climate Fund)*¹⁵⁴. This judgment is landmark and embodies the major contribution of Brazil to climate litigation worldwide: first, because it recognized that Article 255 of the Brazilian Constitution secures a fundamental right to a stable climate for the benefit of present and future generations (in line with OC-32/25); second, because it qualified the Paris Agreement as part of genre of human rights treaties. Both findings were key to allow the court to order the cessation of inaction and the adoption of the appropriate measures aimed at reducing the country’s GHG emissions and to comply with its commitments under the Paris Agreement, without stepping the lines of the separation of powers principle¹⁵⁵. In itself, this innovative stance from a Brazilian apex court is probably its major subregional contribution to global climate litigation and to foster climate action in Brazil.

4.2. Although facing its own climate change impacts, the Colombian case confirms that subregional experiences in the Americas share some commonalities. In particular, Colombia is responsible for a marginal contribution for global GHG emissions, being the largest domestic source of emissions related to the agricultural, land use, and forestry sectors¹⁵⁶. It is also amongst

¹⁵³ *Ibid.*

¹⁵⁴ *Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (PSOL), Partido dos Trabalhadores (PT) e Rede Sustentabilidade v União Federal*. ADPF 708, Judgment of 7 January 2022, Rapporteur: Minister Luís Roberto Barroso, available at <https://www.climatecasechart.com/document/psb-et-al-v-brazil-on-climate-fund_890b>, last accessed 6 January 2026.

¹⁵⁵ M.A. TIGRE, A. ROCHA and D. WINTER DE CARVALHO *op. cit.*, 15-16; DANIELLE DE ANDRADE MOREIRA, *A Panorama of Climate Litigation in Brazil*, in M.A. TIGRE, A. ROCHA and D. WINTER DE CARVALHO (n 144) 47ff.; C. FIGUEIREDO GARRIDO, *Recognizing the Paris Agreement as a Human Rights Treaty: The Climate Fund Case and Brazilian Courts*, in M.A. TIGRE, A. ROCHA and D. WINTER DE CARVALHO (n 144) 111 ff.; D. WINTER DE CARVALHO and A. ROCHA *op. cit.*, 125ff.

¹⁵⁶ M.A. TIGRE, *Climate Litigation in the Global South: Mapping Report*, New York,

the most vulnerable nations to climate change impacts¹⁵⁷. Besides widespread unsustainable use of biodiversity, changes of government and armed conflict add to the risks to achieving climate goals in the country¹⁵⁸.

In terms of climate litigation, the Colombian experience was triggered by a difficulty in enforcing international and domestic commitments¹⁵⁹. Hence, it was not marked by a political ambience of deregulation, but more with structural difficulties in adopting and effectively enforcing ambitious mitigation action¹⁶⁰.

The answer from Colombian courts singled out two main contributions to global climate litigation: on the one hand, a recognition of the rights of future generations; on the other hand, a recognition of the rights of Nature.

In *Future Generations*¹⁶¹, the Supreme Court of Justice noted that fundamental rights protection involves the protection of individuals' rights as well as the rights of 'the other' – a broad notion that includes the other inhabitants of our planet, the unborn generations, as well as animal and plant species. In relation to climate change, these findings allowed the court to flesh out fundamental rights of future generations and to recognize the Amazon Forest as a subject of law, holder of rights¹⁶². In other words, the Supreme Court of Justice recognized that future generations are entitled to protection, which translates into the adoption of effective measures aimed at preventing and fighting deforestation, whilst the Amazon Forest is entitled to protection, conservation, maintenance, and restoration measures¹⁶³.

Even though the *Future Generations* ruling is landmark, it elaborated on the *Atrato River* ruling from the Constitutional Court, which was de-

2024, 103, available at <https://scholarship.law.columbia.edu/sabin_climate_change/230>, last accessed 6 January 2026.

¹⁵⁷ *Ibid.*, 104.

¹⁵⁸ M.P. GARCÍA PACHON, A. VILORIA, M.D. DE LA ROSA CALDERÓN, *Climate Litigation in Colombia*, in F. SINDICO; M.M. MBENGUE (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects*, Heidelberg, 2024, 53-74, 59.

¹⁵⁹ M.D. DE LA ROSA CALDERÓN, *Rights-based Climate Litigation in Colombia: An Assessment of Claims, Remedies, and Implementation*, in *Journal of Human Rights Practice*, 2024, 273-284.

¹⁶⁰ United Nations Environmental Program, *Climate Change in the Courtroom: Trends, Impacts and Emerging Lessons*, New York, 2025, 49, available at <<https://wedocs.unep.org/bitstream/handle/20.500.11822/48518/Global-Climate-Litigation-Report-2025-Status-Review.pdf?sequence=3&isAllowed=y>>, last accessed 6 January 2026; M.A. TIGRE *op. cit.*, 107.

¹⁶¹ *Future Generations v Ministry of the Environment and Others*. STC4360-2018, Judgment of 5 April 2018, Rapporteur: Luis Armando Tolosa Villabona, available at <<https://www.climatecasechart.com/documents/future-generations-v-ministry-of-the-environment-and-others-decision7592>>.

¹⁶² M.A. TIGRE *op. cit.*, 106-107; J.E. VÁSQUEZ SANTAMARÍA, C. RESTREPO MÚNERA, *Justicia ambiental y justicia climática: Principios progresistas configurados desde la participación judicial en Colombia*, in *Revista de Derecho Ambiental*, 2023, 116.

¹⁶³ *Future Generations v Ministry of the Environment and Others* (n 179).

cided in 2016¹⁶⁴. In this case, the Constitutional Court touched upon most, if not all, aspects that would be developed by the IACtHR in OC-32/25, including the human rights to a healthy environment and a stable climate, the rights of Indigenous Peoples, the rights of vulnerable communities including Afro-descendants and poorer communities¹⁶⁵. In addition, it recognized that the Atrato River could be viewed as a subject of rights, entitled to protection measures under the legal system¹⁶⁶.

Recent decisions further help to draw a link between climate change and human rights¹⁶⁷. In *Pirá Paraná Indigenous Council and Association of Indigenous Traditional Authorities of River Pirá Paraná “ACAIPÍ” v. Ministry of Environment and Sustainable Development and others*, decided in 2024, the Colombian Constitutional Court found that a REDD+ project violated indigenous rights. The Court emphasised the critical role of REDD+ projects for climate mitigation and indigenous rights, as well the need to incorporate human rights standards and ensure free and informed consent, monitoring of potential harms from said projects and the need to incorporate ethnic perspectives, drawing a closer link between climate and vulnerable populations¹⁶⁸.

Furthermore, in *José Noé Mendoza Bohórquez et al. v. Department of Arauca et al.*, also from 2024, the Colombian Constitutional Court recognised climate-induced migration as a form of internal forced displacement, applying the legal protections for victims of armed conflict displacement to natural disasters, in that case, flooding¹⁶⁹. This is a significant closure of the existent gap

¹⁶⁴ *Center for Social Justice Studies et al v Presidency of the Republic of Colombia et al (The Atrato River Case)*. T-622/16, Judgment of 25 November 2016, available at <<https://www.climatecasechart.com/documents/atrato-river-decision-t-622-16-of-november-10-2016-judgment8646?l=colombia>>.

¹⁶⁵ M.P. GARCÍA PACHON, A. VILORIA, M.D. DE LA ROSA CALDERÓN *op. cit.*, 63; J.E. VÁSQUEZ SANTAMARÍA, C. RESTREPO MÚNERA *op. cit.*, 116-117.

¹⁶⁶ M.P. GARCÍA PACHON, A. VILORIA, M.D. DE LA ROSA CALDERÓN *op. cit.*, 63.

¹⁶⁷ M.A. TIGRE, M. BARRY, *Climate Change in the Courts: A 2024 Retrospective*, New York, 2024, 8-12, available at <https://scholarship.law.columbia.edu/sabin_climate_change/240/>, last accessed 6 January 2026.

¹⁶⁸ *Ibid.*, 8. See also *Pirá Paraná Indigenous Council and Association of Indigenous Traditional Authorities of river Pirá Paraná “ACAIPÍ” v. Ministry of Environment and Sustainable Development and others*. T248-2024, Judgment of 25 June 2024, Rapporteur: Juan Carlos Cortés González, available at <https://www.climatecasechart.com/documents/pira-parana-indigenous-council-and-association-of-indigenous-traditional-authorities-of-river-pira-parana-acai-pi-v-ministry-of-environment-and-sustainable-development-and-others-judgment_af79>, last accessed 6 January 2026.

¹⁶⁹ M.A. TIGRE, M. BARRY *op. cit.*, 12; *José Noé Mendoza Bohórquez et al. v. Department of Arauca et al. (climate-induced migration as forced displacement)*. T123-2024, Judgment of 16 April 2024, Rapporteur: Natalia Ángel Cabo, available at <<https://www.global-council.org/cases/COL011D>>, last accessed 6 January 2026; J. SETZER, C. HIGHAM, *Global Trends in Climate*

in migration law which still often fails to protect those individuals subject to displacement due to climate events¹⁷⁰. Before it, *Josefina Huffington Archbold v. Office of the President and others* had already emphasised in 2022 the increased impacts of climate change on vulnerable communities, as well as the human rights obligations of States in the face of natural disasters¹⁷¹. Therefore, both in *Josefina Huffington Archbold*, *José Noé Mendoza Bohórquez* and *Pirá Paraná*, important links between climate and human rights were drawn, in line with the ICJ's Advisory Opinion on the issue, dated July 2025¹⁷².

Therefore, Colombia provides us with apex decisions in climate litigation, be it elevating biomes to holders of rights, such as the Amazon and the Atrato River, or by seeing the human rights impacts hiding behind climate change and clarifying States' obligations to protect them.

5. In conclusion, within the complex, heterogenous, and polyhedral OAS system, several organs have been addressing climate action. In that sense, bodies such as the General Assembly, the IACmHR, or REDESCA have become focal points in collecting knowledge and experience, prioritizing climate action at the level of States' policies, outlining policy and regulatory norms and guidelines, and reconciling States' positions in relation to mitigation and adaptation, thus contributing to cement an American perspective for climate action. The contribution of these organs has been confined to the level of non-binding instruments and, with the exception of Resolution No. 3/2021 of the IACmHR, they lack a certain level of detail – but that has not hindered their capacity to prioritize climate action in the Americas and to shape State action at the level of domestic law.

Furthermore, following a request for an advisory opinion submitted in January 2023 by Chile and Colombia, the IACtHR delivered in May 2025 its opinion on States' obligations under the ACHR in relation to climate change, where it espoused an innovative approach on States' human rights obligations in face of the impacts of climate change. Even though advisory

Change Litigation: 2024 Snapshot, London, 2024, 34-35, available at <<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf>>, last accessed 6 January 2026.

¹⁷⁰ M.A. TIGRE, M. BARRY *op. cit.*, 12; United Nations Environmental Programme (n 178) 49.

¹⁷¹ *Josefina Huffington Archbold v. Office of the President and others*, T333-2022, Judgment of 26 September 2022, Rapporteur Cristina Pardo Schlesinger, available at <https://www.climate-casechart.com/documents/josefina-huffington-archbold-v-office-of-the-president-and-others-decision_afb0>, last accessed 6 January 2026; J. SETZER, C. HIGHAM *op. cit.*, 24.

¹⁷² *Obligations of States in respect of Climate Change* [Advisory Opinion, 21 July 2025] available at <<https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf>>, last accessed 6 January 2026.

ry opinions are also non-binding and the IACtHR is a specialized human rights court, advisory opinions are an authoritative judicial pronouncement on States' *legally binding* obligations: i.e., they merely clarify already-existing obligations through less intrusive, non-adversarial means. Moreover, human rights courts cannot micromanage States' climate action, but they are more experienced in balancing competing rights and interests, and in dealing with legal questions that also involve the making of political judgments. Hence, the IACtHR is likely to be an important contribution to flesh out States' obligations to mitigate and/or adapt to climate change (including in the shaping of domestic climate measures) and thus to build a regional perspective for climate action.

Even though the findings of the IACtHR are evidence of a vision of courts as active players in a legal system, their findings are in line with subregional readings of States' climate-related obligations in the context of the American continent. In particular, the case-law of the courts from Brazil and Colombia confirms a concern with prioritizing climate action to cope with the specific challenges posed by climate change adverse effects in the American continent.

ADVANCING CLIMATE RIGHTS FOR MITIGATION, LOSS, DAMAGE AND ADAPTATION IN THE AFRICAN UNION

OTTAVIO QUIRICO*

SUMMARY: 1. Introduction. – 2. The disproportionate impact of unmitigated GHG emissions on the African continent: loss, damage and adaptation. – 3. (Soft) regulatory measures. – 4. Climate cases and climate rights. – 4.1. The limits of climate rights in climate disputes. – 4.2. Regional prospects and the *de lege ferenda* advisory opinion of the African Court on Human and Peoples' Rights. – 5. Conclusion**.

ABSTRACT

Within the framework of a collective and developmental approach to fundamental rights shaped by core regulatory instruments such as the Banjul Charter and the Convention on Internal Displacement, the African Union has thus far reacted to the overwhelming effects of climate change by adopting important regulatory measures, which have led to the implementation of initiatives such as the Great Green Wall and the Africa Adaptation Acceleration Programme. By contrast, perhaps surprisingly, there are scant developments on climate rights in the African case law. In pending proceedings for an advisory opinion, the African Court on Human and Peoples' Rights has therefore the opportunity to disclose forward-looking perspectives for climate change rights and duties, with significant regulatory ramifications regionally and worldwide. Arguably, this is particularly true as concerns the possibility of a human right to climate sustainability rather than a human right to a sustainable environment, and further substantive and procedural implications in terms of their addressees and scope of application, notably, as *erga omnes* obligations, as concerns GHG mitigation, loss and damage, and adaptation.

1. The African continent is among the fastest heating areas of the world and suffers disproportionately from the effects of climate change. Severe droughts, particularly in eastern and southern Africa, have triggered food and water scarcity, augmenting the risk of hunger¹. Diseases, such as malaria, increase because of the effects of heating temperatures on the *Anopheles* mosquito's lifespan². The number Africans displaced by phenomena such

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¹ J. KIMUTAI et al., *Human-induced Climate Change Increased 2021-2022 Drought Severity in Horn of Africa*, in *Weather and Climate Extremes*, 2025, vol. XLVII, 100745.

² T.L. SYMONS et al., *Projected Impacts of Climate Change on Malaria in Africa*, in *Nature*, 2026, 1.

as desertification is growing at an unprecedented rate³. These are just examples of the devastating impact of climate change on the African continent and require considering what regulatory measures have been adopted *de lege lata* and could be implemented *de lege ferenda* within the framework of the main regional organisation, the African Union (AU), in response to global warming and its effects.

This article aims to provide an assessment of climate change regulation in Africa from the specific standpoint of ‘climate rights’⁴, including (1) primary rules and obligations and (2) secondary norms on adjudication procedures, along the lines of the distinction posited chiefly by Hans Kelsen and Herbert Hart⁵. Such a fundamental theoretical framework is complemented by the classical categorisation of human rights developments from individual to collective claims, that is, from civil and political rights (first-generation), to economic, social and cultural rights (second generation), as well as the (third-generation) rights to development and the environment⁶. In this context, the article synthesises the relationship between climate change and human rights via the emerging concept of ‘climate rights’. Within this framework, analysis further relies on the possibility of a human right to ‘a sustainable climate’ – focusing on greenhouse gas (GHG) mitigation – and, more specifically, on the concept of a human right to ‘climate sustainability’, better encompassing the interrelated concepts of mitigation, loss and damage, and adaptation. This is particularly relevant to the African continent, given that regional instruments take an advanced collective and developmental approach to human rights, which is significantly different from that implemented in America, Europe and the Asia-Pacific⁷.

Along these theoretical lines, the article proceeds in three steps. The first section outlines the impact of climate change throughout the African continent as a manifold reality. The second section explores core regulatory initiatives adopted within the AU to address the negative effects of global warming. The third section tackles climate cases, on the one hand, at the

³ Africa Climate Institute, *The Unseen Toll of Climate Migration in Africa*, 25 March 2025, <https://africaclimateinsights.org>.

⁴ See E. BRANDSTEDT and A.-K. BERGMAN, *Climate Rights: Feasible or Not?*, in *Environmental Politics*, 2013, vol. XXII, vol. III, 394.

⁵ H. Kelsen, *General Theory of Law and State*, Russell and Russell, 1961; H. Hart, *The Concept of Law*, Clarendon, 2012.

⁶ L.-A. THIO, *The Universal Declaration of Human Rights at 60: Universality, Indivisibility and the Three Generations of Human Rights*, in *Singapore Academy of Law Journal*, 2009-03, vol. XXI, n. 1, 293; R. LUPORINI, *Cambiamento climatico, disastri e diritti umani nel diritto internazionale*, in *Eunomia*, 2021, vol. 1-2, 25, 38.

⁷ See, for instance, B. IBHAWCH, *Human Rights in Africa*, Cambridge UP, 2018.

domestic level in African States and, on the other, from the standpoint of regional AU developments. The article ultimately aims to understand how to advance climate rights and duties at the regional and global level, whereby pending proceedings in the African Court on Human and Peoples' Rights (ACtHPR) for an advisory opinion on climate change obligations disclose interesting perspectives *de lege ferenda*, with respect to mitigation, loss, damage and adaptation.

2. The African continent includes over 70 percent of global developing countries⁸. With the exception of States such as South Africa and Algeria, the contribution of African States to global GHG emissions is overall negligible, amounting to less than 3 percent of the totality⁹. Conversely, the continent suffers from disproportionate consequences because of climate change, given that higher temperatures act as 'threat multipliers' and intensify environmental phenomena¹⁰. Such a disproportionate scenario, which is synthesised by the concept of 'common but differentiated responsibility' (CBDR) embedded in the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement¹¹, requires remedial action particularly in terms of loss and damage, and therefore from the viewpoint of adaptation.

Reportedly, worldwide unmitigated GHG emissions have triggered a temperature increase that is above the global average throughout Africa, which faces increasingly heavy consequences, including natural events such as sea level rise, deadly heatwaves, heavy rains, flooding and prolonged droughts¹². Mediterranean Africa in the north – from eastern Morocco to western Egypt – is likely to be subject to projected decreases in mean precipitation and wind speed, with increases in drought and aridity, while the Sahara and Sahel area – spanning Mauritania, Mali, Niger, Chad and Sudan – will rather be subject to heavy precipitation and pluvial flooding, involving changes in the Monsoon season. A mix of river flooding, drought, increase in wind speed, heavy precipitation and pluvial flooding is predicted to affect western and central African countries, from Senegal to Nigeria and the Democratic Republic of the Congo (DRC). Both northeast

⁸ B.A. WALE-OSHINOWO, *Least Developed Countries in Africa*, in S.N. ROMANIUK et al. (eds), *The Palgrave Encyclopedia of Global Security Studies*, Palgrave Macmillan, 2020, 1.

⁹ IPCC, *Sixth Assessment Report (AR6) Synthesis*, 2023.

¹⁰ See, for instance, M. ABUNYEWAH et al. *The Multidimensional Impacts of Heatwaves on Human Ecosystems: A Systematic Literature Review and Future Research Direction*, in *Environmental Science & Policy*, 2025, vol. CLXV, 104024.

¹¹ UNFCCC, Preamble and arts 3-4; Paris Agreement, Preamble and arts 2(3) and 4.

¹² IPCC, Working Group I – *The Physical Science Basis, Sixth Assessment Report (AR6), Chapter 9: Africa*, 2022.

and southeast Africa – spanning countries such as South Sudan, Ethiopia, Somalia, Kenya, Uganda and Tanzania – will be subject to a decrease in mean precipitation, snow and glaciers, coupled with an increase in heavy precipitation and pluvial flooding, which, in Southeast Africa, will improve average tropical cyclone wind speeds in Category 4-5. Southwest Africa – spanning Angola, Namibia and western South Africa – will experience decreasing mean precipitations, increasing heavy precipitation and pluvial flooding, aridity, droughts and mean wind speed; additionally, southeast Africa – roughly spanning Zambia, Mozambique, eastern South Africa and Madagascar – will undergo a similar pattern and will further be affected by fire weather conditions as well as increases in mean wind speed and average tropical cyclone wind speed in Category 4-5¹³.

Such events have profound societal implications, and therefore also entail relevant legal consequences. Droughts, for instance, reduce water and food availability not only for people, thus affecting the rights to food and water, but also for animals, thus altering the traditional lifestyle and right to culture of nomadic herders. Extreme weather causes death and loss of goods, negatively impacting the rights to life and property, and further facilitates the spreading of diseases, such as malaria, which affect the right to health. Desertification and loss of property also trigger displacement, which affects, inter alia, the right to house. Thus, across regions in the Niayes horticultural belt, which supplies major cities such as Dakar and Thiès, farmers in Senegal are facing recurrent drought and declining soil fertility, which undermines food productivity¹⁴. In 2025, severe flooding caused by torrential rains destructed core crops such as maize, left without a shelter and displaced nearly 10,000 people and increased cholera cases in the Tanganyika province within the DRC¹⁵. Ten days after Tropical Typhoon Fytia caused heavy rains and flooding in Madagascar, in February 2026 Cyclone Gezani left the island's main port in ruins, causing around 40 deaths and leaving families without homes, water and sanitation, in need for cash support for purchasing food and preparing for further storm struck¹⁶.

¹³ IPCC, Working Group I – *The Physical Science Basis, Sixth Assessment Report (AR6), Regional Fact Sheet: Africa*, 2022.

¹⁴ FAO, *Senegal's Farmers Lead the Fight Against Climate Threats with Soil Revival Clubs*, 16 December 2025, <http://www.fao.org>.

¹⁵ UN, *Flooding Displaces Thousands amid Ongoing Unrest in Eastern DR Congo*, 15 April 2025, <https://news.un.org>.

¹⁶ UN, *Madagascar: 'Overwhelming' Destruction, Surging Needs after Back-to-back Cyclones*, 2026, <https://news.un.org>.

This obviously has significant implications in terms of loss and damage, with disproportionate costs for ensuing adaptation, including investment in risk mitigation, building adaptive capacity, and fostering resilience at the local, national, and regional level. On average, African countries are losing around 2 to 5 percent of Gross Domestic Product (GDP) and several States have been compelled to divert up to 9 percent of their budgets to respond to climate extremes. It is considered that the annual cost of adaptation will be between US\$ 30-50 billion over the next decade, that is, 2 to 3 percent of Africa's GDP. Given that up to 118 million extremely poor people – living on less than US\$ 1.90 per day – are expected to be exposed to drought, floods and extreme heat, adequate response measures for poverty alleviation efforts will significantly affect growth in the African continent¹⁷.

3. In the light of the collective interpretation of fundamental rights adopted in the African continent, core instruments disclose the possibility of a human rights approach to climate change. For this purpose, the African Charter on Human and Peoples' Rights (ACHPR) sets the scene, as a general human rights instrument that is underpinned by collective and developmental fundamental rights. Thus, besides classical provisions on human rights, spanning life, health and culture (arts 4, 16 and 17), third-generation norms on the rights to socio-economic development (art. 22) and to a safe environment (art. 24) stand out as essential tools for tackling the problem of climate change in the African region. Notably, art. 24 provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'¹⁸.

Considering vulnerable groups, the Maputo Protocol to the ACHPR on the Rights of Women in Africa acknowledges a specific claim of women to 'sustainable development' and a correlated state duty to include women in development action at all levels (art. 19). More softly, the preamble to the African Charter on the Rights and Welfare of the Child (ACRWC) underscores the critical situation of African children, owing to socio-economic, cultural, traditional and development circumstances, including 'natural disasters' and 'hunger' (s. 4).

Significantly, the 2009 AU Convention for the Protection and Assistance to Internally Displaced Persons in Africa (Kampala Convention) qualifies internally displaced persons (IDPs) as 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places

¹⁷ WMO, *Africa Faces Disproportionate Burden from Climate Change and Adaptation Costs*, press release, 2 September 2024, <https://wmo.int>.

¹⁸ *Emphasis added.*

of habitual residence’, as a consequence, inter alia, of ‘natural or human-made disasters’, whereby States are required to protect and assist persons displaced because of ‘climate change’ (art 1(k)), including the adoption of pre-emptive measures (art. 5(4)). This approach is particularly relevant to the debate on the question of ‘climate refugees’, as it anticipates the decision of the Human Rights Committee in the case of *Teitiota*¹⁹.

In the light of this regulatory framework, the AU has undertaken important steps on global warming and climate rights more specifically. In 2007, the Union adopted the Declaration on Climate Change and Development²⁰, which acknowledges the potential of global warming to affect ‘the well-being of the population, ecosystems and socio-economic progress of Africa’²¹. Thus, climate sustainability is a ‘urgent’ priority in the 2015 AU’s Agenda 2063²², which is grounded in Pan-Africanism and Africa’s Renaissance, whereby climate-resilient communities and economies become a core component of the vision for a prosperous and peaceful continent as a dynamic global force²³. Interestingly, adaptation, to be implemented in any action undertaken by the AU, comes first on the Agenda in the context of climate action, requiring affordable technology development and transfer, capacity building, as well as financial and technical resources ensuring the survival of the most vulnerable populations²⁴. Along these lines, the AU’s Climate Change and Resilient Development Strategy and Action Plan 2022-2032 envisages GHG mitigation measures such as inclusive, low-emission and resource-efficient industrialisation; building resilient low-carbon urban areas; and promoting adaptive low-carbon transport systems²⁵. For the purpose of resilience and adaptation, the Action Plan foresees measures such as enhanced finance flows and safety mechanisms to reduce loss and damage²⁶. Concretely, this entails action such as institutional risk management, via, for instance, climate policies that support national and continental insurance programmes covering households and businesses by absorbing

¹⁹ *Ioane Teitiota v. New Zealand*; UN HRC; Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No 2728/2016, 7 January 2020.

²⁰ Adopted at the Eighth Ordinary Session of the Heads of State and Government of the AU, Addis Ababa, AU Doc Assembly/AU/Decl 4 (VIII), 30 January 2007.

²¹ *Ibid.*, at 16.

²² AU, *Agenda 2063: The Africa We Want*, 2015, 16, <https://www.afdb.org>.

²³ *Ibid.*, at 3.

²⁴ *Ibid.*, at 4.

²⁵ AU, *Climate Change and Resilient Development Strategy and Action Plan (2022-2032)*, 2022, 46 ff., <https://au.int>.

²⁶ *Ibid.*, 39 and 62.

financial shocks caused by climate disasters²⁷. However, such documents mostly embed declarations that only create soft law, without producing strictly binding effects²⁸. This is particularly evident in the language of the instruments adopted by the African Commission on Human and Peoples' Rights (ACoMHPR) on climate rights, whereby, for instance, the 2016 Resolution on Climate Change and Human Rights in Africa '[e]ncourages Member States to strengthen regional and international cooperation' for 'comprehensive climate action' and '[u]rgently requests Member States' to implement 'special measures of protection for vulnerable groups'²⁹.

Domestically, several States throughout the entire African continent, such as Mali, the Democratic Republic of the Congo (DRC) and the Republic of South Africa, have recognised the right to a safe environment at the constitutional level³⁰. For instance, under article 22, the Constitution of Mali underscores a link between the claims to health, life and environmental protection, whereby '[e]very person has a right to a healthy and sustainable environment'³¹. Focusing more broadly on development, article 53 of the Constitution of the DRC acknowledges that '[e]very citizen shall have the right to a healthy environment favourable to development' as well as 'the duty to defend it', whereby the State is responsible for protection and preservation³². Section 29 of Constitution of the Republic of South Africa is more elaborate and stipulates that '[e]veryone has the right to an environment that is not harmful to their health or wellbeing' and 'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures', which, *inter alia*, 'secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development'³³.

Fewer States have gone further and have acknowledged the claim to climate sustainability as a fundamental right. Thus, among around 10 over-

²⁷ *Ibid.*, 62.

²⁸ See D. HUNTER, *The Hard Choice for Soft Commitments in the Climate Change Regime*, in D. BRADLOW and D. HUNTER (eds), *Advocating Social Change through International Law: Exploring the Choice between Hard and Soft International Law*, Brill, 2020, 138.

²⁹ ACoMHPR, *Resolution on Climate Change and Human Rights in Africa*, ACHPR/Res.342(LVIII), 2016, emphasis added.

³⁰ See Un General Assembly, *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Africa Region*, Doc. A/HRC/43/53/Annex IV, 30 December 2019.

³¹ Decree No. 2023-0401/PT-RM, 22 July 2023.

³² Constitution of the DRC, as amended by Law 11/002 of 20 January 2011.

³³ Constitution of South Africa, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

all developing States recognising the right to a safe climate at the constitutional level, 4 are situated in Africa. Substantively, this is notably the case of Algeria, where the preamble to the Constitution acknowledges ‘the negative implications of climate change’ and the need to protect the environment and a sustainable use of natural resources for the benefit of future generations³⁴. Similarly, the Constitution of Ivory Coast affirms a commitment of the people to ‘contributing to climate protection and to maintaining a healthy environment for future generations’³⁵. More incisively, art. 257 of the Constitution of Zambia recognises that, ‘in the utilisation of natural resources and management of the environment’, the State shall ‘establish and implement mechanisms that address climate change’³⁶. Focusing on the procedural aspects of climate rights, art. 45 of Constitution of Tunisia affirms that ‘[t]he State guarantees the right to a healthy and balanced environment’ as well as ‘the right to participate in the protection of the climate’, providing ‘the necessary means to eradicate environmental pollution’³⁷.

In practice, this framework has stimulated targeted initiatives by African institutions and States. Notably, the Africa Adaptation Acceleration Programme (AAP), an initiative of the African Development Bank and the Global Center on Adaptation, has channelled over \$15bn in climate resilience for around 60 million vulnerable people in 40 countries since 2021, contributing to the creation of almost one million jobs³⁸. The Africa Great Green Wall was installed by 11 African nations in 2007, aiming to contain the expansion of the Sahara Desert, via the plantation of a wall of trees across the entire Sahel from Djibouti to Dakar. While it was initially envisaged to be around 7,775 km long and 15 km wide, the Wall has later been expanded to encompass nations in both northern and western Africa, promoting water harvesting, greenery protection and fostering indigenous techniques for land use, thus creating a mosaic of green and productive landscapes across northern Africa, according to the idea that desert boundaries mutate, particularly in the light of rainfall variation³⁹. Domestically, the government of Kenya, for instance, has implemented various adaptation projects aiming, inter alia, to protect indigenous communities, including the Tana Delta Green Heart Initiative, which is a joint endeavour of the Tana River

³⁴ Constitution of Algeria, as adopted on 30 December 2020.

³⁵ Constitution of Ivory Coast, as adopted on 8 November 2016.

³⁶ Constitution of Zambia, as adopted on 5 January 2016.

³⁷ Constitution of Tunisia, as adopted on 27 January 2014.

³⁸ African Development Bank and Global Center on Adaptation, *Africa Adaptation Acceleration Programme*, 2021, <https://gca.org/programs/aap>.

³⁹ MAURITANIA and TEN OTHER STATES, *The Great Green Wall*, 2007, <https://thegreatgreenwall.org/about-great-green-wall>.

and Lamu County governments, national agencies and international partners, seeking to safeguard vital wetlands and other habitats in the Tana River Delta and fostering a climate-resilient economy for the 120,000 inhabitants of the area⁴⁰. However, overall, despite such advances, there is consensus on a general lack of effective climate legislation in African jurisdictions⁴¹.

4. Climate cases and climate rights

4.1. Contrary to scholarly anticipations⁴², as compared to other regions in the world, there are limited developments in domestic case-law as concerns climate change in Africa⁴³.

The first relevant dispute involving global warming is *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others*, where the question was discussed of the implications of gas flaring for climate change as a ‘peripheral’ matter⁴⁴. In this case, Gbemre, acting on behalf of the Iwherekan community in the Niger Delta, sued Shell for intense gas flaring and the Nigerian government for failing to prevent Shell’s activities, particularly based on a lack of assessment of the environmental impact of gas flaring, including the increased life-threatening effects of global warming. The Federal High Court upheld a breach of Nigeria’s Environmental Impact Assessment Act (EIA) Act and of the community’s rights to life and human dignity under sections 33 and 34 of the 1999 Nigerian Constitution, as well as arts 4, 16,

⁴⁰ T. RIVER and LAMU COUNTY GOVERNMENTS, *Tana Delta Green Heart Initiative*, 2021, <https://greenheart.tanariver.go.ke>.

⁴¹ See, for instance, D. LUPIN and R. NEKURA, *An Advisory Opinion on Human Rights and Climate Change in the African Regional Human Rights System*, in M.A. TIGRE and A. ROCHA (eds), *The Role of Advisory Opinions in International Law in the Context of the Climate Crisis*, Martinus Nijhoff, 2025, 142, 151 and 155.

⁴² L. CHAMBERLAIN and M. FOURIE, *Using Climate Litigation to Strengthen Advocacy Strategies: The Life after Coal Campaign in South Africa*, in *Journal of Human Rights Practice*, 2024, 16(1), 248; T.-L. FIELD, *Towards a Risk-Thematic Approach for African Climate Litigation*, in K. Bouwer, U. ETEMIRE, T.-L. FIELD and A. OLUBORODE JEGEDE (eds), *Climate Litigation and Justice in Africa*, De Gruyter, 2024, 15.

⁴³ See S. ADELMAN, *Climate Change Litigation in Africa: A Multi-Level Perspective*, in I. ALOGNA, C. BAKKER and J.-P. GAUCCI (eds), *Climate Change Litigation: Global Perspectives*, Brill, 2021, 271; M. ADDANEY, *Addressing the Impacts of Climate Change on Human Rights through Adaptation-Focused Litigation: Cases before the African Union’s Human Rights Bodies*, in *Journal of Human Rights*, 2025, vol. XXIV, n. III, 353; W. DA SILVA, *Climate Litigation in the African Human Rights System: Possibilities, Limits, and Constraints*, in C. AMADO GOMES, H. OLIVEIRA, A. ROCHA and M. FERMEGLIA (eds), *Climate Change before International Courts: A Comparative Study*, Routledge, 2025, 224, 238 ff.

⁴⁴ On global warming as a peripheral matter in litigation in Africa, see J. PEEL and J. LIN, *Transnational Climate Litigation: The Contribution of the Global South*, in *American Journal of International Law*, 2019, vol. CXIII(4), 679, 692.

and 24 of the ACHPR, including the fundamental right to (live in) a clean and healthy environment. As a consequence, without awarding compensation and damage, the Court ordered the halting of gas flaring and the amendment of the Associated Gas Re-injection Act so as to bring it into line with Nigeria’s human rights duties under the Constitution and the Banjul Charter⁴⁵.

With regard to substantive climate rights, the most significant case is *Mbabazi and Others v. The Attorney General and National Environmental Management Authority*. In this dispute, in 2012, the plaintiffs sought declaratory and injunctive relief on behalf of four minors, arguing that under art. 237 of the Constitution in Uganda the government acts as a public trustee for natural resources, including the atmosphere, which, in conjunction with art. 39, compels climate preservation in the interest of present and future generations. In the light of a multiplicity of damages and loss of life triggered by extreme weather events, the complainants argue that the government is in breach of constitutional obligations. This should involve injunctive relief, including a request for orders spanning accountability for GHG emissions, ensuing mitigation plans and adequate reparation, including victims’ compensation and the adoption of measures preventing re-occurrence⁴⁶. After various hearings and adjournments, the case is still pending.

With respect to the procedural implications of climate rights, among cases on the EIAs for climate change, *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others* stands out. In this dispute, an NGO appealed a decision of the Minister for Environmental Affairs to the High Court of South Africa – one of the main GHG polluters globally – in Pretoria, for an evaluation of the question as to whether climate change is a relevant consideration for an EIA on plans for a new 1200 MW coal-fired Thabametsi Power Project, notably under the 1998 National Environmental Management Act. While it noted that statutory law does not expressly mention global warming, the Court upheld its relevance and considered that a lack of reference to climate change in the EIA for the project plan entailed its unlawfulness. Inter alia, the Court based its decision on South Africa’s obligations under the Paris Agreement⁴⁷. As a follow up, the Minister for Environmental Affairs reassessed the project in the light of a new EIA, including global warming, and approved the project again in 2018, prioritising

⁴⁵ *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others*, case FHC/B/CS/53/05, judgment of 14 November 2005.

⁴⁶ *Mbabazi and Others v. The Attorney General and National Environmental Management Authority*, High Court of Uganda at Kampala, Civil Suit 283, 2012.

⁴⁷ *Earthlife Africa Johannesburg v. Minister of Environmental Affairs & Others*, Case No 65662/16, High Court of South Africa, Order of 8 Mar 2017.

ing power generation benefits over significant GHG emissions. After a new appeal by the NGOs EarthLife Africa and Trustees for the Time Being of the Groundwork Trust, in 2020, pursuant to an agreement between the parties, the High Court definitely set aside project authorisations and ordered the defendants to bear costs⁴⁸.

According to a scholarly view, the limited development of climate disputes in African States is grounded in causes such as the absence of strong and effective regulatory frameworks and the limited availability of financial resources⁴⁹. In Ghana, for instance, there is reportedly a lack of climate change regulation and, besides standing hurdles, including the absence of support by public funding, litigation is not particularly expedite⁵⁰. However, other reasons cannot be excluded as, for instance, it has been noted that lawsuits focus on threats that are intensified by global warming, for instance, food and water scarcity, rather than targeting climate change per se⁵¹. Furthermore, questions of development seem to be prioritised over environmental concerns in developing countries in general and in the African continent more specifically⁵². However, such arguments are not uncontroversial, as, for example, it can be noted that, while the majority of major GHG emitters is outside the African continent, this should not prevent action for loss, damage and adaptation⁵³.

4.2. Also at the regional level there has thus far been limited jurisprudential progress in the AU as concerns climate cases and climate rights⁵⁴. Indeed, on the one hand, there has been significant progress on environmental protection via claims focusing on the rights to life, health and culture in cases such as *Centre for Minority Rights Development on behalf of Endorois Community v Kenya* and *Ogiek v Kenya*⁵⁵. On the other hand, the human right to environmental

⁴⁸ *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others*, Case 21559-2018, High Court of South Africa, Order of 19 November 2020.

⁴⁹ Y. SUEDE and M. Fall, *Climate Change Litigation before the African Human Rights System: Prospects and Pit-falls*, in *Journal of Human Rights Practice*, 2024, vol. XVI, n. 1, 146.

⁵⁰ B. ERINOSHO, *Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law*, in *American Journal of International Law Unbound*, 2020, vol. CXIV, 51.

⁵¹ ADELMAN, *Climate Change Litigation in Africa*, cit., 273.

⁵² *Ibid.*

⁵³ See further J. SETZER and L. BENJAMIN, *Climate Litigation in the Global South: Constraints and Innovations*, in *Transnational Environmental Law*, 2020, vol. IX, n. 1, 77.

⁵⁴ See E. BOSHOF, *The Prospects and Challenges of Litigating Climate Change before African Regional Human Rights Bodies*, in BOUWER, ETEMIRE, FIELD and JEGEDE, *Climate Litigation*, cit., at 125.

⁵⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf*

protection under ACHPR art. 24 underpins core disputes such as *LIDHO and Others v. Republic of Ivory Coast* and *SERAC and CESR v. Nigeria*⁵⁶. However, despite such important advancements concerning both the greening of first- and second-generation human rights and reliance on the third-generation right to a safe environment, there have thus far been no complaints specifically targeting the question of climate change in the AU's adjudication bodies, notably the AComHPR and the ACtHPR⁵⁷. This is perhaps surprising, particularly in the light of the reasons that are considered to justify the lack of domestic developments, as, according to the principle of the exhaustion of domestic remedies embedded in ACHPR arts 50 and 56(5), the inefficacy of domestic proceedings provides a ground for undertaking action in the AComHPR and the ACtHPR. Furthermore, in the light of the shielding CBDR principle largely embedded in the UNFCCC and the Paris Agreement, peoples leaving in developing countries and developing States themselves in Africa should have a strong incentive in bringing to the fore the responsibility of the few major African GHG emitters for global warming and its consequences, as this would enable the triggering of cooperation mechanisms, financing and reparation for loss and damage⁵⁸.

Despite limited progress, on 2 May 2025, the Registrar of the ACtHPR received from the Pan African Lawyers' Union (PALU)⁵⁹ the request for an advisory opinion on the obligations of African States with respect to the climate change crisis⁶⁰: this may represent a turning point for climate litigation and rights in the African continent. The request is in line with the advisory opinions of the Interamerican Court on Human Rights (IACtHR)⁶¹ and the International Court of Justice (ICJ)⁶² on the same topic and discloses for the ACtHPR the opportunity to build on such opinions to further clarify the scope and nature of climate change obligations, notably, in the light of the collective interpretation of human rights adopted in the AU. Schematically, the Court is called to provide advice, more specifically, on three core

of Endorois Welfare Council) v. Kenya, Comm 276/03, decision of 4 February 2010; *AComHPR v. Kenya*, appl. 06/2012, order for provisional measures, 5 March 2013.

⁵⁶ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, comm. 155/96, decision ACHPR/COMM/A044/1, 2001; *Lidho and Others v. Republic of Ivory Coast*, appl. 041/2016, judgment of 5 September 2023.

⁵⁷ See further W. DA SILVA and A. ROCHA, *The Protection of the Climate System in the African System of Human Rights: Possible Legal Grounds*, in AMADO GOMES, OLIVEIRA, ROCHA and FERMEGLIA, *Climate Change before International Courts*, cit., 105.

⁵⁸ See further J. Setzer and L. BENJAMIN, *Climate Litigation*, cit. at 77.

⁵⁹ PALU, <https://www.lawyersofafrica.org>.

⁶⁰ Pan African Lawyers' Union, *Request for an Advisory Opinion on the Obligations of States with Respect to the Climate Change Crisis*, 2 May 2025.

⁶¹ IACtHR, *Climate Emergency and Human Rights*, advisory opinion 32/25, 29 May 2025.

⁶² ICJ, *Obligations of States in Respect of Climate Change*, Advisory opinion of 25 July 2025.

questions, concerning climate obligations ensuing from specific first- and second-generation human rights under the ACHPR (1), as well as from the third-generation right to a safe environment under ACHPR art. 24 (2), and the impact of climate change on vulnerable groups (3).

Unsurprisingly, the right to a generally satisfactory environment comes first in the petition. Under ACHPR art. 24 as well as art. 18 of the Maputo Protocol, the petition envisages the right to a safe environment as setting a framework for shaping the relationship between fundamental rights and global warming. Indeed, along the lines of the jurisprudence developed by the AComHPR⁶³, the right to a sustainable environment establishes for governments a correlated duty to take reasonable measures preventing ecological degradation and securing sustainable development, including climate sustainability. This concerns substantive action in terms of mitigation and adaptation, as well as complementary procedural action, spanning information, participation in decision-making and access to justice⁶⁴.

Within the broader context of the right to a sustainable environment, first, the Court is asked to shed light on the relationship between climate change and the right to health, which is acknowledged in ACHPR art. 16⁶⁵. Second, the petition identifies a connection between global warming and the right to economic, social, and cultural development under ACHPR art. 22⁶⁶. Third, the right to life is seen as central to the climate crisis, as the State is considered to have an obligation to protect people from the negative effects of global warming⁶⁷, which is relevant to the concept of the ‘right to (live in) a healthy environment’.

Concerning the impact of climate change on vulnerable groups, the petition requires the Court to provide advice on women, children, the elderly, Indigenous peoples and environmental defenders. Notably, women are often excluded from decision-making processes and largely exposed to climate change because of their roles in agriculture and water management. Furthermore, Africa has the youngest population at the global level, whereby children are particularly vulnerable to impacts such as education disruption, social disorder, food insecurity and diseases. Owing to age-related health conditions and limited mobility, the elderly is disproportionately affected by events such as extreme heat, floods, droughts, and food insecurity. Moreover, global warming specifically threatens Indigenous peoples because of their re-

⁶³ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, cit., at para. 52.

⁶⁴ Pan African Lawyers’ Union, *Request for an Advisory Opinion*, cit., at 44.

⁶⁵ *Ibid.*, at 45.

⁶⁶ *Ibid.*, at 46.

⁶⁷ *Ibid.*

liance on ancestral land and resources for subsistence and cultural practices, while environmental human rights defenders face increasing threats because of their activities in support of climate sustainability⁶⁸.

Essentially, it can be expected that the Court addresses these questions by building on the position already expressed by the ICJ under general international law and by the IACtHR from a human rights perspective more specifically. The ACtHPR is also likely to rely on the jurisprudence developed by the European Court of Human Rights (ECtHR)⁶⁹ and by domestic courts, particularly in civil law jurisdictions, such as the Dutch tribunals in *Urgenda*⁷⁰ and the Supreme Court of Brazil in *Psb et al. v. União Federal*⁷¹. Indeed, while literature is burgeoning on climate litigation as a possible remedy to the climate crisis⁷², only to a limited extent have climate rights been thus far advanced globally and certainly more in civil law jurisdictions than in common law countries, where the doctrine of the separation of powers has been interpreted as a major obstacle to the development of climate rights⁷³.

Given that, unlike the Inter-American and the European human rights protection systems – where the right to a safe environment is only recognised at best as a principle, and thus as soft-law, without the possibility of adjudication and sanctions⁷⁴ – the African system acknowledges the human right to a safe environment as sanctionable hard law, it will not come as a surprise if the IACtHR further advances the framework already outlined by national, regional and international jurisdictions. This is particularly important in the light of the fact that, on the one hand, climate rights are far from being firmly established, and, on the other, the African continent embeds jurisdictions that belong to both the civil law and the common law traditions⁷⁵.

⁶⁸ *Ibid.*, at 64-65. See further, B. NKUMAH, *Future Citizens: Intergenerational Equity in Climate Activism*, in BOUWER, ETEMIRE, FIELD and JEDEDE (eds), *Climate Litigation*, cit., at 313; F. BATT, *The Vulnerability of African Indigenous Peoples' Traditional Meteorological Knowledge in the Climate Change Debate*, *ibid.*, at 168.

⁶⁹ *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, judgment of 9 April 2024.

⁷⁰ *Urgenda v. The Netherlands*, case C/09/456689, judgement of 24 June 2015; *The Netherlands v. Urgenda*, case 200.178.245/01, judgment of 9 October 2018; *The Netherlands v. Urgenda*, case 19/00135, judgment of 20 December 2019.

⁷¹ *Psb et al. v. União Federal Brazil (on Climate Fund)*, ADPF 708, Supremo Tribunal Federal, judgment of 30 June 2022.

⁷² See, for instance, F. SINDICO (ed.), *Research Handbook on Climate Change Litigation*, Edward Elgar, 2024; UNEP, *Global Climate Litigation Report*, 2023, <https://www.unep.org>.

⁷³ See, for example, *Juliana v. United States*, 604 U.S., Decision of 24 March 2025.

⁷⁴ E. MORGERA and G. MARIN-DURAN, *Article 37*, in S. PEERS et al. (eds), *The EU Charter of Fundamental Rights: A Commentary*, Hart, 2021, 1041, 1054.

⁷⁵ See R. DIXON, T. GINSBURG and A. ABEBE, *Comparative Constitutional Law in Africa*, Edward Elgar, 2022.

Scholars are considering the advice that the ACtHPR can prospectively deliver as an important instrument to progress climate change regulation and rights⁷⁶. Thus, substantively, it is anticipated that the Court has the opportunity to address the need for mitigation in a regional context, whereby, while African States are generally negligible contributors to GHG emissions, some, such as South Africa, stand out as major emitters, which must be assessed from a normative standpoint not only vis-à-vis people in South Africa, but also vis-à-vis the population of other African States⁷⁷. Also the rights of vulnerable people emerge as a priority, in the light of advanced regional regulation on groups such as migrants and children⁷⁸. Procedurally, it is considered that the advisory opinion can widen participation and access to justice in climate matters in the African continent⁷⁹. In this context, it can be expected that the Court reaffirm the nature of mitigation and adaptation as obligations of means, that is, as best-effort duties, within the general aim of achieving a maximum 2°C temperature increase above pre-industrial levels (at least for the time being)⁸⁰. It would certainly not come as a surprise if the Court confirms that unmitigated climate change breaches the right to life, broadly interpreted as a right to live in a healthy environment (and climate), according to the jurisprudence initially established by the Dutch courts in *Urgenda* and subsequently confirmed in other civil law jurisdictions and by the ECtHR⁸¹.

More specifically, the Court has a unique opportunity to significantly advance knowledge and practice as concerns the scope of the right to a safe environment. In this regard, first, the Court can clarify the nature of such a right with respect to climate change⁸². Indeed, either the right to a healthy environment develops as hard law or it is doomed to remain an inspirational principle, as intrinsically posited in the 1972 Stockholm Declaration on the Human Environment. Second, addressing the right to a sustainable environment entails for the Court the possibility of further considering the establishment of a more specific human right to a sustainable climate – or *rectius*, to

⁷⁶ See, for instance, Y. SUEDI and M. FALL, *Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls*, *Journal of Human Rights Practice*, 2024, vol. XVI, 146, 152-154.

⁷⁷ LUPIN and NEKURA, *An Advisory Opinion*, cit., at 167.

⁷⁸ *Ibid.*, at 168-170. See also s. 3.

⁷⁹ *Ibid.*, at 168.

⁸⁰ See, notably, ICJ, *Obligations of States*, cit., at paras 255-258.

⁸¹ *The Netherlands v. Urgenda*, case 200.178.245/01, cit., paras 43 ff.; *Verein KlimaSeniorinnen*, cit., para. 65. Along these lines, see further S. VAN WY, *Different Roads to the Same Destination: Climate Change Litigation in South Africa and the Netherlands and the Role of Human Rights in the Mitigation of Climate Change*, in BOUWER, ETEMIRE, FIELD and JEGEDE (eds), *Climate Litigation*, cit., at 219.

⁸² See D.R. BOYD, *Safe Climate Report*, UN Doc. A/74/161, 2019.

climate sustainability – along the lines of the few African States that have recognised the right to a safe climate and climate sustainability more broadly as a self-standing claim at the constitutional level⁸³.

Considering the intersection between climate change and the human right to a safe environment, and possibly to a sustainable climate⁸⁴, discloses for the Court the opportunity of expounding on the structural implications of the right to climate sustainability, which is quite specific, rather than the right to a safe environment, which is conversely quite broad. A more analytical approach can indeed shed a different light on core legal issues, including, from a substantive standpoint, the accountability of public and private actors for excessive GHG emissions, the possibly preemptory nature of the obligation to curb GHG emissions, and reparation for loss and damage. Indeed, it is interesting to note that the Court is requested to clarify not only the responsibility of States and sovereign entities more broadly, but also that of non-state actors⁸⁵. While the question has not been extensively addressed in the opinions of the ICJ and the IACtHR, it has been envisaged by scholars and practitioners⁸⁶, including private and State-owned international monopolies, multinational monopolies, large companies and multinational corporations, whereby only 36 companies worldwide are responsible for around 40 per cent of total GHG emissions in the cement sector⁸⁷. First raised in scholarly literature in 2021⁸⁸, the question of the preemptory nature of GHG mitigation duties has gone unnoticed until the recent stance of the IACtHR and has since gained momentum, to the extent that it is now considered central to the debate on the global regulation of climate change policies⁸⁹. The issue of reparation for loss and damage has thus far received little attention, particularly in the advisory opinions of the ICJ and IACtHR⁹⁰. From a procedural standpoint,

⁸³ See s. 3.

⁸⁴ See IACtHR, *Climate Emergency*, cit., paras 298-304.

⁸⁵ Pan African Lawyers' Union, *Request for an Advisory Opinion*, cit., at 54.

⁸⁶ See, in particular, Expert Group on Climate Obligations, *Oslo Principles on Climate Change Obligations*, Eleven International Publishing, 2015 and P. REBELO and X. REBELO, *Rights-Based Climate Change Litigation Against Private Actors*, in BOUWER, ETEMIRE, FIELD and JEGEDE (eds), *Climate Litigation*, cit., at 189.

⁸⁷ Pan African Lawyers' Union, *Request for an Advisory Opinion*, cit., at 55.

⁸⁸ O. QUIRICO, *Towards a Preemptory Duty to Curb Greenhouse Gas Emissions?*, *Fordham International Law Journal*, 2021, vol. XLIV, 923.

⁸⁹ IACtHR, *Climate Emergency*, cit., paras 291 and 335; M. GEHRING, *Jus Cogens and the Climate Crisis: The Inter-American Court's Landmark Climate Emergency Advisory Opinion and Its Jus Cogens Ruling*, *Verfassungsblog*, 16 July 2025, <https://verfassungsblog.de>. More softly, see E. MORGERA, *The Imperative of Defossilizing Our Economies*, UN Doc. A/HRC/59/42, 2025, 11.

⁹⁰ See Y. SUEDEI, *Africa's Turn: The African Court's Advisory Opinion on Climate Change*, *EJIL Talk*, 22 May 2025, <https://www.ejiltalk.org>.

the cleavage between the right to a sustainable environment and the right to climate sustainability also affords an opportunity to explore the implications of these different climate rights perspectives in terms of information, participation in decision-making and access to justice⁹¹.

5. Within the context of a collective and developmental approach to fundamental rights fostered by core regulatory instruments such as the Banjul Charter and the Kampala Convention on displacement, the AU has thus far reacted to the disproportionate impact of global warming on the African continent by adopting important – but soft – regulatory measures, leading to the implementation of initiatives such as the Africa Adaptation Acceleration Programme and the Tana Delta Green Heart Initiative, which are nonetheless still considered insufficient in the scholarly debate. Perhaps surprisingly, there are still limited jurisprudential developments on climate change also in the African case law at both the domestic and regional levels, whereby the request for an advisory opinion by the ACtHPR on climate change and human rights in Africa discloses a unique opportunity for advancing climate rights, with relevant implications in terms of primary and secondary obligations.

Arguably, particularly in the light of the CBDR principle, the ACtHPR will build on the opinions already delivered by the ICJ and the IACtHR, as well as on the (still limited) case law thus far developed by domestic courts in Africa and, more broadly, in civil law jurisdictions, to disclose forward-looking perspectives for climate rights and duties, as concerns mitigation, loss and damage, and adaptation. Within the framework of ACHPR art. 24, it can be expected that the Court advances the obligations to mitigate global warming, adapt to it and repair its effects, as correlated to the general fundamental duty (of means) to ensure climate sustainability. Addressing the question from the angle of a specific right to climate sustainability would arguably contribute to shedding light on core substantive issues, such as the *erga omnes* rather than peremptory character of the obligations at stake and the (public rather than private) nature of their addressees, as well as ensuing procedural implications in terms of information, participation in decision-making and access to justice. Although it is intrinsically not binding, the advisory stance of the ACtHR can prospectively play an essential role in prompting the harmonious development of consistent climate change regulation and case law in African jurisdictions, with further global ramifications.

⁹¹ On the relationship between human rights, climate change and procedural environmental rights, see E. MORGERA, *Access to Information on Climate Change and Human Rights*, UN Doc. A/79/176, 2024; IACtHR, *Climate Emergency*, cit., paras 458 ff.

ANTARCTICA AT RISK: BATTLING THE CLIMATE CRISIS

MALGOSIA FITZMAURICE*, AGNES RYDBERG**

SUMMARY: 1. Introduction. – 2. The Antarctic Treaty System. – 2.1. The Antarctic Treaty. – 2.2. Protocol on Environmental Protection to the Antarctic Treaty. – 2.2.1. The Committee for Environmental Protection (CEP). – 2.3. Convention on the Conservation of Antarctic Marine Living Resources (signed 1980 entered into force 1982 (CCAMLR)). – 3. Responding to Climate Change. – 4. Other Treaties of Relevance to Climate Change Impacts in Antarctica. – 5. Conclusion.

ABSTRACT

This article examines the adequacy of the Antarctic Treaty System (ATS) in addressing the growing threat of climate change to Antarctica and the Southern Ocean. While Antarctica plays a critical role in global climate regulation – hosting vast ice sheets, unique marine ecosystems, and the ocean conveyor belt – the ATS lacks explicit provisions on climate change mitigation or greenhouse gas emissions reduction. The core instruments of the ATS, including the Antarctic Treaty and the Madrid Protocol, were drafted before the emergence of the international climate regime and remain largely silent on the issue. The article analyses the limited responses developed within the ATS framework, such as the Climate Change Response Work Programme and the 2023 Helsinki Declaration, while noting that these remain non-binding soft law instruments. It further considers the relevance of external legal developments, including the ITLOS Advisory Opinion on climate change and UNCLOS obligations, for strengthening Antarctic governance. The article concludes that stronger legally binding measures, greater coordination between the ATS, the UNFCCC, and the IPCC, and enhanced representation of Antarctic interests in global climate forums are urgently needed to protect this ecologically vital and increasingly vulnerable region.

1. Climate change is arguably the most pressing challenge of our time¹. Its effects are causing widespread and severe impacts across the globe. Amongst other consequences, rising temperatures are leading to more frequent and intense heatwaves, extreme weather events, and shifting climate patterns. Glaciers and polar ice caps are melting at an accelerated rate and

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¹ Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change: Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation, UN Doc A/77/226, 26 July 2022, para 1.

contribute to rising sea levels, which threaten coastal communities. Ocean acidification, caused by increased carbon dioxide absorption, is damaging marine ecosystems and coral reefs. There is no sign of climate change effects scaling down; on the contrary, a 2023 Emissions Gap Report from the UN Environment Programme found that current pledges under the Paris Agreement² put the world on track for a 2.5-2.9°C temperature rise above pre-industrial levels this century, far exceeding the Paris Agreement goal of 1.5°C³.

Climate change is a both a global and a regional issue, and its impact are being felt across the world. The continent of Antarctica is no exception. Antarctica is a massive frozen landmass at the bottom of our planet and is the fifth-largest continent in total area. The ocean surrounding Antarctica – the Southern Ocean – covers an area of 20,327,000km². Antarctica is not just a remote, frozen wilderness; it is a vital component of the planet’s climate system. Today, climate change is by far the most challenging issue facing Antarctica⁴. The Antarctic Peninsula, a popular tourist hotspot, is one of the fastest-warming regions in the Southern Hemisphere, with average summer temperatures rising by more than 3°C from 1970 to 2020⁵. Model projections largely concur that over the next 50-100 years, Antarctic Sea ice will decrease⁶. Antarctica holds an ice volume capable of contributing to a sea-level rise of more than 57 meters⁷.

Antarctica and the Southern Ocean is home to a wide variety of marine wildlife: from tiny Antarctic krill (which is a primary food source for penguins, seals, and whales) to the blue whale, which is the biggest animal on the planet. It is also home to half of the world’s penguin species, 15 species of whale and dolphin, as well as over 30 species of seabird and seal⁸. Global warming is driving changes in the Antarctic ecosystem, including a decrease in penguin populations, which is linked to reduced access to food sources

² Paris Agreement on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

³ United Nations Environment Programme (2023), ‘Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)’, Nairobi, available at: <https://doi.org/10.59117/20.500.11822/43922>.

⁴ Z. MADANI and A. SHIBATA, *International Law, Climate Change and the Antarctic Treaty System: Re-contemplating Governance Questions Apropos of the Mounting Challenges* (2023) 35(5) *Antarctic Science* 374.

⁵ Antarctic and Southern Ocean Coalition (ASOC), ‘Climate Crisis in Antarctica’, available at: <https://www.asoc.org/campaign/climate-crisis-in-antarctica/> (last accessed 03/04/2025).

⁶ E. RIGNOT, J. MOGINOT, B. SCHEUCL, and M. MORLIGHEM, *Four Decades of Antarctic Ice Sheet Mass Balance from 1979-2017* (2019) 116 *Proceedings of the National Academy of Sciences of the United States of America* 1095.

⁷ *Ibid.* 1095-1103.

⁸ Antarctic and Southern Ocean Coalition (ASOC), ‘Climate Crisis in Antarctica’, available at: <https://www.asoc.org/campaign/climate-crisis-in-antarctica/> (last accessed 03/04/2025).

such as krill, impacted by changing ocean conditions⁹. Additionally, Antarctica is crucial in regulating the planet's heat balance, as its ice is far more reflective than land or water. The vast Antarctic ice sheet helps reflect some of the sun's rays, keeping temperatures within a liveable range. The surrounding waters are key to the 'ocean conveyor belt', where cold, dense waters push warmer water to the surface. This upwelling is so powerful that it drives water movement across the globe. Without this process, Earth's waters would become imbalanced, and circulation would be inefficient¹⁰.

The Antarctica is governed by a unique example of an international law instrument providing a governance mechanism for a single continent; the Antarctic Treaty¹¹. Despite the urgency of the threats posed by global warming, the legal framework governing Antarctica – the Antarctic Treaty System (ATS) – does not explicitly address climate change. The initial issue regarding climate change in Antarctica is that this is not something that the Antarctic Treaty foresaw regulation of, and international climate law regime postdates the adoption of the Antarctic Treaty and its associated instruments. This raises important questions about the effectiveness of existing legal mechanisms in responding to the growing environmental threats facing Antarctica.

This article examines how the ATS and other international legal frameworks address climate change in Antarctica. Section II explores the ATS, its key agreements, and its limitations in tackling climate change. Section III considers how the ATS has responded to climate change to date and considers potential reforms and the need for stronger international cooperation to enhance climate governance in Antarctica. Section IV discusses other legal instruments of relevance to the ATS, such as the United Nations Convention on the Law of the Sea (UNCLOS)¹² and recent climate-related developments.

The main takeaway is that while the ATS provides a foundational legal framework for governing Antarctica, it lacks explicit provisions to address

⁹ C.L. PARKINSON, *A 40-Y Record Reveals Gradual Antarctic Sea Ice Increases Followed by Decreases at Rates Far Exceeding the Rates Seen in the Arctic* (2019) 116(29) Proceedings of the National Academy of Sciences of the United States of America 144; A.A. ROBEL, H. SEROUSSI and G.H. ROE, *Marine Ice Sheet Instability Amplifies and Skews Uncertainty in Projections of Future Sea-Level Rise* (2019) 116(30) Proceedings of the National Academy of Sciences of the United States of America 148.

¹⁰ Discovering Antarctica, *Impacts of Climate Change*, available at <https://discover-antarctica.org.uk/climate-change/impacts-of-climate-change/> (last accessed 03/04/2025).

¹¹ Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71; D.R. ROTHWELL, *The Antarctic Treaty at 60 Years: Past, Present and Future* (2021) 22 *Melbourne Journal of International Law* 332.

¹² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

climate change, which makes it insufficient in responding to the region's growing environmental challenges and crises. Given Antarctica's critical role in global climate regulation, the article contends that stronger legal mechanisms and international cooperation are necessary to integrate climate change mitigation and adaptation into the ATS.

2. The Antarctic Treaty area – defined as south of 60° South latitude¹³ – is subject to a comprehensive, legally binding regime commonly referred to as the Antarctic Treaty System (ATS). The term 'Antarctic Treaty System' is not referred to in the Antarctic Treaty. However, the 1991 Protocol on Environmental Protection to the Antarctic Treaty defines the ATS as follows: 'Antarctic Treaty System' means the 'Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments'¹⁴. Thus, the ATS consists of the Antarctic Treaty and a collection of agreements and conventions made to regulate relations among countries associated with Antarctica. The core of the ATS is the Antarctic Treaty and include in addition: the 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol); the Convention for the Conservation of Antarctic Seals¹⁵; and the Convention on the Conservation of Antarctic Marine Living Resources¹⁶.

2.1. The Antarctic Treaty was negotiated in a moderately short period, which was a 'testament to the level of consensus that existed around key issues at the time'¹⁷. Twelve States participated in the negotiations, and all became original States parties to the Treaty. These States included Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union (USSR), the United Kingdom (UK), and the United States (US). This group comprised the seven territorial claimants, along with the US and the USSR, both of which had significant historical interests in Antarctica, particularly in the years following World War II¹⁸.

¹³ Antarctic Treaty Article VI.

¹⁴ Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 2941 UNTS 3 ('Madrid Protocol').

¹⁵ Convention for the Conservation of Antarctic Seals (adopted, 1 June 1972, entered into force 11 March 1978) 1080 UNTS 175 ('CCAS').

¹⁶ Convention for the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 48.

¹⁷ ROTHWELL (n 11) 332. See also BULKELEY, *The Political Origins of the Antarctic Treaty* (2010) 46(236) *Polar Record* 9; J. HANESSIAN, *The Antarctic Treaty 1959* (1960) 9(3) *International and Comparative Law Quarterly* 436; R.D. HAYTON, *The Antarctic Settlement of 1959* (1960) 54(2) *American Journal of International Law* 349.

¹⁸ M. HAWARD, *Contemporary Challenges to the Antarctic Treaty and Antarctic Treaty*

The Antarctic Treaty is fundamentally a peace agreement designed to mitigate international political conflicts surrounding the ownership and strategic use of Antarctica. Its primary goal was to promote cooperation and prevent disputes over territorial claims in the region. The Treaty established a comprehensive legal framework that governs the use of Antarctica, ensuring that the continent is used solely for peaceful purposes, such as scientific research. It also guarantees free access to the region and upholds the rights of all nations to conduct research there, fostering international collaboration and preserving Antarctica as a zone of peace and scientific exploration, free from military activity and exploitation.

In its preamble, the treaty affirms that ‘it is in the interest of all mankind that Antarctica shall continue to be used exclusively for peaceful purposes and shall not become the scene or object of international discord’. Article I provides that Antarctica ‘shall be used for peaceful purposes only’ and prohibits ‘any measures of a military nature’. Furthermore, Article II states that the freedom of scientific investigation into Antarctica shall continue.

There are currently 56 States parties to the Treaty. Amongst these, 29 are Consultative Parties, which have the right to participate in decision-making, and the rest are observers. To facilitate the development of the treaty regime, the Antarctic Treaty established a meeting under Article IX, which serves as a platform for the Treaty Parties to consult on matters of shared concern related to Antarctica. This meeting allows the Parties to formulate measures aimed at advancing the principles and objectives of the Treaty, known as the Antarctic Treaty Consultative Measures (ATCMs). These measures, designed to promote the Treaty’s core principles, are legally binding and can only take effect once they are approved by all Consultative Parties entitled to participate in the ATCM responsible for adopting them¹⁹. In other words, the unanimity rule applies in decision-making under the Antarctic Treaty²⁰. Through this consultative process, the Parties collaborate to ensure the ongoing preservation and management of Antarctica in accordance with the Treaty’s goals.

As noted earlier, there are currently 29 Consultative Parties, each of which must consent to the formulation and adoption of new measures within the ATMC. This growing number of parties makes decision-making

System: Australian Interests, Interplay and the Evolution of a Regime Complex (2017) 9(1) *Australian Journal of Maritime and Ocean Affairs* 21; K. DODDS and A.D. HEMMINGS, *Britain and the British Antarctic Territory in the Wider Geopolitics of the Antarctic and the Southern Ocean* (2013) 89(6) *International Affairs* 1429.

¹⁹ Article IX(4) Antarctic Treaty.

²⁰ Z. MADANI and A. SHIBATA *op. cit.* 378.

more complex compared to the early years of the Antarctic Treaty when there were only 12 original signatory States serving as Consultative Parties. The process of reaching consensus was simpler then, as fewer parties were involved. Today, however, with 29 Consultative Parties and more potentially joining in the future, it has become increasingly challenging for the ATCM to adopt binding instruments. This difficulty is particularly evident in addressing significant and complex issues such as climate change, where broad consensus is required to implement effective and coordinated measures. Thus, the expansion of Parties has added layers of complexity as it requires more negotiation and compromise to make decisions that can be enforced across the ATS community²¹.

2.2. The Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol) was adopted in 1991 in response to growing concerns about the lack of specific environmental safeguards within the Antarctic Treaty. While the Antarctic Treaty focused primarily on ensuring peace and promoting scientific cooperation, it did not explicitly address the environmental protection of Antarctica.

The Madrid Protocol designates Antarctica as a ‘natural reserve devoted to peace and science’²² and require the parties to ‘commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems’²³. The Protocol has six annexes but is silent on the issue of climate change²⁴. Thus, neither the Protocol nor any of its six Annexes set out principles or obligations relating to the minimisation or mitigation of greenhouse gas (GHG) emissions.

That said, Article 3 of the Madrid Protocol sets out a number of guiding principles designed to minimise the negative impact of activities on the vulnerable Antarctic environment. According to Article 3,

1. The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct

²¹ J.M. BARRETT, *The Antarctic Treaty System* in K. SCOTT and D. VANDER ZWAAG (eds), *Research Handbook of Polar Law* (Edward Elgar 2020). 40-63.

²² Article 2 of the Protocol.

²³ *Ibid.*

²⁴ On the Protocol, see further C. REDGWELL, *Environmental Protection in Antarctica: The 1991 Protocol* (1994) 43(3) *International and Comparative Law Quarterly* 599; F. ORREGO VICUÑA, *The Protocol on Environmental Protection to the Antarctic Treaty: Questions of Effectiveness* (1994) 7(1) *Georgetown International Environmental Law Review* 1; F. FRANCONI, *The Madrid Protocol on the Protection of the Antarctic Environment* (1993) 28(1) *Texas International Law Journal* 47.

of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area.

2. To this end: (a) activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems; (b) activities in the Antarctic Treaty area shall be planned and conducted so as to avoid: (i) adverse effects on climate or weather patterns; (ii) significant adverse effects on air or water quality; (iii) significant changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments; (iv) detrimental changes in the distribution, abundance or productivity of species or populations of species of fauna and flora; (v) further jeopardy to endangered or threatened species or populations of such species; or (vi) degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance; (c) activities in the Antarctic Treaty area shall be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the Antarctic environment and dependent and associated ecosystems and on the value of Antarctica for the conduct of scientific research...

In brief, under Article 3 of the Madrid Protocol, States parties must plan and conduct activities so as to avoid 'adverse effects on climate and weather patterns'. It has correctly been observed that to 'suggest that this obligation requires states to undertake climate change mitigation measures outside of the Antarctic Treaty area (such as reducing domestic emissions) is arguably too far-reaching'²⁵.

However,

a reasonable and natural interpretation of art 3(2)(b)(i) would suggest that parties must consider the contribution to global emissions and climate change resulting from activities taking place within the Antarctic Treaty area. Although greenhouse gas emissions from scientific and tourist-related bases, camps, vessels and aircraft undoubtedly make only a negligible contribution to climate change, mitigating measures should nevertheless be adopted in order to demonstrate leadership within a region that is especially vulnerable to climate change²⁶.

Thus, while the emissions from activities within the Antarctic Treaty area may have a minimal direct impact on global climate change, it remains essential for parties to adopt mitigating measures as a demonstration of

²⁵ D. FRENCH and K. SCOTT, *International Legal Implications of Climate Change for the Polar Regions: Too Much, Too Little, Too Late?* (2009) 10(2) *Melbourne Journal of International Law* 631.

²⁶ *Ibid.*

leadership and responsibility, particularly given Antarctica's unique vulnerability to the effects of climate change.

Furthermore, all Antarctic activities are subject to at least some level of environmental impact assessment (EIA) under Article 8 of the Madrid Protocol and Annex I. Considering the obligation under Article 3(2)(b)(i) to avoid adverse effects on climate and weather patterns, such an EIA should include an evaluation of the climate change implications of the activity in question²⁷. Activities likely to have more than a minor or transitory impact on the environment are required to undergo a Comprehensive Environmental Evaluation ('CEE')²⁸. Annex I explicitly requires States parties to consider possible alternatives to the activity, including not proceeding as an option²⁹.

Fossil-based hydrocarbons have traditionally been the main energy source for activities in Antarctica³⁰. However, some States have successfully explored renewable energy options for new research stations³¹. For example, Belgium's Princess Elisabeth station in Dronning Maud Land relies on wind and solar power, while Germany's Neumayer III station on the Ekström Ice Shelf uses a wind turbine to supplement its energy supply³². These initiatives reflect a growing shift towards renewable energy to reduce environmental impact and promote sustainability in the region³³.

There is, regrettably, currently no explicit obligation in the Madrid Protocol to report predicted atmospheric emissions from Antarctic activities. Moreover, the Madrid Protocol does not set out any obligations relating to the minimisation or mitigation of GHG emissions. Although the Council of Managers of National Antarctic Programs (COMNAP) produced recommendatory guidelines for national operators³⁴, which were adopted by the CEP in 2007³⁵, the

²⁷ *Ibid.*

²⁸ Annex I Article 3.

²⁹ Annex I Article 3(2)(a).

³⁰ D. FRENCH and K. SCOTT, *op. cit.*; Council of Managers of National Antarctic Programs ('COMNAP'), 'Best Practice for Energy Practice – Guidance and Recommendations' (Working Paper No 35 presented at the XXX ATCM, 2007) 2.

³¹ FRENCH and SCOTT, *op. cit.*; CEP, Report of the Committee for Environmental Protection (CEP VIII) (Report, Stockholm, 6-10 June 2005) annex 7 (Guidelines for Environmental Impact Assessment in Antarctica) [3.1.2].

³² D. FRENCH and K. SCOTT, *op. cit.*

³³ See Belgium Science Policy and International Polar Foundation, Construction and Operation of the New Belgium Research Station, Dronning Maud Land, Antarctica (CEE Final Report, March 2007) 46-9.

³⁴ Council of Managers of National Antarctic Programs ('COMNAP'), 'Best Practice for Energy Practice – Guidance and Recommendations' (Working Paper No 35 presented at the XXX ATCM, 2007)

³⁵ CEP, Report of the Committee for Environmental Protection (CEP X) (Report, New Delhi, 30 April – 4 May 2007) [341]–[342].

guidelines do not apply to other operators, such as tourist operators. Without resorting a formal amendment of the Environmental Protocol³⁶, Scott and French have correctly recognised that the ATCM should take a much more proactive stance on this matter. Such 'action would be most usefully contained within a legally binding Measure, requiring as far as possible the minimisation of greenhouse gas emissions and/or the reliance on renewable sources of energy'³⁷. By formalising these goals, the ATCM could ensure a more consistent and effective approach to mitigating climate change in Antarctica and the Southern Ocean.

Of relevance to climate change effects in Antarctica is also Annex IV of the Madrid Protocol, which establishes principles and standards relating to pollution of the marine environment and has potential application to GHG emissions associated with vessels. Under Article 14 of Annex IV, with respect to those Parties which are also Parties to the International Convention for the Prevention of Marine Pollution from Ships 1973 as Modified by the Protocol of 1978 relating thereto (MARPOL)³⁸, nothing in Annex IV derogates from the specific rights and obligations under MARPOL.

Annex VI was added to MARPOL in 1997 in order to deal with local and global air pollution and environmental problems, and to minimise emissions from ships (Sox – sulphur oxides, NOx – nitrogen oxides, ODS – ozone depleting substances, VOC – volatile organic compounds)³⁹. In 2007, international shipping was estimated to have contributed about 2.7 per cent to the global emissions of carbon dioxide⁴⁰. MARPOL Annex VI prohibits

³⁶ The modification and amendment provisions of the Madrid Protocol are closely linked to those in the Antarctic Treaty. Article XII(2)(a) of the Antarctic Treaty provides: If after the expiration of thirty years from the date of entry into force of the present Treaty, any of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX so requests by a communication addressed to the depositary Government, a Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty. Art 25(1) of the Protocol refers back to the art XII(1) procedures. Provision is also made for a Review Conference in art 25(2) of the Protocol as follows: If, after the expiration of 50 years from the date of entry into force of this Protocol, any of the Antarctic Treaty Consultative Parties so requests by a communication addressed to the Depositary, a conference shall be held as soon as practicable to review the operation of this Protocol.

³⁷ D. FRENCH and K. SCOTT, *op. cit.*

³⁸ International Convention for the Prevention of Pollution from Ships (adopted 15 January 1974) 1340 UNTS 184, as modified by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (adopted 1 June 1978, entered into force 2 October 1983) 1340 UNTS 61 ('MARPOL 73/78').

³⁹ Annex VI was adopted in 1997 and entered into force on 19 May 2005. A revised Annex VI with stricter emissions limits was adopted in October 2008 which entered into force on 1 July 2010. See L. ČAMPARA and others, *Overview of MARPOL ANNEX VI Regulations for Prevention of Air Pollution from Marine Diesel Engines* (2018) 58 SHS Web of Conferences 01004.

⁴⁰ IMO, 'Air Pollution, Energy Efficiency and Greenhouse Gas Emissions', available at

deliberate emissions of ozone-depleting substances⁴¹. As has been noted, ‘[a]lthough Annex IV principally implements much of [MARPOL], on a regional basis, it makes no reference to Annex VI of MARPOL 73/78 on air-polluting emissions from vessels’⁴². Therefore, there ‘would clearly be benefit in updating Annex IV of the Environmental Protocol to require that all vessels registered to parties operating in the Antarctic comply with these standards’⁴³. This suggestion is particularly important in light of the 2023 Strategy on Reduction of GHG Emissions from Ships, adopted by the International Maritime Organization (IMO) Marine Environment Protection Committee (MECP)⁴⁴.

The 2023 IMO GHG Strategy represents a framework for IMO Member States, establishing a future vision for international shipping, including the levels of ambition to reduce GHG emissions and guiding principles. In particular, the 2023 IMO GHG Strategy sets out a reduction in carbon intensity of international shipping (to reduce CO₂ emissions per transport work), as an average across international shipping, by at least 40% by 2030. The 2023 IMO GHG Strategy also includes a new level of ambition in relation to zero or near-zero GHG emission technologies, fuels and/or energy sources which are to represent at least 5%, striving for 10%, of the energy used by international shipping by 2030⁴⁵. Accordingly, updating Annex IV of the Madrid Protocol to mandate that all vessels registered to States parties operating in Antarctica adhere to these standards would significantly enhance environmental protection and ensure more sustainable practices across the region.

2.2.1. The CEP functions as an advisory body to the Parties on a range of environmental protection issues under the Madrid Protocol. It was established under Article 11 of the Protocol with the purpose of providing advice and formulate recommendations to the Parties in connection with the implementation of the Protocol, including the operation of its Annexes, for consideration at the ATCMs⁴⁶. The CEP developed the Climate Change Response

<https://www.imo.org/en/MediaCentre/HotTopics/pages/reducing-greenhouse-gas-emissions-from-ships.aspx> (last accessed 03/04/2025).

⁴¹ See further M. FITZMAURICE, *The International Convention for the Prevention of Pollution from Ships (MARPOL)* in S. BORG, F.G. ATTARD, and P.M. VELLA DE FREMEAUX (eds), *Research Handbook on Ocean Governance Law* (Edward Elgar 2023).

⁴² As Annex IV of the Environmental Protocol was negotiated prior to the adoption of Annex VI to MARPOL 73/78.

⁴³ D. FRENCH and K. SCOTT, *op. cit.*

⁴⁴ MEPC 80/17/Add.1 Annex 15, page 1.

⁴⁵ MEPC 80/17/Add.1 Annex 15, page 1.

⁴⁶ Article 11 Madrid Protocol.

Work Programme (CCRWP)⁴⁷, which provides annual progress reports to the ATCMs and explains the challenges facing the CEP as a result of the changing Antarctic climate, the actions/tasks required to address these issues, their prioritisation, and suggestions as to how, when, and by whom the actions would best be delivered. In 2017, the CEP established the Subsidiary Group on Climate Change Response (SGCCR) to help the CEP in its considerations of how to address the implications of climate change for the protection of the Antarctic environment⁴⁸. SGCCR, with a focus on the fundamental importance of understanding the implication of climate change in Antarctica and the necessity of acting on the basis of the existing science, is mandated to facilitate the coordination and communication of the CCRWP.

2.3. CCAMLR⁴⁹ applies to all Antarctic populations of finfish, molluscs, crustaceans, and sea birds found south of the Antarctic Convergence. The CCAMLR proposed a series of Marine Protected Areas (MPAs) around Antarctica with the purpose of preserving the region's marine biodiversity and creating areas for overfished species (including krill) to recover. Two MPAs have been implemented, one in the South Orkney Islands in 2009 and one in the Ross Sea in 2016⁵⁰. Since 2008, the issue of climate change has become a regular reporting item on the agendas of both the Commission and its Scientific Committee, and in Resolution 30/XXVIII of 2009⁵¹.

3. According to the Antarctic and Southern Ocean Coalition (ASOC), an environmental non-governmental organization (NGO) that is admitted to the ATCM as an expert, activities relating to climate change mitigation should mainly take place in four areas:

1. Reduction of greenhouse gas emissions;
2. Implementation of climate adaptation strategies;
3. Promotion of globally important climate science; and
4. Designation of marine protected areas. Designation of marine protected areas with the objective of protecting large areas from fishing and pollution will provide refuges for vulnerable species whose habitats may be changing dramatically⁵².

⁴⁷ Resolution 4 (2015) - ATCM XXXVIII - CEP XVIII.

⁴⁸ Decision 1 (2017) - ATCM XL.

⁴⁹ Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47 ('CCAMLR').

⁵⁰ ASOC, 'Marine Protected Areas', available at: <https://www.asoc.org/campaign/marine-protected-areas/> (last accessed 03/04/2025).

⁵¹ *Ibid.*

⁵² ASOC, 'Climate Crisis in Antarctica', available at <https://www.asoc.org/campaign/cli->

Furthermore, it has been observed that in order to adequately respond to the challenges of climate change facing Antarctica, greater coordination is needed between the ATS and the international climate change regime. Of importance in this context is Article III of the Antarctic Treaty, which encourages 'cooperative working relations with Specialized Agencies of the United Nations and other international organizations'. Madani and Shibata have noted that the ATCM should consider the establishment and enhancement of effective working relationships with other international organisations. This includes a closer engagement with the United Nations Framework Convention on Climate Change (UNFCCC)⁵³ and the Paris Agreement⁵⁴. In particular, the ATCM should take on a more active role in delivering information on Antarctica into UNFCCC mechanisms and processes, including the Conferences of the Parties (COP)⁵⁵.

Notwithstanding the clear connections between the objectives of the Antarctic Treaty Parties and the UNFCCC and Paris Agreement, there is currently no direct or formal interaction between these two groups⁵⁶. The most notable endeavour undertaken thus far has been the establishment of a cooperation method through the Scientific Committee on Antarctic Research (SCAR)⁵⁷. SCAR is a non-governmental organisation that coordinates international scientific research efforts in Antarctica. SCAR has had an Observer status in the UNFCCC, and sometimes it uses its Observer status in the International Science Council to attend relevant working group or other meetings of the Intergovernmental Panel on Climate Change (IPCC). SCAR is one of the only three Observer organisations recognised under the ATCM, which have extensive participatory rights in the ATCM⁵⁸. SCAR provides the IPCC and UNFCCC with important information regarding the impacts of climate change in Antarctica and to ensure that climate issues in the Southern Ocean are adequately addressed⁵⁹.

All ATS States are members of the UNFCCC and the Paris Agreement. The ATS does not operate in a vacuum, but all States parties still need to comply with the UNFCCC and Paris Agreement. In an era where

mate-crisis-in-antarctica/ (last accessed 03/04/2025). On climate change impact on Antarctica, see generally FRENCH and SCOTT, *op. cit.*

⁵³ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

⁵⁴ Z. MADANI and A. SHIBATA, *op. cit.*

⁵⁵ *Ibid.* 374-78.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

climate change is reshaping the world's most fragile ecosystems, the need for stronger communication between the ATS, the UNFCCC, and the IPCC has never been more urgent⁶⁰. Better collaboration between these bodies could bridge the gap between science and policy, and ensure that the dramatic changes unfolding in Antarctica are not just observed but acted upon at the global level. Global climate negotiations under the UNFCCC could better reflect the alarming transformations in Antarctica – rising sea levels, melting ice sheets, and shifts in marine biodiversity – and prompt stronger commitments to climate action. Greater and better alignment could also elevate Antarctica's climate story on the world stage and increase public awareness and political will for ambitious mitigation strategies.

Furthermore, the Paris Agreement designs climate change is a common concern of humankind⁶¹. By adopting the Agreement, States parties agreed to keep the global average temperature increase caused by global warming below 2°C and pursue efforts to keep this level even below 1.5°C⁶². The Paris agreement holds immense significance for addressing the global environment as a whole, with particular relevance to the Antarctic and Southern Ocean region. Among others benefits, the Paris Agreement's goal of stabilisation of the global temperature below 2°C would reduce sea-level rise resulting from Antarctic ice loss due to melting to < 0.5 m. Therefore, it is suggested that States parties – on the basis of the Paris Agreement and the Madrid Protocol Article 3 – should take further measures on the basis of legally binding standards to reduce and minimise local GHG emissions within Antarctic Treaty area and beyond. In this process, stronger representation of interest of Antarctic region in international fora, such as COP processes, is also needed.

Yet, significant barriers stand in the way. The ATS operates independently of the United Nations (UN) system, which makes formal collaboration difficult. While the UNFCCC and the Paris Agreement focus on global emissions reduction, the ATS remains dedicated to the governance of Antarctica. Geopolitical tensions further complicate matters as some States may be more wary of external influence over Antarctic affairs and may as such resist stronger ties with the UNFCCC or IPCC.

Recent developments within the ATS system highlight some growing efforts to address climate change in the region. At the 45th Antarctic Treaty

⁶⁰ T. KOIVUROVA, *How to Improve Arctic International Governance* (2016) 6(1) *UC Irvine Law Review* 83.

⁶¹ Paris Agreement, Preamble.

⁶² Paris Agreement, Article 2(1)(a).

Consultative Meeting and accompanying 25th Meeting of the Committee for Environmental Protection in 2023, States parties adopted the Helsinki Declaration on Climate Change and the Antarctic⁶³. Parties reaffirmed their firm commitment to combat the adverse impacts of climate change in Antarctica; recognised the critical role of Antarctica and the Southern Ocean in the global climate system, and the implications of Antarctic cryospheric and oceanographic changes for global climate and sea-level rise; further recognised that observations, modelling and global assessments describe significant changes in Antarctic physical and living systems, both marine and terrestrial, and that changes in Antarctic and Southern Ocean environments are linked to, and influence, climate impact drivers globally; were deeply concerned that further irreversible change is likely to occur without accelerated efforts to reduce greenhouse gas emissions in line with a trajectory consistent with holding the global temperature increase to well below 2 degrees Celsius above preindustrial levels and pursuing efforts to limit warming to 1.5 degrees Celsius; and acknowledged that by further delaying concerted global action on climate change mitigation and adaptation, we risk missing the window of opportunity to secure a livable and sustainable future for all⁶⁴.

Furthermore, Parties committed to ‘substantially increasing our efforts to communicate the global implications of climate change in Antarctica within our own countries and in international forums, and the need to prevent the irreversible changes to Antarctica and consequential implications for the planet’; encourage all Antarctic operators, including national Antarctic programs, tourist and non-governmental operators to continue to reduce their carbon footprints and investigate pathways and move towards carbon neutral (‘net zero’) operations; intensify working together, including with SCAR, to plan and implement large scale internationally coordinated field-based research and information exchange efforts to make leaps in knowledge with respect to understanding the impact of global climate change on Antarctica; and work towards developing a systematically coordinated Antarctic climate and environment observation and monitoring network⁶⁵.

Whilst efforts like these are welcome, the preference for soft law instruments in Antarctica can weaken accountability and hinder effective compliance monitoring. While it offers flexibility, soft law often lacks the enforceability needed to ensure stringent environmental protections. Given Antarctica’s ecological vulnerability, robust, legally binding frameworks are

⁶³ Resolution 2 (2023).

⁶⁴ Helsinki Declaration, Preamble.

⁶⁵ Helsinki Declaration, paras 1-6.

essential to safeguard the region and ensure effective environmental safeguards are in place. Without legally binding measures, there is a risk that voluntary measures may fail to prevent significant environmental harm⁶⁶.

4. Pollution from land-based sources is one of the main sources of marine pollution. It also arises through the atmosphere, from land-based activities and from ships and aircraft. In fact, land-based pollution accounts for about 80 % of marine pollution. The relationship between climate change and the law of the sea was not contemplated by the drafters of the UNCLOS.

However, the International Tribunal for the Law of the Sea (ITLOS) has clarified general obligations of States under the in relation to climate change⁶⁷. In respect of climate change and Antarctica, and especially the climate change impact on the Southern Ocean, the ITLOS' Advisory Opinion on Climate Change must be considered as setting the general rules for States in relation to climate change and the law of the sea.

The starting point of the Advisory Opinion of ITLOS are Articles 192 and 194 UNCLOS, dealing with the general obligation of States to protect and preserve marine environment. According to Article 192, States have the obligation to protect and preserve the marine environment. Under Article 194(1)(2) UNCLOS, States have responsibility to take 'all the measures that are necessary to prevent, reduce and control pollution of the marine environment from any source', and to ensure that 'activities within their jurisdiction and control do not cause pollution damage to other states or their environment'.

In its Opinion, the ITLOS first of all confirmed that GHG emission are marine pollution under UNCLOS. Since climate change is caused by an excess of GHG emissions being released into the atmosphere, owing to man-made industrial activities, the emissions causing climate change can be considered as 'pollution' within the meaning of Article 194. In particular, GHG emissions ab-

⁶⁶ See also N.B. GARDINER, N. GILBERT, D. LIGGETT, M. BODE, *Measuring the performance of Antarctic Treaty decision-making* (2025) 39(1) *Conservation Biology* 1.

⁶⁷ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf, 21 May 2024. There are numerous publications commenting on this Advisory Opinion, such as Constantinos Yiallourides and S. DEVA, 'A Commentary on ITLOS' Advisory Opinion on Climate Change', BIICL, <https://www.biicl.org/blog/77/a-commentary-on-itlos-advisory-opinion-on-climate-change>; 'Landmark ITLOS legal opinion – States must protect oceans and marine biodiversity from GHG emissions', Clyde and Co, <https://www.clydeco.com/en/insights/2024/06/landmark-itlos-legal-opinion-states-must-protect-oceans-and-marine-biodiversity-from-ghg-emissions>; J. PAINE, *The ITLOS Advisory Opinion on Climate Change: Selected Issues of Treaty Interpretation*, EJIL:TALK!, <https://www.ejiltalk.org/the-itlos-advisory-opinion-on-climate-change-selected-issues-of-treaty-interpretation/>.

sorbed by the oceans constitute marine pollution within the meaning of Article 194 UNCLOS due to their deleterious effects on the marine environment, including ocean acidification, ocean warming, and other harmful effects. Therefore, States are required to take ‘all necessary measures’, in line with the best available science, to reduce their GHG emissions, to the fullest possible extent, in accordance with UNCLOS and other relevant international legal obligations⁶⁸. The obligation under Article 194, paragraph 1, UNCLOS to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions⁶⁹, and is linked to the precautionary approach⁷⁰.

In its Opinion, the ITLOS also included a number of guidelines for States in order to assist them to discharge their obligations under UNCLOS. States are required to prevent future or potential pollution and reduce and control existing pollution and to adopt States all necessary steps to prevent, control and reduce, anthropogenic GHG emissions, including not only ocean-based emissions from vessels, but also land- and air-based emissions⁷¹. ITLOS interpreted ‘necessary measures’ in a broad way, as including ‘not only measures which are indispensable to prevent, reduce and control marine pollution but also other measures which make it possible to achieve that objective’⁷².

States’ legal obligations also include the protection and preservation of the marine environment (which encompasses restoring degraded habitats and ecosystems). The ITLOS relied on general principles of international environmental law in relation to climate change, i.e. the precautionary principle, the principle of prevention, the environmental impact assessment and the principle of cooperation, based on good faith. States have an obligation under Articles 204-206 UNCLOS to monitor the risks and effects of marine pollution, conduct environmental impact assessments for any activity which ‘may cause substantial pollution to the environment or significant and harmful changes thereto through anthropogenic GHG emissions’ and

⁶⁸ Paras 243-246 of the Opinion.

⁶⁹ Para 243 of the Opinion. The International Court of Justice followed this approach in its Advisory Opinion on Climate Change, confirming that the standard of due diligence for preventing significant harm to the climate system and in preparing Nationally Determined Contributions under the Paris Agreement is is stringent, see *Obligations of States in respect of Climate Change* (Advisory Opinion, 23 July 2025) (Request for Advisory Opinion submitted by the UN General Assembly) ICJ Reports 2025, paras 137-38.

⁷⁰ Para 242 of the Opinion.

⁷¹ Para 198 of the Opinion.

⁷² Para 203 of the Opinion.

publicise the results⁷³. States' cooperation must be based on science on the basis of which States must cooperate to formulate rules, standards and recommended practices and procedures and exchange knowledge⁷⁴.

The ITLOS also referred to other treaties in relation to a global obligations of States in relation to climate change, such as those deriving from the Convention on Biological Diversity and the Convention of the Prohibition of Trade in Endangered of Animals and Plants (CITES), thus relying on the principle of systemic integration under Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT). In this respect, the ITLOS considered that Article 237 UNCLOS reflects the need for 'consistency and mutual supportiveness between the applicable rules'⁷⁵.

Lastly, the ITLOS adopted an ecosystem approach, i.e. protection of marine environment is set out in a holistic manner, considering the entire ecosystem, and acknowledging the interconnectedness between ecosystems and their mutual impact. The general findings of ITLOS will be of great significance for Antarctica, the ATS and the governance of the Southern Ocean. As climate change continues to accelerate, its effects in Antarctica – such as ice melt, rising sea levels, ocean acidification, and ecosystem disruptions – are becoming increasingly severe. Given that the Southern Ocean plays a crucial role in global climate regulation and is home to unique marine ecosystems, the incorporation of ITLOS's findings into the ATS could strengthen existing environmental protections. It may also influence discussions within the CCAMLR regarding marine protected areas and sustainable fisheries management in the Southern Ocean. Ultimately, integrating ITLOS's findings into the ATS would enhance legal clarity, reinforce environmental commitments under the Madrid Protocol and its Annexes, and ensure that Antarctic governance aligns with international norms on climate change.

5. The ATS's response to climate change has thus far been inadequate. The accelerating impacts of climate change on Antarctica and the Southern Ocean demand a more unified, legally robust, and proactive response from the ATS. While the ATS admittedly has played a crucial role in protecting the region, its fragmented structure and complex decision-making processes have limited its effectiveness in addressing climate-related challenges. Integrating all relevant legal, scientific, and environmental considerations

⁷³ Para 367 of the Opinion.

⁷⁴ Paras 294-321 of the Opinion.

⁷⁵ Para 133 of the Opinion.

into a single, cohesive framework would enhance efficiency, strengthen accountability, and provide a clearer framework for action.

Greater collaboration between the ATS, UNFCCC processes, and the IPCC is essential to ensuring that Antarctic climate science directly informs global climate negotiations. The dramatic changes occurring in Antarctica must not only be observed but also acted upon at the highest levels of international policy. The Paris Agreement’s goals are particularly relevant to the Antarctic and Southern Ocean region, and stronger commitments to reducing GHG emissions – both locally within the Antarctic Treaty Area and globally – are needed to mitigate further environmental degradation.

While the Helsinki Declaration represents an important step in recognising the urgency of climate action in Antarctica, soft law commitments alone are insufficient. Legally binding measures should be reinforced to ensure meaningful environmental protections. In this regard, the findings of ITLOS on climate change offer an opportunity to strengthen legal clarity and reinforce obligations concerning marine environmental protection. Ultimately, integrating ITLOS’s findings into the ATS would create a stronger regulatory framework for addressing the region’s environmental vulnerabilities. By enhancing cooperation among ATS parties and ensuring that Antarctic interests are adequately represented in global climate discussions, the international community can take meaningful steps to protect one of the world’s most fragile and ecologically significant regions from irreversible climate-related damage.

ARCTIC REGIONALISMS FOR CLIMATE RIGHTS? REGULATORY INTERACTIONS BETWEEN REALISM AND INSTITUTIONALISM

OTTAVIO QUIRICO*

SUMMARY: 1. Introduction. – 2. Arctic strategies and regulation for sustainable development? – 2.1. Economics and overlapping sovereign Arctic claims. – 2.2. Strategies and regulation between economic development and sustainability. – 3. Effective Arctic climate litigation and rights for mitigation and adaptation? – 4. Between realism and institutionalism: rule of law, use of force and the Arctic. – 5. Conclusion**.

ABSTRACT

Perhaps surprisingly, while, from a scientific perspective, the Arctic is – together with Antarctica – essential to climate sustainability, from a legal standpoint, the Polar Regions are not even mentioned in the UNFCCC and the Paris Agreement. As a regional system, the Arctic is considered to embed and foster major developments in international governance and legality. Against the background of the fundamental tension between institutionalism and realism, this contribution evaluates the viability of Arctic climate change regulation from three different but complementary angles, including the principle of sustainable development, climate rights (law of peace) and the rule of law in an increasingly conflictual context (towards the law of war). Arguably, from the standpoint of ‘primary’ regulation, the absence of a comprehensive regulatory regime – unlike the Antarctic Treaty System – and the progressive erosion of a rule-based international legal order have a significant potential to undermine cooperation essential to outlining effective Arctic governance for global climate sustainability. It is yet to be seen whether progressive developments from the viewpoint of ‘secondary’ regulation in the area of climate litigation and rights as concerns mitigation and adaptation can lead to shaping effectively sustainable climate policies for the Arctic in the interest of the international community as a whole.

1. Geographically, the Arctic is the Region of the globe situated north of the minimum latitude outlined by the 66.33° parallel. It is an ocean surrounded by land characterised by specific environmental and climatic features, whereby part of the territory – the permafrost – is permanently below 0°C and ice covering the Arctic Ocean expands in fall and winter and

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shrinks to a half in summer¹. Because of its exclusive (and fragile) environmental characteristics, the Arctic is – together with Antarctica – essential to the achievement of climate sustainability, whereby Canada, Denmark – notably Greenland – Iceland, Finland, Norway, Russia, Sweden and the US exert sovereignty over emerged and submerged land².

While the Intergovernmental Panel on Climate Change (IPCC) has acknowledged the essential importance of the Arctic for global climate sustainability from a scientific perspective³, quite surprisingly, from a legal standpoint the Arctic is not even mentioned in the main international regulatory instruments for climate change, that is, the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. Politically, whereas on the one hand the Arctic is regarded as a specific sub-system in the context of international relations, it is also considered a region that fundamentally incorporates major international law and policy developments⁴, which currently oscillate between institutionalism and realism⁵.

Against the background of such a complex geopolitical framework, which is increasingly dominated by tensions and insecurity⁶, this contribution aims to assess the viability of Arctic climate change regulation, considering core interactions with international politics. The analysis proceeds in three steps. The first two sections are grounded in the distinction between 'primary' (law-making) rules and 'secondary' (enforcement) rules⁷, fundamentally in the context of the international law of peace, whereas the third section addresses the increasing shift towards international insecurity and war in disregard of the rule of law⁸. More specifically, the first section of the contribution investigates the principle of sustainable development, notably, the tension

¹ Arctic Portal, *Maps: Arctic Definitions*, <https://arcticportal.org/maps/download/arctic-definitions>.

² Arctic Portal, *Maps: Governance and Arctic Organisations*, <https://arcticportal.org/maps/download/maps-arctic-council-member-states-and-observers>.

³ IPCC, *Oceans and Cryosphere in a Changing Climate*, 2019, at 207.

⁴ C.E. MORRISON and M. BENNETT, *The Fall and Rise of Global Geopolitics in the Arctic*, in O.R. YOUNG and K. Jong-Deog, *North Pacific Perspectives on the Arctic: Looking Far North in Turbulent Times*, Edward Elgar, 2024, 1, at 3.

⁵ H. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, Knopf, 1949; Y. KURNYSHOVA, *How Russia's War Hits International Relations Studies*, in *The Ukrainian Analytical Digest*, October 2023, 6.

⁶ M. ROZUMNY, *The Logic of Multilateral Asymmetric Conflicts: The Russia-Ukraine War Case*, in *Modelling the New Europe*, September 2023, 22.

⁷ H. KELSEN, *Reine Rechtslehre*, 1967, *Pure Theory of Law*, tr. M. Knight, University of California Press, 1989, at 89 ff.; R. AGO, *Third Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility*, UN Doc A/CN.4/246 and Add.1-3 (1971) 2(1) YBILC 202, at para. 15.

⁸ H. GROTIUS, *De Jure Belli ac Pacis*, Nicolaym Byon, 1625.

and balance between Arctic economic sovereignty and progress on the one hand and climate sustainability on the other. The second section explores the effectiveness of climate litigation and rights, paying particular attention to the impact of climate change on the Inuit as Indigenous people living in different countries in the Arctic. The third section analyses the evolution of conventional and non-conventional use of force in international relations, eroding the rule of law, its impact on security in the Arctic and relevant implications for regional and global climate governance and regulation.

2. Arctic strategies and regulation for sustainable development?

2.1. Arctic temperatures rise three times faster than the global average, particularly owing to phenomena such as the feedback loop, whereby melting ice uncovers dark-coloured water that absorbs sun light and heat is no longer reflected into space, accelerating Arctic warming⁹. Land ice in the Arctic spans mountain glacier areas such as southeastern Alaska, small ice caps and large sheets, such as the Greenland Ice Sheet. As warming progresses fast, ice is melting at an alarming rate, possibly putting the Arctic on track to achieving semi-tropical temperatures registered 56 million years ago at the time of the Palaeocene-Eocene Thermal Maximum¹⁰. Observed changes on land ice include the widespread retreat of glaciers across Alaska, Canada and Greenland, whereby some have entirely disappeared¹¹. Sea ice is also melting rapidly, whereby over the past 46 years satellites have consistently observed increased melting in summer and more limited ice formation in winter¹². With a rise in global temperatures between 2° and 3°C, the IPCC predicts that the Greenland Ice Sheet will be almost entirely and irreversibly lost over millennia¹³.

⁹ D.M. LAWRENCE et al., *Accelerated Arctic Land Warming and Permafrost Degradation during Rapid Sea Ice Loss*, in *Geophysical Res. Letters*, 2008, vol. XXXV, n. 1, at 5; A. DAI, D. LUO, M. SONG, and J. LIU, *Arctic Amplification Is Caused by Sea-Ice Loss under Increasing CO₂*, in *Nature Communications*, 2019, vol. X, n. 1, 1.

¹⁰ P. DORMAN, *Alligators in the Arctic and How to Avoid Them: Science, Economics and the Challenge of Catastrophic Climate Change*, Cambridge UP, 2022, at 1.

¹¹ T. SCAMBOS and T. MOON, *How Is Land Ice Changing in the Arctic, and What Is the Influence on Sea Level?*, in *Arctic, Antarctic, and Alpine Research*, 2022, vol. LIV, n. 1, 200.

¹² NASA, *Arctic Sea Ice Near Historic Low: Antarctic Ice Continues Decline*, 2024, <https://www.nasa.gov/earth/arctic-sea-ice-near-historic-low-antarctic-ice-continues-decline>; Arctic Portal, *Maps: Arctic Sea Ice*, <https://arcticportal.org/maps/download/maps-arctic-sea-ice>. See further A. KUMAR, J. YADAV and R. MOHAN, *Global Warming Leading to Alarming Recession of the Arctic Sea-Ice Cover: Insights from Remote Sensing Observations and Model Reanalysis*, in *Heliyon*, 2020, 29(6), 1.

¹³ IPCC, *Synthesis Report: Summary for Policymakers*, 2023, at 18.

In 2009, the US Circum-Arctic Geological Survey assessed that the Arctic embeds 13 percent of global undiscovered oil and 30 percent of undiscovered natural gas¹⁴. Furthermore, in the Arctic lay resources such as strategic minerals and rare earth elements necessary to green energy and semiconductors that drive Artificial Intelligence¹⁵. Notably, Greenland hosts some of the largest reserves of critical minerals, rare earth elements and fossil fuel¹⁶. This discloses the possibility of making the Arctic a new economic frontier, triggering requests for extended continental shelves by Arctic coastal States¹⁷. Thus, already in 2006, Norway submitted a request to the UNCLOS Commission on the Limits of the Continental Shelf (CLCS) extending its seabed area to 235000 square kilometres¹⁸. Since 2009, Denmark claims 895000 square kilometres as an extension of the Faroe Islands and Greenland's continental shelf, with a significant development beyond the Pole¹⁹. In 2013, 2019 and 2024, Canada submitted partial requests, claiming a continental shelf of about 1.2 million square kilometres, extending beyond the North Pole²⁰. Since 2001, the USSR has made multiple submissions to the CLCS,

¹⁴ US Geological Survey, *Circum-Arctic Resource Appraisal*, 2008, <https://pubs.usgs.gov/publication/pp1824>.

¹⁵ International Energy Agency, *A New Frontier for Global Energy Security: Critical Minerals*, 2024, <https://www.iea.org/topics/critical-minerals>.

¹⁶ Reuters, *Key Details of Greenland's Rich but Largely Untapped Mineral Resources*, 13 January 2025, <https://www.reuters.com/markets/commodities/greenlands-rich-largely-untapped-mineral-resources-2025-01-13>. See also the Arctic Institute, *Maps: Critical Raw Minerals and 'Green' Natural Resources*, <https://www.thearcticinstitute.org/tatw-map-months-2025>; Nordregio, *Map of Resources in the Arctic*, <https://nordregio.org/maps/resources-in-the-arctic-2019>.

¹⁷ See CLCS, *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, Paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, https://www.un.org/depts/los/clcs_new/commission_submissions.htm; European Environment Agency, *Arctic Continental Shelf Claims*, <https://www.eea.europa.eu/en/analysis/maps-and-charts/arctic-continental-shelf-claims>.

¹⁸ *Continental Shelf Submission of Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea*, Executive Summary, 2006, https://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf.

¹⁹ See, in particular, *Partial Submission of the Government of the Kingdom of Denmark together with the Government of the Faroes to the Commission on the Limits of the Continental Shelf: The Continental Shelf North of the Faroe Islands*, April 2006, https://www.un.org/depts/los/clcs_new/submissions_files/dnk28_09/dnk2009executivesummary.pdf; *Partial Submission of the Government of the Kingdom of Denmark together with the Government of Greenland to the Commission on the Limits of the Continental Shelf: The Northern Continental Shelf of Greenland*, November 2014, https://www.un.org/depts/los/clcs_new/submissions_files/dnk76_14/dnk2014_es.pdf.

²⁰ See, in particular, Canada, *Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission*, Partial Submission: Addendum, Executive Summary, 2022, https://www.un.org/depts/los/clcs_new/submissions_files/can1_84_2019/cda1eseng.pdf.

including revised submissions in 2022 and 2023, which led the Commission to adopt recommendations fundamentally approving a continental shelf of approximately 1.7 million square kilometres, covering around 70 per cent of the Arctic Ocean²¹. Upon scientific assessment of the Lomonosov Ridge as part of the Russian continental shelf, Viktor Posyolov, an officer of the Russian Agency for Management of Mineral Resources, declared that ‘with a high degree of likelihood’, Russia would dispose of ‘potential hydrocarbon reserves of not less than 9,000 to 10,000 billion tonnes of conventional fuel beyond the 200-mile economic zone in the Arctic Ocean’²². These claims reduce the possibility of an Arctic area recognised under UNCLOS as ‘common heritage of mankind’ and overlap, essentially based on the apurtenance of the Alpha-Mendeleev and Lomonosov submarine elevations as natural components of the continental margin, eluding the application of the 350 nautical miles limit under UNCLOS article 76(5)-(6), in a context that is anyway complicated by shifting baselines triggered by sea-level rise²³.

The US is not a party to the UNCLOS and for a long time it did not submit (nor recognise) any claims, remaining free to determine its continental shelf based on conventional measurements under customary law. Eventually, on 19 December 2023, the US released a statement recognising the extended continental shelf regime detailed in UNCLOS article 76 as customary international law and announced its outer geographic coordinates, covering approximately one million square kilometres from Alaska’s baselines in the Central Arctic Ocean, around 72,000 of which overlap with the area included in Canada’s submission²⁴. Furthermore, the US House of Representatives is seeking to build support for a bill allowing talks for purchasing Greenland and the US Presidency has gone as far as to advance the idea of including Canada as the 51st State of the US Federation²⁵. Following a similar invest-

²¹ CLCS, *Recommendations in regard to the Partial Revised Submission Made by the Russian Federation in Respect of the Arctic Ocean on 3 August 2015 with Addenda Submitted on 31 March 2021*, 6 February 2023, https://www.un.org/depts/los/clcs_new/submissions_files/rus01_rev15/2023RusRev1RecSum.pdf.

²² R.A. LOVETT, *Russia’s Arctic Claim Backed by Rocks, Officials Say*, National Geographic News, September 2007, news.nationalgeographic.com/news/pf/47871933.html.

²³ E. ERNESTO FILIPPI and M.J. DEIRÓ DE MELLO NETO, *Melting Sea Ice, Changing Naval Geopolitics: The Impacts of Climate Change in the Maritime Delimitations in the Arctic and the Challenges to the UNCLOS*, in *OASIS*, 2024, n. 40, 161.

²⁴ US, *Statement to the UN in New York concerning Canada’s Submission on the Outer Limits of the Continental Shelf in the Arctic Ocean*, 28 August 2019, https://www.un.org/depts/los/clcs_new/submissions_files/can1_84_2019/2019_08_28_USA_NV_UN_001.pdf.

²⁵ Reuters, *Trudeau Rejects Trump’s Idea of forcing Canada to Become a US State*, 1 January 2025, <https://www.reuters.com/world/americas/canada-rejects-trumps-comments-about-possible-use-economic-force-2025-01-07>.

ment strategy, the Peoples’ Republic of China (PRC) – a ‘near-Arctic State’ – concluded an agreement to invest in Alaskan natural gas export facilities, unsuccessfully attempted to buy mines in Nunavut and recently improved research and land acquisition attempts in the Svalbard area²⁶, thus turning the US-Russia confrontation in the North into a triangular game²⁷.

Ice melting is also opening new commercial routes through the Northwest Passage (NWP) and Northern Sea Route (NSR)²⁸, raising delicate questions of sustainability²⁹, with the NSR expected to become navigable from three to six months per year and the NWP from two to four months by 2100³⁰. In the light of these projections, transporting goods from Europe to the Far East through the NSR is 40 percent shorter than shipping via the Suez Canal, in a context where Houthi attacks in the Red Sea and drought in Panama have prompted prominent shipping companies to limit use of usual routes, in turn increasing transport costs³¹. Indeed, since 2011 Russia has built new ports, customs facilities and marine checkpoints along the Arctic Coastline, with a projected infrastructure investment plan of around \$19 billion by 2035³², which also involves China through the Belt and Road Initiative³³.

2.2. If, on the one hand, the race for extended continental shelves and shipping lanes evidences a fundamentally economically driven approach to Arctic governance and development, on the other, the race for rare and critical mineral resources shows that the energy transition is effectively taking place and Arctic resources are essential to sustainability. In this context, from a regulatory standpoint, the Arctic Council – the main governance

²⁶ K. PECHKO, *Rising Tensions and Shifting Strategies: The Evolving Dynamics of US Grand Strategy in the Arctic*, 7 January 2025, <https://www.thearcticinstitute.org/rising-tensions-shifting-strategies-evolving-dynamics-us-grand-strategy-arctic>.

²⁷ E. LI SHENG, *Arctic Opportunities and Challenges: China, Russia and the US Cooperation and Competition*, Palgrave Macmillan, 2022.

²⁸ Arctic Portal, *Maps: Shipping*, <https://arcticportal.org/maps/download/maps-shipping>.

²⁹ See T. SCOVAZZI, *Legal Issues relating to Navigation through Arctic Waters* (2009) *Yearbook of Polar Law* 371; BOWEN LIN et al., *An Overview of Scholarly Literature on Navigation Hazards in Arctic Shipping Routes*, in *Environmental Science and Pollution Research*, 2024, vol. XXXI, 40419.

³⁰ KHONVC et al., *Perspectives of Northern Sea Route and Northwest Passage in the Twenty-First Century*, in *Climatic Change*, 2010, vol. C, n. 3-4, 757.

³¹ H. SCHØYEN and S. BRÅTHEN, *The Northern Sea Route versus the Suez Canal: Cases from Bulk Shipping*, in *Journal of Transport Geography*, 2011, vol. XIX, n. 4, 977.

³² M. BLUNDEN, *Geopolitics and the Northern Sea Route*, in *International Affairs*, 2012, vol. LXXXVIII, n. 1, 115; TASS, *Arctic Today (2023) Expert: Northern Sea Route May Become Russia’s Biggest Revenue Source in Arctic*, 25 October 2023, <https://tass.com/economy/1696643>.

³³ I. STENSDAL and G. HEGGELUND (eds), *China-Russia Relations in the Arctic: Friends in the Cold?*, Palgrave, 2024.

body in the region which was brought into being in 1996 upon an initiative of Mikhail Gorbachev³⁴ – has largely acknowledged the regional and global impact of a warming Arctic, particularly through the Arctic Monitoring and Assessment Programme (AMAP)³⁵ as part of the Arctic Environmental Protection Strategy (AEPS)³⁶. Together with Observers, including, for instance, France and the Arctic Science Committee³⁷, the Council is therefore working to address the problem of sustainable development³⁸. Concretely, the Arctic Council Strategic Plan 2021-2030 envisages the Arctic as a region of ‘peace and constructive cooperation’ that is a ‘sustainable and secure home for all its inhabitants, including Indigenous Peoples’, where ‘rights and wellbeing are respected’³⁹. Thus, climate change monitoring, scientific exchange, mitigation and adaptation are prioritised as an essential part of peace maintenance and sustainable development⁴⁰. Such an institutional and substantive framework operates in the context of multilateral environmental treaties spanning the Biodiversity Convention, the Convention on Long Range Transboundary Air Pollution and the General Agreement on Tariffs and Trade, whereby, unlike the comprehensive legal regime established under the Antarctic Treaty System (ATS)⁴¹, the only Polar Bear Convention is specific to the Arctic region⁴².

Arctic States have undertaken variously shaded initiatives, which can be classified as ‘soft law’⁴³, to address climate change and Arctic sustainability, from the standpoint of both mitigation and adaptation. The 2019 Canadian Arctic Strategy⁴⁴ prioritises Indigenous peoples’ rights (goal 2) and the op-

³⁴ Arctic Council, 2025, <https://arctic-council.org>.

³⁵ Arctic Monitoring Assessment Programme, <https://www.amap.no>.

³⁶ Amap, *Arctic Climate Change Update*, 2019, <https://oaarchive.arctic-council.org/server/api/core/bitstreams/74c351e5-7ca1-4764-9741-cad56d65f34d/content>; Arctic Portal, *The Arctic Environmental Protection Strategy*, <https://arcticportal.org/arctic-governance/international-agreements-archive/3420-the-arctic-environmental-protection-strategy-aeps-14-june-1991>.

³⁷ Arctic Council Observers, <https://arctic-council.org/about/observers>.

³⁸ Arctic Council, *The Arctic in a Changing Climate*, <https://arctic-council.org/explore/topics/climate>. For an assessment of the Council’s environmental action, see T. BARRY, B. DAVIDSDÓTTIR, N. EINARSSON and O.R. YOUNG, *The Arctic Council: An Agent of Change?*, in *Global Environmental Change*, 2020, 63, 102099.

³⁹ Arctic Council, *Strategic Plan 2021 to 2030*, 20 May 2021, at 1, <https://oaarchive.arctic-council.org/server/api/core/bitstreams/118e0bce-9013-460a-81e0-1dbd0870ee05/content>.

⁴⁰ *Ibid.*, at 2-7.

⁴¹ Opened for signature 1 December 1959, 402 UNTS 71, entered into force 23 June 1961.

⁴² Opened for signature 15 November 1973, 2898 UNTS 243, entered into force 26 May 1976.

⁴³ See H. NADARAJAH, *Prevalence of Soft Law in the Arctic* (2020) *Yearbook of Polar Law* 285.

⁴⁴ Canada, *Arctic and Northern Policy Framework*, 2019, https://assets-global.website-files.com/645b173b42ee12d72d1885cc/6462ffd561d8a317478acffa_nth-arctic_northern_policy_framework_1662642171557_eng.pdf.

timisation of resource development, including responsible and sustainable mining and exploitation of energy sources (goal 3), fostering an inclusive approach to understanding climate change impacts, mitigation and adaptation (goals 4-5), within a rule-based cooperative international legal environment (goals 6-7). Besides sustainable economic development driven by private investment, including mining for critical minerals (pillar 3), the 2022 US National Strategy for the Arctic Region strongly underscores the need for adaptation to build resilience for Indigenous people living in the Arctic (pillar 2)⁴⁵. Conversely, the 2020 Russian Arctic Strategy to 2035 primarily aims to expand offshore oil and gas facilities, seeking, inter alia, to end population decline in the Arctic⁴⁶. Against this background, the Strategy underscores the need to cope with climate change by upgrading sensitive infrastructure and designating new nature reserves, but without referring to the anthropological cause of global warming, in a context where both cooperation and political competition are emphasised⁴⁷. Under its 2021 Strategy for Arctic policy⁴⁸, Finland promotes upfront climate change mitigation and adaptation, in the context of the Paris Agreement objectives for climate sustainability, fostering decentralised renewable energy production, climate-wise infrastructure, the circular economy, bioeconomy and resource efficiency, in a highly cooperative European and international environment (priority 1). The Arctic Strategy published by Norway in 2021 starts by addressing issues of definition of territorial borders and security (sections 2 and 3) to then tackle climate change (section 4) and development (sections 5-8), significantly underscoring the interest of China in the Arctic and the disruption of Norway-Russia relations in the light of the occupation of Ukraine in violation of international law⁴⁹. Although *prima facie* primarily oriented at achieving sustainability and leaving fossil fuel in the ground, at a closer look the EU Arctic policy as lastly outlined in 2021 seems to oscillate between sustainability in the circumpolar Arctic and economic expansion in the European Arctic⁵⁰, whereby a plurality of Arctic regionalisms emerge, including different sub-regional policies.

⁴⁵ White House, *National Strategy for the Arctic Regions*, 2022, <https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/10/National-Strategy-for-the-Arctic-Region.pdf>.

⁴⁶ J. KLUGE and M. PAUL, *Russia's Arctic Strategy through 2035: Grand Plans and Pragmatic Constraints*, 5 November 2020, 1, https://www.swp-berlin.org/publications/products/comments/2020C57_RussiaArcticStrategy.pdf.

⁴⁷ White House, *National Strategy*, cit., at 3-4.

⁴⁸ Finnish Government, *Finland's Strategy for Arctic Policy*, 2021, <https://www.arcticfinland.fi/EN/Policy>.

⁴⁹ Norwegian Government, *Arctic Policy: Peoples, Opportunities and Norwegian Interests in the Arctic*, 2021, <https://faolex.fao.org/docs/pdf/nor203001.pdf>.

⁵⁰ European Commission and High Representative of the Union for Foreign Affairs

While Denmark has not presented an Arctic policy since the last one expired in 2021, waiting to know the stance of Greenland, in 2024 Greenland presented its own Arctic Strategy, which stands out as a complex and sophisticated document⁵¹. The strategy must be understood against the background of a country that is mostly inhabited by Inuit people and is in search of a balance between globalisation, climate change, high demand for mineral resources and an increasing request for improved living conditions, proving that the Arctic embeds multiple economic realities and sub-regionalisms⁵². Ultimately based on the idea of independence grounded in self-determination, the Strategy is fundamentally centred on the impact of climate change on the Arctic – and particularly Greenland and its fishing and hunting culture – as being among the most affected in the world⁵³. Stressing the need to adopt viable climate policies, the Strategy underscores that Greenland is open to business, including shipping through the NWP⁵⁴, and will assist in making minerals available for producing renewable energy sources indispensable to the green transition⁵⁵. Greenland thus remains open to collaboration with foreign countries in all respects, particularly the US for security purposes⁵⁶, as well as Iceland, Canada, East Asia and the EU, notably for trade purposes⁵⁷. It reaffirms the importance of a peaceful definition of territorial claims under UNCLOS⁵⁸, ties with Indigenous communities in Canada and Alaska⁵⁹, and proposes the establishment of an

and Security Policy, *A Stronger EU Engagement for a Peaceful, Sustainable and Prosperous Arctic*, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Join(2021) 27 final, 13 October 2021.

⁵¹ Greenland, *Greenland in the World: Nothing about Us without Us. Greenland's Foreign, Security and Defense Policy 2024-2033 – An Arctic Strategy*, 2024, https://paartoq.gl/wp-content/uploads/2024/03/Greenlands_Foreign_Security_and_Defense_Policy_2024_2033.pdf.

⁵² F. SEJERSEN, *Rethinking Greenland and the Arctic in the Era of Climate Change. New Northern Horizons*, Routledge, 2015; J. NYMAND LARSEN and J. HAUKUR INGIMUNDARSON, *Overarching Issues of Justice in the Arctic: Reflections from the Case of South Greenland Arctic Justice Environment*, in C. WOOD-DONNELLY and J. OHLSSON, *Arctic Justice: Environment, Society and Governance*, Bristol UP, 2023, 154.

⁵³ Greenland, *Greenland in the World*, cit., 15.

⁵⁴ *Ibid.*, 27.

⁵⁵ *Ibid.*, 15.

⁵⁶ *Ibid.*, 17.

⁵⁷ *Ibid.*, 17, 19, 21, 31 and 39.

⁵⁸ *Ibid.*, 37.

⁵⁹ On the importance of transnational cooperation among Indigenous peoples, see M. SCOPELLITI, *Non-Governmental Actors in International Climate Change Law: The Case of Arctic Indigenous Peoples*, Routledge, 2021, 57.

Arctic North-American Forum, including the governments and parliaments of Alaska, Yukon, Northwest Territories, Nunavut and Nunavik⁶⁰.

3. The UNCLOS, which codifies customary international law and is the fundamental regulatory instrument governing international relations in the Arctic, is underpinned by the principle that rights to economic exploitation (development) under the Convention are coupled with an equitable and efficient use of marine resources, aiming to protect and preserve the environment (sustainability). Thus, for instance, UNCLOS article 61 establishes an obligation to preserve living resources in the exclusive economic zone (EEZ) and article 192 reaffirms such a duty with respect to the high seas. In May 2024, the International Tribunal for the Law of the Sea (ITLOS), which has jurisdiction over disputes concerning the interpretation and application of the Convention, delivered an advisory opinion on climate change and international law to the effect that these obligations are open-ended and must be interpreted broadly to encompass contemporary threats – significantly climate change – including an obligation of restoration⁶¹. Under such an overarching duty – and in the light of the opinion of the International Court of Justice (ICJ) on climate change obligations⁶² – Arctic domestic fora have developed a jurisprudence that evidences limited progress in the matter of fundamental climate rights (and duties), monitoring, adjudication and enforcement, from the standpoint of ‘secondary’ rules. Outside the area of fundamental rights, development projects for resource exploitation in the Arctic are challenged with different degrees of success throughout Arctic jurisdictions. Among deferent national jurisprudence underpinned by the principle of the separation of powers, the European Court of Human Rights (ECtHR) – as a supranational jurisdiction overcoming national perspectives – has to a certain extent developed a progressive approach and provides some hope for adjusting and limiting deep seabed mining through climate rights⁶³.

⁶⁰ Greenland, *Greenland in the World*, cit., at 29. See further R. LEANDER NIELSEN and J. STRANDBJERG, “Nothing about Us without Us”: What We Can Learn from Greenland’s New ‘Arctic Strategy’ 2024-2033, in *Arctic Yearbook*, 2024, 1.

⁶¹ ITLOS, *Advisory Opinion on Climate Change and International Law upon Request by Small Island States*, Case n. 31, 21 May 2024, paras 384 ff.

⁶² It is notable that several documents submitted to the ICJ in the context of the request for an advisory opinion on climate change obligations concern fundamental rights (*Obligations of States in respect of Climate Change*, ICJ, Advisory Opinion of 25 July 2025).

⁶³ On the importance of supranational jurisdictions in developing human rights, see L. MARDIKIAN and S. GALANI, *Protecting the Arctic Indigenous Peoples’ Livelihoods in the Face of Climate Change: The Potential of Regional Human Rights Law and the Law of the Sea*, in *Human Rights Law Review*, 2023, vol. XXIII, n. 1, 24.

Although Arctic Indigenous peoples living in Alaska and Canada cannot commence proceedings in the Inter-American Court on Human Rights (IACtHR), as both the US and Canada have not ratified the American Convention on Human Rights and have not accepted the contentious competence of the Court, in 2005 the Inuit from Alaska petitioned the Inter-American Commission on Human Rights (IAComHR) to enjoin the US – as the major GHG emitter globally – to take adaptive remedies and mitigation measures aiming to curb carbon emissions triggering ice melting in breach of fundamental rights spanning food, water, culture and the environment as such⁶⁴. While the IAComHR declined to proceed⁶⁵, arguably based on difficulties in attributing responsibility, and only allowed a subsequent hearing on matters raised by the claim⁶⁶, the petition is fundamental in that it spawned attention, analysis and developments on the relationship between climate change and human rights, particularly through the UN Human Rights Council, which in July 2022 resulted in UN General Assembly Resolution 76/300 affirming the Right to a Clean, Healthy and Sustainable Environment⁶⁷. A further petition submitted in 2013 by the Arctic Athabaskan Inuit against Canada for the (more limited) impact of black carbon emissions on fundamental rights is still waiting for a response⁶⁸. In 2025, the IACtHR delivered an advisory opinion strongly supporting climate rights⁶⁹.

At the domestic level, in *Native Village of Kivalina v. ExxonMobil Corp.*⁷⁰, an Inuit community living in Alaska claimed compensation from oil, energy and utility companies for violating fundamental rights, particularly the right to property, because of excessive GHG emissions triggering land

⁶⁴ S. WATT-CLOUTIER et al., *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005; R. CHUFFART and A. COOPER, *The Future of a Melting Arctic: Implications for Indigenous Rights*, 2026, AJIL Unbound, vol. 120, 193.

⁶⁵ IAComHR, *Reply*, Petition 1413-05, 16 November 2006.

⁶⁶ IAComHR, *Global Warming and Human Rights Hearing*, 1 February 2007.

⁶⁷ UN General Assembly, *The Right to a Clean, Healthy and Sustainable Environment*, Resolution 76/300, 28 July 2022. See further F. IPPOLITO, *Children's Environmental Rights under International and EU Law*, Springer, 2023, 41-43; Y. AGUILA and V. LICHET, *The Need for a Covenant on the Right to a Healthy Environment*, in *Environmental Policy and Law*, 2023, vol. LIII, n. 2-3, 111.

⁶⁸ Arctic Athabaskan Council, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, 23 April 2013.

⁶⁹ *Climate Emergency and Human Rights*, IACtHR, Advisory Opinion 32/25, 29 May 2025.

⁷⁰ *Native Village of Kivalina v. ExxonMobil Corp.*, Docket number(s): 12-1072, US.

erosion and threatening the city of Kivalina with destruction. In addition to a lack of standing, the US Court for the Ninth Circuit and eventually the Supreme Court declined the claims based on the political question doctrine and the *trias politica*⁷¹. Still on the basis of the separation of powers doctrine, in *Juliana v. US*, the Courts for the Ninth Circuit, which includes Alaska, rejected the responsibility of the US for breaching an alleged constitutional right to be free from irreversible and catastrophic climate change⁷². In *Alaska Industrial Development & Export Authority v. US Department of the Interior*, the plaintiffs filed a complaint for relief in the Alaska Supreme Court, contesting strict environmental criteria outlined by the US Department of the Interior for oil drilling developments on the Coastal Plain of the Arctic National Wildlife Refuge⁷³. Conversely, in *Sovereign Inupiat for a Living Arctic and Centre for Biological Diversity v. Bureau of Land Management*, the plaintiffs challenged the approval of a plan for major oil and gas developments in the National Petroleum Reserve in Alaska, including up to five drill sites, 37 miles of gravel roads and 315.9 miles of pipelines. The District Court for Alaska vacated Federal approvals of oil developments, inter alia, on the ground of the exclusion of an assessment of foreign downstream GHG emissions triggered by the implementation of the project⁷⁴. In *Northern Alaska Environmental Centre v. Trump*, based on excess of power, environmental organisations filed a lawsuit in the District Court of Alaska challenging an executive order of US President Trump reversing President Biden’s withdrawal of certain areas of the US outer continental shelf – including the Arctic Ocean – from oil and gas leasing⁷⁵.

In *Lho’imggin et al. v. Her Majesty the Queen*, Indigenous groups allege that Canada has thus far failed to meet its international commitments to reducing GHG emissions under instruments such as the 1988 International Conference on the Changing Atmosphere, the UNFCCC and related

⁷¹ *Native Village of Kivalina, City of Kivalina v. ExxonMobil Corporation and Others*, Order Granting Defendants’ Motions to Dismiss for Lack of Subject Matter Jurisdiction, Case No C 08-1138 SBA, United States District Court for the Northern District of California, Oakland Division, 30 September 2009; *Native Village of Kivalina, City of Kivalina v. ExxonMobil Corporation and Others*, Case No 09-17490 (US Court of Appeals, Ninth Circuit, 21 September 2012); *Native Village of Kivalina v. ExxonMobil Corp.*, Docket number(s) 12-1072, US Supreme Court, Order of 20 May 2013.

⁷² *Juliana v. United States*, 947 F.3d 1159, 1165 (9th Cir. 2020).

⁷³ *Alaska Industrial Development & Export Authority v. US Department of the Interior*, Supreme Court of Alaska, Complaint, Docket number(s): 3:24-cv-00282, 20 December 2024.

⁷⁴ *Sovereign Inupiat for a Living Arctic and Centre for Biological Diversity v. Bureau of Land Management*, District Court of Alaska, Cases No. 3:20-cv-00290-SLG and 3:20-cv-00308-SLG, Order Re Motion for Summary Judgment, 18 August 2021.

⁷⁵ *Northern Alaska Environmental Centre v. Trump*, Case 3:25-cv-00038, District Court of Alaska, Complaint of 19 February 2025.

protocols⁷⁶. The plaintiffs further claim that Canada is unlikely to meet its Nationally Determined Contribution (NDC) under the Paris Agreement, aiming to reduce emissions by 30 per cent below 2005 levels by 2030, which would in any case be inadequate to achieve the Paris commitment below 2°C and possibly (by now exceeded) 1.5°C. Moreover, Canada would have failed to properly implement environmental impact assessments for withholding approval of development projects producing GHG emissions, notably concerning liquefied natural gas export facilities. Mostly under section 91 of the 1867 Constitution Act, embedding a duty to make laws for the peace, order and good government of Canada, as well as under sections 7 and 15(1) of the Charter of Rights and Freedoms, affirming the rights to life, liberty, security of the person and equality before the law, the plaintiffs allege that they experience significant negative effects of global warming in their territories, exacerbating psychological and social trauma caused by discrimination. On this basis, the groups seek declaratory relief and orders requiring the Canadian government to amend environmental assessment statutes for high GHG emitting projects and to complete an annual account of cumulative emissions, allowing a comparison with the State's carbon budget. On the basis of the separation powers doctrine, on 16 November 2020, the Federal Court of Canada granted a motion to strike without leave to amend the case as non-justiciable, having no reasonable cause of action and no available legal remedies⁷⁷, which is nonetheless under appeal⁷⁸. The negative jurisprudence of the Federal Court is in line with that of the courts of Quebec in *ENVironnement JEUnesse v. Procureur General du Canada*⁷⁹.

Moving to the European Arctic, in *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy*, in October 2016, a coalition of environmental groups sought a declaratory judgment from the Oslo District Court that in June 2016 Norway's Ministry of Petroleum and Energy violated the Norwegian constitution by issuing a set of oil and gas licenses for deep extraction in the Barents Sea⁸⁰. Among the risks posed to the fragile Arctic environment, the petition underscores that allowing access to as-yet undeveloped fossil fuel deposits goes against climate change mitigation and the 2°C-1.5°C targets

⁷⁶ *Lho'imggin et al. v. Her Majesty the Queen*, Federal Court of Canada, Statement of Claim of 10 February 2020.

⁷⁷ *Id.*, Federal Court of Canada, Case 020 FC 1059, Order and Reasons of 16 November 2020.

⁷⁸ *Id.*, Federal Court of Appeal of Canada, Case A-308-20, Notice of Appeal, 10 December 2020.

⁷⁹ *ENVironnement JEUnesse v. Procureur Général du Canada*, Appeals Court of Quebec, Case 500-06-000955-183, Decision of 13 December 2021.

⁸⁰ *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy*, Petition HR-2020-846-J, 18 October 2016.

under the Paris Agreement, in breach of the right to a healthy environment posited in article 112 of the Norwegian Constitution. The Court rejected the claims, determining the irrelevance of downstream GHG emissions caused by oil and gas export from Norway and considering that the government had properly assessed licensing against the Paris Agreement⁸¹. In 2020, the Borgarting Court of Appeal and the Supreme Court of Norway confirmed the stance of the Court of first instance and the validity of oil and gas licensing⁸². In December 2020, individuals and NGOs filed an application with the ECtHR, based on the rights to life and to private and family life under articles 2 and 8 of the European Convention on Human Rights (ECHR), particularly in the light of a governmental failure to address the risks of the climate crisis, coupled with a failure to provide effective remedies under ECHR article 13⁸³. Norway asked the Court to dismiss the instance, claiming that Russia’s 2022 invasion of Ukraine justifies the search for more oil and gas, thus foreseeably increasing GHG emissions for about 30 years or more. Proceedings register the intervention, inter alia, of the UN Special Rapporteurs on Human Rights and the Environment, the European Network of National Human Rights Institutions and the International Commission of Jurists. In 2025, the ECtHR dismissed the claims, considering that the plaintiffs had not suffered individual damage under ECHR art. 8, while adequate EIAs had been carried out prior to licensing drilling activities⁸⁴. Similar developments are taking place in the 2021 case of *Greenpeace Nordic and Nature & Youth v. Energy Ministry* (The North Sea Fields Case)⁸⁵. Along these lines, in *WWF v. Norwegian Parliament*, in 2024 the World Wildlife Fund commenced court proceedings in Oslo to challenge a Norwegian parliamentary authorisation of 12 April 2024 for seabed mining in the Arctic extended continental shelf near the Svalbard, based on the alleged inadequacy of the environmental impact assessment (EIA) underpinning the decision, notably in breach of section 2-2

⁸¹ *Id.*, Case 16-166674TVI-OTIR/06, Oslo District Court, Judgment of 4 January 2018.

⁸² *Id.*, Case 18-060499ASD-BORG/03, Borgarting Court of Appeal, Judgment of 23 January 2020.

⁸³ *Greenpeace Nordic and Others v. Norway*, Application no. 34068/21, 15 June 2021. See also *The Norwegian Grandparents’ Climate Campaign and Others v. Norway*, Application no. 19026/21, 26 March 2021.

⁸⁴ See BULL and GLITTERTIND, *Observations in Reply to the Respondent’s Submissions in Application No. 34068/21*, 29 June 2022, at 11 and 12 and *Greenpeace Nordic and Others v. Norway*, Application no. 34068/21, Judgment of 28 October 2025.

⁸⁵ See further R. FRENG DALE and H. DANNEVIG, *Planning for Whose Benefit? Procedural (In)Justice in Norwegian Arctic Industry Projects*, in WOOD-DONNELLY and OHLSSON, *Arctic Justice*, cit., 109.

of the Norwegian Subsea Minerals Act⁸⁶. While the Court of first instance rejected the claims⁸⁷, the case is under appeal and it is notable that the European Parliament passed a motion for a resolution taking a critical stance on Arctic seabed mining activities approved by Norway⁸⁸.

In *Finnish Association for Nature Conservation and Others v. Finland*, in August 2024, a coalition of Finnish NGOs, including Suoma Sámi Nuorat, commenced proceedings against the Finnish government in the Supreme Administrative Court of Finland, underscoring the deep impact of global warming on the traditional lifestyle and culture of the Sámi people⁸⁹. The plaintiffs argue that inadequate climate policies ignoring the special status of the Sami people in the land use sector violate Sami rights under the Constitution and the Climate Change Act, aiming to cut GHG emissions by at least 50-55% by 2030⁹⁰. In January 2025, the Court dismissed the claims, underscoring governmental consideration for carbon sinks and the need to assess the effectiveness of climate policies over time, noting, however, the possibility of reversing the decision based on a future assessment of targets under the Climate Act⁹¹.

At the supranational level, the Court of Justice of the European Union, which exerts competence over Norway, Finland, Sweden and Denmark, has thus far adopted a restrictive approach to climate rights, notably for lack of action on jurisdictional grounds under article 263 of the Treaty on the Functioning of the European Union (TFEU), particularly in the case of *Armando Carvalho*⁹². However, a 2022 complaint with the European Ombudsman concerning oil and gas import from Russia after the invasion of Ukraine could disclose relevant perspectives for the Arctic, as several NGOs allege that continued import – amounting to 61 percent of Russia’s fossil fuel exports in the first one hundred days of war – without a proper assessment of GHG emissions and human rights implications is in breach of international law⁹³.

⁸⁶ *WWF v. Norwegian Parliament*, Oslo District Court, Claim, 2024.

⁸⁷ *Id.*, Decision of 13 February 2025.

⁸⁸ European Parliament, *Motion for a Resolution on Norway’s Recent Decision to Advance Seabed Mining in the Arctic*, 31 January 2024, Doc. 2024/2520(RSP).

⁸⁹ See further T. Joona and J. Joona, *The Complex Relationship between Forest Sámi and the Finnish State*, in WOOD-DONNELLY and OHLSSON, *Arctic Justice*, cit., 124.

⁹⁰ Climate Change Act 2017.

⁹¹ *Finnish Association for Nature Conservation and others v. Finland*, Supreme Administrative Tribunal of Finland, Decision of 17 January 2025.

⁹² *Carvalho v. the European Parliament and the Council*, Case T-330/18, EU:T:2019:324; *Carvalho v. the European Parliament and the Council*, Case C-565/19 P, EU:C:2021:252.

⁹³ *Complaint to the European Ombudsman on Oil and Gas Imports from Russia*, 25 March 2022.

Outside the EU, in *Ecodefense & Other NGOs v. Russia*, on 11 September 2022, several climate and Indigenous groups acted in the Supreme Court of the Russian Federation asking that the Russian government avert the risk of death or illness by limiting global emissions within 1.5 to 1.8°C, in line with domestic and international duties, whereby Russia – the fourth major producer of GHG worldwide – must reduce its emissions by 31 per cent as compared to 1991 levels to meet its 2030 target under the Paris Agreement⁹⁴. The plaintiffs claimed that insufficient climate measures infringe the rights to life, private and family life, property, freedom from inhumane treatment and non-discrimination and to a healthy environment, in breach of various norms of the Russian Constitution and the ECHR⁹⁵. The application was quickly rejected⁹⁶. Reportedly, a subsequent complaint grounded in the same climate rights has been submitted by several NGOs to the Russian Constitutional Court⁹⁷.

Despite the negative decision of the ECtHR in the Norwegian climate dispute, a progressive approach to climate rights is foreseeable in the jurisprudence of the Court in the light of *Verein Klimaseniorinnen*⁹⁸. In line with the emerging stance of key international bodies⁹⁹, in this dispute the ECtHR affirmed the responsibility of Switzerland for not implementing adequate climate mitigation and adaptation measures, in violation of ECHR articles 2 and 8 on the rights to life and to private and family life – broadly interpreted as collective ‘green’ rights to live in a sustainable environment and climate – which are also at stake in the climate cases involving Norway. However, given a failure in sufficiently complying with positive obligations under the judgment and implementing effective measures for mitigating the adverse effects of climate change, the Council of Ministers of the Council of Europe (CoE) has invited competent Swiss authorities to submit updated information for enforcement purposes¹⁰⁰. In any case, the ECtHR

⁹⁴ *Ecodefense & Other NGOs v. Russia*, Supreme Court of the Russian Federation, Complaint of 11 September 2022.

⁹⁵ *Ibid.*, at 6 and 20 ff.

⁹⁶ *Id.*, Decision of 21 September 2022.

⁹⁷ Climate Court, *Ecodefense Leads Renewed Challenge to Russia’s Climate Policy in Constitutional Court*, 15 May 2024, <https://www.climate-court.com/post/ecodefense-leads-renewed-challenge-to-russia-s-climate-policy-in-constitutional-court>.

⁹⁸ *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App no. 53600/20, Judgment of 9 April 2024.

⁹⁹ See *Daniel Billy et al. v. Australia*, Communication No. 3624/2019, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, 22 September 2022; *Ione Teitiota v. New Zealand*, Communication No. 2728/2016, Views Adopted by the Committee under Article 5(4) of the Optional Protocol, 7 January 2020.

¹⁰⁰ *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application 53600/20,

no longer has jurisdiction over Russia, which withdrew from the ECHR on 16 September 2022, as a follow up to the use of force in Ukraine and the exclusion of Russia from the CoE¹⁰¹.

4. Politics driven by development and sustainability in the Arctic are protected via military power. A core space of confrontation between the US, the North-Atlantic Treaty Organization (NATO) and the USSR during the cold war, the Arctic has subsequently become an area of institutional cooperation, particularly via the Arctic Council. At least since 2014, however, it has been observed that, following climate change making Arctic natural resources more accessible, coastal States, notably Canada, Denmark, Norway, the United States as NATO members, on the one hand, and Russia, on the other, have increased their military presence in the region, raising tension about overlapping sovereign claims and spawning the fear of a new ‘cold war’ and confrontation in Europe¹⁰².

International relations and law are currently experiencing unprecedented challenges and developments, first and foremost in the fundamental domain of the use of force, which is at the very basis of the division between the law of peace and the law of war since the inception of international law itself¹⁰³. Essentially, the use of force in Ukraine, at the heart of Europe, is challenging the traditional absolute prohibition that is well-established as *jus cogens* under both customary and conventional international law since the Caroline case¹⁰⁴. While Russia presented the use of force in Ukraine as a ‘special military operation’ in reaction to alleged genocidal politics vis-à-vis people in the Donbass region¹⁰⁵, it is undeniable that this cannot in any case justify armed attacks out of proportionality in other areas of the sovereign territory of Ukraine and should therefore qualify as an act of aggression¹⁰⁶.

CoE Council of Ministers, Supervision of the Execution of the European Court’s Judgments, Doc. CM/Del/Dec(2025)1521/H46-30, 6 March 2025 and Doc. CM/Del/Dec(2025)1537/H4637, 17 September 2025.

¹⁰¹ CoE, *Russia Ceases to Be Party to the European Convention on Human Rights*, <https://www.coe.int>.

¹⁰² M. BRECHER and F.P. Harvey, *Realism and Institutionalism in International Studies*, University of Michigan Press, 2002; ST Wezeman, *Military Capabilities in the Arctic: A New Cold War in the High North?*, SIPRI, 2016, <https://www.sipri.org/publications/2016/sipri-background-papers/military-capabilities-arctic>.

¹⁰³ Grotius, *De Jure*, cit.

¹⁰⁴ *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (1986) ICJ Rep. 14; KURNYSHOVA, *How Russia’s War*, cit., at 7.

¹⁰⁵ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment of 2 February 2024, at 30.

¹⁰⁶ UN General Assembly, *Aggression against Ukraine*, A/RES/ES-11/1, 18 March 2022;

Albeit contrary to the established international legal order, aggression has recently spawned divisions among the NATO countries that have thus far indirectly enforced sanctions and countermeasures¹⁰⁷, at the crossroads between neutrality and non-belligerency¹⁰⁸. For the time being, this has reinforced the idea of a common EU defence policy and it is far from clear what the long-term outcomes will be¹⁰⁹. In parallel with such developments, the threatened use of nuclear armed force by Russia¹¹⁰ has certainly infringed – and is maybe progressively eroding – the fundamental tenet, which is per se problematic, that nuclear force can only be used in extreme cases of self-defence¹¹¹.

Some scholars have invoked the demilitarisation of the Arctic as a necessary premise for achieving global climate sustainability¹¹², but recent international disengagement with the rule of law has rather intensified tensions in the Arctic region, speeding up the move from an institutional approach to progressive confrontation, or, at least, diminished cooperation and increased deinstitutionalisation. Although Arctic strategies maintain their specificities in the global context¹¹³, military advancements by Russia – including the deployment of defence missiles and an upgrade of the submarine fleet – have intensified security concerns around control of resources and foreseeable shipping routes¹¹⁴. Following the planting of a Russian flag on the North Pole and the proclamation that 'The Arctic is Russian' in 2007¹¹⁵, it is considered that, although Rus-

P. Starski and F. Arndt, *The Russian Aggression against Ukraine – Putin and His 'Legality Claims'*, in *Max Planck Yearbook of UN Law Online*, 2022, 756.

¹⁰⁷ A. Gheciu and S. VON HLATKY, *Irreconcilable Differences? NATO's Response to Russian Aggression Against Ukraine*, in *International Journal*, 2024, vol. LXXIX, 275.

¹⁰⁸ See N. RONZITTI, *Neutrality, Non-Belligerency, and Permanent Neutrality according to Recent Practice and Doctrinal Views*, in *Journal of Conflict and Security Law*, 2024, vol. XXIX, n. 1, 55.

¹⁰⁹ See S. RUTIGLIANO, *Ukraine Conflict's Impact on European Defence and Permanent Structured Cooperation (PESCO)*, in *European Papers*, 2023, 765; European Parliament, *MEPs Debate Future of EU Defence and Support for Ukraine*, 11 March 2025, <https://www.europarl.europa.eu/news/en/press-room/20250310IPR27219/meps-debate-future-of-eu-defence-and-support-for-ukraine>.

¹¹⁰ See, for instance, P. Sinovets and I. MAKSYMENKO, *Nuclear Deterrence in Russia's War on Ukraine: The Credibility Dilemma*, in A. VICENTE, P. Sinovets and J. THERON (eds), *Russia's War on Ukraine: The Implications for the Global Nuclear Order*, Springer, 2023, 141, 144.

¹¹¹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, in *ICJ Reports*, 1996, 226.

¹¹² H. EXNER-PIROT, *Between Militarization and Disarmament: Challenges for Arctic Security in the Twenty-First Century*, in L. HEININEN and H. EXNER-PIROT (eds), *Climate Change and Arctic Security: Searching for a Paradigm Shift*, Springer, 2020, 91, at 104.

¹¹³ R. GJEDSSØ BERTELSEN, *Arctic Security in International Security*, Routledge, 2020, 64.

¹¹⁴ US Congressional Research Service, *Changes in the Arctic: Background and Issues for Congress*, Congressional Research Service, 1 October 2025, <https://sgp.fas.org/crs/misc/R41153.pdf>. See further T. Pedersen and B. STEINVEG, *Russia's Clashing Ambitions: Arctic Status Quo and World-Order Revision*, in *Politics and Governance*, 2024, vol. XII, n. 1, at 8.

¹¹⁵ T. PARFITT, *Russia Plants Flag on North Pole Seabed*, in *The Guardian*, 2 August 2007, <https://www.theguardian.com/world/2007/aug/02/russia.arctic>.

sia's 2014 annexation of Crimea triggered an 'Arctic security dilemma'¹¹⁶, relations between Western States and Moscow in the region could not be regarded as 'unambiguously hostile' before the Russian 2022 attack against Ukraine¹¹⁷. Conversely, by 2022 Russian militarism and the PRC's 'Polar Silk Road'¹¹⁸ prompted the US to update its Arctic strategy, underscoring the need for military readiness and NATO collaboration¹¹⁹. Grounded in a monitor-and-respond approach, the Arctic Strategy elaborated by the US Department of Defense (DoD) in 2024 emphasises increasing great-power competition and US sovereignty protection in an environment where security threats are compounded by climate change¹²⁰, calling for 'readiness for operations at high latitudes'¹²¹. In 2023 and 2024, Finland and Sweden eventually decided to enter NATO¹²².

Arctic policy implications of tense international relations significantly undermine cooperation necessary to the achievement of climate sustainability¹²³. For instance, half of the Arctic lies in the Russian territory, and there are remarkable differences between the Russian and non-Russian Arctic areas. Indeed, about 60 per cent of the global permafrost lies in Russia, which makes it impossible to understand Arctic climate developments without data on the Russian Arctic. The establishment of the International Arctic Science Committee (IASC) as an NGO in 1990 facilitated collaboration and exchange of data on the Arctic, with the International Science Initiative in the Russian Arctic (ISIRA) particularly involving Russian representatives since 1994. Since 2000, however,

¹¹⁶ J. Kenneth Wither, *An Arctic Security Dilemma: Assessing and Mitigating the Risk of Unintended Armed Conflict in The High North*, in *European Security*, 2021, vol. IV, 649.

¹¹⁷ F.A. COTTA, *Navigating Arctic Realities: Geopolitics, Security, and Climate Change*, in *Il Politico*, 2024, vol. LXXXIX, n. 1, 41.

¹¹⁸ S. KOPRA, *China, Great Power Responsibility and Arctic Security*, in HEININEN and EXNER-PIROT (eds), *Climate Change*, cit., 33. But see Y. WANG and Y. MA, *Costly Signaling and China's Strategic Engagement in Arctic Regional Governance*, in *Politics and Governance*, 2024, vol. XII, n. 1, at 10, arguing in favour of a cooperative China oriented towards institutional cooperation for sustainability in the Arctic.

¹¹⁹ White House, *National Strategy for the Arctic Region*, cit., at 6.

¹²⁰ US DoD, *Arctic Strategy*, 2024, <https://media.defense.gov/2024/Jul/22/2003507411/-1/-1/0/DOD-ARCTIC-STRATEGY-2024.PDF>. See further S. KALLIOJÄRVI, *Age of Changes: Threat of Climate Change and Its Meaning for Security*, in HEININEN and EXNER-PIROT (eds), *Climate Change*, cit., 9, at 27.

¹²¹ US DoD, *Arctic Strategy*, cit., at 5.

¹²² See K. BASTMEIJER and R.L. JOHNSTONE, *Environmental Protection in the Antarctic and the Arctic: The Role of International Law*, in M. FITZMAURICE, M. BRUS, P. MERKOURIS and A. RYDBERG (eds), *Research Handbook on International Environmental Law*, Edward Elgar, 2023, 459, at 483; A. MICHALSKI, D. BROMMESSON and A.-M. EKENGREN, *Small States and the Dilemma of Geopolitics: Role Change in Finland and Sweden*, in *International Affairs*, 2024, vol. C, n. 1, 139.

¹²³ European Parliament, *Russia's War on Ukraine: Implications for the Arctic*, PE 754.604, January 2024. See further M. LINDROTH, H. SINEVAARA-NISKANEN and M. TENNBERG, *The End of the Arctic? Crisis, War and the Changing Landscape of Arctic Research*, in M. LINDROTH et al. (eds), *Critical Studies of the Arctic*, Springer, 2022, 269, at 271.

collaboration by Russia and China on Arctic science has declined and the process accelerated following Russia's aggression of Ukraine, with the immediate termination of collaborative academic programmes¹²⁴. The Arctic Council itself has been largely paralysed since February 2022, when Russia chaired it, and has not made much progress after Norway took over in 2023¹²⁵. However, scholars remark that, even during the cold war, Russia and the West found common grounds for cooperation in the Arctic and there is therefore still room for hope¹²⁶.

5. Given the centrality of the Polar regions for the preservation of a sustainable climate, a cooperative approach to Arctic climate sustainability would be at least suitable, aiming to fully coordinate Arctic regulation with the UNFCCC and the Paris Agreement. However, the absence of a comprehensive regulatory regime for the Arctic, unlike the ATS, rather discloses the possibility of competition and confrontation among sovereign powers in a fragile ecosystem, at the crossroads between economic development, the rule of law and sustainability. Is there therefore hope for the development of cooperative governance aiming to outline a consistent regulatory framework for a sustainable Arctic in the interest of the global community?

With regard to law-making and governance ('primary' regulation), although praising sustainability, Arctic policies largely driven by economic development – whereby Russia has thus far taken a strategic advantage over the US – have concretely resulted in increased military presence and tension. This evolution embeds and fuels diminished global respect for the rule of law, in a feedback-loop that is eroding the cooperative approach essential to achieving climate sustainability. Mitigation and adaptation developments from the standpoint of rule-enforcement through climate litigation and rights ('secondary' regulation) are thus far conservative – therefore unfolding at a slow pace – in Arctic countries, whereby only the supranational jurisdiction of the ECtHR discloses some hope for making States responsible for unsustainable mining in the deep seabed of continental shelves extending into the Arctic ocean. Time will tell if a prospective evolution of Arctic climate rights driven by the ECtHR – particularly 'greening' first- and second-generation fundamental rights – can lead to implementing effective sustainable climate policies for the Arctic and the international community as a whole.

¹²⁴ G. REES and U. BUNTGEN, *Russian Dilemma for Global Arctic Science*, in *Ambio* 2024, vol. LIII, 1246.

¹²⁵ Arctic Council, *Charimanships*, <https://arctic-council.org/about/previous-chairmanships>.

¹²⁶ A. BOROZNA, *Russia's Security Perceptions and Arctic Governance*, in *Politics and Governance*, 2024, vol. XII, n. 1, at 11.

CLIMATE CHANGE IN SOUTH ASIA: ASSESSING THE ROLE OF THE SAARC IN REGIONAL CLIMATE COOPERATION

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Summary: 1. Introduction and SAARC's Governance Mandate. – 2. Climate Change Vulnerability in South Asia. – 3. SAARC and Climate Change Responses. – 4. National-Level Climate Responses and the Way Forward. – 5. Conclusion.

ABSTRACT

Climate change is an existential and experiential threat to humanity. South Asia is no exception to this reality. Home to one-fifth of the humanity, the South Asian region is highly vulnerable to climate change and its impacts. Glacial melts, floods, droughts, heatwaves, coastal erosion and increased cyclones are becoming increasingly frequent and severe, with severe implications for lives, livelihoods, and ecology. It is well recognised that addressing climate change requires solidarity and collaboration between nations. Since many climate change impacts are felt beyond borders, regional cooperation is essential to building resilience and coordinating climate responses. This paper critically evaluates the role of the South Asian Association of Regional Cooperation (SAARC) in addressing climate change. Energy concerns motivated the initial focus of SAARC on climate change. In 2007, SAARC initiated an Action plan for Climate Change and later signed the SAARC Climate Declaration. In 2010, an Intergovernmental expert group on Climate Change was constituted to oversee the implementation of the Plan. Though the SAARC is slowly entering the climate area, the institution is structurally and politically weak. The instant paper critically examines and evaluates the initiatives under taken at the SAARC level and explore its effectieness.

Keywords: Climate Change, South Asia, SAARC, Regional Cooperation, Climate Action Plan, Sustainable Development, Transboundary Climate Risks, SAARC Climate Declaration, Climate Justice

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1. South Asia is home to 26.05% of the world's current population and makes up 4.61% of the planet's land area¹. Despite making up just 8% of the world's carbon output, South Asia is a major climatic hotspot². The World Bank estimates that 750 million South Asian people have experienced at least one natural disaster³. As reports foresee lasting impacts⁴, the region faces issues such as melting glaciers, erratic monsoons, floods, droughts, and rising sea levels, threatening agriculture, food security, livelihoods, causing water shortages, population dislocation, a lack of land to grow food, human health concerns and push factors⁵.

The South Asia Climatic Change Roadmap⁶ (SACCR) states that the region's growing urbanisation, high reliance on monsoon-fed agriculture, and dense coastal population pose serious climatic concerns. The Himalayan glaciers are melting quickly, endangering the security of food, energy, and water in several of the region's nations. Simultaneously, severe and frequent heatwaves have emerged as a defining feature of the area's climatic issues, with record-breaking temperatures often occurring in India and Pakistan⁷. Rising sea levels pose grave concerns to Bangladesh's low-lying delta areas⁸. Comprehensive, economy-wide initiatives are needed to in-

¹ World Population Review, 'Southern Asia Population 2024' (18 April 2025), available online at: <https://worldpopulationreview.com/continents/southern-asia#:~:text=Southern%20Asia%20comprises%204.61%25%20of,Southern%20Asia%20is%20approximately%202%2C085%2C212%2C758> (accessed 16 Apr. 2025).

² UNICEF, 'Climate Change and Environment' (UNICEF South Asia, 2024), available online at: <https://www.unicef.org/rosa/climate-change-and-environment> (accessed 16 Apr. 2025).

³ J. ROOME, 'SouthAsia4Climate: Solutions to tackle climate change in South Asia' World Bank Blogs, February 10, 2022, available online at: <https://blogs.worldbank.org/en/endpovertyinsouthasia/southasia4climate-solutions-tackle-climate-change-south-asia> (accessed 16 Apr. 2025).

⁴ H.A. AWAN, H. SAEED, *Climate Change and Its Impact on South Asian Economies*, in *Pakistan Social Sciences Review*, 2024, available online at: <https://horizonpublishing.com/journals/index.php/PST/article/view/6379> (accessed 1 May 2025); Asian Development Bank, *Asia-Pacific Climate Report 2024: Climate Challenges and Solutions for the Region*, 2024, available online at: <https://www.adb.org/publications/asia-pacific-climate-report-2024> (accessed 1 May 2025); World Bank, *Integrating Climate and Development in South Asia*, 2024, available online at: <https://www.worldbank.org/en/region/sar/brief/integrating-climate-and-development-in-south-asia/integrating-climate-and-development-in-south-asia-region> (accessed 1 May 2025).

⁵ M. ROWLING, *Climate change could create 63 million migrants in South Asia by 2050* Reuters December 18, 2020, available online at: <https://www.reuters.com/article/us-climate-change-migration-southasia-tr-idUSKBN28S1WV/> (accessed 16 Apr. 2025).

⁶ World Bank Group, *Climate Change Action Plan (2021-2025)*, South Asia Roadmap, available online at: <https://openknowledge.worldbank.org/server/api/core/bitstreams/6ddf98d7-94e4-57d3-a17f-509e91d5f352/content> (accessed 16 Apr. 2025).

⁷ U.S. YOUNUS, *The Politics of Extreme Heat in Urban South Asia*, in *Current History*, 2025, 136 ff.

⁸ M. SHARIOT-ULLAH, *Sea-level Rise and Sustainable Shore Protection Strategies in the Low-lying Delta: A Case Study of Bangladesh* (2024) 71 *Regional Studies in Marine Science*,

crease resilience and lessen the effects of these vulnerabilities. With some of the fastest-growing nations in the world and a large, South Asia is making significant economic strides. The region's infrastructure, livelihoods, and economic trajectory are all seriously threatened by climate change's effects, including floods, droughts, cyclones, and intense heat waves⁹. These climate hazards have the potential to undo decades of arduous economic and development progress if adaptation and resilience (A&R) investments are not made quickly and proactively.

The SAARC has recognised climate change as a critical challenge since the late 1980s and these countries are among the most vulnerable geopolitical entities in the world to the effects of global warming, with climate change-induced droughts, downpours, and rising temperatures becoming more frequent. SAARC's efforts to address these issues have included declarations, action plans, and institutional mechanisms, but regional tensions, limited cooperation, and weak implementation have hampered progress.

This paper examines climate change and assesses the role of SAARC in regional climate cooperation in South Asia in four parts. Part I explores the introduction of regional framework of climate change and SAARC's governance mandate. Part II evaluates the vulnerability of South Asia to climate change. Part III analyzes SAARC and climate change responses. Part IV critically combines national responses and concludes with recommendations for enhancing regional cooperation.

Methodology

The instant research paper adopts a doctrinal approach. It analyses primary legal sources such as statutes, treaties, and case law, as well as secondary sources like commentaries and regional and national policy documents. It focuses on data sources like South Asian environmental regulations, SAARC agreements, etc. It evaluate laws and their coherence and alignment with international standards and enforcement mechanisms. However, the research paper acknowledges the constraints, such as focusing on legal texts rather than field data collection. Existing Scholarship on the role of regional organisation like SAARC on climate cooperation in South Asia is negligible, and there are no key studies on regional climate

available online at: https://www.researchgate.net/publication/378567541_Sea-level_rise_and_sustainable_shore_protection_strategies_in_the_low-lying_delta_A_case_study_of_Bangladesh (accessed 16 Apr. 2025).

⁹ S. JOLLY, N. AHMAD, M. SCOTT, *Introduction*. In: S. JOLLY, N. AHMAD, M. SCOTT (eds) *Climate-Related Human Mobility in Asia and the Pacific*, Singapore. (Springer 2024), available online at: https://doi.org/10.1007/978-981-97-3234-0_1 (accessed 17 Apr. 2025).

change law (RCCL) in South Asia based on international treaties like the Paris Agreement.

SAARC and its Governance Mandate

The South Asian Association for Regional Cooperation (SAARC) was established in 1985. SAARC consists of eight member States: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka¹⁰. The fundamental objective of this regional body is to promote the overall economic, cultural and social welfare and growth of the South-Asian people¹¹. SAARC charter outlines the organisation's core objectives which include¹².

- Promoting the welfare of the peoples of South Asia and to improve their quality of life;
- Accelerating economic development, social progress and cultural exchange expansion in the region and to provide all individuals the opportunity to live in dignity, peace and to realize their full potentials;
- Promoting and strengthening collective self-reliance among the member countries of SAARC in South Asia;
- Contribute to mutual trust, understanding and appreciation of one another's problems;
- Strengthen cooperation among themselves in international forums on matters of common interests;

An assessment of the objectives of the SAARC reveal its broad nature. Firstly, its objectives are not confined to cooperation between member states in promoting economic, social and cultural development, its objectives extend beyond state centrism¹³. Pertinently, it emphasises the welfare of the people of South Asia and focuses on human rights including dignity and quality of life. The emphasis on the people of South Asia is important as it represents that the objective of the organisation is people centric.

In addition, the objectives also focus on encouraging collective position on matters of common interest. The SAARC subscribes to the pur-

¹⁰ South Asian Association for Regional Cooperation, About SAARC (SAARC) available online at: <http://saarc-sec.org/about-saarc> (accessed 16 Apr. 2025)

¹¹ Id.

¹² *Charter of the South Asian Association for Regional Cooperation* (adopted 8 December 1985) 4 ASYIL 473 (SAARC Charter) art I, available online at: <https://www.saarc-sec.org/index.php/about-saarc/saarc-charter> (accessed 16 Apr. 2025).

¹³ L. SAEZ, *The South Asian Association for Regional Cooperation (SAARC): An Emerging Collaboration Architecture*, Routledge (2012) 8. See generally for Organisations, R. PRESTHUS, *The Organisational Society: An Analysis and A Theory* (Virtage Books, New York, 1962).

poses and principles¹⁴ of the UN Charter while functioning as a regional body in the South Asia milieu. It refers to the following core international principles including principle of sovereign equality¹⁵, territorial integrity¹⁶, political independence¹⁷, non-interference¹⁸ in the internal affairs of member-states¹⁹, peaceful settlement of all disputes²⁰ and mutual benefits.

SAARC operates through a hierarchical structure. At the apex of the hierarchical structure there is the Meetings of the Heads of State known as Summit as its highest decision making authority²¹. SAARC Summits are usually held biennially hosted by a Member State in alphabetical order²². Council of Ministers (CoM) comprising of the Ministers of Foreign /External Affairs of the Member States comes second to Summit in authority. CoM is involved in the formulation of policy paradigms of the SAARC, review of progress of cooperation under SAARC; decision on new areas of cooperation and establishment of additional mechanism under SAARC, as deemed necessary²³. CoM is followed by the Standing Committee represented by the Foreign Secretaries of the SAARC Member States. Its functions include overall monitoring of the decisions taken at the Summit and CoM level²⁴. Below the CoM there is programming Committees and technical committee to consider the activities envisaged at the highest level and oversee the implementation²⁵. It should be mentioned that the SAARC charter mandates that decisions at all levels are to be taken on the basis of consensus and unanimity; and bilateral and contentious issues are excluded from the purview of deliberations at the SAARC platform²⁶.

Since its establishment, SAARC has taken measures to encourage cooperation between the member countries in the field of economic, social and cultural cooperation²⁷. In the last forty years of its existence, SAARC through

¹⁴ SAARC Charter *op. cit.*, art II; Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI (UN Charter) art I.

¹⁵ Id. UN Charter art II (1).

¹⁶ SAARC Charter *op. cit.* art II (1); UN Charter *op. cit.* art II (4).

¹⁷ Id.

¹⁸ Id.

¹⁹ SAARC Charter *op. cit.* art II (1); UN Charter *op. cit.* art II (7).

²⁰ SAARC Charter *op. cit.* Preamble; UN Charter *op. cit.* art XXXIII (1).

²¹ South Asian Association for Regional Cooperation, *SAARC Structure: SAARC Summits* available online at: <https://www.saarc-sec.org/index.php/about-saarc/saarc-structure/saarc-summits> (accessed 17 April 2025).

²² Id.

²³ SAARC Charter *op. cit.* art IV (1)

²⁴ Id. art V (1)

²⁵ Id. art VI

²⁶ Id. art X

²⁷ SAARC *op. cit.*

joint effort has played an active role in reducing poverty, strengthened energy cooperation, promoted trade, and providing educational opportunities²⁸. SAARC has also initiated steps to collaborate in climate change. The instant paper explores the step taken by the SAARC in furthering cooperation between member states in addressing climate change. Before proceeding with the specific effort of SAARC, the next section contextualises the discussion by examining the climate change vulnerability for South Asian countries.

2. Profoundly affected by climate change, South Asia is considered one of the most vulnerable regions in climate change. As the World Bank (South Asia Climate Roadmap, 2023) indicated, climate change may impede regional GDP development by 2-3% annually by 2050, thereby reversing significant development²⁹. Losses of \$160 billion annually by 2030 are another way to view the future³⁰. Economic losses will adversely affect agriculture, health, water security, and infrastructure. Despite playing almost no role in the history of global GHG emissions, with South Asia contributing less than 5% of cumulative green house emissions³¹ the region is nevertheless under disproportionately high threats from climate disasters like increasing temperatures, changing monsoon patterns, glacial melting, and flooding.

Compounding this issue, economic development varies widely in South Asia. While India and Bangladesh are developing fast into the industrial age, Nepal, Bhutan, and Afghanistan is still considered agrarian. Their economies depend heavily on climate-sensitive sectors such as agriculture, tourism, and forestry³². This uneven development renders these states fragile under climate hazards, trapping millions within displacement, poverty, and food insecurity³³. The most obvious evidence for climate change, particularly in South Asia, is seen in the rapidly melting glaciers of the Himalayas, which have pronounced effects on millions whose lives depend directly on their waters. The Himalayas, often termed the “water towers” of Asia, provide fresh water to nearly 1.3 billion people. This area is reported to be warming at 0.3 °C per

²⁸ Ma. JIALI, SAARC: Achievements and Challenges (2012) 9(1) *Policy Perspectives* 161-65.

²⁹ World Bank Group, *op. cit.*

³⁰ *Id.*

³¹ Ministry of Environment, Forest and Climate Change, Government of India, *India's Long-Term Low-Carbon Development Strategy. Submission to the United Nations Framework Convention on Climate Change*, 2022, 1 available online at: <https://moef.gov.in/uploads/2022/11/Indias-LT-LEDS.pdf> (accessed 20 Apr. 2025)

³² World Bank Group, *South Asia: Shared Views on Development and Climate Change*, 2009.

³³ V. BHATT, *Impact of Climate Change on South Asia: Problems and Possible Solutions*, in *International Journal of Scientific Research*, VI (2017), 280-281.

decade, and 15% of its ice mass has been lost since 2000³⁴. The water bodies in Nepal, notably Imja Lake, and Bhutan, namely Thorthormi Glacier, are hazardous owing to the hazards posed by GLOF³⁵. In recent years, Uttarakhand, India has witnessed an increase in landslides and floods, leading to displacement from multiple areas where nearly 18.5% of the state is under high to very high landslide susceptibility zones³⁶.

The threat of drought and acidification is also growing and alarming. On average, temperatures in Afghanistan are increasing twice as fast as global averages; over 12 million people face acute food insecurity³⁷. Central India faces recurrent droughts, and areas like Marathwada have recorded 27 since 2001³⁸. These droughts have led to thousands of farmers committing suicide and created massive migration into cities that hurt urban economies and exacerbate poverty³⁹.

The Asian Development Bank stated in 2021 that flood losses will increase sharply due to climate change in South Asia⁴⁰. Increased glacial melt and heavy rainfall will cause river flows to inundate vast low-lying land areas and landslides in hilly areas. According to the ADB's high-emission scenario, annual flood damages by 2070 might reach \$1 trillion, with South Asia suffering the most from the impacts⁴¹. In 2022, the floods severely inundated one-third of Pakistan, displacing about 33 million people and causing damages of over \$40 billion⁴². Saltwater intrusion could submerge

³⁴ B. TALUKDER, R. MATTHEW, G.W. VANLOON, M.J. BUNCH, K.W. HIPEL, J. ORBINSKI, *Melting of Himalayan Glaciers and Planetary Health*, in *The Lancet Planetary Health*, 2021.

³⁵ N.S. PRADHAN, T.C. SHERPA, S. CHAUDHARY, *World Day for Glaciers – 21 March 2025. The Urgent Need to Preserve Glaciers in a Warming World*

³⁶ V. CHAUHAN, L. GUPTA, J. DIXIT, *Landslide susceptibility assessment for Uttarakhand, a Himalayan state of India, using multi-criteria decision making, bivariate, and machine learning models*, in *Geoenvironmental Disasters*, 2025, vol. XII, Art. 2, available online at: <https://geoenvironmental-disasters.springeropen.com/articles/10.1186/s40677-024-00307-3> (accessed 2 May 2025).

³⁷ T. GBADEGESIN, B. ANDREE, A. BRAIMOH, *Better data for better outcomes: New tools and analysis to break Afghanistan's food security crisis*, in *World Bank Blogs*, February 13, 2025.

³⁸ M. MASROOR, S. REHMAN, R. AVTAR, M. SAHANA, R. AHMED, H. SAJJAD, *Exploring climate variability and its impact on drought occurrence: Evidence from Godavari Middle sub-basin, India*, in *Weather and Climate Extremes*, 30, 100277, December 2020.

³⁹ United Nations, *WMO Report: Asia Hit Hardest by Climate Change and Extreme Weather*, 2024.

⁴⁰ Asian Development Bank. (2021). *ADB Annual Report 2021: Toward a Green and Inclusive Recovery*, available online at: <https://www.adb.org/sites/default/files/institutional-document/788046/adb-annual-report-2021.pdf> (accessed 30 Apr. 2025)

⁴¹ Asian Development Bank, *Asia-Pacific Climate Report 2024: Catalyzing Finance and Policy Solutions* (2024).

⁴² International Centre for Integrated Mountain Development (ICIMOD), *Effects of Melting Glaciers on Food Production in South Asia*, 2022.

17% of Bangladesh’s landmass by 2050, displacing 20 million people and affecting agriculture⁴³. The Maldives, where 80% of land is below an elevation of one meter, could be engulfed with a possible 0.5-meter rise in sea level, making 77% of its habitable land uninhabitable⁴⁴.

One of the most life-threatening consequences of climate change is its impact on food security induced by changing patterns of rainfall, extreme weather, and land salinization⁴⁵. Climate change, which is estimated to push an additional 62 million South Asians into hunger by 2030, could jeopardize food security and rural livelihoods threatened by the Food and Agriculture Organization⁴⁶.

In addition, public health faces severe strain under rising temperatures, floods, and droughts, which have increased the incidence of diseases such as dengue, malaria, and heatstroke⁴⁷. Another critical area of concern is housing and personal security, particularly for displaced communities. Cyclones Fani (2019)⁴⁸ and Amphan (2020)⁴⁹ damaged 2.8 million homes in India and Bangladesh alone.

These environmental shocks directly impact South Asia’s fundamental human rights and development indicators. There are threats caused by climate change in South Asia to the very core of human rights provided in the ICCPR, namely Article 6 - Right to life and Article 12 - Freedom of movement⁵⁰. Additionally, climate change undermines other fundamental rights enshrined in

⁴³ UNICEF, *South Asia Region Humanitarian Situation Report No. 3, 1 January to 31 December 2024*, posted 22 Feb. 2025.

⁴⁴ M.S. SONET, M.Y. HASAN, S. CHAKMA, A.A. KAFY, *Assessing Tropical Cyclone Impacts in Coastal Bangladesh: A Change Detection Analysis on Cyclone Bulbul Using Geospatial Analysis and Remote Sensing Techniques*, in *International Journal of Disaster Risk Reduction*, 2024.

⁴⁵ S. KUMAR, M. SHAH, *Climate change-induced migration in South Asia: policy gaps and responses*, in *Discover Sustainability*, 2024, vol. V, Art. 177, available online at: <https://link.springer.com/article/10.1007/s43994-024-00177-3> (accessed 1 May 2025).

⁴⁶ P. SHARMA, S. FARIDI (eds.), *Food Security in South Asia*, National University of Singapore and Institute of South Asian Studies, 2024.

⁴⁷ L. FERNANDO, V.P. WICKRAMASINGHE, P. KALRA, R. KASTNER, E. GALLAGHER, *Epidemiological burden of dengue in Sri Lanka: A systematic review of literature from 2000-2020*, in *IJID Regions*, 2024, 13:100436.

⁴⁸ UNICEF India, *Cyclone Fani Situation Report #2 (National)* (12 May 2019) available online at: <https://www.unicef.org/media/82111/file/India-Cyclone-Fani-SitRep-12-May-2019.pdf> (accessed 30 Apr. 2025).

⁴⁹ UNICEF Bangladesh. (2020). *Cyclone Amphan Situation Report #2 – 21 May 2020*, available online at: <https://www.unicef.org/media/78176/file/Bangladesh-SitRep-Cyclone-Amphan-21-May-2020.pdf> (accessed 30 Apr. 2025).

⁵⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts VI, XII.

international instruments, including the right to adequate housing and food (ICESCR, Article 11), the right to health (ICESCR, Article 12)⁵¹, and the rights of indigenous peoples and women⁵² as protected under UNDRIP and CEDW respectively. As parties to these international covenants, South Asian states have a legal responsibility to uphold these rights. Given the vulnerability of the region, climate change is an important environmental, social and political challenge for the region's peoples and governments⁵³. The following section will address the role played by SAARC in elevating climate consciousness to the policy and implementation level for regional collaboration.

3. The third SAARC summit, which took place in Kathmandu marked the beginning of the main institutional reaction to environmental issues. The SAARC Summit commissioned a research study on the "Protection and Preservation of the Environment and the Causes and Consequences of Natural Disasters"⁵⁴. The final report of the study submitted in 1991 placed a strong focus on the creation of the SAARC Fund for Environmental Protection and the SAARC Network of Environmental NGOs. In order to coordinate and carry out its recommendations, the report also created the SAARC Committee on Environment⁵⁵. However, it should be noted that the details about its implementation and effectiveness is lacking at the public domain.

The fourth summit, which took place in Islamabad, Pakistan, in 1988 emphasised Information exchange on climate change technology transfer, regional mitigation strategies, and scientific technologies were the main topics of the regional conversation⁵⁶. The Fifth Summit, which took place

⁵¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) arts XI, XII.

⁵² Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); United Nations Declaration on the Rights of Indigenous Peoples (UNGA Res 61/295, 13 September 2007).

⁵³ A. MISHRA et al., *Climate Risks in the SAARC Region: Ways to Address the Social, Economic & Environmental Challenges*, The Energy and Resources Institute, New Delhi, 2012, Project Report No. 2012GW03, 60 ff., available online at: https://www.researchgate.net/publication/283436395_Climate_risks_in_the_SAARC_region_ways_to_address_the_social_economic_environmental_challenges (accessed 30 Apr. 2025).

⁵⁴ South Asian Association for Regional Cooperation, *The Kathmandu Declaration of the Heads of State or Government of the member countries of the South Asian Association for Regional Cooperation (3rd SAARC Summit*, Kathmandu, 4 November 1987), available online at: <https://www.saarc-sec.org/index.php/resources/summit-declarations/21-third-saarc-summit-kathmandu-1987/file> (accessed 1 May 2025).

⁵⁵ South Asian Association for Regional Cooperation, *Regional study on the causes and consequences of natural disasters and the protection and preservation of the environment* (South Asian Association for Regional Cooperation, 1992).

⁵⁶ South Asian Association for Regional Cooperation, *The Islamabad Declaration of the*

in Male in 1990 addressed climate change for the first time, highlighting the region's unique vulnerabilities and placing a strong emphasis on systems for technology transfer and financial support⁵⁷.

The 6th summit, which took place in Colombo, Sri Lanka, focused on the necessity of funding in order to pursue and advance sustainable development⁵⁸. The 7th SAARC Summit focused on South-South and intra-SAARC collaboration on environmental issues and concerns⁵⁹. 9th SAARC summit which adopted the Environment Action Plan⁶⁰.

The Environment Action Plan aims to address regional environmental concerns and enhance the environmental management capabilities of the region through co-ordinated national and regional activities⁶¹. The protection of the environment is considered as the axis of the Environment Action Plan, and human well-being is its ultimate goal⁶².

The Environment Action Plan highlights the following implementation strategies including the increased use of "Environmental Assessment" in addressing environmental issues, and establishing legislative framework to encourage creating cooperative efforts to preserve the environment and advance sustainable development⁶³. It reaffirmed the need for a committee of experts to conduct periodic analyses of the effects of climate change on

Heads of State or Government of the member countries of the South Asian Association for Regional Cooperation (4th SAARC Summit, Islamabad, 31 December 1988), available online at: <https://www.saarc-sec.org/index.php/resources/summit-declarations/13-fourth-saarc-summit-islamabad-1988/file> (accessed 1 May 2025).

⁵⁷ South Asian Association for Regional Cooperation, *The Male Declaration of the Heads of State or Government of the member countries of the South Asian Association for Regional Cooperation* (5th SAARC Summit, Male, 23 November 1990), available online at: <https://www.saarc-sec.org/index.php/resources/summit-declarations/10-fifth-saarc-summit-male-1990/file> (accessed 12 April 2025).

⁵⁸ South Asian Association for Regional Cooperation, *The Colombo Declaration of the Heads of State or Government of the member countries of the South Asian Association for Regional Cooperation* (6th SAARC Summit, Colombo, 21 December 1991), available online at: <https://www.saarc-sec.org/index.php/resources/summit-declarations/19-sixth-saarc-summit-colombo-1991/file> (accessed 01 April 2025).

⁵⁹ South Asian Association for Regional Cooperation, *The Dhaka Declaration of the Heads of State or Government of the member countries of the South Asian Association for Regional Cooperation* (7th SAARC Summit, Dhaka, 11 April 1993) available online at: <https://www.saarc-sec.org/index.php/resources/summit-declarations/17-seventh-saarc-summit-dhaka-1993/file> (accessed 01 May 2025).

⁶⁰ South Asian Association for Regional Cooperation, *SAARC Environment Action Plan 1997* (3rd Meeting of the SAARC Environment Ministers, Dhaka, 3 July 2008), available online at: <https://www.saarc-sec.org/images/areas-of-cooperation/ENB/SAARC%20ENVIRONMENT%20ACTION%20PLAN.docx> (accessed 01 March 2025).

⁶¹ Id. 'Aims and Strategies'.

⁶² Id.

⁶³ SAARC, SAARC Environment Action Plan, *op. cit.* 'Environmental Assessment'.

the South Asian area⁶⁴. It also emphasizes Increasing people's sensitivity to and involvement in, finding solutions for climate change crisis and incidental environmental problems in the region through awareness and educational programmes⁶⁵. It highlighted environmental assessment as one of the basic activities which will support the prudent management of the environment and underscored the need to harmonize environmental standards is essential for management of the environment and particularly for pollution control in the regional context⁶⁶. It further proposed the establishment of the two regional institutes, the SAARC Forestry Centre and the SAARC Coastal Zone Centre⁶⁷. Focusing on the need for regional collaboration, Environment Action plan exalts governments to designate national nodal points on water resources management to facilitate networking for dissemination and exchange of information, scientific data and appropriate technologies. They would also share this information, data and technologies within mutually agreed frameworks of co-operation⁶⁸. It also calls for assessing the feasibility of a Regional Treaty on Environmental Law⁶⁹. Member nations were also required to designate a nodal ministry to oversee the plan's execution and advancement, work in tandem with the SAARC Secretariat, and serve as a liaison between the Secretariat and the government⁷⁰. 13th SAARC summit held in Dhaka offered their support for the creation of a regional environment treaty.

The 14th SAARC summit in New Delhi resulted in the Dhaka Declaration and SAARC Action Plan, which argued for the establishment of climate resilience frameworks in South Asia and expressed the deep concern about the threat caused by global climate change. The SAARC Council of Ministers welcomed Bangladesh's plans to host an expert gathering in Dhaka after this. As a result, an Expert Group Meeting on Climate Change-Induced Displacement preceded the SAARC Ministerial Meeting on Climate Change. Nonetheless, a draft SAARC Action Plan on Climate Change was put up by the Expert Group.

By strengthening regional collaboration, the SAARC Action Plan aimed to identify and provide possibilities for technology and knowledge transfer among its member countries specially focusing on south-south support⁷¹. Ac-

⁶⁴ Id.

⁶⁵ Id. 'Aims and Strategies'.

⁶⁶ Id. 'Environmental Assessment'.

⁶⁷ Id. 'Regional Institutions'

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ South Asian Association for Regional Cooperation, SAARC Action Plan on Climate Change 2008 (SAARC Ministerial Meeting on Climate Change, 3 July 2008) available on-

tion Plan also calls for supporting the global negotiation process of the UN-FCCC through a common understanding or elaboration of the various negotiating issues to effectively reflect the concerns of SAARC Member States⁷².

The 15th SAARC summit, which took place in Colombo in 2009, called for a thorough investigation into "Climate Justice: The Human Dimension of Climate Change" in order to provide a human rights-based strategy, with a special emphasis on the dangers and effects of climate change⁷³. In order to address climate change, the member nations promoted the equal evaluation⁷⁴ of the per capita carbon emissions of the Global North and Global South. The statement, which was adopted by the heads of state during the 16th SAARC summit in Thimpu, Bhutan, in 2010, aims to establish diverse intergovernmental panels backed by various SAARC organisations to guarantee the conservation and sustainable consumption of natural resources⁷⁵. The following points were agreed upon by the Member States:

The member states resolved to ensure the timely enforcement of the Climate Change Action Plan and the Dhaka Declaration, reaffirming their commitment to address climate change through concrete actions⁷⁶. In pursuit of this, they determined to establish the Intergovernmental Expert Group proposed under the Climate Change Action Plan to facilitate regional cooperation and provide strategic policy guidance⁷⁷. Recognizing the need for robust research, a study titled "*Climate Risks in the Region: Ways to Comprehensively Address the Related Social, Economic, and Environmental Challenges*" was proposed to be commissioned by the SAARC Secretariat⁷⁸. Additionally, the member states emphasized the importance of fostering regional linkages among organizations to promote the exchange of information, strategies, and best practices related to climate change.

In a bid to strengthen climate resilience, the establishment of an Intergovernmental Mountain Initiative, supported by the SAARC Forestry Cen-

line at: <https://www.saarc-sec.org/images/areas-of-cooperation/ENB/SAARC%20ACTION%20PLAN%20ON%20CLIMATE%20CHANGE.docx> (accessed 01 March 2025).

⁷² Id.

⁷³ Id.

⁷⁴ SAARC, 'Colombo Declaration' *op. cit.*

⁷⁵ South Asian Association for Regional Cooperation, The Thimpu Statement on Climate Change (Heads of State or Government, 16th SAARC Summit, Thimpu, 28-29 April 2010), SAARC/SUMMIT.16/15 (Thimpu Statement) available online at: <https://www.saarc-sec.org/index.php/resources/summit-declarations/18-sixteenth-saarc-summit-thimphu-2010/file> (accessed 01 March 2025).

⁷⁶ SAARC, SAARC Action Plan on Climate Change *op. cit.*; SAARC, 'Dhaka Declaration' *op. cit.*

⁷⁷ SAARC, SAARC Action Plan on Climate Change *op. cit.*

⁷⁸ Id.

tre, would focus on the significance of glaciers for sustainable development and livelihoods⁷⁹. Parallely, an Intergovernmental Monsoon Initiative was suggested to study rainfall patterns, their variability, and vulnerability to climate change, backed by the SAARC Meteorological Research Centre⁸⁰. Finally, the member states called for expediting the ratification of the SAARC Convention on Cooperation on Environment to facilitate its early and effective implementation across the region⁸¹.

Going forward, the 2014 Kathmandu Declaration placed a strong focus on regional collaboration in recognition of the existential survival threat that climate change poses to the area⁸². Despite these efforts, SAARC is idle for almost ten years, although there have been 18 SAARC presidents' summits so far, Nepal hosted the most recent one 11 years ago. Following the terrorist attack in September 2016 on an Indian army camp in Uri⁸³, Jammu & Kashmir, the SAARC summit lost steam. Other South Asian nations followed India in boycotting the event after India stated at the time that terrorism and the next SAARC summit, which was scheduled to be held in Pakistan, could not coexist. As a result whatever initiatives undertaken or proposed at the SAARC suffer from a lack of implementation. SAARC also confronts resource constraints, and proposals like a regional climate fund remain unimplemented due to funding and coordination issues, which are aggravated by the fragmented policies as the national priorities often overshadow regional goals, with countries like Maldives and Bangladesh advocating for climate refugee protections, while others lag⁸⁴.

Thus regional cooperation has been hampered by the political conflicts and mistrust between India and Pakistan. In this scenario, the South Asian countries have taken steps at the domestic level.

⁷⁹ SAARC, Thimpu Statement on Climate Change (n 78); SAARC Forestry Centre, *Proceedings of the Meeting of Heads of Institutes/Centres of Forestry Research on Sustainable Forest Management, Climate Change Related to Forestry and Mountain Ecosystems in the SAARC Region* (10-11 October 2012), Annex VII: Terms of Reference for the SAARC Inter-governmental Mountain Initiative, Taba, Thimphu, Bhutan.

⁸⁰ SAARC, Thimpu Statement on Climate Change *op. cit.*

⁸¹ Id.

⁸² SAARC, *The Kathmandu Declaration* (n 54). The Declaration has decided to establish the SAARC Environment and Disaster Management Centre by merging the earlier institutions established the SAARC Forestry Centre (Bhutan), SAARC Disaster Management Centre (India), SAARC Coastal Zones Management Centre (Maldives) and SAARC Meteorological Centre (Bangladesh).

⁸³ S.S. POUDEL, *SAARC Is Dead. Long Live Subregional Cooperation*, in *The Diplomat*, 27 September 2022, available online at: <https://thediplomat.com/2022/09/saarc-is-dead-long-live-sub-regional-co-operation/> (accessed 01 May 2025).

⁸⁴ A. SHARMA, *SAARC and Climate Change: Prospects and Challenges of Regional Cooperation*, in *South Asian Survey*, 2021

4. South Asian countries have responded to climate change challenges through national policy and legal initiatives. Afghanistan has adopted the National Adaptation Programme 2009, that recognizes the vulnerability of climate change to Afghanistan⁸⁵. In 2010, the National Environmental Protection Agency established a Climate Change Directorate with the mandate to understand climate change and its impacts based on the Islamic Republic of Afghanistan’s commitment to UNFCCC objectives⁸⁶. They have been mandated to encourage coordination between institutions and agencies operating in the area of climate change. Their mandate also includes increasing public awareness and mainstreaming climate change into national policies and development planning⁸⁷.

However, the biggest obstacle facing Afghanistan is obtaining climate financing to execute current policies and create new ones, as the Taliban government has not been acknowledged and is not receiving assistance from other international organisations. Policies require funding reforestation and land reclamation to diversify livelihood options for the climate-vulnerable people, as well as steps to ensure food security through sustainable agriculture techniques. Afghanistan’s inadequate institutional capability and absence of a certified national implementing agency prevent them from accessing funding from the Green Climate Fund (GCF) or the Global Environment Facility (GEF). The government of Bangladesh adopted the National Adaptation Plan (NAPA) 2005, which aims to address the adverse impacts of climate change and to promote sustainable development of the country⁸⁸. NAPA has been ably supported by the adoption of Bangladesh Climate Change Strategy and Action Plan 2009, which focuses on climate vulnerability and provides guidance on the steps to be taken, especially in the area of food security, social protection, and healthcare, comprehensive disaster management, Infrastructure vision, research identification and disaster-knowledge management, mitigation and low carbon development, and capacity building and institutional⁸⁹. In addition,

⁸⁵ *Afghanistan’s National Adaptation Program of Action for Climate Change (NAPA)*, 2009

⁸⁶ National Environmental Protection Agency, Climate Change Directorate, available online at: <https://www.nepa.gov.af/service3> (accessed 01 May, 2025).

⁸⁷ *Id.*

⁸⁸ Ministry of Environment and Forest (MOEF), Government of Bangladesh, *National Adaptation Programme of Action (NAPA)*, 2005, available online at: [http://old.moef.gov.bd/Climate%20Change%20Unit/National%20Adaptation%20Programme%20of%20Action\(NAPA\).pdf](http://old.moef.gov.bd/Climate%20Change%20Unit/National%20Adaptation%20Programme%20of%20Action(NAPA).pdf) (accessed 30 April 2025); K.S. MAHMOOD, *Legal and Policy Response to Climate Change in Bangladesh*, in M. UDDIN (ed.), *International Law, Climate Change and Bangladesh*, Springer, 2024.

⁸⁹ Government of Bangladesh, *Bangladesh Climate Change Strategy and Action Plan 2009*.

in 2010, Bangladesh adopted the Bangladesh Trust Fund Act to reverse the adverse impact of climate change through adequate financial assistance⁹⁰. Bangladesh recently updated its National Adaptation Plan (NAP) (2023-2050), focusing on climate-resilient development⁹¹. India has not enacted climate legislation. 2008, the country adopted the National Action Plan on Climate Change (NAPCC)⁹². NAPCC is supported by the State Action Plan on Climate Change⁹³. NAPCC is operationalized through eight strategic missions to help adapt to climate change⁹⁴. Bhutan lacks a specific climate change policy, but the country has been submitting regular communications to the UNFCCC. In addition, Bhutan strongly emphasizes environmental protection in its legislative framework, where a deep respect for ecology is ingrained⁹⁵. For instance, according to Article 5(1) of The Constitution of the Kingdom of Bhutan, environment is protected and it states that “Every Bhutanese is a trustee of the Kingdom’s natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment friendly practices and policies”⁹⁶. Like most other South Asian countries, Nepal does not have dedicated climate change legislation; policies govern its climate responses. Nepal adopted the National Climate Change Policy 2019, highlighting Nepal’s climate vulnerability and the lack of coordination among agencies to address the intersectoral concerns of climate change⁹⁷. The Policy, in its objectives, highlights the enhanced climate change adaptation competence of people, families, groups, societies and communities vulnerable to and at risk of climate change⁹⁸. Pakistan is the first South Asian country to enact a specific climate legislation. Climate Change Act 2017 aims to

⁹⁰ S. JOLLY, N. AHMAD, *Climate Refugees in South Asia: Protection Under International Legal Standards and State Practices in South Asia*, Springer, 2009, 160.

⁹¹ Government of Bangladesh, *National Adaptation Plan (NAP) 2023-2050*.

⁹² Government of India, *National Action Plan on Climate Change*, 2008.

⁹³ S. JOLLY, A.M. TRIPATHI, *Climate Displacement in India: Exploring the Current Legal Framework and Proposed Legal Initiatives*, in *Asia Pacific Journal of Environmental Law*, 2024, vol. XXVII(2), 185-210.

⁹⁴ Id.

⁹⁵ S. JOLLY, N. AHMAD, *op. cit.* 162.

⁹⁶ Constitution of the Kingdom of Bhutan 2008, art 5(1), available online at: <http://dlgdm.gov.bt/storage/upload-documents/2021/9/20/Constitution-of-bhutan-2008.pdf> (accessed 30 April 2025).

⁹⁷ Government of Nepal, *National Climate Change Policy*, 2019.

⁹⁸ Id.

fulfill Pakistan's obligations under international climate conventions and to address the effects of climate change. It envisages the establishment of a climate change authority headed by the Prime Minister to spearhead climate responses⁹⁹. Unfortunately, even after more than seven years of its enactment, the Authority has not been established, seriously impacting the implementation of the Act¹⁰⁰. Maldives enacted the Climate Emergency Act 2021¹⁰¹, to address climate change and aims to become a fully carbon-neutral country by 2030. While recognising the impact of climate change on human rights, the Act defines the legal structure and provides a plan of action for carbon neutrality¹⁰². Sri Lanka, which has been basing its climate responses through the adoption of the National Climate Change Policy of Sri Lanka¹⁰³, is currently drafting climate legislation for the country. Thus South Asian countries has been trying to address climate change through regional cooperation through SAARC and through their domestic efforts.

5. The paper has explored the vulnerability of South Asia to climate change and the steps taken by the SAARC in enhancing regional cooperation in addressing climate change. The paper highlighted South Asia's susceptibility to the negative consequences of climate change that has been influenced by its topography and geophysical characteristics. SAARC as an organization has underlined the importance of climate change. Through declarations and action plans, SAARC has emphasised regional co-operation, technology transfer, climate justice and raising public awareness about the region's vulnerability as essential to address climate change.

The intense political competition between India and Pakistan has caused the SAARC to lose direction. For SAARC to play a more robust role, long-standing geopolitical disputes, distrust and bilateral hostilities between India and Pakistan must be resolved; trade barriers must be lowered to promote economic integration; infrastructure must be developed; regional investment must be increased; and trustworthy institutions must be established through open governance and efficient administrative frameworks. Above all, SAARC's dedication to fair growth via digital technology, track II diplomacy, cultural interchange, teamwork, and strong political

⁹⁹ Government of Pakistan, *Climate Change Act*, ACT NO. X of 2017.

¹⁰⁰ H.I. KAZMI, *Pakistan Climate Change Act – Challenges*, in *The Tribune*, 30 June 2024, available online at: <https://tribune.com.pk/story/2475219/pakistan-climate-change-act-challenges> (accessed 01 May 2025).

¹⁰¹ Government of Maldives, *Climate Emergency Act*, Act No. 9/2021, 2021.

¹⁰² Id.

¹⁰³ Government of Sri Lanka, *National Climate Change Policy*, 2012.

will may bring the organisation back to life. Only then will we be able to fulfil the SAARC founders' objective of regional collaboration. At present given the political scenario unfolding in the region, SAARC's survival is doubtful. However, nations must cooperate and demonstrate wisdom since climate change is an existential concern.

Cooperation on climate change is a must for South Asia and this is the basic fact too. It would be beneficial for everyone if India and Pakistan could work out their geopolitical issues. Cooperation on climate, which is undoubtedly the largest political problem of the 21st century, cannot be held hostage to disputes from the 20th century, even in the absence of such hopeful possibilities. The implications of climate change are just too severe, and because of its transnational, savagely complicated distributional effects both inside and outside borders, and its multidimensional effects across water, ice, air, heat, and soil, collaboration is not just required but also existentially vital.

REGIONAL ORGANIZATIONS AND CHALLENGES OF CLIMATE CHANGE: WHICH LESSON FROM ASEAN?*

ELISA TINO**

SUMMARY: 1. Introduction. – 2. ASEAN’s Pathway to the Fight Against Climate Change. – 3. ASEAN Institutional Framework on Climate Change. – 4. ASEAN Legal Framework on Climate Change. – 5. ASEAN Climate Goals and Actions. – 5.1. Initiatives for Climate Change Mitigation. – 5.2. Actions for Climate Change Adaptation. – 6. Climate Change Issues in ASEAN’s External Relations. – 6.1. Climate Change Issues in ASEAN’s Relations with other International Organizations. – 6.2. Climate Change Issues in ASEAN’s Relations with Third Countries. – 7. Concluding Remarks.

ABSTRACT

This article examines ASEAN’s institutional and legal responses to climate change, assessing whether the Organization has effectively fulfilled a regional coordinating role for its Member States. Southeast Asia is among the world’s most climate-vulnerable regions, exposed to typhoons, sea-level rise, droughts, and transboundary hazards, making regional cooperation particularly urgent. The article traces ASEAN’s gradual engagement with climate change from the 2007 Singapore Declaration onward, analysing both the institutional framework – including the Working Group on Climate Change and the newly established ASEAN Centre on Climate Change – and the extensive body of soft law instruments adopted over the years, covering mitigation and adaptation initiatives in the areas of renewable energy, disaster risk reduction, food security, and climate finance. ASEAN’s external climate relations with the UN, the EU, China, Japan, and the United States are also considered. The article ultimately concludes that ASEAN has consistently opted for a flexible, non-binding approach rooted in the so-called “ASEAN Way” – prioritising sovereignty, consensus, and non-interference – which, while maintaining regional cohesion, has produced diluted commitments insufficient to meet Paris Agreement targets. Strengthening cross-sectoral coordination, improving implementation mechanisms, and fostering public-private partnerships are identified as essential steps to overcome this structural impasse.

1. According to the National Centers for Environmental Information (NCEI)¹, «the year 2024 was the warmest year since global records began in

* Information reported in the paper is updated as of October 2025.

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¹ The National Centers for Environmental Information (NCEI) is a U.S. government agency that manages one of the world’s largest archives of atmospheric, coastal, geophysical, and oceanic data.

1850»². The same statement was found in the State of Global Climate Report by the WMO, but it referred to the year 2023. And, continuing at this rate, it can be assumed that statements of this kind will unfortunately affect many years from here to come. The empirical data highlight, year by year, records broken for extreme temperatures, ocean heat, and sea-level rise, along with the continuing intensification of extreme weather and disaster events around the world. It is therefore undeniable that – as the International Tribunal for the Law of the Sea has recently recalled³ – climate change represents a common concern of humankind, although there is no doubt that some areas of the world are more exposed to it than others. This is particularly the case of Southeast Asia, which is one of the most vulnerable regions in the world due to the concentration of people and economic activities in the coastal areas, its resource-based economies, and the increased vulnerability of its people which is largely poor. Geological and geographical factors significantly expose Southeast Asian countries to a range of climatic and natural hazards, such as earthquakes, typhoons, sea level rise, volcanic eruptions, droughts, heat waves, etc., which are becoming more frequent and severe. In this regard, suffice it to say that in 2023 the region faced over a thousand disaster events. Additionally, the geophysical and climatic conditions shared by Southeast

² See [https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202413#:~:text=The%20year%202024%20was%20the,decade%20\(2015%E2%80%932024\)](https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202413#:~:text=The%20year%202024%20was%20the,decade%20(2015%E2%80%932024)).

³ See International Tribunal for the Law of Sea, Advisory Opinion of 21 May 2024, *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, para. 122. For some considerations about this opinion and the legal basis of the advisory jurisdiction of the International Tribunal for the Law of the Sea, see R. VIRZO, *Fondamento ed esercizio della competenza consultiva del Tribunale internazionale del diritto del mare: considerazioni a margine del parere del 21 maggio 2024*, in *La Comunità Internazionale*, 2024, 603-628; C. YIALLOURIDES, S. DEVA, *A Commentary on ITLOS' Advisory Opinion on Climate Change*, BIICL Blog, 24 May 2024, <https://www.biicl.org/blog/77/a-commentary-on-itlos-advisory-opinion-on-climate-change>. About the role of international judiciaries in the field of climate change, see P. LAWRENCE, *The International Court of Justice Advisory Opinion on Climate Change and Future Generations*, in *Chinese Journal of International Law*, 2024, 284-300; M. ADIGUN, *Climate Change Litigation before International Human Rights Tribunals in Africa The Role of Advisory Opinions*, in *International Community Law Review*, 2025, 131-161; L. BURGORGUE-LARSEN, *Deciphering the Judicial Policy of the European Court of Human Rights with Regard to Climate Change*, in *Rivista di Diritto Internazionale*, 2025, 25-46; S. FORLATI, *La Corte internazionale di giustizia di fronte ai cambiamenti climatici: «fra Scilla e Cariddi»?*, in *Rivista di Diritto Internazionale*, 2025, 7-24; L.C. LIMA, *Climate Change before the Inter-American Court of Human Rights*, in *Rivista di Diritto Internazionale*, 2025, 47-74; L. SCHIANO DI PEPE, *Il contenzioso climatico davanti alla Corte di giustizia dell'Unione Europea*, in *Rivista di Diritto Internazionale*, 2025, 75-104; C.E. FOSTER, *The 2025 International Court of Justice Advisory Opinion on Obligations of States in respect of Climate Change*, in *International and Comparative Law Quarterly*, 2025, 775-809; D. COPPENS, N. LOCKHART, *Wayfinders for Climate Change Action: The ICJ, ITLOS, IACtHR Advisory Opinions on Climate Change*, in *Netherlands International Law Review*, 2026, 1-34.

Asian countries have also led to common and transboundary environmental concerns, such as air and water pollution, urban environmental degradation and transboundary haze pollution.

Climate change affects negatively several economic sectors and basic needs for human life of involved countries⁴. Indeed, it raises problems in the conservation of biodiversity⁵, in the safeguard of coastal and marine environment, as well as in water resources management; this affects the plant productivity and the number of crops in various parts of the world, thus reducing food production and access and increasing food price volatility. In turn, this reverberates on people's health and makes it easier for diseases to spread. Moreover, climate change affects production and transaction costs through internalizing environmental costs, change in products, services and markets, drag on gross domestic product growth, carbon taxes, allocation and trade of environmental rights, new market opportunities for environmental goods and services. Nonetheless, extreme weather events and subsequent deteriorating living conditions and livelihoods often trigger forced migration. In essence, the subsequent indirect climate change impacts on food and water security, and changes in natural resource exploitation and migration patterns, affect the lives and livelihoods of people and communities across the highly diverse region and threaten its peace and security.

Southeast Asian States seem to be fully aware of the cross-sectoral nature of climate change and of its significantly negative impacts on their economies, some of which are already particularly fragile. Proof of this is that they all are parties to the UN Framework Convention on Climate Change (hereafter, UNFCCC)⁶ and to the Paris Agreement⁷. Accordingly, they ap-

⁴ In this regard, see particularly, M. CABALLERO-ANTHONY et al., *Climate Change and its Impact on Peace and Security in Southeast Asia*. Singapore, 2023, IV-X, 19-62 and 63-80.

⁵ It is now widely recognized that climate change and biodiversity are interconnected, particularly through changes in species to habitat and species to species interactions, reduced synchronicity between predators and availability of prey, migratory journeys and availability of food and other natural interactions that may be affected by changes in temperature, water and food availability and other climate driven factors.

⁶ The United Nations Framework Convention on Climate Change was concluded in New York on 9 May 1992, and it entered into on 21 March 1994. In literature see, among others, D. FREESTONE, *The United Nations Framework Convention on Climate Change – The Basis for the Climate Change Regime*, in K.G. GRAY et al. (eds), *The Oxford Handbook of International Climate Change Law*, London, 2016, 97-199; C. VOIGT, L. YOUNG, *The UNFCCC, the Paris Agreement and Legal Obligations for Climate Action*, in M.C. CORDONIER SEGGER, C. VOIGT (eds), *Routledge Handbook of Climate Law and Governance. Courage, Contributions and Compliance*, Abingdon/New York, 2024, 48-54

⁷ The Paris Agreement was concluded on 12 December 2015, and it entered into force on 4 November 2016. It outlines an action plan to limit global warming providing that global average temperature increase should not exceed 1.5°C by the end of the century. Consistently, State Parties

proved their own climate action plans, called nationally determined contributions, which set targets to be achieved in order to reduce gas emissions⁸. However, most Southeast Asian States, particularly those with limited public funds, depend on international support to implement and further develop their nationally determined contributions to meet ambitious climate goals. Hence, the obvious need for a regional coordination that can help them to achieve these goals, considering their different national circumstances. And it is because of such a need that ASEAN comes to the fore.

ASEAN is an intergovernmental organization whose members are eleven Southeast Asian States, namely Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor Leste and Vietnam⁹. It was originally established by the Bangkok Declaration in 1967 in order to facilitate interstate cooperation in economic, social, cultural and technical fields, and to promote regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of the United Nations Charter¹⁰. So, from legal point

are required to commit to climate action by submitting climate action plans to reduce their emissions and to communicate their action plans every five years (each plan setting more ambitious targets). For an evaluation of the implementation of the Paris Agreement see V. POPOVSKI (ed.), *The Implementation of the Paris Agreement on Climate Change*, Abingdon/New York, 2019; C. VOIGT, *Operationalizing the Paris Agreement Implementation and Compliance Committee (PAICC)*, in M.C. CORDONIER SEGGER, C. VOIGT (eds), *op. cit.*, 259-266; M. Mehling, *Operationalising Article 6 of the Paris Agreement*, in M.C. CORDONIER SEGGER, C. VOIGT (eds), *op. cit.*, 280-291.

⁸ In this regard, in literature see J. QIU ET AL., *Examining climate ambition enhancement in ASEAN countries' nationally determined contributions*, in *Environmental Development*, 2024, n. 1, 1-13. Updated information about nationally determined contributions approved by Southeast Asian States can be consulted at the following Registry, <https://unfccc.int/NDCREG>.

⁹ About ASEAN see, *ex multis*, H. DAVID, *Die ASEAN zwischen Konflikt, Kooperation und Integration*, Hamburg, 2003; C.B. ROBERTS, *ASEAN Regionalism. Cooperation, Values and Institutionalisation*. London, 2003; P.C. SINHA (ed.), *Handbook of ASEAN and Regional Cooperation. 12th Summit and Beyond*, New Delhi, 2007; E.L. FROST, *Asia's New Regionalism*, London, 2008; A. AMIRANTE, *La nuova Carta dell'ASEAN: un trattato per la transizione dalla cooperazione alla integrazione del Sud-est asiatico*, Napoli, 2010; S. TIWARI (ed.), *ASEAN. Life after the Charter*, Singapore, 2010; O. VON FEIGENBLATT, *The Association of Southeast Asian Nations (ASEAN). Conflict and Development*, New Delhi, 2012; D. DESIERTO, D. COHEN (eds.), *ASEAN law and regional integration: governance and the rule of law in Southeast Asia's single market*, Abingdon/New York, 2021; L. JONES, *ASEAN, Sovereignty and Intervention in Southeast Asia*, New York, 2012; A.W. ZIETEK, G. GIL (eds.), *ASEAN in a Changing World*, Berlin, 2021; E.Y. JOONG LEE (ed.), *ASEAN international law*, Singapore, 2022; S. CHO, J. KURTZ, *Investing the ASEAN Way: Theories and Practices of Economic Integration in Southeast Asia*, Cambridge, 2023; J. DOSCH, F. KLIEM (eds.), *The Elgar Companion to ASEAN*, Cheltenham, 2023.

¹⁰ See *ASEAN Declaration*, Bangkok, 8 August 1967 (hereafter, *Bangkok Declaration*). The Bangkok Declaration was originally signed by Indonesia, Malaysia, Philippines, Singapore and Thailand in 1967, launching the start of ASEAN. Brunei joined in 1984, Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999.

of view, it originally amounted to a *soft organization*¹¹, that is to say, it developed a cooperation model characterized by a strong flexibility already expressed by the non-legally binding nature of its founding act. However, a significant change in this respect took place in the 2000s. Since 2008 ASEAN has been governing by an international treaty (the so-called *ASEAN Charter*) transforming interstate cooperation from a *soft organization* to a *treaty-based one*¹².

On the premise that ASEAN served and is going to serve as a platform for interstate dialogue and cooperation in several fields, it is legitimate to ask whether – and, if so, how – it is able to play the aforementioned regional coordinating role and to advance policy discussions in the field of environmental protection and fight against climate change. The present paper aims to answer this question by investigating ASEAN's responses to these issues, particularly to that of climate change. So, it will provide an overview of institutional and normative frameworks developed by the Organization over the years to address the challenges posed by climate change.

2. Over the years, ASEAN has showed a steadfast commitment to confronting climate change through multisectoral dialogue and collaboration with key partners across agriculture, forestry, energy, transport, disaster management, and finance, among others. However, despite its *seniority*, its interest in issues related to environmental protection and climate change is relatively recent. Indeed, the 1967 Bangkok Declaration lacked any expressed or implied reference to these issues. This means that ASEAN founding Members did not aim to endow it with competences in these fields. This has an obvious explanation in the historical period in which such Declaration was adopted. First of all, it is to be taken into account that ASEAN was established during a period of continuing political unrest and armed conflict in various parts of the region¹³. Therefore, as it can be clearly inferred by the Preamble of the

¹¹ The expression *soft organization* usually refers to forms of association which are established and regulated by State manifestations of will be expressed in political and diplomatic acts (that are not legally binding) and designed in such a way to favour fewer constraining options for the freedom of their Member States. In legal literature see, mainly, J. KLABBERS, *Institutional Ambivalence by Design. Soft Organization in International Law*, in *Nordic Journal of International Law*, 2001, 403; A. DI STASI, *About Soft International Organizations: An Open Question*, in R. VIRZO, I. INGRAVALLO (eds.), *Evolution in the Law of International Organizations*, Leiden, 2015, 44.

¹² About this change of legal status see S. TIWARI (ed.), *op. cit.*

¹³ In the 1960s, Southeast Asia was a hotbed of political turmoil, largely driven by the Cold War and communist insurgencies. The region was grappling with the legacy of colonialism, rising communist movements, and the involvement of external powers like the US and China. Key events included the Vietnam War, the rise of communist movements in various countries, and the increasing Cold War tensions. In this regard see J. GRAHAM PARSONS, *Southeast*

Bangkok Declaration, the main goal pursued by its founding Members was obviously to maintain and strengthen security and stability in the region¹⁴, and not to promote environmental protection. On the other hand, it is to be borne in mind that globally the environmental debate was still in its infancy when ASEAN was established¹⁵. Truthfully, it is also worth noting that the Bangkok Declaration failed in defining precisely which were the matters falling under ASEAN's jurisdiction. It merely provided, in general terms, that ASEAN promoted «active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields» (Article II, para. 3).

Just as the Bangkok Declaration was a *child of its time*, so is the ASEAN Charter. Indeed, the latter, which was concluded in 2007 (that is to say, when the ASEAN Member States had already become parties to the UNFCCC¹⁶ and the international debate on the environmental protection and the fight against climate change was already well underway and consolidated) contains an implicit reference to these matters. Paragraphs 8 and 9 of its Article 1 are relevant in this regard. Indeed, paragraph 8 reads «the

Asia, 1950-1960, in *World Affairs*, 1960, n. 1, 3-5; R. BUTWELL, *Growing Involvement in Asia: 1960-1968*, in *Current History*, 1969, n. 336, 88-92.

¹⁴ The Preamble of the Bangkok Declaration read «Desiring to establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region; Conscious that in an increasingly interdependent world, the cherished ideals of peace, freedom, social justice and economic well-being are best attained by fostering good understanding good neighbourliness and meaningful cooperation among the countries of the region already bound together by ties of history and culture; Considering that the countries of South-East Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples (...)». About ASEAN's engagement in the security field see J. VALUCH, O. HAMUĚÁK, *Association of Southeast Asian Nations*, in S. SAYAPIN et al. (eds), *International Conflict and Security Law. A Research Handbook*, The Hague, 2022, 595-608.

¹⁵ As is known, the issue of environmental protection began to be raised at the international level in the 1970s at the instigation of the UN which created the UN Environment Program in 1972. The United Nations Conference on the Human Environment, held in Stockholm in 1972, was the first world Conference to make environment a major issue. Before that time, environmental protection issues had arisen only occasionally and, often, indirectly, in the context of rules directed at addressing issues as diverse as neighbourly relations between neighbouring States. At the Stockholm Conference, as well as at the one that followed, some important statements of principles were adopted (e.g. 1972 Declaration of the United Nations Conference on the Human Environment; 1992 Rio Declaration on Environment and Development; 2002 Johannesburg Declaration on Sustainable Development).

¹⁶ Nine out of eleven ASEAN Member States became parties to the UNFCCC between 1994 and 1997. Timor-Leste and Brunei Darussalam acceded to the Convention in April 2006 and in August 2007 respectively.

purposes of ASEAN are (...) to respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges». Although it does not expressly mention *climate change*, it can reasonably be assumed that the latter amounts to a transboundary challenge due to its intrinsic features and, therefore, that *combating climate change* is one of ASEAN's purposes. This conclusion is – in our view – supported by the wording of paragraph 9 of Article 1 of the ASEAN Charter stating that, among the objectives pursued by the Organization, there is the promotion of «sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of peoples». In essence, in our opinion, it can be reasonably assumed that paragraphs 8 and 9 of Article 1 of the ASEAN Charter constitute the legal basis for ASEAN's competence in combating climate change. Furthermore, since it is undoubtedly a matter «seriously affecting the common interest of ASEAN», pursuant to Article 2, para. 2, lit. (g) of the ASEAN Charter, ASEAN and its Member States are required to deal with climate change in accordance with, *inter alia*, the principle of «enhanced consultation».

Concretely, although ASEAN has shown an interest in environmental issues since the mid-1980s¹⁷, it began to pay serious attention to climate change issues only towards the end of the first decade of the 2000s. In particular, the turning year was 2007, when the Leaders of ASEAN Member States adopted the *Singapore Declaration on Climate Change, Energy and the Environment* at their 13th Summit¹⁸. Since then, during their annual meetings

¹⁷ On 9 July 1985 the ASEAN Member States signed the Agreement on the Conservation of Nature and Natural Resources. Then, in order to react to an environmental crisis that hit Southeast Asian in the late 1990s, they adopted the 1995 ASEAN Cooperation Plan on Transboundary Pollution and the 1997 Regional Haze Action Plan which formed the basis for the conclusion of the ASEAN Agreement on Transboundary Haze Pollution (2002). Then, since early 2000s the declarations approved at the conclusion of their annual meetings by Ministers of ASEAN Member States responsible for are dedicated to sustainable development (see e.g. the 2003 Yangon Resolution on Sustainable Development, the 2006 Cebu Resolution on Sustainable Development). Moreover, although it does not expressly mention the topic of climate change, the ASEAN Agreement on Disaster Management and Emergency Response concluded in 2005 is also closely linked to it. In literature see B. BOER, *Introduction to ASEAN Regional Environmental Law*, in W. SCHOLTZ, J. VERSCHUUREN (eds.), *Regional Environmental Law*, Cheltenham, 2015, 251-281; K.-L. KOH, K. SAIFUL, *The Role of ASEAN in Shaping Regional Environmental Protection*, in P. HIRSCH (ed.), *Routledge Handbook of the Environment in Southeast Asia*, London, 2017, 315-333.

¹⁸ See Singapore Declaration on Climate Change, Energy and the Environment, Singapore, 21 November 2007. About ASEAN's engagement in combating climate change see R. LETCHUMANAN, *Climate Change: is Southeast Asia up to the challenge? Is there an ASEAN policy on climate change?*, in *IDEAS Reports – Special Report*, 2010, <https://eprints.lse.ac.uk/43572/>;

the ASEAN Leaders usually express the Organization's common position on climate change issues through the adoption of Joint Statements or Declarations which are sometimes shared at the UNFCCC Conference of Parties¹⁹. These declarations and statements provide ample insights into the collective understanding and aspirations of ASEAN Member States to achieve regional resilience through collective action. In this context, the *ASEAN Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment* which was adopted on October 26, 2025 during the 47th ASEAN Summit, is particularly relevant²⁰. It is the first-ever regional instrument that brings together human rights and environment in Southeast Asia. The Declaration, which draws inspiration from various international environmental rights instruments²¹, enshrines some principles which are expected to guide the ASEAN Member States in respecting, promoting, protecting, and fulfilling substantive and procedural environmental human rights²².

S. SEAH, M. MARTINUS, *Gaps and Opportunities in ASEAN's Climate Governance*, Singapore, 2021, https://www.iseas.edu.sg/wp-content/uploads/2021/03/TRS5_21.pdf; H. MAHA SETH, A. NAAZ, *Climate Change in ASEAN: Challenges, Initiatives, and the Road Ahead*, in *Modern Diplomacy*, October 21, 2024, <https://moderndiplomacy.eu/2024/10/21/climate-change-in-asean-challenges-initiatives-and-the-road-ahead/>

¹⁹ Joint Statements on climate change were issued in 2007, 2009, 2010, 2011, 2014 and every subsequent year until 2025. See lastly the ASEAN Joint Statement on Climate Change to the 30th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, 26 October 2025. See also, *ex multis*, the Leaders' Declaration on Institutionalizing the Resilience of ASEAN and its Communities and Peoples to Disasters and Climate Change, Kuala Lumpur, 27 April 2015; the ASEAN Declaration on Sustainable Resilience, Jakarta, 5 September 2023.

²⁰ On 29 March 2024, the ASEAN Environmental Rights Working Group made public a draft of the Declaration for the first time. In occasion of this Special Meeting held in April 2025, the ASEAN Intergovernmental Commission on Human Rights had a frank and constructive exchange of views on that draft with the ASEAN Senior Officials on Environment (ASOEN). Following that, it agreed on it.

²¹ The reference is particularly to: UN General Assembly, *Resolution 76/300. The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 of 1 August 2022; Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, Aarhus, 26 June 1998; Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018.

²² In other words, the Declaration is expected to guide ASEAN Member States in strengthening action and accountability related to environmental rights. It is worth noting that, even before being adopted, the Declaration has been widely criticized since it is considered to have significant omissions. In particular, it fails to include provisions on corporate accountability, climate-related mobility, and indigenous rights. This exclusion is considered to undermine the role of indigenous communities as guardians of their environment. Moreover, the text lacks effective measures for corporate accountability. In this regard see H. MAHA SETH, A. NAAZ, *op. cit.*

3. The ASEAN Charter serves as a firm foundation in achieving the «ASEAN Community» envisioned as a community with enhanced capacity and capabilities to both respond effectively to challenges and to seize opportunities. Its realization, firstly envisaged by the ASEAN Leaders at their 9th Summit in 2003 and then reiterated at the 12th Summit in 2007²³, dates back to 2015. It is anchored on three mutually supporting pillars: Political-Security, Economic, and Socio-Cultural²⁴.

Environment-related issues, including climate change, fall primarily under the ASEAN Socio-Cultural Community pillar. In particular, they are discussed by ASEAN Ministers on Environment and by ASEAN Senior Officials on Environment at the annual meetings. A decisive preparatory and supporting role of their activities is played by the Working Group on Climate Change, one of seven technical working groups reporting to Senior Officials on Environment, which was established in 2009. It is tasked to enhance regional cooperation on climate change, to promote collaboration between sectoral bodies²⁵, and to articulate ASEAN's concerns and priorities at the international level. For this purpose, it is usually required to oversee the implementation of relevant action lines of ASEAN in the field of climate change, while the ASEAN Ministers on Environment and the ASEAN Senior Officials on Environment provide policy and strategic guidance for its work. Moreover, on the premise that issues on climate change are multidisciplinary and cross-sectoral in nature²⁶, they are addressed also by other relevant ASEAN sectoral bodies, such as those in charge of forestry and agriculture, transportation and energy, disaster management, etc. Climate change issues are so cross cutting that they have also ended up on the agenda of the ASEAN intergovernmental bodies responsible for defence, since the climate change has

²³ See Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, Cebu, 13 January 2007.

²⁴ About the ASEAN Community and its articulation in three pillars see R. SUKMA, *Building the ASEAN Community*, in *The Indonesian Quarterly*, 2008, n. 3/4, 258-277; V. CHHEANG, *Track-two diplomacy and ASEAN community building*, in J. DOSCH, F. KLIEM (eds.), *op. cit.*, 136-150

²⁵ In order to ensure well-coordinated and integrated approaches, the ASEAN Working Group on Climate Change convenes periodical Climate Change Partnership Conferences gathering sectoral bodies, centres and development partners. The first ASEAN Climate Change Partnership Conference was held in 2018 in Manila to introduce and build awareness on ASEAN-wide cross-sectoral and multi-partner coordination in addressing climate change issues. The second conference took place in Singapore in 2019 to provide a platform to share experiences and identify potential cooperation. Lastly see the 3rd ASEAN Climate Change Partnership Conference, Siem Reap, 26 May 2023; the 4th ASEAN Climate Change Partnership Conference, Bali, 28 May 2024 the 5th ASEAN Climate Change Partnership Conference, Vang Vieng, 14-15 May 2025.

²⁶ In this regard see S. SEAH, M. MARTINUS, *op. cit.*, 5-8.

been recognised as a complex security challenge for ASEAN²⁷. To coordinate regional issues, a consulting platform known as the ASEAN Climate Change Initiative (ACCI) was set up in 2010. Its task is to formulate policy and strategy, share information, conduct capacity-building and facilitate technology transfer. However, 15 years later it is still unclear exactly how the ACCI has operated. Its failing role must have been apparent even to ASEAN Member States which have recently decided to complete the ASEAN climate change governance framework with the establishment of an *ad hoc* Centre²⁸. The ASEAN Centre on Climate Change is expected to facilitate regional cooperation and coordination on climate change initiatives among ASEAN Member States with relevant national governments, regional and international organizations, and to provide policy recommendations on addressing climate change to ASEAN Member States.

4. As far as legal framework on climate change is concerned, over the years ASEAN bodies have adopted a huge number of legal documents dealing with climate change and issues related to it. In particular, the strategic directions of the fight against climate change and the actions to be taken to realize the identified goals have been defined by *soft law* acts.

Interstate cooperation on this field has been firstly guided by the ASEAN Socio-Cultural Community Blueprints which are periodically adopted by ASEAN Leaders to define/update the strategic objectives of the Organization and related key actions to realize and consolidate ASEAN as a people-oriented and socially responsible Community²⁹. Thus, the Blueprint 2009-2015 pinpointed, *inter alia*, «to enhance regional and international cooperation to address the issue of climate change and its impacts on socio-economic development, health and the environment, in ASEAN Member States through implementation of mitigation and adaptation measures, based on the principles of equity, flexibility, effectiveness, common but differentiated responsibilities, respective capabilities, as well as reflecting

²⁷ See Jakarta Joint Declaration of the ASEAN Defence Ministers' Meeting for Peace, Prosperity and Security, Jakarta, 15 November 2023. The recognition of climate change as a security issue is also reflected in the defence white papers and/or national policy papers adopted by various ASEAN Member States. In this regard, in literature see S. NANTHINI, *The ASEAN Defence Ministers' Meeting: A Platform for Climate Security Cooperation*, in IDSS Paper No. 039, March 28, 2024. <https://rsis.edu.sg/wp-content/uploads/2024/03/IP24039.pdf>

²⁸ The establishment of the ASEAN Centre on Climate Change was supported by the Leaders of ASEAN Member States at their 38th and 39th Summit held in October 2021.

²⁹ See the ASEAN Socio-Cultural Community Blueprint 2009-2015 adopted by the ASEAN Leaders at the 14th ASEAN Summit in 2009; the ASEAN Socio-Cultural Community Blueprint 2016-2025 adopted by ASEAN Leaders at the 27th ASEAN Summit in November 2015.

on different social and economic conditions». For this purpose, it identified certain priority actions³⁰.

The following Blueprint 2016-2025, aiming *inter alia* to realize a resilient community with enhanced capacity and capability to adapt and respond to social and economic vulnerabilities, disasters, climate change, as well as emerging threats and challenges, suggested to ASEAN Member States: (i) to enhance participatory and integrated approaches in urban planning and management for sustainable urbanisation towards a clean and green ASEAN; (ii) to strengthen the capacity of national and local institutions to implement strategies and programmes towards liveable cities; (iii) to promote coordination among relevant sectors to provide access to clean land, green public space, clean air, clean and safe water, and sanitation.

In order to translate the strategic directions contained in the ASEAN Socio-Cultural Community Blueprints into more detailed and concrete actions, over the years some *ad hoc* soft law acts have been adopted. They were mainly: the 2012 ASEAN Action Plan on Joint Response to Climate Change³¹ which was replaced by the Action Plan on Climate Change 2019-2025 and then, by the ASEAN Climate Change Strategic Action Plan 2025-2030. In addition to these documents, specifically dedicated to climate change, there are also other *soft law acts* that, while identifying priority actions with a view to environmental protection and disaster risk management, inevitably address

³⁰ Priority actions identified by the ASEAN Socio-Cultural Community Blueprint 2009-2015 included: encouraging a common understanding of and joint action on climate change issues; developing an ASEAN Climate Change Initiative whose implementation should be entrusted to an *ad hoc* Working Group; deploying and transferring adaptation measures; enhancing regional capacities for adaption and creating public awareness of the need to address the effects of climate change. The Blueprint also recommended to Member States to adopt mainstreaming strategies and actions to incorporate climate change in national development plans, to engage stakeholders in their implementation and to establish appropriate capacity building programs.

³¹ In order to efficiently address the climate change in the region, the 2012 ASEAN Action Plan on Joint Response to Climate Change suggested some adaptation activities including: (i) sharing information among Member States on efforts on research and development in hydrological and agricultural management and practices, as well as in urban, rural and coastal areas; (ii) enhancing existing ASEAN climate/meteorological/oceanographical centres and networks to possibly assess climate change impacts on various human life fields; (iii) developing ASEAN work programme to address loss and damage, and options for risk management and reduction. As far as mitigation actions were concerned, the Action Plan proposed to share best practices on mitigating greenhouse gases emissions from energy production and use, agriculture, land use, land-use change and forestry, industrial processes, and waste in the region; to promote a common understanding on Nationally Appropriate Mitigation Actions, and Measurement, Reporting and Verification through workshop(s) and other activities; and to explore the possibility to develop a carbon cap and trade system in the region. The Action Plan also suggested activities in finance and investment, technology transfer, and other matters of regional cooperation.

climate change issues. The reference is, for instance, to the ASEAN Plan of Action for Energy Cooperation 2010-2015 where *climate change* appears as an important element of each of three key initiatives it suggested³², so as to the following Strategic Plan on Environment 2016-2025, where *climate change* is included in the seven strategic priorities of ASEAN cooperation on environment³³, and to the ASEAN Plan of Action for Energy Cooperation that, in defining initiatives for the energy sustainability of ASEAN Member States, identifies mitigation measures to combat climate changes. But many other sectoral documents can be cited, such as the ASEAN Strategic Plan of Action on Water Resources Management³⁴, the ASEAN Tourism Strategic Plans³⁵, the ASEAN Sustainable Urbanisation Strategy³⁶, ASEAN Biodiversity Plan³⁷, etc., as well as *ad hoc* operational initiatives and programmes, such as the ASEAN Initiative on Environmentally Sustainable Cities³⁸, the

³² The ASEAN Plan of Action for Energy Cooperation 2010-2015 was adopted by the ASEAN Ministers on Energy in 2009 with the theme of «Bringing Policy to Actions Towards a Cleaner, more Efficient and Sustainable ASEAN Energy Community».

³³ The ASEAN Strategic Plan on Environment 2016-2025 is a comprehensive guide for interstate cooperation on environment for the period of 2016 to 2025. It consists of action plans for seven agreed strategic priorities with selected programs, outputs, and activities based on existing cooperation, emerging needs of ASEAN Member States, and commitments to address relevant issues in the global agenda. In addition to climate change, other strategic priorities under the Strategic Plan are: nature conservation and biodiversity; coastal and marine environment; water resources management; environmentally sustainable cities; chemicals and waste; environmental education and sustainable consumption and production.

³⁴ The ASEAN Strategic Plan of Action on Water Resources Management details guiding principles for integrated water resource management, a set of strategies to deal with major issues and proposes some future work to improve knowledge and governance as well as capacity in the region. It was developed in 2005.

³⁵ Both the ASEAN Tourism Strategic Plan 2011-2015 and the ASEAN Tourism Strategic Plans 2016-2020 suggested specific actions and approaches to contribute to the realization of the ASEAN integration goal of moving to an economic growth scenario that is more inclusive, green and knowledge-based.

³⁶ The ASEAN Sustainable Urbanisation Strategy, which was launched in 2018, consists of seven priority sub-areas and eight priority actions identified based on the analysis of key trends impacting urbanisation in ASEAN and stocktake of existing actions related to sustainable urbanisation. As part of ASEAN Sustainable Urbanisation Strategy, two accompanying toolkits are also available to assist local Governments in ASEAN to advance sustainable urbanisation in their cities.

³⁷ The ASEAN Biodiversity Plan 2024-2030 aims to contribute to the implementation of the Kunming-Montreal Global Biodiversity Framework through regional interventions and it complements the efforts of the ASEAN Member States in carrying out their respective National Biodiversity Strategies and Action Plans, through capacity development, sharing knowledge and best practices on addressing common challenges and emerging issues affecting the region's natural wealth. See https://asean.org/wp-content/uploads/2024/10/48-Final_ASEAN-Biodiversity-Plan.pdf.

³⁸ The ASEAN Initiative on Environmentally Sustainable Cities, which was endorsed by the ASEAN Environment Ministers in 2005, serves to assist ASEAN cities to pursue environmental sustainability.

ASEAN Smart Cities Network and the related ASEAN Smart Cities Framework³⁹, etc.

As far as future outlooks are concerned, it is undeniable that climate change issues will keep on being at the centre of ASEAN Agenda. A first clue in this respect is offered by the content of the ASEAN State of Climate Change Report launched in 2021⁴⁰. It is the outcome of a two-year project coordinated by the ASEAN Secretariat and Institute for Global Environmental Strategies which serves a twofold function. On the one hand, it provides an overall outlook of the state of play of climate change issues in the ASEAN region. On the other hand, it includes recommendations on making the transition toward 2030 and on to 2050 for both adaptation and mitigation, considering ASEAN's development context and the long-term goals of the Paris Agreement. ASEAN's intention not to disengage from climate change issues is then confirmed by the ASEAN Community Vision 2045⁴¹; indeed, it identifies as an objective to make ASEAN a resilient, innovative, dynamic and people-centred Community by 2045. And, as it is evident, such an objective cannot become a reality without addressing the pressing challenges, such as those determined by climate change. Not by chance, the ASEAN Socio-Cultural Community Post-2025 Strategic Plan, which was adopted by ASEAN Leaders during the 46th ASEAN Summit as a core component of the aforementioned Vision, defines more than one hundred strategic measures that will provide specific and targeted actions in addressing emerging trends and challenges affecting ASEAN especially in promoting human and sustainable development; and climate change is among them!

5. As already said, all ASEAN Member States are committed to the UNFCCC and the Paris Agreement. Pursuant to the latter, State parties are

³⁹ The ASEAN Smart Cities Network was established by the ASEAN Leaders at the 32nd ASEAN Summit on 28 April 2018. It is a collaborative platform where cities from ASEAN Member States work towards the common goal of smart and sustainable urban development. This initiative is supported by the ASEAN Smart Cities Framework which was adopted at the 33rd ASEAN Summit on 13 November 2018.

⁴⁰ The ASEAN State of Climate Change Report was officially endorsed by the National Focal Points of the ASEAN Working Group on Climate Change and the Meeting of ASEAN Senior Officials of the Environment (ASOEN).

⁴¹ The text of the ASEAN Community Vision 2045 is a 20-year strategic blueprint that defines the long-term integration goals for Southeast Asia. The roadmap outlines a collective ambition to establish a region structured around four pillars: resilient, innovative, dynamic and people-centred. The compendium of the ASEAN Community Vision 2045, consists of the Kuala Lumpur Declaration on the ASEAN Community Vision 2045, the ASEAN Political-Security Community Strategic Plan, the ASEAN Economic Community Strategic Plan, the ASEAN Socio-Cultural Community Post-2025 Strategic Plan.

required to «prepare, communicate and maintain successive nationally determined contributions (NDC)» (Article 4.5) and to do so «every five years in accordance with decision 1/CP.21» (Article 4.9). All ASEAN Member States submitted their nationally determined contributions to the Secretariat of the UNFCCC and most of them also communicated their updated targets⁴².

From an overall reading of the various ASEAN documents approved over the years in the field of climate change, it is clear that the Organization has aligned itself to its Members' commitments to the UNFCCC and the Paris Agreement, by accepting the principle of common but differentiated responsibilities and respective capabilities which considers different national circumstances⁴³. Thus, for instance, in consistence with them ASEAN set a target of 32% reduction in energy intensity by 2025 relative to 2005 levels, and a 23% share for renewable energy share in the total primary energy supply by 2025⁴⁴. In 2019 ASEAN Leaders confirmed these targets and added others, concerning the reduction of the average fuel consumption per 100 km of new light-duty vehicles sold in ASEAN by 26% between 2015 and 2025, the increase of the component of renewable energy mix by 23% by 2025, and the reduction of energy intensity by 30% by 2025⁴⁵.

Then, according to the Integrated Assessment Model projections detailed by the 2021 ASEAN State of Climate Change Report, in order to be in

⁴² As of March 2025, Singapore and Thailand submitted their second update of the first nationally determined contributions. Updated submissions of their first nationally determined contributions were presented by Cambodia (December 2020), Laos (May 2021), Malaysia (July 2021), Myanmar (August 2021), Vietnam (November 2022). Indonesia submitted its enhanced nationally determined contributions and is preparing its second nationally determined contributions, while the Philippines and Brunei submitted their first nationally determined contributions in 2021 and in 2020 respectively.

⁴³ As it is well known, the principle of common but differentiated responsibilities and respective capabilities which considers different national circumstances emerged first in Principle 7 of the 1992 Rio Declaration. It was then incorporated into Article 3.1 of the UNFCCC, making it a cornerstone of the international climate change legal regime. Article 2 of the Paris Agreement also explicitly refers to it. In literature see T. LECLERC, *The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law*, in B. MAYER, A. ZAHAR (eds), *Debating Climate Law*, Cambridge, 2021, 76 – 85.

⁴⁴ In this sense, see the ASEAN Plan of Action for Energy Cooperation 2016-2025. It is worth noting that, according to the 2021 ASEAN State of Climate Change Report, 83, «ASEAN is well on track to reach the APAEC 2016-2025 energy intensity target and achieved a 24.4% reduction in energy intensity in 2019».

⁴⁵ For this purpose, Leaders engaged in introducing and strengthening fiscal policy measures based on fuel economy or on CO₂ emissions at national level where applicable to incentivize consumers to purchase efficient vehicles. They also engaged in promoting the adoption of national fuel consumption standards for light-duty vehicles in all markets, striving towards a regional standard in the long term. See ASEAN Joint Statement to the United Nations Climate Action Summit 2019, New York, 23 September 2019, para. 3.

line with long-term goals stipulated in the Paris Agreement, ASEAN should achieve net zero CO₂ emissions by 2050 and net zero greenhouse gases emissions by 2065; while CO₂ and greenhouse gases emissions should peak before 2030. Additionally, a careful balance of rapid industrialization with cleaner energy resources is identified as another target⁴⁶.

In order to achieve these goals, ASEAN has usually moved on two fronts⁴⁷. On the one hand, it has promoted initiatives and policies aimed to act on the anthropogenic causes of climate change, by mitigating them. On the other hand, it has identified some priority actions to adapt to the current and future effects of climate change, to prevent or minimise the damage it may cause, or take advantage of opportunities that may arise⁴⁸.

5.1. As already said, over the years ASEAN has addressed climate change issues firstly by recommending actions for mitigation. Thus, in general terms, the ASEAN Socio-Cultural Community Blueprint 2025 listed, *inter alia*: facilitating multi-stakeholder and multi-sectoral approaches; strengthening the capacity of sectoral institutions and local governments and private sector in reducing greenhouse gases emissions, also through sectoral planning; and strengthening global partnerships such as the UNFCCC.

In more concrete terms, the ASEAN Strategic Plan on Environment 2016-2025 pinpointed, as mitigation measures: (i) promoting sustained forest management by implementing the UNFCCC Conference of Parties' decisions on reducing emissions from deforestation and forest degradation; (ii) launching the ASEAN Regional Strategy on Sustainable Land Transport as a response to the ASEAN Fuel Economy Roadmap for the Transport Sector 2018-2025 that focused on light duty vehicles; and (iii) strengthening ASEAN's capacity in managing climate-related disasters through existing mechanisms under the ASEAN Agreement on Disaster Management and Emergency Response⁴⁹.

⁴⁶ In this regard see K. HANDAYANI et al., *Moving beyond the NDCs: ASEAN pathways to a net-zero emissions power sector in 2050*, in *Applied Energy*, 2022, n. 4, 1-19.

⁴⁷ In this respect see B.A. PUTRA, *ASEAN's Climate Change Mitigation and Adaptation Measures: Abandoning Stagnant Policy Responses*, in *Frontiers in Climate*, 2024, n. 1, 1-5, <https://www.frontiersin.org/journals/climate/articles/10.3389/fclim.2024.1488560/full>.

⁴⁸ This approach characterized also the 2021 ASEAN State of Climate Change Report. Indeed, it recommended both a diverse set of regional actions for adaptation and mitigation, grouped into four categories («acquaint», related to transparency; «integrate»; «involve»; and «motivate» related to transformation), as prioritised by the ASEAN Member States for the next decade, and some essential actions for 2030-2050.

⁴⁹ The ASEAN Agreement on Disaster Management and Emergency Response was concluded in Vientiane on 26 July 2005 and entered into force on 24 December 2009.

On the premise of the existence of a strong energy-climate nexus, ASEAN's actions to mitigate climate change has also concerned the renewable energy transition. In particular, the Organization has promoted it not only to fuel the region's energy security and economic growth, but also to curb carbon emissions from the burning of coal, natural gas and oil for electricity, the largest single source of greenhouse gases emissions in the region. For this purpose, the ASEAN Plan of Action for Energy Cooperation 2010-2015 provided for three key program areas consisting of: (i) Energy Efficiency and Conservation; (ii) Renewable Energy; and (iii) Coal and Clean Coal Technology. In relation to each of them some strategy goals were identified, and specific actions were suggested. Thus, for instance, within the framework of Energy Efficiency and Conservation it was proposed to develop a clear policy and plan to promote energy efficiency, to set national energy efficiency target and develop a plan to monitor the results and to strengthen human capacity and enhance infrastructure to facilitate the energy efficiency policy and plan. Within the program area «Coal and Clean Coal Technology» the Plan of Action provided for, *inter alia*, the compilation and analysis of national coal policies, regulations, plans and institutional arrangements to aid in the development of a regional policy on coal trade; the harmonization of instruments to enhance coal supply and facilitate delivery arrangements, as well as the adoption of an ASEAN Agreement on Coal Supply and Trading. Finally, to promote the use of renewable energy it was recommended, among others, to promote technical cooperation to complement efforts on renewable energy targets of the ASEAN Member States, to propose harmonized standards for renewable energy products, to develop the policy and system to strengthen local manufacturing capabilities for renewable energy technologies and products, and to encourage involvement of the banking sector and financial institutions in renewable energy projects.

More recently, in order to accelerate the transition towards a green economy, the Economic Ministers of ASEAN Member States endorsed the Strategy for Carbon Neutrality highlighting eight areas, including greening the regional supply chain, connecting green infrastructure and market, enhancing common standards, and facilitating green talent development and mobility⁵⁰. Such eight strategies have been detailed out into sixteen priority initiatives that will kick-start ASEAN's journey towards carbon neutrality.

⁵⁰ See Joint Media Statement of the 55th ASEAN Economic Ministers' Meeting, Semarang, 19 August 2023, para. 47. In this regard, in literature see M. MARTINUS, *The ASEAN Strategy for Carbon Neutrality: How to Move It Forward?*, in D. HEW, J. TIJAJA (eds), *Building an ASEAN Economic Community Beyond 2025*, Singapore, 2024, 18-30.

This initiative goes hand in hand with the ASEAN Taxonomy for Sustainable Finance and with the ASEAN Power Grid. The latter is a flagship program mandated in 1997 by the ASEAN Leaders under the ASEAN Vision 2020 and formally established by an *ad hoc* Memorandum of Understanding⁵¹. It aims to ensure regional energy security while promoting the efficient utilization and sharing of resources. So, it envisions the integration of electricity markets, harmonisation of regulations, and the establishment of regional institutions in addition to construction of cross-border interconnections. To pursue this program, ASEAN has adopted a strategy that has encouraged interconnections of some identified projects in three stages, starting with bilateral trade, followed by subregional trade, and finally into an integrated regional system. As of April 2025, 9 out of the 18 key interconnection projects were completed⁵².

Some specific examples of action programmes to reduce greenhouse gases emissions have been also envisaged in the most recent Vision and Strategic Plan for ASEAN Cooperation in Food, Agriculture and Forestry 2016-2025; in particular, this document identifies 7 «strategic thrusts» and in relation to each of them it suggests several Action Programmes concerning agroforestry, the protection of mangrove forests, the establishment of regional agreements on timber trade, strengthening forest management by involving local communities, and the reduction of emissions from deforestation and forest degradation. Thus, for instance, to enhance quantity and quality of production with sustainable, green technologies and resource management systems, it is proposed, *inter alia*: to increase private sector participation in policy discussions, programme and project formulation, research and development; to develop yield and productivity enhancing technologies and best practices that involve land use intensification in a sustainable manner; to balance the competing demands for the use of natural resources for food crops, industrial crops and other purposes through land-use planning to ensure eco-

⁵¹ Memorandum of Understanding on the ASEAN Power Grid, Singapore, 23 August 2007, entered into force in 2009. Its Article X, paragraph 4, provided that it would remain into force for 15 years. In December 2023 ASEAN Ministers of Energy agreed to extend this Memorandum until 2025 while working on the successor agreement (see Instrument of Extension of the Memorandum of Understanding on the ASEAN Power Grid, Bangkok, 18 March 2024).

⁵² The completion of 9 out of the 18 key interconnection projects has resulted in a total installed regional electricity capacity of 7.7 GW, which includes 4.7 GW of dedicated independent power producer (IPP) generation exports (generation to grid). Most of these interconnections are bilateral, with energy trade conducted through long-term power purchase agreements. Ongoing projects currently at various stages of implementation include subsea cables between the Indonesian island of Sumatra and Peninsular Malaysia, overland grids between Kalimantan and Sabah, and upgrades to the interconnections between Thailand and Malaysia.

logical sustainability, food security, quality, productivity and producer profitability. Additionally, to enhance trade facilitation, economic integration and market access, it is suggested, *inter alia*: to identify and eliminate non-tariff barriers that have no economic or scientific rationale and implement trade facilitation measures; to promote direct investment and strategic partnership with ASEAN agricultural cooperatives, farmers organizations and traders; and to enhance regional and international cooperation to ensure that all major ASEAN food markets are integrated.

Actions to mitigate the anthropogenic causes of climate change cannot but include the conclusion of the 2002 Agreement on transboundary haze pollution⁵³ and the related Roadmaps to operationalize its implementation⁵⁴. In order to address the causes of forest fires and haze and to mitigate their effect, the Agreement entails a comprehensive approach including the engagement in constant monitoring, and it emphasizes both national efforts and regional and international cooperation. Moreover, the Agreement enumerates some measures that ASEAN Member States are called upon to undertake to prevent and control activities related to land and/or forest fires and that can therefore be considered as measures for climate change mitigation. They include: the development of legislative and other regulatory policies to promote zero burning and to curb activities that may lead to land and/or forest fires; the identification and monitoring of areas prone to occurrence of land and/or forest fires; the promotion of public education and awareness-building campaigns and strengthening community participation in fire management to prevent land and/or forest fires and haze pollution arising from such fires⁵⁵.

Similar considerations can be expressed for the ASEAN Agreement on Disaster Management and Emergency Response. Pursuant to its Article 6, para. 2, ASEAN Member States «shall undertake measures to reduce losses from disasters which include: a. developing and implementing legislative and other regulatory measures, as well as policies, plans, programmes and strategies; b. strengthening local and national disaster management capability and co-ordination; c. promoting public awareness and education and strengthening community participation; and d. promoting and utilising in-

⁵³ ASEAN Agreement on Transboundary Haze Pollution was signed in Kuala Lumpur on 10 June 2002 and entered into force on 20 November 2003.

⁵⁴ For some legal considerations about this agreement see L. NURHIDAYAH, Z. LIPMAN, S. ALAM, *Regional Environmental Governance: An Evaluation of the ASEAN Legal Framework for Addressing Transboundary Haze Pollution*, in *Australian Journal of Asian Law*, 2014, n. 1, 87-103.

⁵⁵ In order to assist effective implementation and to carry out operational tasks, the Agreement also established the ASEAN Transboundary Haze Pollution Control Fund and the ASEAN Coordinating Centre for Transboundary Haze Pollution Control.

digenous knowledge and practices». As it is evident, it is a programmatic provision giving a broad discretion to States as regards, for instance, the precise content of legislative and other regulatory measures and policies and the means to promote public awareness, etc. However, it is undeniable that such mitigation actions to which States have committed themselves are also valid in the context of combating climate change in the light of the close nexus between disaster management and climate change. It is indeed undisputed that the latter is one of main cause of natural disasters.

5.2. As specified by ASEAN Leaders gathered at their 44th and 45th Summits, «[m]itigation efforts must be complemented by robust adaptation strategies that address the immediate and long-term impacts of climate change on our communities and ecosystems»⁵⁶. And, indeed, over the years ASEAN has actively promoted various actions to strengthen capacities within its Member States in the implementation of adaptation actions at the national and sub-national levels. Thus, under the broad umbrella of the ASEAN Socio Cultural Community Blueprints, which encouraged a common understanding on climate change, and of several Action Plans that followed, several projects and programmes have been implemented. They included, for instance, the four-year project on «Rehabilitation and Sustainable Use of Peatland Forests in Southeast Asia» launched in 2009; it focused on four main areas, namely the strengthening of institutional capacity and frameworks, the reduction of rate of degradation of peatlands in Southeast Asia, the demonstration of integrated management and rehabilitation of peatlands at target sites, and the engagement of private sector and local communities in sustainable peatland management⁵⁷. Consider also the ASEAN Initiative on Environmentally Sustainable Cities, which focused on addressing urban environmental challenges, and the related ASEAN Environmentally Sustainable City Award Program which was expected to encourage ASEAN Member States to promote clean air, clean water and

⁵⁶ See ASEAN Joint Statement on Climate Change to the 29th Session of the Conference of the Parties, cit., para. 5.

⁵⁷ This project, which was financed by the Global Environmental Facility and implemented by the international fund for Agricultural Development, fitted within the framework of the ASEAN Peatland Management Initiative and directly supported the ASEAN Peatland Management Strategy. For an analysis of its implementation see A.K. SAYOK, W.S. SIEW, S.A. KUTTY, *Rehabilitation and Sustainable Use of Peatland Forests in South-East Asia. Mid-term Review Report*, Singapore, March 2013, https://www.researchgate.net/profile/Alex-Sayok/publication/286451518_Rehabilitation_and_Sustainable_Use_of_Peatland_Forests_in_South_East_Asia_Mid_Term_Review_Report/links/586b2d3208aebf17d3a4d22e/Rehabilitation-and-Sustainable-Use-of-Peatland-Forests-in-South-East-Asia-Mid-Term-Review-Report.pdf

clean land to realize environmentally sustainable cities. Likewise, among ASEAN initiatives on climate change adaptation the Heritage Parks Programme can be enumerated; it was one of ASEAN environmental flagship whereby Member States designated their selected national protected areas and reserves as ASEAN Heritage Parks.

It is to be noted that several ASEAN adaptation initiatives are related to natural disasters, and this is because of the proved importance of disaster risk reduction measures as immediate response measures for climate change adaptation⁵⁸. Hence, these include also the conclusion of the aforementioned ASEAN Agreement on Disaster Management and Emergency Response and, particularly, its related work programmes⁵⁹, which included adaptation in their relevant strategic components in order to spur the ASEAN Member States to take concrete actions towards a resilient and safer region. Thus, for instance, the Agreement on Disaster Management and Emergency Response Work Programme (2016-2020) provided for the so-called «Priority Programme on Advance» which aimed to strengthen the legal and policy architecture in support of an integrated system of good governance for risk and climate change management from national to local and community levels, emphasizing the inclusion of local actors and the voice of civil society and the youth. At its core there was the recognition that a resilient future requires responsible and collective action today. For this purpose, it suggested as key activities: the organization of a forum to exchange progress and challenges on the implementation of national action plans on disaster risk reduction and on climate change adaptation; the launch of online forum for public engagement by ASEAN Youth Leaders; and the holding of the ASEAN Community Resilience Awards on ASEAN Day for Disaster Management.

⁵⁸ Proof of this is that a framework on disaster risk reduction and climate change adaptation integration was developed in ASEAN and a baseline study entitled «Strengthening Institutional and Policy Framework on Disaster Risk Reduction and Climate Change Adaptation Integration» was completed in 2017. Likewise, the Work Plan for Strengthening Institutional Policy Framework on Disaster Risk Reduction and Climate Change Adaptation Integration was developed based on the results of the study.

⁵⁹ The reference is to: the ASEAN Agreement on Disaster Management and Emergency Response Work Programme 2010-2015 approved by the ASEAN Committee on Disaster Management at its 15th Meeting in March 2010; ASEAN Agreement on Disaster Management and Emergency Response Work Programme 2016-2020 approved by the ASEAN Committee on Disaster Management at its 28th Meeting in April 2016; the ASEAN Agreement on Disaster Management and Emergency Response Work Programme Work Program (2021-2025) approved by the ASEAN Committee on Disaster Management at its 37th meeting in November 2020 and adopted by the ASEAN Ministerial Meeting on Disaster Management at its 8th meeting on 27 November 2020.

In the Agreement on Disaster Management and Emergency Response Work Programme (2021-2025) some measures for climate change adaptation are suggested within priority programme 2 entitled «Prevention and Mitigation». They are, for instance, the enhancement of capacity building initiatives for planning and implementing climate change adaptation and disaster mitigation measures and strategies for both slow- and sudden-onset hazards; the creation of a platform to share knowledge, policies, data, and skills on climate change impacts, implementation of river basin management, countermeasures for climate change impacts including policies developed; the share of existing laws, regulations and best practices on disaster risk reduction and climate change adaptation.

Food security is also one of the most crucial issues relating to adaptation, since many ASEAN Member States rely on agriculture, fisheries and forestry for livelihood and employment, and negative effects of climate change on biological and maritime resources and, subsequently, on agriculture and fisheries are well documented. For that reason, ASEAN has developed the «Multisectoral Framework on Climate Change: Agriculture, Fisheries and Forestry towards Food Security» which represents a comprehensive and strategic approach to address the impacts of climate change. Its overall goal is to contribute to food security through sustainable, efficient and effective use of land, forest, water and aquatic resources by minimizing the risks and impacts of and the contribution to climate change. The Multisectoral Framework is closely linked to the Integrated Food Security Framework, which enumerates «the enhancing of resilience to climate change» among emerging challenges in food security, food safety and nutrition that ASEAN Member States should jointly address, and to the related Strategic Plan of Action on Food Security 2021-2025⁶⁰. The latter sets the goal of introducing climate smart agriculture in ASEAN Member States⁶¹ and, for this purpose, it suggests plunging into a pilot testing of technologies and practices (such as conservation agriculture, SRI, integrated crop-livestock, organic agriculture, drought and flood tolerant varieties of crops, etc.).

⁶⁰ See ASEAN Integrated Food Security Framework and Strategic Plan of Action on Food Security in the ASEAN Region 2021-2025, adopted by the 42nd ASEAN Ministers on Agriculture and Forestry on 21 October 2020. The Strategic Plan of Action 2021-2025 replaced the Strategic Plan of Action 2009-2013 and the following one covering the five-years period 2014-2020.

⁶¹ According to the Strategic Plan of Action, the expression «climate-smart agriculture» refers to a new approach to ensure food security and nutrition, increase agricultural productivity and incomes, build resilience to climate change as well as reduce emissions. See Strategic Plan of Action on Food Security 2021-2025, cit., 8.

Clearly, any adaptation efforts depend on technology transfer and on capacity building which, in turn, are strictly related to financing. This is why climate considerations for adaptation are increasingly factored in business and investment decisions and several initiatives were launched in this field. Consider, for example, the ASEAN Climate Finance Mobilization and Access Strategy, which was adopted to ensure that climate finance can be effectively accessed, mobilized and scaled up to contribute to achieving the climate goals of ASEAN Member States in a collaborative manner and in accordance with Article 9 of the Paris Agreement. Another significant initiative in this field is represented by the ASEAN Catalytic Green Finance Facility launched in 2019 as the regional green finance vehicle for ASEAN Member States. Managed from the start by Asian Development Bank, it is a one-stop shop to identify, develop, and finance climate projects by integrating support for upstream planning and downstream project financing.

Currently, as many as 29 adaptation actions are outlined in the ASEAN Climate Vision 2050 presented by the 2021 ASEAN State of Climate Change Report⁶²; these together with 30 identified mitigation actions should support development goals; that is to say, «adaptation and mitigation actions to achieve the target of net-zero GHG emissions should promote socio-economic development rather than becoming a constraint for economic development»⁶³. They are articulated in two main groups: adaptation actions aimed to enhance climate transparency, and adaptation actions related to promoting transformation of entire systems (e.g. socio-economic, energy, land-use, etc.). The first group includes, for example, the promotion of risk and vulnerability assessment as basis for adaptation planning, development of best practice guidelines and roadmap for diffusion of adaptation technologies and the strengthening of the scientific information base. Conversely, adaptation actions aimed to transformation include, *inter alia*, the development of regional, national and local *ad hoc* plans, promotion of multi-stakeholders' processes, development of climate risk transfer system, etc.

Apart from proposing adaptation actions, ASEAN also provides guidance for its Member States by identifying relevant policy components within such planned adaptation actions. Thus, for instance, with the view to promoting the development of climate insurance and risk transfer systems, the 2021 ASEAN State of Climate Change Report suggested to encourage private sec-

⁶² In this regard see A. YOSUKE, S.V.R.K. PRABHAKAR, *ASEAN's Transition Pathway to Realize a Resilient and Net-Zero Community: Core Findings from the ASEAN State of Climate Change Report*, Policy Brief No. 2/January 2022, 4. https://www.iges.or.jp/en/publication_documents/pub/policy/en/12130/Arino+and+Prabhakar+%282022%29+Policy+Brief+for+ACE.pdf

⁶³ *Ibid.*

tor participation in insurance and prioritise essential sectors, like agricultural and flood-prone areas. Additionally, it recommended to create an adaptation technology landscape for key regions that illustrates technological requirements, availability and gaps, as well as sources and possibilities, and provides incentives programs for technology development and dissemination.

6. Climate change issues are also in the agenda of ASEAN's external relations. As is well known, over the years ASEAN has established more or less intense and institutionalized forms of collaborations both with third countries and international organizations⁶⁴. Cooperation usually spans multiple fields, including the environmental protection, where climate change mitigation, adaptation and resilience aspects are embedded into specific actions.

6.1. Environmental protection and climate change issues have long been at stake in the relations between ASEAN and United Nations⁶⁵; indeed, they were the subject of two work plan which were adopted in order to guide both ASEAN and UN in further strengthening their Comprehensive Partnership launched in 2011. Moreover, given that cooperation to promote regional and international peace and security remains a key feature of such Partnership and that climate change currently represents one of main threats to security, several ASEAN-UN Regional Dialogue workshops also focusing on climate have been organized over the years⁶⁶.

ASEAN's relations with the EU in the fight against climate change are equally structured and consolidated⁶⁷. Proof of this is firstly the fact that

⁶⁴ About ASEAN's external relations see P. NGUITRAGOOL, J. RÜLAND (eds), *ASEAN as an actor in international fora*, Cambridge, 2015; J.D. STACEY, *ASEAN and Power in International Relations: ASEAN, the EU, and the Contestation of Human Rights*, Abingdon-New York, 2021; S. SUDÔ, C. Yamahata (eds), *ASEAN and Regional Actors in the Indo-Pacific*, Singapore, 2023.

⁶⁵ ASEAN's relations with the UN began in the early 1970s through the UN Development Programme. Starting from 2000 ASEAN-UN Summit have been periodically organized in order to test opportunities for collaboration. Cooperation between two organizations was formalized in 2007 through the conclusion of an *ad hoc* Memorandum of Understanding and was then reinforced at their 4th Summit in 2011 during which the Leaders adopted the Joint Declaration of the Comprehensive Partnership between ASEAN and the UN. Areas of cooperation include the maintenance and promotion of regional peace, security, and prosperity and, on the premise that the climate change represents a significant threat to security, issues related to it are subjects to collaboration.

⁶⁶ In this regard, see ASEAN SECRETARIAT, *Overview of ASEAN-United Nations Relations*, Information Paper, July 2024. <https://asean.org/wp-content/uploads/2024/07/Overview-of-ASEAN-UN-Cooperation-as-of-25-July-2024-fin.pdf>

⁶⁷ The partnership between the EU (at the time, the EEC) and ASEAN dates back to 1972. Soon after, the EU became an ASEAN Dialogue Partner in 1977. About relations between the two Organizations in literature see A. BERRAMDANE, M. TROCHU, *Le Partenariat UE-ASEAN*, Bruylant, 2013; J.D. STACEY, *op. cit.*, 17-35; Y. L. HWEE, *Inter-regionalism: the European Union*

in July 2019 a High-Level Dialogue on Environment and Climate Change between the two Organizations was launched⁶⁸. It is an important platform that reinforces policy dialogue and advances ASEAN-EU cooperation on environmental, climate change and sustainable development issues. Indeed, during the periodical meetings taking place within this platform⁶⁹, Senior Officials usually reaffirm the commitment to strengthen mutual cooperation on shared regional and global challenges related to protection of the environment and climate change and, for this purpose, they discuss the main areas of cooperation which address mitigation, adaptation, long-term strategies and sustainable finance in relation to climate change, as well as other environment issues (e.g. conservation of natural resources, water and biodiversity, waste management, plastics and marine litter). Mutual willingness to consolidate collaboration on environmental and climate change issues is proved, on the one hand, by the elevation of cooperation to ministerial level⁷⁰ and, on the other hand, by the adoption of the Plan of Action to Implement the ASEAN-EU Strategic Partnership (2023-2027) at the ASEAN Post-Ministerial Conference (PMC) +1 with the EU in 2022⁷¹. Indeed, its paragraph 3.5 enumerates the fight against climate change among priority areas of cooperation. As far as concrete results of this collaboration are concerned, several initiatives can be cited as critical example, such as the EU-funded Smart Green ASEAN Cities programme⁷² and the afore-

and ASEAN, in J. DOSCH, F. KLIEM (eds.), *op. cit.*, 234-245; J. STARZYK-SULEJEWSKA, *EU-ASEAN Political Relations in the Light of Values and Norms of the International Liberal Order*, in *Polish Political Science Yearbook*, 2024, 43-64. As regards collaborations in the field of climate change see S. LOKENBERG, L. VAN SCHAIK, C. PICH, *Navigating the Climate Crisis Together. EU-ASEAN Cooperation on Climate Change*, Clingendael Policy Brief, February 2024, https://www.clingendael.org/sites/default/files/202408/Navigating_the_climate_crisis_together.pdf

⁶⁸ Since 2019 ASEAN-EU collaboration has been deepened with five iterations of the ASEAN-EU High-Level Dialogue on Environment and Climate Change.

⁶⁹ It is worth noting that the High-Level Dialogue is supported by the Enhanced Regional EU-ASEAN Dialogue Instrument, namely a development cooperation program that facilitates dialogues between the EU and ASEAN in priority policy areas of joint interest.

⁷⁰ The 1st ASEAN-EU Ministerial Dialogue on Environment and Climate Change took place on 4th September 2025 in Malaysia.

⁷¹ See Plan of Action to Implement the ASEAN-EU Strategic Partnership (2023-2027), AFM-EU/2022/01/POA, 3 August 2022.

⁷² The Programme aims to promote more sustainable urbanisation while reducing environmental and carbon footprints. For this purpose, it supports ASEAN Member States to anticipate the substantial pressure from the high urbanisation rates by focusing on green and smart solutions through digitalisation and the use of technologies. The Smart Green ASEAN Cities programme aims at synergising with other ongoing initiatives in ASEAN, such as the ASEAN Initiative on Environmentally Sustainable Cities, the ASEAN Smart Cities Network, the ASEAN Sustainable Urbanisation Strategy, and the EU-supported SMART CHANGE project.

mentioned ASEAN Catalytic Green Finance Facility, as well as the ASEAN Circular Economy Stakeholder Platform and the ASEAN Green Team Europe Initiative, launched at the 3rd EU-ASEAN Dialogue on Sustainable Development in November 2021. They all contribute to pave the way towards closer collaboration between the two Organizations on green and sustainable development.

Unlikely, if we extend the horizon of investigation to South-South cooperation, we find that environmental protection and fight against climate change are not priority areas in relations between ASEAN and other regional organizations (e.g. ECO, IORA, SCO, Mercosur, GCC)⁷³.

6.2. As regards ASEAN's cooperation in environmental field with third States, that with China is undoubtedly important. It started with the 2003 Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity which emphasized to strengthen cooperation through more exchanges in science and technology, environment, education, culture, personnel, and enhance mutual cooperation mechanism in these fields⁷⁴. In line with such Declaration, in 2009, ASEAN and China formulated and adopted the ASEAN-China Strategy on Environmental Protection Cooperation 2009-2015 setting the goal, principles and six cooperation priority areas. That Strategy has been updated over the years⁷⁵ and, in order to implement it, periodic action plans have been adopted⁷⁶. In this framework China has often engaged in providing technical assistance to ASEAN officials and professionals through capacity-building workshops on climate-related topics. Moreover, in 2011 it supported the establishment of the China-ASEAN Environmental Cooperation Centre serving as the designated focal point for facilitating policy dialogues and promoting environmental technology, joint policy studies and partnership development.

⁷³ For detailed information about ASEAN's cooperation with other regional organizations please consult *ad hoc* sheets on ASEAN website, <https://asean.org/our-communities/asean-political-security-community/outward-looking-community/external-relations/international-regional-organisation/>.

⁷⁴ About ASEAN-China relations in international law perspective see Z. KEYUAN, *China-ASEAN Relations and International Law*, Oxford, 2009; A.D. BA, *Changing conditions, changing roles: ASEAN in Southeast Asia – China relations*, in J. DOSCH, F. KLIEM (eds.), *op. cit.*, 196-210.

⁷⁵ See ASEAN-China Strategy on Environmental Cooperation (2016-2020) adopted at the 18th ASEAN-China Summit in 2015; ASEAN-China Strategy on Environmental Cooperation (2021-2025) adopted at the 23rd ASEAN-China Summit in 2020.

⁷⁶ See lastly Plan of Action to Implement the ASEAN-China Strategic Partnership for Peace and Prosperity (2021 – 2025) adopted by the Foreign Ministers of ASEAN Member States and China in November 2020. It is worth noting that ASEAN and China reaffirmed their shared commitment to further advancing their comprehensive partnership also in the environmental field at the 26th Meeting of the ASEAN-China Joint Cooperation Committee (Jakarta, 21 April 2025).

As far as ASEAN's relations with Japan are concerned, during the 20th ASEAN Plus Three Summit in 2017 the «ASEAN-Japan Environmental Cooperation Initiative» was presented; it included a Climate Change Action Agenda as one of its priority areas. Such Action Agenda, which was launched in at the Japan-ASEAN Summit Meeting in November 2018, aimed to strengthen the regional cooperation on climate change through the three pillars of action, namely transparency, adaptation and mitigation, to enhance co-innovation by using Japanese advanced low/zero carbon and resilient technologies. Then, following the entry into implementation of the Paris Agreement, it was then replaced ASEAN-Japan Climate Change Action Agenda 2.0⁷⁷. At their 27th and 28th Joint Summits in 2024 and in 2025, ASEAN and Japan expressed their joint intention to keep on collaborating in climate change adaptation, energy transition, and emission reduction commitments to foster a resilient and sustainable future and to enhance responses to climate change, disasters, and natural calamities⁷⁸. In particular, the Leaders reaffirmed their collaboration under the “Asian Zero Emission Community” initiative to accelerate practical, country-specific pathways toward net-zero emissions while ensuring regional economic growth and energy security, and focused their discussions on developing regional green infrastructure, deploying low-carbon technologies, and expanding electric vehicle (EV) ecosystems across Southeast Asia⁷⁹. Finally, it is worth noting that Japan has financed some projects assisting ASEAN with environmental issues related to capacity building activities on production on marine plastic waste through TV broadcasting and documentary programs production, development of the report on the state of cli-

⁷⁷ It is to be noted that, under the ASEAN-Japan Transport Partnership, the ASEAN-Japan Plan of Action on Environment Improvement in Transport Sector was developed. It served as a basic framework for ASEAN and Japan to implement measures for environmental improvement with the objective of achieving sustainable development by realizing low-carbon and low-pollution transport systems in the ASEAN region.

⁷⁸ See Chariman's Statement of the 27th ASEAN-Japan Summit, Vientiane, 10 October 2024; Chariman's Statement of the 28th ASEAN-Japan Summit, Kuala Lumpur, 26 October 2025.

⁷⁹ This initiative, launched in 2023, involves: Australia, Brunei Darussalam, Cambodia, Indonesia, Japan, Lao PDR, Malaysia, Philippines, Singapore, Thailand, and Viet Nam. See 1st Asia Zero Emission Community (AZEC) Ministerial Meeting Joint Statement, Tokyo, 4 March 2023; Asia Zero Emission Community (AZEC) Leaders' Joint Statement, Tokyo, 18 December 2023; 2nd Asia Zero Emission Community (AZEC) Ministerial Meeting Joint Statement, Jakarta, 21 August 2024; Asia Zero Emission Community (AZEC) Leaders' Joint Statement Action Plan for the Next Decade, Vientiane, 11 October 2024; Asia Zero Emission Community (AZEC) Leaders' Joint Statement, Kuala Lumpur, 26 October 2025.

mate change in ASEAN Region, and other activities related to disaster risk reduction and improving management effectiveness⁸⁰.

Outside Asian continent, ASEAN has so far collaborated with the United States in the field of climate change⁸¹. Indeed, on their first meeting in 2009, ASEAN-United States Leaders agreed to strengthen collaboration in climate impacts research and in the development and implementation of appropriate policies and measures. Such collaborative willingness was confirmed in 2014 and in 2023⁸², when the US committed to work with ASEAN to address climate change in two joint statements adopted at the Leaders' level. They both called upon both sides to tackle the issue under the UNFCCC and Paris Agreement and encouraged mutual actions to reduce emissions and adapt to climate change. Looking at the results, in 2018 at the US-ASEAN Summit, the US-ASEAN Smart Cities Partnership was launched; it is the most prominent cooperation project serving as a platform for the US Government and US private sector to share best practices on sustainable cities with the ASEAN Smart Cities Network. However, it is worth noting that, although the beginning of Trump's second administration in January 2025 have not ended ASEAN – U.S. climate cooperation, it has significantly changed its character. The relationship has become less climate-centered and more focused on energy security, trade, critical minerals, and infrastructure, while ASEAN increasingly seeks alternative partners and financing sources.

Furthermore, climate change adaptation developing clean energy solutions, improving health systems and increasing resilience to natural disasters is one of the main areas of cooperation both under ASEAN-United Kingdom Dialogue on Science, Technology and Innovation and under the ASEAN – Australia Comprehensive Strategic Partnership (CSP). Established in 2021, one of its most important pillars concerns specifically climate change and energy transition. In this field Australia supports ASEAN through climate adaptation and resilience programs; renewable energy development; clean-energy financing; carbon neutrality strategies, as well as technical assistance and capacity building. In this

⁸⁰ These projects were financed by the Japan-ASEAN Integration Fund which was officially launched in 2006.

⁸¹ About ASEAN-US Relations in general see P. PARAMESWARAN, *The United States and ASEAN*, in J. DOSCH, F. KLIEM (eds.), *op. cit.*, 211-221. New and different scenarios could, however, open up as a consequence of Trump's election as President of the United States.

⁸² See 2nd ASEAN-US Summit – ASEAN-US Joint Statement on Climate Change -, Nay Pyi Taw, 13 November 2014; ASEAN-US Ministerial Dialogue on Environment and Climate – Joint Media Statement, Vientiane, 24 August 2023.

context in 2023 the ASEAN-Australia High-Level Dialogue on Climate Change and Energy Transition was launched⁸³.

Finally, it is worth noting that, in addition to ASEAN, also some of its Member States (e.g. Myanmar, Vietnam, the Philippines) have bilateral cooperation arrangements with third countries (e.g. China) in climate adaptation. Through these inward and outward forms of cooperation, ASEAN and its Member States have been able to mobilise the necessary resources and expertise to bolster climate change resilience in the region.

7. The overview of ASEAN's activities in field of combating climate change reveals that the Organization serves as a forum for exchanging information and sharing best practices. Indeed, except for rare cases, it has not imposed legally binding obligations to its Member States. Rather, it has assisted them in reaching the goals set within the UNFCCC and in fulfilling the binding commitments they made by adhering to the Paris Agreement. In essence, ASEAN has merely provided guidance for its Member States within mitigation and adaptation actions by identifying the main directions of their national policies and by suggesting them relevant measure, strategies and approaches to be taken. In doing so, it has opted for a flexible approach through the adoption of documents that, although variously named, all share the same legal nature. Both the blueprints and the visions they presented, declarations and joint statements that have followed, and the various action plans, strategies, etc. that have been approved over the years, can all be classified as *soft law acts*, since they all are not legally binding. Furthermore, even when (rarely) climate change issues have been the subject of binding rules (e.g. the 2002 Agreement on transboundary haze pollution, the ASEAN Agreement on Disaster Management and Emergency Response), they do not have a prescriptive nature but, in fact, merely define obligations of result, leaving discretion to ASEAN Member States as to how and when they are to be realized. In essence, ASEAN has addressed the climate change issues opting for an approach based on strict adherence to the concepts of sovereignty and non-interference with domestic policy

⁸³ At their 2024 Special Meeting, ASEAN and Australia renewed their commitment to reinforce their partnership to address climate change, environmental challenges and biodiversity loss, including through regional mitigation, adaptation and resilience efforts. The aforementioned format of High-Level Dialogues is part of these efforts. Moreover, Australian Government expressed its intention to keep on supporting ASEAN in implementing its Action Plan on Joint Response to Climate Change and the Strategy for Carbon Neutrality. For this purpose, it announced the allocation of a new \$10 million Climate and Clean Energy Window, designed to bolster our joint efforts on climate change and clean energy. See Melbourne Declaration – A Partnership for the Future, Melbourne, 6 March 2024.

of individual ASEAN Member States, as well as to the tradition of solving problems by negotiation and consensus decision-making. That is to say, it has acted in compliance with the so-called «Asian way», namely in compliance with a markedly voluntaristic view of interstate cooperation based on constant mutual benefit⁸⁴. Thus, in line with this approach, which is typical of Asian States' culture⁸⁵, on the one hand ASEAN included climate change into its Agenda only when it became apparent to its Members the actual benefit that would accrue to all of them *uti universi* and each of them *uti singuli* from its collective and concerted handling. On the other hand, it has neither imposed nor recommended solutions that could go against the interests of even just one of its Member States. The choice to address climate change issues mainly adopting a wide range of non-legally binding instruments allowed ASEAN to strike a delicate but vital balance between the need to act collectively to address common and national regional challenges, on the one hand, and the need to maintain the principle of non-interference with respect to sovereignty, on the other hand. Borrowing an expression used in literature, it can reasonably be stated that ASEAN legal documents on climate change result in the «lowest common denominator» being put forward and reflect the «politics of the possible»⁸⁶. Moreover, on closer inspection, such a flexible approach also allows ASEAN to comply with and achieve the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances, which is incorporated in Article 3.1 of the UNFCCC.

At this point one has to ask whether this approach has proved successful so far. It has been criticised by some scholars considering ASEAN documents on climate change insufficient, since they do not impose obligations on Member States and, consequently, they do not provide for sanctions for defaulting countries. While it has helped maintain regional stability, the emphasis on national sovereignty and consensus often leads to inaction or diluted commitments which are not adequate to respond to pressing challenges, like climate change⁸⁷. And indeed, although ASEAN's efforts in

⁸⁴ See M. HAAS, *The Asian Way to Peace*, New York, 1989; Y. SATO, *The Asian Way – or Scapegoating?*, in *New Zealand International Review*, 1999, n. 6, 22-25; P. PENNETTA, *Il regionalismo multipolare asiatico. Contributo al diritto della cooperazione istituzionalizzata fra Stati*, Torino, 2003, 15; A. SCHIFANO, *Organizationhood in the Light of Asian Minimalism*, in *Chinese Journal of International Law*, 2023, 712.

⁸⁵ Asian States merely consider interstate cooperation as a means to realize carefully balanced reciprocal interests. So, they tend to participate in forms of association whose activities are regarded as concretely useful, from time to time, and to keep issues of disagreement out of cooperation.

⁸⁶ B. BOER, *op. cit.*, 259.

⁸⁷ In this sense see H. MAHASETH, A. NAAZ, *op. cit.*; S. SEAH, M. MARTINUS, *op. cit.*, 16.

promoting climate change adaptation strategies and sustainable practices across its Member States are extremely remarkable, Southeast Asian countries are still very far from achieving targets defined by the UNFCCC and the Paris Agreement.

So, how to get out of this impasse? In my view, ASEAN should prioritize the implementation of existing few agreements, such as the ASEAN Agreement on Transboundary Haze Pollution, by improving monitoring mechanisms and ensuring swift, coordinated responses to transboundary haze incidents. For this purpose, a significant role could be played by a centralized body like the ASEAN Coordinating Centre for Transboundary Haze Pollution Control. Furthermore, ASEAN should improve regional institutional framework on climate change which seems to be extremely fragmented. Indeed, climate change issues are addressed not only by the ASEAN Working Group on Climate Change whose role is still limited to its environmental mandate, but also by other sectoral bodies under the ASEAN Economic Community pillar and, to a lesser degree, under the ASEAN Political Security Community pillar. In the light of their multisectoral nature, it is absolutely right that climate change issues are addressed by several sectoral bodies. However, to avoid wasting energy and duplication of documents which are often similar in their content, it is desirable that ASEAN supports cross-sectoral discussions among environmental, economic, social and defence Ministries. In other words, it should envisage a coordinating body that is able to ensure such cross-sectoral discussions and to manage regional actions by optimizing legal, human and financial resources at the disposal of the Organization. Such role could be played by the ASEAN Centre on Climate Change.

Moreover, on the premise that the involvement of a wide variety of stakeholders is essential for the success of climate change mitigation and adaptation initiatives, ASEAN should promote the establishment of public-private partnerships for sustainable development by convening frequent conferences or workshops⁸⁸. A decisive role could be played by the ASEAN Secretariat in this regard.

While maintaining the aforementioned flexible approach but adopting these small corrections, the achievement of environmental targets in ASEAN is not impossible; of course, provided that the Organization's commitment is accompanied by a consistent will on the part of its Member States.

⁸⁸ In this sense see VGR C. GOVINDARAJU, S. SARPANESWARAN, J. SINGH KESHMINDER, *Policy Coordination for Private Sector Engagement in Climate Change Adaptation*, in *ASEAN Socio-Cultural Community Policy Brief*, 2024, n. 6, 1.

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