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The Controversial Relationship between Human Rights and Climate Change: Recent Developments in the International and European Legal Orders. Focus on the Case-Law of the European Court of Human Rights in Environmental Issues.

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List of Abbreviations

AAUs	Assigned Amounts Units
AC	Aarhus Convention
ACHPR	African Charter on Human and Peoples' Rights
ADP	Ad Hoc Working Group on the Durban Platform for Enhanced Action
AIDS	Acquired Immunodeficiency Syndrome
ARSIWA	Responsibility of States for Internationally Wrongful Acts
CERs	Certified Emission Reduction Units
CDM	Clean Development Mechanism
COP	Conference of the Parties
CTCN	Climate Technology Center and Network
DOEs	Designated Operational Entities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	Espoo Convention on Environmental Impact Assessment in a Transboundary Context
EITs	Economies in Transition
ERU	Emission Reduction Units
EFT	Enhanced Transparency Framework
ETS	Emission Trading System
EU	European Union
GEF	Global Environment Facility
GCF	Green Climate Fund
GHG	Greenhouse Gas
HIV	Human Immunodeficiency Virus

ICCPR	International Covenant on Civil and Political Rights
ICESCR	Committee on Economic, Social and Cultural Rights
INC	Intergovernmental Negotiating Committee
IPCC	Intergovernmental Panel on Climate Change
JI	Joint Implementation
JISC	Joint Implementation Supervisory Committee
ICERs	Long-Term Certified Emission Reduction Units
LDCs	Least Developed Countries
LRTAP	Convention on Long-Range Transboundary Air Pollution
NDCs	Nationally Determined Contributions
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Co-Operation and Development
PA	Paris Agreement
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SCF	Standing Committee on Finance
SDG	Sustainable Development Goals
tCERs	Temporary Certified Emission Reduction Units
TEC	Technology Executive Committee
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TNCs	Transnational Corporations

UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCESCR	United Nations Covenant on Economic, Social and Cultural Rights
UNCRC	United Nations Convention on the Rights of the Child
UNCTs	Guidance Note for UN Country Teams
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNDAF	United Nations Development Assistance Framework
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WMO	World Meteorological Organization

Introduction

> *"Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth… Both aspects of man's environment, the natural and the manmade, are essential to his well-being and to the enjoyment of basic human rights –even the right to life itself"*
>
> *(Preamble to the UN Conference on the Human Environment, 1972)*

The destiny of humankind has always been inextricably linked with the characteristics of the environment that surrounds it. Throughout history, favourable environmental conditions have determined the flourishing of some of the most remarkable and important cultures, while adverse environmental factors have induced upheavals, provoking the migration of entire peoples seeking for better life conditions. Thus, for ages, the development of human civilization has progressed in harmony with nature.

With the advent of modern societies and with the exponential growth of the global population, the just-mentioned positive relationship with the environment has partially faded, leaving the place to more aggressive logics of exploitation of natural resources and to a more incisive human action on the environment. The shift in this relationship has resulted in the emergence of pollution and environmental degradation phenomena until then unknown.

Only from the 1970s, people started to become aware of the negative effects that the economic development, based on prosperity's maximization logics, is capable of having on the environment. Since then, several legal instruments have been drawn up in order to mitigate the consequences of pollution and of environmental deterioration, both at the national level, with the introduction of environmental law and the adoption of environmental policies aimed at the reduction of human activities' consequences on the environment, and at the international level, through international cooperation among States on environmental issues of global significance, such as climate change.

In parallel, the capacity of pollution and environmental degradation phenomena to adversely affect human beings' life, well-being and health has become evident, to the extent that it can be seen to undermine some of the fundamental human rights globally recognized and protected. With the increase of this awareness, the relationship between human rights and the environment has been acknowledged and mentioned for the first time in the Preamble of the United Nations Conference on the Human Environment in 1972, as we can read in the symbolic introductory sentence. The extract is emblematic since it contains the core element at the basis of this work: it

indeed recognizes the importance of a good and healthy environment for the enjoyment of fundamental human rights. However, in the international judicial arena, the consciousness of this relationship has created a crucial fracture: on the one side, the emergence of the necessity of the establishment of a right to a good environment as a means to protect other fundamental human rights, and on the other side, the belief that the existence of this right is groundless and does not deserve a place in international law.

On the basis of this concern, the aim of this thesis is to deeply analyse the contentious interconnection between the enjoyment of fundamental freedoms and environmental degradation, especially in the context of the European Convention of Human Rights and the consequential case-law of the European Court of Human Rights.

In the first chapter, I will start examining the controversies of the relationship between human rights and the environment, analysing the theoretical definition of Environmental Human Rights, in order to reach a potential definition of a right to a good environment. Indeed, this category is worth to be mentioned since it implies the necessary features that a proper right to a good environment should entail, demonstrating the mutually supportive relationship between its two core elements. Moreover, it will be shown how the presence of this set of rights, that are the result of a human right approach to the problem of environmental harm, creates benefits in addressing the implications of climate change on four fundamental rights: the right to life, to health, to adequate food and to adequate housing. In the construction of a proper right to a good environment, I will firstly identify the potential right-holders and duty-bearers, differentiating different scenarios for different actors, and lastly establish how a violation of such rights could occur.

The second chapter will serve as a contextualizing tool for understanding the international and European legal framework in environmental matter. Here, some of the fundamental international legal agreements and conventions will be examined, in order to better understand the context in which the relationship between such concepts has been developing. Indeed, these legal instruments are fundamental for understanding the way in which international actors started to recognize the climate change question as a global issue, and how they have chosen to address it. Through the analysis of the UN Framework Convention on Climate Change, the Kyoto Protocol, the Paris Agreement and the European environmental policy contained in the TFEU, since some of them recognize the importance of the human right dimension in facing climate change while others do not stress this aspect, the controversial opinions on a human right approach to a good environment will be demonstrated at the judicial level.

The third chapter constitutes the core part of the work. After having analysed the main elements of the European Convention of Human Rights, I will discuss the evolution of the case-law of the body that ensures its observance, namely the European Court of Human Rights. Even though the ECHR does not contain provisions devoted to the protection to environmental issues, in its jurisprudence the ECtHR has recognized environmental claims on the basis of

the extension of some human rights' protection. For this purpose, I will describe the environmental implications of the provisions of the Convention that have been mostly questioned in the Court's case-law: the right to life contained in Article 2 ECHR, and the right to respect for private life, family life, and home included in Article 8 ECHR.
Finally, in the fourth and final chapter, I will present two ground-breaking cases, namely the *Urgenda* case and the *People's Climate* case. These will serve to understand how steps taken for mitigating the effects of climate change on mankind have been questioned on the basis of some human rights, as a demonstration of the fragility of the relationship between climate change and human rights.

1 The Relationship between Human Rights and Climate Change

Human rights can be defined as ethical demands operating at an elevated juridical level: they are rights which belong to all human beings, without discrimination in terms of race, sex, nationality, ethnicity, language, religion, or any other status. The international community throughout history has produced several legal instruments, starting from the 1948 UN Universal Declaration on Human Rights, by which universal standards of human rights protection have been set out. The objective of the Universal Declaration has been that of affirming faith in fundamental human rights, "in the dignity and worth of the human person and in the equal rights of men and women"[1] and has committed itself to the promotion of "social progress and better standards of life in larger freedom"[2]. Thus, through a process of integration and natural awareness of the importance of this set of rights, the majority of the countries has become a party to various regionally based systems for the promotion and protection of human rights, namely the European, Inter-American and African systems[3].

The turning point in the construction of the category containing the various aspects of "human rights" has been the discovery of the passage of the Earth from the Holocene epoch to the Anthropocene. It is thanks to this acknowledgement that the environmental aspect has become significant in the human rights' discourse. Indeed, the passage from the Holocene epoch to the Anthropocene one refers to a geological period in which humans are considered to dominate as the great forces of nature everything that surrounds them, and, as a result, the problems that human beings will face in the Anthropocene will be more severe, unpredictable, complex and of a magnitude thus far unseen. Indeed, the global human environmental imprint will render the Earth less predictable, non-stationary and less harmonious[4]. Thus, the major argument according to this theory claims that it is humans' behaviour that is responsible for global ecological demise and that humans will have to re-think the structure governing the responsibility of the natural living, but non-human, world on the legal side, since it is through law that society determines and guarantees limits and allocates responsibilities[5]. Indeed, according to Allot and his research on the social functions of law in the international community, "law plays an important role in the regulation of

[1] Preamble to the Universal Declaration of Human Rights (1948).
[2] *Ibidem*.
[3] LANDMAN (2004: 907).
[4] KOTZÉ (2014: 253).
[5] *Ivi*, p. 257.

the effects of human behaviour on the environment and facilitating adaptation to changing environmental conditions"[6] in three significant ways: first of all, law bears the systems and structures of society through time; secondly, law manages the priorities of society-members, placing the common interest into their behaviour; and finally, law tries to predict different scenarios for the future of society, on the basis of its mechanisms, values and purposes[7].

Within the context of these three functions, human rights' duty goes beyond the traditional instrumentalist function of 'normal' law[8]: by definition, they are ethical demands rather than legal commands and they provide a legal articulation of the intrinsic ethics of society[9].

For these reasons, since the moment of acknowledgment of humans' responsibility towards the environment and the severe consequences that humans' interference with the environment is creating, namely climate change, there has been an increase in the engagement with and the study of human rights law, which has resulted in the conception of it as a tool for activating environmental claims and pursuing environmental justice. Thus, human rights have been placed at the centre of the environmental debate as means to mediate the human-environment and the human-human interface since they are necessary to foster strict environmental laws, improve their implementation and enforcement and promote environmental justice.

In this context, climate change constitutes the biggest environmental challenge faced by the international community, not only due to its widespread, serious and extreme environmental effects, but also because of its anthropogenic nature. Indeed, climate change has been brought about by humans' activities throughout time in order to maximize their level of achievement and prosperity: humans' necessity of electricity, heat, and transportation, produced from burning fossil fuels, as well as deforestation for agricultural or infrastructure expansion, and increasing livestock farming to guarantee sustenance to the ever-growing global population are just some among humans' activities which have contributed to climate change[10].

Moreover, climate change poses questions concerning justice and equality, since those States who contribute less to greenhouse gas emissions will be those who will suffer the most from the impact of climate change[11]. Most importantly, an analysis of the effects of climate change, as we will see further on, shows that it threatens the enjoyment of a wide range of human rights.

It goes without saying that the debate has created supporters and opposers of the relationship between human rights and climate change, creating controversies that rendered this question even more complex than it initially was.

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[6] ALLOT (2000: 69).
[7] *Ibidem.*
[8] A way to intend law as a tool to control human behavior by means of punishment and coercion.
[9] KOTZÉ (2014: 253).
[10] *Causes of Climate Change*, available *online*.
[11] ALTHOR, WATSON, FULLER (2016: 2).

1.1 Environmental Human Rights: A Complex but Mutually Supportive Relationship

1.1.1 Definition of Environmental Human Rights

Giving a definition to the set of "Environmental Human Rights" is not a simple task, since there is not a single category under which they fall. There are at least three different and, in some respects, contrasting perspectives that can describe their contents and consequent role.

Firstly, environmental human rights can be looked at, on the basis of an anthropocentric approach, in which human beings are placed at the center of the concern and, thus, possess rights in the framework of environmental protection. In this sense, existing civil and political rights can make environmental information, judicial remedies and political processes available to citizens, groups of citizens and non-governmental organizations, thus facilitating the level of participation in environmental decision-making and pressuring governments to ensure minimum standards of protection for life, private life and property from environmental harm. However, this approach focuses more on the capabilities that existing rights could have in the framework of environmental protection and on the "harmful impact on individual humans rather than on the environment itself"[12]: it does not aim at pursuing a law of environmental rights, but it rather looks for a "greening" of human rights law[13].

Secondly, a different perspective claims to treat environmental human rights, namely the right to a decent, healthy and sound environment as an economic or social right, following the lines of the 1966 United Nations Covenant on Economic Social and Cultural Rights ('UNCESCR'). Thus, it poses environmental human rights on the same level of rights such as education, fair and just conditions of work, adequate standards of living, the highest attainable standard of health and social security[14]. In this approach, the main argument is that it would promote environmental quality as a fundamental value, comparable to other economic and social rights, almost seeing it as a good in its own right. However, the protection of environmental rights seen in this way would be threatened by the high level of vulnerability of these rights to tradeoffs against other privileged but competing objectives, such as the right to economic development[15].

Thirdly, the last perspective considers environmental quality as a collective or solidarity right. This kind of rights was born as a response to the evolution of the concept of human dignity, and of people's conception of it, and resulted

[12] BOYLE (2007: 472).
[13] *Ibidem.*
[14] Rights that the UNCESCR protects.
[15] BOYLE (2007: 471).

from new emerging threats and opportunities: they embrace collective rights of society or peoples, such as the right to development or the right to peace[16]. Thus, they give advantage to communities rather than individuals in determining how their environment and natural resources should be managed to reach a full protection. This approach is the most contested and criticized among the three presented, since it creates an internal conflict within the concept of Environmental Human Rights itself: if they are to be treated as third generation rights which can be held only by communities or states, they contrast with the objective definition of human rights which can only be held by individuals, providing a justification for potential repressive regimes to sacrifice individual human rights in the name of these collective human rights to which the protection of environment belongs[17].

A second argument against this third approach concerns the problem of accountability of these rights: if it is the international community's responsibility to safeguard third generation rights, who is supposed to make sure that the standards set are respected and guaranteed?[18]
We will focus more on this second concern regarding accountability later on, but at the moment it is certain that further attention from the international community is necessary to clarify some of the doubts arising in this context. Despite this, an example of recognition of the above-mentioned collective rights has been included in the African Charter on Human and Peoples' Rights ('ACHPR'), adopted in 1981, and entered in force in 1986, which aims at promoting and protecting human and peoples' rights and freedoms taking into account the legal and political context of African States as well as preserving African traditions and identity. Not only does this Charter recognize the protection of civil and political rights, as well as economic, social and cultural rights, but it also contains *peoples' rights* or *group rights*, such as the right to development, the right to freely dispose of their wealth and natural resources and, more precisely in its Article 24, the right to a generally satisfactory environment: "all peoples shall have the right to a general satisfactory environment favorable to their development"[19]. The presence of this article seems to confirm the third approach' thesis which supports the belonging of Environmental Human Rights to the category of collective human rights.
In order to reach a synthesis between the three above-mentioned perspectives which would provide us with a more profound understanding of the definition of the topic of the present work, it is necessary to mention the articulation made by the former UN Special Rapporteur John Knox on human rights obligations relating to the environment. In this context, the Human Rights

[16]*The Evolution of Human Rights*, in *Council of Europe Portal*, available *online*.
[17] BOYLE (2007: 472).
[18] Ibidem.
[19]Article 24 of the African Charter on Human and Peoples' Rights (1981).

Council, in its resolution 28/11[20], expressed the necessity to clarify the relation of human rights with the environment in terms of legal obligations: Knox proposed 16 principles according to which States have basic obligations falling under human rights law concerning the enjoyment of a safe, clean, healthy and sustainable environment. The sixteen points provide "an integrated and detailed guidance for practical implementation of [the] obligations, and a basis for their further development as our understanding of the relationship of human rights and the environment continues to evolve"[21]. However, these principles are not exhaustive, but they have to be integrated with also national and international norms which are fundamental for the protection of human rights and the environment.

The 16 Framework Principles on Human Rights and the Environment, listed as Knox did in the 37th session of the 2018 Council, first of all highlight the relationship between the environment and human rights, putting a responsibility on the State in ensuring "a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights"[22] but also stating that "State should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment"[23]. Both elements are put on the same level and have the same weight.
Secondly, the principles provide also a guideline for protection against environmental harm caused by or contributing to discrimination, intended as both direct and indirect. Direct discrimination is "when someone is treated less favorably than another person in a similar situation for a reason related to a prohibited ground […] [while] indirect [is] when facially neutral laws, policies or practices have a disproportionate impact on the exercise of human rights as distinguished by prohibited grounds of discrimination"[24].
As a third concern, the Framework Principles guarantee the respect of traditional human rights in environmental questions, stating that "States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters [as well as] education and public awareness"[25].
Moreover, they highlight the importance of public participation in the government of countries and in the management of state affairs, which include participation also in the decision-making process concerned with environmental matters. In order to ensure its effectiveness, public participation must include all members of the society that may be affected and

[20] Resolution of the Human Rights Council, 7 April 2015, A/HRC/RES/28/11, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development.*
[21]Office of the United Nations High Commissioner for Human Rights, 2018, *Framework Principles on Human Rights and the Environment*, available *online*.
[22] *Ibidem*.
[23] *Ibidem.*
[24] *Ibidem.*
[25] *Ibidem.*

want to give a contribution. For this reason, "States should provide public access to environmental information […] and take the views of the public into account in the decision-making process"[26].
Lastly, the principles take into consideration the fact that the consequences of environmental damages in terms of human rights are felt more by the communities that are already in vulnerable situations; these include: women, children, people living in conditions of poverty, indigenous and traditional peoples, the elderly, people with disabilities, and minorities of all kinds. In this regard, the principles establish that "States should take additional measures to protect the rights of those who are most vulnerable to […] environmental harm […] [and] should ensure that they comply with their obligations to indigenous peoples and members of traditional communities"[27].
Among all the necessary aspects that the 16 principles have to cover, one of the key themes expressed by Knox in the report of the Human Rights Council has been the interdependence of protection of both the environment and human rights, which we have understood to be characterized by tensions and complexities[28]. As a result, a stronger protection of the dual role of the environment as both a source of sustenance and prosperity, and as a provider of spiritual and cultural enhancement, would translate into a wider enjoyment of human rights. After all, the set of rights internationally recognized that also present an environmental dimension, such as the right to health, the right to life, the right to adequate food and the right to adequate housing, can all be potentially affected by poor environmental conditions. Thus, in this sense, "a good environment can be seen as a precondition to the full enjoyment of human rights"[29].

The mutuality of the connection which characterizes the relationship between human rights and the environment results from the fact that the protection of the environment can be fully achieved if the level of human rights guarantees is substantial. Indeed, the strong protection of fundamental human rights and freedoms, such as freedom of expression and information, or the right to equality before the law and to vote in free elections can intensify environmental protection and promote sustainable development. In this concern, some authors have confirmed the mutually supportive feature of the two elements implied in the category of Environmental Human Rights, stating that:

> "It is tempting in the environmental context to move directly to the economic and social, bypassing the civil and political as being concerned with a different set of issues. But access to courts, the ability to protest, and the capacity to obtain information are all central features of the struggle to achieve better

[26] *Ibidem.*
[27] *Ibidem.*
[28] Report of the Independent Expert John H. Knox, 30th December 2013, A/HRC/25/53, *on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*.
[29] LEWIS (2018: 2).

> environmental protection…Even in democratic countries guided by the rule of law and informed by respect for human dignity, this has not been an easy matter"[30].

Having said that and taking into consideration the complex and controversial relationship of the two subjects of study, we can come up with a clearer and comprehensive definition of what the term Environmental Human Rights categorizes, and of the different formulations of the concerned legal status. One key category of environmental human rights includes the environmental aspects of other human rights, such as the right to life or the right to health. In these two cases, for example, the necessity of a healthy environment protects human life under two aspects: firstly, the physical existence and health of human beings, and secondly, the quality of life that makes it worth living, namely the concept of dignity[31].

A second category of Environmental Human Rights concerns international, regional and national laws which aim at granting environmental entitlements, establishing environmental guarantees or imposing environmental duties through the use of the language of human rights. A perfect example of this category is "the constitutional guarantees of the right to a clean, healthy or decent environment"[32] as well as "constitutional duties which require governments to ensure protection and conservation of the environment"[33].

Lastly, the third category includes those regional human rights instruments fundamental for the recognition of analogous environmental human rights and duties, together with soft-law instruments which highlight the importance of the environment to the fulfillment of human rights.

In addition to this categorization, a second broader distinction must be made between *substantive* and *procedural environmental* rights[34].

Substantive environmental rights "are those in which the environment has a direct effect on the existence or the enjoyment of the right itself"[35]. In this classification are included "civil and political rights, such as the rights to life, freedom of association and freedom from discrimination; economic and social rights such as rights to health, food and an adequate standard of living; cultural rights such as rights to access religious sites; and collective rights affected by environmental degradation, such as the rights of indigenous peoples"[36].

Procedural environmental rights, on the other hand, can be principally found in environmental law: they "prescribe formal steps to be taken in enforcing legal rights"[37]. Thus, they include the right of individuals and communities to receive all the information about the impacts on the environment and the right to be included in the decision-making process about the environment.

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[30] GEARTY (2010: 13).
[31] LEWIS (2018: 2).
[32] LEWIS (2018: 4).
[33] *Ibidem.*
[34] *Ibidem.*
[35] *What are Environmental Rights?*, in *UN Environment Programme*, available *online.*
[36] *Ibidem.*
[37] *Ibidem.*

1.1.2 The Need of a Human Rights-Based Approach and its Benefits

The acknowledgment of the fact that climate change and environmental protection must be regarded as human rights-connected issues has raised the attention towards the necessity of an approach that would consider the macro-context in which it is embedded and that would move towards its respect.
In this concern, the Human Rights Council in Resolution 10/4, has officially recognized that "climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights" and that "human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change"[38], thus reminding us the necessity of introducing a human rights-based approach to the global response to the climate crisis.
A human rights-based approach is a conceptual framework which builds its normative basis on international human rights standards: it promotes and protects human rights. In other words, "it seeks to analyze obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights"[39]. In this sense, plans, policies and programs are embedded in a system where rights and obligations are established at a legal international level in order to promote sustainability, empowering the so-called *right-holders* to contribute in policy formulation and to fairly demand accountability from those who have a duty to act, the *duty-bearers*.
As a result, UN agencies have listed a number of essential features that an ideal human rights-based approach should have in environmental protection. First of all, the main objective of both programs and policies should be to fulfill human rights. In this regard, in the case of environmental protection, one of the benefits of the use of a human rights-based approach concerns its moral weight: since human rights have value in a moral sense, "establishing that climate change is a moral […] challenge […] imbues climate change with a sense of gravity and moral urgency"[40], thus creating a guiding principle, that of aiming at the protection of human rights, in facing environmental challenges and finding right solutions.

As a second main feature, a human rights-based approach should define and identify, on the one hand, *right-holders* and their entitlements in order to strengthen their capacity to make claims, and on the other hand, the corresponding *duty-bearers* and their capacity to meet their obligations.
In this respect, the benefits are countless. Indeed, human rights provide us with a guiding principle that refers to climate change not only in terms of

[38] Office of the United Nations High Commissioner for Human Rights, *Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures*, available *online*.
[39] *Ibidem*.
[40] LEWIS (2018: 192).

economic impacts or future targets, but in terms of current obligations and existing illegality. On the one hand, a human-rights based approach encourages us to think not only about what rights are brought into play, but also about whose task is to uphold those rights: in this way, more attention is put on relevant responsibilities in the climate change context and, consequently, accountability's degree is increased. On the other hand, the individual is placed at the center: this contributes to spreading the stories of those who have been negatively affected by environmental degradation, thus helping to advocate and promote public awareness of the injustices resulting from it[41]. In other words, a human rights-based approach "draws attention to the impacts that climate change has on the realization of human rights and empowers vulnerable communities by supporting their claims for international assistance"[42].

The third and last fundamental characteristic of a human rights-based approach to environmental protection is that international human rights treaties can be seen as tools to set principles and standards as guides to all policies and programs concerned with environmental matters. In other words, "human rights [provide] a frame for policy choices"[43].

Following these lines, the consequent benefits result to be more procedural in nature: a human rights-based approach provides several procedural standards which can be fundamental for the decision-making and negotiation processes. Among these, "requirements for participation and consultation with affected groups […], the principles of non-discrimination, equality and respect for the rule of law"[44]. As a result, the improvement of these standards and guidelines altogether can limit corruption, help building accountability and increase legitimacy and sustainability of policy outcomes.

In practical terms, a human rights-based approach can be useful to "guide policies and measures of climate change mitigation and adaptation, […] can inform assessments, and strengthen processes, ensuring access to essential information, effective participation, and the provision of access to justice"[45]. This creates the necessity of integrating a human rights-based approach in any climate change adaptation or mitigation measure, since inadequate measures could lead to human rights violations if full participation of local communities is not granted or if the right to a due process and the right to access to justice are not respected. This has already been done in the Guidance Note for UN country teams (UNCTs) on *Integrating Climate Change Considerations in the Country Analysis and the united Nations Development Assistance Framework* (UNDAF) which has required the UN development system's countries to

[41] *Ibidem.*
[42] LEWIS (2018: 193).
[43] MCINERNEY-LANKFORD, DARROW, RAJAMANI, *Human Rights and Climate Change. A Review of the International Legal Dimensions*, 2011, available *online*.
[44] LEWIS (2018: 193).
[45] Office of the United Nations High Commissioner for Human Rights, *Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures*.

consider the ways and the extent of the climate change's impediment on economic and social development, in terms of poverty reduction, strengthening human rights and improving human health and well-being.

1.2 The Impact of Climate Change on Human Rights

> "Climate change is a reality that now affects every region of the world. The human implications of currently projected levels of global heating are catastrophic. Storms are rising, and tides could submerge entire island nations and coastal cities. Fires rage through our forests, and the ice is melting. We are burning up our future – literally."[46]

It is with this statement that Michelle Bachelet, United Nations High Commissioner for Human Rights, has opened the 42nd session of the Human Rights Council in September 2019 after that the Intergovernmental Panel on Climate Change ('IPCC') had confirmed in its reports[47] that climate change is a real phenomenon and that the primary factors that contribute to the increasing of its negative effects are human-made greenhouse gas emissions. Some of the adverse impacts of climate change include "the increasing frequency of extreme weather events and natural disasters, rising sea levels, floods, heat waves, droughts, desertification, water shortages, and the spread of tropical and vector-borne diseases"[48]. As expressed in the Human Rights Council resolution 41/21, such phenomena are considered to threaten both directly and indirectly the enjoyment of a set of fundamental human rights by people around the globe. These range of rights include: the right to life, health, adequate food, adequate housing, safe drinking water and sanitation, self-determination, culture, work and development.
The analysis will now focus on the impact of climate change on the first four rights mentioned, that are strongly interconnected and are those from which all the others set of rights take inspiration and rationale.

[46] Global Update at the 42nd Session of the Human Rights Council, *Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet*, 2019, available *online.*
[47] IPCC, *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emissions Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, 2018, available *online*.
[48] Global Update at the 42nd Session of the Human Rights Council, *Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet*, 2019, available *online.*

1.2.1 The Right to Life

The right to life can be considered the "prerequisite for the enjoyment of all other human rights"[49]. For some authors, this classifies the right to life as the right "to access to the means of survival; realize full life expectancy; avoid serious environmental risks to life; and enjoy protection by the State against unwarranted deprivation of life"[50].
It is protected by several legal instruments, such as: Article 6 of the International Covenant on Civil and Political Rights (ICCPR) which states that "every human being has the inherent right to life […] protected by law [and] no one shall be arbitrarily deprived of his life"[51]; or Article 3 of the Universal Declaration of Human Rights, according to which "everyone has the right to life, liberty and security of person"[52].
The several possible interpretations of this right have allowed the Human Rights Committee to interpret it as a right which imposes on States the duty to protect people against threats to life, taking into consideration the cases of malnutrition and epidemics too. Thus, if a State does not work to change conditions which present an imminent threat to life, it could be committing a breach of the right to life.
Climate change enters the discourse when talking about its effects and their negative impact on the respect of the right to life. Indeed, the effects of climate change threaten the right to life in several ways. This statement was firstly affirmed in the *Yanomami Indians* Resolution n° 12/85 before the Inter-American Commission of Human Rights. In this case, on the one hand, the Brazilian government allowed the construction of a road and granted mining licenses on the Yanomami's indigenous land, and on the other hand, the reacting claim was that these actions were violating human rights, including the right to life, because the construction work exposed indigenous people to a number of infectious diseases with whom they had never been in contact before. As a result, the Commission on Human Rights decided that the realization of the right to life is strictly connected with and depends on one's physical environment[53].

With this understanding, future projections of climate change's impact on the right to life are not promising, and in some areas of the world, populations are already starting to face these effects on their lives: the Intergovernmental Panel on Climate Change has predicted that life-threatening natural disasters and environmental crises will be caused by climate change and that they will occur much more frequently[54]. These natural catastrophes include heatwaves

[49] *UN Human Rights Committee Publishes New General Comment on the 'Right to Life'*, in *OHCHR*, available *online*.
[50] STEPHENS (2010: 53).
[51] Article 6 of the International Covenant on Civil and Political Rights (1966).
[52] Article 3 of the Universal Declaration of Human Rights (1948).
[53] LEWIS (2018: 33).
[54] ALEXANDER (2015: 4).

and drought, heavy precipitation events and longer monsoon seasons, storms and cyclones as well as non-natural disasters will destabilize our systems. The outcome will be an increase in hunger and malnutrition, which will cause the spreading of related disorders on child growth and development. In this scenario, the consequent result will be an increase in the number of people dying because of diseases and injuries to the point that the World Health Organization has forecasted that between 2030 and 2050, climate change will be the responsible factor of an additional 250,000 deaths every year[55].
To sum up, climate change has the potential to negatively affect the right to life both directly and indirectly, since its effects include both environmental life-threatening events and fundamental determinants of life such as food, shelter and healthy conditions.

1.2.2 The Right to Health

The right to health is one of the few fundamental human rights specifically mentioned in the Preamble of the Paris Agreement, a landmark environmental accord adopted by a vast majority of States to address climate change and its negative impacts. It states that "parties should, when taking action to address climate change, respect, promote and consider their respective obligations on […] the right to health"[56].
Being one of the fundamental rights, it does not have to be associated only with access to health care and the building of hospitals, but it expands further: it implies a wide range of factors that can allow us to lead a healthy life. The Committee on Economic, Social and Cultural Rights has guaranteed the right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which affirms that such right "contains both freedoms and entitlements"[57]: the former concerns the right "to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation"[58]; the latter "include the right to a system of health protection which provides quality of opportunity for people to enjoy the highest attainable level of health"[59].
Since the adoption of the two international Covenants in 1966, the notion of health has widened in scope, resulting in a stronger focus on more of its potential determinants such as resource distribution and gender differences, and it has started to take into consideration formerly unknown diseases, such as Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS) which are now considered to be obstacles for the

[55] World Health Organization, *Climate Change and Health Factsheet*, 2017, available *online.*
[56] Preamble of the Paris Agreement (2015).
[57] General Comment of the Committee on Economic, Social and Cultural Rights, 11 August 200, E/C.12/2000/4, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights.*
[58] *Ibidem.*
[59] *Ibidem*.

enjoyment of the right to health. In 2009, the Office of the United Nations High Commissioner for Human Rights has reached a more comprehensive definition which includes all the aspects that must be taken into account, describing the right to health as implying:

> "the enjoyment of, and equal access to, appropriate health care and, more broadly, to goods, services and conditions which enable a person to live a healthy life. Underlying determinants of health include adequate food and nutritional housing, safe drinking water and adequate sanitation, and a healthy environment"[60].

As for the right to life, climate change impacts health in a number of ways, both directly and indirectly. On the one side, direct impacts relate significantly to changes in the frequency of extreme weather conditions such as higher temperatures which will lead to a higher incidence of food poisoning, drought, heavy rainfalls and floods which can cause an increased prevalence of water-borne diseases, such as cholera. On the other side, indirect effects are those mediated through natural systems, such as "altering distributions of infectious diseases, [or] increased food and water contamination"[61]: global warming will increase rates of diarrheal, cardiorespiratory and infectious diseases as well as the spread of malaria and several more vector-borne diseases.

One of the primary consequences of this extreme climate impact is that it will worsen the conditions of already at-risk groups such as indigenous peoples[62], the elderly, children and people with disabilities, thus exacerbating existing vulnerabilities and reducing the capacity of people and communities to adapt. This allows us to introduce the concept of vulnerability, which is referred to as "the propensity or predisposition to be adversely affected"[63] as the IPCC assessed. Vulnerability is generally caused by several factors, intended as indicators, such as education, income, health status and the quality of governance, but in the case of climate change, the most reliable indicator of vulnerability is the background climate-related disease rate of a population. The reason of the choice of this variable can be found in the fact that increasing the risk of disease in a low-disease population would cause less impact than doubling of the same disease in a high-disease rate one[64].
Despite this, the precise causes of vulnerability to climate change vary from place to place. In this concern, the 2010 World Development Report recalled

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[60] Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, 15 January 2009, A/HRC/10/61, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights.*
[61] International Federation of Medical Students' Associations, *IFMSA Contribution to the UN OHCHR Study on the Climate Change and Human Rights to Health, in the Road to COP21*, available *online*.
[62] E.g. communities in sub-Saharan Africa, South Asia and the Middle East are more likely to be affected by climate change extreme effects, as well as Arctic Indigenous Peoples.
[63] SMITH, WOODWARD (2014: 9).
[64] *Ivi*, p. 7.

that "all developing regions are vulnerable to economic and social damage resulting from climate change […] but for different reasons"[65]. To warn the States of the international community that the failure to face health challenges and climate change pressures on health systems will endanger the lives of millions of people worldwide, the former Special Rapporteur on the right to health has expressed the importance of addressing any immediate threat to health presented by climate change, suggesting the international community to work cooperatively in order to provide appropriate protection against climate-related health risks and sufficient healthcare for those who are already suffering illness and injury[66].

1.2.3 The Right to Adequate Food

The ICESCR protects, in Article 11, the right to an adequate standard of living and includes in it the right to adequate food. It affirms that "the state parties to the […] Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take […] the measures"[67] which are necessary to improve processes of production, conservation and distribution of food by using all the technical and scientific knowledge at their disposal, by stressing the importance of the principle of nutrition and improving, through developments or reforms, agrarian systems in order to achieve the most efficient utilization of natural resources. Moreover, they have to ensure an equitable distribution of world food supplies in relation to the needs of each country, thus taking into consideration the mechanisms of food import-export systems.
As expressed in the Committee on Economic and Social Rights' General Comment 12 on the right to adequate food, the main aim of this guarantee implies the availability of adequate food, which must be provided to all human beings under the jurisdiction of the State, including the cases in which access to adequate food means feeding oneself from natural resources. To ensure this right even in times of natural disasters or extreme conditions, States must take all the necessary steps to alleviate hunger[68].
The threat that climate change poses on this right is consequential to the chain of negative effects that we have analyzed in the case of the rights to life and health. In fact, they are all interconnected. Our system of food production and availability will be threatened by changes in ecological conditions: the acidification of Oceans resulted from a greater carbon dioxide presence in the atmosphere, has already destroyed and will keep destroying coral reefs, leading to a decrease in fish stocks; the rising sea level is causing the

[65] *Ivi*, p. 9.
[66] United Nations Report of the Special Rapporteur on the Right to Health, 8 August 2007, A/62/214, *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*.
[67] Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966).
[68] CESCR General Comment No. 12, 12 May 1999, E/C.12/1999/5, *The Right to Adequate Food*.

salinization[69] of water in certain areas which renders water impossible to use for irrigation purposes; communities living from rainfed agriculture will struggle to maintain sufficient levels of agricultural production because of the change in average temperatures.
A major concern in defining the right to adequate food highlights the importance of governments' interventions in taking measures to improve methods of production, conservation and distribution of food in all possible ways since climate change is presumably going to affect food security by destabilizing our system of access to food. Extreme weather events, in particular droughts and floods, will cause frequent interruptions of local food supplies, with a subsequent rise in terms of prices of food caused by problems of supply and increased costs of transportation. As a result, an income gap will arise, creating different consequences on high-income and low-income level areas: where income levels remain low, higher food prices will aggravate existing food security problems, destabilizing the right to food in already food insecure areas[70].

On the basis of these predictions, the Special Rapporteur on the right to food has suggested governments to re-think their systems of production in the pursuit of climate change mitigation and adaptation, especially when dealing with agriculture[71]. Indeed, if on the one side agriculture will clearly be a victim of climate change, on the other side it is one of the major contributors to greenhouse gas emissions: "it is estimated that 33 percent of man-made greenhouse gas emissions stem from agriculture"[72]. In order to mitigate its effects, a shift towards more sustainable types of agriculture is necessary, which will achieve three objectives at the same time: firstly, it will reduce climate change impact by restricting greenhouse gas emissions coming from food production; secondly, it will reduce the income-gap, increasing incomes of the poorest and marginal farmers, who constitute the big majority of the hungry; and thirdly, it will increase levels of production thanks to the use of available agroecological techniques, contributing to food availability. It goes without saying that in mitigating climate change, States' measures must comply with their human rights obligations.
If a shift in this sense does not occur, the World Food Programme has already predicted that by 2050 there will be an increase of the 10-20% in the number of people at risk of hunger due to climate change compared to that number in a world free of its threat[73].

[69] Phenomenon in which an increase in the concentration of total dissolved solids in water occurs.
[70] Lewis (2018: 161).
[71] Contribution of the Special Rapporteur on the Right to Food, Olivier De Schutter, 24 January 2014, A/HRC/25/57, *The Transformative Potential of the Right to Food*.
[72] Contribution *The Transformative Potential of the Right to Food*.
[73] World Food Programme, 2009, *Climate Change and Hunger. Responding to the Challenge*, available *online*.

1.2.4 The Right to Adequate Housing

The right to adequate housing is recognized at the international level under the right to an adequate standard of living, as it can be found in Article 25 (1) of the Universal Declaration of Human Rights: "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care"[74]. The ICESCR protects the right to adequate housing under Article 11, only adding to the definition mentioned above a reference to the "continuous improvement of living conditions" that individuals should perpetrate. It has further stated that this right should be interpreted broadly: it should be seen as "the right to live somewhere in security, peace and dignity"[75].
In its broadest sense, the right to adequate housing implies a number of freedoms and several entitlements. Concerning the former, it gives individuals the right to freely choose their residence, to determine how to move and where to live. Moreover, it protects individuals from forced evictions and arbitrary demolition of their home, as well as establishing the right to be free from arbitrary interference with someone's home, privacy and family.
In terms of entitlements, security of tenure is the central component: it increases residential stability and reduces stress for people by giving them a sense of autonomy, identity and control over their living environment. The lack of this aspect makes protection against forced eviction very difficult and, as a consequence, it could worsen the conditions of the most vulnerable ones by exposing them to more risks in terms of violations of human rights. In addition, entitlements provide equal and non-discriminatory access to adequate housing and allow participation in decisions concerning housing questions at the national and community levels.

In dealing with the right to adequate housing, the Office of the United Nations High Commissioner for Human Rights has established some fundamental features that constitute the *minimum* standard for a housing to be considered adequate. These criteria are the following: *security of tenure*, already mentioned, according to which housing is not adequate if its occupants are not guaranteed with legal protection against constrained evictions or harassment; *availability of services, materials, facilities and infrastructure* considers adequate the housing whose occupants have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage and accept disposal; *affordability*, on the basis of which housing is not adequate if other human rights are threatened or compromised by its cost; *habitability* sees adequate the housing in which physical safety is guaranteed and adequate space is provided and as long as it provides protection against threats to health and structural hazards; *accessibility*, according to which housing is not

[74] Article 25 (1) of the Universal Declaration of Human Rights (1948).
[75] Contribution *The Transformative Potential of the Right to Food.*

adequate if the needs of disadvantaged and marginalized groups are not accounted for; *location*, since it is fundamental that an adequate housing is placed in a social context which provides for employment opportunities, health-care services, schools, childcare centers and other facilities; and *cultural adequacy*, in the sense that housing must take into consideration and respect the expression of cultural identity[76].
Climate change will have severe consequences also on this fundamental human right which will affect it on two sides. On the one side, extreme weather events, such as rising sea levels with consequent storm surges, flooding and erosion, will render impossible living in coastal settlements, disadvantaging, in particular, Arctic communities and Small Island States.
On the other side, climate change also undermines the right to adequate housing in the future scenario in which people will be forced to move to more urban areas after that rural means of survival become less reliable.

Actually, this future scenario is already happening: today, approximately one billion people live in urban slums in unsafe areas where they are more vulnerable to climate change impacts and this estimation is going to increase year after year[77]. In this concern, Raquel Rolnik, former UN Special Rapporteur on adequate housing, has predicted in his report that over the next decade "the 90% of the increase in population […] would be accommodated in urban areas of less developed countries"[78], and that "factors such as advanced desert frontiers, failure of pastoral farming systems and land degradation would lead to more migration and more pressure on urban housing conditions"[79].
For these reasons, the Office of the United Nations High Commissioner for Human Rights has suggested States' intervention to ensure adequate protection of housing from climate change hazards and availability of housing in areas where such events occur less frequently, as well as providing access to shelter in case of displacement after severe weather hazards.

1.3 Climate Change and the Right to a Good Environment

One of the most pressing and, at the same time, controversial topics of environmental human rights is the establishment of a substantive right to an environment of a standardized quality. Indeed, environmental human rights can be found in the so-called "greening" of already existing rights, and also in several constitutional provisions, which design the environment as something which is pivotal for the fulfilment of other human rights. Thus, they do not explicitly acknowledge the inherent value of the environment, consequently

[76] Fact Sheet No. 21 (Rev. 1), Office of the United Nations High Commissioner for Human Rights, 2009, *The Right to Adequate Housing*.
[77] LEWIS (2018: 163).
[78] *Ibidem.*
[79] *Ibidem*.

rendering it impossible for a person to engage human rights law unless they can demonstrate that a particular environmental condition infringes their own human rights in some way.

This idea of a substantive human right to an environment of a particular quality has opened an interesting debate between those who support it and those who oppose it, attracting the interest of both scholars and a number of United Nations agencies as wells as other international or regional bodies.

Since the time of the United Nations Conference on the Human Environment in 1972, in which it was declared that "man has the fundamental right to freedom, equality and adequate conditions of life, in environment of a quality that permits a life of dignity and well-being"[80], several regional human rights regimes have managed to include some form of this right in their human rights law. However, to date, none of the multilateral human rights treaty of universal application has officially recognized the right to a good environment.

One of the hypotheses on the difficulty of analyzing and discussing this right may lie in the different terminology utilized by institutions, scholars and legal instruments, which creates a confusion on the concept behind the human right. Two strands of thought exist in this sense: on the one hand, those who believe that the right should represent a truly new right to an environment of some particular quality to which independent human needs belong; on the other hand, those according to which it should express a synthesis of the environmental dimensions of other rights. As a consequence, it can be very challenging to make a comparison or an evaluation of the contrasting arguments on the recognition of a human right in the environmental field, since it does not exist a consistency in terms of the subject matter, scope and definition.

On the contrary, understood the important relationship between the environment and human rights, scholars and commentators in this area provided several contrasting opinions "not only on the best way of framing the right, but also […] on whether the concept of a right to a good environment has merit, and whether it is appropriate for inclusion in international human rights law"[81].

As a demonstration, many scholars have claimed for a greater recognition of this right, furthering several justifications. Among these, the strongest argument in favor of the adoption of a right to a good environment is that the relationship between human rights and the environment is not properly recognized under existing law: "there are plentiful examples of communities who continue to live under environmental conditions that are inconsistent with the right to an adequate standard of living, […] to the highest attainable standard of health or even the right to life"[82]. This indicates that the rights we are provided with "are not up to the task of addressing the harms caused by

[80] United Nations Environment Programme (1972).
[81] LEWIS (2018: 62).
[82] LEWIS (2018: 63).

environmental degradation"[83]. Consequently, as Michael Anderson has explained, existing human rights standards lack precision and provide a bungling basis for crucial environmental tasks[84]. For scholars who claim the opposing thesis, namely that a new right to a good environment would not be more successful in addressing the human rights implications of environmental harm, the main reason is that this kind of right would be redundant. Indeed, some of the already existing human rights owns environmental dimensions, and there is an expanding body of jurisprudence which considers environmental degradation as a human rights violation. Thus, on the lines of some authors, the recognition of a human right to a good environment would not add anything more to the achievements reached under these existing laws and regulations.

Despite these contrasting arguments, the peculiar nature of human rights favors the argument which recognizes a right to a good environment, even if that would mean to potentially duplicate protections found elsewhere. More precisely, the recognition of the right to a good environment "would elevate it to the same plane as other human rights and enable more effective balancing of potentially competing rights"[85], bringing the environment within the field of moral rights in the international legal framework. In addition, also practical benefits would follow this recognition, namely legal mechanisms provided for the implementation and enforcement of the right. "By framing a good environment as a human right, individuals would be able to bring an action against a duty-bearer […] for failing to respect, protect of fulfil their rights"[86].

In the context of climate change, a number of its intrinsic characteristics represents problems to the definition and application of the right to a good environment. They concern the fact that greenhouse gas emissions will have collective (and not individual) consequences on future generations; or the fact that specific obligations of States and other actors should be listed, and rights-holders and duty-bearers clarified in order to understand what obligations the right to a good environment would carry with it and how the right would be balanced in the context of other competing rights.

1.3.1 Identification of Right-Holders and Duty-Bearers

Concerning the identification of right-holders, the right to a good environment, in order to respect the theoretical concepts of the traditional human rights theory, needs to be constructed as an individual right. However, since it can be defined as a collective good, considering it as a right which can be enjoyed only by individuals creates conflicts and is incompatible with the theories of interconnected ecosystems, according to which all ecosystems

[83] *Ibidem.*
[84] ANDERSON, (1996), *Human Rights Approaches to Environmental Protection: An Overview*, in BOYLE, ANDERSON, *Human Rights Approaches to Environmental Protection*, Clarendon, p. 1.
[85] *Ivi*, p. 65.
[86] *Ivi*, p. 66.

sharing the same habitats (in our case humans and the environment) are interconnected because each organism can positively or negatively affect the others. Climate change clearly amplifies this problem: "greenhouse gas emissions are an inherently 'collective problem', and the effects of climate change are transboundary and cross-sectoral, making them ill-suited to a narrow, individualized discussion"[87].

Thus, the possibility of recognizing the right to a good environment as a collective right becomes real, in order to render it advantageous in facing climate change. At the international legal level, there is limited precedent for the recognition of collective rights: an example comes from the already mentioned ICCPR and ICESCR which, in their common Article 1, recognize the right to self-determination, constructed as a right collectively enjoyed by peoples. The right to a good environment in order to, on the one side, respect the theoretical foundations of human rights theory and, on the other side, take into account the transnational, intergenerational and cumulative impacts of climate change should include both the collective experience of climate change and its individualistic nature. This can be conceivable only by acknowledging that "while the right is possessed by individuals, it is enjoyed collectively with other members of their community [and] violations of the right could be identified where collective impacts are experienced, although claimants seeking to bring an action […] would do so in an individual capacity"[88].

Another question linked to the identification of the beneficiaries of a human rights-based approach to climate change is whether the right to a good environment, under the category of human rights, can be said to be possessed by future generations. Indeed, by definition, climate change is a phenomenon caused by present humans' actions which are going to affect the lives of people living in the future: "no longer can we ignore the fact that climate change is an intergenerational problem and that the well-being of future generations depends upon actions that we take today"[89]; also the mitigation plans that governments around the world are implementing, such as reducing current rates of greenhouse gas emissions, will see their results in the future. For this reason, to fully offering a worthwhile contribution which addresses the impact of climate change, the right to a good environment should take into consideration the needs and interests of future generations. Some scholars have addressed the question, stating that the right to a good environment should also apply to future generations but remaining doubtful on whether this means "to confer the right on member of future generations or to impose a duty on current generations to protect future generations' interests as part of their obligations under the right"[90]. The majority of the hypothesis for a new environmental right seem to recognize that the right in question would create obligations to protect the environment for the benefits of present and future

[87] *Ivi*, p. 209.
[88] *Ivi*, p. 210.
[89] BROWN WEISS (2018: 616).
[90] LEWIS (2018: 212).

generations, holding that, on the lines of American philosopher and professor of bioethics Ruth Macklin "because future persons do not exist they cannot possess human rights [and] such persons will possess human rights one they are 'actual persons'"[91]. Having said that, since human rights are based on human interests, if we assume that humans' actions can influence the interests of future generations, consequently we must also assume that humans' actions can affect the enjoyment of their rights.

To conclude the argument on right-holders of the right to a good environment, we can affirm that present generations have a duty not to act in a manner which will negatively impact the interests of future generations, since this behavior would translate into a violation of their rights.

A second question is raised in addressing the identification of duty-bearers of the potential right to a good environment. In this case, it goes without saying that the traditional theories of human rights law "place obligations on States to respect, protect and fulfil the human rights of their citizens and those subject to their jurisdiction"[92]. Thus, States are the principal duty-bearers of the right to a good environment.

However, since the ultimate objective of the above-mentioned right is to positively contribute in the fight against climate change, duties and obligations must be placed also on those who actively contribute to the problem: non-State actors give a heavy contribution to the causes of climate change, and their action is needed to decrease greenhouse gas emissions, either intentionally or under regulations of State institutions. When addressing violation of human rights by non-state actors, different entities should be taken into consideration: firstly, individuals or group of individuals; secondly, national and transnational corporations (TNCs); and thirdly, intergovernmental organizations[93].

Generally, "non-State actors […] have an obligation to comply with national laws in conformity with international standards and norms"[94] thus, "non-State actors can be held accountable for violations of the rights of defenders amounting to offences or crimes under national law"[95].

In some circumstances, such as in the case of the rules relating to the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[96], established in the Draft Articles drafted by the International Law Commission and endorsed by the United Nations General Assembly, "the actions of a non-State actor may be attributable to the State itself"[97]. In this sense, no direct obligation is imposed on non-State actors on the grounds of human rights

[91] MACKLIN (1981: 152).
[92] LEWIS (2018:215).
[93] MCCORQUODALE (2002: 384).
[94] Note by the United Nations Secretary-General, 4 August 2010, A/65/223, *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms.*
[95] *Ibidem.*
[96] Even though ARSIWA do not create primary obligations, but only secondary rules relating to the ascertainment and implementation of responsibilities.
[97] LEWIS (2018:216).

law[98] but, on the contrary, "non-State actors are treated as if their actions could not violate human rights, or it is pretended that States can and do control their activities"[99]. In these cases, actions[100] of a non-State actor may be chargeable to the State itself if a close link between the State and the non-state actor can be demonstrated.

When the State is not responsible for the action of a non-State actor, the process in which human rights standards operate on non-State actors follows a specific rule: namely the one according to which it is States' obligation to protect the rights of people under their jurisdiction. Thus, it is States' duty to safeguard human rights, which implies that they are obliged to guarantee that rights are not violated by non-State actors who are subordinated to their laws. In other words, "a state can be held to have breached its obligations under international human rights law where its acts or omissions have enabled a non-State actor to act in a way which violates the human rights which the State has undertaken"[101].

In our specific case, that of climate change and of the right to a good environment, actions of non-State actors which contribute to the increase in greenhouse gas emissions, and so human rights violations, can only be brought within the framework of international human rights law, with States' being responsible for them and non-State actors accountable only under the relevant domestic law.

This analysis paves the way to another problem in the process of establishing responsibility for a violation of the right to a good environment in relation to climate change that will be discussed in the following paragraph, namely, how to demonstrate that a concrete violation of the right to a good environment has occurred.

1.3.2 Violation of the Right to a Good Environment Based on Climate Change

Proving that a violation of the right to a good environment has actually occurred in the context of climate change is not a simple task and it requires an analysis which involves two fundamental steps. Indeed, if we take as granted that the right to a good environment allows that a claim for its violation in terms of environmental impact can be brought in front of a competent court and that it exists an applicable norm on this claim, the general regime would need to prove that a potential duty-bearer is responsible for that impact through its actions or its omissions. The first step is to prove that climate change, and in particular the potential State's contribution, caused the environmental implication. Consequently, the second step is to identify to

[98] *Ibidem.*
[99] *Ibidem.*
[100] Article 8 of the ARSIWA: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"..
[101] LEWIS (2018: 216).

what extent the State actor or the duty-bearer's actions are responsible for climate change. As stated above, this creates a two-faced challenge: on the one side, the question on what standards of proof are considered to be sufficient for establishing causation, and on the other side, what standard of environmental impact we should consider a violation[102].

Our first concern is to establish the main elements of an actual violation of the right to a good environment. In order to establish what violates environmental standards, we need to define what those standards are. According to some scholars, the right to a good environment needs to be supplemented with transparent and concrete standards of ecological health which are able to specify what the right entails and when it has been violated. Despite this, if on the one hand we can presumably come up with some minimum levels for environmental health, for example "tolerable levels of pollution, healthy average temperature ranges, or sustainable population levels of particular species"[103], on the other hand there will be other effects which cannot be classified as either 'healthy' or 'unhealthy, 'good' or 'bad' due to the variableness of the environmental impacts of climate change. Indeed, not all environmental changes caused by climate change are easy to be consider as positive or negative: an example is the fact that as a consequence of the increasing temperatures, migration patterns will be likely to change. However, "it is not clear by what standard we can say that such changes are negative, other than holding that any change is inherently bad"[104]. But, again, this would lead us to a wrong conclusion since ecosystems are likely to inherently adapt to purely natural forces.

A more appropriate alternative would appear to be the one which states that it is humans' interference with the environment that leads to a negative consequence on it, but also in this case, such reasoning would mean that every human intervention on the environment would violate the rights which protects it. This clearly would render the right ineffective and wrongful. Thus, identifying a violation in solely environmental terms represents a significant challenge to the right to a good environment. Although we could describe the characteristics of a violation, it would be difficult to demonstrate that it could have been caused by humans' actions or omissions, as it happens with other human rights' breaches and the identification of their standards of proof and causation in the international legal arena.

Concerning the second question, it is now clear that in order to prove a violation of the right to a good environment it is necessary to demonstrate that the duty-bearer holds some responsibility for climate change. This task is complicated by the fact that the greenhouse gas emissions' effects are cumulative, making it difficult to identify the share of responsibility that a State should carry with it. Indeed, not all States bear the same responsibility in terms of climate change impact: some have low contributions to greenhouse

[102] LEWIS (2018: 218).
[103] *Ivi*, p. 221.
[104] FIELD (2014: 5).

gas emissions compared to others. In this sense, the only viable way for States to prove that they are not liable for climate change would be to demonstrate that it would be happening even if they made more significant cut to their emissions. Clearly, this represents a problem since each State could consequently argue that they are not the primary cause of climate change[105].
What can be suggested in addressing climate change is that a different approach might be needed in order to solve the problem of attribution of responsibility, an approach which takes into account collective contributions and defines responsibility on their grounds.
Regarding the second step in this analysis, if it is demonstrated that a State is responsible for climate change, the following phase would be to prove that the environmental effect which has been condemned was caused by the State's actions or omissions. This creates a much more complex process, since it opens the question concerning the standard of proof and what criterion should be considered in establishing causation between climate change impacts on environment and a State's action[106]. According to Doelle, the traditional 'but-for' test[107] does not apply to this case, because States would be allowed to avoid liability for their actions due to the fact that their contributions are not fully responsible for causing climate change alone, but they are solely one contributing action among many[108].
In his analysis, Professor Doelle adds also an interesting detail: in addition to the institutional position of a State on climate change, there can be secondary effects which, taken as a whole, combine to produce a much more severe effect on the environment compared to greenhouse gas emissions alone: namely, a State's position on public transport, conservation or energy efficiency's plans. On his lines, "a more appropriate standard of proof would be that which applies in domestic cases involving multiple defendants or collective responsibility […] which imposes liability where an accused State has […] contributed to the problem rather than the solution"[109].
To sum up my analysis on the standard of proof for a violation of the right to a good environment, the conclusion is that the nature of the greenhouse gas emissions makes it extremely challenging to demonstrate that an environmental impact is the result of a State's action or omission. This renders conventional approaches to the standard of proof inadequate, since they would allow all States to deny their responsibility for their contributions to climate change, with the exception of the major contributor to which all the liability would be attributed. Thus, the establishment of a right to a good environment would not eliminate the problem but it would serve to find a way between two processes to which are attributed two levels of complexities: on the one hand, balancing States' interference with the environment more broadly; and on the

[105] *Ivi*, p. 219.
[106] *Ivi*, p. 220.
[107] A commonly used test in both tort law and criminal law for determining actual causation, on the basis of the question "but for the existence of X, would Y have occurred?".
[108] DOELLE (2004: 214).
[109] *Ibidem.*

other hand, the complexities of the interconnected systems which contribute to environmental changes.

2 The International Climate Change Legal Framework

After having clarified what the category of Environmental Human Rights identifies and the difficulties through which the two concepts of environment and human rights find a common point, it is necessary to analyse the most significant tools of the environmental international legal framework in order to give a legal context to the subject of the present work.
The field of international climate change law emerged and evolved rapidly: as soon as the international community identified climate change as a global problem, it "negotiated a framework treaty and a protocol to define the parameters of a global response and developed domestic laws and regulations to implement such a response through a network of complex legal and political agreements at every level of governance"[110]. Indeed, no marked branch of the law appears to be able to cover all legal implications of climate change due to its endless ramifications and its interdisciplinary nature which has impacts on various segments of our life. Thus, climate change had to be tackled through a combination of political, legal and natural science tools, resulting in the evolution of some new principles and concepts of international law, such as the principle of common but differentiated responsibilities or the precautionary principle, as it will be seen in the next paragraphs.

2.1 The United Nations Framework Convention on Climate Change

The first legal instrument which deserves to be mentioned due to its relevance is the United Nations Framework Convention on Climate Change ("UNFCCC"). Let us see the reasons of its creation and its core elements.
Every year, approximately, six billion tons of carbon are injected into the atmosphere from the burning of fossil fuels due to humans' activities, as well as a significant amount from deforestation[111]. This has resulted in an increase in atmospheric concentrations of carbon dioxide and other greenhouse gases of more than the twenty-five percent, from 280 to more than 350 parts per million[112], altering the stability between natural emissions of greenhouse gases and the removal of these gases through the so-called "sinks"[113] which has kept the atmospheric concentrations relatively constant[114]. Indeed, the greenhouse effect is a natural phenomenon needed by the Earth to raise its surface temperature by the absorption of infrared radiation, or heat, through trace

[110] CARLARNE, GRAY, TARASOFKSY (2016: 2).
[111] BODANSKY (1993: 453).
[112] Intergovernmental Panel on Climate Change (1992).
[113] Biological processes that tend to remove carbon dioxide from the atmosphere, such as terrestrial vegetation through the photosynthesis.
[114] BODANSKY (1993: 453).

gases and reradiation of it towards the Earth. These so-called trace gases effects are water vapor, carbon dioxide, methane, nitrous oxide, and ozone, without which the Earth would be 33° C colder than its normal temperature, becoming uninhabitable for mankind[115].

By studying this phenomenon, scientists have estimated that if current patterns of emissions remain unchanged and unrestrained, "the increasing concentrations of carbon dioxide, together with parallel increases in other trace gases such as methane and nitrous oxide, will cause an average global warming in the range of 0,2 to 0,5° C per decade by the end of the next century"[116].

As soon as this problem was acknowledged, as a general response to this threat, in December 1990 the U.N. General Assembly established, with Resolution 45/212, the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change ("INC") in order to negotiate a convention that could contain appropriate commitments to face the hazard, ratifiable at the U.N. Conference on Environment and Development ("UNCED") in June 1992. Between February 1991 and May 1992, the INC had 6 rounds of negotiations before adopting the so-called U.N. Framework Convention on Climate Change on May 9, 1992.

Before analysing in further details the objective and the significant features of the Convention, it is necessary to say that what for some is considered a fundamental first step towards a turning point in facing climate change and its detrimental effects, for many is instead a disappointment. Indeed, despite the initial existence of hopes to stabilize or even reduce emissions of greenhouse gases by advanced countries, the reality reflects another truth: the Convention only contains a vague commitment concerning stabilization and no commitment at all on reductions. Moreover, it fails to propose innovative solutions or to establish a financial and technological clearinghouse, or to suggest the use of market mechanisms, for example tradeable emission rights[117].

Certainly, one of the reasons of the vagueness of this Convention lays in the complexity both of its negotiations, involving more than 140 countries differing in interests and ideologies, and of the causes, the effects and the policy implication of climate change and of global warming in particular. Thus, reaching an agreement in these conditions can be considered a significant achievement, since the Convention may not establish specific limitations on greenhouse gas emissions, but it recognizes climate change as a serious danger and gives a starting point for future actions.

[115] BODANSKY (1993: 453-455).
[116] *Ibidem.*
[117] *Ivi*, p. 454.

2.1.1 The Organization and Details of the Objective

The Intergovernmental Panel on Climate Change ("IPCC"), created in 1988 by the World Meteorological Organization[118] ("WMO"), and the UN Environment Programme[119] ("UNEP"), "to provide policymakers with regular scientific assessments on climate change, its implications and potential future risks, as well as to put forward adaptation and mitigation options"**[120],** in 1990 highlighted in its first report the threat of a global warming coming from the increase in greenhouse gas emission in the atmosphere. As a result, at the end of 1990, the European Union ("EU") adopted the objective to stabilize the above-mentioned emissions of carbon dioxide within the year 2000, requesting from State Members plans to implement initiatives for the protection of the environment and of energetic efficiency. The objectives fixed on the EU level have created the basis for the negotiation of the UNFCCC.
The UNFCCC came into force on 21 March 1994, after opening for signature in Rio de Janeiro in June 1992. It represents an international environmental treaty which clearly establishes its ultimate objective in its Article 2, namely:

> "to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner"[121].

The Convention is a framework treaty, in the sense that it does not pose legal obligations for greenhouse gas emissions' reductions to individual nations. The framework model has been chosen since it is useful to serve two basic functions. First of all, it allows to proceed in the negotiation process in an incremental manner, where states can begin to cooperate and work to address the problem without the emergence of a consensus, or even before the problem is officially acknowledged by them. Secondly, this approach can create positive feedback loops, making the approval of specific substantive commitments easier. Scientific research and assessments, institutions and meetings carried out under the convention: all help the process of agreement

[118]A specialized agency of the United Nations aimed at promoting international cooperation and coordination of states' behavior with regards to the Earth's atmosphere, its interaction with the land and oceans, the weather and climate it produces, and the resulting distribution of water resources.
[119]Leading global environmental authority which establishes the global environmental agenda, promotes the correct implementation of the environmental dimension of sustainable development within the United Nations system, as well as serving as an authoritative advocate for the global environment.
[120] *The Intergovernmental Panel on Climate Change*, in *Intergovernmental Panel on Climate Change*, available *online.*
[121] Article 2 UNFCCC (1992).

by reducing uncertainties and laying a basis for action, providing technical assistance and issuing reports[122].

However, at the time, not all countries agreed on the above-mentioned approach to be the most suitable one for the Convention. Indeed, given the perceived seriousness of the problem they were facing, States considered the two-step framework convention process as unreasonably slow and suggested the INC to come up with more than a framework convention. "In Working Group I, some states argued that the INC should not only adopt general commitments […] but also set specific targets and timetables to limit greenhouse gas emissions"[123] while in Working Group II "states disagreed about whether the Convention should establish only a skeletal structure or set forth more developed implementation mechanisms at the outset"[124].

The discussion between the framework and substantive approaches continued until the end of the INC, where it was reflected in the indecision on the title of the Convention: "the U.N. Convention on Climate Change" or the "U.N. Framework Convention of Climate Change". Eventually, the latter was ultimately agreed.

However, the Convention's nature lies in between of a substantive and a framework convention: on the one hand, it goes further in establishing commitments compared to the Convention on Long-range Transboundary Air Pollution[125] ("LRTAP") or the Vienna Convention for the Protection of the Ozone Layer[126]; on the other hand, it fails to establish specific emissions control measures such as those contained in the Sulphur Dioxide or Montreal Protocols. In other words, there are some procedural and institutional innovations, and the Convention does establish scientific committees for research about greenhouse gas levels, as well as financial and technical support to assist implementation and the financial mechanism[127].

In greater detail, the UNFCCC identifies two major areas of action needed to face climate change, namely mitigation and adaptation, and suggests a number of measures to address climate change through activities such as scientific and technical cooperation, technology transfer and finance. It can be divided into four parts:

> "(1) the introductory provisions, setting forth the basic definitions, principles, and objectives of the Convention; (2) the commitments relating to the sources and sinks of greenhouse gases; scientific cooperation, public information, and education; and financial resources and technology transfer; (3) institutional

[122] BODANSKY (1993: 494).
[123] *Ivi,* p. 495.
[124] *Ibidem.*
[125] Convention entered into force in 1983 and aimed at protecting the human environment against air pollution, by gradually reducing and preventing it.
[126] Multilateral environmental agreement signed in 1985 providing for international reductions in the production of chlorofluorocarbons because of their contribution to the destruction of the ozonosphere.
[127] BODANSKY (1993: 496).

> and procedural mechanisms to implement the Convention; and (4) final clauses dealing with such matters as protocols and annexes, amendment, ratification, and entry into force"[128].

It has a nearly universal membership: it allows any state to become a member and as of 2020 it has 197 signatories, which makes it a global instrument.
The UNFCCC sets the Conference of the Parties ("COP") as its supreme body: it includes all the states that have ratified the Convention and its main task is the promotion and control of the implementation of the Convention's commitments, including the power to adopt new ones through amendments and protocols.
In addition, the Convention establishes two subsidiary bodies: the Subsidiary Body for Scientific and Technological Advice ("SBSTA") and the Subsidiary Body for Implementation ("SBI"). The former gives advices and information to the COP on scientific and technological matters, and the latter helps the COP in its role of assessing and reviewing the Convention's implementation.
A Secretariat supports the COP and its subsidiary bodies: it was first established during the negotiation of the Convention and became permanent on 1 January 1996. Its main tasks concern the arrangement of sessions of the COP and subsidiary bodies, drafting of official documents, compilation and transmission of reports, facilitation of assistance to Parties for the communication of information and coordination with other secretariats of other international bodies[129].
Within its structure, the UNFCCC incorporates several key principles as a basis for actual obligations of the members, which differ substantially between industrialised and developing countries. According to the Convention and its general commitments addressed to the Parties, all members should develop and submit national communications comprising inventories of greenhouse gas emissions by source and greenhouse gas removals by sinks. Moreover, they should take into account climate change in their social, economic, and environmental policies, adopting national programmes for mitigating it and developing strategies for adaptation to its impacts, through cooperation in scientific, technical and educational matters and education on climate change questions.
Among the above-mentioned principles, the attention has fallen upon two guiding principles which have been considered significant for the understanding of the Convention in question and of the general concept to which it relates, namely the *precautionary principle* and the *principle of common but differentiated responsibilities.*

2.1.2 The Precautionary Principle

The UNFCCC explicitly mentions in Article 3.3 the precautionary principle:

[128] *Ivi*, p. 492.
[129] *What are Governing, Process Management, Subsidiary, Constituted and Concluded Bodies?*, in *UNFCCC*, available *online*.

> "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost"[130].

In other words, it allows decision-makers to adopt precautionary measures if scientific evidence about an environmental or human health threat is still unsure and the stakes are high.

The precautionary principle, originated in German law as the *Vorsorgeprinzip*[131] during the negotiation on air pollution in the 1970s[132], is described as one of the most important and, at the same time, controversial improvement in modern international environmental law. Even though there is not a unitary understanding of it, it is contained in several international instruments, including its first reference in the 1985 Vienna Convention for the Protection of the Ozone Layer and several mentions in the Second and Third International Conferences on the Protection of the North Sea.

Its general definition can be found in Principle 15 of the 1992 Rio Declaration[133]:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"[134].

Although there are many notable pieces of legislation containing the precautionary principle, its components are still evolving, together with long-lasting debates around its nature, resulting in the so-called *precautionary discourse*. Indeed, there are some countries which prefer to call it a precautionary approach and avoid using the term 'principle', since the former expression carries lower legal force and refers to a non-binding political guideline.

In any case, the precautionary principle finds its conceptual origins in the rejection of the basic assumption of the so-called assimilative capacity approach, according to which "science could accurately determine the assimilative capacity[135] of the environment and that, once determined,

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[130] Art. 3.3 UNFCCC (1992).

[131] Namely, 'foresight principle': the term was used by the German State as a legal justification for carrying out intense policies to cope with acid rain, pollution and global warming.

[132] The precautionary principle emerged in former West Germany on the belief that the State should prevent environmental damage through advance planning.

[133] Short document consisting of 27 principles with the objective of guiding countries in future sustainable development.

[134] Principle 15 Rio Declaration (1992).

[135] The ability of the environment to carry waste material without adverse effects on the environment or on users of its resources.

sufficient time for preventive action would remain"[136]. In other words, the assimilative capacity approach assumes that: first, threats to the environment can be accurately predicted by science; second, technical solutions aimed at mitigating the predicted threats can be provided by science; third, sufficient time to act will remain available; and at last, that acting at this stage results in the most efficient utilization of scarce financial resources[137].

The failure of the assimilative capacity approach has led to the adoption of a precautionary approach or principle. This new paradigm is based upon a new set of assumptions, comprising: "the vulnerability of the environment; the limitations of science to accurately predict threats to the environment; and, the availability of alternative, less harmful processes and products"[138]. Among these, scientific uncertainty is key to capturing the precautionary principle's meaning: it refers to the difficulty in determining exactly when and how to act on potential risks.

Due to the lack of consistency of its definition, this principle can be implemented in a variety of ways, and some authors have attempted to attribute common characteristics to it. Among these, Hey has identified the general characteristics of the principle, which ensures that the lack of scientific certainty should not be used to defer measures to enhance the quality of the environment. The features identified by Hey and necessary for the objective of the principle state that:

> "(i) clean production methods, best available technology and best environmental practices must be applied; (ii) comprehensive methods of environmental and economic assessment must be used in deciding upon measures to enhance the quality of the environment; (iii) research, particularly scientific and economic research that contributes to a better understanding of the long-term options available, must be stimulated; and (iiii) legal, administrative and technical procedures that facilitate the implementation of this approach must be applied and, where not available, developed"[139].

On the basis of these features, some conflicting viewpoints have emerged, creating a distinction between those who consider the precautionary principle as a pointless and potentially dangerous principle and those who believe that it is a useful principle for averting complex hazards.

According to the first strand of thinkers, which bases its assumption on the maximalist interpretation of the precautionary principle, "since it is based on ideological value judgments, it may lead to paralysis and threaten human progress [and] since it is simply a question of common sense, it should not be raised to the status of a principle"[140]. On these lines, scientists could accurately predict environmental and health hazards, provide solutions and take action only when the risks arise. These assumptions are based on arguments that refer

[136] MCINTYRE, MOSEDALE (1997: 222).
[137] *Ibidem.*
[138] *Ibidem.*
[139] HEY (1992: 311).
[140] BOURGUIGNON (2015: 12).

to the impossibility in achieving absolute scientific certainty, which would render the precautionary principle applicable to any activity, and to the fact that a strict application of the principle would, on the one hand, undermine progress by denying society the use of products such as antibiotics and vaccines, and on the other hand, would deprive it of a source of knowledge[141]. The second string of thoughts, which refers to the minimalist interpretation of the precautionary principle, sees it "as reducing serious and irreversible environmental and public health hazards, including by drawing lessons from past mistakes"[142]. Here, the main argument treats the precautionary principle as a powerful tool to establish regulatory mechanisms able to align business and societal interests in a scenario in which firms do not always have to pay the entire cost of adverse environmental and health effects.
To sum up, even though the precautionary principle has provided the international community with some solutions for facing complex environmental and health threats, by considering carefully whether a technology or activity is safe or not, its definition is still under debate and its status still in dispute. It has been subject to multiple criticisms, but it is potentially able to be used to encourage democratic, transparent and inclusive decision-making processes in scenarios where different voices are heard and taken into account.

2.1.3 The Principle of Common but Differentiated Responsibilities

The UNFCCC in Article 3.1 stresses the principle of common but differentiated responsibilities, according to which:

> "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof"[143].

As the precautionary principle, also this principle's general definition was formulated in the Rio Declaration in Principle 7:

> "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command"[144].

[141] *Ibidem.*
[142] *Ibidem.*
[143] Article 3.1 UNFCCC (1992).
[144] Principle 7 Rio Declaration (1992).

The idea of differentiation in the treatment of developed and developing countries started to emerge in international environmental law at the end of the twentieth century in order to address the fact that environmental issues have an impact which is too universal to be treated as only a matter of domestic jurisdiction. Moreover, it recognizes that "imposing equal obligations on subject of law that are unequal in relevant ways may be perceived as unjust if they exacerbate inequalities or impose unfair burdens on those least able to bear them"[145]. Thus, responsibilities should be differentiated because not all nations contribute to climate change to the same degree: developed countries bear the main responsibility for climate change since they have contributed to the largest share of historical GHG emissions.
As the precautionary principle, the principle of common but differentiated responsibilities has never been clearly defined, but in time a series of arrangements in the climate change regime have divided parties into different groups to take on different responsibilities to act.
The UNFCCC originally divided member States into three groups: "developed countries (Annex I), countries undergoing a transition to a market economy (also Annex I parties, but differentiated within the Annex), and developing countries (non-Annex I)"[146], on the basis of different levels of distribution of greenhouse gas emissions among the member states to the Convention. Thus, it implicitly made a differentiation of countries according to per capita GDP. More precisely, according to this differentiation, all Parties have commitments, the so-called commonalities, listed in Article 4.1 of the Convention, but Annex I Parties have to meet specific requirements to demonstrate that they are actually taking the lead in facing climate change. According to Article 4.2, they have to adopt policies and measures to mitigate climate change by, on the one hand, reducing and restraining their greenhouse gas emissions and, on the other, strengthening their greenhouse gas sinks and reservoirs[147].
Between the forty-three industrialized countries and countries with economies in transition ("EITs") listed in Annex I of the UNFCCC, twenty-four are also listed in Annex II of the Convention, which includes all members of the Organisation for Economic Co-operation and Development ("OECD") without the economies in transition. Differentiation of responsibilities occurs also among them: "on one hand, Parties listed in Annex II to the Convention […] are required to provide financial assistance and facilitate the transfer of technologies to developing countries to help them implement their commitments […]. On the other hand, the group of countries with economies in transition are granted a certain degree of flexibility in implementing their commitments"[148] due to recent economic and political turmoil in those countries.

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[145] SHELTON (2008: 647).
[146] BUSHEY, JINNAH (2010: 2).
[147] Climate Change Secretariat (2006), *United Nations Framework Convention on Climate Change: Handbook*, in *UNFCCC*, available *online*, p. 24.
[148] *Ibidem.*

Concerning the forty-eight Parties included in the non-Annex I, classified as least developed countries ("LDCs"), they are given special consideration by the United Nations due to their limited capacity to cope with climate change and to adapt to its negative effects. On these lines, "parties are urged to take full account of the special situation of LDCs when considering funding and technology transfer"[149]. Moreover, some states within the developing countries category, such as countries with low-lying coastal areas or those susceptible to desertification and drought, are treated as a separate group by the Convention due to their high vulnerability to the negative effects of climate change.

By way of conclusion, the principle of common but differentiated responsibilities is the most significant guiding principle in the international climate change regime. According to this principle, developed countries are generally requested to submit information more often, and to give more details than developing countries. Both developed and developing countries are asked to cooperate, following the Clean Development Mechanism, defined in Article 12 of the Kyoto Protocol. This mechanism allows Annex I nations to receive mitigation credits for avoiding emissions and the non-Annex countries to achieve their sustainable development objectives.

2.2 The Kyoto Protocol

The Kyoto Protocol to the UNFCCC is one of the most significant environmental international agreement and, thus, it must be given due consideration.

It was adopted in Kyoto, Japan on December 1997 at the third Conference of the Parties to the UNFCCC and entered into force on 16 February 2005, after a complex ratification process. Indeed, it was opened for signature in 1998, but it could not enter into force until at least 55 parties ratified the treaty, which needed to account for at least 55 percent of the total carbon dioxide emissions of the Annex I Parties[150].

The Protocol, adopted under the UNFCCC, shares the Convention's ultimate objective, namely the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"[151] as well as its principles and institutions. Moreover, it introduces a significant update: it strengthens, for the first time, the Convention by legally binding developed countries, Annex I countries, to limit or reduce their greenhouse gas emissions, putting in place an accounting and compliance system for the specific time period set, starting in 2008 and ending in 2012, with a set of rules and regulations. As held in its Article 3:

[149] *Ibidem.*
[150] *Paris Agreement, Status of Ratification,* in *UNFCCC,* available *online*.
[151] Article 2 UNFCCC (1992).

> "The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012"[152].

Apart from the common binding commitment to limit or reduce GHG emissions, in the Protocol are listed specific commitments for Annex I and non-Annex I countries.
Among these, according to Article 2.1 of the Kyoto Protocol, policies and measures established by each Annex I Party "in achieving its quantified emission limitation and reduction commitments under Article 3"[153] should be elaborated in accordance with domestic circumstances, including the promotion of sustainable agricultural methods and the innovation in renewable forms of energy. Moreover, Annex I Parties must guarantee that these policies and measures "minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other parties, especially developing country Parties"[154]. Not only does the Protocol ask to respect in particular the conditions of low-income countries, but it also establishes the principle of cooperation[155] between them in the areas of:

> (a) the development, application and diffusion of climate friendly technologies; (b) research on and systematic observation of the climate system; (c) education, training, and public awareness of climate change; and (d) the improvement of methodologies and data for GHG inventories"[156].

The emission targets for the first commitment period of the Kyoto Protocol concern the six main greenhouse gases, namely: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and Sulphur hexafluoride. On the basis of the UNFCCC's principles and following the above-mentioned principle of common but differentiated responsibilities, the individual emission targets for Annex I countries are differentiated and are listed in Annex B of the Kyoto Protocol: for example, the United States of America has to reduce its emissions by seven percent, while Canada and Japan's objective is a six per cent reduction; for some countries, such as Australia, Norway and Iceland, the possibility of increasing their emissions has been allowed[157].

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[152] Article 3 Kyoto Protocol.
[153] Article 2.1 Kyoto Protocol.
[154] Article 2.3 Kyoto Protocol.
[155] Article 10 Kyoto Protocol.
[156] UNFCCC (2008), *Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amount*, in *UNFCCC*, available *online*.
[157] *Kyoto Protocol, Targets for the First Commitment Period*, in *UNFCCC*, available *online*.

The Kyoto Protocol was ratified by 192 countries, becoming an international agreement which sets binding targets to only Annex I countries.
Despite its global recognition, several criticisms followed the Kyoto Protocol's approach, starting from the common but differentiated responsibilities' principle. For some, it reduced the effectiveness of the protocol by managing commitments in different ways relating to the countries' development, and thus reflecting the nature of a sub-global agreement[158] instead that of a global one.
For others, the first commitments period of the protocol (5 years between 2008 and 2012) was not enough, given the nature of the climate change question. The main reason lying under this criticism is that carbon dioxide and other greenhouse gas tend to remain in the atmosphere for decades. So, if this period could encourage participation and raise awareness, it could also create uncertainties on the effectiveness of the commitments established.
However, the Kyoto Protocol's effectiveness should not be disregarded or undermined since current evidence tell us that between 1990 and 2012 the Annex I Parties reduced their carbon dioxide emissions by the 12,5 percent, a result which is well beyond the 2012 target of 5 percent[159].

2.2.1 The Kyoto Mechanisms

The Kyoto Protocol, in addition to and to facilitate the commitments concerning the reduction of greenhouse gas emissions of Annex I countries, establishes three flexibility mechanisms: International Emissions Trading, Clean Development Mechanism ("CDM"), and Joint Implementation ("JI").
The governing principles of the Kyoto Mechanisms were established and defined in the Bonn Agreement[160] in 2001, as well as being included in the legal texts of the Marrakech Accords: first of all, the principle according to which the Kyoto Protocol has not created or conferred any right, title or entitlement to any kind of emission on Annex I Parties; second of all, the principle affirming that the mechanisms in question shall be supplemental to domestic action for reducing greenhouse gas emissions; third, the principle that recognizes that Parties are not allowed to achieve emissions reduction using nuclear facilities; and last, the principle which establishes that Annex I Parties should establish policies and measures to achieve emission reduction in a way that favours the narrowing of per capita differences between developed and developing countries[161].
Concerning the first mechanism, the International Emission Trading, Article 17 explicitly establishes that "the Parties included in Annex B may participate

[158] WIENER (2007: 1961-1979).
[159] *What is the Kyoto Protocol?*, in *UNFCCC*, available *online*.
[160] A mechanism by which ten governments, namely Belgium, Denmark, France, Germany, Ireland, the Netherlands, Norway, Sweden, United Kingdom and Spain, in cooperation with the European Union, deal with pollution of the North Sea by oil and other dangerous substances.
[161] *Mechanisms under the Kyoto Protocol*, in *UNFCCC*, available *online*.

in emissions trading for the purposes of fulfilling their commitments under Article 3"[162]. Thus, Emission Trading establishes the creation of a market for carbon dioxide and greenhouse gas, allowing Annex I countries to acquire assigned amounts units ("AAUs") from other Annex I Parties which are more likely to reduce their emissions. In other words, "developed countries whose emissions are less than their assigned amounts can sell the unused portion to countries whose emissions exceed their assigned amounts"[163]. More precisely, the Kyoto Protocol establishes an upper limit on the total quantity of emissions in developed countries by giving quantified national emissions commitments, the so-called initial assigned amounts. As a result of the transactions allowed under the Emission Trading mechanisms, individual Parties' assigned amounts may increase or decrease, according to the scheme which adds new parts of assigned amount to the already assigned amounts of a country that buys them and subtracts them from the assigned amount of the country that sells them. After all the transactions are finished, the total sum of emissions should equal the total sum before any trading has occurred, since a re-distribution of the allowed emissions from one country to another has taken place, keeping the emissions within the originally agreed limit[164].

In this regard, it is important to stress a term used in Article 17 of the Kyoto Protocol: *supplemental*. Indeed, according to the Protocol, the emissions trading should be supplemental to domestic action. As a result, the Parties are not allowed to achieve their commitments only through buying and transferring unused emissions, but they should take all the measures necessary to reduce them, such as reverse wasteful energy consumption patterns and bring about innovation in energy efficiency technology and renewable energy systems. Moreover, even if the Kyoto Protocol does not address domestic or regional emissions trading schemes, the mechanism contained in the Kyoto Protocol for emission trading forms a framework under which national and regional trading schemes may be activated: such domestic or regional trading systems which account for transfer of units between entities in different Parties are to be subjected to the Kyoto Protocol regulation. An example of a regional trading system operating in respect of the Kyoto Protocol framework is the European Union emissions trading scheme ("EU ETS").

The result of the Emission Trading mechanism has been the creation of a new commodity, in the form of emissions reductions or removals, which it is today known as the carbon market, that takes its name from the main greenhouse gas' reduction target, carbon dioxide, in which carbon is tracked and traded as any other commodity[165].

The second mechanism established by the Kyoto Protocol is the Clean Development Mechanism, defined in Article 12.2 in terms of purpose:

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[162] Article 17 Kyoto Protocol.

[163] Tessa Robertson, 1998, *Greenpeace Analysis of the Kyoto Protocol*.

[164] UNFCCC (2008), *Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amount*, in *UNFCCC*, available *online*.

[165] *Emissions Trading*, in *UNFCCC*, available *online*.

> "the purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3"[166].

As expressed in the following part of the provision, countries with emission-reduction or emission-limitation commitments listed in Annex B of the Kyoto Protocol can implement emission-reduction projects in developing countries in order to earn certified emission reduction ("CERs") credits, which are equivalent to one tonne of carbon dioxide and which can be traded and sold for the achievement of the Kyoto targets.
On the one hand, this mechanism bolsters sustainable development and emission reductions, and on the other hand, it gives industrialized countries some flexibility in finding ways to meet their emission reduction targets. The potential projects must follow a rigorous and public registration and issuance process carried out by designated operational entities ("DOEs") to guarantee that a real, measurable, and verifiable emission reduction has occurred through the project that would not have occurred otherwise. After the supervision, CDM projects can be labelled in three different ways and produce three different Kyoto units: Certified emission reductions ("CERs") for projects that are demonstrated to reduce emissions, and temporary CERs ("tCERs") and long-term CERs (lCERs) issued for projects that support removals through projects of afforestation and reforestation[167].
The CDM mechanism is considered to be a trailblazer, since it is the first global environmental scheme for investments and credits of its type, which additionally provides a standardized emissions' compensation instruments, the CERs[168]. Moreover, it is the first to "explicitly create incentives for investments in clean technologies in developing countries at scale [and] the first policy instrument to operationalize over 200 quality-assured methodologies […] to reduce emissions"[169]. Since its first operation in 2006, the mechanism has already registered a significant number of projects, namely one thousand six hundred fifty, and it has produced a number of CERs equal to more than three billion tonnes of carbon dioxide in the first commitment period set under the Kyoto Protocol.
To conclude, the last mechanism envisaged in the Kyoto Protocol is the Joint Implementation mechanism, which, according to Article 6, states that:

> "any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy"[170].

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[166] Article 12 Kyoto Protocol.
[167] UNFCCC (2008), *Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amount*, in *UNFCCC*, available *online*, p. 18.
[168] *The Clean Development Mechanism*, in *UNFCCC*, available *online*.
[169] Adam Bumpus, *Highlights of the 2012 Report on the Benefits of the CDM*, available *online*.
[170] Article 6 Kyoto Protocol.

In other words, JI is a project-based mechanism through which Annex I Parties can invest in emission reduction projects in another Annex I country, and, as a result, receive credit for the removals or reduction of emissions achieved through those projects, offering Parties an elastic and profitable means to fulfil their Kyoto commitments and host Parties benefits coming from foreign investment and transfer of technology[171].
In order to be labelled as JI project, a potential project must cause an emission reduction by sources, or an increasing in removals by sinks, that would have not otherwise occurred without the project. Obviously, the host Party must approve the project, and the participants to it must be authorized by a Party involved in the project[172].
Two approaches are provided for the verification of emission reductions under JI: Track 1 and JI Track 2. Following the former, a host Party which meets all of the eligibility requirements can verify its own projects and issue the units associated with JI, called emission reduction units ("ERU") and each equivalent to one tonne of carbon dioxide, resulting from emission reductions or removals. Concerning the latter, JI Track 2's eligibility requirements are less strict compared to those for Track 1 and the projects are to be subjected to procedures for their verification under the supervision of the Joint Implementation Supervisory Committee ("JISC"), which determines if the project meets the requirements listed under Article 6. In addition, also the consequent emission reductions or removals must be verified by an independent body able to confer to the Party in question the power to issue the corresponding ERUs[173].

2.3 The Paris Agreement

A second milestone accord in the climate change process which deserves to be mentioned due to its role in bringing all nations into a common objective, to face climate change and to adapt to its impacts, is the Paris Agreement. To offer a complete analysis of the accord in question, firstly the historical context in which the Paris Agreement has been developed will be addressed, followed by a description of its core elements and, lastly a focus on the Preamble and on human-rights related articles will be provided.

2.3.1 Advocacy Pre-Paris Agreement

Since the IPCC indicated in its reports the necessity to keep the global annual average temperature below 2 degrees Celsius than pre-industrial times and the

[171] UNFCCC (2008), *Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amount*, in *UNFCCC*, available *online*, p. 17.
[172]Climate Change Secretariat (2007), *The Kyoto Protocol Mechanisms. International Emissions Trading, Clean Development Mechanism, Joint Implementation*, in *UNFCCC*, available *online*.
[173] *Ibidem.*

institution of the UNFCCC in 1992, the international arena has struggled to keep States within the limits contained in the Convention. The reasons lie on the enormity of the challenge to face climate change and on the profound disparity in states' capacity to cope with its adverse effects.

We have seen that the main instrument that has relatively managed to both support countries in facing climate change impacts and in stabilising greenhouse gas concentrations in the atmosphere has been the 1997 Kyoto Protocol: by differentiating commitments between developed and developing countries, the Protocol imposed binding emission reduction targets only on the first category of States.

However, the continuous increasing in greenhouse gas emissions in emerging economies, such as China and India, has been translated by the IPCCC as a failure of the Kyoto Protocol, due to the fact that "reducing emissions in developed countries only would not be enough"[174]. Moreover, after the first commitment period in 2012, for some major actors, such as Japan, New Zealand and the Russian Federation, it has resulted impossible to establish new targets for a second commitment period, and without the US and Canada in the Protocol, the European Union and a few other developed countries, namely Australia, Norway and Switzerland, have been left in the uncomfortable position of being the only countries to be subjected to the reduction targets listed in the Kyoto Protocol[175].

At this point, hoping that more countries would join in the objective of the Protocol, and thus in reducing their emissions, in 2007 the members of the UNFCCC started negotiating new measures to strengthen the objectives of the Convention and to include emission reduction commitments to all Parties.

The Paris Climate Change Conference was expected to conclude this round of negotiations, bringing about a protocol or a new legal instrument able to be implemented from 2020 and applicable to all Parties. The Ad Hoc Working Group on the Durban Platform for Enhanced Action ("ADP"), namely the body charged with following the development of the text of the agreement, met 15 times before adopting the Paris Agreement, trying to turn the initial chaotic text into that of a legal tool to be adopted in December 2015.

The apple of discord was undoubtedly the differentiation among developed and developing countries in terms of distribution of the burden to mitigate climate change and of the provision of capacity-building, finance and technology for those in need. This divided the spectrum of Parties into those countries supporting the idea of moving beyond a *bifurcated approach* to differentiation, and those opposing the idea of moving beyond the existing differentiation parameters[176].

A second crucial point on which Parties struggled to find consensus concerned the already-mentioned NDCs, namely the nationally determined contributions meant to inform the actions of Parties to tackle climate change. Also in this

[174] SAVARESI (2016: 17).
[175] *Ibidem.*
[176] *Ivi*, p. 18.

case, ADP negotiations did not find an agreement on a process to review and adjust Parties' contributions to facilitate the achievement of the goal.
In addition, at the centre of the debate there was also the question of the connection between climate change and human rights. Indeed, until then, only the Human Rights Council had showed its support on the human rights approach to climate change, inserting a human-right language into the Cancun Agreements, a set of significant decisions taken at the 2010 United Nations Climate Change Conference to start concrete action to face the long-term challenges of climate change and to speed up the global response to it. As expressed in recital 8 of the Cancun decision:

> "Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of cli- mate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability..."[177].

This provision, together with paragraph 8 of the Cancun Agreements which explicitly emphasized that "Parties should, in all climate change related actions, fully respect human rights"[178], encouraged a change in the climate change regime, which had to include a human rights language, and expressed this request with the publication of an open letter and by signing the Geneva Pledge for Human Rights in Climate Action, a voluntary, non-binding initiative aimed at facilitating coordination between human rights and climate experts at a national level. Moreover, the Human Rights and Climate Change Working Group, formalized in 2010 to gather civil society advocates and experts asking for a stronger recognition of the human rights dimension of climate change, harmonized the actions of several non-governmental organizations for the inclusion of human rights language in the work of the Ad-Hoc Working Group on the Durban Platform and asked for a reference on human rights in the article defining the purpose of the Paris Agreement, contrasting other advocates more reluctant to support this reference as they considered that an agreement on climate change should have a specific climate goal, and not a human rights goal[179].
Nevertheless, without a common vision on all these questions as well as doubts on the nature of the Paris Agreement as a protocol to the UNFCCC or not, on 12 December 2015 the UNFCCC COP officially adopted the Paris Agreement as a treaty.

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[177] Decision the Conference of the Parties, 15 March 2011, 1/CP.16, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention.*
[178] *Ibidem.*
[179] MAYER (2016: 110-112).

2.3.2 The Paris Agreement

The Paris Agreement is a landmark environmental treaty adopted by nearly every nation, more precisely 196 Parties, in 2015 at COP 21 in Paris under the UNFCCC through Decision 1/CP.21[180], aimed at addressing climate change and its adverse impact. It entered into force in November 2016 and its main goal is to limit global temperature increase in our century to 2 degrees Celsius above preindustrial levels, preferably to 1,5 degrees Celsius. The purpose of the Agreement is contained in Article 2, which is expressed as it follows:

> "This Agreement […] aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development"[181].

This article provides a temperature target, namely below 2 degrees Celsius, and takes into consideration also the anxieties of low-lying island states and seaside communities by referencing to the efforts to limit the increase in global temperature to 1,5 degrees Celsius. Indeed, some least developed countries and other climate-vulnerable Parties from the Alliance of Small Island States and the Africa Group firmly asked to commit countries to limit the global average temperature increase to less than 1,5 degrees Celsius above pre-industrial levels[182]. The final version uses the term "pursuing efforts" towards 1,5 degrees, which does not mean that it can be legally dismissed without difficulties but, on the contrary, it means that concrete measures have to be adopted, "which try to reduce more emissions than necessary to stay within 1,7 or 1,8 degrees"[183]. Moreover, it "signals urgency for climate action, and sets the direction of travel for al commitments under the Paris Agreement"[184].
The Accord, made of twenty-nine articles and sixteen preambular paragraphs, includes legally binding commitments for all major emitting countries to reduce their climate-changing pollution as well as providing a route for

[180] Decision adopted by the Conference of the Parties, 29 January 2016, FCCC/CP/2015/10/Add.1, *Adoption of the Paris Agreement.*
[181] Article 2 Paris Agreement.
[182] ABEYSINGE, CRAFT, TENZING (2016), *The Paris Agreement and the LDCs. Analyzing COP21 outcomes from LDC positions*, in *International Institute for Environment and Development*, available *online*, p. 11.
[183] EKARDT, WIEDING, ZORN (2018: 3).
[184] ABEYSINGE, CRAFT, TENZING (2016), *The Paris Agreement and the LDCs. Analyzing COP21 outcomes from LDC positions*, in *International Institute for Environment and Development*, available *online*, p. 11.

developed countries to support developing nations in their climate mitigation and adaptation efforts.
It is considered a landmark pact in the multilateral process of facing climate change since it represents for the first time a binding agreement that brings all nations around a common objective, that of undertaking audacious efforts to cope with climate change and adjust to its effects[185].
In order to implement the Paris Agreement, economic and social transformations are needed on the basis of the best available science. Starting from the just-passed year, 2020, by which the Parties had to submit their nationally determined contributions ("NDCs"), namely their plans and measures for climate action, it works on a 5-year cycle. In their NDCs, Parties have to express the actions they intend to take in order to reduce their greenhouse gas emissions for reaching the goal established under the Agreement, as well as communicating necessary steps to build resilience to adapt to the adverse impact of climate change[186].
More generally, the Paris Agreement, as expressed in its Articles 9, 10 and 11, serves as a framework to provide three fundamental types of support to the countries in need: financial, technical and capacity building support[187].
Concerning the financial field, the Treaty reaffirms the concept according to which developed countries should take the lead in supporting in financial terms those countries that are less resourced "through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties"[188]. But it goes even further: for the first time, it encourages voluntary contributions by other Parties, establishing that "other Parties are encouraged to provide or continue to provide such support voluntarily"[189]. In this sense, it helps building and strengthening both metaphorically and empirically the concept of climate finance. Climate finance "refers to local, national or transnational financing – drawn from public, private and alternative sources of financing – that seeks to support mitigation and adaptation actions that will address climate change"[190]. On the one hand, climate finance is fundamental for mitigation, since reducing emissions requires large-scale investments, and on the other hand, it is equally significant for adaptation, since resources are needed to help creating a system of resilience towards the adverse effects of climate change[191]. In order to implement the provisions of climate finance, the UNFCCC provides the Parties to the Paris Agreement with a Financial Mechanism which includes funds for developing country Parties, such as the Global Environment Facility ("GEF") or the Green Climate Fund ("GFC"), which have both served as "operating entit[ies] of the financial mechanism since the Convention's entry

[185] *The Paris Agreement*, in *UNFCCC*, available *online*.
[186] *Ibidem.*
[187] *Ibidem.*
[188] Article 9.3 Paris Agreement.
[189] Article 9.2 Paris Agreement.
[190] *Introduction to Climate Finance*, in *UNFCCC*, available *online*.
[191] *Ibidem.*

into force in 1994"[192]. The organ entrusted with specific functions concerning the assistance of the Financial Mechanism is the Standing Committee on Finance ("SCF"), and these include: "assisting the COP in improving coherence and coordination in the delivery of climate change financing; assisting the COP in rationalization of the financial mechanism of the UNFCCC; supporting the COP in the mobilization of financial resources for climate financing; and supporting the COP in the measurement, reporting and verification of support provided to developing country Parties"[193].

Moving on to the technology dimension, the Paris Agreement highlights the importance of a full realization in technology development and transfer in order to achieve both its objectives, namely resilience to climate change and greenhouse gas emissions' reduction. Technology, indeed, plays a central role in facing climate change and in helping us to adapt to its adverse effects: renewable energies such as solar power, wind energy and hydropower are only few of the climate technologies' innovations, as well as drought-resistant crops, early warning systems and sea walls. Through the so-called Technology Mechanism, established in 2010, which "supports country efforts to accelerate and enhance action on climate change"[194] through its two bodies, the Technology Executive Committee ("TEC") and the Climate Technology Centre and Network ("CTCN"), it establishes a technology framework to accelerate technology development on the basis of its policies and measures.

Lastly, regarding the capacity-building support, since not all developing nations are able to face all the challenges brought by climate change, the Paris Agreement stresses the importance of climate-related capacity building for developing countries, asking to all developed countries to intensify their support for capacity-building actions in developing countries.

As a way of controlling and reporting the actions taken in climate change mitigation, adaptation measures and support provided or received, countries established under the Paris Agreement the so-called Enhanced Transparency Framework ("ETF"), that starting from 2024 will gather together all the concerned information to create the Global Stocktake, namely a five-yearly review of the collective impact of countries' climate change actions[195].

In addition to its core elements, the Paris Agreement can also be considered as a human rights treaty: it represents the first global environmental agreement which recognizes that human rights obligations have to be taken into account as integral elements of the system it creates. However, the Paris Agreement does not have to be considered as a human right treaty in the traditional sense: indeed, its aim is not to define specific human rights and to create mechanisms to control and promote their observance. Rather, it gives a significant contribution to the fulfillment of human rights: "by clarifying that actions to address climate change should take human rights into account, the agreement

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[192] *Ibidem.*

[193] *Ibidem.*

[194] *Technology Mechanism. Enhancing Climate Technology Development and Transfer*, in *Climate Technology Centre and Network*, available *online*, p. 1.

[195] *What is Transparency and Reporting?*, in *UNFCCC*, available *online*.

helps to mainstream human right norms into the ongoing implementation and evolution of the climate regime"[196].

2.3.3 The Preamble to the Paris Agreement

The Paris Agreement is the first legally binding multilateral environmental instrument which refers to human rights. However, human rights *per se* were not the first priority of the negotiations held in the ADP and at COP 21: some developing countries claimed for an inclusion of the right to development along with human rights, while other countries asked for a reference to other fragile groups, including both categories recognized by the international human rights law, such as migrants and persons with disabilities and categories not recognized, such as local communities and young people.
Eventually, the Preamble of the Paris Agreement explicitly includes the human rights language in the climate change discourse, stressing the importance of respecting human rights when taking climate actions:

> "Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity…"[197]

This reference expands the already existing reference on human rights contained in the Cancun Agreements, which stresses the importance of the respect of human rights in all actions taken to fight climate change. The Preamble to the Paris Agreement goes even further, "elaborating on specific aspects of human rights and specific groups of rights holders that are relevant in the implementation of the Paris Agreement"[198]. In addition, it emphasizes significant principles in the realm of human rights: "the fundamental priority of safeguarding food security and ending hunger; the imperatives of a just transition of the workforce and the creation of decent work and quality jobs; and the importance of ensuring the integrity of al ecosystems"[199].
What has been questioned throughout the years is the legal force of this Preamble, which theoretically is not able to create right or obligations on its own "even though it could contribute to the formation of a customary norm"[200]. More precisely, under international law, the content of a preamble of an agreement should be considered as an integral part of it and should be taken into account when it comes to interpret the contained provisions. Even

[196] KNOX (2018: 1).
[197] Preamble to the Paris Agreement.
[198] DUYCK (2015: 11).
[199] *Ibidem.*
[200] MAYER (2016: 113).

though preambular texts in general, and in our case the Preamble to the Paris Agreement, cannot create legal human-rights-related obligations, "the preambular language of the Paris Agreement […] refers to existing human rights obligations that parties have entered into previously"[201] . Therefore, the Parties to the Agreement have an obligation to respect their human-rights obligations when taking climate-change related actions due to commitments of the Agreement. In other words, the preambular reference "establishes an explicit link between the obligations set forth in the Paris Agreements and existing human eights obligations and could therefore contribute significantly to promote policy coherence"[202]. The same conclusion could be achieved also on the grounds of general treaty interpretation: according to Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"), a treaty must always be interpreted also considering all the significant rules of international law valid in the relations between the parties.
However, even if an operative reference to human rights would have strengthened the political message concerning the inclusion of human rights in the UN climate regime, the real reason for the inclusion of a reference to human rights in the Preamble to the Paris Agreement was that the proponents wanted to conceive it as a symbolic statement, "a way of conveying a certain normative vision of the climate regime and […] of reaffirming the relevance of human rights in responses to the greatest problem of our time"[203]. However, it is the Preamble that renders the Paris Agreement the first environmental agreement of international scope that includes an explicit mention of human rights, thus establishing a precedent of fundamental value for the international community's commitment in promoting a more coherent approach for sustainable development.

2.3.4 Human-Rights Related Provisions in the Paris Agreement

Apart from the agreement's Preamble, several decisions adopted under the Paris Agreement contain considerations that are generally associated with the development of human rights in all their aspects, such as gender equality, participation, sustainable development and poverty reduction.
A first category of provisions stresses the close relation between the objectives of the climate regime and those related to the development of human rights. Here, paragraph 109 of the Decision 1/CP.21 "recognizes [the] co-benefits [of voluntary mitigation actions] for adaptation, health and sustainable development"[204], as well as Article 8 of the Paris Agreement, where great importance is given to sustainable development, in which Parties "recognize […] the role of sustainable development in reducing the risk of loss and

[201] DUYCK, LENNON, *Delivering on the Paris Promises: Combating Climate Change while Protecting Rights. Recommendations for the Negotiations of the Paris Rule Book*, in *Center for International Environmental Law*, available *online*, p. 3.
[202] *Ivi*, pp 11-12.
[203] MAYER (2016: 114).
[204] MAYER (2016: 115).

damage"[205]. In this context, a stress is placed on food security, highlighting the vulnerabilities of food production systems to the adverse effects of climate change, which has already diminished global agricultural production and is expected by the IPCCC that will have effects on all aspects of food security. Indeed, globally, "795 million people are chronically hungry [and] 159 million children under five are stunted"[206]. As a result, Parties to the Paris Agreement recognize "the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change"[207]. To reach their goals under the agreement, actions in the agricultural sector will be fundamental, but these would need to avoid risky, unproven technologies that could potentially threaten food security and human rights, in particular land rights.
A second set of provisions claims for the integration of human rights-related questions in climate actions. In particular, two provisions of the agreement recognize the importance of the adaptation actions and capacity-building to be gender-responsive. On the one hand, Article 7.5 explicitly affirms that "adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems"[208], and on the other hand, Article 11.2 states that "capacity-building should be guided by lessons learned […] and should be an effective, iterative process that is participatory, cross-cutting and gender-responsive"[209]. Moreover, a provision contained in paragraph 103 of Decision 1/CP.21 prescribes that members of the expert-based committee established under Article 15 to facilitate the implementation and promote compliance with the provisions of the Agreement should be elected "while taking into account the goal of gender balance"[210]. In addition to these provisions, great concern is given to gender equality by the Paris Agreement and Sustainable Development Goals ("SDGs"), since it is recognized that "women and girls are disproportionately affected by climate change due to gender inequalities that restrict access to education, resources, decision-making spaces, and other opportunities"[211]. As a result, much importance is given to gender-responsive climate policy and actions since they can promote the integration of women's rights by including women into the decision-making process and implementation of policies and programs.
A third set of provisions highlights the importance of "public participation, public access to information and cooperation at all levels"[212] on the basis of

[205] Article 8 Paris Agreement.
[206] DUYCK, LENNON, *Delivering on the Paris Promises: Combating Climate Change while Protecting Rights. Recommendations for the Negotiations of the Paris Rule Book*, p. 9.
[207] Preamble to the Paris Agreement.
[208] Article 7.5 Paris Agreement.
[209] Article 11.2 Paris Agreement.
[210] Decision of the Conference of Parties, 29 January 2016, 1/CP.21, *Report of the Conference of the Parties on its twenty-first session.*
[211] DUYCK, LENNON, *Delivering on the Paris Promises: Combating Climate Change while Protecting Rights. Recommendations for the Negotiations of the Paris Rule Book*, p. 8.
[212] Preamble to the Paris Agreement.

the Paris Agreement and SDGs, which affirms the importance of effective engagement of all actors of society to face climate change and promote sustainable development. In this sense, the public's right to participate in climate change decision-making is considered a core principle in international law: at the Rio Earth Summit in 1992, also known as the UN Conference on Environment and Development, the Parties identified three procedural rights belonging to the public in environmental terms: "access to information, participation in decision-making, and access to justice"[213]. These three dimensions of participation are fundamental to strengthen the legitimacy and the effectiveness of climate responses: they are required to improve the quality of environmental actions, to guarantee that decisions are practical and to ensure that local circumstances and needs are taken into account.
To conclude, the last category of provisions concerns the enjoyment of a series of human rights, such as the rights to life, health, food and water, which can be protected only with the achievement of a healthy and sustainable environment. Indeed, "healthy ecosystems sequester and store carbon, provide a natural defence against climatic hazards […] and support the livelihoods of billions of people"[214], making it necessary for the objectives of Parties to the Paris Agreement to maintain and enhance the integrity and resilience of the environment. In this sense, the PA tasks countries in its Preamble with the protection of all ecosystems, "noting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth"[215]. This preambular note finds solid footing in the articulation of Article 7.5 that, as I have already mentioned in the gender equality's discourse, states that countries should take into account communities and ecosystems in their adaptation actions. If they do not act in this direction, mitigation and adaptation actions may be inappropriate and deliver minimal emissions reduction, also aggravating the vulnerabilities of communities and ecosystems to the impacts of climate change.

2.4 Environmental Policy of the European Union

Nowadays, the European Union has some of the world's highest environmental standards, which have been reached after a long development over decades. Indeed, the situation concerning European environmental policy has not always been like the current one, but in the early days of European integration, environmental questions were not the first priority. The beginning of the environmental policy of the EU dates back to 1972, when the Heads of State or Government of the six founding Member States of the European Community – namely France, Belgium, Germany, Italy, Luxemburg and the

[213] DUYCK, LENNON, *Delivering on the Paris Promises: Combating Climate Change while Protecting Rights. Recommendations for the Negotiations of the Paris Rule Book*, p. 7.
[214] *Ivi*, p. 12.
[215] Preamble to the Paris Agreement.

Netherlands – and of the three states that were entering the European Community in 1973 – Denmark, Ireland and the United Kingdom – met to define new fields of action of the Community and to re-establish 1980 as the deadline for achieving economic and monetary union. Among these fields of action, "the Heads of State or Government emphasized the importance of a community environment policy […] [and] invited the Community institutions to establish, before 31 July 1974, a program of action accompanied by a precise timetable"[216]. Following this event, a first starting signal was given with the adoption of a framework for the Community's environmental policy which covered the period from 1973 to 1976.

However, the turning point for European environmental policy is considered to be the 1986 Single European Act, which "sought to revise the Treaties of Rome setting up the European Economic Community and the European Atomic Energy Community […] [and] introduced several new policy areas"[217]. More precisely, it introduced a new Environmental Title signaling the creation of a legal basis for common environmental measures aimed at safeguarding the quality of the environment, protecting human health, and guarantee rational use of natural resources. This has been followed by treaty revisions which enforced the EU commitment to environmental protection and defined the role of the European Parliament in environmental matters.

A second crucial event which contributed to the development of European environmental policy was the adoption of the 1992 Maastricht Treaty, officially known as the Treaty on the European Union. It marked "the beginning of a new stage in the process of creating an ever-closer union among the peoples of Europe […] [and] laid the foundations for a single currency and significantly expanded cooperation between European countries in a number of areas"[218]. Most importantly, the Maastricht Treaty added the task of "sustainable and non-inflationary growth respecting the environment"[219] in Article 2 and included the precautionary principle in the article that establishes environmental policy, also upgrading the status of environmental questions to Environmental Policies. More precisely, it states that:

> "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies"[220].

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[216] BROWN (2012), *40th Anniversary the Paris Summit October 1972. Prelude to the First Enlargement of the European Community and to European Social Policy*, in *The Institute of International and European Affairs*, available *online*, p. 21.

[217] *The Single European Act*, in *Eur-Lex*, available *online*.

[218] *Five Things you Need to Know about the Maastricht Treaty*, in *European Central Bank*, available *online*.

[219] Article 2 TEU.

[220] Article 130r TEU.

In addition, the role of the European Parliament on environmental matters was expanded: the co-decision procedure with equal powers for the Council and for the Parliament was established, and the number of policy areas in which the Council could legislate by qualified majority voting rather that unanimity was extended, consequently removing the 'veto power' and thus making it easier to agree on environmental standards[221].

Two other Treaties paved the way to today's environmental policies standards, namely the Amsterdam Treaty of 1997 and the Lisbon Treaty of 2007. The first accord mentioned was adopted to amend the Treaty on the European Union. It became a fundamental step in the environmental sector since it explicitly established sustainable development as one of the objectives of the EU, amending Article 2 and stating that "the community shall have as its task […] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, sustainable and non-inflationary growth"[222]. On another side, the Amsterdam Treaty strengthened the necessity to include the environment into other European Union policy categories, by transferring it to the initial part of the Treaty, more precisely in its Article 6 – rather than being mentioned in the Environment Title – and stating that "environmental protection requirement must be integrated into the definition and implementation of the [other] Community policies"[223]. Moreover, the Amsterdam Treaty modified the decision-making process in environmental questions: "co-decision became the normal process for agreeing environment policy, thus further enhancing the role of the European Parliament"[224].

Concerning the Treaty of Lisbon, it came into force in December 2009 and created a new institutional framework composed of two treaties, namely the Treaty on the European Union ("TEU") and the Treaty on the Functioning of the EU ("TFEU")[225]. In environmental matters, the Treaty left unchanged the main provisions on environmental policy, namely Articles 191 and 193 of the TFEU, and it only replaces Article 2 of the TFEU with Article 3 of the TEU, which establishes that the Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment"[226], clarifying that "in its relations with the wider world, the Union […] shall contribute to peace, security, the sustainable development of the Earth"[227]. As a consequence, this creates a strong legal obligation for the

[221] FARMER (2012), *Manual of European Environmental Policy*, in *Institute for European Environmental Policy*, available *online*, p. 3.
[222] Article 2 Treaty of Amsterdam.
[223] Article 6 TEU.
[224] FARMER (2012), *Manual of European Environmental Policy*, p. 4.
[225] *Ibidem.*
[226] Article 3 TFEU.
[227] *Ibidem.*

EU to aim at act for the achievement of sustainable development not only in in Europe, but also in the actions with regard to the rest of the world.
Since the beginning of the process which led to the creation of the European environmental policy, the situation has unquestionably changed, with a strong development of environmental principles and achievements within the European context. At the moment, European policies have reached such a high level of attention toward the environment that environmental quality has become central to our health, our economy and well-being: it now "protects natural habitats, keep air and water clean, ensures proper waste disposal, improve knowledge about toxic chemicals and help business move toward a sustainable economy"[228].
On climate change, the EU takes a leading role in international negotiations on decision to face its adverse effects, formulating and implementing climate policies and strategies. Moreover, the EU is committed to the right implementation of the Paris Agreement and of the EU's Emission Trading System ("EU ETS"), "a cornerstone of the EU'S policy to combat climate change, […] its key tool for reducing greenhouse gas emissions cost-effectively [namely] the world's first major carbon market"[229].
Concerning its legal basis, EU environmental policy is contained in Articles 11, 191 and 193 of the TFEU, which establish the main principles and define the core objective in environmental terms.

2.4.1 Legal Basis of European Environmental Policy: Articles 11 and 191-193 TFEU

Article 11 of the TFEU is the first to include an integration clause in environmental matters, supporting the idea of a holistic interpretation of the Treaty, as it states that:

> "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development"[230].

The history of integration of environmental matters in European policy is made of several important steps which resulted in the conclusive statement expressed by Article 11 TFEU, namely that "the sectoral policy in non-environmental areas not only takes account of its particular concerns […] [but] it must also take its environmental impact into account"[231]. On this basis, the intrinsic rule suggests that the interpretation of EU law should be consistent with environmental protection requirements, in order to ensure an *ex ante* identification and solution of potential controversies between different policies and avoid possible damages after that they have occurred.

[228] *Environment and Climate Change*, in *European Union Law*, available *online*.
[229] *EU Emissions Trading System*, in *European Union*, available *online*.
[230] Article 11 TFUE.
[231] NOWAG (2016: 19).

In its provision, Article 11 legally binds both Union Institutions and European Member States: the formers are bound at a policy-making level but also in the adoption of individual measures such as regulations, directives and decisions; the latters are directly bound when applying Union law, thus when they are acting in quality of Union organs[232]. In contrast to this, it has been argued by Dhondt and Kramer that Article 11 only binds the European Union and not Member States, and thus that only EU institutions have responsibility in policy-making and not Member States when implementing EU law. According to the supporters of this thesis, Member States are only bound by the duty of loyal cooperation, expressed in Article 4.3 TEU which states that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"[233]. Such an argument is the result of the interpretation of the wording of Article 11 TFEU that, following these lines, would have included the expression 'and Member States' if Member States had to be considered to be bound by it. However, these arguments have been rejected since the terminology used in Article 11 refers to the implementation of policies, action programmes and strategies which are conventionally achieved through directives, regulations and decisions. In this sense, limiting the interpretation of Article 11 to refer only to the European Union would render it pointless, since the majority of the EU law is implemented by Member States. Thus, we can conclude that Article 11 TFEU binds Member States when they are implementing Union law[234] and its objective can be compared to that of EU fundamental rights, which seem to apply when EU law is applicable, namely whenever a national measure falls within the European sphere.

In light of the objective of Article 11, and thus to integrate environmental protection requirements into the activities and policies of the EU, another provision must be mentioned. Indeed, to respectively understand the objective, the principles and the criteria of EU environmental policy, Article 191 TFEU must be mentioned and analysed. This article consists of three paragraphs that describe the three above mentioned elements. More precisely, Article 191.1 TFEU lists the objectives of European environmental policy, namely:

> "(a) preserving, protecting and improving the quality of the environment, (b) protecting human health, (c) prudent and rational utilisation of natural resources, (d) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change"[235].

Article 191.2 TFEU sets the four main environmental principles that direct policy within the scope of EU law, namely the precautionary principle, the prevention principle, the rectification at source principle and the polluter pays

[232] *Ivi*, p. 21.
[233] Article 4 TEU.
[234] NOWAG (2016: 24).
[235] Article 191.1 TFEU.

principle. In these regards, I have already deeply explained the precautionary principle, which "allows regulatory action to be taken eve if a risk has not been established with full certainty"[236]. Concerning the second principle, the prevention principle, it "aims to prevent environmental damage, such as to protected species or to natural habitats […] rather than to react to it"[237] and it was one of the eleven objectives and principles mentioned in the First EU Environmental Action Programme in 1973[238]. Moving on to the third principle, the rectification at source principle can be defined as the principle "which seeks to prevent pollution at its source rather than remedy its effects"[239] and it is not applied as an absolute rule: it is rather considered as predominant guide to policy for encouraging progress in environmentally friendly innovations and technologies. Lastly, the polluter pays principle "requires polluters to bear the financial cost of their actions"[240]: it is often utilised as an economic tool for handling different kinds of environmental pollution through embodiment in legislation such as the Waste Framework Directive[241], Landfill Directive[242] and Water Framework Directive[243].
Additionally, Article 191.3 TFEU enumerates the different criteria that the EU shall take into account when preparing its policy on the environment, which include "available scientific and technical data, environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action and the economic and social development of the Union"[244].
Concerning the environmental decision-making procedure, it is Article 192 TFEU which governs the matter, and states that:

> "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191"[245].

In other words, it establishes that the ordinary legislative procedure, namely of co-decision between the Council and the European Parliament, has to be employed for the adoption of environmental legislation, "including the

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[236] Houses of Parliament (2018), *EU Environmental Principles*, in *Parliamentary Office of Sciences and Technology*, available *online*, p. 1.
[237] *Ibidem.*
[238] HAIGH (2017: 14).
[239] Houses of Parliament (2018), *EU Environmental Principles*, in *Parliamentary Office of Sciences and Technology*, p. 1.
[240] *Ibidem.*
[241] Directive of the European Parliament and of the Council of the European Union, 19 November 2008, 2008/98/EC, *on Waste and Repealing Certain Directives*.
[242] Directive of the Council of the European Union, 26 April 1999, 1999/31/EC, *on the Landfill of Waste.*
[243] Directive of the European Parliament and of the Council of the European Union, 23 October 2000, 2000/60/EC, *Establishing a Framework for Community Action in the Field of Water Policy.*
[244] Article 191.3 TFEU.
[245] Article 192.2 TFEU.

adoption of the legally binding acts setting out the General Action Programmes defining the priority objectives of the EU environmental policy"[246]. However, Article 192.2 introduces an exception to the ordinary legislative procedure, by affirming that "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply"[247] can be adopted by unanimity of the Council in accordance with a special legislative procedure, following a consultation of the European Parliament, the Economic and Social Committee and the Committee of the Regions. On this regard, it also adds that "the Council by unanimity could change the rules of procedure for the adoption of the measures mentioned above requiring unanimity so that they are adopted by co-decision"[248].

By means of conclusion, Article 193 introduces another principle, namely the principle of minimum harmonization in EU environmental policy and legislation: by definition, a piece of law is described as minimum harmonisation if it identifies a threshold which must be respected by national legislation. By affirming that "the protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures"[249], it establishes a minimum standard which allows Member States to adopt stricter measures as long as they do it by respecting the Treaty and not distorting the market[250].

The chapter has tried to outline the key instruments composing the current international climate change legal framework. Analyzing the fundamental aspects of such legal instruments, it has been clarified how international actors, with the UNFCCC, the Kyoto Protocol and the Paris Agreement, and European countries, with several treaties entailing environmental policy, deal with climate change and environmental questions. In addition, the importance of human rights' protection in environmental policies has been highlighted, and it has been showed how it has been taken into consideration in the majority of the above-mentioned legal instrument. In sum, this appears to strengthen the relationship between the two concepts, showing the strong connection that exists between the protection of the environment and human rights.

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[246] *The Impact of the Lisbon Treaty. An Environmental Perspective*, in *ClientEarth*, available *online*, p. 18.
[247] Article 192.2 TFEU.
[248] *The Impact of the Lisbon Treaty. An Environmental Perspective*, in *ClientEarth*, available *online*, p. 22.
[249] Article 193 TFEU.
[250] *The Impact of the Lisbon Treaty. An Environmental Perspective*, in *ClientEarth*, available *online*.

3 The European Convention on Human Rights, the European Court of Human Rights and the Environment

The European Convention on Human Rights ("ECHR"), an international treaty that came into force in 1953 before the international agenda was concerned with the environmental question, does not explicitly protect the environment, nor does it deal with environmental issues. Namely, no provision exists for providing relevant rights concerning the environment[251]. This is because the primary objective of the Convention was to set out a body of legal provisions that aimed at the protection of democratic fundamental rights and liberties of the individual against the State. Indeed, questions such as the atmosphere, the safeguard of ecosystems, or environmental issues did not concern the conventional conception of individual human rights.
However, recently, the European Court of Human Rights ("ECtHR") has been urged to give its interpretation on the application of the ECHR to the environmental crisis[252]. This is creating much jurisprudence on environmental questions between states and the Court, and some cases have reached significant success in domestic courts[253]. Indeed, it has been recognized that it is undoubtedly true that climate change undermines the enjoyment of several human rights. Moreover, the ECtHR has also established some minimum requirements the States must respect in dealing with environmental hazards.
Some of these successes have been achieved in the unprecedented decision discussed in the next and final chapter, namely the Urgenda decision, delivered by the Dutch Supreme Court in December 2019.

Generally, in these decisions, the core element in claimants' argument is that some obligations in Article 2 and Article 8 of the ECHR should be interpreted following some of the international treaties concluded on climate change mitigation, namely: the Paris Agreement and its aspiration to limit global average temperatures' increase to 1.5 C; the UNFCCC and its objectives; and, also some requirements under the UN Convention on the Rights of the Child ("UNCRC"). In other words, the ECtHR is being asked to interpret the environmental duties contained in the ECHR, taking into account the interpretation that some international legal instruments give on environmental provisions. This is reasonable in two respects: first of all, because since the ECHR does not contain regulations in terms of environmental risks and protection, the ECtHR has significantly relied on European and international environmental law tools to deal with environmental questions; secondly, the

[251] DESGAGNE (1995: 265).
[252] O. W. PEDERSEN, *The European Convention of Human Rights and Climate Change – Finally!*, 22 September 2020, in *EJIL:Talk! Blog of the European Journal of International Law*, available *online*.
[253] *Ibidem.*

use of general international law as a framework for interpreting provisions is an entrenched practice of the ECtHR[254].
Our concerns now are to first analyze the ECHR and its core elements in environmental protection and subsequently describe the core elements of the process of recognition of the relationship between human rights and the environment by the ECtHR.

3.1 The European Convention on Human Rights in Environmental Protection

The European Convention on Human Rights is "an international treaty for the protection of fundamental […] civil and political liberties in European democracies committed to the rule of law"[255].
This Convention was created by the ten states of the Council of Europe[256] whose aim was to achieve "a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles […] [of] common heritage, and facilitating their economic and social progress"[257]. It was opened for signature on 4 November 1950 in Rome, but it entered into force in 1953[258], and it has now been ratified by all 47-member States of the Council of Europe.
The idea for the creation of the ECHR developed in the early 1940s during the Second World War on the concept that "governments would never again be allowed to dehumanize and abuse people's right with impunity"[259]. Indeed, it is the first legal instrument that considers the provisions of the Universal Declaration of Human Rights[260] for its purpose, namely to protect fundamental rights and freedoms, and establishes a Court to monitor the observance of the rights envisaged in it. In fact, to protect individuals from human rights breaches, the ECHR established the European Court of Human Rights. In this sense, "any person whose rights have been violated under the Convention by a state party may take a case to the Court"[261].
Throughout the years, the ECHR has been subjected to many amendments several times. This fact reflects the nature of the instrument of "adapting itself

[254] *Ibidem.*
[255] GREER (2006: 1).
[256] International organization founded in 1949 in the United Kingdom for the protection of democracy and human rights and the promotion of European equity by encouraging cooperation among European countries in social, cultural, and legal issues.
[257] Council of Europe, *History of the Council of Europe*, available *online*.
[258] *European Convention on Human Rights*, in *ECHR.CouncilOfEurope*, available *online*.
[259] Amnesty International UK, *What is the European Convention on Human Rights?*, 21 August 2018, in *Amnesty.org.uk*, available *online*.
[260] Proclaimed by the UN General Assembly on 10th December 1948.
[261] *European Convention on Human Rights*, in *Eur-Lex*, available *online*.

to new developments"[262], that allows us to describe it as a 'living instrument'[263].

> "The adaptation and extension of the Convention has been effected through the interpretation of its provisions by the Commission and the Court in the light of the changing conditions of life and the prevailing conceptions and values in democratic societies"[264].

The same is happening with environmental cases today. The environmental issue is gaining recognition in its importance in the judicial field and the society, making matters of environmental threats, environmental protection, and quality of the environment appearing more and more.
However, officially, the term 'environment' is not specified in the ECHR's provisions and the same happens with the right to a healthy environment. Thus, at first glance, it could seem that the right to a healthy environment is not included in the rights and liberties generated by the Convention. But, as we shall see, this is not the case.

3.1.1 The Recognition of the Right to a Healthy Environment through Environmental Information

Despite the absence of references to environmental obligations in the ECHR, the ECtHR has succeeded in building a comprehensive body of case-law allowing for a right to a healthy environment[265]. The primary concern in the different cases is related to the question "to what extent can individuals invoke this new subjective right to a healthy environment, alongside the state's correlative obligation in front of an international judicial body"[266]. Consequently, the right to a healthy environment has been recognized in the European case law of the ECtHR through "an extensive interpretation of the applicability domain of certain rights, expressly provided for in the provisions of the Convention"[267]. For this reason, it is not possible to invoke an infringement of the right to a healthy environment as such in front of the ECtHR since the Convention does not protect it *in terminis*[268]. Moreover, it is not the Court's nor the Convention's duty to establish necessary measures for the protection of the environment, but it is a matter of domestic jurisdiction: "national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects"[269]. It follows that, in its judgments, the Court provides national authorities with broad

[262] LOUCAIDES (2005: 249).
[263] *Ibidem*.
[264] *Ibidem.*
[265] PEDERSEN (2018: 2).
[266] DOGARU (2013: 1348).
[267] *Ibidem*.
[268] *Ibidem.*
[269] Council of Europe, *Manual on Human Rights and the Environment*, available *online*.

discretion, the so-called "margin of appreciation" that will be analyzed later on, in the decision-making process. This is a direct result of the application of the principle of previous exhaustion of domestic remedies, contained in Article 35 of the ECHR, establishing that:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken"[270].

Thus, the ECtHR should intervene on violations of the Convention only if domestic remedies have failed to solve controversies as a last resort and only if they fall within the scope of the Convention, on which the Court has exclusive jurisdiction.

Concerning domestic public authorities and their role in granting environmental protection, the Court has established some requirements for information and communication in environmental questions that must be observed. First, these concern the right to receive and impart information and ideas on environmental matters and access information on the same topics.
First of all, Article 10 of the ECHR guarantees the right to receive and impart information and ideas, under the protection of "the right to freedom and expression"[271]. Concerning the environment, the Court has stated in the *Steel and Morris v. the United Kingdom*[272] judgment, that "there exists a strong public interest in enabling […] groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest"[273].
In *Vides Aizsardzibas Klubs v. Latvia*[274], the Court has concluded that restrictions imposed by public authorities on receiving and disseminating information and ideas, among other environmental matters, must be established by law and aimed at a lawful objective. Thus, measures interfering with this right must be proportionate to the legitimate aim pursued[275] and a fair balance must be found between the individual's interest and the community's one.
Besides, the *Guerra and others v. Italy*[276] case allows us to add another detail to the information and communication questions: this case dealt with the State's failure to provide the community with information about the risks of

[270] Article 35 ECHR (1950).
[271] Article 10 ECHR (1950).
[272] Judgment of the European Court of Human Rights, 15 February 2005, Case 68416/01, *Steel and Morris v. the United Kingdom.*
[273] Judgment *Morris v. the United Kingdom*, para. 89.
[274] Judgment of the European Court of Human Rights, 25 May 2004, Case 57829/00, *Vides Aizsardzibas Klubs v. Latvia.*
[275] *Ibidem*, para. 40.
[276] Judgment of the European Court of Human Rights, 19 February 1998, Case 14967/89, *Guerra and Others v. Italy*.

an accident that occurred close to a chemical factory. In the judgment, the Court concluded that:

> "freedom to receive information […] basically prohibits a government from restricting a person from receiving information that other wish or may be willing to impart to him […]. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion"[277].

In other words, the Court stated that the right to receive information protected in Article 10 cannot be interpreted as an obligation for public authorities to gather and share information related to the environment of their own initiative[278].

Concerning the access to information on the environment, the Court has stated that some obligations emerge for public authorities from the liberties protected in Article 2 and 8 of the ECHR, namely the right to life and the right to respect for private and family life, home and correspondence. These obligations concern the protection of the right to access to information on environmental issues in specific conditions. In particular, in the *Öneryıldız v. Turkey*[279] judgment, concerning the death of thirty-nine people due to a methane explosion that occurred close to their slum, the Court has established the importance of the public's right to information when this concerns dangerous activities for which the State is responsible[280], expressing that "where such dangerous activities are concerned, public access to clear and full information is viewed as a basic human right"[281].

When these dangerous activities involve detrimental risks to health, and public authorities engage with them and are aware of their dangerousness, in the *McGinley and Egan v. the United Kingdom*[282] the Court established that an effective and accessible procedure must be provided for individuals in order to find out all pertinent and correct information[283].

At this point, it is worth mentioning the Aarhus Convention. The Aarhus Convention is significant in our concerns because its essential elements have been integrated with the ECHR law through case law in terms of procedural environmental rights. Thus, they can be enforced in domestic law and in front of the Strasbourg Court as the extensions of other human rights.

The Aarhus Convention draws inspiration from Article 10 of the Rio Declaration protecting the right to information, participation, and the judicial remedy concerning environmental contexts and matters[284]. It is one of the two

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[277] Judgment *Guerra and Others v. Italy*, para. 53.
[278] *Ibidem*.
[279] Judgment of the European Court of Human Rights, 30 November 2004, Case 48939/99, *Öneryıldız v. Turkey.*
[280] *Ivi*, para. 90.
[281] *Ivi*, para. 62.
[282] Judgment of the European Court of Human Rights, 9 June 1998, Case 10/1997/794/995-996, *McGinley and Egan v. the United Kingdom.*
[283] Judgment *McGinley and Egan v. the United Kingdom*, para.101.
[284] HARTLEY, WOOD (2005: 320).

elements which constitute the body of vital environmental conventions under the patronage of the UN Economic Commission for Europe[285] ("UNECE"). The other instrument is the Espoo Convention on Environmental Impact Assessment in a Transboundary Context ("EIA"), set out to "assess the environmental impact of certain activities at an early stage of planning"[286]. Going back to the Aarhus Convention, it is considered a regional treaty of "significant global potential to serve as a framework for strengthening citizens' environmental rights"[287] and it can also be defined as a human rights treaty. Indeed, it is based on the old human right that protects access to justice and on the procedural aspects of the protection of the rights to life, health, and private life. Moreover, its provisions do not establish rights only for States, but especially for individuals. More precisely, the Aarhus Convention establishes rights that fall under three types of categories: access to information, public participation, and access to justice[288].

Concerning the access to information, Article 4 of the Convention claims that "each party shall ensure that […] public authorities, in response to a request for environmental information, make such information available to the public"[289]. It also specifies this right feature, including the maximum amount of time allowed for providing the information and the terms for refusing a request.

Moving on to public participation, that is seen by many authors as a fundamental factor of the environmental assessment process since it increases accountability and clarity of the decision-making process[290]. For this purpose, the Aarhus Convention establishes three rights in its concern:

> "(i) the right of public participation in decisions of 'specific activities' which may have a significant effect on the environment in such way that public concerned shall be informed in an adequate, timely and effective manner; (ii) the right of public participation during the preparation of plans and programmes relating to the environment; (iii) […] [and] Art. 8 provides the right to public participation during the preparation of regulations or legislation"[291].

Lastly, concerning access to justice, the Convention establishes a set of requirements that must be complied with by the contracting Parties for enabling environmental public interest litigation in the domestic jurisdiction. In this sense, "everybody who considers that his request for environmental

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[285] One of UN five regional commissions aiming at the promotion of economic integration at the European Union level.

[286] *Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) – the 'Espoo (EIA) Convention',* in *UNECE.org*, available *online*.

[287] UNECE (2000), *The Aarhus Convention. An Implementation Guide*, in *UNECE.org*, available *online*.

[288] CARELLI (2019), *Enforcing a Right to Healthy Environment in the ECHR System: the "Cordella v. Italy" Case*, in *Ambiente Diritto,* available *online*.

[289] Article 4 of the Aarhus Convention (1998).

[290] HARTLEY, WOOD (2005: 320).

[291] CARELLI (2019), *Enforcing a Right to Healthy Environment in the ECHR System: the "Cordella v. Italy" Case*, in *Ambiente Diritto,* available *online*.

information has been not dealt with in accordance with the AC provisions must have the access to review the procedure before a court of law"[292].

3.1.2 Article 2 of the ECHR: The Right to Life and the Environment

Despite the importance of access to environmental information, especially in these information concern dangerous activities towards the enjoyment of human rights, the ECHR, when dealing with environmental issues through a human-rights approach, "is the judicial organ that is to be considered the frontrunners in Europe, its jurisprudence being the representative of a regional court pushing the limit of its own jurisdiction in order to respond to the increasing environmental protection concerns of modern society"[293]. Thus, in practice, it extends the scope of application of existing rights under the Convention for accommodating questions of environmental protection[294]. On this line, provisions that have been considered to encompass environmental values are principally Article 2, establishing the right to life, and Article 8, on the respect for private life, but also Articles 6, right to a fair trial, Article 10, freedom of expression and the right to receive and impart information, and Article 11, namely freedom of assemble and association, have been invoked by claimants.
For the purpose of this work, and due to the jurisprudence available, we will focus on the two Articles that have been invoked the most by applicants in climate change litigation, namely Article 2 and Article 8 of the ECHR. Concerning the first right, Article 2 of the ECHR states that:

> "everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"[295].

In this sense, Article 2 is considered one of the fundamental provisions of the Convention, that embodies one of the principal democratic values characterizing the Council of Europe[296]: on the one hand, it concerns deaths directly related to the actions of the State, and on the other hand, it sets out a positive obligation on States to intervene in the safeguard of lives of people under their jurisdiction. Due to the importance of the right to life and the fact that the majority of its violations are irreparable, this obligation has been extended to a variety of situations in which life is put at risk.
For what concerns us, in the environmental context, "Article 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life"[297], for example, nuclear tests, the toxic

[292] *Ibidem.*
[293] CENEVSKA (2016: 307).
[294] *Ibidem.*
[295] Article 2 ECHR (1950).
[296] ZAHRADNIKOVA (2017: 19).
[297] Council of Europe, *Manual of Human Rights and the Environment*, in *ECHR.CouncilofEurope*, available *online*.

emissions of chemical factories or waste collection sites. It is essential to remind that these situations are considered to be exceptional ones: environmental issues have, indeed, arisen in four cases brought in front of the ECtHR, with two of them relating to dangerous activities and the other two to natural disasters.

As a general rule concerning dangerous activities based on the Court's case law, "the extent of the obligations of public authorities depends on factors such as the harmfulness of the dangerous activities and the foreseeability of the risks to life"[298]. Let us explore in more detail the case concerning dangerous activities.

The first case of the four mentioned above is *LCB v. United Kingdom*[299]. Here, the applicant's father was present at nuclear testing in the 1950s when enrolled in the army and exposed to radiation. During the course of her life, the applicant contracted leukemia. She claimed that the United Kingdom did not warn her father of the risks that radiations could have on him and on any children he could have had. According to the applicant, this consisted of a violation of the United Kingdom's obligations under Article 2 of the ECHR. The Court had to determine whether the State had done "all that could have been required of it to prevent risk to the applicant's life"[300]. In its judgment, the Court expressed that:

> "having examined the expert evidence submitted to it, the Court is not satisfied that it has been established that there is a causal link between the exposure of a father to radiation and leukemia in a child subsequently conceived. [..] The Court could not reasonably hold, therefore, that, in the late 1960s, the United Kingdom authorities could or should, on the basis of this unsubstantiated link, have taken action in respect of the applicant"[301].

In other words, since the Court did not find any causal link between the applicant's father's exposure to radiation and her contraction of leukemia, it concluded that the United Kingdom authorities had no duty to take action towards the applicant[302]. Thus, no violation of Article 2 occurred[303]. It could have been considered a violation of the provision under examination only if the authorities had specific knowledge of the risk of damage[304].

Moving on to the second case, the *Öneryıldız v. Turkey*[305] judgment expresses a violation of Article 2. In this case, as already explained above, a methane explosion occurred near a landfill and killed thirty-nine people who had illegally set up their accommodations around it. The applicant's family was

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[298] Judgment *Öneryıldız v. Turkey*, para. 71.
[299] Judgment of the European Court of Human Rights, 1998, Case 23413/94, *LCB v. United Kingdom.*
[300] DEMERIEUX (2001: 542).
[301] Judgment *LCB v. United Kingdom*, para. 39.
[302] Judgment *LCB v. United Kingdom*, para. 39.
[303] Judgment *LCB v. United Kingdom*, par. 41.
[304] Judgment *LCB v. United Kingdom*, par. 41.
[305] Judgment of the European Court of Human Rights, 30 November 2004, Case 48939/99, *Öneryıldız v. Turkey.*

destroyed since nine of its members died in the tragedy. Here, the public authorities have been warned about the possibility of a methane explosion at the landfill, but they had intervened in no ways. Indeed, "Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near Umraniye municipal rubbish tip"[306]. Thus, the Court established that, since the authorities knew about the threat for people living near the dump, "they had an obligation under Article 2 to take preventive measures to protect those people"[307].

Proceeding with the case law concerning natural disasters, as a general environmental extension of the right to life, "the Court requires States to discharge their positive obligation to prevent the loss of life also in cases of natural disasters, even though they are as such, beyond human control"[308].

This was established in the *Budayeva and others v. Russia*[309] case, the first case concerning natural disasters. Here, the applicants claimed that the Russian authorities had not respected their positive obligation to warn the population about the threat of landslides near their living area, which eventually occurred and devastated Tyrnauz in July 2000, causing numerous deaths. Moreover, the ECtHR was asked to consider whether Russia had failed to implement evacuation and take emergency relief policies. In its task, the Court concluded that "there was no justification for the authorities' omission in implementation of the land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk"[310]. Thus, a causal link between the applicants' deaths and the administrative flaws was found[311].

In the second and last case concerned with natural disasters, namely the *Murillo Saldias v. Spain*[312] judgment, the applicants submitted a complaint concerning the State's failure in complying with its positive duty to take necessary measures to prevent several deaths caused by a flood following heavy rain. Here, the Court did not find a violation of the positive obligation of Article 2, but it found, instead, that the applications were inadmissible. The Court justified its decision "not because the article did not apply *ratione materiae* to natural disasters, but because one of the applicants had already obtained satisfaction at the national level"[313] and the other applicants did not exhaust all the available domestic remedies[314].

To sum up the discourse revolving around Article 2 of the ECHR, we can say the it "was assigned a 'green' dimension when threatened by environmental

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[306] Judgment *Öneryıldız v. Turkey*, para. 101.
[307] *Ibidem,*
[308] *Ibidem.*
[309] Judgment of the European Court of Human Rights, 29 September 2008, Case 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, *Budayeva and Others v. Russia.*
[310] Judgment *Budayeva and Others v. Russia*, para. 158.
[311] *Ibidem.*
[312] Judgment of the European Court of Human Rights, 28 November 2006, Case 76973/01, *Murillo Saldias v. Spain.*
[313] Council of Europe, *Manual of Human Rights and the Environment.*
[314] Judgment *Murillo Saldias v. Spain.*

deterioration"[315]. Considering all that has been said in the case law selected, we can articulate some general rules that result from the extension of Article 2 of the ECHR in environmental questions.
First of all, public authorities are required to adopt measures to prevent breaches of the right to life caused by dangerous activities or natural disasters. This implies that the State has the duty to implement a legislative and administrative system that includes:

> "(i) making regulations which take into account the special features of a situation or an activity and the level of potential risk to life […]; (ii) placing particular emphasis on the public's right to information concerning such activities […]; (iii) providing for appropriate procedure for identifying shortcomings in the technical processes concerned and errors committed by those responsible"[316].

Secondly, in case of loss of life caused by a violation of the right to life, public authorities must guarantee a proper response, ensuring the right implementation of the legislative and administrative system and punishing the infringement of the right to life adequately[317]. In other words, as expressed in *Budayeva and others v. Russia*[318] and *Öneryıldız v. Turkey*[319], an independent and impartial investigation must be initiated, aiming at the identification of the circumstances of the incident and the public authorities involved in the controversy.
Furthermore, if the violation of the right to life is unintentional, disciplinary, civil, or administrative remedial measures can be considered a proper response. But, if public authorities are aware of the risks to the right to life in perpetuating dangerous activities and they ignore their responsibility to take necessary measures for preventing threats to happen, the Court states that those liable for having endangered life must be accused of criminal offence and prosecuted[320].

3.1.3 Article 8 of the ECHR: Respect for Private Life, Family Life, and Home and the Environment

The second provision of the ECHR that encompasses environmental values is Article 8. It provides for the right to respect for private and family life, home and correspondence, stating that:

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[315] ZAHRADNIKOVA (2017: 19).
[316] Council of Europe, *Manual of Human Rights and the Environment*.
[317] *Ibidem.*
[318] Judgment *Budayeva and Others v. Russia*, para. 109.
[319] Judgment *Öneryıldız v. Turkey*, para. 93.
[320] Council of Europe, *Manual of Human Rights and the Environment.*

> "(i) everyone has the right to respect for his private and family life, his home and his correspondence; (ii) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law […]"[321].

Thus, this provision's primary objective concerns a negative obligation, namely the duty of the State to abstain from arbitrary interferences with individuals' private life, family life, and correspondence. On the other hand, it also includes a State's positive obligation to guarantee that Article 8 provisions are correctly observed[322].

As it might be intended from a first interpretation of Article 8, the right to privacy does not seem a right from which it is possible to derive a substantive environmental right. Indeed, "'privacy' […] had been seen to refer […] to the intimate and sexual life of the individual; relations between family members; the 'treatment' by the law of homosexuals; also freedom from unwanted publicity and matters pertaining to honor and reputation"[323]. Following this line, the term 'home' enabled its development in environmental issues: initial applications accepted by the former Commission as claims for the violation of Article 8 concerned, indeed, aircrafts' noise pollution by the applicants' home. In these cases, since the right contained in Article 8 includes the respect for not only the actual physical area, but also the quality of private life and the enjoyment of the amenities of someone's home, the Court has found that intense environmental pollution can affect the quality of the residents' life. This prevents them from enjoying their home and constitutes a violation of their rights contained in Article 8.

More specifically, for controversies to arise under Article 8, the environmental component "must directly and seriously affect private and family life or the home"[324]. In this concern, there are two factors that the Court has to consider: first, if a causal link connects the activity and the negative impact on the individual; secondly, if the adverse have reached a standard threshold of harm. The minimum threshold of harm is dependent on the circumstances of the case, including the duration and intensity of the discomfort, and its mental or physical effects[325]. In this framework, it must be recalled that the Court starts to examine the case by determining if Article 8 applies to the case's scenario, and only if the result is positive it determines if there has been a breach of its provisions.

The *Kyrtatos v. Greece*[326] case is the example that fits this situation the most. In this case, the applicants claimed that the authorities had failed to comply

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[321] Article 8 of the ECHR (1950).

[322] ECHR, *Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence*, in *ECHR.CouncilofEurope*, available *online*.

[323] DEMERIEUX (2001: 528).

[324] Council of Europe, *Manual of Human Rights and the Environment*.

[325] *Ibidem.*

[326] Judgment of the European Court of Human Rights, 22nd May 2003, Case 41666/98, *Kyrtatos v. Greece*.

with the national Supreme Administrative Court decision that annulled two authorizations for the construction of buildings around their residence. According to the applicants, urban development had led to the destruction of the scenic beauty of the area surrounding their home. However, the Court underlined the importance of domestic legislation and of other international tools in dealing with the general protection of the environment rather than the ECHR[327]. Thus, stating that "neither Article 8 nor any of the other provisions of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instrument and domestic legislation are more pertinent in dealing with this particular aspect"[328], it found no violation of Article 8.

An opposing circumstance, in which environmental issues can be raised under Article 8, concerns the 'intense environmental pollution' that includes excessive noise levels, fumes, contamination and smells coming from a waste treatment plant, or toxic emissions from a factory. Even if most of them are not health-threatening, these factors can interfere with an individual's enjoyment of their home. In the *Brânduşe v. Romania*[329] case, the applicant, namely a prisoner condemned to ten years of imprisonment, claimed that his detention violated Article 8 of the ECHR because the authorities failed to remedy the "polluted and pestilent air that came from a nearby garbage dump that […] [the applicant] claimed exposed him to a real risk of disease"[330]. Here, the Court was asked to decide if the Convention could apply to a cell considered by the applicant as his 'living space', and secondly if the pestilent odors violated the threshold of harm implied in Article 8. In the judgment, the Court accepted the applicants' claims since the cell represented for him the only possible 'living space'. Furthermore, the ECtHR held that his quality of life had been negatively affected by the bad smell, even if it did not cause any irreparable health impact on his person. On these grounds, the Court established a violation of Article 8 of the ECHR[331].

A second feature that characterizes individuals' negative obligation to be free from arbitrary interference is that obligations may arise for public authorities aimed at the protection of the rights in Article 8. The obligations in question refer to the adoption of positive measures when State activities cause environmental damage and when it is attributable to private sector activities. In practical terms, the *Moreno Gómez v. Spain*[332] involved an applicant's claim for noise pollution from bars and discotheques. Here, public authorities should have taken measures to keep the noise at a reasonable level: they made

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[327] Judgment *Kyrtatos v. Greece,* para. 52.
[328] *Ibidem.*
[329] Judgement of the European Court of Human Rights, 27th October 2015, Case 39951/08, *Brânduşe v. Romania*.
[330] Global Health and Human Rights Database, *Brânduşe v. Romania*, in *GlobalHealthRights.org*, available *online*.
[331] Judgement *Brânduşe v. Romania*.
[332] Judgement of the European Court of Human Rights, 16th February 2005, Case 4143/02, *Moreno Gómez v. Spain.*

regulations setting out a maximum level of noise permitted and consequent penalties for those who violated that standard, but did not ensure the proper implementation of such measures. In this concern, the Court highlighted that "authorities should not only take measures aimed at preventing environmental disturbance […], but should also secure that these preventive measures are implemented in practice"[333]. Indeed, it stated that:

> "Although the Valencia City Council has used its powers in this sphere to adopt measure […], it tolerated, and thus contributed to, the repeated flouting of the rules which it itself had established during the period concerned. Regulations to protect guaranteed rights serve little purpose if they are not duly enforced […]. The facts show that the applicant suffered a serious infringement of her right to respect for their home as a result of the authorities' failure to take action to deal with the night-time disturbances"[334].

Thus, in this case, the ECtHR found, for the first time, a violation of Article 8 by a signatory country in failing to implement preventive measures to protect a claimant from noise disturbance[335].
The second paragraph of Article 8 of the ECHR must be mentioned since there are interesting environmental implications to its extension. It states that:

> "there shall be no interference by a public authority with the exercise of his right except such as is following the law and is necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"[336].

In other words, this paragraph confers public authorities the power to interfere with the right to respect for private or family life or the home, according to the established conditions. These conditions include: firstly, that the decisions to interfere with the right in question must be provided for by law and pursue a legitimate aim; secondly, that they must be commensurate to the legitimate aim pursued – balancing the individual interest with the interest of the society as a whole[337]. This provision has been strictly followed in empirical cases, since in the majority of case law analyzed, such as *Guerra and others v. Italy*[338] or *Fadeyeva and others v. Russia*[339], the violation was not the result of the absence of legislation for environmental protection, but rather the failure of national authorities to comply with such legislation. For instance, in *Guerra*

[333] Council of Europe, *Manual of Human Rights and the Environment*.
[334] Judgement *Moreno Gómez v. Spain*, para. 61.
[335] Judgement of the European Court of Human Rights, 16th February 2005, Case 4143/02, *Moreno Gómez v. Spain.*
[336] Article 8 of the ECHR (1950).
[337] Council of Europe, *Manual of Human Rights and the Environment*.
[338] Judgment of the European Court of Human Rights, 19 February 1998, Case 14967/89, *Guerra and Others v. Italy*.
[339] Judgement of the European Court of Human Rights, 30/11/2005, Case 55723/00, *Fadeyeva and others v. Russia.*

and others v. Italy[340] public authorities failed to share information with the population on the risks and on how to proceed in case of an accident by a chemical factory[341].
To conclude, there is one last aspect of Article 8 that must be recalled, which opens the discourse of the next paragraph. Indeed, given the social and technical difficulties in managing and assessing environmental issues, public authorities are in the most suitable position to determine the best policy for environmental controversies. Thus, they own a wide *margin of appreciation* in deciding the balance between the individual's interest and the community's interest. It follows that the Court might be asked to determine if public authorities have taken the proper approach in dealing with the problem, and if all of the competing interests have been taken into account[342].

3.1.4 The Margin of Appreciation Doctrine

The expression "margin of appreciation" derives from the French term *marge d'appréciation*, and it refers to "the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention of Human Rights"[343]. The term does not appear in the ECHR text, but it was first introduced in 1958 in several applications of Article 15 of the Convention[344]. The first is the *Cyprus Case (Greece v. United Kingdom)*[345], which concerned Greece's application against the United Kingdom for the latter's failure to observe the Convention in Cyprus. Accordingly, Article 15 of the ECHR states that:

> "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law"[346].

In this case, according to Greece, the United Kingdom, by invocating Article 15, had failed to meet the emergency conditions of the same Article[347]. On the other side, the United Kingdom declared to have derogated from the Convention only because in Cyprus existed a "public emergency threatening

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[340] Judgment of the European Court of Human Rights, 19 February 1998, Case 14967/89, *Guerra and Others v. Italy*.
[341] Judgment *Guerra and Others v. Italy*, para. 53.
[342] Council of Europe, *Manual of Human Rights and the Environment*.
[343] GREER (2000), *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, available *online*.
[344] GROSS, NÌ AOLÀIN (2001: 626).
[345] Judgement of the European Court of Human Rights, 1958-1959, Case 299/57, *Greece v. United Kingdom*.
[346] Article 15 of the ECHR (1950).
[347] Judgement of the European Court of Human Rights, 1958-1959, Case 299/57, *Greece v. United Kingdom*.

the life of the nation"[348] caused by murders and sabotages for the subversion of the Cypriot government. Consequently, the British government had no chance but the adoption of emergency measures including detention and deportation, which theoretically represented a violation of Article 5 of the Convention, namely the right to liberty and security[349]. The Court accepted the case and was asked to determine the existence or not of the public emergency in Cyprus and if the measures adopted by the United Kingdom respected the conditions contained in Article 15. Most importantly, the Commission allowed to the derogating Member State "a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation"[350]. Thus, in this case, the Commission established the margin of appreciation as an instrument for granting Member States going through a state of emergency the discretion to decide to comply with their obligations contained in the Convention[351].

Since that moment on, the doctrine of the margin of appreciation has become a well-established feature of the ECtHR's case law. Considered as an instrument of interpretation, the margin of appreciation is used in cases where the Court confers autonomy of decisions to national authorities in determining the measures that should be adopted to guarantee compliance with the ECHR[352].

Accordingly, since the Court's role is subsidiary to domestic protection of the ECHR's liberties, national authorities, with the margin of appreciation, enjoy more discretion in setting the best system in safeguarding human rights within their territory. Moreover, this autonomy guaranteed to States poses limitations on the Court's power of review, since it has to accept that domestic authorities are in the best position for settling a dispute: on the one hand, it the measures adopted by a State respect the margin of appreciation, the Court has to accept them without reviewing them; on the other hand, if the actions of the State exceed the margin of appreciation, then the Court will carry out a full review[353]. In this concern, the Court makes a distinction between a narrow and

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[348] Judgement *Greece v. United Kingdom*, para(s).174-179.

[349] Article 5 of the ECHR: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

[350] Judgement *Greece v. United Kingdom*, para.176.

[351] FEINGOLD (1977: 91).

[352] MUŀLLEROVÁ (2014: 84).

[353] *Ivi*, p. 85.

a wide margin: if the Court determines a narrow margin for a particular case, the State is more probable to be accused of breaching the Convention, while if the Court establishes a wide margin, determining a violation by the State is less likely[354].

Despite its useful implications, the margin of appreciation doctrine is one of the most criticized and discussed ECtHR achievements[355].
The first critique generally sees the margin of appreciation as a means of the Court through which it refrains from reviewing controversies considered as 'domestic' ones. This critique builds upon the fact that, as stated by Article 32 of the Convention, "the jurisdiction of the Court should extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto"[356]; thus, the Court should be the only interpreter of the provisions contained it the ECHR. The rift between the original function of the Convention and the practice of the Court has created uncertainties about the appropriateness of the margin of appreciation: "by allowing any margin of a certain width, is the European Court simply waiving its power of review or is it attributing responsibility to the domestic courts in the interest of a healthy subsidiarity"[357]According to some authors who have tried to answer this question, the margin of appreciation does not represent a waiving tool used by the Court: it does not guarantee a 'reserved domain' for national authorities. Instead, it "allows an apportionment of case assessment in the interest of well-established subsidiarity"[358], subordinate to the ultimate review of the ECtHR.

A second weakness concerns the lack of theoretical background of the margin of appreciation doctrine. Indeed, some authors have questioned the use of the term 'doctrine' for the margin, since it lacks "the minimum theoretical specificity and coherence which a viable legal doctrine requires"[359]. It is true that, instead of deriving the rules for its application from theoretical background and principles, the Court evaluates the individual circumstances of every single case and then determines the width of the margin. Put differently, the margin of appreciation is never measurable *a priori*, but its width is always related to a specific case. To find some recurrent aspects of the margin of appreciation throughout the case law, some commentators have listed several factors that are considered to be influential on the Court's choice. The factors mentioned above include: the level of consensus among contracting states; the type of right concerned; the nature of the individual

[354] *Ibidem*.
[355] LAVENDER (1997: 380-381).
[356] Article 32 of the ECHR (1950).
[357] SPIELMANN (2017: 385).
[358] *Ivi*, p. 417.
[359] GREER (2000), *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights.*

interest on the line; the positive or negative dimension of the State's duty; and, the nature of the activity at stake[360].
Despite these features, the lack of a theoretical basis to the application of a doctrine leads to the unpredictability in the results of the margin of appreciation: not having a defined scope, it is characterized with vagueness[361].

A third and last criticism has been moved towards the Court's application of the margin of appreciation as a "conceptual composition"[362], even if the different empirical steps have been developed through its case law. For example, some authors identify five phases under the wider doctrine: the first phase concerns the identification of the facts and their ascertainment; the second one is related to the interpretation and application of national laws; thirdly, the evaluation of conceptual parameters of the Convention's right at stake and the application of them to a precise controversy arising from a State's law; as a fourth step, the establishment of a balance between the individual's right and the public interest; and finally, the balancing of the two competing rights and freedoms[363].

Others believe that it should be considered as a quasi-technical way of considering the discretion that the Strasbourg institutions allow national authorities to exercise in specific circumstances. Their conception entails the distinction within the margin of appreciation between two interpretations of it: "implementation discretion", which derives from the principles of protection and proportionality; and "deference to national judicial authority", derived from the principle of legality. The result is confusing since the margin of appreciation use suggests a common identity and rationale for the different state discretion recognizable in the Convention[364].

By means of conclusion, despite all the conceptual issues and criticisms rotating around the margin of appreciation – "a degree of vagueness, […] a certain incoherence in the Court's reliance on the margin of appreciation, a risk of manipulation of the identified factors and parameters and the resulting […] lack of legal certainty"[365] – the ECtHR has started to apply its doctrine in several areas of the Convention, including Articles 4-6, 8-11, 13 and 14, along with Article 1 and 2 of the First Protocol to the Convention. Thus, the margin of appreciation is applied to the rights of the Convention that are considered derogable[366], and, as the Court has stated in the *Leyla Sahin v Turkey*[367] case,

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[360] HILSON (2013: 265).
[361] MUŀLLEROVÁ (2014: 85).
[362] *Ibidem.*
[363] ARAI-TAKAHASHI (2002: 69).
[364] GREER (2000), *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, p. 32.
[365] SPIELMANN (2017: 417).
[366] MUŀLLEROVÁ (2014: 86).
[367] Judgement of the European Court of Human Rights, 10th November 2005, Case 44774/98, *Leyla Sahin v Turkey.*

> "rules in […] [some] spheres will […] vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of other and to maintain public order […]. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context […]. This margin of appreciation goes hand in hand with a European supervision, embracing both the law and the decisions applying it"[368].

3.2 The European Court of Human Rights in Environmental Protection

As we have understood, the European Court of Human Rights is entitled to monitor the respect of the provisions contained in the ECHR. It is established by Article 19 of the ECHR, which explicitly states that:

> "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights […]. It shall function on a permanent basis"[369].

Today, it is composed of forty-seven judges, as the number of States Parties to the Convention. The judges are elected from a list of three candidates offered by each State by the Parliamentary Assembly of the Council of Europe for a non-renewable term of nine years[370].

The ECtHR structure and functions have not always been as they are today, but they have gone through a process of modification. Indeed, initially, the role established by the founders of the Convention for the Court was predominantly political[371], based on the view of the ECHR as "a means of strengthening the resistance in all […] countries against insidious attempts to undermine […] democratic way of life, and thus to give to Western Europe as a whole a greater political stability"[372]. On this line, the ECtHR had to be intended as "a collective insurance policy against the relapse of democracies into dictatorships"[373], accompanied by the European Commission of Human Rights, established in 1954, whose duties were the admissibility of complaints, the supervision of settlements, and referencing cases to the ECtHR[374].

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[368] Judgement *Leyla Sahin v Turkey*, para(s).109-110.
[369] Article 19 of the ECHR (1950).
[370] Council of Europe, *The ECHR in 50 Questions*, available *online*.
[371] WILDHABER (2007: 523).
[372] *Ibidem.*
[373] *Ibidem*.
[374] International Justice Resource Center, *European Court of Human Rights*, available *online*.

In 1998, with the entry into force of Protocol No. 11 to the Convention[375], the Convention mechanism was subject to a major reform: the European Commission of Human Rights was removed from the system, and its roles and the Court's ones were merged into a single Court working full-time, namely the ECtHR. Since then, the Court is responsible for examining complaints moved by individuals or States, which must consist of violation of rights in the ECHR.

Despite the dimension of the application brought in front of the Court, may it be environmental or for violations of other provisions of the Convention, it has to follow a specific procedure that has changed over time.
As already mentioned in the ECtHR introduction, the individual complaint procedure underwent reform to eliminate the European Commission of Human Rights in 1998, in order to improve the efficiency of the Convention's institutions and accelerate the process of examination of the constantly growing number of applications submitted to the Commission.
Thus, since 1998, the ECtHR is a full-time court and it has exclusive jurisdiction on questions of its competence, as stated in Article 32[376] of the ECHR: individuals can directly bring cases before the Court and no decision concerning the cases is taken by the Committee of Ministers, that maintains its duty of supervision of the execution of judgments. The ECtHR's judgments bind only respondent states to comply with them, and even if other states are not subjected to the Court's decisions, its judgments may involve other states, that, in order to comply with the Court, may change their practices and laws. Thus, all states are interested in reviewing domestic laws for other states' case law's potential implications on their laws.

Despite the adjustments made under Protocol 11, the problem of applications' overloading to the Court has not been solved: for instance, in 2004, in only one year, more than forty-four thousand applications have been submitted to the Court[377]. As a consequence, in 2004, Protocol 14 was adopted. The Protocol's innovation concerned the introduction of a new admissibility criterion, according to which any application submitted that does not respect them should not be considered admissible, and the management of repetitive or inadmissible cases for a better functioning of the ECtHR.

Concerning the admissibility criteria by Protocol 14, the updated version of the ECHR establishes with Article 34 the first admissibility criterion:

[375] Protocol aimed at improving the system for the enforcement of rights and liberties under the Convention.
[376] Article 32 of the ECHR (1950): "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47".
[377] CAMERON (2011: 42).

> "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto"[378].

In other words, the Convention requires that the applicant must have been the victim of the violation, namely it must have personally suffered from the declared breach.
The set of admissibility criteria can be found in Article 35, that firstly establishes the principle of subsidiarity, stating that "the Court may only deal with the matter after all domestic remedies have been exhausted"[379]. This means that the Convention allows States to address the controversy by its own means, before resorting to the intervention of a regional or international tribunal. According to paragraph 2 of Article 35, the Court should not deal with applications that are anonymous or are analogous to cases that have already been examined by it; moreover, all the applications that are incompatible with the provisions of the ECHR and its Protocols should be declared inadmissible[380]. Lastly, the Convention highlights the importance of "significant disadvantage"[381] that the applicant has to suffer in order to render its application admissible for an investigation before the Court.

Considering all that has been said, theoretically, controversies of environmental dimension should not be declared admissible for a judgment of the Court. Indeed, as expressed by Article 35, an environmental violation is not considered a violation of the ECHR. However, we have seen that the domain of certain provisions has been extended in order to create a set of fundamental environmental rights that have been recognized in several case law situations.
Among these, it is worth mentioning three ECtHR judgments that have been significant in integrating environmental protection under a human rights regime.

3.2.1 Integration through Substantive Rights: *Powell & Rayner v. The United Kingdom*

Since the ECHR does not provide for a right to a good environment, environmental issues have been raised incidentally by protecting substantive rights[382], namely those rights that have a reason to exist for their own sake and that guarantee a standard legal order in the society.

[378] Article 34 of the ECHR (1950).
[379] Article 35 of the ECHR (1950).
[380] Ibidem.
[381] Article 35 (3) of the ECHR (1950).
[382] SCHALL (2008: 425).

In this concern, the *Powell & Rayner v. The United Kingdom*[383] case was central for the Commission and the ECtHR to link environmental damage to a breach of the Convention[384]. The case concerned two applicants, Richard J. Powell and Michael A. Rayner, who owned dwellings near Heathrow Airport, in a sensitive air traffic noise area. The first complaint was moved by Mr. Powell, who lived in an area that, together with approximately one-half million of other people, experienced a low level of noise disturbance; on the other hand, the second complainant, Mr. Rayner, lived in a house located in a high noise annoyance area along with approximately other 6,500 people. According to their complaint, four articles of the Convention had been violated by the aircraft noise and by the consequent process: Article 6[385], protecting the right to a fair trial and in particular the right to hearing in determination of civil rights; Article 8 and the right to respect for private life and home contained in it; Article 1 of the First Protocol and the right to property; and, finally, Article 13[386], securing the right to an effective remedy. Concerning the admissibility of the case, the Commission examined it and considered the claims under Article 1 of the First Protocol and Article 8 of the ECHR as manifestly ill-founded, thus inadmissible. Furthermore, the Commission made a distinction between the two scenarios of the applicants: Powell's residence was located in a low noise annoyance area and so the interference[387] between the two factors was not found, as demonstrated by the opinion of the Commission explaining that:

> "it its admissibility decision concerning Mr. Powell the Commission left open whether the noise levels experienced by him occasioned an interference with his right to respect for his private life and his home […]. In the opinion of the Commission, the facts of his case did not give rise to an arguable claim of breach of Article 8 (art.8) or, consequently, to any entitlement to a remedy under Article 13 (art.13)"[388].

On the other hand, Rayner's house was situated in an area of high noise, thus clear interference was found[389]: "the Commission considered the facts of Mr. Rayner's case to be markedly different. […] In its admissibility decision the

[383] Judgement of the European Court of Human Rights, 21st February 1990, Case 9310/81, *Powell and Rayner v. The United Kingdom*.
[384] VAN DYKE (1994: 329).
[385] Article 6 of the ECHR (1950): "any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
[386] Article 13 of the ECHR (1950): "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".
[387] Usually an intervention that has an impact on the integrity or physical health of an individual.
[388] Judgement *Powell and Rayner v. The United Kingdom*, para. 38.
[389] DESGAGNE (1995: 275).

Commission found a 'clear interference' which 'involved the Government's positive obligations under Article 8 (art.8)"[390].
However, eventually, the Court did not consider the distinction of the Commission and found environmental interference with private life in both cases, stating that:

> "whether the present case be analyzed in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2 (art. 8-2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole"[391].

Subsequently, concerning the other claims, the Commission found that the "facts of the case sufficiently implicated article eight so as to render the case admissible for the purpose of determining if the article eight claims were 'arguable'"[392], and thus that the claimants' rights to national remedy as protected in Article 13 had been breached. More precisely, the Commission differentiated the two complaints. It found that Mr. Powell's complaint did not consist of a violation of Article 8 and so he was not eligible for a remedy under Article 13[393]. Indeed, paragraph 2 of Article 8 states that "there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of […] the economic well-being of the country"[394] and the Commission considered "the existence of large international airports, even in densely populated urban areas […] the increasing use of jet aircraft, […] the establishment of a nuclear power station [and] the construction of a hydroelectric plant"[395] as measures in the interests of the economic well-being of the country. Concerning Mr. Rayner's complaint, the Commission established that in his case the noise represented a proper interference with his right to respect for his private life and home due to the proximity of his residence to the airport, the high noise-annoyance area, and the fact that his purchase of the house occurred before the expansion of the airport. Accordingly, the Commission established that:

> "the 'careful consideration' which had had to be given to Mr. Rayner's claim under Article 9 (art.8) at the admissibility stage and the facts underlying it persuaded the Commission that it was an arguable claim for the purposes of Article 13 (art. 13). Being of the opinion that none of the available remedies […] could provide adequate redress for the claim, it concluded that there had been a violation of Article 13 (art. 13)"[396].

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[390] Judgement *Powell and Rayner v. The United Kingdom*, para. 38.
[391] *Ivi*, para. 41.
[392] VAN DYKE (1994: 329-330).
[393] Judgement *Powell and Rayner v. The United Kingdom*, para. 38.
[394] Article 8.2 of the ECHR (1950).
[395] Judgement of the European Court of Human Rights, 21st February 1990, Case 9310/81, *Powell and Rayner v. The United Kingdom*.
[396] Judgement *Powell and Rayner v. The United Kingdom*, para. 38.

Thus, the Commission found a violation of Article 8 and a consequent breach of his right under Article 13.
After receiving the Commission's report, the Court expressed that, despite the Commission's differentiation, in both cases, the limitations under paragraph 2 of Article 8 could justify the closing down of domestic remedies to the applicants:

> "there is no serious ground for maintaining that either the policy approach to the problem or the content of the particular regulatory measures adopted by the United Kingdom authorities give rise to violation of Article 8 (art.8), whether under its positive or negative head. In forming a judgement as to the proper scope of the noise abatement measures for aircraft arriving at and departing from Heathrow Airport, the United Kingdom Government cannot arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8 (art.8). This conclusion applies to Mr. Rayner as much as to Mr. Powell"[397].

Thus, the United Kingdom did not exceed the margin of appreciation afforded to it, and the Court had no jurisdiction to answer the applicants' complaints under Article 8.
Despite this, the Court demonstrated how a Convention provision can be threatened by environmental impact, stating that:

> "in each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport […]. Article 8 (art.8) is therefore a material provision in relation to both Mr. Powell and Mr. Rayner"[398].

3.2.2 More Comprehensive Environmental Protection of the Individual: *Lopez Ostra v. Spain*

The *Lopez Ostra v. Spain*[399] case deserves to be explained for its significance in recognizing a more comprehensive environmental protection of the individual.
In this case, the applicant, Mrs. Gregoria Lopez Ostra, and her daughter underwent serious health problems due to a waste treatment plant's fumes, built by the State and operating twelve meters off her residence. The factory started working in July 1988 without a proper license, and immediately malfunctioned, releasing gas fumes and unpleasant smells that created health problems to the families living in that area[400]. Consequently, the town council

[397] *Ivi*, para. 45.
[398] Judgement *Powell and Rayner v. The United Kingdom*, para. 40.
[399] Judgement of the European Court of Human Rights, 09th December 1994, Case 16798/90, *López Ostra v. Spain*.
[400] FITZMAURICE, MARSHALL (2007: 117).

decided to evacuate the residents and rehouse them in the town's central area. However, the local authorities never provided for the plant's total closure, allowing for the continuing of its partial operation tasks. When in October 1998 Mrs. Lopez Ostra and her family came back to their house, they found out that the problems persisted. Thus, after having exhausted the remedies available for the compliance with fundamental rights in Spain, namely local authorities and the Supreme Court of Spain[401], the complainant applied to the Commission in May 1990.

In the application, Mrs. Lopez Ostra complained about the domestic authorities' inactivity towards the problems caused by the waste facility[402]. Moreover, she claimed to be a victim of a breach of the right to respect for her home that did not allow for the right enjoyment of her private and family life under Article 8, and of an inhuman and degrading treatment, prohibited by Article 3[403] of the ECHR[404].

Concerning the Spanish Government's preliminary objection, it stated that the applicant should have set up a proceeding for the protection of fundamental rights and a criminal and an ordinary administrative proceeding, and thus that she did not exhaust domestic remedies since her "procedure was a shortened, rapid one intended to remedy overt infringements of fundamental rights"[405]. However, the Court stated that these other proceedings relate to the failure to obtain the local authorities' authorization to build and run the plant, while "the issue of whether SACURSA might be criminally liable for any environmental health offence is […] different from that of the town's or other competent authorities' inaction with regard to the nuisance caused by the plant"[406]. Thus, it concluded that, "having had recourse to a remedy that was effective and appropriate in relation to the infringement of which she had complained"[407], Mrs. Lopez Ostra had properly exhausted her domestic remedies[408].

With respect to the alleged violation of Article 8, the Court initially did not pose the importance on the analysis of the infringement as a positive duty of the State –act to guarantee the individual's right under Article 8 – or as a negative duty of the State – to justify the interference according to paragraph 2 of Article 8. Contrarily, it highlighted the importance of striking a proper balance between the individual's interests and the community's ones. On this point, the Court noted that even though Spanish domestic authorities were not directly liable for the emissions that disturbed the applicant, they were responsible for the authorization to build the plant on their territory: "the Spanish authorities […] were theoretically not directly responsible for the

[401] It denied her appeal since it was considered as manifestly ill-founded.
[402] Judgement *López Ostra v. Spain*, para. 30.
[403] Article 3 of the ECHR (1950): "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[404] Judgement *López Ostra v. Spain*, para. 30.
[405] *Ivi*, para. 35.
[406] *Ivi*, para. 37.
[407] *Ivi*, para. 38.
[408] *Ivi*, para. 39.

emissions in question. However, as the Commission pointed out, the town allowed the plant to be built on its land and the State subsidized the plant's construction"[409].
Moreover, the authorities were aware of the persisting problems due to the factory's partial operation and did not take measures to solve them. Despite the rehousing of the applicant provided for by the town council, the Court stated that this measure was not addressing correctly the inconvenience to which Mrs. Lopez Ostra and her family had been subjected[410]. Thus, it concluded that:

> "despite the margin of appreciation left to the respondent State, […] the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life"[411].

Moreover, even if national authorities recognized the negative effects of the noise and smells on the claimant's quality of life, they argued that this did not represent a serious and grave health risk, not reaching a sufficient level of severity for violating the protected right[412]. However, the Court found that individuals' well-being and their enjoyment of private and family life may be affected by environmental pollution even if it does not seriously threaten their health[413]. For these reasons, the ECtHR established a violation of Article 8[414].

Concluding with the alleged violation of Article 3, the Court agreed with the Commission's opinion according to which "there had been no breach of this Article (art. 3)"[415]. It, thus, established that the conditions in which Mrs. Lopez Ostra and her family had lived for several years were definitely complicated and problematic, but "did not amount to degrading treatment within the meaning of Article 3"[416]. Thus, no violation of Article 3 was found[417].

From the analysis of the *López Ostra v. Spain* case, several significant questions can be deducted. First of all, that pollution or environmental harms do not have to cause serious harm to human health, but it must rather be 'severe' to create causality[418]. Furthermore, in this case, for the first time, it was recognized by the European Court the existence of an environmental issue within the human rights regime, even in the absence of an environmental right in the ECHR that protected it, but only with the extension of the protection of

[409] *Ivi*, para. 52.
[410] *Ivi*, para. 57.
[411] *Ivi*, para. 58.
[412] *Ivi*, para. 11.
[413] *Ivi*, para. 51.
[414] *Ivi*, para. 58.
[415] *Ivi*, para. 59.
[416] *Ivi*, para. 60.
[417] *Ibidem.*
[418] FITZMAURICE, MARSHALL (2007: 117).

Article 8 of the Convention, sufficiently serving as a link between the two aspects.

3.2.3 Integration through Procedural Rights: *Balmer-Schafroth and others v. Switzerland*

As we have understood, the controversies arisen at the international level on the formulation and recognition of a human right to a healthy environment have been counterbalanced by the identification in some international instruments, such as the Rio Declaration, of procedural rights related to the environment, such as the right to environmental information, of public participation in environmental questions, and access to remedies for environmental harm. In a similar way, also in the ECHR's case law there has been a protection of the environment through procedural rights, namely the body of law that establishes formal steps to be taken to enforce legal rights – such as the right to a fair trial, the right to an effective remedy and the right to receive information. The *Balmer-Schafroth and Others v. Switzerland*[419] represents the ideal example to show how the Court dealt with integrating procedural environmental rights under the ECHR.
In this case, the applicants were ten Swiss nationals who lived in an area near the nuclear power station at Muhleberg. The company owning the power station, the Bernische Kraftwerke AG, in 1990 asked for an extension of its license to operate for an undefined period and an authorization to increase the production of nuclear power by 10%. As a reaction, approximately twenty-eight thousand objections were submitted to the Federal Energy Office asking for the rejection of the license's extension, and for the immediate and permanent shutdown of the nuclear station[420]. The primary reasons behind their petition were that the station did not respect safety standard and that it could cause an accident threatening the well-being of the local population.
Despite this petition, the Federal Department of Transport, Communications and Energy rejected the petitioners' request for the adoption of provisional measures, and the Federal Council did not take into account the requests, granting an extended operating license and a 10% increase in the production.
Therefore, after having exhausted all the domestic remedies, the applicants presented their case to the Commission, claiming that a violation of the ECHR had been committed on two grounds. The first claim concerned the fact that the Federal Council, as the competent domestic body for their complaints, did not guarantee a fair procedure since it did not give them access to a tribunal as intended in Article 6 of the Convention. More precisely, this article states that:

[419] Judgement of the European Court of Human Rights, 24th August 1999, Case 50495/99, *Balmer-Schafroth and Others v. Switzerland.*
[420] *Ivi*, para. 9.

> "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"[421].

Moreover, the applicants claimed that they had not been given an effective remedy accordingly to Article 13 of the ECHR. The Commission declared that there had been a violation of Article 6 paragraph 1, but that no question arose under Article 13.

Both the Commission and the Swiss government referred the case to the ECtHR. The latter declared to the Court that no violation of the ECHR had occurred due to three preliminary objections: firstly, that the claimants could not be regarded as victims in accordance with the meaning of Article 34 of the Convention since the effects of the alleged violation were "too remote" to directly and personally affect them[422]; secondly, it claimed the applicants' failure of exhaustion of national remedies, stating that "the applicants had not availed themselves of certain remedies which would have led to a ruling on their complaints by a tribunal in accordance with Article 6 (1)"[423]; and finally, that Article 6 paragraph 1 was not applicable due to the fact that, since "the applicants' complaints were that their physical integrity was in jeopardy, they did not concern 'civil rights and obligations within the meaning of that provision"[424].
After having established that the applicants were considered victims under the ECHR, stating that "the fact that the Federal Council declared admissible the objections the applicants wish to raise before a tribunal justifies regarding them as victims"[425], the Court focused on the alleged violation of Article 6 (1).
As we have seen, Article 6 ECHR provides that for the protection of the civil rights and obligations, every individual has the right to a fair hearing in front of a tribunal. According to the Convention and the Court's case law, "in its 'civil' limb to be applicable, there must be a 'dispute' […] over a 'right which can be said, at least on arguable grounds, to be recognised under domestic law […] [and] the dispute must be genuine and serious"[426].
On the one hand, Switzerland argued that the claimants' requests did not relate to civil rights and obligations, since they concerned their physical integrity[427]; on the other hand, the Court determined that the applicants were relying on the right contained in the 1959 Federal Nuclear Energy Act according to which "a license must be refused or granted subject to appropriate conditions

[421] Article 6 of the ECHR (1950).
[422] Judgement *Balmer-Schafroth and Others v. Switzerland*, para. 24.
[423] *Ivi*, para. 28.
[424] *Ivi*, para. 30.
[425] *Ivi*, para. 26.
[426] *Ivi*, para. 32.
[427] *Ivi*, para. 30.

or obligations if that is necessary in order, in particular, to protect people, the property of others or important rights"[428].

Concerning the genuine and serious conditions, the Swiss Court stated that there was no "genuine and serious dispute" due to the nature of the issue: it was a technical issue involving a moral and political liability that should have been addressed by political authorities rather than a Court[429]. However, by dismissing all the objections brought before the national court, the applicants did not have access to a Court to challenge the operating license extension. For this reason, the Court recognized the genuine and serious dimension of the dispute between the applicants and the national authorities who permitted the extension of the license for the nuclear power station[430]. In other words, the applicants had a right recognized under Swiss law "to have their life, physical integrity and adequately protected from the risks entailed by the use of nuclear energy"[431].

After ruling that the dispute was genuine and serious, the Court had to decide whether the outcome of the proceedings was directly decisive for the rights asserted by the complainants. Simply put, "whether the link between the Federal Council's decision and the applicant's right to adequate protection of their physical integrity was sufficiently close to bring Article 6 (1) into play, and was not too tenuous or remote"[432]. In this concern, since the applicants failed to show that the activity of the nuclear plant had exposed them directly to a serious, specific and imminent threat[433], the Court ruled that the link between the operating conditions of the nuclear station and the right to protection of their physical integrity was too tenuous and remote[434]. This means that the consequences on the population of the measures that should have been taken by the Federal Council remained hypothetical[435]. Therefore, the Court concluded that Article 6 was not applicable[436], stating that:

> "neither the dangers nor the remedies had been established with the degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants"[437].

Not finding possible the application of Article 6 paragraph 1, the Court also concluded that, since in order to apply Article 13 there must occur a violation of the Convention, neither Article 13 was applicable.

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[428] Section 5(1) of the Nuclear Energy Act.
[429] Judgement *Balmer-Schafroth and Others v. Switzerland*, para. 35.
[430] Council of Europe, *Manual of Human Rights and the Environment*, p. 98.
[431] Judgement *Balmer-Schafroth and Others v. Switzerland*, para(s). 33-34.
[432] *Ivi*, para. 39.
[433] *Ivi*, para. 40.
[434] *Ibidem.*
[435] *Ibidem.*
[436] *Ibidem.*
[437] *Ibidem.*

To conclude, it has been shown how in the ECHR, and in the enforcement of its provisions, theoretically there is no recognition of a right to a good environment, but practically the case law demonstrates the opposite. Indeed, some environmental issues can be protected in relation to other human rights contained in the Convention that can be affected by environmental degradation and impact. Through the analysis of the ECtHR jurisprudence, it has been demonstrated how the Court has taken significant steps towards the recognition of the importance of substantive and procedural rights concerning different aspects of international environmental law: the evolutive interpretation of the ECtHR has allowed for damages produced by the environment to be included in the scope of several fundamental rights. However, despite the progresses made by the Court concerning the relationship between human rights and the environment, there is still some work to do for it to reach a more comprehensive integration of environmental justice, and of justice in general: individuals do not possess the right to bring a claim before the ECtHR until all domestic remedies are exhausted. On the one hand, this is necessary for a correct system of justice, but on the other, it considerably limits the protection of rights, and in particular, of the right to a healthy environment[438].

Bearing in mind what has been said, the last and final part of this work consists of a brief reference to the *People's Climate*, and to conclude, the analysis of the most significant case delivered in 2019 by the Dutch Supreme Court, the groundbreaking *Urgenda* case.

[438] DOGARU (2013: 1351).

4 The Contribution of *The Urgenda* Case and *The People's Climate* Case on the Relationship between Human Rights and the Environment: How Governments' Climate Change Plans Can Violate Human Rights

It has been demonstrated how climate change and the deterioration of the environment are human rights related issues. The environmental question can be tackled from many perspectives, and one may choose not to stress its human rights dimension, but certainly climate change has had, is having and will continue to have dramatic impact on several human rights, if mitigation plans are not adequately implemented. With the establishment of international and regional legal instruments, countries throughout the globe are now looking for the best climate change mitigation strategies in order to comply with the targets established at the international level. In the international arena, there are three main climate change mitigation approaches adopted by States: first, conventional mitigation technologies aim at decarbonization[439] in four sectors – power, industry, transportation and buildings – through the introduction of renewable energies, nuclear power, carbon capture and storage in the energy matrix of these sectors[440].
The second category includes recently proposed methods that can isolate and capture carbon dioxide from the atmosphere, known as 'carbon dioxide removal methods': these include "bioenergy carbon capture and storage, biochar[441], enhanced weathering, direct air carbon capture and storage"[442] and more.
The third and final set of measures adopted by countries consists in altering the earth's radiation balance via solar and terrestrial radiation in order to reach a temperature stabilization or reduction. However, they are still mainly theoretical and are not certain and riskless[443].

Despite the differences in the type of measures adopted, the heated question concerns another aspect. Indeed, lately, because of the environmental aspect related to human rights protection, some States' climate change mitigation plans have been questioned in terms of their respect of human rights, and some of them specifically on the grounds of the ECHR's provisions, giving rise to the so-called climate change litigations. Today, these are well-known

[439] The reduction or elimination of carbon in the worldwide energy use.
[440] FAWZY, OSMAN, DORAN, ROONEY (2020: 2073).
[441] Carbonaceous material produced by plants and maintained in the soil to reduce carbon dioxide concentration in the atmosphere.
[442] FAWZY, OSMAN, DORAN, ROONEY (2020: 2073).
[443] *Ibidem.*

phenomena that concern alleged violations of human rights due to environmental issues.

4.1 *The People's Climate Case*

In this respect, it is worth mentioning the *Carvalho and others. v. European Parliament and Council of the European Union*[444], better known as the *People's Climate Case.* In this case, the claimants challenged the EU's 2030 mitigation plans – more precisely the climate target – because of their alleged inadequacy to avert the effects of climate change and insufficiency in protecting the citizens and some of their fundamental freedoms, such as the right to life, health, occupation and property. Indeed, in 2014, the EU, with the European Green Deal[445], has established a target for cutting EU domestic greenhouse gas emissions by at least 40%, compared to 1990 levels, by 2030. Three main Greenhouse gas Emission Acts have been emitted to achieve this target: the Emission Trading Scheme Directive[446], the Effort Sharing Regulation[447] and the Land use, Land use Change and Forestry Regulation[448]. The argument of the claimants concerned the fact that the target implemented through the three legal acts does not respect the requirements of higher-rank European and international law. They asked the court to annul, under Article 263 (4) TFEU[449], the following acts:

[444] Judgement of the European General Court, 15 May 2019, Case T-330/18, *Carvalho and others. v. European Parliament and Council of the European Union.*

[445] Directive of the European Parliament and of the Council, 13 October 2003, 2003/87/EC, *establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.* The directive establishes a European plan to make the EU's economy sustainable by eliminating greenhouse gases emissions by 2050.

[446] Covering GHG emissions coming from the energy sector and industries.

[447] Regulation of the European Parliament and of the Council, 30 May 2018, (EU) 2018/842, *on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.* It translates the EU commitment to the reduction target into binding annual GHG emission targets for every Member State in the 2021-2030 period, on the basis of the principles of fairness, environmental integrity and cost-effectiveness.

[448] Regulation of the European Parliament and of the Council, 20 July 2016, 2016/0230, *on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry into the 2030 climate and energy framework and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change.* It requires Member States to follow the so called 'no debit' rule, namely to ensure that their emissions coming from land use are completely compensated by an equal removal of carbon dioxide from the atmosphere.

[449] Article 263 (4) of the TFEU states that "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

> "Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3), in particular Article 1 thereof, Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ 2018 L 156, p. 26), in particular Article 4(2) thereof and Annex I thereto, and Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (OJ 2018 L 156, p. 1), in particular Article 4 thereof"[450].

Secondly, they asked for a compensation under Articles 268[451] and 340 of the TFEU in the context of non-contractual liability[452].
For these reasons, the claimants asked to the Court to:

> "declare that the legislative package regarding greenhouse gas emissions is unlawful in so far as it permits the emission between 2021 and 2030 of a quantity of greenhouse gases corresponding to 80% of 1990 levels in 2021, decreasing to 60% of 1990 levels in 2030; […] order the Council and the Parliament to adopt measures under the legislative package regarding greenhouse gas emissions requiring a reduction in greenhouse gas emissions by 2030 by at least 50% to 60% compared to their 1990 levels, or by such higher level of reduction as the Court shall deem appropriate"[453].

Moreover, "regarding the action for damages, the applicants […] [argued] that the non-contractual liability of the European Union has been triggered inasmuch as, by failing to comply with the higher-ranking rules of law, the European Union has caused them damage for which they request compensation"[454].

The case was presented in front of the European General Court, that on 8th May 2019 ordered its judgment. The General Court rejected the argument of the applicants and held that they were not individually concerned as required by Article 263(4) TFEU, that establishes the conditions upon which an action

[450] Judgement *Carvalho and others. v. European Parliament and Council of the European Union.*
[451] Article 268 of the TFEU: "the Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340".
[452] Article 340 of the TFEU: "The contractual liability of the Union shall be governed by the law applicable to the contract in question".
[453] Judgement *Carvalho and others. v. European Parliament and Council of the European Union*, para. 18.
[454] Judgement *Carvalho and others. v. European Parliament and Council of the European Union*, para. 24.

for annulment can be brought before the Court of Justice of the EU, by groups or individuals. According to the Court,

> "natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons"[455].

The mere infringement of their fundamental rights was declared insufficient to consider their action admissible, as stated for the first time in the *Plaumann v Commission*[456] case that established the requirement of "genuine distinguishing features"[457] . Indeed, "the applicants have not established that the contested provisions of the legislative package infringed their fundamental rights and distinguished them individually from all other natural or legal persons concerned by those provisions just as in the case of the addressee"[458]. Furthermore, the Court acknowledged the effects of climate change on every individual, but "the fact that the effects of climate change may be different for one person that they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application"[459]. Thus, the action claim has been dismissed as inadmissible.

This judgement represents the long-standing paradox of the Court according to which "the more serious the damage and the higher the number of affected persons, the less judicial protection is available"[460], since persons need to show that they are individually concerned by the contested act. Thus, under this case, the human rights approach in protecting individuals from the detrimental effects has failed in reversing the Court's settled case law that prevents environmental or human rights NGOs and individuals to stand in front of it for climate change impacts on them in absence of specific individual involvement.

On the contrary, a case which resulted in a success for the enforcement of the relationship between human rights and the environment is the *Urgenda* decision, that provides an interesting case for highlighting not only the need for more climate action that takes into account the protection of human rights, but it also raises several other important questions.

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[455] *Ivi*, para. 45.
[456] Judgement of the European Court of Justice, 15 July 1963, Case 25/62, *Plaumann & Co. v. Commission of the European Economic Community*.
[457] Judgement *Carvalho and others. v. European Parliament and Council of the European Union*, para. 28.
[458] *Ivi*, para. 49.
[459] *Ivi*, para. 50.
[460] *The General Court of the EU Rejects the People's Climate Case as Inadmissible,* in *Clientearth.org*, available *online*.

4.2 The Urgenda Case

The judgement of the Dutch Supreme Court in the *State of the Netherlands v. Urgenda*[461] case is a milestone for future climate change disputes. Indeed, it is essential to understand how State's climate change plans can be questioned on the grounds of human rights protection, stressing the importance of their relationship. More precisely, it demonstrates how domestic national courts can determine liabilities of their own state, even though climate change is the result of the actions of a multiplicity of other actors that share responsibility for its detrimental effects.
Being one the most significant judgments of its kind, the *Urgenda* decision establishes that even if a State is a minor contributor in comparison with other actors in the climate change question, it still has its individual responsibility. Moreover, it is significant since it concludes that climate change is encompassed in the right to life and to respect for private and family life. As we will see, indeed, the State has the duty to take preventive measures in relation to both, in conformity with the precautionary principle: the *Urgenda* judgment, in this sense, connects these obligations with the targets negotiated regarding greenhouse gas emissions[462].

4.2.1 Background to the Proceedings

The *State of the Netherlands v. Urgenda* case is a complex piece of jurisprudence that must be analyzed in depth to understand all of its significant aspects. To begin with, central to the case is the requirement established in the 2007 Fourth Assessment Report of the IPCC, according to which developed countries, listed in Annex I of the UNFCCC, are required to make greenhouse gas emissions reductions of 25-40 % by 2020 compared to the 1990 levels[463]. Bearing this in mind, in 2012, the Urgenda Foundation, a Dutch NGO operating in the transition towards a more sustainable society and a circular economy through renewable energies, pointed out to the Dutch government that the European Union's obligation to reduce greenhouse gas emission by 20% against 1990 standards was not enough to mitigate serious climate change[464]. Moreover, it stated that the Dutch reduction targets resulted from the European ones were not adequate in addressing the problem. Accordingly, in the first judgement's assessment, we can read that:

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[461] Judgement of the Supreme Court of the Netherlands, 20 December 2019, Case 19/00135, *State of the Netherlands v. Urgenda.*
[462] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, available *online*.
[463] Working Group II to the Fourth Assessment Report of the IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability*.
[464] GRAAF, JANS (2015: 518).

> "Urgenda argues that the States does not pursue an adequate climate policy and therefore acts contrary to its duty of care towards Urgenda and the parties it represents as well as, more generally speaking, Dutch society"[465].

The Dutch government did not show much concern for what was expressed by the complaining NGO, and, as a result, Urgenda, with nine hundred co-plaintiffs, requested the District Court of The Hague to accuse the government to be liable for causing harmful global climate change. Thus, Urgenda asked the Court to consider the Netherlands as acting unlawfully in case of its failure to reduce the annual GHGs emissions by 40%, or by at least 25% in comparison with 1990 levels, by 2020, and to order the State to act in compliance with this target[466].

On the other hand, the Netherlands highlighted its effort in preventing dangerous climate change by implementing relevant policies, namely mitigation strategies that, however, would only reduce the GHGs emission by 17% by the end of 2020. It argued that, according to national and international law, there was no legal obligation for the Dutch government to follow the Urgenda's instructions on targets' reduction. Moreover, according to the Netherlands "any court order to amend the State's climate change mitigation policies would violate the government's prerogative over environmental policies and interfere with the system of separation of powers"[467].

On 24th June 2015, the Urgenda prevailed against the Dutch government in the judgement of The Hague District Court. As a result, the Court ordered the State to limit the total volume of annual greenhouse gas emissions by at least 25% compared to the 1990 levels by the end of 2020. It based its decision on the "doctrine of hazardous negligence"[468]. In other words, Urgenda claimed that the Dutch government was violating the duty contained in Article 21 of the Dutch Constitution, according to which "it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment"[469]. The Netherlands, on the other hand, argued that even in its action had failed to meet an international obligation, it had not acted unlawfully towards the Urgenda foundation: since the obligations contained in international agreements such as the UNFCCC or the Kyoto Protocol have binding effects only between States, the Court ruled that it did not find specific obligations for the state towards the NGO derived from provisions under international law[470]:

> "a legal obligation of the State towards Urgenda cannot be derived from Article 21 of the Dutch Constitution, the UN Climate Change Convention, with

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[465] Judgement of The Hague District Court, 24 June 2015, Case C/09/456689, *Urgenda Foundation v. the State of the Netherlands*, para. 4.1.
[466] Judgement *Urgenda Foundation v. the State of the Netherlands*, para(s). 2.6-2.7.
[467] GRAAF, JANS (2015: 518).
[468] Judgement of The Hague District Court *Urgenda Foundation v. the State of the Netherlands*, para. 4.53.
[469] Article 21 of the Constitution of the Kingdom of the Netherlands.
[470] GRAAF, JANS (2015: 519-520).

> associated protocols, […] and Article 191 TFEU with the ETS Directive and Effort Sharing Decision based on TFEU"[471].

After finding that the State had no legal obligation towards Urgenda, the Court had to establish whether the Dutch government's actions were violating the standard of due care contained in Article 6:162 of book 6 of the Dutch Civil Code[472]. In this, it is contained a definition of a 'tortious act', namely a violation of someone's right or an omission that breaches a duty imposed by law, even if this behavior is unwritten but is accepted as a proper social conduct. According to the Dutch Civil Code,

> "a person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered […] [if] it results from his fault or from a cause for which he is accountable by virtue of law"[473].

The question of whether the State was violating unwritten standard of due care that should be respected in taking measures to mitigate climate change had never been brought before Dutch tribunals. Thus, the Court established, on the basis of international principles and agreements but, most importantly of the Dutch Supreme Court's case law on negligence endangerment[474], six factors for the determination of the scope of the State's duty of care:

> "(1) the nature and extent of the damage ensuing from climate change; (2) the knowledge and foreseeability of this damage; (3) the chance that hazardous climate change will occur; (4) the nature of the acts (or omissions) of the State; (5) the onerousness of taking precautionary measures; (6) the discretion of the State to execute its public duties"[475].

Concerning the first three factors, the Court highlighted that the Dutch State was aware of the seriousness and gravity of the consequences of climate change on people[476]. Thus, the State is required to take preventive measures for the protection of its citizens. At the same time, concerning the fourth aspect, the Court stated that the Dutch State could effectively control the collective level of greenhouse gas emissions and that had a significant role in the path to a more sustainable society. Concerning the fifth point, the Court held that the Urgenda's mitigation measures were the most useful means to avert climate change. Lastly, with regard to the sixth factor, the Court

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[471] Judgement of the Hague District Court *Urgenda Foundation v. the State of the Netherlands*, para. 2.3.1.
[472] Judgement of the Hague District Court *Urgenda Foundation v. the State of the Netherlands*, para. 4.46.
[473] Article 6:162 of the Dutch Civil Code.
[474] Namely the situation where someone continues to act in a hazardous manner towards others, not respecting the unwritten standard of due care that must be observed in society.
[475] Judgement of the Hague District Court *Urgenda Foundation v. the State of the Netherlands*, para. 4.63.
[476] Judgement of the Hague District Court *Urgenda Foundation v. the State of the Netherlands*, para. 4.65.

recognized the discretionary power of the Dutch State in regulating environmental policies, but also highlighted the fact that it was not unlimited:

> "the State has an extensive discretionary power to flesh out the climate policy. However, this discretionary power is not unlimited. If […] there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. […] Naturally, the question remains what is fitting and effective in the given circumstances"[477].

Thus, the State had the duty to implement proper and effective measures in order to protect its citizens[478].
To sum up, the Court concluded that the climate change mitigation measures implemented by the Dutch government were not meeting the standards to avert dangerous climate change; thus, the State was violating its duty of care and, consequently, acting illegally towards Urgenda.

Lastly, the applicants by asking the Court to assess whether or not the Netherlands with its climate policy was breaching one of the Urgenda's personal rights, they relied a violation of Articles 2 and 8 of the ECHR[479]. However, the Hague District Court did not consider the Urgenda Foundation as having the status of a potential victim as contained in Article 34 of the ECHR, and, for this reason, could not count on those provisions:

> "the Court considers that Urgenda itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR. After all, unlike with a natural person, a legal person's physical integrity cannot be violated nor can a legal person's privacy be interfered with. […] Therefore, Urgenda itself cannot directly rely on Articles 2 and 8 ECHR"[480].

Thus, contrary to the claims of the applicant, The Hague District Court did not ground its decision on the provisions of the ECHR.
The decision of The Hague District Court created a fracture in the public opinion: it was supported by many, but also severely criticized by others who considered that the Court had exceed its role within the national separation of powers for having transformed IPCC models into binding obligations for the government. As a reaction, the Dutch State appealed the case, and the Urgenda answered with a cross-appeal claiming its full reliance on the human rights provisions contained in the ECHR[481].

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[477] *Ivi*, para. 4.74.
[478] *Ibidem.*
[479] *Ivi*, para. 4.45.
[480] *Ibidem*.
[481] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.

4.2.2 The Appeal's Judgement and Final Verdict

The Court of Appeal, in its judgement of 9 October 2018, agreed with the District Court's order and accepted the Urgenda's appeal, basing its judgement directly on Articles 2 and 8 of the ECHR. It stated that:

> "The State has done too little to prevent a dangerous climate change and is doing too little to catch up […]. Based on this, the Court is of the opinion that the State fails to fulfil its duty of care pursuant to Articles 2 and 8 of the ECHR by not wanting to reduce emissions by at least 25% by end-2020"[482].

On the basis of this decision, concerning the Dutch government's it concluded that:

> "the State's grounds of appeal pertaining to the district court's opinion about the hazardous negligence doctrine need no discussion under these states of affairs. The judgment is hereby upheld"[483].

Not satisfied with the judgement of the Court of Appeal, the State instituted appeal before the Supreme Court. The Advocate-General and Procurator-General of the Supreme Court issued an opinion expressing their approval for the decision of the Court of Appeal[484]. Furthermore, they suggested the Supreme Court to not invalidate the ruling[485]. Finally, on 20 December 2019, the Supreme Court of the Netherlands in The Hague concluded in its final judgement that Dutch government must urgently and substantially reduce its greenhouse gas emissions to protect human rights, thus rejecting all the State's reasonings and affirming the judgement of the Court of Appeal.
In the proceedings that led to such decision, the reasons of the judgement were governed by the Dutch Civil Code and the Dutch Code on Civil Procedure, as well as the Dutch constitutional provisions concerned with the domestic effect of international law. Three main conclusions were formulated by the Supreme Court on the basis of three relevant aspects of the Dutch legal framework.
First of all, the Supreme Court found that Urgenda had the right to file a collective claim on the grounds of Article 3:305 of the Dutch Civil Code since "the interests of residents of the Netherlands in relation to climate change are sufficiently identical and can be 'bundled', so that legal protection by a collective action suit can be more efficient and effective"[486]. In this concern, the Supreme Court established that:

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[482] Judgement of The Hague Court of Appeal, 9 October 2018, Case C/09/456689, *State of the Netherlands v. Urgenda*, para(s). 71-72.
[483] *Ivi*, para. 76.
[484] Advisory Opinion of the Advocate-General and Procurator-General of the Supreme Court of the Netherlands, 13 September 2019, Case 19/00135, *State of the Netherlands v. Urgenda.*
[485] *Ibidem*.
[486] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.

> "Urgenda, which in this case, on the basis of Article 3:305a DCC, represents the interests of the residents of the Netherlands with respect to whom the obligation referred to in 5.9.1 above applies[487], can invoke this obligation"[488].

It also found support for this statement in the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental questions, and more precisely, in Articles 9(3) and 2(5) of the Convention, establishing that

> "legal protection through the pooling of interests is highly efficient and effective […] in line with Article 9(3) in conjunction with Article 2(5) of the Aarhus Convention, which guarantees interest groups access to justice in order to challenge violations of environmental law"[489].

As we have analyzed in the third chapter, the former requires States to "ensure that […] members of the public have access to administrative or judicial procedure to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"[490], while the latter establishes that "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest [in environmental decision-making"[491].
Concerning the second background aspect, the Supreme Court did not express itself on the fact that climate change posed serious risks, since both parties agreed on this statement. Indeed, according to the Dutch Code of Civil Procedure, Courts can take for granted matters agreed by both parties or facts that are submitted by one party but not adequately contested by the other[492].
Lastly, the third aspect concerns the significant role played by international law in the procedure. Indeed, Article 93 of the Dutch Constitution states that:

> "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published"[493].

This implies that provisions contained in international legal instruments that are binding on people, can be directly applied in the domestic legal order. Thus, both the Court of Appeal and the Supreme Court highlighted the direct

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[487] Obligations under Article 2 and Article 8 to take appropriate measures against the risks of dangerous climate change.
[488] Judgement of the Supreme Court of the Netherlands, 20 December 2019, Case 19/00135, *State of the Netherlands v. Urgenda*, para. 5.9.2.
[489] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.9.2.
[490] Article 9(3) of the Aarhus Convention.
[491] Article 2(5) of the Aarhus Convention.
[492] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.
[493] Article 93 of the Dutch Constitution.

applicability of the ECHR, together with many other principles that served mainly for interpretative purposes included in the UNFCCC, the Paris Agreement and the precautionary principle[494]. It highlighted this point in paragraph 5.6.1 of the judgment, concluding that:

> "Pursuant to Articles 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons. Because the ECHR also subjects the Netherlands to the jurisdiction of the ECtHR (Article 32 ECHR), Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR"[495].

4.2.3 The Use of Human Rights Law in the Final Judgement

There are three main conclusions contained in the judgement of the Supreme Court that are worth mentioning and rotate around the use of human rights law in the case.

In this concern, the Supreme Court supported the Court of Appeal's decision to ground the obligation of the Netherlands to take preventive measures to meet its emission reduction target in international human rights law. The Court refused the Dutch State's argument according to which even though the Netherlands was aware of the threat posed by climate change, the provisions in the ECHR did not contain obligations to provide protection against risks of environmental change[496]. Moreover, according to the Dutch State, the risks of climate change were considered not sufficiently specific and of a global nature, and that environmental protection was not in the ultimate objective of the ECHR.

On the contrary, the Supreme Court highlighted that the risks of climate change were absolutely included in the context of the Convention. Indeed, "according to the established ECtHR case law, [Article 2 ECHR] […] encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction"[497] if there is a real and immediate risk to persons and the State is aware of that risk[498]. On the reality and on the imminence of the risk, the Supreme Court held that the "risks caused by climate change are sufficiently real and immediate to bring them

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[494] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.

[495] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.6.1.

[496] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.1.

[497] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.2.2.

[498] SPIER (2020: 323).

within the scope of Articles 2 and 8"[499], and that they may take several forms, such as sea level rise, deteriorated air quality, disruption of food production, rising spread of infectious diseases[500]. It is not sure what risk will occur and when this will happen, but the Supreme Court stated that the fact that these threats would become noticeable not in the immediate did not mean that Article 2 and 8 of the ECHR would not provide protection against these risks. In this concern, the Supreme Court stated that:

> "the term 'real and immediate' must be understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialize within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialize in the longer terms"[501].

In light of what has been said, as reported by Spier:

> "no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem. Given the findings above […] this constitutes a 'real and immediate risk' […] and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised. The same applies to, *inter alia*, a possible sharp rise in the sea level, which could render part of the Netherlands uninhabitable. The fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean […] that Articles 2 and 8 EHCR offer no protection from this threat"[502].

Established the existence of the positive obligations under Article 2 and 8 for a State to protect citizens from environmental risks, the Supreme Court had to ascertain that these positive obligations actually contained the obligation for the Netherlands to reduce greenhouse gas emissions by 25% by 2020. In addressing this question, the Court relied on the conceptual tool of the so-called 'common ground', articulated by the ECtHR in the *Demir and Baykara v. Turkey*[503] case. Here, the European Court established that courts

> "in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention […] [if] the relevant international instruments denote a continuous

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[499] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.
[500] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.6.1.
[501] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.2.2.
[502] *Ivi*, para. 5.6.2.
[503] Judgement of the European Court of Human Rights, 12 November 2008, Case 34503/97, *Demir and Baykara v. Turkey.*

> evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show […] that there is common ground in modern societies"[504].

On this basis, what converted the 25% target into an element of 'common ground' was the fact that it had been promulgated and underpinned in several ways and by the majority of developed countries in the COP to the UNFCCC, European countries included. Thus, the Supreme Court concluded that it was possible to ground the urgent need for developed countries to meet the reduction target of 25-40% by 2020 on a high shared degree of consensus among them. As a result, the shared consensus gave concrete sense to the positive obligations contained in Articles 2 and 8 of the ECHR[505]. As clarified by the Supreme Court,

> "on the basis of the […] common ground method, which the Dutch courts are obliged to apply when interpreting the ECHR […], the courts are then obliged to proceed to establishing such and to attach consequences to it in their judgment on the extent of the State's positive obligations. It follows from the ECtHR case law […] that, under certain circumstances, agreements and rules that are not binding in and of themselves may also be meaningful in relation to such establishment. This may be the case if those rules and agreements are the expression of a very widely supported vie or insight and are therefore important for the interpretation and application of the State's positive obligations under Articles 2 and 8 ECHR"[506].

To conclude with its judgement, the Supreme court had to address another argument of the Dutch State against the application of the ECHR to climate change, namely that the Netherlands was only a minor contributor to climate change. In the first place, the Supreme Court ruling was direct and explicit: it held that the Dutch State "was subject to its own independent obligations and thereby was bound to do its part to prevent harmful climate change, as defined by these obligations"[507]. "The Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem […] [since] greenhouse gases take place from the territories of all countries and all countries are affected"[508]. These obligations were not only the obligations contained in the ECHR, but also in the UNFCCC, and, most importantly, the Supreme Court referred to the so-called 'no-harm' principle, according to

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[504] Judgement *Demir and Baykara v. Turkey*, para(s). 85-86.
[505] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*.
[506] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 6.3.
[507] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.
[508] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para(s). 5.7.1-5.7.2.

which "states must ensure that activities within their jurisdiction do not cause significant cross-boundary environmental damage"[509].
Moreover, the Court based its conclusion on Article 47 of the Articles on the Responsibility of States for Internationally Wrongful Acts and their commentary, according to which "where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act"[510], deriving from this that each participating State has its individual responsibility, determined on its conduct and in relation to its international obligations[511].
However, the Court went even further: it deeply analyzed the question of the Netherlands' minor contributions and concluded it with the proposition according to which "partial causation justifies partial responsibility"[512]. In other words, this means that each State is responsible for its portion in the reduction of greenhouse gas emissions and "the fact that other states fail to meet their responsibility is no ground for the State not to perform its obligations"[513]. Furthermore, the Court stated that the fact that the total share of Dutch emissions is minor in comparison to the global total share, does not allow the State to non-perform its obligations, since no reduction is negligible because every reduction contributes to diminish the effects of climate change[514].

By means of conclusion, the final judgement of the Supreme Court in the *Urgenda* case can certainly be considered a landmark decision in the international legal scenario and will be taken as reference for future climate litigation, since it reached two fundamental conclusions: firstly, that climate change risks create obligations for States to protect human rights, more precisely the rights to life and to respect for private and family life and secondly that these obligations can be connected with the targets negotiated for greenhouse gas emissions[515].
Most importantly, this case will be taken as a reference in the context of the relationship between human rights and the environment. Indeed, not only does it demonstrate the existence of this crucial relationship, but also it shows how claims concerning the protection of human rights entailing an environmental

[509] SANDS, PEEL (2012: 195-200).
[510] International Law Commission (2001), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, in *Yearbook of the International Law Commission, 2001*, vol. II, p. 124.
[511] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.7.6.
[512] Judgement of the Supreme Court of the Netherlands *State of the Netherlands v. Urgenda*, para. 5.7.5.
[513] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.
[514] Judgement *State of the Netherlands v. Urgenda*, par. 5.7.8.
[515] NOLLKAEMPER, BURGERS (2020), *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *European Journal of International Law*, pp. 1-8.

dimension – the violation of human rights by climate change mitigation plans – can be addressed only with more environmental protection in terms of climate change reduction – the Supreme Court ruled that the Netherlands had to meet its reduction targets in order to not commit a violation of human rights. Thus, human rights protection and environmental protection can be seen as two directly proportional factors of the same function: when human rights are violated because of environmental threats, the only viable solution is to increase environmental protection in order to strengthen the level of human rights protection.

Conclusions

The present research has examined the relationship between human rights and the environment, focusing on the mutually supportive dimension of these concepts. The study of the evolution of the linkages between the two areas has been useful to understand how serious environmental problems, in particular climate change, can negatively impact the lives of individuals. Indeed, the adverse effects of climate change on humankind have an impact on the enjoyment of a wide variety of human rights, as it has been analysed in the case of the right to life, health, adequate food and housing. Thus, it is important to tackle climate change as a human rights question, and States around the globe have started to approach the problem in this way demanding stronger international mobilisation. For this reason, the wide range of rights affected by climate change has started to be recognised as having an environmental dimension, stressing the linkage between the two areas.

However, despite this clear nexus, the case law does not properly recognize that environmental degradation automatically gives rise to a violation of human rights. Indeed, the opposing thesis does not justify the existence of a human right to a good environment since it presents many challenges. First of all, it is not conceivable to define a concept of healthy environment without including it in rights that are already protected in international human rights law. Furthermore, in the context of climate change, it would be complex to find a precise and clear definition of the right to a good environment that would provide for the enforcement of all its aspects. For this reason, the objectives entailed in this right would be better achieved through the use of well-established and clearly defined human rights that take into account the human needs and interests and not the ambiguous elements of a potential right to a good environment. On the side of case law, both at the regional and international level, legal instruments do not provide for a right to a good environment, but, according to law, it is necessary to identify a violation of other existing rights to consider environmental damage as a breach of human rights.

Moreover, as shown in the European Court of Human Rights case law, the claim must originate from a person who has been directly affected by the environmental damage in question, making it impossible to pursue a claim that relates to general environmental impacts, such as climate change. In particular, the impacts of climate change are not only widespread and collectively experienced, but they are also conditioned by a variety of cumulative, complex and interrelated factors that, on the basis of the current legal situation, may hamper the proof that a violation of a human rights law based on climate change has occurred.

Thus, there is no doubt on the human rights consequences of climate change, but there is less certainty when claiming that climate change should be considered as a breach of human rights. As we have seen, the international legal system imposes duties to protect, respect and fulfil human rights to States

in relation to their citizens and people under their jurisdiction, but does not establish obligations for States to take measures for protecting human rights outside their jurisdictional limits. The limitations on the human rights' obligation for States can clash with the climate change scenario, in which the consequence of a single State's greenhouse gas emissions affect the enjoyment of human rights universally. Thus, no proper recognition is given to the exterritorial dimension of climate change, with the result that a human rights-based approach is rendered ineffective. Moreover, the enforcement of such obligations through judicial claims is subordinated to another requirement, namely that the harm must be attributable to the State, that must be responsible for its contribution to the anthropogenic climate change.

Despite these difficulties, through the present work, it has been demonstrated the importance of a human rights-based approach to climate change and, in parallel, of the integration of human rights principles in climate change mitigation measures. Indeed, the major benefit resulting from such an approach, as it has been deeply analysed in the case-law of the European Court of Human Rights, is that it gives the possibility to use the international human rights framework to demonstrate the responsibility of States for failing to address climate change in the proper way, as demonstrated looking at the two cases c analysed at the end of the work, the *Urgenda* case and the *People's Climate Case*. A human rights-based approach to climate change can give voice to individuals and groups and channel the attention on their necessities, stimulating States to adopt proper measures to address the human impact of climate change.

On the basis of what has been said, this analysis aimed at the pursuit of the interests of a human right to a good environment, that does not necessary implicate the creation of an independent right, but that surely encompasses the expansion of already existing environmental rights. Even if this practice has already been put in place by the European Court of Human Rights, a further expansion would offer positive results in the protection of both the environment and human rights: elaborating on the notion of cross-border harm that already exists in international law or considering responsible States for pollution exceeding the national borders are just two of the ways through which the Court should extend the boundaries of its current jurisprudence.

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Executive Summary

The aim of this theoretical research is to deeply analyse the contentious interconnection between the enjoyment of fundamental freedoms and environmental degradation, especially in the context of the European Convention of Human Rights and the consequential case-law of the European Court of Human Rights.

A preliminary introduction explains the emergence and evolution of the link between the two fields. Human rights, defined as ethical demands operating at an elevated juridical level, namely rights which belong to all human beings, without discrimination in terms of race, sex, nationality, ethnicity, language, religion, or any other status, have started to be protected with several legal instruments drafted by the international community, starting with the 1948 UN Universal Declaration on Human Rights. The turning point in the construction of the category containing the various aspects of "human rights" has been the discovery of the passage of the Earth from the Holocene epoch to the Anthropocene. It is thanks to this acknowledgement that the environmental aspect has become significant in the human rights' discourse. Indeed, the passage from the Holocene epoch to the Anthropocene one refers to a geological period in which humans are considered to dominate as the great forces of nature everything that surrounds them, and, as a result, the problems that human beings will face in the Anthropocene will be more severe, unpredictable, complex and of a magnitude thus far unseen. Since the moment of acknowledgment of humans' responsibility towards the environment and the severe consequences that humans' interference with the environment is creating, namely climate change, there has been an increase in the engagement with and the study of human rights law, which has resulted in the conception of it as a tool for activating environmental claims and pursuing environmental justice.

In this context, climate change constitutes the biggest environmental challenge faced by the international community, not only due to its widespread, serious and extreme environmental effects, but also because of its anthropogenic nature. Indeed, climate change has been brought about by humans' activities throughout time in order to maximize their level of achievement and prosperity: humans' necessity of electricity, heat, and transportation, produced from burning fossil fuels, as well as deforestation for agricultural or infrastructure expansion, and increasing livestock farming to guarantee sustenance to the ever-growing global population are just some among humans' activities which have contributed to climate change.

Moreover, climate change poses questions concerning justice and equality, since those States who contribute less to greenhouse gas emissions will be those who will suffer the most from the impact of climate change. Most importantly, an analysis of the effects of climate change, as we will see further on, shows that it threatens the enjoyment of a wide range of human rights.

It goes without saying that the debate has created supporters and opposers of the relationship between human rights and climate change, and more precisely of the conception of Environmental Human Rights, creating controversies that rendered this question even more complex than it initially was.

Giving a definition to the set of "Environmental Human Rights" is not a simple task, since there is not a single category under which they fall. However, from the analysis emerges the existence of three different perspectives that can describe the category's content and role. First, environmental human rights can be looked at, on the basis of an anthropocentric approach, in which human beings are placed at the center of the concern and, thus, possess rights in the framework of environmental protection. Second, a different perspective claims to treat environmental human rights, namely the right to a decent, healthy and sound environment as an economic or social right, following the lines of the 1966 United Nations Covenant on Economic Social and Cultural Rights: it aims at promoting environmental quality as a fundamental value, comparable to other economic and social rights, almost seeing it as a good in its own right. Thirdly, the last perspective considers environmental quality as a collective or solidarity right: it gives advantage to communities rather than individuals in determining how their environment and natural resources should be managed to reach a full protection. To synthesize the features of these three categories, it is necessary to mention the articulation made by the former UN Special Rapporteur John Knox on human rights obligations relating to the environment: Knox proposed 16 principles according to which States have basic obligations falling under human rights law concerning the enjoyment of a safe, clean, healthy and sustainable environment. According to the principles, in the relationship between the environment and human rights both elements are put on the same level and have the same weight: responsibility on the State is put to ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights, but also vice versa, asking States to respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

The acknowledgment of the fact that climate change and environmental protection must be regarded as human rights-connected issues has raised the attention towards the necessity of an approach that would consider the macro-context in which it is embedded and that would move towards its respect.
In this concern, the Human Rights Council in Resolution 10/4, has officially recognized the necessity of introducing a human rights-based approach to the global response to the climate crisis. A human rights-based approach is a conceptual framework which builds its normative basis on international human rights standards: it promotes and protects human rights, embedding plans, policies and programs in a system where rights and obligations are established at a legal international level in order to promote sustainability. Moreover, it defines on the one hand, *right-holders* and their entitlements in

order to strengthen their capacity to make claims, and on the other hand, the corresponding *duty-bearers* and their capacity to meet their obligations. In this sense, the benefits are countless: human-rights based approach encourages us to think not only about what rights are brought into play, but also about whose task is to uphold those rights. In this way, more attention is put on relevant responsibilities in the climate change context and, consequently, accountability's degree is increased.
These reasons create the necessity of integrating a human rights-based approach in any climate change adaptation or mitigation measure, since inadequate measures could lead to human rights violations if full participation of local communities is not granted or if the right to a due process and the right to access to justice are not respected.

In this context, Michelle Bachelet, United Nations High Commissioner for Human Rights, has opened the 42nd session of the Human Rights Council in September 2019 after that the Intergovernmental Panel on Climate Change ('IPCC') had confirmed in its reports that climate change is a real phenomenon and that the primary factors that contribute to the increasing of its negative effects are human-made greenhouse gas emissions. Some of the adverse impacts of climate change include the increasing frequency of extreme weather events and natural disasters, rising sea levels, floods, heat waves, droughts, desertification, water shortages, and the spread of tropical and vector-borne diseases. As expressed in the Human Rights Council resolution 41/21, such phenomena are considered to threaten both directly and indirectly the enjoyment of a set of fundamental human rights by people around the globe. These range of rights include: the right to life, health, adequate food, adequate housing, safe drinking water and sanitation, self-determination, culture, work and development.
Despite the recognition of the negative effects of climate change on the enjoyment of some human rights, to date, none of the multilateral human rights treaty of universal application has officially recognized the right to a good environment. One of the hypotheses on the difficulty of analyzing and discussing this right may lie in the different terminology utilized by institutions, scholars and legal instruments, which creates a confusion on the concept behind the human right. Two strands of thought exist in this sense: on the one hand, those who believe that the right should represent a truly new right to an environment of some particular quality to which independent human needs belong; on the other hand, those according to which it should express a synthesis of the environmental dimensions of other rights. As a consequence, it can be very challenging to make a comparison or an evaluation of the contrasting arguments on the recognition of a human right in the environmental field, since it does not exist a consistency in terms of the subject matter, scope and definition. Despite these contrasting arguments, the peculiar nature of human rights favors the argument which recognizes a right to a good environment, even if that would mean to potentially duplicate protections found elsewhere. More precisely, the recognition of the right to a

good environment would bring it to the same level of other human rights and enable more effective balancing of competing rights, bringing the environment within the field of moral rights in the international legal framework. In addition, also practical benefits would follow this recognition, namely legal mechanisms provided for the implementation and enforcement of the right, including the identification of right holders and duty bearers. In this concern, the right to a good environment, in order to respect the theoretical concepts of the traditional human rights theory, needs to be constructed as an individual right. However, since it can be defined as a collective good, considering it as a right which can be enjoyed only by individuals creates conflicts and is incompatible with the theories of interconnected ecosystems, according to which all ecosystems sharing the same habitats (in our case humans and the environment) are interconnected because each organism can positively or negatively affect the others. Climate change clearly amplifies this problem: greenhouse gas emissions are inherently collective, and the consequences of climate change are transboundary and cross-sectoral, not suited to a narrow and individualized discussion. Thus, the possibility of recognizing the right to a good environment as a collective right becomes real, in order to render it advantageous in facing climate change.

When addressing the identification of duty-bearers, the traditional theories of human rights law considers States to be the principal duty-bearers of the right to a good environment. However, since the ultimate objective of the above-mentioned right is to positively contribute in the fight against climate change, duties and obligations must be placed also on those who actively contribute to the problem: non-State actors give a heavy contribution to the causes of climate change, and their action is needed to decrease greenhouse gas emissions, either intentionally or under regulations of State institutions. Generally, non-State actors must comply with national laws in conformity with international standards and laws. Thus, non-State actors can be held accountable for violations of the rights of defenders in cases of offences or crimes under national law. In some circumstances, actions of a non-State actor may be chargeable to the State itself if a close link between the State and the non-state actor can be demonstrated. When the State is not responsible for the action of a non-State actor, the process in which human rights standards operate on non-State actors follows a specific rule: namely the one according to which it is States' obligation to protect the rights of people under their jurisdiction. Thus, it is States' duty to safeguard human rights, which implies that they are obliged to guarantee that rights are not violated by non-State actors who are subordinated to their laws. In our specific case, that of climate change and of the right to a good environment, actions of non-State actors which contribute to the increase in greenhouse gas emissions, and so human rights violations, can only be brought within the framework of international human rights law, with States' being responsible for them and non-State actors accountable only under the relevant domestic law.

This analysis paved the way to how to demonstrate that a concrete violation of the right to a good environment has occurred. The first step is to prove that climate change, and in particular the potential State's contribution, caused the environmental implication. Consequently, the second step is to identify to what extent the State actor or the duty-bearer's actions are responsible for climate change. This creates a two-faced challenge: on the one side, the question on what standards of proof are considered to be sufficient for establishing causation, and on the other side, what standard of environmental impact we should consider a violation. In order to establish what violates environmental standards, we need to define what those standards are. According to some scholars, the right to a good environment needs to be supplemented with transparent and concrete standards of ecological health which are able to specify what the right entails and when it has been violated. A more appropriate alternative would appear to be the one which states that it is humans' interference with the environment that leads to a negative consequence on it, but also in this case, such reasoning would mean that every human intervention on the environment would violate the rights which protects it. This clearly would render the right ineffective and wrongful. Thus, identifying a violation in solely environmental terms represents a significant challenge to the right to a good environment. Although we could describe the characteristics of a violation, it would be difficult to demonstrate that it could have been caused by humans' actions or omissions, as it happens with other human rights' breaches and the identification of their standards of proof and causation in the international legal arena.

Regarding the second step in this analysis, if it is demonstrated that a State is responsible for climate change, the following phase would be to prove that the environmental effect which has been condemned was caused by the State's actions or omissions. This creates a much more complex process, since it opens the question concerning the standard of proof and what criterion should be considered in establishing causation between climate change impacts on environment and a State's action. According to Doelle, the traditional 'but-for' test does not apply to this case, because States would be allowed to avoid liability for their actions due to the fact that their contributions are not fully responsible for causing climate change alone, but they are solely one contributing action among many. This renders conventional approaches to the standard of proof inadequate, since they would allow all States to deny their responsibility for their contributions to climate change, with the exception of the major contributor to which all the liability would be attributed. Thus, the establishment of a right to a good environment would not eliminate the problem but it would serve to find a way between two processes to which are attributed two levels of complexities: on the one hand, balancing States' interference with the environment more broadly; and on the other hand, the complexities of the interconnected systems which contribute to environmental changes.

After having clarified what the category of Environmental Human Rights identifies and the difficulties through which the two concepts of environment and human rights find a common point, it is necessary to analyse the most significant tools of the environmental international legal framework in order to give a legal context to the subject of the present work.
The first legal instrument which deserves to be mentioned due to its relevance is the United Nations Framework Convention on Climate Change. It came into force on 21 March 1994, after opening for signature in Rio de Janeiro in June 1992. It represents an international environmental treaty which clearly establishes its ultimate objective in its Article 2, namely: "to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". The Convention is a framework treaty, in the sense that it does not pose legal obligations for greenhouse gas emissions' reductions to individual nations. The framework model has been chosen since it is useful to serve two basic functions. First of all, it allows to proceed in the negotiation process in an incremental manner, where states can begin to cooperate and work to address the problem without the emergence of a consensus, or even before the problem is officially acknowledged by them. Secondly, this approach can create positive feedback loops, making the approval of specific substantive commitments easier. Scientific research and assessments, institutions and meetings carried out under the convention: all help the process of agreement by reducing uncertainties and laying a basis for action, providing technical assistance and issuing reports. Within its structure, the UNFCCC incorporates several key principles as a basis for actual obligations of the members but the attention has fallen upon two guiding principles which have been considered significant for the understanding of the Convention in question and of the general concept to which it relates, namely the *precautionary principle* and the *principle of common but differentiated responsibilities.*

The precautionary principle is explicitly mentioned in Article 3.3 of the UNFCCC: it allows decision-makers to adopt precautionary measures if scientific evidence about an environmental or human health threat is still unsure and the stakes are high. Due to the lack of consistency of its definition, this principle can be implemented in a variety of ways, and some conflicting viewpoints have emerged, creating a distinction between those who consider the precautionary principle as a pointless and potentially dangerous principle and those who believe that it is a useful principle for averting complex hazards.

The principle of common but differentiated responsibilities is contained in Article 3.1 of the UNFCC. The idea of differentiation in the treatment of developed and developing countries started to emerge in international environmental law at the end of the twentieth century in order to address the fact that environmental issues have an impact which is too universal to be treated as only a matter of domestic jurisdiction. Thus, responsibilities should

be differentiated because not all nations contribute to climate change to the same degree: developed countries bear the main responsibility for climate change since they have contributed to the largest share of historical GHG emissions. As the precautionary principle, the principle of common but differentiated responsibilities has never been clearly defined, but in time a series of arrangements in the climate change regime have divided parties into different groups to take on different responsibilities to act. The UNFCCC originally divided member States into three groups: developed countries in Annex I, countries in a transition to a market economy (also included in Annex I parties, but differentiated within the Annex), and developing countries (non-Annex I), on the basis of different levels of distribution of greenhouse gas emissions among the member states to the Convention. Thus, it implicitly made a differentiation of countries according to per capita GDP. More precisely, according to this differentiation, all Parties have commitments, the so-called commonalities, listed in Article 4.1 of the Convention, but Annex I Parties have to meet specific requirements to demonstrate that they are actually taking the lead in facing climate change. According to Article 4.2, they have to adopt policies and measures to mitigate climate change by, on the one hand, reducing and restraining their greenhouse gas emissions and, on the other, strengthening their greenhouse gas sinks and reservoirs.
In brief, developed countries are generally requested to submit information more often, and to give more details than developing countries. Both developed and developing countries are asked to cooperate, following the Clean Development Mechanism, defined in Article 12 of the Kyoto Protocol. This mechanism allows Annex I nations to receive mitigation credits for avoiding emissions and the non-Annex countries to achieve their sustainable development objectives.

For this reason, the second legal instrument that must be given due consideration is the Kyoto Protocol to the UNFCCC. It was adopted in Kyoto, Japan on December 1997 at the third Conference of the Parties to the UNFCCC and entered into force on 16 February 2005, after a complex ratification process. Indeed, it was opened for signature in 1998, but it could not enter into force until at least 55 parties ratified the treaty, which needed to account for at least 55 percent of the total carbon dioxide emissions of the Annex I Parties.
The Protocol, adopted under the UNFCCC, shares the Convention's ultimate objective, as well as its principles and institutions. Moreover, it introduces a significant update: it strengthens, for the first time, the Convention by legally binding developed countries, Annex I countries, to limit or reduce their greenhouse gas emissions, putting in place an accounting and compliance system for the specific time period set, starting in 2008 and ending in 2012, with a set of rules and regulations. In addition, to facilitate the commitments concerning the reduction of greenhouse gas emissions of Annex I countries, it establishes three flexibility mechanisms: International Emissions Trading, Clean Development Mechanism ("CDM"), and Joint Implementation ("JI").

A third milestone accord in the climate change process which deserves to be mentioned due to its role in bringing all nations into a common objective, to face climate change and to adapt to its impacts, is the Paris Agreement. The Paris Agreement is a landmark environmental treaty adopted by nearly every nation, more precisely 196 Parties, in 2015 at COP 21 in Paris under the UNFCCC through Decision 1/CP.21, aimed at addressing climate change and its adverse impact. It entered into force in November 2016 and its main goal is to limit global temperature increase in our century to 2 degrees Celsius above preindustrial levels, preferably to 1,5 degrees Celsius. Its Preamble is significant since it explicitly includes the human rights language in the climate change discourse, stressing the importance of respecting human rights when taking climate actions. Apart from the agreement's Preamble, several decisions adopted under the Paris Agreement contain considerations that are generally associated with the development of human rights in all their aspects, such as gender equality, participation, sustainable development and poverty reduction.

Concerning environmental policies at the European Union level, the EU has some of the world's highest environmental standards, which have been reached after a long development over decades. Through the establishment of some of the most important European Treaties, on climate change the EU takes a leading role in international negotiations on decision to face its adverse effects, formulating and implementing climate policies and strategies. The legal basis of the European environmental policy comes from Articles 11 and 191-193 TFEU, that guarantee that the interpretation of EU law should be consistent with environmental protection requirements, in order to ensure an *ex ante* identification and solution of potential controversies between different policies and avoid possible damages after that they have occurred.

Analyzing the fundamental aspects of such legal instruments, it has been clarified how international actors, with the UNFCCC, the Kyoto Protocol and the Paris Agreement, and European countries, with several treaties entailing environmental policy, deal with climate change and environmental questions. In addition, the importance of human rights' protection in environmental policies has been highlighted, and it has been showed how it has been taken into consideration in the majority of the above-mentioned legal instrument. In sum, this appears to strengthen the relationship between the two concepts, showing the strong connection that exists between the protection of the environment and human rights. The focus has, then, shifted towards the analysis of the European Convention on Human Rights, the European Court of Human Rights and their relationship with environmental questions.

The European Convention on Human Rights ("ECHR"), an international treaty that came into force in 1953 before the international agenda was concerned with the environmental question, does not explicitly protect the

environment, nor does it deal with environmental issues. Namely, no provision exists for providing relevant rights concerning the environment. This is because the primary objective of the Convention was to set out a body of legal provisions that aimed at the protection of democratic fundamental rights and liberties of the individual against the State. Indeed, questions such as the atmosphere, the safeguard of ecosystems, or environmental issues did not concern the conventional conception of individual human rights.
However, recently, the European Court of Human Rights ("ECtHR") has been urged to give its interpretation on the application of the ECHR to the environmental crisis. This is creating much jurisprudence on environmental questions between states and the Court, and some cases have reached significant success in domestic courts. Indeed, it has been recognized that it is undoubtedly true that climate change undermines the enjoyment of several human rights. Moreover, the ECtHR has also established some minimum requirements the States must respect in dealing with environmental hazards.
Some of these successes have been achieved in the unprecedented decision discussed in the next and final chapter, namely the Urgenda decision, delivered by the Dutch Supreme Court in December 2019.

Generally, in these decisions, the core element in claimants' argument is that some obligations in Article 2 and Article 8 of the ECHR should be interpreted following some of the international treaties concluded on climate change mitigation, namely: the Paris Agreement and its aspiration to limit global average temperatures' increase to 1.5 C; the UNFCCC and its objectives; and, also some requirements under the UN Convention on the Rights of the Child ("UNCRC"). In other words, the ECtHR is being asked to interpret the environmental duties contained in the ECHR, taking into account the interpretation that some international legal instruments give on environmental provisions. This is reasonable in two respects: first of all, because since the ECHR does not contain regulations in terms of environmental risks and protection, the ECtHR has significantly relied on European and international environmental law tools to deal with environmental questions; secondly, the use of general international law as a framework for interpreting provisions is an entrenched practice of the ECtHR.

Despite the absence of references to environmental obligations in the ECHR, the ECtHR has succeeded in building a comprehensive body of case-law allowing for a right to a healthy environment. Concerning the access to information on the environment, the Court has stated that some obligations emerge for public authorities from the liberties protected in Article 2 and 8 of the ECHR, namely the right to life and the right to respect for private and family life, home and correspondence. These obligations concern the protection of the right to access to information on environmental issues in specific conditions. In this concern, The Aarhus Convention is significant because its essential elements have been integrated with the ECHR law through case law in terms of procedural environmental rights. Thus, they can

be enforced in domestic law and in front of the Strasbourg Court as the extensions of other human rights.

Despite the importance of access to environmental information, especially in these information concern dangerous activities towards the enjoyment of human rights, the ECHR extends the scope of application of existing rights under the Convention for accommodating questions of environmental protection. On this line, provisions that have been considered to encompass environmental values are principally Article 2, establishing the right to life, and Article 8, on the respect for private life, but also Articles 6, right to a fair trial, Article 10, freedom of expression and the right to receive and impart information, and Article 11, namely freedom of assemble and association, have been invoked by claimants. For the purpose of this work, and due to the jurisprudence available, the focus has been on the two Articles that have been invoked the most by applicants in climate change litigation, namely Article 2 and Article 8 of the ECHR.
In the environmental context, Article 2 has been applied where certain activities endangering the environment are dangerous to the extent that they also endanger human life, for example, nuclear tests, the toxic emissions of chemical factories or waste collection sites. It is essential to remind that these situations are considered to be exceptional ones: environmental issues have, indeed, arisen in four cases brought in front of the ECtHR, with two of them relating to dangerous activities and the other two to natural disasters.
As general rules concerning dangerous activities based on the Court's case law, the magnitude of the obligations of public authorities depends on factors such as the harmfulness of the hazardous activities and the foreseeability of the risks to life. Thus, public authorities are required to adopt measures to prevent breaches of the right to life caused by dangerous activities or natural disasters. In case of loss of life caused by a violation of the right to life, public authorities must guarantee a proper response, ensuring the right implementation of the legislative and administrative system and punishing the infringement of the right to life adequately. Furthermore, if the violation of the right to life is unintentional, disciplinary, civil, or administrative remedial measures can be considered a proper response. But, if public authorities are aware of the risks to the right to life in perpetuating dangerous activities and they ignore their responsibility to take necessary measures for preventing threats to happen, the Court states that those liable for having endangered life must be accused of criminal offence and prosecuted.

The second provision of the ECHR that encompasses environmental values is Article 8. It provides for the right to respect for private and family life, home and correspondence. In this case, initial applications accepted by the former Commission of the European Court as claims for the violation of Article 8 concerned, indeed, aircrafts' noise pollution by the applicants' home. In these cases, since the right contained in Article 8 includes the respect for not only the actual physical area, but also the quality of private life and the enjoyment

of the amenities of someone's home, the Court has found that intense environmental pollution can affect the quality of the residents' life. This prevents them from enjoying their home and constitutes a violation of their rights contained in Article 8. More specifically, for controversies to arise under Article 8, the environmental component there are two factors that the Court has to consider: first, if a causal link connects the activity and the negative impact on the individual; secondly, if the adverse have reached a standard threshold of harm. The minimum threshold of harm is dependent on the circumstances of the case, including the duration and intensity of the discomfort, and its mental or physical effects. In this framework, it must be recalled that the Court starts to examine the case by determining if Article 8 applies to the case's scenario, and only if the result is positive it determines if there has been a breach of its provisions.
The second paragraph of Article 8 of the ECHR confers public authorities the power to interfere with the right to respect for private or family life or the home, according to the established conditions. These conditions include: firstly, that the decisions to interfere with the right in question must be provided for by law and pursue a legitimate aim; secondly, that they must be commensurate to the legitimate aim pursued – balancing the individual interest with the interest of the society as a whole.
Given the social and technical difficulties in managing and assessing environmental issues, public authorities are in the most suitable position to determine the best policy for environmental controversies. Thus, they own a wide *margin of appreciation* in deciding the balance between the individual's interest and the community's interest.

The expression “margin of appreciation” derives from the French term *marge d’appréciation*, and it refers to the margin for manoeuvre that the Strasbourg institutions are willing to concede to national authorities in fulfilling their obligations under the European Convention of Human Rights. The term does not appear in the ECHR text, but it was first introduced in 1958 in several applications of Article 15 of the Convention. Accordingly, since the Court’s role is subsidiary to domestic protection of the ECHR’s liberties, national authorities, with the margin of appreciation, enjoy more discretion in setting the best system in safeguarding human rights within their territory. Moreover, this autonomy guaranteed to States poses limitations on the Court’s power of review, since it has to accept that domestic authorities are in the best position for settling a dispute: on the one hand, it the measures adopted by a State respect the margin of appreciation, the Court has to accept them without reviewing them; on the other hand, if the actions of the State exceed the margin of appreciation, then the Court will carry out a full review.
Despite its useful implications, the margin of appreciation doctrine is one of the most criticized and discussed ECtHR achievements. The first critique generally sees the margin of appreciation as a means of the Court through which it refrains from reviewing controversies considered as ‘domestic’ ones, while a second weakness concerns the lack of theoretical background of the

margin of appreciation doctrine. However, despite all the conceptual issues and criticisms rotating around the margin of appreciation – degree of vagueness, incoherence in the Court's reliance on the margin of appreciation, a risk of manipulation of the identified factors and parameters and the resulting lack of legal certainty – the ECtHR has started to apply its doctrine in several areas of the Convention, including Articles 4-6, 8-11, 13 and 14, along with Article 1 and 2 of the First Protocol to the Convention. Thus, the margin of appreciation is applied to the rights of the Convention that are considered derogable.

Opening the discourse on the ECtHR, as we have understood, the European Court of Human Rights is entitled to monitor the respect of the provisions contained in the ECHR. Today, it is composed of forty-seven judges, as the number of States Parties to the Convention. The judges are elected from a list of three candidates offered by each State by the Parliamentary Assembly of the Council of Europe for a non-renewable term of nine years.
Since the ECHR does not provide for a right to a good environment, environmental issues have been raised incidentally by protecting substantive rights, namely those rights that have a reason to exist for their own sake and that guarantee a standard legal order in the society.
In this concern, the *Powell & Rayner v. The United Kingdom* case was central for the Commission and the ECtHR to link environmental damage to a breach of the Convention. The case concerned two applicants, Richard J. Powell and Michael A. Rayner, who owned dwellings near Heathrow Airport, in a sensitive air traffic noise area. According to their complaint, four articles of the Convention had been violated by the aircraft noise and by the consequent process: Article 6, protecting the right to a fair trial and in particular the right to hearing in determination of civil rights; Article 8 and the right to respect for private life and home contained in it; Article 1 of the First Protocol and the right to property; and, finally, Article 13, securing the right to an effective remedy. In this case, the Court demonstrated how a Convention provision can be threatened by environmental impact, stating in its judgment that "the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport. Article 8 is therefore a material provision in relation to both Mr. Powell and Mr. Rayner".

The *Lopez Ostra v. Spain* case deserves to be explained for its significance in recognizing a more comprehensive environmental protection of the individual. In this case, the applicant, Mrs. Gregoria Lopez Ostra, and her daughter underwent serious health problems due to a waste treatment plant's fumes, built by the State and operating twelve meters off her residence. The factory started working in July 1988 without a proper license, and immediately malfunctioned, releasing gas fumes and unpleasant smells that created health problems to the families living in that area. Consequently, the town council decided to evacuate the residents and rehouse them in the town's

central area. However, the local authorities never provided for the plant's total closure, allowing for the continuing of its partial operation tasks. When in October 1998 Mrs. Lopez Ostra and her family came back to their house, they found out that the problems persisted. Thus, after having exhausted the remedies available for the compliance with fundamental rights in Spain, namely local authorities and the Supreme Court of Spain, the complainant applied to the Commission in May 1990.
In the application, Mrs. Lopez Ostra complained about the domestic authorities' inactivity towards the problems caused by the waste facility. Moreover, she claimed to be a victim of a breach of the right to respect for her home that did not allow for the right enjoyment of her private and family life under Article 8, and of an inhuman and degrading treatment, prohibited by Article 3 of the ECHR. From the analysis of the *López Ostra v. Spain* case, several significant questions can be deducted. First of all, that pollution or environmental harms do not have to cause serious harm to human health, but it must rather be 'severe' to create causality. Furthermore, in this case, for the first time, it was recognized by the European Court the existence of an environmental issue within the human rights regime, even in the absence of an environmental right in the ECHR that protected it, but only with the extension of the protection of Article 8 of the Convention, sufficiently serving as a link between the two aspects.

As we have understood, the controversies arisen at the international level on the formulation and recognition of a human right to a healthy environment have been counterbalanced by the identification in some international instruments, such as the Rio Declaration, of procedural rights related to the environment, such as the right to environmental information, of public participation in environmental questions, and access to remedies for environmental harm. In a similar way, also in the ECHR's case law there has been a protection of the environment through procedural rights, namely the body of law that establishes formal steps to be taken to enforce legal rights – such as the right to a fair trial, the right to an effective remedy and the right to receive information. The *Balmer-Schafroth and Others v. Switzerland* represents the ideal example to show how the Court dealt with integrating procedural environmental rights under the ECHR.
In this case, the applicants were ten Swiss nationals who lived in an area near the nuclear power station at Muhleberg. The company owning the power station, the Bernische Kraftwerke AG, in 1990 asked for an extension of its license to operate for an undefined period and an authorization to increase the production of nuclear power by 10%. As a reaction, approximately twenty-eight thousand objections were submitted to the Federal Energy Office asking for the rejection of the license's extension, and for the immediate and permanent shutdown of the nuclear station. The primary reasons behind their petition were that the station did not respect safety standard and that it could cause an accident threatening the well-being of the local population.

Despite this petition, the Federal Department of Transport, Communications and Energy rejected the petitioners' request for the adoption of provisional measures, and the Federal Council did not take into account the requests, granting an extended operating license and a 10% increase in the production. Therefore, after having exhausted all the domestic remedies, the applicants presented their case to the Commission, claiming that a violation of the ECHR had been committed on two grounds. The first claim concerned the fact that the Federal Council, as the competent domestic body for their complaints, did not guarantee a fair procedure since it did not give them access to a tribunal as intended in Article 6 of the Convention. Moreover, the applicants claimed that they had not been given an effective remedy accordingly to Article 13 of the ECHR. After having established that the applicants were considered victims under the ECHR, the Court focused on the alleged violation of Article 6 (1). Article 6 ECHR provides that for the protection of the civil rights and obligations, every individual has the right to a fair hearing in front of a tribunal. On the one hand, Switzerland argued that the claimants' requests did not relate to civil rights and obligations, since they concerned their physical integrity; on the other hand, the Court determined that the applicants were relying on the right contained in the 1959 Federal Nuclear Energy Act.
After ruling that the dispute was genuine and serious, the Court had to decide whether the outcome of the proceedings was directly decisive for the rights asserted by the complainants. In this concern, since the applicants failed to show that the activity of the nuclear plant had exposed them directly to a serious, specific and imminent threat, the Court ruled that the link between the operating conditions of the nuclear station and the right to protection of their physical integrity was too tenuous and remote. This means that the consequences on the population of the measures that should have been taken by the Federal Council remained hypothetical. Not finding possible the application of Article 6 paragraph 1, the Court also concluded that, since in order to apply Article 13 there must occur a violation of the Convention, neither Article 13 was applicable.

It has been demonstrated how climate change and the deterioration of the environment are human rights related issues. The environmental question can be tackled from many perspectives, and one may choose not to stress its human rights dimension, but certainly climate change has had, is having and will continue to have dramatic impact on several human rights, if mitigation plans are not adequately implemented. lately, because of the environmental aspect related to human rights protection, some States' climate change mitigation plans have been questioned in terms of their respect of human rights, and some of them specifically on the grounds of the ECHR's provisions, giving rise to the so-called climate change litigations. Today, these are well-known phenomena that concern alleged violations of human rights due to environmental issues.

In this respect, it is worth mentioning the *Carvalho and others. v. European Parliament and Council of the European Union*, better known as the *People's Climate Case*. In this case, the claimants challenged the EU's 2030 mitigation plans – more precisely the climate target – because of their alleged inadequacy to avert the effects of climate change and insufficiency in protecting the citizens and some of their fundamental freedoms, such as the right to life, health, occupation and property. Indeed, in 2014, the EU, with the European Green Deal, has established a target for cutting EU domestic greenhouse gas emissions by at least 40%, compared to 1990 levels, by 2030. They asked the court to annul, under Article 263 (4) TFEU, the legislative package regarding greenhouse gas emissions and for a compensation under Articles 268 and 340 of the TFEU in the context of non-contractual liability. The case was presented in front of the European General Court, that on 8th May 2019 ordered its judgment. The General Court rejected the argument of the applicants and held that they were not individually concerned as required by Article 263(4) TFEU, that establishes the conditions upon which an action for annulment can be brought before the Court of Justice of the EU, by groups or individuals. According to the Court, the mere infringement of their fundamental rights was declared insufficient to consider their action admissible, as stated for the first time in the *Plaumann v Commission.*

On the contrary, a case which resulted in a success for the enforcement of the relationship between human rights and the environment is the *Urgenda* decision, that provides an interesting case for highlighting not only the need for more climate action that takes into account the protection of human rights. The *State of the Netherlands v. Urgenda* case is a complex piece of jurisprudence that must be analyzed in depth to understand all of its significant aspects. To begin with, central to the case is the requirement established in the 2007 Fourth Assessment Report of the IPCC, according to which developed countries, listed in Annex I of the UNFCCC, are required to make greenhouse gas emissions reductions of 25-40 % by 2020 compared to the 1990 levels. Bearing this in mind, in 2012, the Urgenda Foundation, a Dutch NGO operating in the transition towards a more sustainable society and a circular economy through renewable energies, pointed out to the Dutch government that the European Union's obligation to reduce greenhouse gas emission by 20% against 1990 standards was not enough to mitigate serious climate change. Moreover, it stated that the Dutch reduction targets resulted from the European ones were not adequate in addressing the problem. Thus, Urgenda asked the Court to consider the Netherlands as acting unlawfully in case of its failure to reduce the annual GHGs emissions by 40%, or by at least 25% in comparison with 1990 levels, by 2020, and to order the State to act in compliance with this target. The process passed through three different degrees of trials: on 24th June 2015, the Urgenda prevailed against the Dutch government in the judgement of The Hague District Court. As a result, the Court ordered the State to limit the total volume of annual greenhouse gas emissions by at least 25% compared to the 1990 levels by the end of 2020.

The Court of Appeal, in its judgement of 9 October 2018, agreed with the District Court's order and accepted the Urgenda's appeal, basing its judgement directly on Articles 2 and 8 of the ECHR and stating that the State was doing too little to prevent a hazardous climate change. Not satisfied with the judgement of the Court of Appeal, the State instituted appeal before the Supreme Court. Three main conclusions were formulated by the Supreme Court on the basis of three relevant aspects of the Dutch legal framework.
First of all, the Supreme Court found that Urgenda had the right to file a collective claim on the grounds of Article 3:305 of the Dutch Civil Code. It also found support for this statement in the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental questions, and more precisely, in Articles 9(3) and 2(5) of the Convention. Concerning the second background aspect, the Supreme Court did not express itself on the fact that climate change posed serious risks, since both parties agreed on this statement. Indeed, according to the Dutch Code of Civil Procedure, Courts can take for granted matters agreed by both parties or facts that are submitted by one party but not adequately contested by the other. Lastly, the third aspect concerns the significant role played by international law in the procedure: provisions contained in international legal instruments that are binding on people, can be directly applied in the domestic legal order. Thus, both the Court of Appeal and the Supreme Court highlighted the direct applicability of the ECHR, together with many other principles that served mainly for interpretative purposes included in the UNFCCC, the Paris Agreement and the precautionary principle.

By means of conclusion, the final judgement of the Supreme Court in the *Urgenda* case can certainly be considered a landmark decision in the international legal scenario and will be taken as reference for future climate litigation, since it reached two fundamental conclusions: firstly, that climate change risks create obligations for States to protect human rights, more precisely the rights to life and to respect for private and family life and secondly that these obligations can be connected with the targets negotiated for greenhouse gas emissions.
Most importantly, this case will be taken as a reference in the context of the relationship between human rights and the environment. Indeed, not only does it demonstrate the existence of this crucial relationship, but also it shows how claims concerning the protection of human rights entailing an environmental dimension – the violation of human rights by climate change mitigation plans – can be addressed only with more environmental protection in terms of climate change reduction – the Supreme Court ruled that the Netherlands had to meet its reduction targets in order to not commit a violation of human rights. Thus, human rights protection and environmental protection can be seen as two directly proportional factors of the same function: when human rights are violated because of environmental threats, the only viable solution is to increase environmental protection in order to strengthen the level of human rights protection.