ARTICLES

# EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS IN THE AREA OF CLIMATE CHANGE: WHY THE EUROPEAN UNION SHOULD TAKE THEM SERIOUSLY

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ABSTRACT: While it is by now recognised that climate change is having and will increasingly have a devastating impact on human rights and that ill-conceived climate action can also have adverse repercussions, the legal implications of these dynamics are still debated. This is particularly the case for the apparent incompatibility between the global nature of climate change and the primarily territorial nature of States' human rights obligations. In this context, the potential human rights obligations of the European Union (EU) towards persons living in third countries when it acts – or refrains from acting – to counter climate change have been particularly neglected, notwithstanding the major role played by the EU in both contributing to and mitigating climate change. Accordingly, the *Article* aims to shed light on the existence and extent of EU extraterritorial human rights obligations in the area of climate change. After exploring the wide array of EU climate measures and their extensive impacts on third countries and persons living therein, the *Article* offers an overview of the historical evolution and current state of extraterritorial human rights obligations in general and in the context of climate change specifically, paying special attention to recent judicial and quasi-judicial developments. The *Article* then points to a number of peculiarities of the EU legal framework and EU climate

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policy to conclude that, notwithstanding potentially significant enforcement obstacles, the EU legal order could be readier than others to recognise extraterritorial human rights obligations when EU institutions act (or not) in the area of climate change.

KEYWORDS: European Union – EU climate policy – extraterritoriality – extraterritorial human rights obligations – climate litigation – Court of Justice of the European Union.

## I. INTRODUCTION

Since the 1992 Rio Conference, the European Union (EU) has striven to portray itself as a global leader in the fight against climate change.[1] This adds to the strengthening of the role of the EU in the promotion of human rights worldwide after the entry into force of the Lisbon Treaty.[2] Nevertheless, these two areas of strategic interest appear to have mainly run on parallel tracks, to the extent that human rights considerations have not featured prominently in the climate policy of the EU. This is not surprising considering that, until the late 2000s, the interactions between climate change and human rights have hardly been addressed holistically within international organisations and multilateral fora. However, such state of affairs is rapidly changing, also in light of an ever-growing wave of human rights-based climate change litigation.

These developments raise the question of whether the EU, in devising and implementing its climate action, which has wide-ranging effects on third countries, is promoting and protecting the human rights of those living in such countries; and whether the EU has any legal obligation to do so.[3] International lawyers have increasingly scrutinised the external dimension of EU climate measures against its international obligations – specifically, obligations deriving from multilateral climate agreements, World Trade Organization's (WTO) rules, and customary norms on State jurisdiction. However, comparatively less attention has been devoted to whether and how EU climate measures (or lack

[1] S Oberthür and C Dupont, 'The European Union's International Climate Leadership: Towards a Grand Climate Strategy?' (2021) Journal of European Public Policy 1095.

[2] J Wouters and M Ovádek, 'Human Rights in EU External Action' in J Wouters and M Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) 539; and T King, 'The European Union as a Human Rights Actor' in M O'Flaherty, Z Kędzia, A Müller and G Ulrich (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff 2011) 77. For a critical appraisal: G de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) AJIL 649.

[3] This *Article* focuses on the potential extraterritorial human rights obligations of the EU rather than those of its Member States, as this topic has been comparatively less explored. The two aspects are of course related, as climate policies are increasingly agreed upon at the EU level and implemented by the Member States. Equally, the *Article* does not focus on corporate actors, as potential international responsibility for their harmful activities would lie – at most – with the Member States in which they are domiciled or under whose jurisdiction they can otherwise be considered, and not with the EU. It is a different question whether the EU has an obligation to regulate corporate responsibility including in light of the UN Guiding Principles on Business and Human Rights: Commission Staff Working Document of 15 July 2015 on Implementing the UN Guiding Principles on Business and Human Rights – State of Play.

thereof) are compatible with the negative and positive human rights obligations of the EU as stemming from both international law and its own "constitutional law", in particular to the extent that such measures (or lack thereof) can have a harmful impact on the rights of "distant strangers" living in third countries.[4] In other words, the thorny issue of extraterritorial human rights obligations arises.

Accordingly, the *Article* aims to shed light on the extraterritorial human rights obligations of the EU when taking action – or when omitting to take action – against climate change. To do so, it highlights how the wide array of climate measures that the EU has put in place over time can have extensive impacts on third countries and persons living therein (Section II). While EU unilateral climate measures with external effects (such as the EU Emissions Trading System and, more recently, the Carbon Border Adjustment Mechanism) have attracted extensive scholarly interest, together with EU trade agreements with third countries containing environment- and climate-related clauses, there is a need for more comprehensive scrutiny of how EU climate policy in all its manifestations can negatively affect third countries. More specifically, using a human rights lens to examine EU climate policy allows to open up largely underexplored research avenues on the impacts of EU climate action and inaction on persons living in third countries, as opposed to impacts on third countries' sovereignty and economies.

To ascertain whether the EU is under any legal obligation to prevent, mitigate and remedy such negative human rights impacts, Section III retraces the historical evolution and current state of extraterritorial human rights obligations in general, as (divergently) interpreted by regional human rights courts and United Nations (UN) human rights treaty bodies. Zooming in on the context of climate change, special attention is paid to the much-debated recent pronouncements by the Inter-American Court of Human Rights (IACtHR),[5] the Committee on the Rights of the Child (CRC Committee),[6] and the European Court of Human Rights (ECtHR)[7] – and their opposite outcomes. The analysis of this case-law is considered relevant in light of the increasing trend of cross-fertilisation and dialogue among international courts and quasi-judicial bodies addressing human rights (including in the area of climate change). Additionally, the case-law of the ECtHR is considered of particular importance for the purposes of this *Article* in light of the special relationship between the EU Charter of Fundamental Rights (CFREU) and the European Convention on Human Rights (ECHR) on the basis of art. 52(3) CFREU; and in light of recent progress in the process of EU accession to the ECHR.

Section IV pulls the threads and adds a further piece by emphasising the peculiarities of the EU legal framework and particularly of the CFREU, which would seem to apply to

[4] A Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (2016) MichJIntlL 475.

[5] IACtHR advisory opinion OC-23/17 on the environment and human rights [15 November 2017].

[6] CRC Committee decisions of 22 September 2021 *Sacchi and Others v Argentina and Others* CRC/C/88/D/104-108/2019.

[7] ECtHR *Duarte Agostinho and Others v Portugal and 32 Others* App n. 39371/20 [9 April 2024].

all EU acts, regardless of any territorial consideration. Taken together with further special features of the EU legal order and EU climate policy, section IV points out the comparative ease with which extraterritorial human rights obligations could be recognised as incumbent on EU institutions when they act (or not) in the area of climate change. While acknowledging the significant enforcement issues connected to the restrictive approach by the Court of Justice of the European Union (CJEU) to the standing of individuals and non-governmental organisations (NGOs), it is shown how the topic could nonetheless soon reach the CJEU through different avenues; and, in light of the above, how the outcome could be conducive to stronger climate action. Section V concludes on the enduring relevance of human rights in tackling climate change and on the significant role that the EU legal order and the CJEU can potentially play in this regard.

## II. EU climate policy and its impacts on third countries and persons living therein

In the last 30 years, the EU has built an increasingly sophisticated climate policy – *i.e.*, a policy "ecompass[ing] measures aimed at preventing climate change, especially by reducing GHG emissions and by alleviating the consequences of global warming through adaptation strategies".[8] Different measures have been characterised as forming internal, external and international EU climate policy, but they are frequently difficult to disentangle. Indeed, in the area of climate change, the multi-level governance defining the vast majority of EU action is particularly intricate;[9] and the most effective measures are those that tackle the whole carbon footprint and thus reach beyond territorial boundaries.[10] The mainstreaming of climate considerations in a wider range of EU policies[11] adds to this complexity and makes attempts at defining what constitutes climate policy and at distinguishing between internal and external policy increasingly challenging and, in many ways, artificial. Nevertheless, as it will be shown, these distinctions have little significance when the impact of climate-related measures on human rights is considered. Accordingly, for this *Article*, a purposefully broad and loose notion of EU climate policy is adopted, which also includes the decision by EU institutions *not* to act in certain areas.

[8] F Stangl and R Mauger, 'EU Climate Policy' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* (Edward Elgar 2022) 10, 12.

[9] H Vedder, 'Multi-Level Governance in EU Climate Law' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* cit. 237.

[10] NL Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law* (Hart 2023) 2; and Z Hausfather, 'Mapped: The World's Largest CO2 Importers and Exporters' (5 July 2017) Carbon Brief www.carbonbrief.org.

[11] European Commission, *Climate Mainstreaming* commission.europa.eu; K Rietig and C Dupont, 'Climate Policy Integration and Climate Mainstreaming in the EU Budget' in T Rayner, K Szulecki, AJ Jordan and S Oberthür (eds), *Handbook on European Union Climate Change Policy and Politics* (Edward Elgar 2023) 246.

### II.1. EU CLIMATE POLICY AND ITS IMPACTS ON THE SOVEREIGNTY AND ECONOMIES OF THIRD COUNTRIES

To further complicate the picture just painted, especially since the mid-2000s, the EU has increasingly gone in its climate policy beyond what was agreed in multilateral climate negotiations[12] by autonomously experimenting paths to climate mitigation and thereby exercising considerable intellectual and exemplary leadership.[13] While this approach has promoted the spread of new climate measures, it has also met with significant resistance in a context – that of international climate regulation and governance – where multilateralism is generally preferred.[14]

Accordingly, the devising and implementation of EU climate policy have raised several issues from an international law perspective. First among such issues is respect for the principle of sovereign equality of States and for the limitations on extraterritorial jurisdiction, which generally prevent States from exercising their prescriptive, adjudicative and enforcement authority over conducts and events taking place beyond their territories.[15] While instances of extraterritorial jurisdiction are increasingly accepted in a globalised world[16] and while EU unilateral climate measures with significant extraterritorial impacts generally pursue goals broadly shared by the international community,[17] such measures have nonetheless often been vehemently opposed by third countries, lamenting a violation of their sovereignty.

Among the most controversial examples of such approach is the EU Emissions Trading System (ETS) – namely the world's biggest carbon market, whose unilaterally planned extension to the aviation and navigation sectors was rejected by several third countries and even led to the institution of judicial proceedings, which challenged the inclusion of emissions connected to entirely foreign conduct in the schemes (*i.e.*, those parts of flights

[12] This is the case for the environmental field more generally: I Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Bloomsbury 2019).

[13] S Oberthür and M Pallemaerts, 'The EU's Internal and External Climate Policies: An Historical Overview' in S Oberthür and M Pallemaerts (eds), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUB Press 2010) 27; E Pander Maat, 'Leading by Example, Ideas or Coercion? The Carbon Border Adjustment Mechanism as a Case of Hybrid EU Climate Leadership' European Papers (European Forum Insight of 29 April 2022) www.europeanpapers.eu 55.

[14] This is true for global environmental issues more generally: JE Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment' in N Bhuta (ed.), *The Frontiers of Human Rights* (Oxford University Press 2016) 177, 179 ff.

[15] International Bar Association (IBA), *Report of the Task Force on Extraterritorial Jurisdiction* (IBA 2008).

[16] International Law Commission, Report on the work of its fifty-eighth session (2006), Annex V, UN Doc A/61/10; MT Kamminga, 'Extraterritoriality' (2020) Max Planck Encyclopedia of Public International Law.

[17] On the "international orientation" characterising the "territorial extension" of EU law, see J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) AmJCompL 87. Relatedly, on unilateralism in pursuance of the common good, see C Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (Oxford University Press 2020).

taking place outside EU territory).[18] Incidentally, the EU subsequently decided to limit the application of its ETS to flights within the European Economic Area and facilitated the creation of a global carbon market within the International Civil Aviation Organization (ICAO);[19] whereas, regarding maritime emissions, the inclusion in the EU ETS has been established from 1 January 2024 and covers 50 per cent of emissions from voyages starting or ending outside the EU.[20]

More recently and relatedly, the creation of the Carbon Border Adjustment Mechanism (CBAM) has caused a similar furore. Through the CBAM, the EU intends to lead the way in combatting so-called carbon leakage, namely the increase in greenhouse gas (GHG) emissions that is expected from asymmetries in the climate policies of different countries, which can encourage companies to move production to countries with a more relaxed regulation of emissions.[21] The CBAM, adopted by the EU in the absence of any real progress in the international discussions over carbon border measures, is also seen by many countries as interfering with their sovereign rights.[22]

The lawfulness of the CBAM and EU ETS under international law has also been debated with respect to WTO law, particularly its most-favoured-nation and national treatment principles.[23] Similarly, the EU Deforestation Regulation,[24] which aims to block the entry and consumption in Europe of products that contribute to deforestation and forest degradation and thus to climate change, has been criticised by developing countries as

[18] Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864. In this preliminary ruling concerning the validity of Directive 2008/101/EC, which included aviation activities in the ETS, the Grand Chamber found that the Directive did not apply extraterritorially and was, therefore, valid. In the literature, see C Voigt, 'Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction' (2011-2012) CYELS 475; NL Dobson and C Ryngaert, 'Provocative Climate Protection: EU "Extraterritorial" Regulation of Maritime Emissions' (2017) ICLQ 295.

[19] Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community; and ICAO, Assembly Resolution A39-3 of October 2016.

[20] European Commission, *Reducing Emissions from the Shipping Sector* climate.ec.europa.eu.

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

[22] For an overview of the main issues raised by the CBAM under international law: NL Dobson, '(Re)framing Responsibility? Assessing the Division of Burdens Under the EU Carbon Border Adjustment Mechanism' (2022) Utrecht Law Review 162.

[23] I Espa, J Francois and H van Asselt, 'The EU Proposal for a Carbon Border Adjustment Mechanism (CBAM): An Analysis under WTO and Climate Change Law' (WTI working paper 06-2022); I Venzke and G Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' in M den Heijer and H van der Wilt (eds), *Netherlands Yearbook of International Law 2020* (Asser 2022) 187. With respect to the ETS: L Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation' (2012) EJIL 429.

[24] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

erecting discriminatory trade barriers.[25] In their view, the Regulation would generate disproportionately high compliance costs for their producers and exporters (although the Regulation was considered an encouraging step by many environmental NGOs[26]).

Finally and more generally, EU unilateral climate measures have been decried as infringing upon international climate change law as agreed upon in the dedicated multilateral fora. In this respect, a tenet of the international climate change regime which the EU has particularly struggled to comply with in the enactment of its climate action is the principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDRRC).[27] The absence in the EU ETS and CBAM of any differentiation in favour of developing countries and least developed countries in particular (which have contributed minimally to global emissions and lack the resources to decarbonise efficiently) has been highlighted as problematic – and disappointing in light of the alternative proposals that had emerged during the respective adoption processes.[28]

But it is not only unilateral measures that risk hindering EU compliance with its international climate commitments. Notwithstanding the emphasis put by the EU on the inclusion, since 2011, of Trade and Sustainable Development chapters in its bilateral trade agreements with third countries,[29] the effectiveness of these provisions has been limited to date due to several factors and much remains to be done in terms of mainstreaming climate objectives into trade agreements.[30]

Overall, the potentially negative impacts of EU climate policy on the sovereignty and economies of third countries (which are interests protected by the above-mentioned international norms and regimes) are at the centre of a wide and lively political and academic debate. On the other hand, the potentially negative impacts of EU climate action –

[25] WTO – Committee on Trade and Environment, European Union Regulation on Deforestation and Forest Degradation-Free Supply Chains: Communication from Argentina, Brazil, Colombia, Ecuador, Guatemala, Honduras, Mexico, Paraguay and Peru of 10 November 2023, WT/CTE/GEN/33.

[26] WWF, *EU Leaders Seal Deal for Groundbreaking Law to Stop Deforestation* www.wwf.eu; Greenpeace, *Greenpeace's Views on the Commission Proposal for an EU Regulation on Deforestation-Free Products* (Greenpeace 2022).

[27] On the content and legal status of the principle, see L Rajamani, 'Common but Differentiated Responsibilities' in M Faure (ed.), *Elgar Encyclopedia of Environmental Law* (Edward Elgar 2023) 291.

[28] With respect to the application of the EU ETS to aviation: J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) EJIL 469. With respect to the CBAM: NL Dobson, '(Re)framing Responsibility?' cit. 172; I Venzke and G Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities?' cit.; J Bednarek, 'Is the EU Realizing an Externally Just Green Transition? A Short Analysis of The Carbon Border Adjustment Mechanism from the Perspective of the CBDR Principle and the Right to Development of LDCs' (31 October 2022) EJIL: Talk www.ejiltalk.org.

[29] European Commission, *Sustainable Development in EU Trade Agreements* policy.trade.ec.europa.eu.

[30] M Bronckers and G Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) JIEL 25; CAN Europe, *CAN Europe's Position on Trade and Trade Policy* (CAN Europe 2020). M Dupré and S Kpenou, *Making Trade Agreements Conditional on Climate and Environmental Commitments* (Veblen Institute 2023) analyses outstanding issues following a review completed by the European Commission in 2022.

or lack thereof – on the human rights of individuals and groups living in third countries has been the subject of more limited scrutiny.

### II.2. CLIMATE ACTION AND INACTION AND THEIR IMPACTS ON HUMAN RIGHTS

Today it appears somewhat trite to state that climate change is already having and will increasingly have devastating impacts on most – if not all – human rights all over the world, with disproportionately severe consequences for most vulnerable countries and individuals.[31] Nevertheless, discussion of the relationship between climate change and human rights in international legal terms has come relatively late, if one considers that the UN Human Rights Council first addressed the nexus in 2008;[32] while in the context of the international climate change regime, human rights-related references emerged in the 2010 Cancun Agreements[33] and culminated in the much-publicised mention in the preamble of the Paris Agreement.

Thereafter, virtually all UN human rights mechanisms have dealt with the negative impacts of climate change on human rights – from the Office of the UN High Commissioner for Human Rights (OHCHR) to Special Procedures, human rights treaty bodies and the Universal Periodic Review – through a wide array of instruments, including thematic and country reports, studies, debates, resolutions, statements, concluding observations, general comments, and decisions on individual cases.[34] At the same time, the increasingly broad participation of human rights experts and NGOs, as well as of stakeholder groups such as indigenous people, youth and women, in the Conferences of the Parties to the UN Framework Convention on Climate Change (UNFCCC COPs) and in other international fora devoted to the regulation of climate change has considerably contributed to the mainstreaming of human rights in the debates shaping international climate change law.[35]

The growing integration of the two international legal regimes has been compounded by litigation: against the explosion of climate-related cases (by now in the

[31] S Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press 2010); S McInerney-Lankford, M Darrow and L Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (The World Bank 2011); United Nations Environment Programme (UNEP), *Climate Change and Human Rights* (UNEP 2015). See also the dedicated webpage of the Office of the United Nations High Commissioner for Human Rights (OHCHR) www.ohchr.org; and the reports by the Intergovernmental Panel on Climate Change (IPCC), especially the one on *Impacts, Adaptation and Vulnerability* (2022).

[32] Human Rights Council Resolution 7/23 of 28 March 2008 on Human rights and climate change, UN Doc A/HRC/RES/7/23.

[33] Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC COP), Decision 1/CP.16. The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention of 10-11 December 2010, UN Doc FCCC/CP/2010/7/Add.1.

[34] For an overview of the engagement of the UN human rights machinery with climate change, see OHCHR, *Human rights mechanisms addressing climate change* www.ohchr.org.

[35] On the participation of NGOs in UNFCCC COPs, see the statistics published at unfccc.int. On the work of UN human rights mechanisms, see OHCHR, *Integrating human rights at the UNFCCC* www.ohchr.org.

hundreds) before national, regional and international courts and quasi-judicial bodies,[36] a significant trend of human rights-based complaints is emerging.[37] Moreover, human rights-based proceedings are proving to be among the most successful ones – *e.g.*, the cases of *Leghari* in Pakistan,[38] *Urgenda* in the Netherlands,[39] *Neubauer and Others* in Germany,[40] *Generaciones Futuras* in Colombia,[41] and *Billy and Others v Australia* before the UN Human Rights Committee.[42]

Both in multilateral fora and in the context of litigation, the main focus has been on the alleged inaction or insufficient action of States – both in preventing the negative impacts of climate change on human rights through mitigation and, less often, in addressing the impacts bound to materialise nonetheless through adaptation. In other words, the omissive conduct of States in the face of the climate crisis has been at the heart of political and expert debates and court decisions.

Yet, climate action – in the sense of positive conduct by States aimed at mitigating or adapting to climate change – can also have adverse repercussions on human rights. This already emerges clearly from the preamble of the Paris Agreement, which is more well-known as the first reference to human rights in a binding climate change agreement than for its actual content, according to which: "[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights […]".[43]

More generally, there is increasing awareness about the need for the green transition to be a "just" one – *i.e.*, a transition that is fair and inclusive and leaves no one behind.[44] Human rights evidently have a fundamental role to play in this respect, as it is also made clear by the rising trend of so-called just transition litigation, referring to those "cases that

[36] Sabin Center for Climate Change Law, *Climate Change Litigation Databases* climatecasechart.com.

[37] UNEP, 'Global Climate Litigation Report: 2023 Status Review' (UNEP 2023); J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) Transnational Environmental Law 37.

[38] Lahore High Court order of 4 September 2015 *Leghari v Federation of Pakistan*.

[39] Supreme Court of the Netherlands judgment of 20 December 2019 *State of the Netherlands v Stichting Urgenda.*

[40] German Constitutional Court order of 24 March 2021 1 BvR 2656/18 and others.

[41] Colombian Supreme Court decision of 5 April 2018 STC4360-2018.

[42] Human Rights Committee views of 21 July 2022 *Daniel Billy and Others v Australia* CCPR/C/135/D/3624/2019.

[43] On the significance and limitations of the human rights dimension of the Paris Agreement, see B Mayer, 'Human Rights in the Paris Agreement' (2016) Climate Law 109; and C Antoniazzi, 'What Role for Human Rights in the International Climate Change Regime? The Paris Rulebook Between Missed and Future Opportunities' (2021) Diritti umani e diritto internazionale 435, 439 ff.

[44] United Nations Development Programme, 'What is Just Transition? And Why is it Important?' (3 November 2022) UNDP Climate Promise climatepromise.undp.org. For an overview of the current state of the academic debate on just transition, see X Wang and K Lo, 'Just Transition: A Conceptual Review' (2021) Energy Research & Social Science 102291; and H Müllerová, E Balounová, OC Ruppel and LJH Houston, 'Building the Concept of Just Transition in Law: Reflections on its Conceptual Framing, Structure and Content' (2023) Environmental Policy and Law 275.

rely in whole or in part on human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net zero emissions".[45]

Accordingly, both climate inaction and climate action can negatively affect human rights. This suggests, first of all, that the examination of the EU climate policy's compatibility with the organisation's human rights obligations should extend beyond those climate measures that are generally considered in the literature (*i.e.*, unilateral climate regulations and EU trade agreements with climate clauses). Additionally, a number of factors determine that, particularly in the case of the EU, the negative impacts of its climate action and inaction should be considered with respect not only to those individuals living in the EU territory,[46] but also to those living in third countries. Such factors include the considerable EU global environmental footprint[47] (which makes the consequences of inaction or insufficient action particularly severe), the extensive extraterritorial reach of several EU climate measures, and the peculiarities of the EU human rights legal framework (analysed in greater detail in Section IV).

Before delving into the characteristics and implications of extraterritorial human rights obligations in the context of climate change in Section III, the following sub-section shows how EU climate policy specifically can, in practice, negatively affect the rights of individuals and groups living in third countries.

### II.3. EU climate policy and its impacts on the human rights of persons living in third countries

Based on the foregoing, it can preliminarily be said that both EU climate inaction and EU climate action can have harmful human rights consequences outside EU borders. Furthermore, with regard to climate action, this can take the form of both legislative and administrative acts, as well as of acts that are not climate-related in a strict sense but should nonetheless include climate and human rights considerations. Examples taken from the practice are shown for each category with a view to making the illustration more concrete and showing how EU climate action and inaction are already threatening or harming the rights of distant strangers.

It is first of all clear that insufficient climate action by the EU can infringe on multiple human rights of persons living not only in its Member States, but in third countries as well. This is due to the "mismatch" between a country's contribution to climate change,

[45] A Savaresi and J Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) Journal of Human Rights and the Environment 7. See also MA Tigre, L Zenteno, M Hesselman and others, *Just Transition Litigation in Latin America: An Initial Categorization of Climate Litigation Cases Amid the Energy Transition* (Sabin Center for Climate Change Law 2023).

[46] More precisely, the territory of its Member States.

[47] J Scott, 'The Global Reach of EU Law' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 21.

the extent to which it experiences climate change impacts, and its vulnerability to them;[48] something that is particularly apparent in the case of the EU, whose Member States collectively remain among the largest GHG emitters but also among those countries best prepared for climate change negative effects.

These considerations were at the heart of one of the most well-known climate cases brought before the CJEU, the so-called *People's Climate* case, which argued that the EU "grossly inadequate" target of emissions reduction was violating the Union's human rights obligations.[49] The complaint was rejected at first instance and on appeal in light of the restrictive interpretation given by the CJEU to the requirements of "direct and individual concern" (or "direct concern" in the case of acts not entailing implementing measures), which individuals and NGOs need to demonstrate to bring annulment proceedings against EU acts (in accordance with art. 263(4) TFEU).[50] Notwithstanding the rejection of the *People's Climate* case on admissibility grounds, it is noteworthy that among the complainants were a family of Kenyan herders and a family from Fiji relying on farming and fishing, whose livelihoods stand to be gravely affected by climate change.

But it is not only the lack of ambitious action by the EU that can have negative repercussions on persons living in third countries. Ill-conceived climate action can also be the source of adverse human rights impacts, with far-reaching geographical extent. This applies, first and foremost, to EU legislative acts. It has been alleged that the above-mentioned Deforestation Regulation has failed to adequately take into account the rights and interests of smallholder producers and local communities in third countries, who will likely not be able to meet the demanding compliance costs and therefore lose their main source of income.[51] As a further example, the 2018 recast of the Renewable Energy Directive[52] was challenged before the CJEU because of its qualification of forest biomass as a source of renewable energy.[53] The complaint, which failed once again on admissibility grounds, mostly focused on the violation of multiple fundamental rights of EU citizens, but it also included among the applicants a US citizen whose right to property would be infringed by logging activities. Besides, the negative human rights impacts of the emissions produced by bioenergy are not limited to EU citizens.

[48] G Althor, JEM Watson and RA Fuller, 'Global Mismatch between Greenhouse Gas Emissions and the Burden of Climate Change' (2016) Nature (Scientific Reports) 20281.

[49] Case C-565/19 P *Carvalho and Others v Parliament and Council* ECLI:EU:C:2021:252.

[50] L Hornkohl, 'The CJEU Dismissed the People's Climate Case as Inadmissible: The Limit of Plaumann is Plaumann' (6 April 2021) European Law Blog europeanlawblog.eu. For further details on the so-called *Plaumann* test, see below sub-section IV.2.

[51] E Zhunusovaa, V Ahimbisibwea, LTH Senc and others, 'Potential Impacts of the Proposed EU Regulation on Deforestation-free Supply Chains on Smallholders, Indigenous Peoples, and Local Communities in Producer Countries Outside the EU' (2022) Forest Policy and Economics 102817.

[52] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast).

[53] Case C-297/20 P *Sabo and Others v Parliament and Council* ECLI:EU:C:2021:24.

In addition to EU acts of a general nature, EU climate policy can also take the form of administrative acts of individual scope, whose compliance with human rights should also be scrutinised. For instance, the European Investment Bank (EIB) has increasingly sought to position itself as "the EU climate bank" and to, *inter alia*, finance climate change mitigation projects both within Europe and in developing countries.[54] However, some projects supported by the EIB (such as the construction of dams and of geothermal and biomass power plants) have been accused of causing forced displacement, job losses and multiple violations of indigenous peoples' rights.[55]

Acts adopted by the EU in pursuance of its climate policy might also infringe on its procedural human rights obligations in the environmental area – namely the obligations to guarantee access to information, participation in decision-making and access to justice in environmental matters, as deriving from the Aarhus Convention.[56] In this respect, the CJEU has recently found that the Aarhus Regulation (implementing the Aarhus Convention for EU institutions) applies to a decision by the EIB to finance a biomass power plant and, therefore, that the EIB unlawfully refused a request for internal review of that decision submitted by an environmental NGO.[57] While the complaint in question did not include an explicit extraterritorial dimension, the non-discrimination clause of the Aarhus Convention (art. 3(9)) significantly extends the procedural rights that it protects to natural and legal persons in third countries.

Finally, it could also be the case that both climate and socio-economic considerations are not mainstreamed by EU institutions in areas of policy other than the climate one – something which can in turn lead to human rights violations as well as undesired environmental and climate outcomes. In this respect, sustainability impact assessments are expected to play a crucial role; which is why the inability of the European Commission to finalise such an assessment before the conclusion of the negotiations for the EU-Mercosur trade agreement was denounced by several NGOs and censored by the European Ombudsman.[58] Similarly, the European Ombudsman had already found that the lack of

[54] D Mertens and M Thiemann, 'The European Investment Bank: The EU's Climate Bank?' in T Rayner and others (eds), *Handbook on European Union Climate Change Policy and Politics* cit. 68.

[55] CEE Bankwatch Network and Counter Balance, *The EIB's Empty Promises on Human Rights* (CEE Bankwatch Network and Counter Balance 2020).

[56] The EU ratified the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [1998] (so-called Aarhus Convention) in 2005.

[57] Joined cases C-212/21 P and C-223/21 P *EIB v ClientEarth* and *Commission v ClientEarth* ECLI:EU:C:2023:546. The so-called Aarhus Regulation is Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. As mentioned below in sub-section IV.2, the Regulation has been amended in October 2021.

[58] European Ombudsman, Decision of 17 March 2021 in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated "sustainability impact assessment" before concluding the EU-Mercosur trade negotiations. Among NGOs' reports critical of the agreement, see T Fritz, *EU-*

consideration of human rights impacts in the European Commission's impact assessment concerning a free trade agreement with Vietnam constituted maladministration.[59]

## III. From impacts to legal obligations: extraterritorial human rights obligations in the context of climate change

It has been shown that, in general terms, climate action and inaction can have negative impacts on human rights all over the world; and, more specifically, that EU climate action and inaction can impinge on the human rights of individuals and groups living in third countries.[60] The recognition of such factual negative impacts raises complex legal questions and, more specifically, brings forth the thorny issue of whether the EU bears any negative or positive human rights obligation towards distant strangers who are adversely affected by its omissive or positive conduct in the area of climate change.

To answer this question, it is first of all appropriate to give a brief overview of the evolution and current state of the debate regarding extraterritorial human rights obligations in general (sub-section III.1). Thereafter, recent judicial and quasi-judicial developments about the existence and extent of extraterritorial human rights obligations in the area of climate change are analysed, together with outstanding issues and potential obstacles in the way of a wider recognition of these obligations (sub-section III.2). While the case-law examined is premised on legal instruments that are not, as such, binding on the EU, this analysis is considered relevant for the purposes of this *Article* for at least three reasons: *a)* an increasing cross-fertilisation is taking place among international judicial and quasi-judicial bodies, within and without the area of human rights, and the CJEU is not extraneous to this trend;[61] *b)* the ECtHR case-law is of particular significance for the EU legal order, in light of the special relationship between the ECHR and the CFREU on the basis of art. 52(3) CFREU,[62] as well as in light of the obligation for the EU to accede to the ECHR (as enshrined in art. 6(2) of the Treaty on European Union) and of the progress

*Mercosur Agreement: Risks to Climate Protection and Human Rights* (MISEREOR, Greenpeace and CIDSE 2020); and ClientEarth, *EU-Mercosur Association Agreement: Governance issues in the EU trade decision making process* (ClientEarth 2021).

[59] European Ombudsman, Decision of 26 February 2016 in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement.

[60] On EU climate policies and human rights in general, not focusing on the rights of persons living in third countries, see M Hesselman, 'Human rights and EU climate law' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* cit. 259.

[61] E Kassoti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and The ICJ at the Interface' (2015) European Journal of Legal Studies 21.

[62] Art. 52(3) reads as follows: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

that is being made in that direction;[63] and *c)* the EU is bound by customary international law,[64] including in the area of human rights, and the decisions by international courts are "subsidiary means" for the determination of norms of customary international law.[65] The EU (including the CJEU) can, in turn, contribute to the development and identification of customary international law.[66]

### III.1. Extraterritorial human rights obligations: a primer

At the outset, it is useful to highlight that "extraterritorial jurisdiction" has different meanings in general international law and in international human rights law. Whereas in the former context reference is made to the *right* of a State (or international organisation) to govern conducts and events taking place abroad, in the latter what is at stake is the arising of a State's *obligation* in relation to conducts and events taking place beyond its borders.[67] While the two notions are not unrelated and can be both considered an exception to the territorial rule,[68] they have different functions and do not necessarily go hand in hand, as States (and international organisations) can be found to have extraterritorial human rights obligations even when they do not have a legal basis for exercising extraterritorial jurisdiction under general international law.[69]

Indeed, extraterritorial human rights jurisdiction has traditionally been based on the exceptional factual circumstance of a State exercising some form of control over a territory or person outside its borders – the so-called "spatial" and "personal" models of

[63] CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, Report to the CDDH of 30 March 2023, 46+1(2023)35FINAL.

[64] As confirmed by the CJEU itself: *Air Transport Association of America and Others* cit. para. 101. In the literature, see T Konstadinides, 'Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) Yearbook of European Law 513; and T Ahmed and I de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) EJIL 771. In this respect, reference is frequently made to art. 3(5) of the Treaty on European Union: "In its relations with the wider world, the Union shall [...] contribute [...] to the strict observance and the development of international law".

[65] General Assembly Resolution 73/203 of 20 December 2018 UN Doc A/RES/73/203.

[66] F Lusa Bordin, AT Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press 2022).

[67] W Vandenhole, 'The "J" Word: Driver or Spoiler of Change in Human Rights Law?' in S Allen, D Costelloe, M Fitzmaurice and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 413, 415-416; and M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2013) 19 ff.

[68] On the reasons for the historically territorial approach to human rights obligations, S Skogly and M Gibney, 'Introduction' in M Gibney and S Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 1.

[69] M den Heijer and R Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in M Langford, W Vandenhole and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 153.

jurisdiction.[70] Typical examples include, respectively, control over a territory which is militarily occupied; and the authority exercised over specific individuals by diplomatic and consular agents, or during military or police operations abroad.

The ECtHR has arguably developed the most extensive jurisprudence on extraterritorial human rights jurisdiction, when interpreting art. 1 of the European Convention on Human Rights (ECHR), which establishes that States parties "shall secure to everyone *within their jurisdiction* the rights and freedoms" enshrined in the Convention (emphasis added). However, the ECtHR case-law on the matter has been decried as incoherent from various quarters, including by some of its own judges.[71] For all its inconsistencies and constant evolution, the ECtHR case-law on extraterritoriality can be summarised at present as: *a)* being premised on the notion that States' human rights jurisdiction is "primarily territorial"; *b)* recognising that extraterritorial human rights jurisdiction can arise in instances of effective control over an area or physical control over specific individuals abroad (see the examples above of 'spatial' and 'personal' control); and *c)* cautiously carving out further, limited extensions of extraterritorial jurisdiction by referring to alleged "special features" (*e.g.*, with respect to the procedural obligation to investigate uses of lethal force abroad[72]), while steering clear of (re-)statements of principle and political controversies (as seen with respect to situations of active conflict[73]).

The ECtHR is not, at any rate, the only international judicial or quasi-judicial body to have grappled with the legal basis and extent of States' extraterritorial human rights obligations. First and foremost, it should be noted that not all human rights treaties include a "jurisdictional clause" along the lines of art. 1 ECHR – something which prompted the respective monitoring bodies to adopt a rather expansive reading of States parties' extraterritorial human rights obligations, while not completely dispensing with notions of control.

[70] For the view that the ECtHR and the Human Rights Committee have relied on both a factual and legal relationship in interpreting jurisdiction, see H King, 'The Extraterritorial Human Rights Obligations of States' (2009) HRLRev 521. As is shown in this sub-section, extraterritorial human rights jurisdiction is a particularly controversial topic, with respect to which scholars have provided different readings of the – often unsystematic – decisions by regional human rights systems and UN human rights treaty bodies.

[71] ECtHR *Al-Skeini and Others v the United Kingdom* App n. 55721/07 [7 July 2011], concurring opinion of judge Bonello; and ECtHR *Georgia v Russia (II)* App n. 38263/08 [21 January 2021], partly dissenting opinion of judge Pinto de Albuquerque. In the literature, see, among many, C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' (2021) QuestIntlL Zoom-in 31; R Lawson, 'Life after *Bankovic* – On the Extraterritorial Application of the European Convention on Human Rights' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 83; and M Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) EJIL 121. For a different appraisal of the evolution of the ECtHR jurisprudence on extraterritoriality, which denies its incoherence: I Karakaş and H Bakırcı, 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 112.

[72] See, for instance, ECtHR *Güzelyurtlu and Others v Cyprus and Turkey* App n. 36925/07 [29 January 2019]; and ECtHR *Hanan v Germany* App n. 4871/16 [16 February 2021].

[73] M Milanović, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (25 January 2021) EJIL: Talk www.ejiltalk.org.

This is the case, *inter alia*, for the Committee on Economic, Social and Cultural Rights, which oversees a treaty where the international dimension of the realisation of rights is particularly pronounced.[74] And it is also the case for the African Commission on Human and Peoples' Rights, which, among others, established that States imposing an embargo could be found responsible extraterritorially in case of disproportionate actions.[75]

But the presence of a "jurisdictional clause" has not prevented other international courts and quasi-judicial bodies from embracing a broader notion of extraterritorial human rights jurisdiction as well. Both the UN Human Rights Committee and the Inter-American system of human rights (with its Commission and Court)[76] have come to establish extraterritorial "personal jurisdiction" whenever an act of State authority has a negative impact on the rights of a person. More precisely, in the words of the Human Rights Committee with respect to the right to life:

> "a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, *all persons over whose enjoyment of the right to life it exercises power or effective control*. This includes persons located outside any territory effectively controlled by the State whose *right to life is nonetheless affected* by its military or other activities *in a direct and reasonably foreseeable manner*".[77]

[74] As evidenced in the reference to "international assistance and co-operation" in art. 2(1) of the International Covenant on Economic, Social and Cultural Rights: see F Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* cit. 183; and R Künnemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* cit. Conversely, the Optional Protocol to the Covenant refers to jurisdiction when establishing the admissibility conditions for individual communications: "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation [...]" (art. 2).

[75] For an overview of the approaches adopted by the judicial and quasi-judicial bodies of the African human rights system, see L Chenwi and TS Bulto, 'Extraterritoriality in the African Regional Human Rights System from a Comparative Perspective' in L Chenwi and TS Bulto (eds), *Extraterritorial Human Rights Obligations from an African Perspective* (Intersentia 2018) 13; and A Oloo and W Vandenhole, 'Enforcement of Extraterritorial Human Rights Obligations in the African Human Rights System' in M Gibney, G Erdem Türkelli, and others, *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) 140.

[76] On the interpretation of extraterritorial jurisdiction in the Inter-American human rights system, see CM Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* cit. 141; and C Burbano-Herrera and Y Haeck, 'Extraterritorial Obligations in the Inter-American Human Rights System' in M Gibney, G Erdem Türkelli, and others, *The Routledge Handbook on Extraterritorial Human Rights Obligations* cit. 110.

[77] Human Rights Committee, General comment no. 36 of 3 September 2019 on Article 6: right to life, UN Doc CCPR/C/GC/36, para. 63 (emphasis added).

This "control over rights' approach"[78] – as opposed to control over the individual – broadens the scope of extraterritorial human rights jurisdiction and appears to conflict with the much-criticised *Banković* judgment by the ECtHR;[79] although the ECtHR has also on occasion come closer to a more functional concept of extraterritorial jurisdiction by stating that "[the jurisdictional clause] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[80]

The "control over rights" or "impact" test has been further applied and refined by UN treaty bodies and – to a certain extent – the Inter-American Court and Commission, which have increasingly focused on the "*cause-and-effect*" relationship between the control by a State over a harmful activity and the reasonably foreseeable injury caused by that activity extraterritorially; as well as on the reasonable *capacity* of the State to intervene.[81] While this approach has been criticised by some commentators on the basis that it would conflate jurisdiction with the content of obligations (of due diligence),[82] the relevant monitoring bodies do not appear to have reneged on it. It has also been suggested that the ECtHR itself has applied in essence a "cause-and-effect" test on a few occasions, while in principle holding that effective control over territory or person is required.[83]

It is undeniable that these novel tests centred around control over the source of harm and the capacity to prevent or remedy the harm are much more promising for the recognition of extraterritorial human rights obligations in the area of climate change, as opposed to traditional approaches to human rights jurisdiction. Indeed, when climate-related complaints are brought against the EU or developed States, what is argued is that they, as major GHG emitters and in light of their financial resources, have both control over the main sources of harm and the capacity to act to prevent or reduce the harm. It is therefore no surprise that the "cause-and-effect" approach, which has been applied to contexts as different as search and rescue operations at sea and the repatriation of

[78] B Çali, 'Has "Control Over Rights Doctrine" for Extra-Territorial Jurisdiction Come of Age? Karlsruhe, too, has Spoken, Now it's Strasbourg's Turn' (21 July 2020) EJIL:Talk www.ejiltalk.org.

[79] ECtHR *Banković and Others v Belgium and Others* App n. 52207/99 [12 December 2001].

[80] ECtHR *Issa and Others v Turkey* App n. 31821/96 [16 November 2004] para. 71.

[81] As examples of this trend, see IACtHR advisory opinion on the environment and human rights, cit.; *Sacchi and Others v Argentina* cit. (which "endorsed" the IACtHR advisory opinion, see below); and Human Rights Committee views of 4 November 2020 *AS and Others v Italy* CCPR/C/130/D/3042/2017 (and the "twin" case against Malta).

[82] S Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (28 April 2020) ESIL Reflections; and A Ollino, 'The "Capacity-Impact" Model of Jurisdiction and Its Implications for States' Positive Human Rights Obligations' (2021) QuestIntlL Zoom-in 81.

[83] V Tzevelekos and A Berkes, 'Guest Post: Turning Water into Wine – The Concealed Metamorphosis of the Effective Control Extraterritoriality Criterion in Carter v. Russia' (9 November 2021) ECHR Blog www.echrblog.com.

foreign fighters' children from Syria,[84] has recently been referred to in cases related to transboundary environmental harm and climate change.

### III.2. Recent judicial and quasi-judicial developments in the area of climate change

On 15 November 2017, the IACtHR delivered a pioneering advisory opinion on the applicability of the American Convention on Human Rights to environmental harm. While the opinion broke new ground in different areas, its discussion of extraterritorial human rights obligations is of particular importance and relevance to this *Article*:

> "When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises *effective control over the activities that caused the damage* and the consequent human rights violation".[85]

This is arguably the clearest application by an international judicial or quasi-judicial body of a "cause-and-effect" model of extraterritorial human rights jurisdiction. The relevance of such a test to the context of climate change was readily apparent and soon confirmed by the CRC Committee. While rejecting on admissibility grounds the complaints by a group of young people against five States based on the States' failure to prevent and mitigate the effects of climate change, the Committee "noted" the IACtHR advisory opinion and found the "cause-and-effect" test applied there to be the "appropriate test" for the case before it.[86] It further elaborated that "the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location"[87] and that the harm caused through GHG emissions was "reasonably foreseeable" by the defendant States.[88]

The ECtHR has, however, recently rejected such an approach explicitly in *Duarte Agostinho and Others*, one of three much-awaited decisions delivered by the Grand

[84] *AS and Others v Italy* cit. (on search and rescue operations); and CRC Committee decisions of 30 September 2020 *LH and Others v France* CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019 (on the children of foreign fighters in Syrian camps).

[85] IACtHR advisory opinion on the environment and human rights, cit. para. 104(h) (emphasis added). On the innovative jurisdictional test developed by the IACtHR, see ML Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights' (10 May 2018) ASIL Insights www.asil.org; A Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR' (28 March 2018) EJIL:Talk www.ejiltalk.org.

[86] *Sacchi and Others v Argentina* cit. paras 10(5) and 10(7).

[87] *Ibid*. para. 10(10).

[88] *Ibid*. para. 10(11).

Chamber of the Court on 9 April 2024.[89] The complaint was brought by six Portuguese children against 33 States parties and was thus premised on the responsibility of States other than the State of residence of the applicants, while remaining within the "European legal space". The ECtHR first excluded the existence of extraterritorial jurisdiction in that case based on its long-established spatial and personal models; it further ruled out that the "special features" of climate change invoked by the applicants would justify an expansion of extraterritorial jurisdiction.[90] Among others, the Court expressly refused to apply a "control over rights" approach[91] and, with respect to the pronouncements by the IACtHR and CRC Committee referred to by the complainants, maintained that "both are based on a different notion of jurisdiction, which, however, has not been recognised in the Court's case-law".[92] The complaint was therefore declared inadmissible for lack of jurisdiction and, with respect to Portugal, for lack of exhaustion of domestic remedies.

Two pending cases, which have been modelled on *Duarte Agostinho* (as they have been brought by youth against over 30 governments), are bound to meet the same fate.[93] It should also be noted that a case already decided by the Court was centred around the violations of human rights allegedly suffered by individuals with personal ties to the Global South, where the calamitous effects of climate change are already being felt more strongly;[94] but the complaint was dismissed by a committee of three judges on admissibility grounds, without public statement of reasons.

It can therefore be derived that the ECtHR is not willing to change its jurisprudence on extraterritorial jurisdiction in light of the special characteristics of climate change.[95] Those peculiarities where, nonetheless, at the heart of the landmark judgment in the *Klimaseniorinnen* case, which was issued on the same day as *Duarte Agostinho* and found that the Swiss Government had violated art. 8 ECHR (protecting the right to respect for private and family life) because of several deficiencies of the regulatory framework for climate change policy and its implementation.[96] By means of that judgment, the Court

[89] *Duarte Agostinho* cit. The other two cases are ECtHR *Carême v France* App n. 7189/21 [9 April 2024], and ECtHR *Verein Klimaseniorinnen Schweiz and Others v Switzerland* App n. 53600/20 [9 April 2022].

[90] *Duarte Agostinho* cit. paras 180 ff.

[91] *Ibid*. paras 205 ff. The ECtHR referred to this test as "control over the applicants' Convention interests".

[92] *Ibid*. para. 212.

[93] ECtHR *Uricchio v Italy and 31 Other States* App n. 14615/21 pending; and ECtHR *De Conto v Italy and 32 Other States* App n. 14620/21 pending.

[94] ECtHR *Plan B.Earth and Others v the United Kingdom* App n. 35057/22 [13 December 2022].

[95] Contrary to the CRC Committee, which explicitly recognised that "The authors' communication raises novel jurisdictional issues of transboundary harm related to climate change" (*Sacchi and Others v Argentina* cit. para. 10(4)). In the literature, see H Duffy, 'Global Threats and Fragmented Responses: Climate Change and the Extra-Territorial Scope of Human Rights Obligations' in NM Blokker, D Dam-de Jong and V Prislan (eds), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development* (Brill 2021) 62.

[96] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. The Court also found a violation of art. 6 ECHR, as the applicant association's complaint had never been examined on the merits by a domestic court. For some initial comments on the Grand Chamber's trio of decisions, see M Milanović, 'A Quick Take

considerably innovated its jurisprudence on victim status and legal standing and it demonstrated its readiness "to further adapt the approach to [causation] matters, taking into account the special features of the problem of climate change".[97] In so doing, it has likely spurred a new wave of climate litigation within States parties to the ECHR.

Incidentally, the *Klimaseniorinnen* case also tangentially dealt with an extraterritorial aspect – *i.e.*, the so-called "embedded emissions" generated abroad for the production of goods imported to Switzerland;[98] whereas, somewhat symmetrically, the *Greenpeace Nordic and Others* case, also pending before the ECtHR and challenging the decision of the Norwegian government to grant new oil licences, refers extensively to the negative effects of the export of oil from Norway.[99] The fact remains that both cases, while having an extraterritorial dimension, do not engage the responsibility of States towards distant strangers, as all applicants are residents of States parties to the ECHR.

Therefore, at present, different courts and quasi-judicial bodies have offered widely divergent interpretations of the conditions for the extraterritorial human rights jurisdiction of States to arise in the context of climate change. Future guidance from the International Court of Justice and the IACtHR, which have both been asked to issue advisory opinions clarifying States' human rights obligations with respect to climate change,[100] as well as potential developments in national case-law, will provide new insights and hopefully foster inter-court dialogue, although differences are likely to remain given the distinct legal bases.

Certainly, irrespective of the restrictive approach adopted by the ECtHR, a number of issues hinder the definition of States' human rights obligations towards distant strangers in the area of climate change. Even in those contexts that are more open to the recognition of State responsibility in such instances, a first problem relates to the risk of excessive expansion of States' obligations. To assuage these concerns and delimit States' obligations, States themselves in their arguments and courts in their reasoning could rely on the criteria of "reasonable foreseeability" of harmful consequences on the enjoyment of human rights; of "proximity" (in causal terms) between the activity (or omission) and the injury; and of "reasonableness" of the measures required to prevent or mitigate the

on the European Court's Climate Change Judgments' (9 April 2024) EJIL:Talk www.ejiltalk.org; and A Buyse and K Istrefi, 'Climate Cases Decided Today: Small Step or Huge Leap?' (9 April 2024) ECHR Blog www.echrblog.com.

[97] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. para. 440. See paragraphs above and below in the judgment for, respectively, an illustration of the issues related to causation and the application of the "adapted approach" to the circumstances of the case.

[98] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. paras 275 ff.

[99] ECtHR *Greenpeace Nordic and Others v Norway* App n. 34068/21 pending.

[100] General Assembly, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change of 29 March 2023, UN Doc A/RES/77/276; and Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile [9 January 2023]. The request to the International Court of Justice refers to several potential legal bases for States' obligations, including human rights treaties.

harm.[101] While these criteria are neutral per se and have as such been used by individual applicants as well, they can and should be used in order not to stretch the causal link too much or extend States' obligations unfeasibly.

Causation remains particularly problematic in the context of climate change, whose aggregate, non-linear and long-term nature does not sit well with causality tests traditionally applied in judicial proceedings. Nevertheless, progress in attribution science can potentially be a game-changer in this respect[102] and alternative causality tests are being proposed that are more suitable for a situation of collective causation.[103] As mentioned, the ECtHR itself has recently shown flexibility in this respect.

Relatedly, an issue that is crucial in instances where the responsibility of States other than the territorial State (generally, the primary bearer of human rights obligations) is engaged regards concurrent responsibility and the apportionment of reparation. Admittedly, the law of international responsibility is not well-developed as regards the separate conducts of several States contributing to the same indivisible harm.[104] If to this are added the complications of establishing extraterritorial human rights jurisdiction and the unique challenges of climate change (for instance, in terms of the cumulative nature of States' contributions to the injury and of the number of States contributing to the injury), the situation becomes particularly intricate and the relevant practice is very limited.[105]

[101] *Sacchi and Others v Argentina* cit. paras 10(6) ff.; General comment No. 36 cit. paras 7, 22 and 63 (speaking of "direct and reasonably foreseeable impact"); *AS and Others v Italy* cit. para. 7(8) ("the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable"). See also Principles 9(b) and 13 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 28 September 2011.

[102] S Marjanac, L Patton and J Thornton, 'Acts of God, Human Influence and Litigation' (2017) Nature Geoscience 616.

[103] N Nedeski and A Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation' (15 December 2022) EJIL:Talk www.ejiltalk.org; and JH Knox, 'Human Rights Principles and Climate Change' in CP Carlarne, KR Gray and R Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 213, 225 ff.

[104] As opposed to the responsibility of multiple States for the same wrongful act, to which art. 47 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001) is devoted. But see Principle 4 of the Guiding Principles on Shared Responsibility in International Law, drafted by a group of academics: A Nollkaemper, J d'Aspremont, C Ahlborn and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) EJIL 15.

[105] On the ECtHR jurisprudence on concurrent responsibility, referring to the special difficulties raised by cases involving extraterritorial jurisdiction: S Besson, 'Concurrent Responsibilities under the European Convention on Human Rights. The Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 155. On the peculiar challenges that the law of shared responsibility faces in the area of climate change, see J Peel, 'Climate Change' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 1009.

Some elements were provided by the Dutch Supreme Court in the *Urgenda* case, when, in response to the Dutch Government's argument that the Netherlands only minimally contributes to climate change, it held that:

> "Each country is [...] responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. This obligation of the State to do 'its part' is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands".[106]

The ECtHR essentially confirmed this interpretation in the *Klimaseniorinnen* case;[107] and the CRC Committee also came to a similar conclusion in the *Sacchi and Others* case – significantly, in the context of extraterritorial human rights obligations as well.[108]

However, neither the ECtHR (whose judgment was a declaratory one) nor the CRC Committee (due to the findings of inadmissibility) addressed what is arguably the most problematic aspect of concurrent responsibility, namely the allocation of (duties of) reparation. The applicability of the model of "joint and several responsibility", which is common in domestic legal systems and entails that each responsible party can be asked to remedy the whole injury on behalf of all responsible parties, is debated in international law[109] and could lead to unfair (and impossible) outcomes in the area of climate change. Indeed, on that basis, a defendant State (or other entity) could be held responsible for the entire damage caused by climate change, irrespective of the extent of its contribution and without clear avenues of recourse against the other responsible parties.[110] In light of this, in the case of *Lliuya v RWE*, brought by a Peruvian farmer against the German utility giant, the applicant asked the defendant to contribute to the costs that his municipality is going to incur to adapt to the melting mountain glaciers by 0.47 per cent of total costs, namely the estimated contribution of RWE to global historic GHG emissions (the case is

[106] *Urgenda* cit. para. 5(8) (English translation available at climatecasechart.com).

[107] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. paras 441 ff.

[108] *Sacchi and Others v Argentina* cit. para. 10(10).

[109] JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) YaleJIntlL 225. The ECtHR appears to favour an approach based on proportionality, although no principle has been clearly spelt out: M Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) Journal of International Dispute Settlement 361, 378 ff.

[110] On the difficulties of reparation for human rights violations in the context of climate change, see M Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) Climate Law 224; and O Quirico, 'Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation' (2018) Netherlands International Law Review 185, 199 ff.

still pending).[111] Arguably also with a view to avoiding such problems, several human rights-based climate cases filed to date have not asked for reparation.

National and international courts and quasi-judicial bodies will increasingly be confronted with these issues. In this author's view, solutions to them cannot escape a clarification of the relationship between States' obligations under international environmental law (IEL) and international climate change law on the one hand and (extraterritorial) human rights obligations on the other.[112] This is necessary to ensure a harmonious interpretation of different legal regimes and to allow States to comply with all their international obligations. International human rights monitoring bodies have time and again referred to general international law or to other sectors of international law (*e.g.*, international humanitarian law, or the international law of the sea) in interpreting the respective human rights treaties. With specific regard to IEL, the ECtHR has made multiple references to its principles, including the principle of "no harm", the "polluter pays" principle, and the precautionary principle; to the Aarhus Convention; and to EU directives and Council of Europe's conventions on liability for environmental damage.[113] Admittedly, the ECtHR has not consistently done so.[114] Nevertheless, in the *Klimaseniorinnen* case, the Court heavily relied on, among others, UNFCCC-related legal instruments, the Aarhus Convention and the CBDRRC principle to interpret the scope of States parties' obligations as well as the applicants' legal standing. On its part, the IACtHR, with its 2017 advisory opinion, has paved the way for the "systemic interpretation" of States' IEL and human rights obligations.[115] On the other hand, at present, it does not seem that a "rights turn" can be discerned in the abundant case-law of the CJEU addressing environmental matters.[116]

In any case, all these developments and open questions have an important bearing on the potential responsibility of the EU for the negative human rights impacts produced by its climate action and inertia. This is due, in particular, to the influence that the case-law of international courts can have on the interpretation of the CFREU (in relation to which the ECtHR jurisprudence has special value) and of other EU acts, as well as on the

[111] Regional Court of Hamm (Germany), *Lliuya v RWE AG* pending.

[112] On the connection between the IEL-based prevention principle and extraterritorial human rights obligations, see JE Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection?' cit.

[113] For an overview of the references to IEL principles and standards in the ECtHR case-law, see Council of Europe, *Manual on Human Rights and the Environment (3rd edition)* (Council of Europe 2022) Appendix IV in particular.

[114] E Lambert, *The Environment and Human Rights: Introductory Report to the High-Level Conference Environmental Protection and Human Rights* (Council of Europe 2020).

[115] IACtHR advisory opinion on the environment and human rights, cit. para. 125. See paras 123 ff. for the analysis of IEL obligations relevant for the concretisation of human rights obligations in the context of (risk of) transboundary environmental damage. In the literature, see ML Banda, 'Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm' (2019) Minnesota Law Review 1879.

[116] J Krommendijk and D Sanderink, 'The Role of Fundamental Rights in the Environmental Case Law of the CJEU' (2023) European Law Open 616.

identification of possible norms of customary international law, to which the EU is also subjected. In turn, the EU legal framework and the CJEU jurisprudence can help fill some gaps and contribute to the further elaboration of the regime of extraterritorial human rights obligations in the area of climate change.

## IV. Pulling the threads together: the extraterritorial human rights obligations of the EU in the area of climate change

The necessary premise of this Section is that the EU is the bearer of human rights obligations, on the basis of both its internal legal order and international law.[117] The issue is definitively settled by the Charter of Fundamental Rights of the European Union (CFREU). The Charter, which, since the entry into force of the Lisbon Treaty, has the same legal value as the EU treaties, is "addressed to the institutions and bodies of the Union" (and to Member States to the extent that they implement EU law; art. 51(1)).

It is submitted here that the EU legal order, as interpreted by the CJEU, has peculiar features that are of considerable significance when assessing the existence and extent of EU extraterritorial human rights obligations: such features include the extraterritorial applicability of the CFREU and the scope of "extraterritorial acts" (as opposed to "territorial acts with extraterritorial effects") (sub-section IV.1). These elements, combined with the contribution of EU Member States to GHG emissions and the characteristics of the EU climate action, give rise to interesting results in defining the EU extraterritorial human rights obligations in the area of climate change (sub-section IV.2).

### IV.1. Does the EU have extraterritorial human rights obligations?

When discussing the possible existence of extraterritorial human rights obligations incumbent on the EU, reference is generally made to two primary sources of EU law – namely, the Treaty on European Union (TEU) and the CFREU. The first states, in its art. 3(5), that "[i]n its relations with the wider world, the Union [...] shall contribute to [...] the protection of human rights". Art. 21 TEU further includes human rights among the principles and objectives guiding the EU external action; and it stipulates that human rights shall also apply to the "external aspects of [EU] other policies". The CFREU, on its part, is notable for what it does *not* say – *i.e.*, for the fact that it does not include a "jurisdictional clause".

[117] See, among many, T Ahmed and I de Jesús Butler, 'The European Union and Human Rights' cit.; and S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) HRLRev 645. Views differ as to whether the EU can be said to exercise human rights "jurisdiction" in a proper sense or not, but there is agreement in the literature in concluding that human rights obligations are incumbent on the EU: compare S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution?' (2015) Social Philosophy and Policy 244; and O De Schutter, *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework* (European Union 2016) 57.

The legal value and implications of such provisions and omission remain contested. A majority of scholars read the relevant provisions of the TEU and art. 51 CFREU (coupled with the absence of a jurisdictional clause) as indicating that EU institutions and bodies are always bound by the human rights obligations enshrined in the Charter, whenever and wherever they act, including in situations where they act extraterritorially or where their territorial acts have extraterritorial effects.[118] Such a position would find at least indirect support in the CJEU jurisprudence, and specifically in *Front Polisario I*, regarding the validity of a trade agreement between the EU and Morocco to the extent that the agreement applied to the disputed territory of Western Sahara.[119] At first instance, the General Court annulled the decision adopting the agreement on the ground that the Council of the European Union had not examined the potential negative human rights impacts of the agreement on the Sahrawi people, thus *assuming* the application of the CFREU in such a situation.[120] The issue was not addressed on appeal by the Grand Chamber as the agreement in question was interpreted as not applying to Western Sahara.[121] Beyond the *Front Polisario* case, the CJEU has been confronted with actions for damages brought against EU institutions by residents of third countries alleging violations of their human rights. In various such instances, the CJEU did not question the potential responsibility of the EU for extraterritorial conduct or conduct with extraterritorial effects, even though the complaints ultimately failed on other grounds.[122]

Additionally, as far as the specific area of trade and investment is concerned, the 2015 *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* drafted by the European Commission recognise that "[r]espect for the Charter of Fundamental Rights in Commission acts and initiatives is a **binding legal requirement** in relation to both internal policies and external action" (bold in the original text).

[118] See, famously, V Moreno-Lax and C Costello, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' in S Peers, TK Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1657. See also E Kassoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the *Front Polisario* Saga' (2020) European Journal of Legal Studies 117; and V Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?' (EUI Working Paper LAW 2016/10).

[119] On the relevance of the *Front Polisario I* jurisprudence for the extraterritorial application of the CFREU, see E Kassoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights' cit. The complaints in question are part of a broader judicial effort by Front Polisario; for the most recent developments of the '*Front Polisario* saga', see A Carrozzini, 'Working Its Way Back to International Law? The General Court's Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 *Front Polisario v Council*' (7 April 2022) European Papers www.europeanpapers.eu 31.

[120] Case T-512/12 *Front Polisario v Council of the European Union* ECLI:EU:T:2015:953.

[121] Case C-104/16 P *Council of the European Union v Front Polisario* ECLI:EU:C:2016:973. See, for a commentary: V Kube, 'The Polisario Case: Do EU Fundamental Rights Matter for EU Trade Policies?' (3 February 2017) EJIL:Talk www.ejiltalk.org.

[122] Case C-581/11 P *Mugraby v Council and Commission* ECLI:EU:C:2012:466; case C-288/03 P *Zaoui and Others v Commission* ECLI:EU:C:2004:633.

The opposing view was taken by Advocate General Wathelet in *Front Polisario I*, who supported the application of the restrictive ECtHR jurisprudence on extraterritorial human rights obligations. He arguably did so by implicitly relying on art. 52(3) CFREU, according to which "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention".[123]

This author shares the former view, also considering that art. 52(3) rather clearly refers to the interpretation of the content of *substantive* rights (as opposed to jurisdictional conditions); also, the same provision ends by stating that it "shall not prevent Union law providing more extensive protection". The significance attributed to the lack of a jurisdictional clause in other human rights treaties by their respective monitoring bodies and by several scholars would also point in the same direction. While it is true that the TEU and CFREU provisions in question have yet to be fully tested in practice and that appropriate limitations will need to be worked out so as not to burden EU institutions (and Member States) excessively, the EU legal order appears to be particularly supportive of the recognition of extraterritorial human rights obligations.

A related issue which should be also considered concerns the conditions for establishing "extraterritoriality". Indeed, the difference between "extraterritorial acts" and "territorial acts with extraterritorial effects" is far from clearcut in some circumstances. In this respect, the CJEU has shown a certain propensity for qualifying acts with a strong extraterritorial dimension as territorial – *e.g.*, when it found that the directive extending the EU ETS to flights arriving at or departing from EU airports did "not contain any extraterritorial provisions".[124] While referring to the notion of "extraterritorial jurisdiction" as the competence of the EU to regulate (see sub-section III.1 above), such a broad interpretation of what represents a "territorial act" of the EU is bound to have effects on the EU institutions' human rights obligations, also considering that art. 21(3) TEU explicitly extends respect for human rights to the external aspects of EU internal policies.[125]

[123] Case C-104/16 P *Council of the European Union v Front Polisario* ECLI:EU:C:2016:677, opinion of AG Wathelet, para. 271 ("since in this case neither the European Union nor its Member States exercise control over Western Sahara and Western Sahara is not among the territories to which EU law is applicable, there can be no question of applying the Charter of Fundamental Rights there").

[124] *Air Transport Association of America and Others* cit. paras 145 ff. For a critique of the judgment: C Voigt, 'Up in the Air' cit.

[125] L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' cit. The extraterritorial protection of data ensured by EU law can be of inspiration, even though in that area the focus is on the protection of the rights of EU citizens: see M Taylor, 'The EU's Human Rights Obligations in Relation to its Data Protection Laws with Extraterritorial Effect' (2015) International Data Privacy Law 246. But see the groundbreaking judgment by the German Constitutional Court on the right to privacy of non-German citizens abroad in the context of telecommunications surveillance activities: German Constitutional Court judgment of 19 May 2020 1 BvR 2835/17 (for a comment: B Reinke, 'Rights Reaching Beyond Borders: A Discussion of the BND-Judgment, dated 19 May 2020, 1 BvR 2835/17' (30 May 2020) Verfassungsblog verfassungsblog.de).

Accordingly, in the EU context, it might be easier to establish human rights obligations with respect to territorial acts having extraterritorial effects (*e.g.*, the conclusion of trade agreements, the adoption of carbon border policies), as opposed to the ECHR context. Indeed, while the ECtHR did find in the past that it had jurisdiction in instances where territorial acts of the State had extraterritorial effects, the relevant jurisprudence is rather contradictory.[126] The fact remains that a broader notion of 'territorial conduct' does not solve all the issues highlighted in sub-section III.2 above in the area of human rights-based climate litigation; nevertheless, it can potentially defuse the radical exclusion of responsibility based on extraterritoriality.

### IV.2. Enforcing the extraterritorial human rights obligations of the EU in the area of climate change: obstacles and ways forward

The analysis above suggests that the EU context might provide a fertile ground for the recognition of human rights obligations towards distant strangers when designing and implementing climate policies. Firstly, the lack of territorial limitations in the CFREU, coupled with the human rights references in the TEU, would seem to remove the obstacles placed by traditional approaches to human rights jurisdiction. While the CJEU has yet to comprehensively address the issue, the case remains that the CJEU never questioned the extraterritorial applicability of the Charter even though the issue was at stake.

Secondly, notwithstanding their significant extraterritorial effects, the acts that make up the EU climate policy have little in common with the kind of extraterritorial conduct which is at the heart of the ECtHR case-law on spatial and personal control. In this sense, the mentioned trend towards a "territorialisation" of EU acts with an extraterritorial dimension is particularly relevant in the area of climate change. A majority of scholars, the European Ombudsman and the European Commission itself agree that EU institutions have a due diligence obligation to take into account the impacts that trade agreements (and international agreements more generally) with third countries can have on the human rights of persons living in those countries.[127] Such an obligation is essentially centred on territorial

[126] The following two cases are generally mentioned as exemplary of the difficulty to reconcile ECtHR cases on territorial acts with extraterritorial effects: *Kovačić, Mrkonjić and Golubović v Slovenia* App n. 44574/98, 45133/98 and 48316/99 [9 October 2003], admissibility decision; and *Ben El Mahi and Others v Denmark* App n. 5853/06 [11 December 2006], admissibility decision. See L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) EJIL 1071, 1077-1078; *contra*, for an interpretation that reconciles the two cases: A Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' cit. 527 ff. *Non-refoulement* cases have not been mentioned as they concern individuals who are in the territorial State and therefore, in the view of the ECtHR, clearly fall within that State's jurisdiction.

[127] In addition to the Commission's Guidelines mentioned above in sub-section IV.1 and to the European Ombudsman's decisions mentioned in sub-section II.3, see, in the literature: C Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (2018) ICLR 374; P Van Elsuwege, 'The Nexus between the Common Commercial Policy and Human Rights: Implications of the Lisbon

conduct – namely, the decision by the competent EU institutions to conclude the agreement. This model would apply to most EU climate acts mentioned in section II – from the adoption of legislation on deforestation or renewable energy with extraterritorial effects to the decision by the EIB to fund climate projects abroad, to the setting of certain GHG emissions reduction targets or to the decision to contribute to multilateral climate funds.

The example of the due diligence obligation with respect to trade agreements shows that, should EU human rights obligations be recognised by the CJEU towards individuals and groups living in third countries, those obligations would not extend to all aspects of all human rights, whose full enjoyment can only be guaranteed by the territorial State. It has been suggested in the literature that extraterritorial human rights obligations be limited to negative obligations to respect human rights and/or positive obligations of a procedural nature;[128] or to serious violations.[129] In *Neubauer*, a case which alleged the inadequacy of Germany's Climate Protection Act and which included among the applicants individuals residing in Bangladesh and Nepal, the German Constitutional Court held that: "[a] duty of protection vis-à-vis the complainants living in Bangladesh and in Nepal would not in any case have the same content as that vis-à-vis people in Germany. In general, the content of fundamental rights protection vis-à-vis people living abroad may differ from the content of fundamental rights protection vis-à-vis people living in Germany. Under certain circumstances, modification and differentiation are required".[130]

Along similar lines, the ECtHR itself has concluded, with respect to extraterritorial human rights obligations, that ECHR rights can be "divided and tailored" (on the point notably reversing its *Banković* judgment).[131] Accordingly, the content of the obligations incumbent on EU institutions towards distant strangers whose rights are negatively affected by EU climate (in)action can be adapted to the peculiar context and the specific relationship between the individual and the EU; and to what can be *reasonably* required, in such

Treaty' in M Hahn and G Van der Loo, *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon* (Brill Nijhoff 2021) 416; and C Macchi, 'With Trade Comes Responsibility: The External Reach of the EU's Fundamental Rights Obligations' (2020) Transnational Legal Theory 409.

[128] Distinguishing between negative and positive obligations: M Milanović, *Extraterritorial Application of Human Rights Treaties* cit. 209 ff. Focusing on procedural standards: V Kube, 'The European Union's External Human Rights Commitment' cit.; and A Berkes, 'The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies' (2018) Europe and the World: A law review. *Contra*, for the view that the whole spectrum of obligations (both negative and positive) should apply: A Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' cit.

[129] C Ryngaert, 'EU Trade Agreements and Human Rights' cit.

[130] German Constitutional Court order 1 BvR 2656/18 and others cit. paras 176. See paras 173 ff. for the examination of the existence of a duty of protection based on fundamental rights towards applicants living abroad.

[131] *Al-Skeini and Others v the United Kingdom* cit. para. 137; compare with *Banković and Others v Belgium and Others* cit. para. 75. For a criticism of *Banković* on this point and in support of a "gradual approach" to extraterritorial human rights jurisdiction, see R Lawson, 'Life after Bankovic – On the Extraterritorial Application of the European Convention on Human Rights' cit. 120.

circumstances, from the EU.[132] Specifically in the EU context, the CJEU jurisprudence on the protection of the "essence" of CFREU rights (referred to in art. 52(1) CFREU) might play a role in cases with an extraterritorial dimension, as it is happening in data protection cases.[133]

In addition to the relatively "a-territorial" approach of the EU legal order as regards human rights and to the territorial anchoring of EU climate acts, further factors support the recognition of EU human rights obligations with respect to persons living in third countries in the context of the design and implementation of EU climate policy. The expanding tendency of the EU to adopt unilateral climate acts with broad extraterritorial effects strengthens the nexus between the EU act and the potential human rights violations in third countries. In other words, the extension of the EU climate jurisdiction (*i.e.*, its regulation of climate-related conducts and events taking place abroad) can, to a degree, be accompanied by an extension of its human rights obligations, insofar as the causal proximity between the act and the injury is stronger.[134] Also concerning causation, complaints against EU climate acts or inaction could overcome the (already weak) "drop in the ocean" argument,[135] as EU Member States collectively are responsible for a rather well-defined and significant share of GHG emissions. Relatedly, such complaints would also pose less problems in the apportioning of responsibility. Finally, the place that specific principles and rules occupy in the EU legal order and jurisprudence could be interpreted as requiring more decisive climate action – *e.g.*, the precautionary principle[136] and the provision on environmental protection included in the CFREU (art. 37).[137]

That said, a considerable obstacle currently exists to the actual enforcement of these obligations – namely, the stringent admissibility test applied by the CJEU with respect to

[132] "Reasonableness" and assessment *in concreto* are likely to play a role in this "tailoring" operation: C Ryngaert, 'Jurisdiction: Towards a Reasonableness Test' in M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties* cit.

[133] For a critical commentary: M Tzanou, '*Schrems I* and *Schrems II*: Assessing the Case for the Extraterritoriality of EU Fundamental Rights' in F Fabbrini, E Celeste and J Quinn (eds), *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing 2021) 99.

[134] On the connection between the exercise of a lawful extraterritorial competence and the arising of extraterritorial human rights obligations, see H King, 'The Extraterritorial Human Rights Obligations of States' cit. The issue has also been put in terms of legitimacy, with specific reference to the EU and the extraterritorial reach of its prescriptive jurisdiction: "the issue that needs to be addressed is whether it is *legitimate* for the EU to regulate at home with extraterritorial effect without accepting commensurate human rights responsibilities towards those individuals in third countries affected by these regulations" in D Augenstein, 'The Human Rights Dimension of Environmental Protection in EU External Relations after Lisbon' in E Morgera (ed.), *The External Environmental Policy of the European Union EU and International Law Perspectives* (Cambridge University Press 2012) 263, 286.

[135] See above notes 87 and 106 for examples of this argument.

[136] P Craig, *EU Administrative Law* (Oxford University Press 2018, third edn) 694 ff.

[137] Which is, however, formulated as a principle and not as a right: E Morgera and G Marín Durán, 'Article 37 – Environmental Protection' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021, 2nd edn) 1041.

the standing of individuals and NGOs in annulment proceedings pursuant to art. 263(4) of the Treaty on the Functioning of the European Union. The so-called *Plaumann* test, which interprets the requirement of "individual concern" in art. 263(4), was originally elaborated in 1963 and reads as follows: "[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed".[138]

Notwithstanding scholarly criticism and findings of non-compliance by the Aarhus Convention Compliance Committee with respect to environmental cases,[139] the CJEU continues to apply this test, which has so far thwarted attempts at human rights-based climate litigation before the CJEU.[140] In light of this, several commentators have concluded that the CJEU is not, as things stand, a promising forum for eliciting stronger climate action from the EU and its Member States;[141] and complainants have been exploring other avenues (mostly relying on the ECHR and national constitutions), which, however, present their own set of obstacles, especially to individuals and groups living in third countries.

Not all roads to Luxembourg appear to be closed, however. First, it should be recalled that, in October 2021, the Aarhus Regulation was amended and the scope of internal review of administrative acts at the initiative of individuals and NGOs considerably broadened.[142] This has resulted in an increase of requests for review of EU climate-related acts – from the European Commission's delegated acts qualifying economic activities as

[138] Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community* ECLI:EU:C:1963:17.

[139] Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 Concerning Compliance by the European Union; Part I was adopted on 14 April 2011, while Part II was adopted on 17 March 2017. In the literature, see, among many, A Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) CMLRev 191; A Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' (2003) CLJ 72; and P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2020, 7th edn) 540 ff. With specific regard to environmental matters, see M van Wolferen and M Eliantonio, 'Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-Compliance with the Aarhus Convention' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 148; and I Hadjiyianni, 'Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies' (2021) CMLRev 777.

[140] See *Carvalho and Others* cit., and *Sabo and Others* cit.

[141] L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' cit. 1087 ff.; L Hornkohl, 'The CJEU Dismissed the People's Climate Case as Inadmissible' cit.; and J Hartmann and M Willers, 'Protecting Rights through Climate Change Litigation before European Courts' (2022) Journal of Human Rights and the Environment 90.

[142] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006. See, for an analysis of the amendments and their significance: M Hedemann-Robinson, 'Access to Environmental Justice and European Union Institutional Compliance with the Aarhus Convention: A Rather Longer and More Winding Road than Anticipated' (2022) European Energy and Environmental Law Review 175.

"environmentally sustainable" to EIB decisions financing projects. Such requests, in turn, are already giving rise to CJEU proceedings, as complainants whose requests for review were refused by the competent EU institutions and bodies turn to the CJEU for annulling these rejection decisions.[143] Significantly, requests for internal review and related access to the CJEU under the Aarhus Regulation are open to persons living in third countries, although their concrete situation might entail additional barriers in practice.[144] Following the recent heavy reliance by the ECtHR on the Aarhus Convention in *Klimaseniorinnen* and its related extension of NGOs' legal standing in climate change cases, one may also wonder whether the CJEU could take note and finally amend its *Plaumann* test in environment-related cases – but this might be too much of a stretch.

Second, human rights-based climate complaints could be examined by the CJEU through the preliminary reference procedure (art. 267 of the Treaty on the Functioning of the European Union). While representing an indirect and tortuous avenue, essentially dependent on the assessment by national courts, the preliminary reference procedure should not be discarded too easily, considering the remarkable growth of national climate litigation. Such a procedure could, as opposed to actions for annulment brought under art. 263(4), concern legislative acts and acts of general application. Admittedly, this procedure is even less ideal for persons living in third countries. Nevertheless, much will depend on the rules of standing in EU Member States and their openness towards applicants from third countries; as well as on the concrete drafting of the submission. Accordingly, a submission referring, more or less prominently, to the extraterritorial effects of a EU climate act and to the EU "a-territorial" human rights obligations deriving from the CFREU could benefit persons living in third countries, even if the original complaint was not brought by them.

Third, the possibility should not be ruled out that third countries themselves (as opposed to their residents) bring an action for annulment under art. 263(4). While equally non-privileged applicants, and thus having to satisfy the "direct and individual concern" requirement (or "direct concern" requirement in case of regulatory acts not entailing implementing measures), the recent *Venezuela* case confirms that third countries can successfully challenge regulatory acts of general application (in that case, a sanctions regime),[145] although legislative acts would remain out of reach.

[143] In accordance with art. 12(2) of the Aarhus Regulation. See, for a selection of cases, climatecasechart.com. Among cases that have led to the lodging of actions for annulment before the CJEU, see case T-579/22 *ClientEarth v Commission* pending; *Greenpeace and Others v Commission* pending; and *EIB v ClientEarth* and *Commission v ClientEarth* cit.

[144] For an overview of the obstacles encountered by persons living in third countries in challenging EU environmental acts: I Hadjiyianni, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors' (2017) European Papers www.europeanpapers.eu 519.

[145] Case C-872/19 P *Venezuela v Council* ECLI:EU:C:2021:507. For a comment on the significance of the judgment: T Vandamme, '"Practice What you Preach": EU Law Extends to Third Countries the Right to an Effective Legal Remedy' (12 January 2022) European Law Blog europeanlawblog.eu.

Fourth and finally, Member States and EU institutions can bring wide-ranging actions for annulment, including of legislative acts, as privileged applicants. While this avenue has long been considered unlikely in the area of climate action, Austria has recently asked for the annulment of the Commission's delegated regulation that qualifies certain activities relating to nuclear energy and gas as "environmentally sustainable".[146] Austria based its submission, among others, on the lack of impact assessment and public consultation as well as on the precautionary principle. It is not implausible that, also depending on the outcome of the case, further complaints might be submitted by more climate-sensitive Member States and EU institutions. Whereas this kind of cases would only indirectly benefit persons living in third countries, they have the advantage of being able to address legislative acts as well and giving the CJEU a role in scrutinising the EU climate policy, including based on human rights.

A further possibility in the future might be for individuals and NGOs to bring human rights-based proceedings against EU climate action or inaction not to Luxembourg, but to Strasbourg – once the EU finally accedes to the ECHR. However, while this avenue might circumvent the current obstacles to the legal standing of individuals and NGOs in actions for annulment before the CJEU, as it has been shown the ECtHR has to date maintained its restrictive stance on extraterritorial human rights jurisdiction, so that it cannot be considered a useful forum for distant strangers at present. The matter is different for persons living in EU countries (although further issues might arise): a situation that can potentially benefit distant strangers as well, should more ambitious climate action be required from the EU and its Member States.

## V. Conclusion

It has long been argued that human rights would not represent the most appropriate means to address the insufficient or ill-conceived climate action of States and international organisations. Among the main reasons is precisely the misalignment between traditionally territorial human rights obligations and the global nature of climate change negative effects, with the most devastating of such effects being felt primarily by persons living in developing countries. In this respect, climate change is clearly one of those global challenges that put to the test long-established distinctions between territoriality and extraterritoriality, making them essentially obsolete.[147] Accordingly, human rights scholars have come up with more or less radical proposals for overcoming paradigms centred on

[146] Case T-625/22 *Austria v Commission* pending.

[147] H Duffy, 'Global Threats and Fragmented Responses' cit.; and SL Seck, 'Moving Beyond the E-Word in the Anthropocene' in DS Margolies, U Özsu, M Pal and N Tzouvala, *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019).

territory and physical control, by referring to notions such as universality and "common concern of humankind".[148]

The practice is, as it often happens, steering a middle course between the irrelevance of human rights and their overhaul. Undeterred by the difficulties inherent in using human rights to tackle climate change and States' responses to it, individuals and NGOs (as well as, notably, States themselves through advisory opinions) have given rise to an ever-growing trend of human rights-based climate litigation. Courts and quasi-judicial bodies are, on their part, finding novel ways to apply human rights to new phenomena, thus testifying to human rights' enduring relevance and ability to evolve, as well as to the accessibility of the related mechanisms compared to other avenues.

In this context, the human rights obligations of the top State emitters towards individuals and groups living in developing countries are increasingly put to the fore of the public debate and even of multilateral climate negotiations; and they have also found their way in judicial and quasi-judicial proceedings. The decisions on the subject by the IACtHR and CRC Committee have significant potential in innovating one of the shakiest pillars of the human rights framework (*i.e.*, jurisdiction) and making it suitable to today's challenges, building on – rather than revolutionising – past decisions. However, the ECtHR has recently refused to embrace such an approach in the handling of its climate docket. The state of affairs risks leaving an accountability gap in Europe, a continent whose climate action and inaction still has a considerable impact on the rest of the world.

Against this background, this *Article* has shed light on the extraterritorial human rights obligations of EU institutions in the area of climate change – a topic which has received very little consideration to date. On the one hand, the significance of EU climate action and inaction is undeniable: EU Member States collectively remain among the largest GHG emitters; the primary climate targets and measures are being adopted at the EU level; and the measures in question increasingly have an extraterritorial reach (in other words, the prescriptive jurisdiction of the EU in the area of climate change is expanding). On the other hand, the protection of human rights in the EU legal order has special features, which are particularly significant with respect to the EU external action and its internal action with external effects. Accordingly, human rights obligations would seem to accompany the exercise of EU competences, rather than the being limited by territorial boundaries. While the CJEU has yet to comprehensively address the human rights obligations of the EU towards persons living in third countries, including in the area of climate

[148] V Bellinkx, D Casalin, GE Türkelli and others, 'Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind' (2022) Transnational Environmental Law 69; W Scholtz, 'Human Rights and Climate Change: Extending the Extraterritorial Dimension via the Common Concern' in W Benedek, K De Feyter, MC Kettemann and C Voigt (eds), *The Common Interest in International Law* (Intersentia 2014) 127; and D Palombo, 'Extraterritorial, Universal, or Transnational Human Rights Law?' (2023) Israel Law Review 92 (referring, in addition to universality, to transnationality).

change, the promise that the EU legal order holds in removing increasingly anachronistic distinctions based on territory does not appear to have been sufficiently highlighted.

Well aware of the difficulties that individuals and NGOs still experience in accessing the CJEU, this *Article* has identified ways in which the CJEU might still be called upon to scrutinise EU climate action. It has also shown how the outcome could be favourable to the extension of EU human rights obligations beyond its Member States' territories and, consequently, to stronger climate action; and why, therefore, EU institutions should take extraterritorial human rights obligations seriously.