TRANSNATIONAL CLIMATE LITIGATION: EMERGENCE AND LIMITS OF A DIAGONAL PROTECTION OF FUNDAMENTAL RIGHTS

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Abstract

There is a growing body of climate litigation cases that are *strictu sensu* transnational, directed against foreign corporations or foreign governments. In some cases, courts adopted an approach open to reconsider well established principles: in the *Neaubauer* case, the German constitutional court did not rule out the responsibility of Germany in fulfilling its positive obligations to protect fundamental rights of foreign citizens, while the Inter-American Court on Human Rights and the UN Committee on the Rights of the Child opened to the possibility of diagonal human rights protection in climate litigation. In the recent *Duarte* case, the ECHR declared inadmissible the complaint directed by some Portuguese youths against States other from Portugal, limiting the recognition of the extraterritorial protection of fundamental rights. Climate transnational litigation shows how climate change continuously challenges old legal paradigms, fostering the need for adapting existing instruments and building new ones.

TABLE OF CONTENTS

1. Transnational climate litigation: the perspective of research

In the last decade, climate litigation has been growing steadily in number, scope, and impact[1]. As of 2023, more than 2300 cases of climate litigation have been reported, of which around two thirds have been filed since 2015[2]. The scope of climate litigation has also widened, encompassing not only cases intended to challenge the lack or adequacy of governments' action to address climate change, or the responsibility for damages caused by corporate actors, but also a variety of complex legal claims, such as those concerning just transition cases and climate washing ones[3]. Such trend is expected to increase in the next years and to gain momentum, in the aftermath of the *Klimaseniorinnen* case, ie. the first case in which the European Court of Human Rights (ECHR) condemned a State – Switzerland – for its failure to fulfill its positive obligations to protect individuals within its jurisdiction from the adverse effects of climate change on their life and health, hence violating their right to private life protected under art. 8 ECHR[4].

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[1] J. Peel & H.M. Osofsky, *Climate Change Litigation*, 16 Ann. Rev. Soc. Sci. 21 (2020); W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021).

[2] J. Setzer & C. Higham, *Global trends in climate change litigation: 2023 Snapshot*, 2023, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf. Statistics are regularly updated in the climate litigation databases of the Grantham Research Institute at LSE and Sabin Centre at Columbia.

[3] See I. Alogna, *Increasing Climate Litigation: A Global Inventory*, 1 French Y.B. Pub. L. 101 (2023).

[4] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz and Others V. Switzerland*, Application no. 53600/20, 9 April 2024. For a first comment, see M.A. Tigre & M. Bönnemann, *The Transformation of European Climate Change Litigation:*

Climate litigation is having a tremendous impact in advancing the objective of mitigation, as it responds to States' failures to protect their citizens from the threat of climate change[5] and to their lack of compliance with international commitments[6]. Moreover, climate litigation cases foster the public's awareness on the climate emergency[7].

Besides its practical impact, climate litigation raises a number of theoretical legal challenges[8]. For example, even if at the origin of this phenomenon lies the governments' lack of effective action and delay in the implementation of international commitments, a highly contested conundrum is the one of the scope and limits of the courts' review on such action or inaction[9]. In other words, the intervention of the courts in this area challenges one of the founding principles of modern constitutionalism, *i.e.* the separation of powers[10].

Introduction to the Blog Symposium, 9 April 2024, https://blogs.law.columbia.edu/climatechange/2024/04/09/the-transformation-of-european-climate-change-litigation-introduction-to-the-blog-symposium/. For some preliminary remarks on the three climate litigation cases decided by the ECHR 9 April 2024, see Section 4.

[5] H.M. Osofsky, *The continuing importance of climate change litigation*, 1 Climate L. 3 (2010), and C.P. Carlarne, *The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis*, in B. Mayer & A. Zahar (eds.), *Debating Climate Law* (2021), 113. For a more critical viewpoint, see G. Dwyer, *Climate Litigation: A Red Herring among Climate Mitigation Tools*, in *op.ult.cit*.

[6] S. Maljean-Dubois, *Climate Change Litigation*, Max Planck Encyclopedias of International Law (2018).

[7] J. Peel & H.M. Osofsky, *Climate Change Litigation. Regulatory Pathways to Cleaner Energy* (2015), 10 and 233.

[8] S. Simou, *The emergence and potential of climate change litigation: methodological and theoretical legal challenges*, 35 Eur. Rev. Pub. L. 145 (2023).

[9] M. Payandeh, *The role of courts in climate protection and the separation of powers*, in W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021); see also C. Voigt, *Introduction Climate Change As A Challenge For Global Governance, Courts And Human Rights*, in *op. ult. cit.*, at 15. I have discussed elsewhere what standard of review would be more appropriate for the courts to follow, in order to square the circle with the separation of powers principle: see M. De Bellis, *Adjudicating Climate Change (In)action from Urgenda to Neubauer: Minimum Reasonableness and Forward-Oriented Proportionality*, 35 Eur. Rev. Pub. L. 213 (2023).

[10] On the separation of powers in general, see C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (2013); E. Carolan, *The New Separation of Powers: A Theory for the Modern State* (2009); J. Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. Rev. 433 (2013).

The magnitude of the challenges that climate litigation raises is not isolated. Climate change, in itself, raises a number of theoretical and normative challenges for law in general, and public law more specifically[11].

This article will focus on one type of climate litigation, ie. transnational climate litigation. In a broad sense, all climate litigation is transnational, as it plays a diagonal regulatory role, involving vertical and horizontal governance simultaneously[12]. From this perspective, climate litigation can be understood as a transnational legal process as it breaks the dichotomy between the domestic and the international, the public and the private, being, on the contrary, multiscalar and multiactor[13]. Additionally, climate litigation is explicitly transnational in its impact, as the agenda of the plaintiffs – even when the case is before a domestic court and involves exclusively domestic litigants – is usually the one of producing spillover effects, in terms of cross fertilization and imitation, well beyond the jurisdiction where one specific case takes place[14]. Under a *strictu sensu* understanding, however, transnational litigation involves a foreign plaintiff, or a defendant located outside the jurisdictions of the court[15]. While in the past climate claims *strictu sense* transnational were limited[16], recently there has been a growing trend of such cases[17].

The reasons behind the trend toward the growth of climate litigation *strictu sensu* transnational can be easily understood. First of all, climate change is, for its very nature, a transboundary phenomenon. Second, the increasing number of climate litigation cases show that some jurisdictions can present a more favorable law for the applicants than others. Such mismatch between venues and instruments for protection can fuel attempts from individuals or

[11] J.-B. Auby & L. Fonbaustier, *Climate Change and Public Law Dossier: Introduction*, 1 French Y.B. Pub. L. 25 (2023).
[12] H.M. Osofsky, *Is Climate Change International - Litigation's Diagonal Regulatory Role*, 49 Va. J. Int'l L. 585 (2009), 631.
[13] Ivi, 634-6.
[14] J. Peel & J. Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 Am. J. Int'l L. 679 (2019), 696.
[15] In a similar sense, see Y. Marique, *"Transnational" Climate Change Law. A case for reimagining legal reasoning?*, 1 French Y.B. Pub. L. 69 (2023).
[16] J. Peel & J. Lin, *Transnational Climate Litigation*, cit. at 1, 696 and M.L. Banda & S. Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 Envtl. L. Rep. 101 (2017).
[17] I. Alogna, *Increasing Climate Litigation: A Global Inventory*, cit. at 3, 119.

organization in one jurisdiction to seek a favorable judgment before the Courts of a different jurisdiction. For instance, nationals of highly affected territories – for example, islands - could have an interest in filing a case before Courts of the global North.

What type of transnational climate cases are emerging in the practice? Against corporation or against States? Within which type of procedures? What are the legal obstacles and what are the perspectives?

After mapping the field of transnational climate actions within the more general landscape of climate litigation (Section 2), the article analyses the openings that can be traced within recent case law in favor of the recognition of the duty of a State to protect the fundamental rights of a foreign individual, in the context of a climate litigation case (Section 3). These openings can be traced both in a judgment of national constitutional Court (ie. the German Federal Constitutional Court (FCC) in the *Neubauer et al. v. Germany* case: Section 3.1), in the opinion given by an International Court (ie. the opinion of the Inter-American Court on Human Rights (IACtHR): Section 3.2) and in the decision of the United Nations Committee on the Rights of the Child (CRC) in the *Sacchi and Others* case (Section 3.3). On the other hand, though, the ECHR has recently declared inadmissible a case in which six Portuguese youths had challenged thirty-two States, in addition to Portugal, limiting the recognition of the extraterritorial protection of fundamental rights (Section 4). The reasonings followed in these cases present some common starting points, but also diverging outcomes; possible reconciliations and future perspectives, however, can be suggested (Section 5).

2. A typology of transnational climate actions

Within the academic legal literature, the very definition of climate litigation is discussed. Some authors limit their analysis to "any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts"[18]. This definition, however, appears too narrow, as it would exclude cases that, albeit

[18] D. Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 Env'y L. Rep. 10644 (2010), 10647.

being motivated by concerns on climate change, base their claims on different grounds, such as, for instance, energy plants' contribution to air pollution[19]. For purposes of this article, the definition of climate litigation as including "cases before judicial and non-judicial bodies that involve material issues of climate change science, policy or law" will be used, as encompassing a broader variety of cases[20] .

As recalled at the outset, the types of climate litigation cases have been evolving over time. The main distinction is the one between cases in which litigants intend to promote climate change regulation (so-called pro-regulatory litigation) and cases in which claimants seek to oppose existing regulation or regulatory efforts (so-called anti-regulatory cases)[21]. Recently, however, it has been suggested to replace such distinction with the one between Climate-aligned and Non-climate aligned cases[22], with the purpose of including in the first category not only anti-regulatory cases, but also just transition ones, ie. cases that do not oppose climate regulation in itself, but some specific consequences that such regulation can produce (for example, the impact on occupation[23]).

Other differences concern the type of claimants and defendants: while pro-regulatory cases are usually brought by individuals, NGOs, or both acting together, defendants can be corporations or governments (the first case being more common in the United States, and the second one outside)[24]. Correspondingly, also the type of strategy varies, as claims against governments can be directed to challenging the governments' climate targets and to increasing the ambition of such action, seeking higher greenhouse gases (GHG) reductions, while cases against corporations can be directed to disincentivizing high-emitting activities and seeking compensation.

Several transnational climate change actions have been brought by foreign plaintiffs against corporations. In the case *Lilyua*

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[19] J. Peel & H. M. Osofsky, *Climate Change Litigation*, cit. at 1, 6.
[20] J. Setzer & C. Higham, *Global trends in climate change litigation*, cit. at 2, 6.
[21] C. Hilson, *Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)*, in F. Fracchia & M. Occhiena (eds.), *Climate Change: La Risposta del Diritto* (2010).
[22] J. Setzer & C. Higham, *Global trends in climate change litigation*, cit. at 2, 7.
[23] A. Savaresi & J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, 13 J. Hum. Rts. Env't 7 (2022).
[24] J. Setzer & C. Higham, *Global trends in climate change litigation*, cit. at 2, 11-2.

vs. RWE[25], a farmer from Peru sued RWE, the largest electricity producer of Germany, before the District Court of Essen, Germany. The claimant argued that RWE had contributed, due to its high emission of GHG, to the melting of the glacier Palcacocha, located close to the town where he lived, and asked the court to order the company to bear a share of his adaptation costs (specifically, the costs incurred for setting up flood protection), or, alternatively, asked compensation for the damages. The share of the costs to be reimbursed was identified in the percentage of 0.47%, equal to RWE estimated contribution to global industrial GHG emissions. While the District Court dismissed the case in 2016, the appeal court – the Higher Regional Court of Hamm – declared the case to be admissible and released an order to the parties to submit evidence. The case is currently pending.

A similar case is the *Asmania vs. Holcim* one, filed in 2022 and also pending, in which four inhabitants of the Indonesian island of Pari, supported by three NGOs, sued the Swiss-based cement producer Holcim, before a Swiss Court, under Swiss civil law[26]. As in the RWE case, the claimants seek compensation for damages and financial contribution for adaptation measures; in addition, they are asking for a reduction of CO2 emissions[27].

In *Union Hidalgo vs. EDF France*, a Mexican indigenous community (Union Hidalgo) challenged the project of the French electricity company Electricité de France (EDF) to construct a wind farm – named Gunaa Sicarù – on a land possessed by such indigenous community in the state of Oaxaca, in Mexico[28]. The claim concerned a lack of consultation of the indigenous community in the authorization procedure (more specifically, their

[25] District Court Essen, *Luciano Lliuya vs. RWE AG*, 15 December, 2016, and Higher Regional Court of Hamm, *Luciano Lliuya vs. RWE AG*, Indicative Court Order and Order for the Hearing of Evidence, 30 November 2017, and Order of 7 January 2021, unofficial translations in English available at: https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/. For a comment, see P. Semmelmayer, *Climate Change and the German Law of Torts*, 22 German L.J. 1569 (2021).

[26] See https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/.

[27] By 43% by 2030, and and by 69% by 2040, compared to 2019.

[28] Z. Brémond, *Corporate Duty of Vigilance and Environment: Some Lessons Drawn from the EDF and the TotalEnergies Cases*, VerfBlog (6 April 2023), https://verfassungsblog.de/corporate-duty-of-vigilance-and-environment/.

right to free, prior and informed consent (FPIC))[29], hence falling within the typology of "just transition" cases, not intended to oppose regulatory action, but contesting its impact on other rights, such as, in this case, the right of indigenous communities. After a failure to find a settlement before the French National contact point, Union Hidalgo and two NGOs started a lawsuit before a civil court in Paris. In the meantime, the energy Ministry of Mexico cancelled the contract with EDF[30]; however, the action, intended to ascertain whether a violation of the French law on the duty of vigilance was involved, is pending[31].

The transnational litigation cases listed above include actions taken by foreign plaintiffs against corporations, before tribunals of the jurisdiction of the latter. A different pattern emerges in the *Envol Vert vs. Casino*, in which a number of NGOs based in France or elsewhere sued the French supermarket chain Casino before a French Court, challenging its responsibility for the violation of its duty of vigilance on the activity undertaken by its subsidiaries in Brasil and Colombia, which caused environmental damages in those countries[32].

While all these cases involve corporations, hence being relevant for public law only as a source of possible spillover in the elaboration of principles on causality and responsibility (particularly relevant in cases such as the one involving EDF, a publicly-owned company), in other transnational cases the plaintiffs addressed the responsibility for the breach of their fundamental rights by foreign governments. The cases that will now be examined include *Neubauer et al. v. Germany*, in which the Federal Constitutional Court of Germany examined, *inter alia*, the admissibility of foreign nationals' complaints within constitutional proceedings; the opinion of the Inter-American Court on Human Rights (IACtHR), in which the international court expressed an opening to 'diagonal' human rights obligations; the decision of the United Nations Committee on the Rights of the Child (CRC), in the

[29] https://www.oecdwatch.org/complaint/union-hidalgo-vs-edf-group/.
[30] Such cancellation was followed by a declaration of nullity of the contracts by the Tribunal Agrario de Oaxaca: https://www.business-humanrights.org/en/latest-news/mexico-agrarian-tribunal-declares-nullity-of-lease-contracts-of-11-community-members-of-uni%C3%B3n-hidalgo-regarding-wind-farm-owned-by-renovalia-energy/
[31] *A la cour d'appel de Paris, une nouvelle chambre pour mieux traiter les contentieux environnementaux liés aux grandes entreprises*, in *Le Monde*, 5 March 2024.
[32] See https://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/.

Sacchi and Others case, following the notion of extraterritorial jurisdiction elaborated by the IACtHR; lastly, the decision *Duarte & others*, with which the ECHR declared the claim of six Portuguese youth against States different from Portugal to be inadmissible.

3. The emergence of the protection of 'diagonal' fundamental rights

3.1. The admissibility of foreign national complaints within Constitutional proceedings: *Neubauer, et al. v. Germany*

The judgment of the Federal Constitutional Court (FCC) of Germany originated from four different complaints, the first of which was lodged in 2018, when a number of German young individuals and two German NGOs alleged a failure to take action to counter climate change from the German legislature, hence infringing the State's duties to protect the rights to dignity, to life and to physical integrity of its citizens[33]. As, in December 2019, the Federal Climate Protection Act was adopted, the first constitutional complaint was changed. The complainants alleged that such act did not alter fundamentally their complaint, as the national climate targets and the annual emission amounts allowed under such act were insufficient in order for Germany to do 'its part' in meeting the legal obligation under the Paris agreement to limit the increase in the global average temperature well below 2° C and preferably to 1.5° C, and that it did not contain a reduction path after 2030[34].

At the same time, three other groups of claimants lodged a complaint against the Federal Climate Protection Act: two environmental associations, other individuals from Germany and – what matters the most for purposes of this article – individuals from Bangladesh and Nepal.

The parameters invoked by the claimants were generally the constitutional provisions protecting the fundamental rights to

[33] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Neubauer et. al. vs. Germany*, Mar. 24, 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, available at http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/, para. 39.

[34] Complaint, 2 June 2020, 7 and 10, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint-1.pdf.

dignity, to life and to physical integrity (articles 1 and 2 of the German constitution (*GrundGesetzt* (GG)), read in conjunction with art. 20a, according to which the state shall protect the natural foundations of life and animals by legislation, taking into account also its responsibility towards future generations. Some also claimed a violation of the fundamental right to property (art. 14). The FCC decided to rule jointly on these complaints.

The outcome of the decision has been momentous[35]. The FCC rendered its judgment on the basis of the State's both negative and positive obligations to protect the fundamental rights of its citizens.

On the one hand, there is a positive obligation for the Government, stemming from its general duty to protect the fundamental rights to life and physical integrity, «to maintain minimum ecological standards that are essential for fundamental rights, thereby making it obligatory to afford protection against environmental degradation "of catastrophic or even apocalyptic proportions"»[36]. However, in the Neubauer case no infringement of this positive obligation was assessed[37], as the Federal Constitutional Climate Act was not considered «manifestly unsuitable» for the protection goals, as the goal of climate neutrality by 2050 and the interim goal of 55% reduction by 2030 that the German law identifies are consistent with the goal of limiting the increase of the temperature to well below under 2° and preferably 1.5° compared to pre-industrial levels set in the Paris agreement[38].

On the other hand, though, it is from the point of view of the negative obligations not to restrict freedom that the FCC found the Climate law to be unlawful. As the Federal Constitutional Climate Law postpones significant GHG reduction burdens to the post-2030 period, it produces an «advance interference effect» on future freedom, ie. the restrictions to freedom that will be necessary in the

[35] See the Special Issue edited by V. Casado Pérez & E. Orlando, 22 German L.J. 1387 (2021), and in particular A. Buser, *Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity–The German Constitutional Court's Climate Decision*, 22 German L.J. 1409 (2021), at 1414-7; J. Peel & R. Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, 22 German L.J. 1484 (2021); L. J. Kotzé, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, 22 German L.J. 1423 (2021). See also T. Gross, *Climate change and duties to protect with regard to fundamental rights*, 35 Eur. Rev. Pub. L. 81 (2023).

[36] FCC, *Neubauer*, cit. at 33, para. 114.

[37] FCC, *Neubauer*, cit. at 33, paras. 115 and 149-172.

[38] FCC, *Neubauer*, cit. at 33, paras. 155-164.

future are «already built into the generosity of current climate legislation»[39]. Post 2030, mitigation efforts will then be necessary, and the actions that will have to be taken will place complainants under enormous strain, jeopardizing their freedom protected by fundamental rights. As a result, the Federal Constitutional Climate Law produces an «advance interference effect» on future freedom, hence violating the fundamental rights of the claimants, and in particular the State's negative obligation not to restrict freedom in a disproportionate way[40].

The central doctrinal legal novelty has rightly been considered to be the construction of the obligation to protect the freedom of the future[41], or the «intertemporal guarantee of freedom»[42]. Additionally, the use made by the German FCC of the proportionality principle is innovative, as, in the balancing and accommodating conflicting interests that constitutes its founding, it is here shaped as a «forward looking exercises», which needs to take into account the duty to protect future generation, and as it tends to affirm the growing weight that will be given to climate action in any balancing exercise entailed in the proportionality principle[43].

For purposes of this article, however, what matters the most is the way the FCC has treated the complaints from the individuals living in Bangladesh and Nepal. Such complaints were considered admissible and the claimants were recognized standing, as the Court argued that it could not be «ruled out from the outset» that the State would have a duty to protect their fundamental rights to life and physical integrity against the impact of climate change[44]. On the contrary, according to the FCC, «While Art. 1(3) GG makes fundamental rights binding on the German state, *it does not explicitly restrict this binding effect to German territory*. Rather, the binding

[39] FCC, *Neubauer*, cit. at 33, paras. 120.
[40] FCC, *Neubauer*, cit. at 33, paras. 116 and 182.
[41] A. Buser, *Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity*, cit. at 35, 1417. Considering it as an innovative legal argument, see also J. Peel & R. Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, cit. at 35, 1484.
[42] V. Casado Pérez & E. Orlando, *Introduction*, cit. at 35, 1389.
[43] M. De Bellis, *Adjudicating Climate Change (In)action from Urgenda to Neubauer: Minimum Reasonableness and Forward-Oriented Proportionality*, cit. at 9, 237.
[44] FCC, *Neubauer*, cit. at 33, paras. 90 and 101.

effect of the Basic Law's fundamental rights on German state authority is *comprehensive*» (italics added) [45].

In examining the merit of the case, the FCC clarifies that the specific protections afforded by fundamental rights and their scope abroad may vary, depending on specific circumstances, and that «The circumstances under which fundamental rights may be invoked as the basis for establishing duties of protection vis-à-vis people living abroad have yet to be fully clarified»[46]. Hence, there is an opening to a State's duty of protection towards individuals living in a different State – even if not equal to the one concerning individuals living in Germany –; an opening which, as has been stated, «could be of immense significance in future cases where the only way to overcome global problems is international cooperation[47].

The FCC has further specified that the duty of fundamental rights protection that the German State has vis-à-vis individuals living in a country other than Germany «could not have the same content» as the duty toward individuals living in Germany[48].

More specifically, such different content is clarified by the FCC, taking into account the two different sets of measures that a State can adopt in order to fulfil the duty to protect rights from the consequences of climate change, ie. mitigation and adaptation measures. Limitations are identified, in particular, as for the second set of measures, given the lack of power of the German State to adopt adaptation measures outside the German border[49].

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[45] FCC, *Neubauer*, cit. at 33, para. 175.

[46] FCC, *Neubauer*, cit. at 33, para. 175.

[47] M. Goldmann, *Judges for Future: The Climate Action Judgment as a Postcolonial Turn in Constitutional Law?*, VerfBlog (30 April 2021).

[48] FCC, *Neubauer*, cit. at 33, para. 178.

[49] FCC, *Neubauer*, cit. at 33, para. 178: «However, with regard to people living abroad, the German state would not have the same options at its disposal for taking any additional protective action. Given the limits of German sovereignty under international law, it is practically impossible for the German state to afford protection to people living abroad by implementing adaptation measures there ([...]). Rather, it is the task of the states concerned to select and implement the necessary measures. Whereas steps such as minimising the further development of open spaces, restoring, unsealing, renaturing and reforesting suitable areas, and introducing resilient plant varieties are generally feasible at the domestic level, the German state clearly cannot implement such measures abroad. This is illustrated by examining some of the adaptation measures considered by the IPCC to be viable and necessary worldwide […]. These particularly include the modification of existing infrastructure in order to provide better protection

Even if in this specific case the claims of the foreign individual were dismissed, as no infringement of the German State of its positive duty to product fundamental rights was found[50], the State's positive obligation to protect the fundamental rights of foreign individuals was not excluded; additionally, it was affirmed that the content of such obligation would be different from the one vis-à-vis the citizens of a State and that such specific content would still need further specifications.

3.2. 'Diagonal' human rights obligations: the opinion of the Inter-American Court on Human Rights (IACtHR)

A second interesting opening to extraterritorial or 'diagonal' protection of fundamental rights, entailing «obligations capable of being invoked by individuals or groups against States other than their own»[51] does not originate from a judgment, but from an advisor opinion given by the Inter-American Court on Human Rights (IACtHR)[52].

In March 2016, Colombia requested the IACtHR to issue an opinion on three distinct questions, related to the interpretation of the American Convention on Human Rights (ACHR).

At the background of the opinion was the construction of major new infrastructure projects in the Wider Caribbean Region (such as the then Chinese funded trans-isthmus canal[53]) that, due to

against heat, wind and flooding. For areas prone to tropical cyclones and flooding, the IPCC mentions houses with low and aerodynamic de- sign, sewage systems, dykes, flood levees, beach nourishment and the retrofitting of buildings; for cities it names sustainable infrastructure such as green roofs, urban parks and porous pavements; and for agriculture it mentions efficient irrigation systems and the introduction of plants with high drought tolerance as well as resettlement […]. None of this could be carried out by the German state in the countries where the complainants live. For this reason alone, a duty of protection could not have the same content as it has vis-à-vis people living in Germany».

[50] FCC, *Neubauer*, cit. at 33, paras. 173 and 180-1.

[51] M. Feria-Tinta & S. Milnes, *The Rise of Environmental Law in International Dispute Resolution: the Inter-American Court of Human Rights issues a Landmark Advisory Opinion on the Environment and Human Rights*, 27 Y.B. Int'l Env't L. 64 (2016), 65.

[52] IACtHR, Advisory Opinion no. OC-23/17, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (15 November 2017).

[53] See Council on Foreign Relations, *Nicaragua's Grand Canal* (2015), https://www.cfr.org/backgrounder/nicaraguas-grand-canal. The project was abandoned due to a collapse of the Chines company involved in it: see *The rival*

their dimensions, may cause significant harm to the marine environment and, consequently, to the inhabitants of the coastal areas and islands located in the region[54]. However, such practical aspect was not considered by the IACtHR, which, instead, focused on the theoretical issues[55].

In particular, the request revolved around the interpretation of the notion of "jurisdiction" under the ACHR: more specifically, it was requested whether the obligations for the signatories States to respect the rights and freedoms recognized by the ACHR shall be interpreted to apply in the case of a damage to the right of a person that is outside the territory of such State.

According to the IACtHR, «the fact that a person in subject to the jurisdiction of a State does not mean that he or she is in its territory»; on the contrary, «the meaning of the word "jurisdiction",[…] signifies that it is not limited to the concept of national territory, but covers a broader concept that includes certain ways of exercising jurisdiction beyond the territory of the State in question»[56].

The specific case taken into account by the IACtHR is the one of transboundary damage. In such a case, it is the State «in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them»; as a result, such State is in the position to prevent those activities from causing transboundary harm that can impact the human rights of persons outside its territory. This leads the court to rule that «for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage»[57] the potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin.

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to the Panama Canal that was never built (26 August 2023), https://www.bbc.com/future/article/20230825-the-rival-to-the-panama-canal-that-was-never-built.

[54] IACtHR, Advisory Opinion no. OC-23/17, cit. at 52, paras. 2 and 25.

[55] M. Feria-Tinta & S. Milnes, *The Rise of Environmental Law in International Dispute Resolution*, cit. at 51, 57.

[56] IACtHR, Advisory Opinion no. OC-23/17, cit. at 52, para. 130. About extraterritorial protection of fundamental rights, S. Skogly & M. Gibney (eds.), *Universal Human Rights and Extraterritorial Obligations* (2010); M. Langford et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013); M. Gibney et al., *The Routledge Handbook on Extraterritorial Human Rights Obligations* (2022).

[57] IACtHR, Advisory Opinion no. OC-23/17, cit. at 52, para. 102.

Some legal scholars have argued for the extension to the opening to extraterritorial protection of human rights and the rising of diagonal obligations, stated by the IACtHR for the cases of transboundary damage, also to litigations revolving on climate litigation and adaptation[58]. As it will now be seen, such perspective has been shared by of the Committee on the Rights of the Child (CRC), while the ECHR has recently taken a different stance, differentiating the two cases.

3.3. Climate litigation and extraterritorial jurisdiction: the *Sacchi and Others* case

In September 2019, 16 individuals - who were all, at the time of submission, under the age of 18 - filed five complaints with the Committee on the Rights of the Child (CRC) against Argentina, Brazil, France, Germany, and Turkey. The complainants argued that the respondent states, by causing and perpetuating climate change, had violated their rights to life, health, and culture, under the United Nations Convention on the Right of the Child (UNCRC)[59]. The complaints were filed under the Convention's 2011 Optional Protocol, which gives individuals a right to petition to the CRC.

In October 2021, the CRC adopted five decisions, one for each respondent, which are nearly identical, and it found that the communications were inadmissible for failure to exhaust domestic remedies. Notwithstanding this unfavorable outcome, the CRC adopted a notion of jurisdiction that follows the IACtHR opinion discussed in the preceding section[60], hence opening the door to future child-centric climate related cases[61].

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[58] M. Feria-Tinta & S. Milnes, *The Rise of Environmental Law in International Dispute Resolution*, cit. at 51, 78-9, and C. Voigt, *Introduction Climate Change As A Challenge For Global Governance, Courts And Human Rights*, in W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021), 11.

[59] As discussed in the text, the five decisions adopted by the CRC as a result of the petitions are nearly identical. Reference will here be made to Committee on the Rights of the Child (CRC), *Decision adopted under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019 (Sacchi et al. v. Argentina)*, CRC/C/88/D/104/2019, 8 October 2021.

[60] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.5.

[61] M.A. Tigre & V. Lichet, *The CRC Decision in Sacchi v. Argentina*, 25 ASIL Insights (2021),
https://www.asil.org/sites/default/files/ASIL_Insights_2021_V25_I26.pdf,
and I. Gubbay & C. Wenzler, *Intergenerational Climate Change Litigation: The First*

The CRC recalled that, according to the notion of jurisdiction developed by the IACtHR, the appropriate test to be met is the one of the 'effective control' of the State of origin on the activities that caused the transboundary damage and the consequent human rights violations[62]. According to the CRC, a second element that needs to be considered in order to establish the existence of jurisdiction is the one of the 'reasonable foreseeability' of the harm[63]. The CRC concluded positively on both elements, considering both that the State of origin had 'effective control' over the sources of emissions causing harm to children outside its territory[64] and that, due to the existing scientific evidence showing the cumulative impact of carbon emission, the potential harm of the State's acts or omissions concerning GHG emissions originating in its territory were also reasonably foreseeable[65].

As for the causal link between the alleged harm and the State's acts or omissions, the Committee concluded that the applicants had *prima facie* established the existence of a real and significant harm[66] sufficiently for the purpose of establishing jurisdiction, while the assessment of the elements required to establish responsibility would be a matter for the merit[67] (to which the CRC did not go, given the inadmissibility for failure to exhaust domestic remedies).

4. The ECHR and the limits to an extraterritorial notion of jurisdiction: *Duarte Agostinho & Others*

As anticipated above, on April 9th 2024, with the *Klimaseniorinnen* case, the ECHR condemned for the first time a State in a climate litigation case, identifying an infringement of art. 8 ECHR in its failure to fulfill its positive obligations to protect individuals within its jurisdiction from the adverse effects of climate change on their right to private life[68]. The impact of the case

Climate Communication to the UN Committee on the Rights of the Child, in I. Alogna et al. (eds.), *Climate Change Litigation: Global Perspectives* (2021).

[62] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.5.

[63] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.7.

[64] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.12.

[65] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.11.

[66] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.14.

[67] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.7.

[68] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz and Others V. Switzerland*, cit. at 4. For a first comment, see M.A. Tigre & M. Bönnemann, *The*

on climate litigation is expected to be tremendous. The discussion of the reasoning of the Court in this case - just published at the moment of writing this article - will occupy legal scholars for years to come. However, as the *Klimaseniorinnen* case dealt exclusively with the responsibility of the condemned State vis-à-vis individuals within its territorial jurisdiction, its implications appear to be only tangentially related with the focus of this contribution.

On the contrary, for the purposes of this article, some preliminary remarks need to be sketched about one of the two other cases[69] decided on the same date by the ECHR, ie. *Duarte Agostinho & Others vs. Portugal & Others*[70], in which the Court of Strasbourg found inadmissible the claim filed by six Portuguese youth against 32 countries, in addition to Portugal[71].

The claimants (all Portuguese nationals living in Portugal, born between 1999 and 2008) alleged that the respondents had violated their human rights obligations under articles 2 (life), 3 (prohibition of torture), 8 (private and family life), and 14 (prohibition of discrimination) of the Convention. According to the claimants, all respondents States bore responsibility for the harm caused by climate change on human health, in particular in relation to heatwaves and wildfires, due to the release of emissions within their territory and offshore areas "over which they had jurisdiction", and because of the export of fossils fuels extracted in

Transformation of European Climate Change Litigation: Introduction to the Blog Symposium (9 April 2024), https://blogs.law.columbia.edu/climatechange/2024/04/09/the-transformation-of-european-climate-change-litigation-introduction-to-the-blog-symposium/. For some preliminary remarks on the three climate litigation cases decided by the ECHR 9 April 2024, see Section 4.

[69] ECHR, Grand Chamber, *Carême v. France*, Application no. 7189/21, 9 April 2024, which was also declared inadmissible, on different grounds (lack of status of victim of the applicant). For a first overview of the case, before the decision, M. Torre-Schaub, *The Future of European Climate Change Litigation: The Carême case before the European Court of Human Rights,* VerfBlog (10 August 2022), https://verfassungsblog.de/the-future-of-european-climate-change-litigation/.

[70] ECHR, Grand Chamber, *Duarte Agostinho & Others vs. Portugal & 32 Others*, Application no. 39371/20, 9 April 2024.

[71] The action was filed against against the Member States of the EU (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Denmark, Estonia, Finland, France, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain and Sweden) as well as Norway, Russia, Switzerland, Turkey, Ukraine and the United Kingdom.

their territory, the import of goods (for the emissions involved in their production) and the extraction of fossil fuels overseas from entities within their jurisdiction or financing such extraction[72].

The Court declared the claims directed against States different from Portugal to be inadmissible, as it considered that no jurisdiction could be established for such States[73]. In the end, also the claim against Portugal was declared inadmissible, due to the lack of exhaustion of domestic remedies[74].

The crucial point in assessing the admissibility of transnational claims is the concept of jurisdiction. The Court of Strasbourg did accept some of the arguments put forward by the applicants, and in particular that 1) there is «a certain causal relationship» between activities based on a State's territories that produce GHG emissions and «the adverse impact on the rights and well- being of people residing outside its borders and thus outside the remit of that State's democratic process» and 2) «the problem of climate change is of a truly existential nature for humankind, in a way that sets it apart from other cause-and-effect situations»[75]. However, according to the Court, these arguments cannot serve as a basis for «creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction», nor can justify an expansion of the existing ones[76].

The main arguments used by the Court to exclude an expansion of the notion of jurisdiction are three.

First, the Court underlines that in the case *Duarte* there was no specific link between the applicants and any of the other respondent States (other than Portugal), so that jurisdiction would end up having to be established exclusively on the argument that a State is capable of adopting a decision or action impacting the applicant's situation abroad[77].

Second, the Court of Strasbourg stresses that the Convention is not a legal instrument designed to provide general protection of the environment, and that accepting the applicant's line of argument would result in «a radical departure from the rationale of the Convention protection system, which is primarily and

[72] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, paras. 12-14.
[73] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 214.
[74] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 227.
[75] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, paras. 193-4.
[76] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 195.
[77] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 199.

fundamentally based on the principles of territorial jurisdiction and subsidiarity»[78].

Third, the Court maintains that, contrary to the cases of specific activities that can be labelled as dangerous, whose impact can be localized and limited to specific installations from which a harmful conduct emanates, the harmful consequences produced by GHG emissions are the result of a complex chain of effects and are diffuse[79]. Accepting a criterion of reliance on control over the person's interest for establishing the State's extraterritorial jurisdiction would hence lead to «a critical lack of foreseeability of the Conventions' reach»[80], as the scope of the extraterritorial jurisdiction would be «without any identifiable limits»[81].

A common trait of the line of arguments used by the Court of Strasbourg appears to be the one of avoiding a limitless load of cases, together with the transformation of the Convention in a «global climate-change treaty»[82].

The Court, however, uses two relevant caveas. First, it affirms that it is conscious of the diverging approaches used by other international Courts (notably, both the Advisory Opinion of IACtHR and the *Sacchi and Others* case of the CRC, discussed above, are specifically recalled); however, it observes that both use «a different notion of jurisdiction»[83]. Second, it did not bound itself to the position taken, as it comes to the conclusion of inadmissibility «while also mindful of the constant legal developments at national and international level and global responses to climate change, together with the ever-increasing scientific knowledge about climate change and its effects on individuals»[84].

While this latter caveat seems to show that the Court leaves its hands free to adapt to such developments and increasing knowledge and effects on individuals in the future[85], the distancing

[78] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 202.
[79] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 207.
[80] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 206.
[81] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 207.
[82] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 208.
[83] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 212.
[84] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 213.
[85] Yet, in the closest future the Court will most likely follow its own precedent in *Duarte*, leading to an analogous declaration of inadmissibility for cases such as *De Conto v. Italy and 32 other States*, Complaint no. 14620/21, https://climatecasechart.com/non-us-case/de-conto-v-italy-and-32-other-states/ and *Uricchio v. Italy and 32 other States*, Complaint no. 14615/21,

from other precedents is not entirely convincing[86]. The Advisory Opinion of IACtHR, discussed above, was focused on transboundary harm: hence, the distinction based on the reasoning of the Strasbourg Court, recalled above, contrasting such type of harm, which can be specifically identified, from harms connected in general with GHG emission, which are diffuse and potentially without limits, could soundly justify diverging approaches. Yet, the Strasbourg Court appears to have magnified its differences from the other two cases specifically recalled: for instance, it distances its own system, as involving individual claims, from the other relevant legal frameworks, as inter-States ones, while in the case of the CRC the petition was coming from individuals, not from a State[87].

Most notably, while the Strasbourg Court gives account of the existence of the *Neaubauer* case of the German Constitutional Court in the introductory part of its judgment, where the relevant legal framework and an overview of domestic case law is provided, such case is entirely ignored in the part of the decision on the merits, where the Strasbourg Court gives consideration of the alternative approaches of the IACtHR and of the CRC. In this sense, the Strasbourg Court avoided to engage with the differentiated type of approach suggested by the German constitutional Court, and intended to consider the responsibility of a state vis à vis individuals based in foreign states for the consequences of climate inaction, while also differentiating it from the type of responsibility the State has vis-à-vis its own citizens.

5. Concluding remarks

The analysis has shown that there is a growing body of climate litigation cases that are *strictu sensu* transnational. Transnational actions are directed against foreign corporations, such as in the *RWE* or in the *EDF* cases, or against foreign governments, like in the *Neubauer* and *Duarte* cases. These latter can be strategic climate cases, aimed specifically at challenging the lack

https://climatecasechart.com/non-us-case/uricchio-v-italy-and-32-other-states/.

[86] For a critical standpoint on the mismatch between the ECHR case law and the IACtHR's and CRC's one, A. Rocha, *States' Extraterritorial Jurisdiction for Climate-Related Impacts, VerfBlog,* 12 April 2024, https://verfassungsblog.de/states-extraterritorial-jurisdiction-for-climate-related-impacts/.

[87] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 213.

of climate action or inaction, or transnational environmental cases that can also involve climate effects (cases involving transboundary projects which can cause environmental harm, such as the IACtHR opinion).

Transnational climate litigation cases raise substantial challenges to legal concepts and requirements such as standing, jurisdiction, and causality. While the majority of these cases are still pending, others have led to remarkable decisions.

In some cases, courts adopted an approach open to an evolutive interpretation of well-established principles. For example, the German constitutional court in the *Neaubauer* case did not rule out the responsibility of Germany in fulfilling its positive obligations to protect fundamental rights also of foreign citizens; however, it specified that such obligations would have a different content than the one that the State has vis-à-vis its own citizens, also due to practical considerations (such as the lack of power of a State to adopt adaptation measures in the territory of a different State).

The Inter-American Court on Human Rights and the UN Committee on the Rights of the Child developed a notion of extraterritorial jurisdiction based on the appropriate test of the 'effective control' of the State of origin on the activities that caused the transboundary damage and the consequent human rights violations, opening the path for actions against a State's acts or omissions concerning GHG emissions originating in its territory and causing harm to fundamental rights outside its territory.

A stop to these openings emerged in one of the three cases that the ECHR decided on April 9th 2024. In the *Duarte* case, the Court, adopting a more restrictive notion of jurisdiction than the one put forward by the IACtHR and by the CRC, found the claims directed by some Portuguese youth against thirty-two States other than Portugal to be inadmissible. The Court of Strasbourg stressed that no specific link between the applicants and such States could be established and that, contrary to the cases of specific dangerous activities, whose impact can be localized, the harmful consequences produced by GHG emissions are diffuse. According to the Court, using a criterion of reliance on control over the person's interest for establishing the State's extraterritorial jurisdiction would lead to a lack of foreseeability of the Conventions' reach. Paradoxically, the ECHR's decision could end up fostering the use of environmental transnational litigation in the traditional sense, as cases could be strategically constructed in order to identify specific links between

the applicant and the respondent in terms of transboundary harm, hence overcoming the objections of the ECHR.

Climate transnational litigation shows how climate change continuously challenges old legal paradigms, fostering the need for adapting existing instruments and building new ones. However, the urge to take action could in turn promote the use of instruments which would encounter less limitations, like the successful outcome of the other case decided by the ECHR on the same day, the *Klimaseniorinnen* case – in which a State was condemned for its failure to fulfill its positive obligations to protect individuals within its own jurisdiction, hence not involving transnational *strictu sensu* aspects – shows.