UNIVERSIDAD COMPLUTENSE DE MADRID
FACULTAD DE DERECHO

TESIS DOCTORAL

The participation of non-State actors in international climate change law-making: exploring a human rights-based approach

MEMORIA PARA OPTAR AL GRADO DE DOCTOR

PRESENTADA POR

Marzia Scopelliti

Directora

Elena Conde Pérez

Madrid

© Marzia Scopelliti, 2019

UNIVERSIDAD COMPLUTENSE DE MADRID

FACULTAD DE DERECHO

Departamento de Derecho Internacional, Eclesiástico y Filosofía del Derecho

TESIS DOCTORAL

The Participation of non-State Actors in International Climate Change Law-Making: Exploring a Human Rights-Based Approach

MEMORIA PARA OPTAR AL GRADO DE DOCTOR

PRESENTADA POR

Marzia Scopelliti

DIRECTORA

Elena Conde Pérez

Madrid, 2019

To my parents.

To my brother.

"Se ti dico che la città cui tende il mio viaggio è discontinua nello spazio e nel tempo, ora più rada ora più densa, tu non devi credere che si possa smettere di cercarla"

Le città invisibili – Italo Calvino

"What are we doing here, that is the question. And we are blessed in this, that we happen to know the answer. Yes, in the immense confusion one thing alone is clear. We are waiting for *Godot* to come"

Waiting for Godot – Samuel Beckett

"El tratamiento jurídico de los problemas que suscita el cambio climático constituye […] el lugar de encuentro de diferentes saberes que deben integrarse para lograr sinergias eficaces, subrayando el carácter interdisciplinar que es propio del tratamiento jurídico de las cuestiones ambientales. El Derecho internacional ambiental encuentra así un desafío particularmente complejo al que debe responder mediante procedimientos imaginativos capaces de lograr resultados eficaces."

El Derecho Internacional frente al Desafío del Cambio Climático – José Juste Ruiz

Acknowledgements

Many times I have dreamt about writing the acknowledgements of my dissertation. If only because I would finally have had the chance to thank every person that has contributed to the completion of this work.

Before anyone else, a special mention is due to my academic supervisor, Professor Elena Conde Pérez. Since the first time she welcomed me at the Complutense University of Madrid in 2014, she has not only guided me in this research but also embarked with me in many important projects, showing trust in my ideas and in my person. While I am sure that the relationship of mutual respect and friendship that binds us will last over the years, I thank her for everything she did for me, helping me to grow into the young professional that I am today.

A very deep 'thank you' goes to my parents, who have unconditionally supported me – emotionally and economically – in this endeavour and who have travelled the world to follow a wandering daughter, encouraging her to pursue all her ambitions. For their blind trust and immense support, I dedicate this work to them.

I also dedicate this dissertation to my brother, who has always been a model to me. When I look through his eyes, I see integrity and a bright, eager mind. I especially want to thank him for teaching me how to grasp the beauty of things and for instilling dedication and passion for my work in me.

Finally, these acknowledgements would remain incomplete without mentioning some of the many special people that I have met along the way.

For their warmth, friendship, for all nice conversations and suggestions, I especially wish to thank Amaia, An, Nikolas and his family, and Ines, who have made me feel at home even when I was far apart from everyone and everything I knew.

At the very end but among the most important is Remo, my life companion. I thank him for cheering me up and for reminding me of my strength and determination when I could

not see them any longer. For reading every chapter of this work, for listening to all my presentations but especially for all the joy that you have brought in these years together, thank you!

Basel, in spring 2019

TABLE OF CONTENTS..... 11

Acknowledgements 9
Abstract..... 15
Resumen..... 20
Acronyms..... 25
Images and tables..... 28

PART I – INTRODUCTION 31

1. General Introduction 31
2. Background 35
3. Research questions and objectives..... 38
4. Relevance..... 41
5. The Current State of Research 42
6. Approach and methodologies 46
7. Structure..... 48

PART II – SETTING THE CONTEXT 52

Chapter 1. Non-State Actors in International Law 52
1.1 The Emergence of non-State Actors in International Law 52
1.2 Non-State Actors and the International Legal Personality 55
1.3 Non-State Actors and International Law-Making..... 58
1.3.1 International Law-Making and non-State Actors. Redressing a Democratic Deficit? 66
1.3.2 States, Non-State actors and Legitimacy 69
1.4 Non-State Actors: Breaking Down a Circular Concept..... 75
1.5 Concluding Remarks..... 79

Chapter 2. The Participation of Non-State Actors in International Climate Change Governance..... 81
2.1 Introduction..... 81
2.2 The Principle of Public Participation in International Environmental Law: Evolution and Application in International Contexts. 84
2.2.1. The Aarhus Convention and the Implementation of Principle 10 in International Contexts. 88
2.2.2. The Application of the Aarhus Convention to the Climate Change Regime 90
2.3. Progresses and Setbacks in the Application of the Principle of Public Participation in International Climate Change Law-Making: From the UNFCCC to the Paris Agreement..... 93
2.3.1 The International Climate Change Regime: An Introduction. 94
2.3.2 Public Participation in International Climate Change Law-Making and Governance: Is it Relevant? 97
2.3.3. Public Participation in the Climate Change Regime: Institutional Arrangements. 102
2.3.4 Public Participation After the Adoption of the Paris Agreement 106

2.4 Concluding Remarks 110

PART III – CASE STUDY: THE PARTICIPATION OF ARCTIC INDIGENOUS PEOPLES IN CLIMATE GOVERNANCE 112

Chapter 3. Non-State Actors and International Climate Change Governance: Learning from Arctic Indigenous Peoples' Practice 112
3.1 Introduction 112
3.2 Arctic Indigenous Peoples: Main Features, Impacts Derived from Climate Change and Transnational Organisation 113
3.2.1 Indigenous Peoples of the Arctic, An Overview 113
3.2.2 Arctic Indigenous Peoples and the Impacts of Climate Change in the Arctic 115
3.2.3 The Transnational Organisation of Arctic Indigenous Peoples 117
3.3 From Observers to Permanent Participants: Arctic Indigenous Peoples in the Arctic Council 124
3.3.1 The Indigenous Practice within the Arctic Council: Regional and International Implications 128
3.4 Going Global: Arctic Indigenous Internationalism Against Climate Change 131
3.4.1. Beyond Westphalia: An Arctic Indigenous Diplomacy? 131
3.4.2. Arctic Indigenous Peoples and International Environmental Law-Making 135
3.4.3 The Inuit Petition before the Inter-American Commission on Human Rights. 137
3.5 Concluding Remarks: The Arctic Case as a Paradigm of Non-State Actors Participation in International Climate Governance 143

PART IV – IMPROVING PUBLIC PARTICIPATION IN CLIMATE CHANGE LAW-MAKING: INTERNATIONAL LAW INSTRUMENTS 145

Chapter 4. Climate Change Litigation: Redressing the Lack of Participation in International Climate Change Law-Making? 145
4.1 Introduction 145
4.2 Litigation in International Environmental Law 149
4.3 Introducing Climate Change Litigation: Main Characteristics and Legal Elements 151
4.3.1 Commonalities Among Climate Change Litigation: Legal Elements . 153
4.3.1.1 Justiciability 154
4.3.1.2 Sources of Legal Rights and Obligations 156
4.3.1.3 The Strategic Choice of the Relevant Legal Forum 161
4.3.2 Building on Climate Change Litigation: Main Problems 162
4.4 Functions and Potentially Positive Impacts of Litigation in the Context of a Changing Climate 166
4.5 Climate Change Litigation: Analysis of Relevant Case Law 169
4.6 Climate Change Litigation as an Instrument to Uphold Procedural Rights? 172
4.7 Concluding Remarks 174

Chapter 5. Exploring a Human Rights-Based Approach to Climate Change 176
5.1 Introduction 176
5.2 Introducing Human Rights and International Human Rights Law: the Emergence of Third Generation Rights 177
5.2.1 Applying Human Rights Law: Particular Reference to the Right to a Healthy Environment 180
5.2.2 Regional Human Rights Systems 183
5.3 Human Rights and the Environment 185
5.4 When Climate Change Became a Human Rights Issue: The Role of the United Nations in Establishing the Climate Change-Human Rights Nexus 191
5.5 Framing Climate Change as a Human Rights Issue: Limitations and Opportunities 196
5.5.1 A Human Rights-Based Approach to Climate Change: Main Opportunities 200
5.6 Improving the Participation of Non-State Actors in International Climate Change Law-Making by Framing Climate Change as a Human Rights Issue . 206
5.7 Concluding Remarks 211

PART V – CONCLUSIONS 212

1. On Non-State Actors and International Law-Making 212
2. On Public Participation in International Climate Change Law-Making 213
3. On the Relationship between Human Rights and Climate Change 214
4. Towards a New Significance for Non-State Actors in International Climate Change Law-Making: A Proposal for Reform 216

References 222

a) Textbooks 222
b) Monographs and edited volumes 223
c) Chapters 228
d) Encyclopedias and courses of The Hague Academy of International Law 236
e) Journal articles 237
f) Legal and official documents 247
g) Case law (by date) 251
h) Petitions 253
i) Comments, decisions and opinions of international bodies 253
j) Legislation 254
k) Reports 254
l) Dissertations 255
m) Online resources 255
n) Presentations held at international congresses 257
o) Relevant websites 257

Abstract

Climate change has arisen in recent decades as a major challenge for contemporary societies. The global and transnational nature of this environmental harm paired with the persistence of its impacts and intergenerational character, make the reach of this anthropogenic phenomenon unprecedented.

The difficulty of addressing global warming is reflected in the international regime developed to tackle this problem. Since the adoption of the United Nations Framework Convention on Climate Change in 1992, the international legal regime addressing climate change has evolved into a complex and hybrid system of governance in which soft law instruments, flexibility mechanisms and voluntary pledges work along with more traditional instruments of hard law. In such a context, the contribution payed by different non-State entities are also increasingly central to the development and implementation of an international climate change regime.

Despite the fundamental role that non-State entities play in the development of a climate change regime and the existence of a legal framework regulating their participation in environmental decision-making, how the right of the public to participate in decision-making articulates in its international dimension – that is, in the context of this dissertation, how non-State actors participate in international climate change law-making – remains rather uncertain. Whereas the exercise of procedural rights has been primarily translated into the participation of the public in national decision-making process, the inclusion of non-State entities under the category of observers to intergovernmental negotiations does not secure that their right to participate is constantly met. As discussed in this dissertation, in the absence of a global binding treaty regulating the participation of the public in international decision- and law-making process, there is no coherent and systematic approach to the exercise of procedural rights by non-State entities. As a result, the participation of non-governmental actors in international climate change law-making has at times been impaired.

Against this background, this dissertation considers *whether* and *how* the participation of non-State actors in international climate change law-making should be improved. In

answering this research question, the following hypothesis were considered and validated:

- Although theoretically the creation of norms at the international level is often understood as a corollary of statehood, in practice international environmental law-making is largely, though often informally, shaped by non-governmental entities;

- The above is particularly true in the context of climate change where, in light of the specificities of this environmental problem, private and sub-national initiatives often work alongside (or act in lack of) governmental climate action and thus are instrumental to the development and implementation of the present climate regime. In light of the fundamental contribution payed by these non-State entities, their *de facto* normative capacity should be improved or at least formalised through the enhancement of their right to participation in international climate change law making;

- Considering the shortcomings of the institutional arrangement established under the United Nations Framework Convention on Climate Change for as much as public participation is concerned, the advocacy and the model of participation of Arctic Indigenous Peoples, as detailed in Chapter 3 of this work, may serve as a relevant model for improving the participation of non-State actors in international climate change law-making.

- Although transnational climate change litigation may serve the scope of upholding procedural rights, judicial governance is to be considered only as a second best option to secure the right of the public to participate in international climate change law-making.

- In the absence of an international binding instruments that regulates the participation of the public in international environmental law-making, a human rights-based approach to climate change may serve as relevant legal approach for

improving the participation of non-State entities in international climate change rule-making.

Due to the large number of agents that may fall under the category of non-State actors, this research is limited to those non-State entities that, already identified by the Agenda 21 of 1992, are recognised as constituencies of the United Nation Framework Conventions on Climate Change. Moreover, the research includes references to different branches of international law – mainly international environmental law and human rights law – as well as to the theory of international relations.

As detailed in its introduction, the research work has been carried out using different methodologies: a descriptive method has been alternated to the textual and hermeneutical analysis of different international legal materials. Furthermore, a comparative and analytical methods have been applied in building a case study on Arctic Indigenous Peoples, focused on their strategy of advocacy and their model of participation in the Arctic Council. It follows that an inductive method has ultimately been used for building an abstraction of this case study and in order to propose it as a paradigm for the participation of different non-State actors in international climate change law-making process.

Concerning the organisation of the dissertation, the research work is divided in four main parts, including an introduction and the main conclusions drawn from the research:

The first part is composed of a general introduction, in which the background, the research questions and the objectives of the dissertation are exposed in more detail. This part further explains the relevance of this investigation and guides the reader through the structure of the work.

The second part sets the context of the investigation and, therefore, exposes the theoretical framework and the literature review on which the dissertation builds. Chapter 1 considers the main legal question revolving around the emergence of non-State actors in international law and international norm-making, and addresses the issue of defining non-State entities and assessing their legitimacy in those roles. After introducing the legal framework that regulates the participation of the public in environmental contexts,

Chapter 2 considers how non-State entities participate in international climate change governance and law-making. Adopting an institutional perspective, the chapter details the institutional arrangements created under the United Nations Framework Convention on Climate Change for the participation of different constituencies in the governance of global warming.

The third part of the research exposes a case study on Arctic Indigenous Peoples, which is preparatory to the legal issues considered in Chapter 4 and Chapter 5. Fundamental of the considered case study is that the indigenous practice of advocacy has been built on rights-based claims and on the use of litigation as an instrument to redress States' inaction on climate change. Moreover, under an institutional perspective, the right to full and effective participation that these peoples enjoy within the Arctic Council, the most relevant regional forum for circumpolar cooperation, is exceptional to the most common model of non-State actors' participation and, therefore, represents a paradigmatic example of inclusive governance.

The fourth part of the dissertation considers which international law instruments could be relevant to the improvement of the right to participation of non-State actors in international climate change law-making. Building on the evidence provided in Chapter 3, Chapter 4 aims at considering how, after the first climate change litigation was filed by Arctic Indigenous Peoples in 2005, judicial governance has grown into a transnational movement and whether, being used as a bottom-up approach to climate change governance, it could serve the scope of upholding the procedural rights of non-State entities. On the other hand, Chapter 5 exposes the main reasons by which a human rights-based approach to climate change is considered to be a relevant legal approach to answer the legal question discussed throughout the dissertation.

The main findings of the research are enumerated in part fifth of the study, where the conclusions of the research work are listed. There, a proposal for reform of the United Nations Framework Convention institutional arrangement is discussed, mainly drawing on the case of Arctic indigenous peoples. Finally, the subjects on which future and complementary research could focus are also recommended in this section.

Overall, this research aims at contributing to the broader debate that discusses how climate change, the defining problem of our time and a challenge to many of the most traditional notions of international law, could be effectively addressed. It does so by building bridges between different areas of knowledge and various disciplines, eventually envisioning the law as a living instrument, a tool serving the protection and the advancement of international societies.

Resumen

El cambio climático ha surgido en las últimas décadas como el mayor desafío para las sociedades contemporáneas. La naturaleza global y el alcance transnacional de este daño ambiental, junto con la persistencia de sus impactos y su carácter intergeneracional, hacen de este fenómeno antropogénico un problema ambiental sin precedentes.

La dificultad de abordar el calentamiento global queda patente en el régimen internacional desarrollado para solucionar este problema. A partir de la adopción de la Convención Marco de las Naciones Unidas sobre el Cambio Climático en 1992, el régimen jurídico internacional que regula el calentamiento global se ha convertido en un sistema complejo e híbrido de gobernanza en el que los instrumentos de *soft law*, los mecanismos de flexibilidad y los compromisos voluntarios funcionan junto a los instrumentos más tradicionales de *hard law*. En ese contexto, la contribución de diferentes entidades no estatales también es cada vez más importante para la elaboración y aplicación de un régimen internacional sobre cambio climático.

A pesar del papel fundamental que desempeñan las entidades no estatales en la elaboración de un régimen sobre cambio climático y no obstante la existencia de un marco jurídico que regula su participación en la adopción de decisiones sobre el medio ambiente, la forma en que el derecho del público a participar en la adopción de decisiones se articula en su dimensión internacional – es decir, en el contexto del presente trabajo, la forma en que los actores no estatales participan en la elaboración de las normas internacionales sobre cambio climático – sigue siendo relativamente incierta. Si bien el ejercicio de los derechos procesales se ha traducido principalmente en la participación del público en los procesos decisionales nacionales, la inclusión de entidades no estatales bajo la categoría de observadores en la negociación intergubernamental no garantiza que su derecho a la participación se respete de forma adecuada. Como se examina en la presente investigación, a falta de un tratado global y vinculante que regule la participación del público en el proceso de formación de las normas internacionales, no existe un ejercicio coherente y sistemático de los derechos procesales que asisten a las entidades no estatales. Como resultado, la participación de los actores no gubernamentales en la elaboración de normas internacionales sobre cambio climático, se ve no pocas veces truncada.

Ante estas circunstancias, en este análisis se examina si la participación de los actores no estatales en la elaboración de la normativa internacional sobre el cambio climático debe mejorarse y, eventualmente, de qué manera. Para responder a esta pregunta de investigación, se han considerado y validado las siguientes hipótesis:

- A pesar de que, a nivel teórico, la creación de normas a nivel internacional se entiende a menudo como un corolario de la condición de Estado, en la práctica la elaboración de la normativa ambiental internacional está en gran medida, aunque a menudo de manera informal, influenciada grandemente por entidades no gubernamentales.

- Lo anterior es particularmente evidente en el contexto del cambio climático donde, a la luz de las especificidades de este problema ambiental, las iniciativas privadas y sub-nacionales trabajan junto con (o actúan en ausencia de) acciones gubernamentales sobre el clima y, por lo tanto, son instrumentales para el desarrollo y la implementación del actual regimen normativo climático internacional. A la luz de la fundamental contribución aportada por estas entidades no estatales, consideramos que su capacidad normativa debería ser mejorada o, al menos, debería formalizarse mediante el fortalecimiento de su derecho a participar en la elaboración de reglas internacionales sobre cambio climático.

- Teniendo en cuenta las deficiencias del sistema institucional establecido en virtud de la Convención Marco de las Naciones Unidas sobre el Cambio Climático en cuanto a participación del público se refiere, la promoción del modelo de participación de los pueblos indígenas del Ártico, expuesto en el Capítulo 3 del presente obra, puede servir de ejemplo para mejorar la participación de los agentes no estatales en la elaboración de reglas internacionales sobre cambio climático.

- Aunque los litigios climáticos, que en la actualidad se configuran como un fenómeno transnacional, pueden servir para defender los derechos procesales de la ciudadanía, la denominada ‘gobernanza judicial’ debe considerarse sólo como

segunda alternativa para garantizar el derecho del público a participar en la elaboración de normas internacionales sobre cambio climático.

- A falta de un instrumento internacional y vinculante que regule la participación del público en la elaboración de normas ambientales internacionales, abordar el cambio climático como una cuestión de derechos humanos puede servir de enfoque jurídico para mejorar la participación de las entidades no estatales en la elaboración de normas internacionales sobre cambio climático.

Debido al gran número de agentes que, potencialmente, pueden entrar en la categoría de actores no estatales, esta investigación se limita a considerar aquellas entidades que, ya identificadas por la Agenda 21 de 1992, están reconocidas como circunscripciones de la Convención Marco de las Naciones Unidas sobre el Cambio Climático. Además, la investigación incluye referencias a diferentes ramas del derecho internacional – principalmente el derecho internacional del medio ambiente y el derecho de los derechos humanos – así como a la teoría de las relaciones internacionales.

Como se detalla en su introducción, el trabajo de investigación se ha llevado a cabo alternando diferentes metodologías: el método descriptivo ha sido complementado con el análisis textual y hermenéutico de diferentes textos jurídicos internacionales. Además, se han aplicado los métodos comparativo y analítico para elaborar un caso de estudio sobre los pueblos indígenas del Ártico, centrado en su estrategia de defensa y promoción de sus derechos y en su modelo de participación en el Consejo Ártico. De ello se deduce que, en última instancia, se ha utilizado un método inductivo para construir una abstracción de este caso y así proponerlo como paradigma para la participación de diferentes actores no estatales en el proceso internacional de elaboración normativa sobre cambio climático.

En cuanto a la organización de la tesis, el trabajo de investigación se divide en cuatro apartados principales, incluyendo una introducción y las principales conclusiones alcanzadas tras llevar a cabo la investigación:

La primera parte se compone de una introducción general, en la que se exponen con más detalle los antecedentes, las preguntas de investigación y los objetivos de la tesis. Esta

parte explica pormenorizadamente la relevancia del trabajo de investigación y pretende server de guía al lector estableciendo la estructura de la obra.

La segunda parte establece el contexto de la investigación y, por lo tanto, expone el marco teórico y la base bibliográfica sobre los que se desarrolla este trabajo. En el Capítulo 1 se examinan las principales cuestiones jurídicas surgidas tras la aparición de actores no estatales en el derecho internacional y en la elaboración de normas internacionales. De la misma forma, se aborda la cuestión de la definición de estas entidades no gubernamentales y la evaluación de su legitimidad en el proceso de creación y aplicación normativas. Tras introducir el marco jurídico que regula la participación del público en el contexto medioambiental, en el Capítulo 2 examina la forma en que las entidades no estatales participan en la gobernanza y en la elaboración de normas internacionales sobre cambio climático. Adoptando una perspectiva institucional, el capítulo detalla los mecanismos institucionales creados al amparo de la Convención Marco de las Naciones Unidas sobre el Cambio Climático para la participación de diferentes grupos en la gobernanza del calentamiento global, individualizando sus principales deficiencias.

La tercera parte de la investigación expone un caso de estudio sobre los pueblos indígenas del Ártico, que es preparatorio de las cuestiones jurídicas consideradas en los Capítulos 4 y 5. Lo fundamental del caso expuesto es que la práctica indígena se ha basado constantemente en la reivindicación de sus derechos en cuanto pueblo y en el uso de herramientas jurídicas -demandas climáticas- como instrumento para remediar la inacción de los Estados ante el cambio climático. Además, desde una perspectiva institucional, el derecho a la plena y efectiva participación del que gozan estos pueblos en el Consejo Ártico, el foro regional más importante para la cooperación circumpolar, es excepcional con respecto al modelo más habitual de participación de los actores no estatales y, por lo tanto, representa un ejemplo paradigmático de gobernanza inclusiva.

La cuarta parte del trabajo constituye el último apartado de la investigación, dedicada a considerar qué instrumentos jurídicos podrían ser relevantes a la hora de mejorar el derecho de participación de los actores no estatales en la elaboración de las normas internacionales sobre cambio climático. Sobre la base de las evidencias proporcionadas en el Capítulo 3, el Capítulo 4 tiene por objeto examinar cómo, después de que los pueblos indígenas del Ártico entablaran el primer asunto litigioso sobre el cambio climático en

2005, la gobernanza judicial se ha convertido en un movimiento transnacional y si, al constituirse como enfoque de abajo hacia arriba a la gobernanza del calentamiento global, podría servir para mejorar los derechos procesales de las entidades no estatales. Por otra parte, en el Capítulo 5 se exponen las principales razones por las que se considera que un enfoque basado en los derechos humanos de participación pública en los procesos normativos sobre el cambio climático es un planteamiento jurídico pertinente para responder a la cuestión jurídica que se examina a lo largo de la investigación.

Los principales resultados del trabajo de investigación se enumeran en las conclusiones y parte quinta del estudio. Allí se examina una propuesta de reforma del mecanismo institucional creado por la Convención Marco de las Naciones Unidas sobre el Cambio Climático, que se inspira en gran parte al caso de los pueblos indígenas del Ártico. Por último, en esta sección también se recomiendan algunos temas, surgidos durante este estudio, sobre los que podría centrarse una investigación futura y complementaria.

En conclusión, esta investigación tiene como objetivo contribuir al debate más amplio que discute cómo el cambio climático, uno de los problemas ambientales que más definen nuestro tiempo y un desafío para el derecho internacional, podría ser abordado de manera más eficaz. Para ello, hemos construido puentes entre las diferentes áreas de conocimiento y entre diversas disciplinas y, finalmente, hemos concebido la norma internacional como un instrumento vivo, una herramienta que atiende a la protección y al avance de las sociedades internacionales.

Acronyms

AC	Arctic Council
ACIA	Arctic Climate Impact Assessment
AEPS	Arctic Environmental Protection Strategy
AIA	Aleut International Association
AMAP	Arctic Monitoring and Assessment Programme
ASEAN	Association of Asian Nations
A5	Arctic Five
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of the Parties
CSOs	Civil Society Organisations
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPA	Environmental Protection Agency
ESR	Effort Sharing Regulation
ETS	Emission Trading System
EU	European Union
GAP	Gender Action Plan
GCI	Gwich'in Council International
GHGs	Green House Gases
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
ICC	Inuit Circumpolar Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
IGOs	International Governmental Organisations
IIPFCC	International Indigenous Peoples' Forum on Climate Change

ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organisation
IOs	International Organisations
IPCC	Intergovernmental Panel on Climate Change
IPs	Indigenous Peoples
IPOs	Indigenous Peoples Organisations
IWGIA	International Work Group for Indigenous Affairs
LAC	Latin American and Caribbean
LCIPs	Local Communities and Indigenous Peoples
LPAA	Lima-Paris Action Agenda
LULUCF	Land Use, Land Use Change and Forestry
MEAs	Multilateral Environmental Agreements
NAZCA	Non-State Actor Zone for Climate Action
NDCs	Nationally Determined Contributions
NGOs	Non-Governmental Organisations
NSAs	Non-State Actors
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
PIL	Public Interest Litigation
POPs	Persistent Organic Pollutants
PPs	Permanent Participants
RAIPON	Russian Association of Indigenous Peoples of the North
REDD+	Reducing Emissions from Deforestation and Forest Degradation
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SIDS	Small Island Developing States
TFUE	Treaty on the Functioning of the European Union
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNCED	United Nations Conference on Environment and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change

UNGA	United Nations General Assembly
UNPFII	United Nations Permanent Forum on Indigenous Issues
USA	United States of America
WGP	Working Group of the Parties

Images and tables

Image 1.	122
Arctic Indigenous NGOs and Permanent Participants to the Arctic Council	
Table 1	146
Number of Climate Change Litigation Cases by Country	
Table 2	147
Suits Against Governments	

PART I – INTRODUCTION

1. General Introduction

In 2008 the International Law Association (ILA) established a committee on non-State actors (NSAs) with the aim of examining their position in international law in terms of their rights and obligations. The concluding remarks of its 2016 final report spelled out the complexity of such a task and likewise put forward some interesting ideas.[1] First, the traditional interpretation that confers to States an exclusive role in international law does not adequately recognise the functions that different NSAs play in its development and enforcement. Second, while international law has not completely overlooked the plethora of NSAs intervening in the international law-making process, this topic remains largely under-theorised and allows for a reflection on the very foundations of international law. As a matter of fact, the fast growing literature in this area has not reached consensus on the role and the legal status of this heterogeneous category of actors under international law.[2]

While establishing general criteria for the extension of the international legal personality to different categories of NSAs is a rather complex task and goes beyond the scope of this study, it is not unrelated to the question addressed in this work. A reflection on the existence of an international legal personality of NSAs is after all the point of departure of this research and part of its culmination. A traditional understanding of the theory of subjects of international law suggests that States, as central units of those relations that international law aims to govern, are inherently entitled to international legal personality and exclusively authorised to the creation of international norms. This positivist approach to international law-making finds support in article 38 (1) of the Statute of the International Court of Justice (ICJ), which recognises as sources of international law those to which States have – explicitly or implicitly – consented to. It

[1] ILA COMMITTEE ON NON-STATE ACTORS, *Final Report on Non-State Actors in International Law*. ILA Conference in Johannesburg, 2016. Available at: http://www.ila-hq.org/index.php/committees. (Last access 03 October 2018).
[2] See, as a general reference, M. NOORTMANN, A REINISH and C. RYNGAERT (eds.) *Non-State Actors in International Law*. Oxford, Portland: Hart Publishing, 2015.

follows that the creation of norms at the international level has traditionally been the domain of nation States.[3]

The State-driven nature of international law-making is not disputed in this work. However, it should be noticed that the category of international legal personality has been stretched over the last decades as to include different non-State entities. Particularly the end of the World War II and the ever-expanding globalisation, paired with concerns for the protection of human rights and the global environment, have paved the way for *inter alia* individuals, minorities and indigenous groups to be considered as limited subjects of international law.[4] Although individuals may be capable of bringing claims before national and international courts and are subject to duties under, for instance, international humanitarian and international criminal law, whether or to what extent they are able to influence international law-making remains contested. Besides international inter-governmental organisations (IGOs) that, as State-based entities, can create and enter international agreements,[5] most non-State actors are only entitled to standard setting or to participate – with degrees of representation that varies between institutional settings– in international law-making.[6]

The right to public participation was affirmed in the field of international environmental law and sustainable development in order to ensure the access to information, participation in decision-making processes and access to justice in environmental matters to every person.[7] Today considered as an expression of environmental democracy, it has first been established by Principle 10 of the United Nations (UN) Rio Declaration on Environment and Development of 1992 and subsequently incorporated in regional instruments, mainly the Aarhus Convention of

[3] See, on State consent in international law, S. BESSON, "State Consent and Disagreement in International Law-Making. Dissolving the Paradox" *Leiden Journal of International Law*, Vol. 29, 2016, pp. 289–316.
[4] See, e.g., R. HOFMANN (ed.) *Non-State Actors as New Subjects of International Law – From the Traditional State Order Towards the Law of the Global Community.* Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law March 25 to 28, 1998. Berlin: Duncker und Humblot, 1999; M. BETSILL and E. CORELL, *NGO Diplomacy. The Influence of Nongovernment Organizations in International Environmental Negotiations*. Cambridge, London: The MIT Press, 2008.
[5] As established by the International Court of Justice in 1949. ICJ advisory opinion *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 178.
[6] See, A. PETERS, L. KOECHLIN, T. FÖRSTER and G. FENNER ZINKERNAGEL (eds.) *Non-State Actors as Standards Setters*. Cambridge: Cambridge University Press, 2009.
[7] The focus of attention of this work will be the second pillar of the right to public participation: participation in (international) environmental decision-making.

1998 and the Escazú Agreement of 2018.[8] Whereas the exercise of procedural rights has been primarily translated into the participation of the public in national decision-making, just a few authors have explored whether – and how – this right has been consistently secured in international fora.[9] Traditionally implemented through the establishment of diverse institutional arrangements in which NSAs participate under the category of observers, claims have been made for the recognition of civil society representatives as complementary legitimate actors of international law-making.[10]

In the context of climate change, the contribution of non-governmental (NGOs) and civil society organisations (CSOs) has been acknowledged as fundamental for the development and implementation of an international climate change regime.[11] As recalled in the United Nations Framework Convention on Climate Change (UNFCCC) Guidelines for the participation of NGO-representatives: "[NGO] involvement allows vital experience, expertise, information and perspectives from civil society to be brought into the process to generate new insights and approaches."[12] Although the UNFCCC system has worked – and continues to work – towards the incorporation of NSAs in the creation of a climate change regime,[13] their participation in the law-making process has at times

[8] Since the adoption of the Rio Declaration on Environment and Development in 1992, public participation has been repeatedly recognised in successive UN conferences on sustainable development and implemented by the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, 1998). In March 2018, the Ninth Meeting of the Negotiating Committee of the Regional Agreement on Principle 10 adopted the Escazú regional agreement for Latin American and the Caribbean States. The agreement will remain open for signature from September 2018 to September 2020.

[9] J. EBBESSON, "Principle 10. Public Participation" in J., E. VIÑUALES (ed.) *The Rio Declaration on Environment and Development*. Oxford: Oxford University Press, 2015, pp. 288–309; S. DUYCK, "Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime", *Review of European Community & International Environmental Law*, Vol. 22, No. 4, 2015, pp. 123–137.

[10] See, e.g., S. BESSON and J., L. MARTÍ, "Legitimate actors of international law-making: towards a theory of international democratic representation", *Jurisprudence*, 2018, pp. 1–38; G., F. MAGGIO, "Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity", *UCLA Journal of Environmental Law & Policy*, Vol. 16, No. 1, 1997, pp. 179–226.

[11] At present, the UNFCCC recognises as observers nine main constituencies. As specified below, these constituencies are the reference groups of this research when it refers to NGOs and civil society organisations.

[12] UNFCCC, Guidelines for the participation of representatives of non-governmental organizations at meetings of the bodies of the United Nations Framework Convention on Climate Change, Bonn, 2017. Available at: https://unfccc.int/files/parties_and_observers/ngo/application/pdf/guidelines_for_the_participation_of_ngos.pdf (Last access, 05 October 2018).

[13] A report from the secretariat of the Aarhus Convention on "Good practice and challenges for public participation in international forums" (2011) quotes the UNFCCC procedures as example of best practices in terms of public participation. However, it also notes pending challenges concerning the volume of participants, their capacity building or limitations regarding the rights of freedom of expression and peaceful assembly of participants.

been impaired, based on the assumption that international law-making remains a prerogative of sovereign nation states.[14] Moreover, any attempt to enhance the procedural rights of non-Party stakeholders have occurred without contesting the State-driven nature of intergovernmental negotiations.[15] In other words, States remain the gatekeepers of the international climate change law-making process and there is no coherent and systematic approach to the exercise of procedural rights by NSAs. As Duyck has recently underlined: "Although the Parties to the UNFCCC have developed rules that describe the ways in which public participation can be exercised in intergovernmental processes, the exclusion of NGOs from crucial phases of the climate negotiations (most recently in Paris) is an issue that must be addressed."[16]

The present work explores *whether*, and if yes, *how* the emerging relationship between human rights and climate change could be used as a legal basis for the enhancement of non-State actors' participation in international climate change law-making processes.[17] To a minimum, a human rights-based approach to climate change may put emphasis on participation as a right on its own, an obligation that States owe to individuals and from which no derogation can be admitted. It could further improve the right to participation of those that will be disproportionally affected by climate change, as it seems to be the case with indigenous and local communities, women and youth, who already enjoy specific rights under human rights law. Alternatively, the emerging relationship between global warming and human rights could serve as a legal ground for building NSAs' status as rights-holders (as opposed to stakeholders) and for promoting

[14] Several authors have reported on the exclusion of accredited observers from critical phases of climate negotiations, particularly during the COP15 of Copenhagen, but also in Paris at COP21. See, e.g., M. DOELLE, "The Paris Agreement: Historic Breakthrough or High Stakes Experiment?", *Climate Law*, Vol. 6, 2016, pp. 1–20 and W., J. WILSON, "Legal Foundations for NGO Participation in Climate Treaty Negotiations", *Sustainable Development Law and Policy*, Vol. 10, No. 2, 2010, at 54. Nonetheless, it should also be noted that in none of these occasions the non-compliance procedure established under the Aarhus Convention have been triggered, even if both COPs have been held under European presidencies.

[15] As reported in the second chapter of this dissertation, the First Open Dialogue initiated between Parties and non-Parties stakeholder on how to better integrate the latter into the climate negotiations process, has been held *on the understanding that any outcome of such a dialogue should have persuasive value only, respecting the Party-driven nature of the UNFCCC process.* See, decision FCCC/SBI/2017/7, par. 119.

[16] S. DUYCK, "The Paris Agreement and the Protection of Human Rights in a Changing Climate", *Yearbook of international Environmental Law*, Vol. 26, No. 1, 2015, pp. 3–45, at 41.

[17] Since 2008, different UN human rights bodies have repeatedly reported on the impacts that climate change has on the enjoyment of human rights. The interference that climate change has on the effective enjoyment of human rights was also recognised by the climate change regime, for instance, in the Cancun Agreement of 2010 and in the Preamble of the Paris Agreement of 2015. See, for extensive reference on this subject: S. DUYCK, S. JODOIN and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Governance*. New York, London: Routledge, 2018.

the procedural rights of individuals and the civil society in the creation of a climate change regime[18]. The possibility for certain NSAs to strike a better balance between the vital contribution that they provide to climate change governance and their actual law-making capacity, may be built on rights-based claims since a human rights language has been introduced for the first time in the Paris Agreement of 2015. To this end, Arctic indigenous peoples' (IPs) practice could serve as a roadmap. As detailed in the case study proposed by this work, this practice relies on constructing rights-based claims, in order to ensure that the degree of participation that IPs enjoy in regional and international decision-making is consistent with their status as right-holders under international law.

Certainly, there are conceptual and logistical difficulties to answer the question of whether – and how – the law-making capacity of individuals, and of those NGOs representing them, can or should be enhanced in the climate context. For instance, how could public participation be promoted practically? Can non-governmental and civil society organisations legitimately represent individuals and channel their participation at the international level? If so, should NGOs or CSOs participate in the law-making process by means other than observer status usually granted within intergovernmental negotiations? These questions reveal that, beyond the conclusions drawn from this work, further research is required on this topic.[19]

2. Background

In 2005 the Inuit petition before the Inter-American Commission on Human Rights (IACHR) was the first climate change litigation case to be filed before an international human rights body. The most immediate effect of the petition was to bring the human rights implications of global warming in the international spotlight. Especially after the IACHR decided to hold public hearings on the relationship between human rights and climate change in 2007, the academic interest on this relationship grew exponentially, as it did the work of UN human rights bodies on this subject.[20]

[18] The UNFCCC recognizes public participation as relevant to intergovernmental negotiations in its art. 4.1(i), which commits parties to encourage the widest participation of the public, including non-governmental organizations.

[19] The question of legitimacy of non-State actors and the 'democratic deficit' inherent in international law-making are considered in Chapter 1.

[20] As detailed in Chapter 4, the Human Rights Council has expressed its view on climate change and human rights in different resolutions and the UN Special Rapporteur on Human Rights and the Environment was also required to further research and report on this relationship.

Since then and up until the time of writing, around 800 climate change litigation cases have been brought before national and international courts.[21] While very different in their claims and characteristics, a few successful cases aimed (and succeeded) at sanctioning and redressing States' inaction in the development of climate change mitigation and adaptation policies and laws.[22] Therefore, when looking at climate change litigation as a transnational phenomenon, its strategic character becomes evident. The Grantham Research Institute on Climate Change has recognised that litigation cases *"*are strategic because they are being used as a mechanism for climate governance."[23]. In this regard, litigation stands out as an evidence of civil society's disaffection with the international regime created to tackle climate change, thus as an argument in support of a more open international decision-making process. While providing a critical assessment of this trend, Duncan French has identified climate change litigation as a driver for multiple achievements, which *inter alia* include upholding procedural rights.[24] It follows that the proliferation of these cases and their foreseeable increase in the future can be ascribed to a widespread discomfort within portions of the international society. Oftentimes feeling underrepresented, frustrated or even excluded from the climate change international decision- and law-making processes, common citizens (usually represented by NGOs) aim at reverting this direction by submitting pleads to courts.

This evidence spurred the idea of a research work in which the question of public participation in international climate change law-making should be addressed. Since the impacts of climate change in the Arctic region and the system of governance of this now globalised area have been part of the research interests of the author before,[25]

[21] The Sabin Center for Climate Change Law maintains a data base on US and non-US climate change litigation cases. The databases are available at: http://climatecasechart.com/ (Last access 09 October 2018).
[22] See Chapter 4 of this research.
[23] M. NACHMANY and J. SETZER, "Global Trends in Climate Change Legislation and Litigation: 2018 Snapshot". Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, 2018, pp. 1–8, at 7.
[24] See, S. ADELMAN and S. HOSSAIN, "Blog: Climate Change Law, Litigation and Governance", *Global Network for the Study of Human Rights and the Environment*, 18 April 2018. Available at: http://gnhre.org/2018/04/18/blog-climate-change-law-litigation-and-governance/ (Last access 09 October 2018).
[25] The proposal builds on a research activity started in 2014 at the Complutense University of Madrid, during which the candidate worked at the research project "*The Race for the Arctic: International Law Issue Considering Climate Change"* (DER2012-36026, Main researcher: E. Conde Pérez) studying the interplay between hard and soft law instruments in providing an effective governance structure for the region, including an insight on the role played by Arctic indigenous peoples in the governance system. See, on the Arctic as an increasingly global area, K. KEIL and S. KNECHT (eds.) *Governing Arctic Change. Global Perspectives*. London: Palgrave Macmillan, 2017.

the regional and international practice of Arctic indigenous peoples' organisations served as a source of inspiration for this research too. Already in 2006, Koivurova and Heinämäki maintained that the Arctic Council (AC) provides, through the category of Permanent Participants (PPs), an exceptional model for the participation of this category of non-State actors in regional governance.[26] Although the Arctic Council was created as an intergovernmental body and without legal personality, State practice has evolved in recent years towards using this political forum for the negotiation of regional binding instruments, concluded under its auspices. It follows that the model of participation of Arctic IPs, at a halfway between observership and participation with voting rights, has become an increasingly paradigmatic model of inclusive governance and decision-making.

This has prompted the idea for a dissertation that considers whether this model can serve as a blueprint for improving the participation of other non-State actors in international climate change law-making, from both an institutional and discursive perspective.[27] In the latter case, since the advocacy of Arctic indigenous peoples has largely relied on rights-based claims, framing climate change as a human rights issue allows for an analogy in which the Arctic model, practice and advocacy are expanded to other right-holders and reinterpreted in the context of international climate change law-making.

From a normative perspective, article 12 of the recently adopted Paris Agreement, establishes the obligations for Parties to cooperate in taking measures to enhance public participation. In light of this provision a dialogue was recently initiated within UNFCCC

[26] Extensive reference to the Arctic Council and Permanent Participants is provided in Chapter 3 of this research work. Suffice here to say that through the status of PPs the six transnational NGOs representing Arctic IPs can participate in regional governance exercising a veto-kind power, since all decisions are made by consensus. To this end, the status of Permanent Participants has been considered from different sides as an example of best practices in relation to indigenous peoples' participation in environmental governance. See, e.g., L. HEINÄMÄKI, "Towards an Equal Partnership between Indigenous Peoples and States: Learning from Arctic Experiences?", *The Yearbook of Polar Law*, Vol. 3, No.1, 2011, pp. 193–246.

[27] In this regard, Lena Heinämäki proposed in 2010 to extend the model of Permanent Participants to the United Nations Permanent Forum for Indigenous Issues (UNPFII). See, L. HEINÄMÄKI, *The Right to Be a Part of Nature – Indigenous Peoples and the Environment*. Rovaniemi: Lapland University Press, 2010, at 75. What advocated in this work is that a similar proposal could be made for those non-State actors that already enjoy specific rights under international human rights law – including youth, women and indigenous peoples – and will likely be disproportionally impacted by climate change, but also for those non-State entities that already have democratic legitimisation, as in the case of local governments and municipal authorities.

bodies on how to enhance the participation of observes in the institutional framework of the UNFCCC, particularly following the exclusion of CSOs and NGOs from the Paris conference. This seemed a timely opportunity for exploring how the participation of non-State actors in international climate change law-making could be improved and reassessed. Therefore, the present research is part of and aims at contributing to this debate.

Finally, the choice of focusing on the climate change regime is determined by the significance of this social, economic and political issue. For the magnitude of its impacts and its inter- and intragenerational character, it fundamentally differs from any other environmental problem. By its very nature, it requires a great deal of collective action and political will to be effectively addressed. As a result, it also opens possibilities to rethink the scope, use, and application of international law – and particularly the interaction between international environmental law and human rights law – in environmental contexts.

3. Research questions and objectives

The primary objective of this research is to study how to improve the application of the principle of public participation in the context of international climate change law-making, in order to remedy a situation in which, although private and subnational actors increasingly work alongside States in the making of international climate regime, they are not officially recognised in this normative capacity. Reflecting on the ever increasing role that different NSAs play in climate change governance, we contend that the normative functions that they perform should be improved — or at least formalised — through the enhancement of their rights to participate in international climate change law-making. While this would be of benefit for those non-State actors already working for the promotion of a climate agenda, a formalisation of the regulatory role of non-State entities would also expose those actors that (1) work on hidden agendas; (2) promote particular interests; or (3) aim to overthrow the present climate change regime. With this in mind it seems fair to say that enhanced participation would also improve the overall legitimacy of the international legislative process on climate change.

Considering the above, the present dissertation aims at addressing two main research questions. First:

- *Should the participatory rights of NSAs be enhanced in the international climate change law-making processes?*

Far from being unproblematic, any satisfactory answer should further investigate the legitimacy of different non-State actors, as well as the legitimacy of international law-making as a process, given that the creation of norms at the international level makes the 'chains of delegation' secured by national elections less straightforward.[28] For instance, on which criteria should the authority of States and non-State actors be ultimately evaluated in the context of climate change law-making? An answer to this question is deemed necessary in light of the gap between the theory and practice of international law-making: although the creation of norms at the international level remains anchored to the doctrine of subjects, in practice, international law-making has been largely – though often informally – shaped by non-governmental influence. The distance between the practice and theory of international law-making must be reconciled for the international legal system to remain credible.[29]

The second research question is framed in light of the evidence that climate change is and will likely continue to be considered in the future as a question of human rights. While it is complex to demonstrate that climate change may constitute a violation of fundamental rights, the obligation of States to respect, promote and consider their human rights obligations when taking action to address climate change has been enshrined in the Paris Agreement. As the former UN Special Rapporteur on human rights

[28] Lengthy, opaque and remote international decision-making may contribute to a perceived democratic deficit in international treaty-making. This problem is particularly felt in the regulation of global problems that rely on collective and global action, and thus make it harder to ensure that one or another nationally elected representative is made accountable for the success or failure of negotiations. The same is true for international organisations, such as the European Union, where the issue of democratic deficit has been extensively discussed. See, e.g., E. CONDE PÉREZ, "El control democrático del segundo pillar o un supuesto de déficit democrático" in F. ALDECOA LUZÁRRAGA (coord.) *Los tratados de Roma en su cincuenta aniversario. Perspectivas desde la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*. Madrid: Marcial Pons, 2008, pp. 1439–1450.

[29] As recalled throughout this work and, particularly, in the conclusions, the possibility to enhance non-State actors' participatory rights should ensure that participation is not diluted in particular interests. Therefore, the legitimacy of different NSA should be carefully balanced in any new framework created for improving the the participation of the public.

and the environment, John Knox, has pointed out: "The Paris Agreement will be remembered not only as the first major climate agreement of the century, but also as the first international environmental agreement to recognize that human rights are part of the framework it creates."[30] Since a human rights-based approach to climate change is increasingly affirming in the literature and in the legal framework created to address global warming, it seems natural to frame the second question addressed in this research in the following terms:

- *Is a human rights-based approach to climate change a viable option to enhance public participation in international climate change law-making?*

While answering these questions, the research aims to achieve the following specific objectives:

- To build a theoretical framework in which:
  - the concept of international subjectivity is explored in relation to the emergence of different non-State actors in international law;
  - the legal instruments that authorise (1) the participation of the public in decision-making processes and (2) the formation of international norms in the environmental field are thoroughly analysed.

- To conduct a case study on Arctic indigenous peoples in order to:
  - illustrate the advanced model of participation through which they engage in regional governance, hard or soft law-making;
  - consider the practice of these peoples at the international level in relation to environmental and climate change governance;

- To gauge which international law instruments could better serve the improvement of non-State actors' participatory rights in the formation of international norms on climate change, considering:

[30] J. H. KNOX, "The Paris Agreement as a Human Rights Treaty" in D. AKANDE, J. KUOSMANEN, H. McDERMOTT and others (eds.) *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*. Oxford: Oxford University Press, 2019, pp. 1–26, at 26.

- the potential for climate change litigation cases and judicial governance to become a bottom-up approach to climate change governance;
- the relevance of a human rights-based approach to climate change for the improvement of NSAs' procedural rights;

- To outline a proposal for the future for improving the participation of non-State actors in the formation of international norms on climate change.

4. Relevance

Anthropogenic climate change has been described as the defining problem of our century.[31] The transnational origin and scope of this environmental problem, paired with its intergenerational character and the persistence of its impacts on the natural and human environments, make it one of the most complex global environmental issues that States and international societies have faced in decades. Being focused on the governance of global warming, the present research aims at contributing to the academic debate developed around how this environmental harm can be effectively addressed by international law.

A study on the participation of non-State actors in climate change law-making can help identifying the most urgent questions regarding the legal framework that to date has been developed to regulate the participation of non-State actors in international law- and decision-making. This seems particularly relevant in the context of complex environmental problems that, as in the case of climate change, entail the development of solutions in which both public and private initiatives are necessary. The scarce academic interest that these topics have generated so far, particularly in the legal field, turns this research into a timely contribution, together with those works that are being developed on the construction of a legal framework for the establishment of the right to public participation as a general principle of international law.[32]

[31] See the discourse pronounced by UN Secretary-General Antonio Guterres on 10 September 2018. Available at: https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered (Last access 22 September 2018).

[32] See, e.g., J. VAN BEKHOVEN, "Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact", *National Taiwan University Law Review*, Vol. 11, No. 2, 2016, pp. 219–260.

By exploring the participation of non-State actors in international decision-making fora, this dissertation is an opportunity to further discuss whether subjects other than States and international organisations should be provided with increased participatory rights in the creation of legal regimes. This seems a particularly relevant question in the climate context where basic human rights, such as the right to life and health are at stake, put at risk by a changing climate. The choice to explore the implications that a human rights-based approach to climate change may have on public participation is also innovative since most legal writings have explored this relationship exclusively to consider whether climate change could be framed and classified as a violation of human rights. By taking a broader approach and considering the significance of climate change litigation and of a human rights-based approach to climate change, this research will contribute to the literature concerning the emerging relationship between climate change and human rights, and the recognition of a stand-alone right to the environment.

5. The Current State of Research

In the aftermath of the adoption of the Paris Agreement, two comprehensive textbooks have reviewed and analysed the development of the international climate change regime and a vast number of peer-reviewed articles have assessed the advancements and setbacks introduced by this new treaty. They also consider how global warming has been addressed beyond the UNFCCC regime.[33] The positive role that private actions and initiatives can play in the governance of this environmental problem has also been at the centre of several academic works.

From the perspective of political sciences and International Relations, Chan *et al*. and Hickmann sustain that an effective framework for climate change must integrate multilateral treaty-making with the climate initiatives of sub- and non-State actors.[34] The

[33] See, e. g., D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, *International Climate Change Law*. Oxford: Oxford University Press, 2017; D. KLEIN, M., P. CARAZO, M. DOELLE and others, *The Paris Agreement on Climate Change*. *Analysis and Commentary*. Oxford: Oxford University Press, 2017.
[34] S. CHAN, H. VAN ASSELT, T. HALE and others, "Reinvigorating International Climate Policy: A comprehensive Framework for Effective Nonstate Action", *Global Policy*, Vol. 6, No. 4, 2015, pp. 466–473; T. HICKMANN, *Rethinking Authority in Global Governance. How transnational climate initiatives relate to the international climate regime*. Oxon, New York: Routledge, 2016.

limits and the relevance of polycentric climate governance, a term coined to signal those dispersed and multilevel pattern of governing emerging alongside the UNFCCC,[35] have been explored in the work edited by Jordan *et al*.[36] While these analyses are essential contributions to the subject, they primarily focus on the process of governance and less on the legal issue of international law-making, which entails considering more thoroughly the questions of non-State actors' international subjectivity and legitimacy.

The role and status of different non-State actors in international law have been alternatively considered by exponents of the theories of international relations and by the international legal scholarship, who often underpin different understanding of legal personality and legitimacy. A recent perspective is found in the comprehensive work edited by Noortmann, Reinisch and Ryngaert, in which an interdisciplinary analysis of the participation of NSAs in the international legal systems is put forward.[37] Noortmann, reiterates the idea – already proposed by other scholars – of international legal personality as a fiction. Writing about the role of NGOs, the author sustains that any international legal status for NGOs should be based on a more differentiated perspective which is able to grasp NGOs' roles, rights and responsibilities rather than on a purely doctrinal approach.[38]

Underlining the divergence of specific international law theories, primarily positivism and those approaches to international law-making that advocate for a more open decision-making process, Boyle and Chinkin point to an unspoken contradiction in the discourse on NSAs when they maintain that "[…] among the strongest adherents to positivist law are civil society groups who seek the conclusion of treaties between States in as strong language as possible and to have input into those processes."[39]

More recently, the question of who is or should be considered a legitimate actor of international law-making has been addressed by Besson and Martí. Drawing on the

[35] E. OSTROM, "Polycentric systems for coping with collective action and global environmental change", *Global Environmental Change*, Vol. 20, No. 4, 2010, pp. 550–557.
[36] A. JORDAN, D. HUITEMA, H. VAN ASSELT, and J. FORSTER (eds.) *Governing Climate Change. Polycentricity in Action?* Cambridge: Cambridge University Press, 2018.
[37] M. NOORTMANN, A REINISH and C. RYNGAERT, 2015, *op. cit.*
[38] M. NOORTMANN, "Non-Governmental Organisations: Recognition, Roles, Rights and Responsibilities" in *Ibid*, pp. 205–223.
[39] A. BOYLE and C. CHINKIN, *The Making of International Law*. Oxford: Oxford University Press, 2007, at 12.

perspective of democratic theory, the authors have proposed an expanded model of international representation in which the shortcomings of a statist model – largely reliant on State consent – is complemented by a reinterpreted dualist model, one in which international law-making is open to the participation of non-State entities provided that they satisfy some basic principles of democratic representation.[40]

The scholarly debate on the principle of public participation has also been recently revived by the celebration of the 20th anniversary of the Aarhus Convention and the adoption of the Escazú Agreement in Latin America.[41] The importance of procedural rights to environmental matters has been recognised through the negotiations of binding agreements and an abundant case law. Notwithstanding, Duvic-Paoli underlines that the precise implications of public participation as a right and the scope of the 'public concerned' category are rarely clarified.[42] Indeed, how this right should be applied in international law-making has been addressed in few legal writings.

In a recently published commentary on the Rio Declaration on Environment and Development, Ebbesson argues about the difficulties encountered in promoting a global instrument that regulates public participation in decision-making. He sustains that this is largely due to the recent origins of international environmental law and to the close relationship between decision-making and state sovereignty, although this is not *per se* precluded by the language of Principle 10.[43] Looking at the implementation of the Aarhus Convention in international climate change decision-making, Duyck has assessed the role played by the Almaty Guidelines in the realisation of public participation in international processes. He argues that, despite the different initiatives undertaken to apply the provisions of the Convention in international climate change law-making and the opportunities opened by the adoption of a new regional agreement on public participation in Latin America, the promotion of the Aarhus Convention beyond the UNECE (United Nations Economic Commission for Europe) region has been limited so far.[44]

---

[40] S. BESSON and J., L. MARTÍ, 2018, *loc. cit.*
[41] See, L. CASADO CASADO, "Acceso a la Información, Participación Pública y Acceso a la Justicia en Materia de Medio Ambiente: Veinte Años del Convenio de Aarhus", *Revista Catalana de Dret Ambiental*, Vol. IX, No. 1, 2018, pp. 1–10.
[42] L., A. DUVIC-PAOLI, "The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence", *Yearbook of International Environmental Law*, Vol. 23, No. 1, 2012, pp. 80–105.
[43] J. EBBESSON, 2015, *op. cit.*
[44] S. DUYCK, "Promoting the Principles", 2015, *loc. cit.*

With regard to the Arctic region, while the impact of climate change on its human and natural environment have been confirmed by several studies,[45] the status and participation of Arctic indigenous peoples in regional governance are analysed by Koivurova and Heinämäki. The authors propose the structure of the Arctic Council as a unique exception to the more general NGO model, because it provides Arctic indigenous peoples with exceptional participatory rights in regional governance.[46] Poto and Fornabaio also study the Arctic Council as a system of good governance for its commitment to the promotion of indigenous peoples' participation in environmental decision-making.[47] In this regard, a pioneer work has been done by the Inuit Circumpolar Council (ICC), the non-governmental organisation representing the Inuit populations of Alaska, Canada, Greenland and Chukotka. Being one of the most vocal advocates of Arctic indigenous peoples' rights at the regional and international level, the ICC has also sustained the expansion of the Arctic Council model of participation to the international climate change regime. ICC main features and transnational political action in and for the Arctic are extensively analysed by Shadian. Her work contributes to the definition of Arctic IPs as *polities*, political units which, by representing an alternative to the model of sovereign States, conceptually helps rethinking the international political space and the most traditional concept of sovereignty.[48]

While the relationship between climate change and human rights has become an important element of the global climate change debate since 2005, Osofsky stresses the relevance that the Inuit's petition to the IACHR has had on increasing the research on the human rights' implications of climate change and defines it as an example of creative lawyering.[49] Asking whether human rights should influence the design of the climate

[45] See, e.g., S. J. HASSOL, *Impacts of a Warming Arctic. Arctic Climate Impact Assessment*. Cambridge: Cambridge University Press, 2004.
[46] T. KOIVUROVA and L. HEINÄMÄKI, "The Participation of Indigenous Peoples in International Norm-Making in the Arctic", *Polar Record*, Vol. 42, No. 221, 2006, pp. 101–109.
[47] M. P. POTO and L. FORNABAIO, "Participation as the Essence of Good Governance: Some General Reflections and a Case Study on the Arctic Council", *Arctic Review on Law and Politics*, Vol. 8, 2017, pp. 139–159.
[48] J. SHADIAN, "From States to Polities: Reconceptualizing sovereignty through Inuit governance", *European Journal of International Relations*, Vol. 16, No. 3, 2010, pp. 485–510; J. SHADIAN, "Rethinking Westphalian Sovereignty: The Inuit Circumpolar Council and the Future of Arctic Governance", *Working Papers on Arctic Security*, No. 8, 2013, pp. 1–58.
[49] H. M. OSOFSKY, "The Inuit Petition as a Bridge? Beyond Dialectic of Climate Change and Indigenous Peoples' Rights", *American Indian Law Review*, Vol. 31, No. 2, 2007, pp. 675–697.

change regime, Koivurova, Duyck and Heinämäki underline the importance for human rights bodies to open up new ways of interpreting human rights instruments to handle the impact of global climate change.[50] To this end, Hunter, Salzman and Zaelke have considered the advantages of using a human rights approach for the development of international environmental law, underlining that: "The focus of human rights on the individual can inspire reform of international environmental law, which still resists full participation by individuals and NGOs".[51]

6. Approach and methodologies

The approach underpinning this research envisions law as a powerful instrument for the protection of individuals and for the advancement of international societies. It follows from this assumption that its analysis cannot be reduced to the study of a body of norms. It rather requires building a more complex research environment, in which different and complementary methodologies are applied and diverse disciplines are interlinked. By alternating diverse methodologies and relying on the multidisciplinary background of the author, this is what this dissertation aims to do.

At the early stage of this study, a bibliographic review was instrumental to the definition of the scope and objectives of the analysis. A survey of the literature has allowed defining the main legal questions surrounding the emergence of non-State actors in international law and their participation in the international law-making processes. As such, it has not only served to build the background and the theoretical framework for the research but it has also been fundamental for the identification of the main problems and legal gaps of this subject. On the other hand, an institutional analysis was applied to look at how procedural rights have been incorporated in the UNFCCC system, in order to develop a critique of the institutional arrangements created by the UNFCCC for the participation of observers to international climate change law-making.

[50] T. KOIVUROVA, S. DUYCK and L. HEINÄMÄKI, "Climate Change and Human Rights" in E., J. HOLLO, K. KUVOLESI and M. MEHLING (eds.) *Climate Change and the Law*. Dordrecht: Springer, 2013, pp. 287–325.
[51] D. HUNTER, J. SALZMAN and D. ZAELKE, *International Environmental Law and Policy*. St. Paul MN: Foundation Press, 2015, at 1325.

Alongside this process, the textual and hermeneutical analysis of different legal materials (international declarations, international and regional conventions, human rights instruments) has been instrumental to comprehensively define the existing and developing international legal regulation of climate change and public participation. The same method has been applied for interpreting the meaning and implications that the introduction of a human rights language within the Paris Agreement will have for the intersection between international environmental law and human rights law in the context of climate change regulation.

While international climate change law is at the core of this dissertation, the research further touches upon international environmental law, human rights law and the rights of indigenous peoples. The applied methodology also draws and feeds from a case study so as to generate findings from which conclusions concerning the broader topic addressed in this work can be drawn. The dissertation considers the regional and international practice of Arctic indigenous peoples, and whether their model of participation in the Arctic Council and rights-based claims could be resembled by other non-State actors for the enhancement of their procedural rights.

Answering the research questions addressed in this dissertation further required bridging different disciplines. For example, approaching climate change as a legal question, demands having a basic scientific, economic and political understanding of this highly complex environmental problem. Likewise, the issue of public participation entails considering questions of legitimacy, which stands at the intersection of law and social sciences. Ultimately, the analysis and definition of non-State actors has required exploring the abundant literature developed on this topic by theory of International Relations. It follows that none of the subjects addressed in this dissertation has been approached exclusively from the perspective of international law, but rather weighing the raised legal issues with socio-political and economic considerations.

The legal materials used for the completion of this dissertation consist of international declarations, global and regional agreements, the resolutions of UN human rights bodies, as well as the analyses of legal experts. To a lesser extent the research has incorporated the jurisprudence of international, regional and national (human rights) courts and the reports of scientific bodies, such as the Intergovernmental Panel on Climate

Change (IPCC). The referenced bibliographic materials have been collected in Spanish and international universities and research centres. The vast collection of the María Zambrano Library of the University Complutense of Madrid, as well as the bibliographic materials acquired through the collaboration at different research projects conducted at the same University have served as an invaluable resource for this dissertation. During a research stay at the Polar Cooperation Research Centre in 2017, the law library of the Kobe University, Japan, has also been extensively consulted. Since part of this thesis has come into being during a second research stay at the Faculty of Law of the University of Fribourg, Switzerland, a substantial part of the research materials has been found at different Swiss universities and research institutes, among others the Bibliothèque de la Faculté de Droit, University of Fribourg; the Bibliothèque de l'institut de droit européen of the same university; the library of the Institut de hautes études internationales et du développement of Geneva and the UB Hauptbibliothek of the University of Basel. The exchange with the supervisors, peers and colleagues met at these international research institutes also constitutes an immaterial and invaluable contribution to this dissertation.

Finally, it must be noted that the review of the literature on the status and role of non-State actors in international law has revealed that there is no agreed definition on the concept of non-State actors. This category could be stretched as to include actors that range from individuals to armed groups and terrorists. Moreover, their emergence has been registered in very different branches of law. Yet, it is the aim of this dissertation to restrict the analysis to the international climate change law context and thus exclusively consider as non-State actors the nine constituencies that are already recognised as observers in the institutional framework of the UNFCCC and reflect the 9 major groups identified by the Agenda 21 on Sustainable Development. These are: Business and industry NGOs; Environmental NGOs; Farmers and agricultural NGOs; Indigenous Peoples Organisations; Local Government and municipal authorities; Research and independent NGOs; Trade union NGOs; Women and gender constituency and Youth NGOs.

7. Structure

Considering the above, the work is structured as follows:

The study begins by outlining the theoretical framework for the research. Chapter 1 considers the premises for the emergence of non-State actors as a broad category of entities participating in the international system and law-making process. It does so by balancing a State-centric conception of international law and law-making against the body of literature that gives account of a normative role of non-State actors. Although giving a definition of NSAs may prove to be problematic, insofar as they are generally characterised by what they are not – namely States – indirectly reaffirming the still dominant inter-State character of contemporary international law, the chapter ends by considering on which criteria the legitimacy of different NSAs and of international law-making can be assessed.

Chapter 2 introduces the emergence of the principle of public participation in environmental contexts, tracing back its affirmation in the Rio Declaration of 1992 and looking at its subsequent incorporation in different regional conventions, primarily the Aarhus Convention of 1998. Notwithstanding its widespread recognition and implementation through regional conventions, human rights instruments and jurisprudence,[52] the application of such a principle at the international level is non-uniform and ambiguous, and the international law-making process is still formally dominated by nation States. The analysis of the construction of the climate change regime presented in this section shows that, although the UNFCCC system has progressively incorporated several NSAs, their participation lacks adequate systematisation and remains subjected to States' interests.

In making the case for the enhancement of NSAs' participatory rights in climate governance, Chapter 3 outlines a case study on Arctic indigenous peoples. Their practice is analysed from three main perspectives. First, at the institutional level, the formal recognition and integration of Arctic IPs within the most relevant intergovernmental

[52] Boyle has qualified procedural rights as the most relevant environmental addition to human rights law since the Rio Declaration of 1992. Referring to the Aarhus Convention, the author equates it to a human rights treaty, underlining three main aspects of the Convention: (1) it it builds on the established human rights of Access to justice and on procedural elements aimed at securing the rights to life, health and family life; (2) it confers rights directly on individuals; (3) all essential aspects of the Convention have been integrated into European human rights law through the jurisprudence of the ECtHR. More generally, the right to participate in the formulation and implementation of policy at the international level has been recognised as an aspect of art. 25 of the International Covenant on Civil and Political Rights. See: A. BOYLE, "Human Rights and the Environment. Where Next?" in B. BOER (ed.) *Environmental Law Dimensions of Human Rights*. Oxford: Oxford University Press, 2015, pp. 201–239; *International Covenant on Civil and Political Rights* of 16 December 1966, art. 25 (999 UNTS 171).

regional forum, the Arctic Council, provides an example of inclusive form of governance regimes. Although the AC was created at the regional level and without a legal personality,[53] the establishment of the category of Permanent Participants may provide a valuable example for the extension of NSAs' procedural rights in other fora. A justification for the latter is in part provided into the second perspective brought forward: a functional aspect. In different occasions, the contribution of Arctic IPs has proved critical to the initiation, negotiation, and adoption of international environmental agreements,[54] and the relevance of their traditional knowledge as functional to achieve sustainable development is now widely recognised.[55] By the same token, it is now beyond debate that the initiatives of different NSAs will play a key role in helping States meeting the objectives of the Paris Agreement while also mitigating and fostering adaption to climate change.

Third, a rights-based perspective is introduced to explore how the indigenous peoples of the Arctic, through the primary NGOs representing them at different scales but also within the wider international indigenous climate movement, have been able to promote a human rights agenda in the context of climate change,[56] drawing upon advocacy and litigation. The human rights dimension of climate change has been translated into a legal argument by the Inuit Petition to the Inter-American Commission on Human Rights.[57] The latter is analysed in the light of its contribution to the emergence of a debate on climate change and human rights in UN bodies, in the scholarly debate, and in raising public awareness on the subject. Furthermore, and to a greater extent, the petition has been the forerunner of different climate change litigation cases, which are examined in Chapter 4.

[53] See, on the legal personality of the Arctic Council, F. BORGIA, *The Arctic Council: from soft law body towards international organization?*. Presentation held at the 10th Polar Law Symposium 2017. Rovaniemi: Nov. 2017.
[54] See, e.g., L. DOWNIE and T. FENGE, *Northern Lights Against POPs*. Montreal: McGill-Queen's University Press, 2003; H. SELIN, "Global Environmental Governance and Treaty-Making: The Arctic's Fragmented Voice" in K. KEIL and S. KNECHT, 2017, *op. cit*., pp. 101–118.
[55] In the climate regime, art 7.5 of the Paris Agreement expressively acknowledges the importance of traditional knowledge, knowledge of indigenous peoples and local knowledge systems.
[56] Albeit included in the Preamble, the Paris Agreement is the first international environmental agreement with a reference to human rights.
[57] There are at least two ways in which climate change is related to human rights. First, rising temperatures are likely to impede the enjoyment of basic human rights, the right to health and life, among others. Second, the implementation of mitigation and adaptation projects have the potential to further impinge on human rights.

The last part of the dissertation studies international law instruments that may prove relevant for the advancement of a right to public participation in international climate change law-making. While the emerging relationship between climate change and human rights is proposed as the main tool for the enhancement of procedural rights, climate litigation is also considered for two main reasons. First, this phenomenon could be envisioned as an evidence of civil society disaffection with the regime created to tackle climate change, therefore as another argument in support of a more open climate decision-making process. Second, it likewise raises interest for its configuration as a transnational and bottom-up approach to climate change. Although innovative in the use of the law (since it alternates the use of national, European and international law, and resorts to public interest litigation to overcome standing requirements), litigation is regarded as a second best option to climate governance. In this context, the concluding part of the study exposes the advantages and limits of an interplay between human rights and international climate change law for the promotion of public participation. Reflecting on the emergence of a stand-alone human rights to environment,[58] the concluding remarks provide a practical proposals for the improvements of NSAs participation in international climate change law-making.

[58] Following the presentation of its final report (UN Doc. A/HRC/37/59), the UN Special Rapporteur on human rights and the environment, John H. Knox, has urged the global recognition of the right to a safe and healthy environment. The proposal, which was submitted to the Human Rights Council this March, conceives this right in two ways. On the one hand, if envisioned as a capstone, it would provide a more solid framework for the fulfilment of existing obligations under human rights instruments. On the other hand, understood as a cornerstone, it could contribute to the development of more abstract human rights (e.g. the rights to nature or the rights of future generations, not contemplated into the present human rights law).

PART II – SETTING THE CONTEXT

Chapter 1. Non-State Actors in International Law

1.1 The Emergence of non-State Actors in International Law

The appearance of non-State actors in international affairs is mainly linked to the inception of globalisation.[59] As the world became increasingly interconnected with the integration of national markets into a global economy during the 1990s, societal and political interdependence grew beyond nation States. This, in turn, gave rise to concerns different from States' security (e.g. global commons or public good) and favoured the affiliation of groups and individuals transnationally, beyond national borders.

As recognised by the Commission on Global Governance, especially people(s)' concerns for human rights, democracy, and environmental protection produced the emergence of a multitude of new actors that today contribute to global decision- and law-making.[60] As this introduction will show, while traces of non-State influence can be found in very different fields of international law (international humanitarian law, international criminal law or labour law), particularly the environmental realm and the domain of human rights is where NSAs, and specifically non-governmental organisations, have come up more prominently. In other words, where the limited capacity of single nation States to cope with transnational environmental problems or massive violations of human rights became evident, NSAs' contribution to the creation, implementation, and

[59] In the context of this research, globalisation refers to the process of intensification of economic, political and social relations across international boundaries, what implies the overcoming of national frontiers by goods, services and people as well as the establishment of closer contacts among societies. Since public international law is primarily concerned with the existence of States and the regulation of their relations, the challenges that globalisation poses to the status and role of States internationally by redistributing attributes of power among different actors, are likely to impact the evolution of international law too.

[60] COMMISSION ON GLOBAL GOVERNANCE, *Our Global Neighbourhood. The Report of the Commission on Global Governance*. Oxford: Oxford University Press, 1995. The Commission was established in 1992 with the scope of furthering an international agenda on global security, understood in a broad manner. With this mandate it also explored the question of universal democracy and proposed a reform of the United Nations system aimed at redressing the undemocratic character of the Security Council and the General Assembly. In this context it promoted the establishment of an International Assembly of People and a Forum of Civil Society having direct access to the UN.

fulfilment of international law has turned into a precondition to effective governance, along with (but also alternatively to) increased intergovernmental cooperation.

A clear example of how non-State actors have directly or indirectly influenced the development of international law can be found in the work of the International Law Commission (ILC) on this topic.[61] In its role of guardian of the progressive development and codification of international law, the ILC has given credit to NSAs while addressing topics related to the subjects of international law, the law of international organisations or the position of the individual in international law. More specifically, as reported by Zyberi, the Commission addressed those non-State entities falling under the following categories: (1) State responsibility for non-State actors whose conduct can be attributed to the State, including the development of a *Draft Articles on the Responsibility of States,*[62] which addresses the relationship between States and persons, groups of persons or insurrectional movement in articles 8, 9, 10 and 11; (2) Individual responsibility for non-State actors, under which falls the work on the accountability of individuals and international organisations; and finally (3) Non-State actors as it addresses of rights and obligations under international law, which mainly concerns human rights issues regarding the protection of persons in the event of disasters and the expulsion of aliens.[63]

The work of the Commission has not necessarily sparked more clarity on any agreeable definition of NSAs, nor has it definitely solved the question of their role and

[61] See, e. g., G. ZYBERI, "Non-state actors from the perspective of the International Law Commission" in J. D'ASPREMONT (ed.) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*. New York, London: Routledge, 2011, pp. 165–178.

[62] The adoption of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* in 2001 is a clear example of how international law has developed to reconcile its state-centred genealogy with the advent of new actors whose responsibility cannot but be traced back to States, as in the case of armed/private groups and transnational corporations. While responsibility for internationally wrongful acts is usually linked to acts that are attributable to States for an obligation incumbent on them, exceptions to these principles can be found in the so-called "indirect responsibility", when the State acknowledges and adopts illegal private acts or it fails to prevent them in violation of legal obligations. See, INTERNATIONAL LAW COMMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001. Supplement No. 10 (A/56/10), chp.IV.E.1.

[63] See, generally, J. KLABBERS, *International law*. Cambridge: Cambridge University Press, 2017, at 137–153; F. ZORZI GIUSTINIANI, E. SOMMARIO, F. CASOLARI and others (eds.) *Routledge Handbook of Human Rights and Disasters*. New York, London: Routledge, 2018. The account of the democratically elected nature of States, as mentioned above, considers the celebration of free elections. Although Freedom House has registered a decline in the exercise of political and social rights in over 68 countries, the organization's report "Freedom in the World 2018" identifies 116 electoral democracies in 2018. See, M. J. ABRAMOWITZ, *Freedom in the World 2018*. Freedom House. Available at: https://freedomhouse.org/report/freedom-world-2018-table-country-scores
(Last access, 27 April 2019).

status under international law. Nonetheless, its work certainly is reflective of the emergence and increased importance of these non-State entities in international affairs, as well as of a changing international law framework in which non-State actors' activity has to be recognised and further regulated. It must be noticed, however, that these examples primarily refer to how the international legal framework has evolved so as to accommodate or regulate non-State actors, instead of looking at how, conversely, non-State actors have directly or indirectly, and more or less formally, influenced the development and the making of international norms.

The State-driven nature of international law-making is not disputed in this work. The democratically elected nature of most States explains why they are primarily entitled to the conduct of international relations and why their consent is central to the process of law-making internationally.[64] Nonetheless, the international system has also evolved towards the incorporation of actors other than States along the entire norm creation process and evidence of a shift from an exclusively State-centric system is certainly found in international environmental law. For this reason, while mention to different fields of international law and diverse types of NSAs will be found in this first chapter, most references will be made in the context of international environmental law, to which non-governmental organisations and civil society organisations have contributed more prominently.

Indeed, as a result of a broader environmental movement that emerged during the 1960s due to large-scale environmental problems with human rights implications (e.g. transboundary pollution, ozone layer depletion, and climate change), the first UN Conference on Human Environment was held in 1972 in Stockholm, with the participation of 170 NGOs. Already in 1992, NGOs were given the possibility to directly participate in the preparatory committees of the UN Conference on Environment and Development (UNCED, 1992). Finally, as a consequence of Principle 10 of the Rio Declaration on Environment and Development, the participation of entities other than States to the law-making process has become a constant of most environmental law institutional arrangements.[65]

[64] See, on the notion of State consent and its relevance to international law-making, S. BESSON, 2016, *loc. cit.*
[65] See, e.g., M. BETSILL and E. CORELL, 2008, *op. cit.*

As a result of this process, a new liar of complexity is added not only to the making of international environmental law and the conduct of international affairs more broadly but also to the study of international law as a discipline. The emergence of NSAs has opened the debate on the emergence of a new category of actors to be potentially regarded as subjects of international law.

1.2 Non-State Actors and the International Legal Personality

In 2008 the International Law Association established a committee on non-State actors with the aim of examining their position *in international law in terms of their rights and obligations*.[66] The concluding remarks of its 2016 final report spelled out the complexity of such a task and likewise acknowledged some interesting ideas.[67] First, the traditional interpretation that confers to States an exclusive role in international law does not adequately recognize the functions that different NSAs play in its development and enforcement. Second, while international law has not completely overlooked the plethora of NSAs intervening in international law-making, this topic remains largely under-theorised and allows a reflection on the very foundations of international law. Indeed, the scholarly debate on this heterogeneous category of actors is growing, and their role and legal status in international law is still contested.

That great uncertainty still revolves around the emergence of NSAs in international law is primarily demonstrated by the very different terms used to qualify how NSAs interact with international law. Non-State actors are alternatively addressed as 'participants', 'co-authors' or 'users' of international law. This adds to the differing views existing around the relevance of international legal personality as a doctrinal category,[68] as well as to the attempt of applying this quality to the very broad category of

[66] For the purposes of its analysis, the ILA committee agreed on the following working-definition of non-State actors: *legally recognized and organised entities that are not comprised of nor governed or controlled by States nor groups of States and that actually perform functions in the international arena that have real or potential effects on international law.* International Law Association Committee on Non-State Actors, 2016, *op. cit*., at 4.
[67] *Ibid*.
[68] See, e.g., A. CLAPHAM, *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006, at. 62, 63. Most of the criticism developed around international legal personality as a legal category used to define who should bear obligations and hold rights in the international legal system, relates to the inexistence of a supranational authority granting this status to different subjects. Also, the definition of how this status is to be acquired is not regulated by a legal norm of international law but rather left at the

non-State actors. In fact, as traditionally understood and theorised, public international law aims at governing inter-State relations and it is a discipline developed around the ideas of State sovereignty, equality, and international legal personality. The latter entailing the capacity of having international rights and obligations under a given legal system, as well as the capacity to maintain those rights by bringing international claims.

In a State-centric approach to international law, the doctrine of subjects also suggests that the international legal personality is coupled with the capacity to create law and usually considers States as exclusive law-makers, the only legitimate actors entitled to this function. The understanding of legitimacy paired with this view often comes from the idea of legality, meaning that a norm will be considered legitimate if it originates from a correct source of law and if it has been adopted following a correct procedure.

While this positivist approach is still widely spread in the doctrine and literature of international law,[69] it has also come under certain strain, challenged by the emergence of individuals, minority groups and different non-State entities that act as 'partial' or 'limited' subjects of international law. In this sense, the dichotomy between subjects and objects upheld by the concept of international legal personality is often contested for being normatively unhelpful and for having no functional purpose.[70] Distant from becoming obsolete, the contours of this division have at least become more blurred.

Already in 1949, the ICJ rejected the view that subjectivity exclusively is a matter of statehood. Although confined to the case of an international organisation (IO) that, as a State-based entity, did not completely depart from the idea of State centrality and State consent, in its Advisory Opinion *Reparation for Injuries Suffered in the Service of the United Nations* the Court acknowledged that:

---

discretion of States itself. Also M. ABAD CASTELOS refers to different understanding of the international legal personality in international law theories, when addressing the role and status of NGOs in the present international legal order. See, M. ABAD CASTELOS, *¿Una alternativa solidaria frente a la barbarie? Las ONG en la nueva sociedad global*. Madrid: CIDEAL, 2004, at 238, 239.

[69] See, e.g., H. THIRLWAY, "The Role of Non-State Actors: A Response to Professor Ryngaert", *Netherlands International Law Review*, Vol. 64, No. 1, 2017, pp. 141–153; and J. D'ASPREMONT, "Non-State Actors and the Social Practice of International Law" in M. NOORTMANN, A. REINISCH and C. RYNGAERT, 2015, *op. cit*., pp. 11–31.

[70] See, e.g., R. HIGGINS, *Problems and Process: International Law and How We Use It.* Oxford, Oxford University Press, 1994, at 49.

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States."[71]

The atrocities of the Second World War and the prosecution of international and war crimes also helped establishing that individuals can hold rights and obligations under international law, particularly under international humanitarian law, international criminal law and human rights law. To this end, the second half of the twentieth century saw the "humanization" of international law to the point that international norms on the protection of human rights are considered, at least in their nuclear elements, as *jus cogens.* It follows that nowadays natural persons, legal entities, and peoples are considered as limited subjects of international law.[72]

As a result, the international legal community cannot be said today to be a completely closed system. Over the decades, it has accommodated different entities *ratione personae*, which are regarded as participants and, to a different extent, subjects of international law. The Holy See, the United Nations and the International Committee of the Red Cross (ICRC) represent three examples of how the category of international legal personality has been stretched to cover very different actors, including *sui generis*, States-based and non-State entities.

It follows that, while the centrality of States and their consent remains relevant to the making of international law, the emergence of a category of actors different from that of States has brought into the academic debate a new variable to be considered. As such, the appearance of non-State entities at all level of international governance may be

[71] ICJ advisory opinion, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 178.
[72] Interesting in this sense is the distinction and reflection made by Pastor Ridruejo on the international subjectivity of the individual as a concept to be evaluated on a technical and juridical level on the one hand, and on the axiological level on the other. Under the axiological point of view, a personalist conception of international law asserts the supremacy of human interests in a scale of values and requires States to make human interest the focus of their collaboration. See, J., A. PASTOR RIDRUEJO, *Cursos de Derecho Internacional Público y Organizaciones Internacionales*. Madrid: Tecnos, 2017, at 193.

considered as underlining the limits of a traditional State-centric approach to international law but also as reflective of the changing nature of international law, a living instrument able to evolve and develop over time.

Against this background, and recalling the words of Abad Castelos on the emergence of non-governmental organisations in the international community: "Lo que más nos importa en esta sede, es que la intervención de las ONG en la escena internacional ya se ha producido, sin aguardar, como la práctica muestra, a la adopción de instrumentos que pudieran pretender efecto constitutivo alguno. Una vez acontecida su actuación, el desafío actual no es decidir si esos nuevos actores poseen un título para participar, sino en qué condiciones pueden hacerlo."[73]

In the following section, this work will provide evidence of how the making of international norms has become a more horizontal process, considering how non-State entities engage and relate to the practice of international law-making.

1.3 Non-State Actors and International Law-Making

In article 38 (1) of the Statute of the ICJ, the idea that States are to be considered the exclusive actors of international law-making is taken for granted. Indeed, no indication over the role and functions of actors other than States is to be found in this article. The exclusive sources of law referred to in the Statute are: *a). international conventions, whether general or particular, establishing rules expressively recognised by contesting States; b). international custom, as evidence of a general practice accepted as law;* and *c). the general principles of law recognised by civilised nations*.[74]

In other words, the treaties to which States have – explicitly or implicitly – consented to and the international custom arising from States' practice are the main sources of international law, supported by existing general principles of law when no clear treaty or custom have emerged on a specific issue. Finally, judicial decisions and the writings of the most qualified publicists are also listed by the Statute as subsidiary means for the determination of the rules of law.

[73] M. ABAD CASTELOS, 2004, *op. cit*., at 239.
[74] *Statute of the International Court of Justice* of 18 April 1946, art. 38 (1).

Implied in this is that States, and by extension State-based entities, are unique makers and only legitimate authors of international law. Indeed, as exposed above, while there is still great disagreement on whether or to what extent different non-State entities are to be considered subjects of international law – and thus are entitled to a normative function – international governmental/intern-governmental organisations are essentially governmental bodies. As international organisations established by States through the ratification of a founding treaty, IGOs are provided with an international legal personality and with the possibility to conclude binding agreements with States or among each other.[75] For this reason, these entities will not be part of the analysis of this chapter.

Certainly more problematic is to assess the contribution of NSAs to the formation of international law, both customary and treaty law. Concerning the former, States' general practice and *opinio juris* are the constitutive elements of customary law. The difficulty of tracing non-governmental influence in the formation of customary law is given by the peculiar nature of this source of law. Indeed, there are hurdles in establishing when States' practice is general enough as to become custom. For instance, for how long should a practice be exercised before it can be considered custom, and by whom should it be practiced? What is practice in the first place? In very broad terms, custom is said to emerge when a certain legal practice is widespread enough to be followed and sanctioned by relevant actors for any considerable period of time.

Complications emerge also in the determination of what States accepts as law, although, as Klabbers has pointed: "In fact, the evidences of *opinio juris* are often identical to those of state practice; enacting a law, concluding a treaty, engaging in a legal practice may all count both as evidence of state practice, and as evidence of the sentiment that the behaviour is legally warranted".[76] It follows that, in opposition to treaty law, custom usually relies on the implied consent of States to a certain legal behaviour.[77] In

[75] As established by the 1986 Vienna Convention on the Law of the Treaties between States and International Organisations or between International Organisations at article 2. See, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of* 21 March 1986 (Doc. A/CONF.129/15).
[76] J. KLABBERS, 2017, *op. cit*., at 32.
[77] An exception to this is the persistent objection, that is, a consistent and permanent opposition to an international practice in course, that might be expressed by States so as not to be bound to emerging customary law.

such a State-centred idea, the literature has usually been prone to trace back NSAs' contributions to customary law to States. Therefore, as the International Law Commission has also concluded, NSAs may be able to influence the formation of customary law exclusively if their contribution is finally carried out on behalf of the State or adopted by it. A way for NSAs of doing so would be, for example, to influence the State's conduct through a judicial action, something that will be recalled in a subsequent chapter of this research speaking about the function of litigation in international law. Nevertheless, Boyle and Chinkin report that proposals for accepting NGOs activities as constitutive of practice for determining rules of customary international law have already been made.[78]

On the other hand, although treaty-making is based on the free consent of States and could be considered, as such, the most direct emanation of sovereignty, treaty law is nevertheless very permeable and influenced by non-State entities. The possibility for NSAs to contribute to multilateral intergovernmental negotiations is today a rather institutionalised common practice. This is especially true for those non-governmental organisations that perform specific epistemic functions or that are able to assist States in fulfilling their international obligations. Moreover, being the governance of climate change primarily conducted through the negotiation of multilateral agreements, this research will more thoroughly look into this process of law-making.

Historically, the first acknowledgement of a role to be played by NGOs in international law-making occurred in 1945, with the adoption of the United Nations Charter. Article 71 of the UN Charter expressively prescribes that the UN Economic and Social Council (ECOSOC) "may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence. Such arrangements may be made with international organisations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned".[79]

[78] A. BOYLE and C. CHINKIN, 2007, *op. cit*., at 36.
[79] *Charter of the United Nations* of 26 October 1945 (1 UNTS XVI), article 71.

Certainly, this arrangement introduced a novel form of cooperation between this major State-based entity and one of the most influential categories of NSAs.[80] Nowadays, the consultative arrangement initially sketched out in article 71 is governed by the ECOSOC Resolution 1996/31 on *Consultative relationship between the United Nations and non-governmental organisations.*[81] The consultative status accorded to NGOs whose mandates are in conformity with the UN Charter is further divided into three main categories: (1) *General consultative status*, through which NGOs get the right to attend the meeting of the ECOSOC and its subsidiaries bodies, as well as the possibility to speak, circulate statements and make proposals for provisional agenda; (2) *Special consultative status*, which is close to the general one but reserved to NGOs with smaller scope of activities, although these are not allowed to speak at ECOSOC meetings; and finally (3) *Roster*, which can only attend meetings within their field of competence and provided that consultation with them is requested by ECOSOC or its subsidiary bodies. The practice concerning the adjudication of the status is usually based on the ability of the NGO to contribute to the work of the ECOSOC and thus advance the objectives of the UN.

As a result of this acknowledgement, diverse NGOs have gained access to the UN system and can now participate in international decision-making processes, including some treaty-based regimes as the one on global climate change. It is, in fact, this consultative status that allows NGOs qualified in a relevant field to become observers to multilateral intergovernmental conferences or summits held under the auspices of the UN. Alternatively, another channel of participation is to apply for accreditation directly to the UN Secretariat.

Either way, as it will be detailed in the following chapter, clearer rules for the participation of observers are provided in the rules of procedure established by single organisations or treaty-based systems. Suffice here to say that the observer status may entail the exercise of very different 'rights',[82] from the possibility to exclusively attend

[80] Although criticism has also been moved by different authors. See, e.g., M. ABAD CASTELOS, 2004, *op. cit*., at 221.
[81] United Nations, Economic and Social Council, *Resolution on Consultative relationship between the United Nations and nongovernmental organizations*, 1996 (Resolution 1996/31).
[82] In this sense, it is important to remember that there is no general right to observer status granted to NGOs. Rather, this is established on a case by case basis.

multilateral conferences, or directly engage and lobby *via* participation in a State delegation, to the voting right agreed – almost uniquely – by the International Labour Organisation (ILO) in its tripartite system of consultation. Of course, this is without prejudice of the possibility for NGOs to influence the decision-making process at the national level and by carrying out very diverse advocacy techniques, for example, strategies of 'inside' or 'outside' advocacy, as labelled in the literature.[83]

It is no coincidence therefore that, as noted by Boyle and Chinkin already in 2007: "The international legal system has moved far beyond the categorisations of the sources of international law of the Statute of the ICJ."[84] Increasingly more, by looking at the practice of international law-making, the ICJ assumption of an exclusively State-based law-making system seems in contrast with the evidence of different non-State actors contributing to the success of multilateral negotiations, as well as to their failure[85]. An often-cited example of the latter is the Multilateral Agreement on Investment, largely criticised and finally exhausted by civil society NGOs. The negotiations of the treaty, initiated in 1995, raised criticism when the draft agreement was leaked in 1997. Particularly the lack of transparency in the intergovernmental process and concerns that the treaty would disproportionally favour the interests of financial corporations to the detriment of human and labour rights as well as of environmental standards, caused NGOs strong reactions. After a global campaign lead by global NGOs and paired with the opposition of some developing States, the negotiations were suspended in 1998, with the decision not to resume them.[86] Conversely, in the fields of human rights law, NGOs took initiative for intergovernmental law-making contributing to the drafting of the *International Covenant on Civil and Political Rights*[87] (ICCPR, 1966), as well as the *International Covenant on Economic, Social and Cultural Rights*[88] (ICESCR, 1966). The

[83] See, on this topic, C. BETZOLD, "Business insiders and environmental outsider? Advocacy strategies in international climate change negotiations", *Interest Groups & Advocacy*, Vol. 2, No. 3, 2013, pp. 302–322.
[84] A. BOYLE and C. CHINKIN, 2007, *op. cit.*
[85] For a detailed account of this topic, see the International Law Association Report on Non-State Actors of 2012: INTERNATIONAL LAW ASSOCIATION COMMITTEE ON NON-STATE ACTORS, Second Report of the Committee. *Non-State Actors in International Law: Law-making and participation rights*. ILA Conference in Sofia, 2012. Available at: http://www.ila-hq.org/index.php/committees (Last access, 11 July 2018); as well as the case studies provided in A. BOYLE and C. CHINKIN, 2007, *op. cit*., at 67.
[86] See, on the proposed agreement: https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm (Last access, 29 April 2019).
[87] *International Covenant on Civil and Political Rights*, of 16 December 1996 (999 UNTS 171).
[88] *International Covenant on Economic, Social and Cultural Rights* of 16 December 1966 (993 UNTS 3).

role of the International Committee of the Red Cross in the formation and implementation of international humanitarian law is also largely recognised.[89]

By the same token, environmental and human rights NGOs were determinant to the negotiation, adoption and implementation of several multilateral environmental treaties, including the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[90] (CITES, 1973) and, most recently, the *Paris Agreement* of 2015.[91] Concerning the latter, Jacobs has recalled how a global coalition of NGOs and the civil society have put pressure on governments in the aftermaths of the failure of COP15 in Copenhagen, through the mobilisation of public opinion and advocacy, but also working towards the definition of acceptable emissions levels to be agreed upon in Paris, thus providing expert advice and scientific evidence to the negotiation table. The celebration of the 2014 Climate Summit organised by the UN Secretary General Ban Ki-Moon in which leaders from business, NGOs and city majors where brought together along with governments, also prepared the ground for effective ambitious intergovernmental negotiations, since commitments to climate action were made by private entities for the first time.[92]

While in all the above mentioned cases it is difficult to exactly trace NGOs influence on the law-making process, a clear example in which NSAs amounts to co-creators of international law is the case of the International Labour Organisation in which, as mentioned above, the participation of workers' and employers' representatives is completely institutionalised through the conferral of voting rights.

---

[89] Extensive account of the ICRC role in the promotion of International Humanitarian Law is found in M. HARROFF-TAVEL, "The International Committee of the Red Cross and the promotion of international humanitarian law: Looking back, looking forward", *International Review of the Red Cross*, No. 96, 2014, pp. 817–857.

[90] *Convention on International Trade in Endangered Species of Wild Fauna and Flora* of 3 March 1973 (993 UNTS 243). The wildlife monitoring network TRAFFIC, a partnership between the World Wildlife Fund for Nature and the World Conservation Union, plays a key role in implementing the provisions of the CITES Convention but also provides essential evidence aimed at catalysing actions by governments and business concerning the trade of wild species. See: https://www.traffic.org/about-us/our-mission/ (Last access 29 April 2019).

[91] *Paris Agreement* of 12 December 2015 (UN Doc. FCCC/CP/2015/10/Add, 1).

[92] M. JACOBS, "High pressure for low emissions. How civil society created the Paris climate agreement", *Juncture*, Vol. 2, No. 4, 2016, pp. 314–323.

Apart from this example, NGOs influence on treaty-making usually follows a rather common pattern. Maintaining closed ties with civil society, NGOs are first of all able to identify an area of concern for the general public, which could become the subject of a legal reform. Instead, when a topic still does not ride high on the social agenda, different advocacy strategies are also used to introduce this area of concern into the domestic or global public opinion debate, so that different national governments will be pressured to accommodate it in their political agendas. As a result of this preparatory work, NGOs may be able to introduce an issue in the international agenda and become very active advocates and lobbyist in intergovernmental negotiations, where fundamentally States will control the law-making stage, although NGOs perform different and relevant functions. From the supply of information and expertise to the work done on draft texts, non-governmental influence aims at keeping the attention of governments delegates on the issue they have raised, as well as to make themselves indispensable to the success of intergovernmental law-making. The building of coalitions among different NGOs can also increase their influence and help to redress the problems of representation and lack of resource that smaller NGOs may face.[93]

Then again, the possibility for NGOs to directly impact the making of international legal norms varies very much from subject to subject, and from one institutional setting to the other. Traditionally, economic organisations have been less prone to accommodate NGOs influence, while non-governmental organisations enjoy a completely different kind of legitimisation in environmental contexts.[94]

In institutional terms, instead, there are at least five main categories under which the inclusion of NGOs in the international treaty-making system may be realised:

- The first and the arguably more advanced category, is the participation with voting rights. Probably due to the State-centric nature of international law, this category is not very widespread. The exceptional tripartite consultative status created in the ILO

[93] In this regard, an important problem concerns the North-South divide among NGOs. See, H. STEVENSON and J., S., DRYZEK, *Democratizing Global Climate Governance.* Cambridge: Cambridge University Press, 2014.

[94] Due to the structure of international environmental law, which is largely reliant on the best available science, environmental NGOs have been able to legitimise themselves in environmental organisations as contributors to the development of the science base necessary to the development of multilateral environmental agreements.

has likely been influenced by the way in which labour law is created nationally, where trade unions and employers largely bargain on contracts and employment standards.

- Participation without voting rights is the second category in point and, arguably, the most widespread in both treaty-based systems and international organisations. This category, as applied in the climate change regime, will be largely detailed in the following chapter of this work.

- A third possible mode of participation is that of concertation, which entails the need to consult with different NGOs before a decision is taken. This model seems very suitable for decision-making based on consensus and largely deliberative systems.

- Finally, the least advanced model would be consultation, through which NGOs are merely required to provide information and their viewpoint on the issue under discussion.

This section has tried to understand how NSAs, and particularly NGOs, relate to the practice of international law-making. A conventional consideration of what constitutes a source of law primarily suggests that law-making is a State-centred practice, although this definition neglects the role that actors other than States may play for the emergence of customary law and treaty-law internationally. Indeed, the consideration of the practice of international law-making suggests that this process has evolved towards accommodating actors different from States and that, even under an institutional perspective, law-making is a more plural and horizontal legal practice, which comprises the contributions of entities that are not States and do not enjoy a full legal personality. This is, for instance, the case of many NGOs that, to different extents, have been able to influence the adoption of multilateral treaties.

As a result, while the normative – or quasi-normative – functions displayed by different non-State actors do not point to the emergence of new sources of international law, in as much as soft law is considered binding only in political terms, there is little doubt that different non-State entities have contributed and still contribute to the emergence and development of international law. In essence, as Boyle and Chinkin have

concluded, how international law is made may depend upon what one understands as comprising international law.[95]

1.3.1 International Law-Making and non-State Actors. Redressing a Democratic Deficit?

The creation of legal norms at the international level usually happens through the negotiation of multilateral treaties conducted by States' representatives. States officials are vested with the authority to negotiate international treaties on behalf of their citizens, on the basis of the democratic legitimisation obtained at the national level.

While State consent is aimed at representing the will expressed by citizens through democratic legitimisation, the creation of norms at the international level makes the 'delegation of powers' secured by national elections less straightforward. As a result, although States remain central to the process of international law-making, a so-called 'democratic deficit' is rooted in the creation of international law. Clearly, this deficit is further hampered in non-democratic countries, in which the claims and interests of citizens are simply left unrepresented. Since the divide between national and international law becomes thinner, and international law increasingly more directly affects the lives of individuals, a problem with the way in which legal norms are created internationally is undeniable. Thus, although under different conditions, a question of legitimacy affects States and NSAs alike when they intervene in the creation of international norms.

In this context, proposals for the improvement of the international law-making process can be found across the literature developed around the rise of non-State actors. The academic debate usually points to the need of making the creation of norms at the international level more plural and open to the participation of the civil society, assuming that the legitimacy of international law-making would be enhanced by according a more prominent role to civil society throughout institutional processes. Those opposing an

[95] A. BOYLE and C. CHINKIN, 2007, *op. cit*., at 10. The same has been claimed in a seminal work of 2009, in which Anne Peters and co-authors framed the activity of non-State entities in terms of standard setting. While, they argue, this is a broader concept than that of law and one that is able to transcend important analytical categories as to include the activity of NSAs, how standards are considered binding and law-like depends very much on ones understanding of law. Interestingly, the authors conclude that many standards created by NSAs usually spell out existing legal obligations and therefore may well be stricter than existing laws. See, A. PETERS, L. KOECHLIN, T. FÖRSTER and FENNER ZINKERNAGEL, 2009, *op. cit.*

unconditioned opening of international law-making to NSAs, instead, usually base this claim on the fact that, under a democratic perspective, non-State actors are not elected entities and thus cannot legitimately claim to represent a specific group of citizens, interests or constituencies.

Accordingly, a review of the literature developed around this topic discloses a divide between authors that oppose and criticise a more traditional positivist paradigm and those who are, instead, in favour of a more complementary model of law-making, in which both State and non-State entities are comprised. In the latter case, it is sustained that NSAs cannot replace States in their normative functions but that these entities should be integrated into the law-making process because of their expertise and ability to inject transparency and democracy to the overall procedure.

In general terms, what it is sustained in this work is a non-hierarchical[96] halfway position, in which the deficiencies of a primarily dogmatic statist model is complemented by the normatively relevant functions unfolded by non-State actors, at least for as much as the climate change law-making process is concerned. After all, as Boyle and Chinkin have rightly and ironically pointed: "[…] among the strongest adherents to positivist law are civil society groups who seek the conclusion of treaties between States in as strong language as possible and to have input into those processes."[97]

As anticipated at the beginning of the chapter, already in 1995 the Commission on Global Governance proposed the institution of an International Assembly of People and a Forum of Civil Society, which would have direct access to the United Nations system. Following on the perceived need to reform the UN, and as part of a broader set of reforms, in 2000 the UN Secretary General Kofi Annan invited over 1400 civil society representatives to expose their views at the NGO Millennium Forum, held in parallel to the Millennium Assembly. As a final proposal, the forum agreed on the establishment of a permanent assembly of civil society representatives to meet every two years before the

[96] As it will be made clear in subsequent sections and chapters of this work, the voluntary or involuntary hierarchy perpetrated by the present international law-making system is, in the view of the author, not sufficiently reflective of the importance of the individual in international law as primer subject and ultimate recipient of the norms constituting the international legal system.
[97] A. BOYLE and C. CHINKIN, 2007, *op. cit*., at 12.

celebration of the UN General Assembly annual session. Nevertheless, at the moment of writing, this proposal has yet to materialise.

The idea of a global parliament has been recovered and refined by Falk and Strauss.[98] The authors have proposed the creation of a popularly elected Global People Assembly constituted of global citizenry, in which elected delegates would represent individuals – and not States – and vote independently from the latter. Such a system, which should not necessarily be constituted on the basis of a formal treaty, would redress the *ad hoc* nature of civil society access to global decision-making and institutionalise civil society participation in intergovernmental processes.

Without directly advocating for the creation of a global assembly but strictly referring to the environmental realm, Biermann has also criticised multilateral institutions for being centred around governmental representatives.[99] In his *Earth System Governance*, the author advocates for the creation of a World Environment Organisation. Following his proposal, this could be realised through an upgrade of the United Nations Environmental Programme (UNEP) into a UN specialised agency, to be conceived as the focal point among the different and independent organisations operating on an environmental mandate (FAO, WMO etc.). In detailing the characteristics of this institutional reform, Biermann also argues in favour of a stronger role for civil society organisations in such institutions. By advocating that their primary role should be to serve as 'institutionalised watchdogs', he recalls the theories of liberal institutionalism or cosmopolitanism where the creation of civil society chambers, parliamentary or deliberative assemblies as consultative organs of international institutions are advanced.

Global constitutionalism has more broadly focused on researching the constitutional features of the international legal system, examining the role that the State, individuals, and NGOs play in it.[100] Under this perspective, the rights and obligations held by NGOs should be suited to their functions, in order to "[…] reconcile the

[98] R. FALK and A. STRAUSS, "Toward Global Parliament", *Foreign Affairs*, Vol. 80, No. 1, 2001, pp. 212–220.
[99] F. BIERMANN, *Earth System Governance. World Politics in the Anthropocene*. Cambridge, London: The MIT Press, 2014, at 127.
[100] See, e.g., J. KLABBERS, A. PETERS and G. ULFSTEIN, *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009.

conflicting objectives of inclusiveness and transparency with the preservation of the authority and ultimate responsibility of States."[101] The authors adhering to this view ultimately propose to grant a voice but not a vote to NGOs in the law-making process, as well as to introduce a uniformed procedure for their participation.

Although not exhaustive, this brief account demonstrates that several proposals to overcome the shortcomings of a State-centric model of international law-making have been made from exponents of different international law theories. Yet, it is sustained here, all proposals are also problematic to some extent. First of all, any suggestion is usually made in very abstract terms, not providing a clear path on how the creation of a global assembly should be operationalised, and the election of its representatives made. Also, the idea of civil society is very general, debatable and undefined. Any concrete proposal should be able to define or constrain this concept and its content, at least to a minimum. Instead, when the proposal to grant a voice but not a vote to NGOs is made – as in the context of global constitutionalism – it seems fair to say that the model of participation recommended by this approach is often already in place, at least in environmental contexts. Finally, a problem common to most of these approaches is that they usually justify the claim for more civil society direct participation on a social understanding of legitimacy instead of a normative one, sustaining that public participation injects transparency and democracy to the decision-making, and should, therefore, be justified. Although this might be true in principle, the introduction of criteria for assessing the accountability of different NSAs could help legitimising them, while maintaining their primary role of contestation.

In conclusion, what this overview ultimately reveals it is that, at least so far, no direct peoples' governance has been realised and therefore further consideration of this question is welcomed and much needed, especially regarding the problem of legitimacy.

1.3.2 States, Non-State actors and Legitimacy

Boyle and Chinkin have defined legitimacy as the normative belief that a rule or institution ought to be obeyed.[102] While such a definition may seem unproblematic at a

[101] *Ibid*, at 225.
[102] A. BOYLE and C. CHINKIN, 2007, *op. cit*., at 24.

first glance, the strict relation that the concept of legitimacy holds with the ideas of morality, legality, authority, and power makes whatever definition object of further scrutiny. Indeed, what one is to consider moral, legal or just may be strictly subjective and irreducible to objective categories, as well as it is perfectly possible for powerful and authoritative institutions to be illegitimate. Another problem that entails the definition of *what* or *who* is to be considered legitimate, is the difficulty to ascertain this term in its sociological dimension– namely *what* or *who* people perceive to be legitimate – and its normative one – *who* in fact is entitled to legitimacy –.[103]

The difficulty of agreeing on a unique definition of legitimacy has brought to the theorisation of this concept under four main broad categories,[104] which have been differently used to better detail the multidimensional nature of this concept, and applied to assess the authority of States and non-State actors in international law-making.

Often related with a normative understanding of legitimacy are the categories of *substantive* and *procedural legitimacy*. The authority of an international norm, it is argued, will be legitimised by its substance or by the procedure or sources through which it has come into being. This idea is often paired with a legal positivist view, due to the legitimising role played by State consent, understood as representing the peoples that constitute it, and thus conflated with an idea of legality.[105]

Two other conceptualisations point instead to the functioning of the institutions where decision- and law-making are carried out. *Input legitimacy* refers to the transparency and representativeness of a certain institutional arrangement, including how

[103] See, for a legal perspective on legitimacy, R. WOLFRUM and V. RÖBEN (eds.) *Legitimacy in International Law*. Heidelberg: Springer, 2008. While, on the distinction between justice and legitimacy and on the legitimacy of the sources of international law more broadly, see J., L. MARTÍ, "Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law" in S. BESSON and J. D'ASPREMONT (eds.) *The Oxford Handbook on the Sources of International Law*. Oxford: Oxford University Press, 2017, pp. 724–745.

[104] For a detailed account on the concept of legitimacy and related theorisation, see D. BODANSKY, "Legitimacy" in D. BODANSKY, J. BRUNNÉ and E. HEY, (eds.) *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2007, pp. 705–721; A. BUCHNAN, "The Legitimacy of International Law" in S. BESSON and J. TASIOULAS (eds.) *The Philosophy of International Law*. Oxford: Oxford University Press, 2010, pp. 79–96. On a democratic conception of legitimacy, see T. CHRISTIANO, "Democratic Legitimacy and International Institutions" in *ibid*, pp. 119–137.

[105] R. WOLFRUM, "Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations" in R. WOLFRUM and V. RÖBEN, 2008, *op. cit.*, pp. 1–24.

its members are selected, and the procedures followed to take decisions. In the context of climate change, for instance, input legitimacy has been questioned after the adoption of the Copenhagen Accord of 2009, mainly concluded by the representatives of only 28 States acting as Friends of the Chair group and with the exclusion of other actors, States and non-States alike.[106]

Finally, perhaps the most intuitive categorisation is the one of *output legitimacy*, stemming from the idea that an institution will gain legitimacy for the success and results of its own work. This is, for example, the case of the International Committee of the Red Cross or, in an environmental context, of the UN Environment Programme. Conversely, the output legitimacy of the United Nations Framework Convention on Climate Change[107] has been perceived as very much constrained until the conclusion of the Paris Agreement in 2015, especially due to the non-adherence of major political actors, such as China and the United States of America to the Framework Convention.[108]

As a result, the authority of international norms and processes, as well as of the actors participating therein, may be the result of a variable combination of the above mentioned understanding of legitimacy, including the possibility that, for instance, a high degree of input legitimacy compensates for the more limited results obtained by a certain institution and vice versa. This may be better illustrated by the case of the ILO in which, although input legitimacy ranges very high for the inclusion of non-State entities with a high degree of representation, the overall output legitimacy of this system is to some extent undermined by the relatively slow path at which decisions are taken and law-making realised.

At this point, considering the creation of international legal norms, on which of the following or other criteria should the legitimacy of States and non-State actors be ultimately evaluated?

---

[106] K. BÄCKSTRAND, J., W. KUYPER, B. LINNÉR and others, "Non-state actors in global climate governance: from Copenhagen to Paris and beyond", *Environmental Politics*, Vol. 24, No. 4, 2017, pp. 561–579.

[107] *United Nations Framework Convention on Climate Change* of 09 May 1992 (1771 UNTS 107).

[108] Interestingly in this regard, when dealing with the concept of legitimacy, Boyle and Chinkin also explored the idea of "system legitimacy". By using this term, they aim at referring to the US practice of often resorting to unilateralism and rejecting of multilateralism in international law-making what, in turn, may have the effect to weaken the legitimacy of the overall international legal system. See, A. BOYLE and C. CHINKIN, 2007, *op. cit*., at 28.

As already said regarding State entities, legitimacy is, in intergovernmental rule-making, based on the accountability[109] of governments representatives to their voters. While, as Besson and Martí have rightly pointed,[110] States' democratic legitimisation is not exempt from potential improvement, NSAs certainly raise more problems.

Arguments in support of the participation of non-State actors in international law-making invariably range from the opinion that they inject transparency and democracy into the decision-making, to the conviction that their knowledge and expertise confers them authority.

Wheatley, for example, has underlined the epistemic authority of non-state actors[111]. Recalling Haas' definition of epistemic communities, the author puts forward an instrumental argument to justify why NSAs should be able to influence international law-making: non-State actors will be able to exercise political authority only if they demonstrate their normative legitimacy, which is given by evidence of their competence and epistemic authority. It could be safely said that this is the kind of authority appreciated today by the Intergovernmental Panel on Climate Change, which has been able to build its profile by virtue of the knowledge of its members and its knowledge production on climate change dynamics and impacts.

Outside knowledge-based communities, Spiro has considered the legitimacy and accountability of non-governmental organisations.[112] While the author expressively recognises that NGOs may not necessarily act in the interest of the public, he also sustains that the putative lack of accountability and legitimacy of such entities is mediated in different ways. Although not formally democratic, NGOs are subject to both internal and

[109] In this context, the author borrows the definition of accountability given by Biermann, understood as the willingness to accept responsibility and to account for one's action. In this sense, accountability is comprised of four elements: (1) a normative element, a defined standard of behaviour; (2) a relational element, which links those who are held accountable to those that have the right to hold them accountable; (3) a decision element, the judgment of those able to held other accountable about whether the expected standard of behaviour has been met; (4) behavioural element, which allows the governing actor to punish deviant behaviours. See, F. BIERMANN, 2014, *op. cit*., at 122.
[110] S. BESSON and J., L. MARTÍ, 2018, *loc. cit.*
[111] S. WHEATLEY, "Democratic governance beyond the state: the legitimacy of non-state actors" in A. PETERS, L. KOECHLIN, T. FÖRSTER and G. FENNER ZINKERNAGEL, 2009, *op. cit*., pp. 215–240.
[112] P. SPIRO, "Non-Governmental Organizations and Civil Society" in D. BODANSKY, J. BRUNNÉ and E. HEY, 2007, *op. cit*., pp. 770–790.

external accountability mechanisms. Besides the informal oversight exercised by the members of an NGO over their directorates, reputational considerations are likely to influence their work. The competition with other NGOs may positively influence their behaviour too. More externally then, NGOs become part of an institutional context in which their work is mediated by States and international institutions. In this context, the need to achieve their objective will constrain their capacity to opt out of any institutional set, subsequently obliging them to perform as socialised actors.

Drawing on democratic theories of representation, Besson and Martí have tackled this question more thoroughly,[113] and proposed what they have named a "multiple representation model", based on the consideration and fulfilment of the democratic principles of ultimate and effective popular control; political equality; deliberative contestability and the protection of human rights, on which the legitimisation of both States and non-State entities should be constantly evaluated. In this sense, their view is somehow in line with that of other authors, such as Moravcsik, who claims that any requirement of democratic legitimacy imposed on NSAs, should not be stricter than those existing for States.[114]

While not advocating for the legitimisation of NSAs *tout court*, and referring to the legitimacy of the overall legal system, Abad Castelos has more broadly spoken of the existence of a gap between the theory and practice related to how NGOs particpate in the international system. The author points out that international law has been deficient in regulating the legal status of NGOs if one is to compare the actual relevance and weight that these NSAs have gained on decision-and law-making, and their normative status.[115] She recalls Cutler when criticising the legal structures inherited from a positivist legal order, arguing that this gap may in turn trigger a crisis of legitimacy of the overall international legal system.[116]

[113] S. BESSON and J., L. MARTÍ, 2018, *loc. cit*.
[114] A. MORAVCSIK, "Is there a "Democratic Deficit" in World Politics? A framework for Analysis", *Government and Opposition*, Vol. 39, No. 2, 2004, pp. 336–363.
[115] It is here important to underline, as Abad Castelos does in her analysis, that not only States should be blamed for the lack of recognition of an international legal status for NGOs. In this regard, the author is critical towards the conduct of different NGOs that, she sustains, prefer to carry on their work in this context of legal uncertainty. M. ABAD CASTELOS, 2004, *op. cit*., at 257.
[116] *Ibid*.

In fact, the current situation of international law is one in which non-democratically elected NGOs or NSAs of different kinds are rather socialised with the institutions they aim at influencing, and are thus able to intervene in the law-making process. In this sense, the fact that they do not enjoy (in most cases) formal democratic election and legitimisation, has not precluded them from being decisive to the success or failure of international law-making.

Against this backdrop, any sound proposal for improving the legitimacy of international law-making and of the actors intervening in it, would need to balance all the considerations and concerns exposed so far. Ideally, the possibility to directly elect NGOs representatives would secure the establishment of a democratic link between the citizens of a globalised world and those claiming to represent their interests internationally. The question of representation is fundamental if one is to avoid the perpetuation of a State-centred view, in which the appreciation of NSAs as legitimate actors requires their recognition by States. In other words, the source of authority (and thus legitimacy) of NSAs must be found outside States. In this sense, no further obstacle would be placed on NGOs than to conduct global elections for their representatives. This could be done by realising one of the suggestions made by Besson and Martí who proposed, among others, the organisation of electronic elections secured by block chain or the opening of consultations over NSAs actions. In all such cases, particular attention should be paid to the geographical representation of NGOs and CSOs, as well as to the fact that major organisations should not overrun smaller ones.[117]

Until such a proposal is made possible, a second best option rests in the possibility to foresee incremental models of participation and representation in which, the more non-State entities are allowed to influence the international law-making process, the more their legitimisation should be made explicit. It follows that, if voting rights were to be granted to a specific NSA acting on the same foot as States, the NSA in question should at least enjoy the same legitimisation of States, establishing, therefore, a direct and democratic link with the constituency it aims at representing. On the other hand, if NSAs were to be admitted in the decision-making process as participants but without voting rights, the criteria for assessing their legitimisation and accountability could be less

[117] In the context of climate change governance, these complexities have been exposed in H. STEVENSON and J., S., DRYZEK, 2014, *op. cit*.

demanding. In any case, participation should be institutionalised and secured at any stage of decision making, in order not to recreate the existing model of participation in which States remain the gatekeepers of procedural rights. In this regard, the model of participation of Arctic Indigenous Peoples in the Arctic Council, which will be exposed in the third chapter of this work, may offer an interesting insight.

1.4 Non-State Actors: Breaking Down a Circular Concept

In previous sections, this chapter has considered the emergence of non-State actors in international law. Primarily ascribable to the emergence of global concerns – for instance, the protection of human rights and the environment – very different categories of non-State entities have come to play a prominent role in international affairs and international law. Despite remaining anchored to the idea of State consent and the subjects' theory, the practice of international law-making has been informed and shaped by non-governmental influence. Particularly in the making of treaty law, where the participation of non-State entities is today rather institutionalised, their contribution has been fundamental to the rise or overturn of different legal regimes in diverse fields of international law.[118]

Arguments opposing NSAs' participation in international law-making often point to their lack of legitimisation, while the existence of a democratic deficit has been also identified in the way in which international law is created at the intergovernmental level. International law-making, so the argument goes, always occurs far away from those individuals that, once regarded as passive objects of interstate relations, today are increasingly considered the direct addresses and subjects of international law.[119]

Against this background, the aim of this final section is to explore how the concept of NSAs has been alternatively defined at the international level what, in turn, will not only disclose the main criticalities of a circular concept but also help to set the premises for the analysis of the *problématique* addressed in this research.

[118] See, the examples and references provided in section 1.3 of this Chapter.
[119] See, on this subject, A. PETERS, *Beyond Human Rights. The Legal Status of the Individual in International Law*. Cambridge: Cambridge University Press, 2016.

A paradox emerges when trying to define non-State actors. They always are determinate by what they are not, namely States. Being an empty term, this classification does not provide much information on the variety of entities falling under this category, nor it speaks about their characteristics, functions, and legitimacy, and just says little about their legal status in international law. As already said, under a legal perspective, not all NSAs are considered subjects of law, since they do not all enjoy an international legal personality. As a result of this complexity, non-governmental organisations were recognised by the United Nations in 1945 introducing a negatively composed term. This negatively connoted and one-fit all approach to such a broad category of actors still persists today and, at least to some extent, influences the way in which the doctrine and international law theories conceptualise entities other than States[120].

While this negative definition has been internalised by both the literature referring to and the institutional arrangements incorporating NSAs, it has also received criticisms from different commentators, who first of all contest this terminology for being old-fashioned and mostly anchored to a Westphalian understanding of international law and international relations, as well as for giving NSAs a derived – somehow subordinated – position in the international law system. Indeed, what one could criticise about this approach is that it does not provide justice to the primary and most genuine function of NSAs, as the representatives of (a global) civil society and the individuals of which it comprises. Then again, not all non-governmental organisations are constituted as non-profit or in promotion of the public good, and this is where part of the problem of any overreaching definition lies.

Nevertheless, this terminology already points to three interesting considerations and conclusions that one could draw. First of all, the need to find a definition for entities that are not recognised as a subject of international law, somehow suggests that they have progressively become relevant enough to be studied, discussed and, although not exhaustively, defined. This ontologically proves that, beyond any definition, NSAs are increasingly central in international law and international relations. Second, there is one common denominator that reconciles the heterogeneity of this broad range of actors. This is that they are not public actors, something that raises question over their legitimacy and

[120] In this work, the terminology "non-State actors" and "entities other than States" are used interchangeable.

accountability, as seen above. Third, and contradictorily, such a definition implicitly reaffirms the centrality of State entities in international law. Although this is not questioned here, this State-centric view does not adequately underline the potentially complementary roles that different categories of actors perform in the realm of international law and, being the focus of this research, in international environmental law-making particularly.

A review of the international legal instruments that have attempted to define NGOs in their legal status and functions, likewise reveals that no agreement has been found on a concerted definition. For instance, this is what has emerged from the work of the UN and the Council of Europe, respectively.[121]

As reported above, article 71 of the United Nations Charter recognises the possibility for the ECOSOC to arrange for the consultation with NGOs, although the article falls short of providing a definition of the latter. Always in 1993, when the ECOSOC established an open-ended working group to update its arrangement for consultation with NGOs, it exclusively elaborated broad criteria and general conditions that NGOs must fulfil to gain the consultative status. This left the task to describe NGOs to a UN report from 1994, which proposed the following definition: "An NGO is a non-profit entity whose members are citizens or associations of citizens of one or more countries and whose activities are determined by the collective will of its members in response to the needs of the members or of one or more communities with which the NGO cooperates."[122]

Although very broad and of limited normative significance, the importance of the above mentioned criteria and general definition lies in the influence that they have had for almost all international organisations and institutional arrangements that today incorporate NGOs under this definition. Particularly because so far no international convention has defined or regulated the nature and status of NGOs in international law.[123]

[121] See, K. MARTENS, "Examining the (Non-) Status of NGOs in International Law", *Indiana Journal of Global Legal Studies*, Vol. 10, No. 2, 2003, pp. 1–24.
[122] See, P., J. SIMMONS, "Learning to Live with NGOs", *Foreign Policy*, No. 112, 1998, pp. 82–96, at 83.
[123] See, on this topic, K. MARTENS, 2003, *loc. cit*., at 20.

Indeed, it is exclusively in the European context where major efforts to define and regulate the status of non-governmental organisations via an international agreement were made in 1986, when the Council of Europe adopted the *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*. In the provision enshrined in article 1, the Convention establishes some basic criteria for the identification of international NGOs, among which are that an NGO: (1) has to be a non-profit-making association, foundation or private institution with an aim of international utility; (2) has to be established by an instrument governed by the internal law of a Party; (3) has to carry out activities with effects in at least two States; and finally (4) has to have a statutory office in the territory of a Party and its central management in the territory of that or another Party.

Despite its significance, at date the instrument has been ratified by only twelve States. For the above, as underlined by different authors,[124] there still exists an implicit contradiction between the strong international vocation of most NGOs and the national law by which their status and activities are regulated. As Martens concludes, "[…] from a legal perspective, NGOs seem to remain terra incognita".[125]

Nonetheless, more general definitions and criteria have also been elaborated by different bodies that have devoted their work to NSAs. This is, as already mentioned, the case of the International Law Association which, for the past ten years, has had an operating committee on non-State actors. Having concluded its work in 2016, an analysis of the definition given by this organisation may represent a fresh insight into the subject under scrutiny. For the purposes of its work, and following a rather traditional approach, the committee preliminary classified NSAs in relation with States, distinguishing between international governmental and non-governmental organisations. Another important separation made was the one between legitimate and non-legitimate NSAs, including the latter terrorist or criminal groups and, more broadly, those entities that do not abide by the law. Finally, building on these distinctions, the working definition adopted by the committee was the following: "NSAs [are] legally recognized and organised entities that are not comprised of nor governed or controlled by States nor groups of States and that

[124] M. ABAD CASTELOS, 2004, *op. cit*., at 213; *Ibid*.
[125] K. MARTENS, 2003, *loc. cit*., at 21.

actually perform functions in the international arena that have real or potential effects on international law."[126]

Distant from previous definitions and far from exclusively recognising non-State actors by means of their non-governmental nature, the committee interestingly pointed to the fact that NSAs do perform relevant functions for international law. While this is novel, as the conclusions of the ILA committee also pointed in its concluding report, it would be difficult to draw general principles for the study of NSAs' position in international law without falling in generalizations.

In order to avoid this and narrow its scope, this research will focus in its following chapters only on non-governmental and civil society organisations representing individuals or different societal groups. As a basis, the considered CSOs or NGOs should at least satisfy the following conditions: (1) be an organization autonomous from governments' funding and control; (2) operate in a transnational fashion; and (3) act in ways that affect political outcomes. Finally, as regards the covered societal groups, the reference taken in this work can be found in the nine major groups identified by the Agenda 21 as channels for a facilitated participation in UN activities related to sustainable development.[127]

1.5 Concluding Remarks

As this last section has shown, despite the academic interest grown around the emergence of non-State actors in international law and international relations, no clear or unified definition of this category of actors has emerged in international law theories. This, in turn, makes even more complicated the task of tracking and assessing the influence and role that non-State entities hold in the creation of international legal norms.

As limited subjects of international law, at best, the possibility for non-State actors of being entitled with a normative function remains uncertain. Yet, the analysis of the

[126] INTERNATIONAL LAW ASSOCIATION COMMITTEE ON NON-STATE ACTORS, 2016, *op. cit*., at 4.
[127] These are: Women; Children and Youth; Indigenous Peoples; Non-governmental Organisations; Local Authorities; Workers and Trade Unions; Business and Industry; The Scientific and Technological Community; Farmers.

practice of international law-making has also underlined that different non-State entities are often determinant for the success or the failure of the creation of international legal norms internationally, especially for as much as treaty law is concerned. This further highlights the gap existing between the theory and practice of international law-making and somehow hampers the perceived legitimacy of the overall legal system, already concerned with the democratic deficit of intergovernmental international law-making and the contested authority of the subjects intervening in it. Particularly the realms of international human rights law and environmental law is where the influence of non-State actors has shown more prominently. Encompassing the latter area, the next chapter of this work aims at exploring the international legal framework that authorises the participation of non-State entities in international climate change law-making.

Chapter 2. The Participation of Non-State Actors in International Climate Change Governance[128]

2.1 Introduction

When the Paris Agreement was adopted in 2015, the treaty was presented to the media as a major achievement, a turning point in climate talks. Indeed, the text represents the capstone of previously disappointing climate conferences,[129] during which States' delegations seemed no longer able to agree on how to face *the defining challenge of our age.*[130] For the first time in decades, the treaty is bringing together all nations of the world in tackling climate change, including major pollutant-countries such as the United States of America (USA) and China. According to some commentators,[131] part of this success was due to the multilevel structure and rather hybrid legal form of the agreement.

The main goal of the treaty is to keep global temperature rise below the 2 degrees Celsius above pre-industrial levels, it also aims to further limit the temperature increase to 1,5 degrees Celsius. For that, it builds on a rather unusual combination of hard and soft law provisions,[132] to be applied through national pledges and reviewed by a mechanism of international stocktaking. This notwithstanding, and although it carefully considers and builds on different national circumstances,[133] under the limits of the Vienna Convention on the Law of Treaties the Paris Agreement is a legally binding instrument. Adopted by the Conference of the Parties (COP) decision 1/CP.21, the text consists of a 16 lines long Preamble and 29 articles regulating mitigation and adaptation ambitions, as well as issues

[128] Although very broad under a legal perspective, the term governance will be used in this chapter to identify the totality of ways in which individuals, public and private institutions regulate or organise their common affairs, including both institutionalised mechanisms and non-institutionalised processes. The definition is borrowed from A. PETERS, L. KOECHLIN, T. FÖRSTER and G. FENNER ZINKERNAGEL, 2009, *op. cit*., at 17.

[129] Even if primarily referring to the role of the European Union, an account of the most recent climate talks is provided by X. RUIZ, "El Papel de la Unión Europea en las Negociaciones sobre el Cambio Climático", *UNISCI Journal*, No. 39, 2015, pp. 105–126.

[130] As defined by the former UN Secretary General Ban Ki Moon during the Bali climate change conference of 2007. Available at: https://www.theguardian.com/environment/2007/dec/12/bali.climatechange1 (Last access, 12 May 2018).

[131] See, e.g., L. RAJAMANI, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations", *Journal of Environmental Law*, Vol. 28, No. 2, 2016, pp. 337–358; or A. SAVARESI, "The Paris Agreement: a new beginning?", *Journal of Energy & Natural Resources Law*, Vol. 34, No. 1, 2016, pp. 16–26.

[132] L. RAJAMANI, 2016, *loc. cit.*

[133] The agreement mainly relies on Nationally Determined Contributions (NDCs), these are the pledges and climate actions that all Parties are willing to pursue at the domestic level to achieve the objective of the Paris Agreement.

related with finance, technology development and transfer, transparency, capacity-building and loss and damage.[134] In its final provisions, the agreement includes specific clauses for ratification, entry into force, dispute settlement, and States' withdrawal.

These provisions were was first triggered after the election of Donald Trump at the US Presidency, when the newly elected President announced the American pull out from the Agreement in 2017.[135] Although the withdrawal, as regulated under article 28 of the treaty will not be effective before 2020, it has raised great international concern and opposition at the national level. Betsill has given an account of the reactions that followed Trump's announcement.[136] Different public statements voiced opposition to the US decision, and legal proceedings have been launched by US citizens due to federal inaction.[137] Especially remarkable is the number of domestic coalition of governors, mayors, business leaders and universities that declared their reiterated support to the Paris Agreement. For instance, the city of New York has already released a plan listing action that the city will apply to accelerate the reduction of greenhouse gases (GHGs) emissions, the first of this kind from any city in the world.[138]

In relation to this, a study from Chan and others has reported that cities account for 70 per cent of global greenhouse gas emissions.[139] Echoing a 2014 United Nations Environmental Programme report that clearly assessed that collective national pledges will fall short in meeting the goals set in the Paris Agreement,[140] the authors have stressed the importance of NSAs' action at a different level to achieve, even improve, effective mitigation and adaptation objectives under the Agreement. This was also recognised in

[134] See, e.g., D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, 2017, *op. cit*., at 209–250.
[135] The US State Department sent a formal communication to the United Nations on its withdrawal on the 4th of August 2017.
[136] M. BETSILL, "Trump's Paris withdrawal and the reconfiguration of global climate change governance", *Chinese Journal of Populations Resources and Environment*, Vol. 15, No 3, 2017, pp. 189–191.
[137] Juliana v. U.S. – Climate Lawsuit. The details of the case are available at: https://www.ourchildrenstrust.org/us/federal-lawsuit/ (Last access, 16 May 2018).
[138] The plan is available at: http://www1.nyc.gov/office-of-the-mayor/news/634-17/nyc-delivers-first-ever-city-plan-meet-goals-the-paris-climate-agreement (Last access, 12 May 2018).
[139] S. CHAN, H. VAN ASSELT, T. HALE and others, 2015, *loc. cit.*
[140] UNEP, *Climate Commitments of Subnational Actors and Business. A Quantitative Assessment of Their Emission Reduction Impact*. Nairobi: UNEP, 2015.

2017 by the President of the COP23 in Bonn, at the start of the first Open dialogue between Parties and non-Party Stakeholders.[141]

In this context, the American example serves as an evidence of two phenomena. On the one hand, as it will be argued in the second section of this chapter, non-State entities or, as more broadly defined by decision 1/CP.21 "non-Party stakeholders", can effectively contribute to the achievement of the treaty goals. Especially in the light of the structure of the Paris Agreement that, in contrast with the top-down logic of the Kyoto Protocol, is based on nationally determined contributions (NDCs) and favours a bottom-up approach to climate change, entities other than States are key to the achievement of the Agreements' objective. On the other hand, and contradictorily, although the participation of these entities in climate governance is widely acknowledged and instrumental to the fulfilment of the climate regime, their weight is still not adequately reflected in the international law-making process. Although the United Nations Framework Convention on Climate Change system has worked – and it is still working – towards the incorporation of NSAs[142] in the creation of a climate change regime, their participation in the law-making process is inconsistent, lacks systematisation and it is often subject to States' interests,[143] formally unique law-makers in international law together with international organisations. As the review of the UNFCCC system will show, attempts to enhance procedural rights in the climate context have occurred without contesting the State-driven nature of the intergovernmental process.

Against this backdrop, the aim of this chapter is to introduce and define public participation as a "legal trend", a legal idea or even inspiring legal principle of

[141] Open Dialogue Between the Parties and Non-Party Stakeholders. Fijian Presidency's Report, p. 2. Available at: https://cop23.com.fj/cop23-presidency-hosts-first-ever-open-dialogue-government-parties-non-state-actors/ (Last access, 16 May 2018).

[142] A report from the secretariat of the Aarhus Convention on "Good practice and challenges for public participation in international forums" (2011) quotes the UNFCCC procedures as example of best practices in terms of public participation. However, it also notes pending challenges concerning the volume of participants, their capacity building or limitations regarding the rights of freedom of expression and peaceful assembly of participants.

[143] Several authors have reported on the exclusion of accredited observers from critical phases of climate negotiations, particularly during the COP15 of Copenhagen, but also in Paris at COP21. See, e.g., M. DOELLE, 2016, *loc. cit.* and W., J. WILSON, 2010, *loc. cit*. It should also be noted that in none of these occasions the non-compliance procedure established under the Aarhus Convention have been triggered, although both COPs have been held under European presidencies.

international environmental law[144] and explore how the latter has been applied in international contexts, specifically the climate change regime. Accordingly, the character of this chapter will be predominantly descriptive and just partially analytical. What argued by this research is that, although generally uphold as fundamental to the law-making aimed at addressing complex environmental problems, the application of the principle of public participation in international law-making is still far from being effective. While mechanisms allowing the participation of the public in intergovernmental decision-making are a common feature of all main multilateral environmental agreements, including the climate regime, the real possibility for these categories of actors to influence climate law-making remains limited or largely informal. If this is primarily due to the lack of democratic legitimisation of NSAs, it is nevertheless in contrast with the importance attached to private climate initiatives under the current climate regime and, most importantly, it does not sufficiently reflect the conditions of civil society members as rights holders under international and human rights law. By proposing an ameliorated model for the participation of the public in international climate change law-making, the research argues that the principle of public participation may be explored as a way of enhancing – in some instances formalize – the normative significance of specific categories of NSAs.

2.2 The Principle of Public Participation in International Environmental Law: Evolution and Application in International Contexts.

Public participation is today widely recognised as a core feature of environmental governance and sustainable development.[145] The principle was first enunciated in 1992, during the Rio Conference on Environment and Development, which established the premises for the participation of the public in environmental issue and the so-called 'environmental democracy'.[146]

---

[144] It must be specified that public participation has not been recognised as a general principle of international law. Therefore, in the framework of this work, the expression "principle" is used outside the meaning of article 38.1 of the International Court of Justice Statute. This notwithstanding, due to its widespread recognition and inclusion in treaty law, public participation may be understood as *lege ferenda* in international environmental law. See, for an examination of the status of public participation in international environmental law, J. VAN BEKHOVEN, 2016, *loc. cit*.

[145] Chapter 23 of Agenda 21 recognises public participation as a "fundamental prerequisite for the achievement of sustainable development." Report of the UN Conference on Environment and Development. UN Doc. A/CONF.151/26 of 14th of June 1992.

[146] While, in general terms, international norms are directed at States, this principle conceivably enables non-State actors to have a voice in the elaboration and implementation of these norms, thus making the decision-making process more open and transparent.

In its principle 10, the Declaration states: "[…] environmental issues are best handled with the participation of all concerned citizens, at the relevant level."[147] The text continues by elaborating on the application of procedural rights at the national level, leaving the implementation of the principle in international decision-making somehow unclear. Albeit primarily addressing States and their *concerned citizens*, as Ebbesson has noted, there is no preclusion to the promotion of Principle 10 in international fora or to the expansion of the scope of the concept of *persons* granted with the possibility to participate in decision-making.[148]

Although non-binding as for article 38 of the Statute of the International Court of Justice, the principle is today applied at the national level by a considerable number of States[149] and different multilateral environmental agreements (MEAs) include provisions on public participation. If this points to the political consensus existing over the importance of public participation in addressing environmental matters, an effective application of the principle in its international dimension has encountered more hurdles. Following the 1992 UNCED, successive international environmental summits have reiterated the importance of Principle 10 for intergovernmental decision-making. Notably, in both the Johannesburg World Summit on Sustainable Development of 2002 and the Rio+20 Summit of 2012, States have reiterated their commitment to enhancing "[The] participation and effective engagement of civil society and other relevant stakeholders in the relevant international forums",[150] although this has not added clarity on how participation should be carried out.

The participation of the public in international decision-making contexts has also been acknowledged and promoted in the field of human rights law. While two of the constitutive elements of this principle – access to information and access to justice –

[147] *Rio Declaration on Environment and Development*, "Principle 10", UN Doc. A/CONF.151/26 (Vol.1).
[148] J. EBBESSON, 2015, *op. cit*.
[149] For example, and in relation with the purposes of this research, Mexico has included an explicit reference to the participation of the public in its recent law on climate change. *Ley General de Cambio Climático*, art. 7o(XII), Diario Oficial de 6 de junio de 2012. Available at: http://www.diputados.gob.mx/LeyesBiblio/ref/lgcc/LGCC_orig_06jun12.pdf (Last access, 14 May, 2018).
[150] United Nations, *The Future We Want. Outcome document of the United Nations Conference on Sustainable Development*. Brazil, 2012. Available at: https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf (Last access, 29 May 2018).

reflects rights enshrined in international human rights treaties (e.g. political participation and the right to a fair trial), the Human Rights Committee has also recognised that the right to participate in the formulation and implementation of policies at the international level falls under the scope of article 25 of the International Covenant on Civil and Political Rights.[151] In regional human rights systems, different regional courts have established a link between the right to participate and political and civil rights[152] and especially the jurisprudence of the European Court of Human Rights (ECtHR) has elaborated procedural rights as an expression of the right to private and family life.[153] Notwithstanding this widespread recognition, Ebbesson argues, due to the recent origins of international environmental law and the close relationship between public participation in decision-making and state sovereignty, it has been difficult to agree on a global scale on the promotion of binding legal norms regarding participation.[154] Although efforts regarding its codification have been made by the International Law Commission[155], he concludes, the rules applying public participation go rarely beyond regional application.

Hence, endeavours to apply the principle in its domestic and international dimensions have particularly occurred at the regional level. After almost ten years from its enunciation, Principle 10 was crystallised in the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention, 1998),[156] a regional environmental treaty adopted under the auspices of the UN Economic Commission for Europe which secures the three main pillars sustaining procedural rights in environmental governance: (1) access to information; (2) participation in environmental decision-making; and (3) access to

[151] HUMAN RIGHTS COMMITTEE, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25),* (CCPR/C/21/REV.1/Add.7, General Comment No. 25, 1996).
[152] S. JODOIN, S. DUYCK, and K. LOFTS, "Public Participation and Climate Governance: An Introduction", *Review of European Community & International Environmental Law*, Vol. 24, No. 2, 2015, pp. 117–122.
[153] ECtHR, *López-Ostra v. Spain*, Application no. 16798/90, Judgement of 9 December 1994; ECtHR, *Guerra and Others v. Italy*, Application no. 14967/89, Judgement of 19 February 1998; and ECtHR, *Di Sarno and Others v. Italy*, Application no. 30765/08, Judgement of 10 January 2012.
[154] J. EBBESSON, "Public Participation" in D. BODANSKY, J. BRUNNÉ and E. HEY, 2007, *op. cit*., pp. 681–703.
[155] In its 2001 *Articles on Prevention of Transboundary Harm from Hazardous Activities* (ILC Articles), the International Law Commission noted that states shall provide the public that is likely to be affected by hazardous activities with information on the activity, on the risks involved and the potential harm deriving from it. Moreover, the views of the public shall be ascertained. ILC Articles, article 13.
[156] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* of 25 June 1998 (2161 UNTS 447).

judicial and administrative proceedings and remedies. While an effective application of the principle can only be achieved through the fulfilment of these interrelated components, the focus of this research is particularly on the second pillar.

The relevance of the Aarhus Convention for environmental democracy has been recognised by different scholars, who often underline how its content extends beyond international environmental law, to address human rights-related issues. Alan Boyle has directly equated the Convention to a human rights treaty, underlining three main relevant aspects. First of all, the Convention builds on the established human rights of access to justice and on procedural elements aimed at securing the rights to life, health and family life. Second, it confers rights directly on individuals. Interestingly in this sense, article 15 of the Convention provides the possibility for the Meetings of the Parties to establish mechanisms for the review of compliance with its provisions and allows members of the public or NGOs to bring complaints before a non-compliance committee. Third, as already pointed out, all essential aspects of the Convention have been integrated into European human rights law through the jurisprudence of the ECtHR, as well as by other human rights bodies. Again Ebbsson has highlighted the rights-based approach to public participation adopted by the Aarhus Convention. This unique feature stands out when the Convention is compared with other regional arrangements that include only minimum standards for public participation, or when weighted with the references to this principle as included in international environmental agreements, which just generally endorse public participation[157].

Despite its relevance as almost the only environmental agreement that comprehensively addresses public participation, the potential of the Convention seems undermined by its rather limited endorsement. While the Convention provides the possibility for non-ECE countries to become signatories, at the moment of writing it applies most prominently to European countries, the EU, and its institutions, as well as to former Soviet Republics such as Azerbaijan and Kazakhstan. As for the promotion of procedural rights beyond the European area and in international law-making contexts, Duyck has emphasised the importance of different Convention's bodies, also providing a

[157] J. EBBESSON, 2015, *op. cit.*

careful analysis of how these have helped the implementation of public participation in the climate context.[158]

The following section is therefore dedicated to assess whether – and to which extent – the Aarhus Convention has contributed to the application of Principle 10 in international decision- and law-making processes.

2.2.1. The Aarhus Convention and the Implementation of Principle 10 in International Contexts.

At the moment of writing, the Aarhus Convention has been ratified by 46 countries and the European Union. It is nevertheless important to once again underline that the Convention remains open to accession by non-ECE countries and has, as such, the potential to expand into a treaty on public participation of global application. This would fully realise what prescribed in article 3.7 of the Convention,[159] a provision requiring to all Parties to promote the principles contained in the Convention in international forums. For this purpose, the *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums* were adopted in 2005. This is a non-legally binding document that complements the normative content of the Aarhus Convention, providing interpretation and guidance for the application of its principles in international fora.[160]

In the light of the non-binding nature of the Guidelines, a Task Force on public participation in international fora was also established in 2005 to promote their content. Until 2011, when the Task Force was finally substituted by a Working Group of the Parties (WGP), the body has maintained a double mandate. It focused on promoting the

[158] S. DUYCK, "Promoting the principles", 2015, *loc. cit*.
[159] It has to be noted that this provision is formulated in non-binding terms: "Each Party *shall* (emphasis added) promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment".
[160] As laid out in paragraph 4 of the Guidelines, the term international forum includes: (1) The negotiation and implementation at the international level of MEAs, including decisions and actions taken under their auspices; (2) The negotiation and implementation at the international level of other relevant agreements; (3) Intergovernmental conferences focusing on the environment or having a strong environmental component, and their respective preparatory and follow-up processes at the international level. ECE/MP. PP/2005/2/Add.5, June 2005.

guidelines in international forums on the one hand, and addressed the role of the Parties to the Convention in applying article 3.7, on the other.

To this end, the Task Force has prepared a compendium of best practices, organised different workshops for the exchange of experiences among the Parties,[161] and finally contributed to the improvement of the reporting obligations established under article 10.2 of the Convention. With the dismantlement of the Task Force, the consideration of public participation in international fora continues under thematic sessions organised within the WGP, which more broadly serves to oversee the implementation of the work programme under the treaty and to propose amendments and reviews of the Convention.

Notwithstanding the significance and potential impact of article 3.7 for the extension of public participation to international decision-making, until 2018 the Aarhus Convention has remained the only legally binding instrument putting Principle 10 into practice. Only more recently, the Ninth Meeting of the Negotiating Committee of the Regional Agreement on Principle 10 has adopted a regional agreement for Latin American and the Caribbean (LAC) States, the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (Escazú Agreement, 2018).[162] The agreement, that will remain open to signatures from September 2018 to September 2020, was promoted during the Rio+20 summit, in which 12 Latin American and Caribbean States expressed commitment towards the adoption of a regional instrument of similar content to the UNECE Convention. The adoption of a new regional convention that applies to a vast majority of Latin American countries undoubtedly represents a further step towards the implementation of procedural rights worldwide.

[161] With regard to climate change, two relevant workshops were held. The first in 2010 on a case study on "Promoting the principles of the Aarhus Convention in the lead up to, during and after the United Nations Climate Change Conference 2009" and the second in 2011 on the theme "Making Aarhus work in international forums". See: https://unfccc.int/resource/docs/2010/smsn/igo/088.pdf (Last access, 20 May 2018).

[162] *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* of 4 March 2018. The agreement is currently open for signature.

A first analysis of the document, suggests that emphasis has been given to the international dimension of procedural rights, which are expressively mentioned in article 7.12 of the text.[163] Moreover, article 11.4 obliges all signatories to create partnerships with States from other regions, intergovernmental and non-governmental organisations in implementing the Agreement. Yet, up to the moment of writing it is not possible to assess the implications that this will have in clarifying the content of Principle 10 in intergovernmental decision-making. Moreover, the adoption of a twin convention for the Latin American continent poses the question over the uniform application of public participation and of why, although praised internationally, the Aarhus Convention is still far from enjoying global adherence.

Up to this point, it seems reasonable to conclude that while the Aarhus Convention has certainly played a key role in the implementation of Principle 10 in the European context and, to some extent, has influenced similar legal developments in other regions, the primary content of the Convention remains procedural and, besides article 3.7, largely regulates the exercise of public participation at the domestic level. As a result, and notwithstanding the backing it has received in international environmental summits and by human rights bodies, the participation of the public in international forums requires further consideration.

2.2.2. The Application of the Aarhus Convention to the Climate Change Regime

The participation of different categories of non-State actors in the climate change regime has been explored in several publications, especially with regard to the involvement of NGOs.[164] On the contrary, just a few works have provided a legal analysis of the role that the Aarhus convention has had in promoting the participation of such entities within the regime regulating climate change.

At ten years from the adoption of the Almaty Guidelines, Duyck has assessed the role played by the Convention in the realization of public participation in international

[163] The article reads: "Each Party shall promote, where appropriate and in accordance with domestic legislation, public participation in international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum."
[164] S. OBERTHÜR, M. BUCK, S. MÜLLER and others (eds.) *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience*. Berlin: Ecologic-Institute for International and European Environmental Policy, 2003, at 117.

processes, particularly the UN climate change regime.[165] In his analysis, the author takes into consideration three ways in which bonds between the two legal regimes have been created: (1) the actions triggered by different stakeholders; (2) the initiatives taken by the Aarhus parties to promote the Convention's principles in the UNFCCC system; and finally (3) the institutional role played by the Secretariats of the Aarhus and the UNFCC Conventions.

A first link between the two regimes was created by the interventions of the members of the public during both the UNFCCC sessions and the aforementioned Task Force and WGP meetings dedicated to the application of art. 3.7 in international contexts.[166] The importance of the principles of the Aarhus Convention with regard to enhancing stakeholders' participation has been reiterated in the UNFCCC context during the oral interventions of civil society representatives. In several occasions, NGOs have voiced concerns for the obstacles faced in obtaining access to relevant information as well as to negotiating sessions. For example, during the COP15 of 2009, public participation was severely restricted by the Danish Presidency, who was unable to cope with the logistical challenges posed by an unprecedented level of attendance by civil society representatives. In this regard, it is worth remembering that the Arhus Convention also established a Compliance Mechanism under its article 15, where the public is given the possibility to report a breach of the treaty by one of its Parties.

It seems reasonable to observe that the Mechanism would have provided an appropriate venue for the discussion of the problems raised by civil society representatives on this occasion. Interestingly, however, the Mechanism has never been triggered or used to report a violation of article 3.7 of the Aarhus Convention. Even after the restriction to public participation occurred in 2009, 50 NGOs only suggested a breach of the Convention by Denmark in a joint statement. Since the complaint did not follow the formal procedures established under article 15, the case was finally dismissed and no assessment of the state of implementation of article 3.7 has been made by the Compliance

[165] This section will largely rely on the analysis made in 2015 by S. Duyck since, to the author's knowledge, this is the only study specifically addressing the implementation of art. 3.7 of the Aarhus Convention in the UNFCCC framework. See, S. DUYCK, "Promoting the Principles", 2015, *loc. cit.*

[166] Reference to the work of the WGP is also found in S. KRAVCHENKO, "Procedural Rights as a Crucial Tools to Combat Climate Change", *Georgia Journal of International and Comparative Law*, Vol. 38, No. 3, 2010, pp. 614–648, at 637.

Committee to date.[167] It is the author's view to consider that the mechanism has not been formally used because it would have been difficult to demonstrate the responsibility of a specific Party of the Aarhus Convention for the breach of article 3.7, and because the problems concerning participation have been subsequently discussed within the UNFCCC Subsidiary Body for Implementation (SBI).[168]

This notwithstanding, other Aarhus Convention institutions have served for the exchange of good practices and information among its Parties. Duyck reports that three of the Aarhus meetings addressing public participation have been dedicated to discuss its implementation in the UNFCCC. Those States that are contemporarily Aarhus signatories and Parties to the UNFCCC have had the chance to report on the actions undertaken to promote public participation, which mainly pointed to the practice of including civil society representatives at the domestic decision-making phase or in national delegations at the UNFCCC sessions. Further exchanges have occurred through the reports prepared by the Convention's Parties to the Aarhus Convention Secretariat under article 10.2 and via the national communications presented by UNFCCC Parties under article 12 of the Framework Convention.

Finally, the interactions between the Secretariats of the two Conventions have provided new opportunity to influence the implementation of public participation in the formulation of policies and law pertaining to climate change. Once again, this has primarily occurred thanks to the participation of representatives from the UNFCCC Secretariat in the Aarhus Task Force meetings on participation. Although no direct normative development has derived from this, the UNFCCC Secretariat has nevertheless promoted awareness over the relevance of the Aarhus provisions among the Parties of the Framework Convention, as well as voiced concerns whenever the rights of observers to the Framework Conventions have been restricted, as in the case of the COP15. The maintenance of a sustained dialogue between the two international bureaucracies can play a crucial role in upholding public participation in the climate context.

[167] Ebbesson provides a brief review of the most relevant "jurisprudence" of the Committee until 2015. See, J. EBBESSON, 2015, *op. cit.*
[168] T. KOIVUROVA, S. DUYCK and L. HEINÄMÄKI, 2013, *op. cit*.

As a result, it is undeniable that the work of the Aarhus Task Force on public participation, as well as of the WGP, has provided its Parties with an opportunity to discuss the implementation of public participation in the international climate change regime. Such an exchange has been primarily initiated due to the concerns raised by the observers to the UNFCCC system and progressively endorsed by the UNFCCC Secretariat. The participation of those States that are parties to both Conventions in the Task Force meetings, underlines their general commitment to the provisions of the Aarhus Convention although their reports have informed on the seldom inclusion of civil society representatives in national delegations and that, for most of the time, the engagement with the public has occurred at the domestic level. Therefore, while the continued exchange between the Parties of both Conventions and their institutions is a good practice, to date this has contributed little to the promotion of the Aarhus Convention principles beyond the UNECE region, pursuant to its article 3.7. In fact, as little as 40 UNFCCC Parties are simultaneously signatories of the Aarhus Convention. This notwithstanding, the adoption of the LAC Agreement on Public Participation is a synonym of the growing awareness towards public participation beyond the European context, which will hopefully create new momentum for reconsidering the scale, scope, and exercise of public participation in international forums.

2.3. Progresses and Setbacks in the Application of the Principle of Public Participation in International Climate Change Law-Making: From the UNFCCC to the Paris Agreement

As for most Multilateral Environmental Agreements, the principle of public participation has found application in the UN Convention that regulates international climate change. The relevance of public participation to climate change governance is primarily enshrined in several UNFCCC provisions and regulated by the Rules of Procedures to be adopted by the Conference of the Parties. Notwithstanding the existence of rather formalised system of participation, the negotiation of the Paris Agreement and, subsequently, of the Paris Rulebook, has brought back on the agenda the issue of public participation. In light of this, the aim of this section is to briefly introduce the climate change regime, in order to discuss how public participation have been channelled in the UNFCCC system and, to some extent at least, reconsidered with the adoption of the Paris Agreement.

2.3.1 The International Climate Change Regime: An Introduction.

In his "Climate Change and State Consent", Christiano refers to the climate change regime creation as a universal treaty-making method.[169] This is the creation of a nearly universal agreement in the form of a framework convention where only aspirations, general principles, and procedures for making more demanding agreements in the future are defined. Such a broad context is likely to favour and result in a more inclusive decision-making process since Parties will just progressively deepen their commitments. This is the idea that, since 1992, underpins the present climate change regime, which today consists of a United Nations Framework Convention on Climate Change and two subsequent implementing treaties, the Kyoto Protocol of 1997 and the Paris Agreement of 2015.

The architecture of the UNFCCC as a Framework Convention reflects the political, scientific and economic complexity of dealing with climate change, as it just provides the structure for the development of the international climate change law, setting the foundations of this regime. The core of the text is composed of definitions, principles, and objectives that States are required to follow in order to solve the climate change urgency (articles 1–6).

The main objective of the UNFCCC is to stabilize the concentration of greenhouse gas emissions at a safe level (article 2) but neither a determined emissions' level nor a clear time frame is set. The first articles of the Convention include the general principles by which parties should be guided by in taking effective actions against global warming. Among the most relevant ones are inter-generational equity, the precautionary principle and the principle of common but differentiated responsibilities. Particularly, the latter has represented an important and innovative achievement in the consideration of environmental matters.[170] Taking into account the different level of economic development among the contracting parties and thereby the divergent and historical responsibility that States hold in the production of greenhouse gases emissions,[171] all

[169] T. CHRISTIANO, "Climate Change and State Consent" in J. MOSS (ed.) *Climate Change and Justice*. Cambridge: Cambridge University Press, 2015, pp. 17–38.
[170] See, generally, P. BIRNE, A. BOYLE and C. REDGWELL, *International Law and the Environment.* Oxford*:* Oxford University Press, 2009.
[171] Based on an implicit differentiation between developed and developing countries, a list of developed states and economies in transition is included into Annex I and Annex II of the Convention. In Annex I

developed countries are given a leading role in tackling climate change. Having been a guiding criterion in the implementation of the Kyoto Protocol, its relevance has been to some extent lessened with the adoption of the Paris Agreement that, in search for global ratification and more homogeneous climate action, builds on the more realistic approach of NDCs.

Significantly, already during the first COP of Berlin in 1995, the provisions included in the UNFCCC were considered insufficient and needed to be further specified on the basis of the last report of the Intergovernmental Panel on Climate Change.[172] Therefore, building on article 17 of the Convention, the result of the COP 1 was the so-called *Berlin Mandate*, which exhorted for the negotiation of more rigorous obligations and originated the Kyoto Protocol, adopted in 1997.

Several new aspects were included in this Protocol. Primarily, the specific definition of the quantitative restrictions on emission for industrialized countries, included in Annex B of the Protocol, as well as the introduction of supplemental market-based mechanisms for emission reduction,[173] whereby the partnership with private sector obtained a key role. A first commitment period (2008–2012) for all Parties was also defined, after which the Protocol has been revised and extended until 2020 through the Doha Amendment to the Kyoto Protocol (1997), although the latter has yet to enter into force.[174] Parallel to the renegotiation of the Protocol, a dialogue for the conclusion of a new legal agreement started among the UNFCCC Parties, what resulted in the conclusion of the Paris Agreement on the 12th of December 2015.[175]

---

parties are generally called on assisting developing countries (non-Annex I parties) with technology transfer and funding and have more specific commitments regarding mitigation and reporting. In general terms, article 4 includes a series of possible actions that states may undertake to address the objective of the Convention (e. g. national and regional programmes, promotion and cooperation in different research areas, exchange of relevant information, integration of climate change in national public policies etc.) which will be then communicated and revised during the Conferences of the Parties.

[172] The progressive building of a climate change regime is based on the best available scientific knowledge provided by the IPCC. Established in 1988, it provides assessments of climate change, its impacts and options for mitigation and adaptation.

[173] Essentially three new *Flexibility Mechanisms* were elaborated: the Clean Development Mechanism (CDM), the Joint Implementation (JI) and the International Emission Trading Mechanism (IET) that have been at the centre of climate action as conceived until the Paris Conference.

[174] As reported by the UNFCCC website, in March 2018 111 Parties have ratified the Amendment to the Kyoto Protocol against the 144 instruments of acceptance required for its entry into force. Available at: https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment (Last access, 9 May 2018).

[175] The Paris Agreement was adopted on the 12th of December 2015 as outcome of the COP21 held in Paris, France, and entered into force on the 4th of November 2016. It consists of 29 articles and a Preamble that gives guidance in interpreting its objectives and provisions. Annexed to it is a decision adopted by the COP,

Opinions differ on the effectiveness of the Kyoto Protocol. Despite the importance that the Protocol has had in converting the stabilisation targets included in the UNFCCC into quantitative emission reduction objectives for developed countries, a feeling of failure was triggered by the impossibility to count on the cooperation of key international actors. Shortly after its entry into force, for instance, the United States withdrew from the Protocol and China, another major world polluter, fell under the category of developing countries, not bound to particular reduction targets. Moreover, after 2012, New Zealand, the Russian Federation, and Japan did not set new reduction targets and Canada withdrew from the Protocol. To avoid replication of such a situation, the preparation phase for COP21 marked the fundamental stages for the success of a new agreement, especially promoting a new bottom-up approach, completely alien to the previous Protocol. Since the COP19 of Warsaw in 2013, Parties were tasked with the preparation and submission of their 'intended nationally determined contributions', forerunners of the NDCs that are today at the core of the Agreement reached in France. These are voluntary pledges related to mitigation and adaptation actions that all Parties intend to achieve.

This stressed how, as opposed to the Kyoto system – which imposed reduction commitments on developed countries – the Paris Agreement aimed at reaching a virtually universal acceptance, while adopting a broader approach to reduction commitments and establishing effective mechanisms for their review and progression.[176] Bodansky and others have detailed the hybrid architecture of the Agreement, "[…] in which bottom-up substance to promote participation is combined with a top-down process to promote ambition and accountability".[177]

Clearly, such a mechanism leaves a great deal of autonomy to each State – perhaps one of the reasons for its fast adoption – but Parties are nevertheless obliged to prepare, communicate and maintain their NDCs (article 4.2), and are as well subjects to three

which formally adopts the agreement and develops some technical aspects of the treaty. An Ad Hoc Working Group on the Paris Agreement has also been established to specify the rules, modalities and the content of the treaty which, in many cases, includes only very general provisions. As a result, the COP22 of Marrakech, Morocco, and the COP23 of Bonn, Germany, has been held to date among its Parties.

[176] In this regard, no express reference is made to the principle of common but differentiated responsibilities. Rather, the agreement more often refers to the "different national circumstances" of its signatories.

[177] D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, 2017, *op. cit.,* at 214.

different review mechanisms. In the light of the agreement's transparency framework (article13), States are required to submit periodical reports on their emissions reduction and removal, together with information on the support they provide in terms of technology, finance and capacity-building measures to developing countries. An initial mechanism for implementation and compliance review is then set in article 15. Finally, the effectiveness of the overall agreement is to be reviewed every five years by a global stocktake, in which the collective progress made by all Parties towards the achievement of the treaty goal is assessed. At the moment of writing, technical negotiations for establishing the rules that will govern the implementation of the Agreement (for example how to implement the transparency framework and the compliance review) are on-going. The so-called Paris Rulebook is under negotiation and will likely be defined during the COP24 of Katowice, Poland.

Meanwhile, the Agreement institutes a series of advances: the mechanism for monitoring emissions' reductions and the compliance with national plans, the general relevance accorded to greater transparency, as well as the establishment of a principle of non-regression underscoring the reduction of greenhouse gases emissions of each party. All of them are aspects that, in a perspective of future implementation, leave ample room for manoeuvre to the Parties, but also open possibilities for non-State actors to contribute to the effective review of the pledges made by States at the national and international level.

2.3.2 Public Participation in International Climate Change Law-Making and Governance: Is it Relevant?

The participation of the public in international environmental arrangements through non-governmental organisations, serves a set of different functions and occurs at very different stages. Spiro provides a rather intuitive classification.[178] By considering law-making as a linear succession of decision-making phases in which NGOs are able to intervene, he argues, NGOs usually take part in the *before* (agenda setting and events that bring an issue into policy-makers attention), the *during* (negotiations on a specific issue), and the *after* (both the implementation and enforcement phases) of such a process. Thus, traces of public participation may be found across the whole spectrum of international

[178] P. SPIRO, 2007, *op. cit.*

environmental law-making and enforcement. The degree of non-governmental influence over one or another stage of this process may change based on specific institutional settings' set for participation, NGOs size and resources, as well as governmental responsiveness.[179] All the same, scholars largely converge on the idea that public participation is relevant to the deliberative process in as much as it contributes transparency, along with public opinion acceptance for intergovernmental decisions. By fostering public awareness, NGOs are able to trigger great support for intergovernmental decisions or, conversely, to urge advocacy against one or another policy or the maintenance of the *status quo*.

Especially in the context of highly complex and transnational environmental problems, support for public participation stems from the perception that if environmental laws and policies have to be effective, they require the contribution and involvement of a broad range of actors, representing diverse views, expertise and concerns. Of course, when a determined lobby strategy is meant to advance a specific and non-altruistic interest over public good, a distortion of the primarily essence of public participation occurs. This can be the case with NGOs working on hidden agendas, as well as with government-organised NGOs.[180] Also in this regard, although they are not formally democratic, NGOs' participation may be relevant in enhancing the knowledge base of decision-making, in giving voice to the voiceless or in bringing the concerns of those distant from the *loci* of decision-making[181] to the intergovernmental process. Accordingly, public participation can provide relevant information and knowledges[182] on highly complex environmental issues, improve the legitimacy of intergovernmental negotiations and overall foster good governance and inclusive decision-making.[183]

---

[179] C. BETZOLD, "Responsiveness or influence? Whom to lobby in International Climate Change Negotiations", *International Negotiations*, Vol. 19, 2014, pp. 35–61.
[180] K. MARTENS, 2003, *loc. cit*., at 9.
[181] This is what Sconfienza has addressed as thick participation. The engagement with non-governmental instances able to provide information to help the design of more equitable policies, as well as the ability to bring new perspectives to the decision-making table. U. SCONFIENZA, "The Narrative of Public participation in Environmental Governance and its Normative Presuppositions", *Review of European Community & International Environmental Law*, Vol. 24, No. 2, 2015, pp. 139–151.
[182] In both the conservation of biological diversity and the tackling of climate change the scientific knowledge has been progressively complemented by the traditional ecologic knowledge of Indigenous Peoples. Accordingly, both regimes expressively make reference to these different sources of knowledge.
[183] T. BERNAUER and C. BETZOLD, "Civil Society in Global Environmental Governance", *The Journal of Environment & Development*, Vol. 21, No. 1, 2012, pp. 62–66.

If public participation in environmental contexts usually raises more approval than concerns, debatable is the democratic legitimacy, representativeness, and accountability of civil society representatives. As already studied in the first chapter of this work, the acceptance of civil and non-governmental organisations as "legitimate" representatives of the public interest is likely based on a sociological understanding of legitimacy as opposed to a normative one, which has to be contrasted on the democratic criteria of representation, accountability, and transparency.[184] To be sure, much of the uncertainty surrounding the status of CSOs and NGOs at the international level is also determined by the impossibility to agree on their legal personality in international law.

In the context of climate change, public participation has been recognised as paramount for the intergovernmental process from the outset. Already during the negotiation of the UNFCCC more than 100 NGOs participated as accredited observers. The same Guidelines for the participation of NGOs' representatives at meetings of the bodies of the UNFCCC read in the introductory section: "[NGOs] involvement allows vital experience, expertise, information and perspectives from civil society to be brought into the process to generate new insights and approaches."[185]

Indeed, the engagement with the public has helped to establish new international standards by bringing distinct values into the decision-making process. This has been the case with the agenda on human rights advanced by advocacy groups like environmental NGOs and Indigenous Peoples representatives prior and during the negotiation of the Paris Agreement. Or, again, when these same constituencies vindicated the imbalances created by market-based mechanisms such as the Reduce Emissions from Deforestation and from Forest Degradation (REDD+).[186] Therefore, while the participation of the public in the climate change regime has manifested itself in the forms that have been listed above, different NGOs, civil society organisations and subnational actors have also gone a step further by directly taking initiatives to address this environmental problem. In his work

[184] On this idea, see K. BÄCKSTRAND, F. ZELLI and P. SCHLEIFER, "Legitimacy and Accountability in Polycentric Climate Governance" in A. JORDAN, D. HUITEMA, H. VAN ASSELT, and J. FORSTER, 2018, *op. cit*., pp. 338–356.
[185] UNFCCC, Guidelines for the participation of representatives of non-governmental organizations at meetings of the bodies of the United Nations Framework Convention on Climate Change, Bonn, 2017. Available at: https://unfccc.int/files/parties_and_observers/ngo/application/pdf/guidelines_for_the_participation_of_ngos.pdf (Last access, 16 May 2018).
[186] See, generally, S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit.*

on authority in global climate governance, Thomas Hickmann has given account of the growing importance of sub- and non-State actors[187] in governance arrangements that exceed the international climate regime. While the scholarly debate referred by the author varies in the understanding of hierarchical relationships existing between the different actors and institutions involved in this process, they all point to the fact that NSAs are an integral and progressively more authoritative component of the institutional set(s)[188] developed to address climate change.

It could be argued that the same regime developed to tackle global warming has progressively developed towards including both public and private initiatives. While the core obligations of the UNFCCC, the Kyoto Protocol and the Paris Agreement inevitably fall on the nation States that have consented to them, the reach of climate change – which touches upon the regulation and management of a range of public and private activities as broad as energy, security, and transportation – inevitably requires the partnership with stakeholders originating from different sectors and levels of government.

Evidence of that are, *inter alia*, the private certification schemes developed under the Kyoto Protocol, the manifold and transnational initiatives created by private entities to meet the objective of the Paris Agreement (e.g. city networks and majors' coalitions), as well as the adaptation projects elaborated and implemented at the subnational level, which overall improve States' ability to tackle climate change. Finally, since the primary channel of influence for most NGOs is the realm of domestic politics, the bottom-up approach to climate change designed in the Paris Agreement assumes relevance since non-governmental influence may prove persuasive in keeping States' commitment in line with the objectives included in their NDCs and, more broadly, with the goal of the Agreement.[189]

---

[187] T. HICKMANN, 2016, *op. cit*., at. 20.

[188] Distinct approaches to climate change governance have been proposed by different authors, as a result of the complexity characterising and emerging from climate change. Keohane and Victor, for example, has coined the idea of 'regime complexes', as a loosely coupled system of institutions aimed at governing climate change as opposed to a comprehensive and integrated regime. The idea of 'policentricity' has been introduced by Ostrom in 2010 to identify a polycentric system of governance, in which different units and authorities have considerable independence in making norms within a specific domain. The more classical idea of multi-level governance has also been applied to this environmental problem. Finally, Savaresi has written on the issue of fragmentation of international law in relation to climate change, as a consequence of multiple international regimes conflicting or overlapping while addressing the same legal question.

[189] See H. VAN ASSELT, "The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement", *Climate Law*, Vol. 6, 2016, pp. 91–108.

Under a more strictly normative perspective, subnational entities have begun to fill important normative gaps. This is, for example, the case of many autonomous communities in Spain which, based on their regional competence on the environment[190] and on the principle of subsidiarity, have bridged the regulatory gap left by the central government until 2017, when the Spanish State eventually developed a national Law on Climate Change and Energy Transition[191]. Most likely, similar developments will occur in the United States after the complete withdrawal of the US from the Paris Agreement. If the elected nature of these subnational entities allows them to exercise a certain regulatory power, interesting and arguably more controversial is the recent practice of NGOs that have resorted to climate litigation to press legislators to promote regulatory actions or advocated for the promotion of more ambitious policy-and law-making against climate change. This is, as it will be detailed in Chapter 4, the case of the *Urgenda Foundation case*.

As a result, although it is not always easy to assess in concrete terms its influence, public participation undoubtedly is relevant to the creation, implementation, and oversight of environmental agreements. In the light of its complex, global, cross-sectoral and intergenerational nature, the same can be concluded for climate change law that, not only during the law-making process but especially in the implementation and fulfilment of its regime, heavily relies on the contributions of the private sector, non-State inputs and subnational initiatives alike.

In general terms, the participation of the public in environmental contexts is believed to contribute democracy, transparency, and expertise to law-making, improving the overall effectiveness of decision-making. Especially in global contexts, participation can create a sense of ownership with the solution, helping to reconcile global expectations and local demands.

---

[190] Article 148.1.9° of the Spanish Constitution allows the Autonomous Regions to assume statutory powers in the area of environmental protection. Based on this provision, the regions of Andalusia, Catalonia and the Valencian Community have adopted different strategies aimed at responding to the impacts of climate change in their territories. A compilation of the latter is available at the AdapteCCa.es platform, established to favour the exchange on climate change adaptation in Spain. Available at: http://www.adaptecca.es/administracion-autonomica-local/comunidades-autonomas (Last access, 9 May 2018).

[191] For information on the law, see L. LÁZARO TOUZA, "Cambio climático en 2018: de la gobernanza climática global post Trump a España", *ARI 22*, 2018, pp. 1–7, at 5.

In conclusion, although not exhaustive, the account of private activities provided in this section reveals that public participation in the climate change regime is relevant, although it requires further improvements in terms of how it should be conducted, by whom, and on the basis of which representative mandate.

2.3.3. Public Participation in the Climate Change Regime: Institutional Arrangements.

As a framework convention, the UNFCCC set the basic regulation for the participation of the public in climate change law-making. It is not surprising that, having been negotiated in parallel with the UN Conference on Environment and Development, the Framework Convention welcomes and acknowledges the participation of representatives of the civil society through different procedural mechanisms.[192]

Primarily article 4(i), which makes explicit reference to the widest participation of the public, including that of non-governmental organizations, provides the legal basis for the application of Principle 10 in climate change law-making. This is a general commitment that applies to all the Parties. Whereas article 6(a) also relates to education, training and public awareness, its scope is confined to the national level and, as appropriate, to the sub-regional and regional levels. As a matter of fact, only article 7.6 further specifies how non-Parties stakeholders can engage in the intergovernmental process. The article provides that any agency or body willing to be represented at the COP as an observer has to fulfil the following criteria: (1) to be qualified in the matters covered by the Convention; and (2) to have informed the Secretariat of its wish to be represented as an observer. Finally, it states that any observer will be admitted unless at least one-third of the Parties present will object its application, and more broadly indicate that the admission and participation of observers are subject to the Rules of Procedures to be adopted by the Conference of the Parties.

The rules were negotiated in the first Conference of the Parties (1995), but were eventually never adopted due to a controversial provision on majority voting. Nevertheless, this "Draft Rules" inform on a range of different procedural aspects,

[192] Already during the negotiation process for the Convention in 1991 different NGOs were accredited as observers.

including the participation of observers, and the UNFCCC currently operates under them. In paragraph V, dedicated to observers, Draft Rules 6, 7 and 8 add little to what is already stated in the Convention. While article 7.1 directly mirrors article 7.6 of the Convention, the other provisions add that observers *may be represented at sessions of the Conference of the Parties as observers* (Rule 6.1) and that such observers may*, upon invitation of the President, participate without the right to vote in the proceedings of any session* (Rule 6.2) or *in the proceedings of any session in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the session object* (Rule 7.2). Based on these rules, the Secretariat of the Convention has developed procedures for the admission of IGOs and NGOs as observes. To be considered eligible, applicants are required to provide a statement of competence in the Convention matter, a confirmation of independent juridical personality and confirmation of their non-profit status. More recently, the possibility for non-admitted observers to participate in side events and exhibition has also been established.

As the UNFCCC website summaries, there are three categories of participants at the UNFCCC meetings and conferences: representatives of Parties to the Convention and Observer States, members of the press and media, and representatives of observer organisations. These are further divided into three categories: (1) the UN System and its Specialized Agencies; (2) Intergovernmental Organisations (IGOs); and, most relevant for this research, (3) non-governmental organisations (NGOs). Due to the rise in the number of observers NGOs – there are currently more than 2000 admitted observers NGOs – they have formed themselves into loose groups that are recognised under the Convention as constituencies and mirror the nine major groups established in the Agenda 21[193]: Business and industry NGOs; Environmental NGOs; Farmers and agricultural NGOs; Indigenous Peoples Organisations; Local Government and municipal authorities; Research and independent NGOs; Trade union NGOs; Women and gender constituency and Youth NGOs. Each of them has a Focal Point serving as a contact point for the

[193] Since 2016, the UNFCCC Secretariat has recognised three informal NGOs groups: Faith Based Organisations (FBOs); Education and Capacity Building and Outreach NGOs (ECONGO) and Parliamentarians, although they do not enjoy the same privileges of an official constituency.

UNFCCC Secretariat. Nasiritousi, Hjerpe, and Linnér have assessed the influence of single NGOs and specific constituencies in the UNFCCC process.[194]

Until the adoption of the Paris Agreement, the main channels for participation of NGOs consisted of the following actions:[195]

1. Access to the conference venue, which allows observers' participation in public sessions and, at times, access to open-ended contact groups;
2. Oral intervention during debates. With the growing number of admitted observers, the possibility to make joint constituencies' statements during plenary meetings has also been provided;
3. Holding of bilateral meetings with government delegates and face to face lobbying, which is generally considered the most powerful way to influence law-making and inform delegations and deliberations;
4. Development of position papers in response to call for information by negotiating bodies in between sessions. After a call for improved transparency and record from observers most submissions presented by the constituencies are accessible on the UNFCCC website;
5. The organisation of press conferences, side events, and exhibition, which recently have been allocated increasing space and attention;
6. The preparation of briefings with presiding officers and the Executive Secretary;
7. The inclusion of NGOs' representatives into a national delegation, which provides more direct access to negotiators and the possibility to attend closed meetings. This is an often applied practice with regard to Indigenous Peoples because of their specific conditions of *peoples* within a nation States.

It is nevertheless to be noted that neither the Draft Rules of Procedures nor the Guidelines for participation formalise or clearly establish how participation is to be carried out in climate conferences. As Oberthür has noted, formal rules define NGOs' participation in terms of what they are not allowed to do, namely voting, as opposed to

[194] N. NASIRITOUSI, M. HJERPE and L., B., LINNÉR, "The roles on non-state actors in climate change governance: understanding agency through governance profiles", *International Environmental Agreements: Politics, Law and Economics*, Vol. 16, No. 1, 2016, pp. 109–126.
[195] Oberthür and others provide a detailed analysis of observers' participation in the climate change regime. See: S. OBERTHÜR, M. BUCK, S. MÜLLER and others, 2003, *op. cit.,* at 128–135.

what they can do.[196] As a consequence, not much clarity has been added to the content of the Framework Convention which, by definition, merely aims to give guidance on the issue. On this, different authors have expressed diverging views. Konrad has critically assessed the implementation of Principle 10 as regulated under the UNFCCC. The author notes that both the Draft Rules of Procedures and the Guidelines for representatives of non-governmental organisations are by far not as ambitious or comprehensive as those of the Aarhus Convention and the Almaty Guidelines, and proposes the revision of these Guidelines as a first step to avoid UNFCCC bodies discretion over the participation of the public.[197]

In 2017, notwithstanding the adoption of revised Guidelines, their primarily regulatory character has remained unchanged, what makes them something closer to a code of conduct. This notwithstanding, Riedel and Bodle have sustained in a recent publication on the Local Communities and Indigenous Peoples (LCIPs) Platform,[198] that the rather limited guidance provided in the Draft Rules of Procedures and the Guidelines, may be understood in the light of the need to provide flexibility to this process and find new format and modes of participation for non-Party stakeholders over time.

While it is not the aim of this work to provide an answer to this debate, a half-way perspective is sustained in this research. Certainly, under an institutional point of view, a great deal of procedures has been developed in order to accommodate the increasing number of non-Party stakeholders that have expressed their interest in participating at the climate change regime formation. While their content has added little clarity as to the question of who should legitimately participate and how participation should be exercised in the formation of a climate regime, informality has favoured flexibility and adjustments of the institutional architecture of the UNFCCC system. On the other hand, as will be exposed in the following chapter, informality can also be counterproductive and hinder participation and thus represent a key critical aspect to be addressed when dealing with NSAs' participation in climate change law-making.

---

[196] *Ibid*, at 128.
[197] C. KONRAD, "UNFCCC and the Aarhus Convention. An Analysis of Existing Rules", *Justice and Environment*, 2011, pp. 1–9.
[198] A. RIEDEL and R. BODLE, *Local Communities and Indigenous Peoples Platform – potential governance arrangements under the Paris Agreement*. Denmark: Nordic Council of Ministers, 2018, at 19. Extensive reference to the Platform will be made in following section of this chapter.

Another characteristic that the UNFCCC practice reveals, is the largely remedial character with which the issue of participation has been considered. A piecemeal approach to participation has prevailed over a more ambitious reconsideration of the issue. As a result, informality has coexisted with periodical efforts by the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice (SBSTA) to structure NSAs participation,[199] after the dramatic rise of applicants, observers paired with the complaints from already admitted NGOs.[200] The mentioned UNFCCC bodies especially addressed the issue of participation after COP15 in 2009, during which thousands of duly accredited observers remained excluded from the conference due to logistical challenges, clearly revealing some of the problems affecting public participation in the present climate change regime.

2.3.4 Public Participation After the Adoption of the Paris Agreement

As underlined above, the renegotiation of the Kyoto Protocol opened the way to new opportunities for the Parties to the UNFCCC and non-State actors to cooperate towards the development of multilateral climate action. As a result, the participation of non-Party Stakeholder in this UN framework gained momentum before and during the negotiation of the Paris Agreement.

For example, in 2014 the UN climate conference in Lima launched the Non-State Actor Zone for Climate Action (NAZCA) portal, an online platform aimed at tracking and accelerating cooperative climate actions between States and non-State actors. Likewise, before the celebration of the COP21, the Peruvian and French governments initiated the Lima-Paris Action Agenda (LPAA) for scaling up multilateral climate actions, with the support of the UN Secretary General and the UNFCCC Secretariat. Although relevant because they gradually formalise the fundamental and transnational contribution made to climate governance by different NSAs, these initiatives do not directly bear on the participation of the public in international climate change law-making.

[199] Already between 2010 and 2011, the SBI placed the issue of enhancing the engagement with observers on its agenda. In this context, a workshop was convened in 20111 to discuss opportunities for improved engagement with observers. On the result of the meeting, see H. STEVENSON and J. DRYZEK, 2014, *op. cit*., at 125.

[200] Koivurova, Duyck and Heinämäki give further information on the objections raised by observers over time. See: T. KOIVUROVA, S. DUYCK and L. HEINÄMÄKI, 2013, *op. cit.*

If anything, they are another evidence of the imbalanced position of non-State actors in a system that alternates the support and promotion of NSAs actions, to their exclusion form the law-making process by virtue of their status as mere observers.

Nevertheless, other interesting developments have occurred after the conclusion of the Paris Agreement, which in article 12 expressively reads: "Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement".[201]

For example, the decision accompanying the text adopted in Paris specifically recognised the value of indigenous peoples' knowledge in responding to climate change. A similar reference is made in both the Preamble (paragraph 11) and article 7.5 of the Agreement. These acknowledgements, paired with the advocacy exercised by the International Indigenous Peoples' Forum on Climate Change (IIPFCC), the caucus of Indigenous Peoples at the UNFCCC, and more prominently by the United Nations Permanent Forum on Indigenous Issues (UNPFII),[202] led to the establishment of the Local Communities and Indigenous Peoples Platform in 2015. The overall purpose of the Platform is to foster the exchange of experiences and best practices on mitigation and adaptation in the climate context. The operationalisation of the Platform has been carried out in subsequent COPs and has been the subject of a multi-stakeholder dialogue at SBSTA in which knowledge, climate change policies and actions, and capacity for engagement in the UNFCCC process also emerged as its functions. Up to the moment of writing, the operationalisation of the Platform is still on-going. However, its institution has already raised important questions. During COP23, for example, the IIPFCC called for three main principles to be adopted for the participation of IPs in the Platform, among them, the full and effective participation of IPs – that expressively echoes the status held by Indigenous Peoples Organisations (IPOs) in the Arctic Council – and an equal standing between IPs and the Parties to the UNFCCC and the Paris Agreement.

[201] Paris Agreement, art. 12

[202] A review of the advocacy exercised by indigenous peoples in the climate change context is available in B. POWLESS, "The indigenous rights framework and climate change" in S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit*., pp. 213–221.

As Riedel and Bodle have pointed out, beyond the form and governance structure that the Platform will assume, its establishment touches upon a number of sensitive topics.[203] Significantly improving the participation of a specific constituency, as in the case of IPOs, could set a precedent for other non-Party Stakeholders. While the development of the LCIPs Platform points to the necessary recognition of the status of IPs as rights-holders under international law,[204] and as such has been recognised by other observers, [205] undoubtedly the process represents an experience on which new arrangements for NSAs' participation may be drawn, especially in the case of more marginalised groups or of those whose rights are – and will likely be – disproportionally impaired by climate change. As this research will argue, the status of civil society's members as rights holders under international law, could also be at the basis of improved procedural rights for NSAs, CSOs and NGOs, provided that the latter are legitimately standing for the individuals and interests that they claim to represent.

Another positive improvement has occurred in relation to women, whose rights are recalled in the Preamble of the Paris Agreement, as well as in article 7.5 and 11.2 of the Treaty. The UN Climate Gender Action Plan (GAP) has been approved, in order to integrate a gender perspective into national climate policies and, notably, "to achieve and sustain the full, equal and meaningful participation of women in the UNFCCC process."[206] Although the terms of its implementation are still unclear, actions under the Plan should include, *inter alia*, increased access for women to international climate negotiations and specific training programmes.

With regard to other non-Parties Stakeholders and their engagement at the intergovernmental level, the negotiation of the Paris Agreement has put back on the

[203] A. RIEDEL and R. BODLE, 2018, *op. cit*., at 36.
[204] In the light for example of the United Nations Declaration on the Rights of Indigenous Peoples.
[205] The UNFCCC Constituencies Joint submission on the Local Communities and Indigenous Peoples Platform of May 2017 reads in paragraph 9: "*Given the unique rights and position of Indigenous Peoples, we call for the establishment of a platform that promotes indigenous knowledge and the participation of Indigenous Peoples in the UNFCCC process in a manner that is specific only to this constituency*.". Available at: http://unfccc.int/files/parties_observers/submissions_from_observers/application/pdf/887.pdf (Last access, 9 May 2018).
[206] A thorough analysis of the role of women in the climate change regime and of the steps that brought to the establishment of the GAP is provided in T. PRIOR and L. HEINÄMÄKI, "The Rights and Role of Indigenous Women in The Climate Change Regime", *Arctic Review on Law and Politics*, Vol. 8, 2017, pp. 193–221.

agenda the issue of public participation. Similar to what occurred in 2009, several negotiating sessions remained closed to observers at a very early stage and limited opportunities to follow the negotiations were provided for civil society representatives. [207]

In response to the concerns raised by observers, and as encouraged by the SBI at its forty-sixth session, the Parties agreed to address the issue considering possibilities to enhance their participation. On this premise, the First Open Dialogue between Parties and Non-Parties Stakeholders was held in 2017 during COP23. In the application of the Talanoa tradition, [208] nearly 50 Parties and a broad cross-section of non-Parties Stakeholders members to all constituencies gathered to discuss two main topics: (1) the enhancement and implementation of NDCs, with the aim to create greater collaboration between Parties and Non-Parties Stakeholders at the national level; and (2) the enhancement of observers' access to and participation in formal meetings.

Already proposed in a report of the SBI as a way to enhance the participation of the public in the climate process, the dialogue is expected to continue in future COPs. Its importance notwithstanding, it is fundamental to note that the decision of the SBI mandating the dialogue expressively reasserts the State-driven nature of the UNFCCC process.[209] In other words, although the dialogue represents an opportunity for further engaging with non-Party stakeholders, and is as such a much welcomed improvement of the UNFCCC system, this is not aimed at opening the decision-making process to NSAs. The decision- and law-making process may be opened to the public, but only by means that do not challenge the authority of States as final decision-makers in international law. As underlined by van Bekhoven, "[…] giving full and unconditional effect to public

[207] M. DOELLE, 2016, *loc. cit.*
[208] The Talanoa tradition has been introduced by the Fijian Presidency during the COP23 in Bonn and refers to a tradition of thoughtful, respectful and productive contributions among different parties.
[209] The decision FCCC/SBI/2017/7 reads at paragraph 119: *"The SBI identified opportunities to further enhance the openness, transparency and inclusiveness of the effective engagement of non-Party stakeholders. […] Encouraging future Presidencies, subject to the availability of resources, to explore ways to enable admitted NGO constituencies to have an open dialogue with Parties, whereby agenda setting as well as programming of the dialogue are conducted jointly among the admitted NGO constituencies, the Presidency, the Bureau and the secretariat as appropriate, on the understanding that any outcomes of such a dialogue should have persuasive value only, respecting the Party-driven nature of the UNFCCC process."*

participation provisions may impact State sovereignty and governance and existing institutions and structures of power that States are not willing to accept."[210]

2.4 Concluding Remarks

The participation of non-State actors in international environmental governance and law-making has dramatically increased since the affirmation of Principle 10 of the Rio Declaration of 1992. While the content of such a principle is non-binding under international law, it has been institutionalised as part of most multilateral environmental agreements, interpreted by human rights courts and further implemented with the adoption of regional agreements. In this regard, the Aarhus Convention is the regional treaty that has contributed the most to the application and respect of procedural rights in both their domestic and international dimension. Due to the transboundary nature and scope of climate change, that requires the commitment of both State and non-State actors for the fulfilment, enforcement and advancement of the international regime regulating it, especially the latter aspect, have been in the focus of this chapter.

A brief analysis of the contributions that civil and non-governmental representatives are able to make to international environmental law, has shown the importance of public participation to intergovernmental processes. Particularly in the context of climate change governance, that requires the regulation of different sectors on a multi-level scale and the undertaking of transnational climate actions, public participation is relevant to effective law-making and enforcement. It follows that, in the light of the widely recognised importance attached to non-State entities and transnational actions in the climate governance context, their participatory rights and duties in intergovernmental decision-making should be clearly stated and their participation be a constant of climate negotiation. Instead, a piecemeal approach to public participation has prevailed in the climate change regime so far.

As sustained by several authors, this is meant to provide a more flexible context in which public participation can be progressively scaled up. Notwithstanding this, the lack of a coherent and systematic approach to participation has at time impaired the rights

[210] J. VAN BEKHOVEN, 2016, *loc. cit*., at 250.

of the public to participate in climate change law-making. Undoubtedly, several improvements have occurred in recent years as a result of the dialogue initiated between those States that are contemporarily signatories of the Aarhus Convention and the UNFCCC regimes, the Conventions Secretariat and as a result of the work initiated by the SBI. Yet, CSOs and NGOs are still prevented from being decision-makers in international climate change law. Particularly the dialogue initiated on how to enhance the participation of observes, started as a result of the exclusion of CSOs and NGOs from the Paris conference, is a timely opportunity to provide non-State Parties with a new role in climate change law-making.

PART III – CASE STUDY: THE PARTICIPATION OF ARCTIC INDIGENOUS PEOPLES IN CLIMATE GOVERNANCE

Chapter 3. Non-State Actors and International Climate Change Governance: Learning from Arctic Indigenous Peoples' Practice

3.1 Introduction

In a previous chapter, this research has detailed the characteristics of the recently established Local Communities and Indigenous Peoples Platform as a rather advanced channel for the participation of local and indigenous communities in the international climate change law-making process. Although a final judgement on its effectiveness will only be possible after its complete operationalisation, it is interesting to note that one of the main objectives it longs for is the achievement of an equal standing between IPs and State parties in the framework of climate negotiations. This, in turn, is nothing less than a reflection of the status of Permanent Participants that Arctic indigenous peoples enjoy within the Arctic Council, the main intergovernmental forum devoted to the governance of the Arctic region.[211]

To be sure, in recent decades Arctic IPs have been at the forefront of the regional and international efforts to revert global warming. Indeed, it is in the polar regions where the increase in global temperatures has been most pronounced worldwide, to the extent that the South and North poles have become the symbols and barometers of these climate variations.[212] While major warmings of the Antarctic peninsula are capturing international headlines,[213] the loss of sea ice in the Arctic is likely to have global

[211] As detailed in the second chapter of this work, after the institution of the LCIPs Platform, the IIPFCC called for three main principles to be adopted for the participation of IPs in the Platform. Among them is the full and effective participation of IPs, which expressively echoes the status held by Indigenous Peoples Organisations in the Arctic Council. In fact, as reported by Heinämäki, already during the Seventh Session of the PFII, the Arctic Caucus – formed by the Sámi Council and the ICC – required the creation of a reserved seat for IPs at the UNFCCC negotiations. Thus, the transposal of the Arctic model to other fora of decision-making has often been advocated by Arctic IPs. See, L. HEINÄMÄKI, 2010, *op. cit.*, at 74.

[212] S. DUYCK, "Which Canary in the Coalmine? The Arctic in the International Climate Change Regime", in T. KOIVUROVA, G. ALFREDSSON and W. HASANAT (eds.) *The Yearbook of Polar Law, Volume 4*. Leiden, Boston: Brill, 2012, pp. 583–617.

[213] See, e.g., M. TAYLOR, "Antarctic ice melting faster than ever, studies show" *The Guardian*, 13 June 2018. Available at: https://www.theguardian.com/environment/2018/jun/13/antarctic-ice-melting-faster-than-ever-studies-show (Last access 22 August 2018).

repercussions on sea levels and precipitation patterns, but also on the likelihood of the region to be used for the exploitation and transportation of different resources.[214]

Therefore, it comes as no surprise that the inhabitants of the Arctic region[215] – whose livelihoods and identities are largely dependent on the use of ice and ice-related resources, as well as on the exercise of traditional practices – have been among the most vocal advocates in the fight against climate change regionally, transnationally and internationally. As this chapter aims to show, this has partially been the result of a generalised recognition of indigenous' rights under international law,[216] but also a consequence of their transnational organisation and empowerment within the Arctic Council, where these populations enjoy a high degree of representation and participation.

3.2 Arctic Indigenous Peoples: Main Features, Impacts Derived from Climate Change and Transnational Organisation

3.2.1 Indigenous Peoples of the Arctic, An Overview

According to the second Arctic Human Development Report of 2014, today 4 million people live in the Arctic, among which roughly a ten percent are Arctic indigenous peoples.[217] Approximately 155,000 Inuit live in Alaska, Canada, Greenland and Russia; 55,000 Athabaskans and Gwich'in people inhabit Alaska and Canada; 15,000 Aleut reside in different territories of Alaska and Russia, and other 250,000 members of different

[214] See, e.g., J. WATTS, "Arctic's strongest sea ice break up for first time on record" *The Guardian*, 21 August 2018. Available at: https://www.theguardian.com/world/2018/aug/21/arctics-strongest-sea-ice-breaks-up-for-first-time-on-record. (Last access 22 August 2018).

[215] There are no indigenous peoples living in Antarctica and human settlement in this region are confined to seasonal research expeditions.

[216] A fundamental recognition of indigenous peoples' rights occurred in 2007 with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007). Although this is not a formal binding instrument under international law, most of its provisions are today endorsed by a majority of UN Member States and have been referred by national and international courts in the adjudication of cases concerning the rights of IPs, to the point that several authors have been discussing on whether its key provisions could be considered as international customary law. See, on this point, S., G. BARNABAS, "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law", *International Human Rights Law Review*, Vol. 6, 2017, pp. 242–261. See also the work and conclusions of the ILA Committee on the Rights of Indigenous Peoples as reported in D., S. DOROUGH, "Our homeland. Arctic Indigenous peoples' perspectives on non-Arctic states" in A. SHIBATA, L. ZOU, N. SELLHEIM and M. SCOPELLITI (eds.) *Emerging Legal Orders in the Arctic: The Role of non-Arctic Actors.* New York, London: Routledge, 2019, pp. 69–90, at 84–85.

[217] T. HELENIAK, "Arctic Populations and Migration" in J. NYMAND LARSEN and G. FONDAHL (eds.) *Arctic Human Development Report. Regional Processes and Global Linkages*. Copenhagen: Nordic Council of Ministers, 2014, pp. 53–103, at 53. It seems important to remember here that indigenous peoples represent about half of the total population in Canada, as well as the majority of the population in Greenland.

indigenous groups live in northern Russia.[218] Finally Sámi, who are the only native people recognised within continental Europe, live across the territories of Norway, Finland and Sweden, as well as in the Kola Peninsula of Russia.

These are rural and nomadic communities that mostly subsist on farming, fishing, reindeer herding and hunting, holding a unique knowledge and expertise in the management of natural resource and of their ancestral territories. This is not to say that Arctic first inhabitants exclusively rely on these traditional practices. As a matter of fact, Arctic indigenous peoples have also acquired control over different natural resources in the region[219] and are progressively developing an entrepreneurial spirit, especially in those sectors like the textile, the art or food industries, in which it is possible to promote their cultures and identities internationally.[220]

Yet, indigenous peoples of the North are not exempt from the hurdles that affect most indigenous peoples worldwide, including disputes over land and resource ownership, or the alternatively conflicting relationships with newcomers.[221] Indeed, the legacy of the colonialist era in the region is still reflected in the manifold social problems that affects large portions of these populations: violence, alcohol abuse and high rates of suicide, among others.

As for other indigenous peoples of the world, since the 19th century, Arctic IPs have been assimilated to the values and customs introduced by the European colonisers, who brought to the region the ideas of sovereignty and statehood. Although justified in legal terms by the doctrine of discovery, these concepts and legal structures were

[218] M. BYERS, *International Law and the Arctic.* Cambridge: Cambridge University Press, 2014, at 218.
[219] This is the case of Greenland, in which almost the 90% of the population is of Inuit origins. As a result of the Home rule of 1979 Greenlandic Inuit people obtained self-government which, as extended by a referendum held in 2008, entitled the population to a right to extract natural resources. See, on this, P. STEINBERG, J. TASCH, H. GERHARDT and A. KEUL, *Contesting the Arctic. Rethinking Politics in the Circumpolar North*. London: I.B. Tauris, 2015.
[220] As in the case of the book *EALLU – Food, Knowledge and How We Have Thrived on the Margins*, recently awarded at the 2018 Gourmand World Cookbook Awards. K. STEPHEN, "Arctic indigenous cookbook wins Gourmand World Cookbook Award" *High North News*, 30 May 2018. Available at: http://www.highnorthnews.com/arctic-indigenous-cookbook-wins-gourmand-world-cookbook-award/. (Last access 22 August 2018).
[221] See, generally, K. HUSSAIN and A. PETRÉTEI (eds.) *Understanding the Many Faces of Human Security: Perspectives of Northern Indigenous Peoples*. Leiden, Boston: Brill Nijhoff, 2016.

completely unknown to the first Northern inhabitants.[222] Their previously autonomous ways of living, based on hunting, herding, fishing, and built on close parental relations, were suddenly permeated with an invasive governmental structure. This, in turn, has contributed to the development of a sense of estrangement that, at least to some extent, persists today. Nonetheless, these indigenous peoples are also keeping the pace of a fast-changing Arctic and adapting to an increasingly globalised region, no longer perceived as *terra nullius*.[223]

Given the context of increasing globalization, indigenous people are less and less living in a condition of isolation and their prosperity and cultural survival are closely linked to their resilience and adaptability skills. The advent of urbanization, the competition for natural resources, and the expansion of tourism in the Arctic are but a few of the challenges that indigenous peoples have to cope with if they are to maintain their identity as peoples while developing new and hybrid ones. Most of these challenges are caused or at least amplified by the dynamics of climate change, which has notoriously negatively affected the Arctic region in recent decades.

3.2.2 Arctic Indigenous Peoples and the Impacts of Climate Change in the Arctic

With the publication of the *Arctic Climate Impact Assessment Report* in 2004, the effects of climate change on the Arctic became known internationally. This seminal work, which also brought the Arctic region to the attention of the IPCC, assessed the impacts of warming temperatures on socio-economic conditions in the region.[224] A unique feature of the report – as it will be recalled later on – is the direct involvement and participation of Arctic IPs in its elaboration and drafting. In fact, an entire section of the document is devoted to indigenous communities.[225]

---

[222] This is the doctrine aimed at justifying the occupation and acquisition of newly discovered lands under international law. To date, however, the doctrine largely converges on considering unwarrantable the acquisition of a territory in breach of the right to self-determination. See, on these topics, A. CASSESE, *Self-Determination of Peoples. A Legal Reappraisal*. Cambridge: Cambridge University Press, 1995.
[223] See, on the Arctic as a globally embedded region, K. KEIL and S. KNECHT, 2017, *op. cit*.
[224] For a broader consideration of the impacts of climate change on indigenous peoples, see, R., S. ABATE and E., A. KRONK WARNER, "Commonality among unique indigenous communities: an introduction to climate change and its impacts on indigenous peoples", in R., S. ABATE and E., A. KRONK WARNER (eds.) *Climate Change and Indigenous Peoples. The Search for Legal Remedies.* Cheltenham, Northampton: Edward Elgar, 2013, pp. 3–18.
[225] See, S. J. HASSOL, 2004, *op. cit*., at 92.

What bonds together different indigenous people around the world is the intrinsic relationship that their lifestyles have with nature. The lands and natural environments in which IPs live, hunt or gather sustain their culture and are essential to the maintenance and transmission of their traditions. This is no exception to the indigenous peoples living in the Arctic, who primarily depend on using the resources of Arctic lands and sea. Much to Arctic IPs dismay, however, climate change is having dramatic impacts on the Arctic environment.

Rising temperatures are first of all affecting the characteristics of permafrost and ice, making it thinner and less stable. Seasonal temperature and the quality of snow are also changing, contributing to the migration of animals as well as to the emergence of alien species. On the other hand, the possibility of extinction of some species is increased by the shrink of the marine habitat. As the distribution of animals is changing and travelling on ice becomes more dangerous, also access to food gets harder. This has negative effects on Arctic IPs diet, which largely relies on plants and animals found in ice-covered areas. The emergence of new diseases, as for example diabetes, or poisoning have also been reported to be increasingly widespread.[226] Similarly, skin cancer and immune system disorders are heightened by the increase in temperatures and sun intensity.

Being traditionally coastal communities, the recession of ice has further impacted on Arctic indigenous peoples' way of living. This is the case of those indigenous that have been relocated from the coasts to in lands. Unable to harvest marine mammals in remote and eroded coastal areas, these peoples are obliged to rapidly adapt to new living conditions, reinventing their social and economic practices. Yet, it has been noticed by these same populations, that climate change is occurring faster than indigenous knowledge can adapt, what increases their vulnerability to its impacts. Finally, the retreat of ice and poor snow quality affects indigenous peoples in their housing conditions too.

Therefore, as this brief account has shown, it is beyond doubt that climate change represents for these populations a major pattern of change which, by influencing already new socio-economic dynamics and accentuating them through alterations of the natural

[226] S. TORRECUADRADA GARCÍA-LOZANO and R., M. FERNÁNDEZ EGEA, "Environmental challenges for Arctic peoples" in E. CONDE and S. SÁNCHEZ IGLESIAS (eds.) *Global Challenges in the Arctic Region*. London, New York: Routledge, 2017, pp. 236–253.

environment, has in many cases led to their migration and displacement.[227] Faced with these challenges, the largest indigenous groups of the region have relied on their transnational organisation to reciprocally support their work on climate change and other environmental problems at the local, regional and international level.

3.2.3 The Transnational Organisation of Arctic Indigenous Peoples

With the decolonisation of the Arctic, the indigenous peoples of the region summed to the broader indigenous movement that was prising the abandonment of the paternalistic and assimilation policies that had characterised colonialism in Europe and abroad. During the 1970s, the Arctic's indigenous peoples started their journey towards the recognition of their political, social and economic rights primarily – but not exclusively – enshrined in the right to self-determination. Distant from a claim of complete independence, the latter entails the achievement of self-government within existing States, including the possibility to participate in political processes, local decision-making and the ownership over natural resources. The former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has qualified the right to self-determination as a foundational one, essential for the enjoyment of IPs' human rights.[228]

While the achievement of these objectives certainly requires the ability to influence national policy- and decision-making, the practice of Arctic indigenous peoples has contemporarily relied on diverse strategies, all aimed at furthering their political interests.[229] Their constitution as political actors in the region (*polities*) or their transnational organisation and participation in the AC and UNPFII are just two examples of how Arctic IPs have aimed at influencing the development of regional and international law which, in turn, will more likely force the advancement of laws and policies related to indigenous rights at the national level.[230] Monika Tennberg, for instance, has

[227] See, on this, N. ARENA HIDALGO, "Climate Change Induced Displacement: Migration as an Adaptation Strategy also in the Arctic?" in *ibid*, pp. 254–277.
[228] UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya*, 15 July 2009, par. 41 (UN Doc. A/HRC/12/34).
[229] As made clear by Loukacheva, to which degree political rights are granted to indigenous peoples ultimately is and depends on a State decision. N. LOUKACHEVA, "Arctic indigenous peoples' internationalism: in search of a legal justification", *Polar Record*, Vol. 45, No. 23, 2009, pp. 51–58.
[230] See T. KOIVUROVA and A. STEPIEN, "How International Law Has Influenced the National Policy and Law Related to Indigenous Peoples in the Arctic", *Waikato Law Review*, Vol. 19, No. 1, 2011, pp. 123–

underlined how the establishment of the UNPFII has contributed to the reconfiguration of power relations between States and IPs internationally.[231] Likewise, but referring to the practice of Inuit peoples and to the emergence of the Inuit Circumpolar Council (ICC), Jessica Shadian has extensively written on Arctic IPs have challenged the westphalian concept of sovereignty.[232] More broadly, and when compared with the possibilities and conditions of other and arguably larger indigenous populations, Arctic IPs enjoy more favourable conditions at the national level too.[233] To the exception of the Russian Federation, where Arctic IPs have faced governmental opposition for same time,[234] it seems fair to recall here that the condition of empowerment that most Arctic IPs enjoy at the regional and international level is also a consequence of their residing in States with relatively high living standards and fairly positive human rights' records. Particularly so in the case of Inuit peoples living in the USA and Canada,[235] as well as of the Sámi residing in Scandinavian where, for instance, the negotiation of a Nordic Sámi Convention on Sámi rights and culture have been discussed since 1995 and its ratification seems now forthcoming.[236]

To this end, also the association of Arctic indigenous peoples into major non-

143. This was also expressively recognised in the Inuit Circumpolar Council's *Principle and Elements for a Comprehensive Arctic Policy* of 1992.

[231] M. TENNBERG, "Indigenous peoples as international political actors: a summary", *Polar Record*, Vol. 46, No. 238, 2010, pp. 264–270.

[232] See, for instance, J. SHADIAN, 2010, *loc. cit*. and J. SHADIAN, 2013, *loc. cit*.

[233] See, as a general reference, the last IWGIA report on the situation of indigenous peoples around the world. P., J. ANDERSEN (ed.) *The Indigenous World 2018*. Copenhagen: The International Work Group for Indigenous Affairs, 2018.

[234] For instance, in 2012, the activities of the Russian Association of the Peoples of the North have been suspended due to the enactment of a legislation regulating the founding of NGOs and requiring that all non-profit organisations accepting foreign funding must be registered as foreign agents. This, in turn, required to comply with additional and more stringent reporting obligations and brought the Russian Federal Ministry of Justice to order in 2013 the suspension of the Association's activities, the modification of its statute and the registration of its logo.

[235] Especially with the inception of the Trudeau administration, indigenous rights have seen increased recognition in Canada. For instance, in 2016, Canada officially adopted the UNDRIP after years of opposition. In the same year then, Prime Minister Trudeau also announced the Government commitment to enact an Indigenous Language Act, to be co-developed with Canadian IPs. Finally, in 2017 the Inuit-Crown Partnership Committee was created with the aim of advancing the cooperation between the Canadian Government and Inuit peoples on land claims agreements, social development, and reconciliation. See, M. COPPES, "Canada's Acceptance of the United Nations Declaration on the Rights of Indigenous Peoples: Implications for the Inuit" *The Arctic Institute*, 09 August 2016. Available at: https://www.thearcticinstitute.org/canadas-acceptance-declaration-rights-indigenous-peoples/ (Last access 03 October 2018).

[236] See, for a commentary on the draft for a Nordic Sámi Convention, T. KOIVUROVA, "The Draft for A Nordic Saami Convention", *European Yearbook of Minority Issues*, Vol. 6, 2006, pp. 103–136. At present, the Sámi Parliaments and the Governments of Finland, Norway and Sweden are discussing on the final wording of the Convention. Particularly challenging to the adoption of the Draft Convention is the fact that only Norway have ratified the ILO Convention 169 to date.

governmental organisations has been a crucial tool for the success of their advocacy. Although it would be impossible to precisely enclose the great variety of indigenous groups living in the region into clearly recognisable groups, today six major organisations act as representatives of Arctic indigenous peoples regionally and internationally. Such organisations have formed following two main patterns: being an association that includes a single indigenous group that resides in more than one Arctic State or, conversely, including more than one Arctic indigenous peoples' group resident in a single Arctic country.[237] Either way, their grouping into transnational organisations has been possible because they share territories, harsh climate conditions and a language that is different from that of the colonising nation States; thus similar histories of colonialism, coerced relocation, land seizure and the imposition of state borders.[238] At present, the following are the non-governmental organisations representing the peoples of the Arctic, who are also acting as Permanent Participants in the Arctic Council:

- The Sámi Council

The Sámi Council was created in 1956 as a non-governmental organization for the promotion of the rights of the 70,000 Sámi living in Norway, Sweden, Finland and Russia, both internationally and nationally. Indeed, the same proponents of the Council, have been able to secure governmental support for the creation of Sámi Parliaments in Finland, Sweden and Norway.[239] The Council deals with activities related to Arctic environment, human rights and culture, hence it first developed in order to reverse the policies of linguistic and cultural assimilation imposed by the colonising states. At date its main tasks consist in the promotion of Sámi rights and interests in the countries where these populations live, in the consolidation of the relations among Sámi peoples, and the pursuing of agreements among the nation States and the Sámi Parliaments. As for the Inuit Circumpolar Council, it takes turn representing the Arctic indigenous at the UNPFII and it has received the consultative status at the UN ECOSOC.

[237] This classification has also been recalled in the Ottawa Declaration of 1996. For more details on the Declaration see section 3.2 in this chapter.
[238] S. PLAUT, "Cooperation is the story: best practices of transnational indigenous activism in the North", *The International Journal of Human Rights*, Vol. 16, No. 1, 2012, pp. 193–215.
[239] See A. STEPIEN, A. PETRÉTEI and T. KOIVUROVA, "Sámi Parliaments in Finland, Norway and Sweden" in T. H. MALLOY, A. OSIPOV and B. VIZI (eds.) *Managing Diversity through Non-Territorial Autonomy: Assessing Advantages, Deficiencies, and Risks*. Oxford: Oxford University Press, 2015, pp. 117–138.

- The Inuit Circumpolar Council

The Inuit Circumpolar Council was established in 1977 and today is a major international non-governmental organization representing 150,000 Inuit in four states: Alaska, Canada, Denmark (Greenland) and Russia (Chukotka). At date, it enjoys the participation in several international fora with different degrees of engagement: it holds a consultative status at the UN ECOSOC, and it alternatively participates as indigenous representative at the United Nations Permanent Forum on Indigenous Issues. It is composed by an ICC Chair and Executive Council, but at the core of its actions there is a General Assembly, held every four years. At this meeting, all the delegates from the circumpolar regions gather in order to adopt the agenda for the coming term, developing policies and initiatives in different areas: environment and sustainable development, human rights and cultural issues. Besides these activities, the Assembly can adopt resolutions aimed at pursuing their principal goals: the reinforcement of the unity among all Inuit, the promotion of their rights and interests at the international level, and the development of strategies to safeguard the Arctic environment.

- The Russian Association of the Peoples of the North (RAIPON)

RAIPON was created in 1990, after the Soviet collapse and on the ruins of the *Association of Peoples of the North of the USSR,* which gathered up to twenty-six indigenous groups of the former Soviet Union. At date it counts on the participation of forty-one groups of indigenous peoples of the North, Siberia and the Far-East (Chukchi, Nenets, Kets, etc.). Therefore, it is considered an umbrella organization for the 270,000 peoples living in the region, from Murmansk to Kamchatka. Its highest body is the Congress of all Indigenous Peoples of the North, Siberia and Far-East, held every four years. The main objectives and purposes of RAIPON are the protection and defence of indigenous rights and legal interests. Moreover, it assists indigenous peoples in solving environmental, social, cultural and educational issues.

- The Aleut International Association (AIA)

The Association is a not-for-profit organisation representing Alaskan natives of

the Arctic. It was created in 1998 to address environmental, cultural concerns and with the aim of improving the overall wellbeing of Aleuts peoples living in the Arctic.

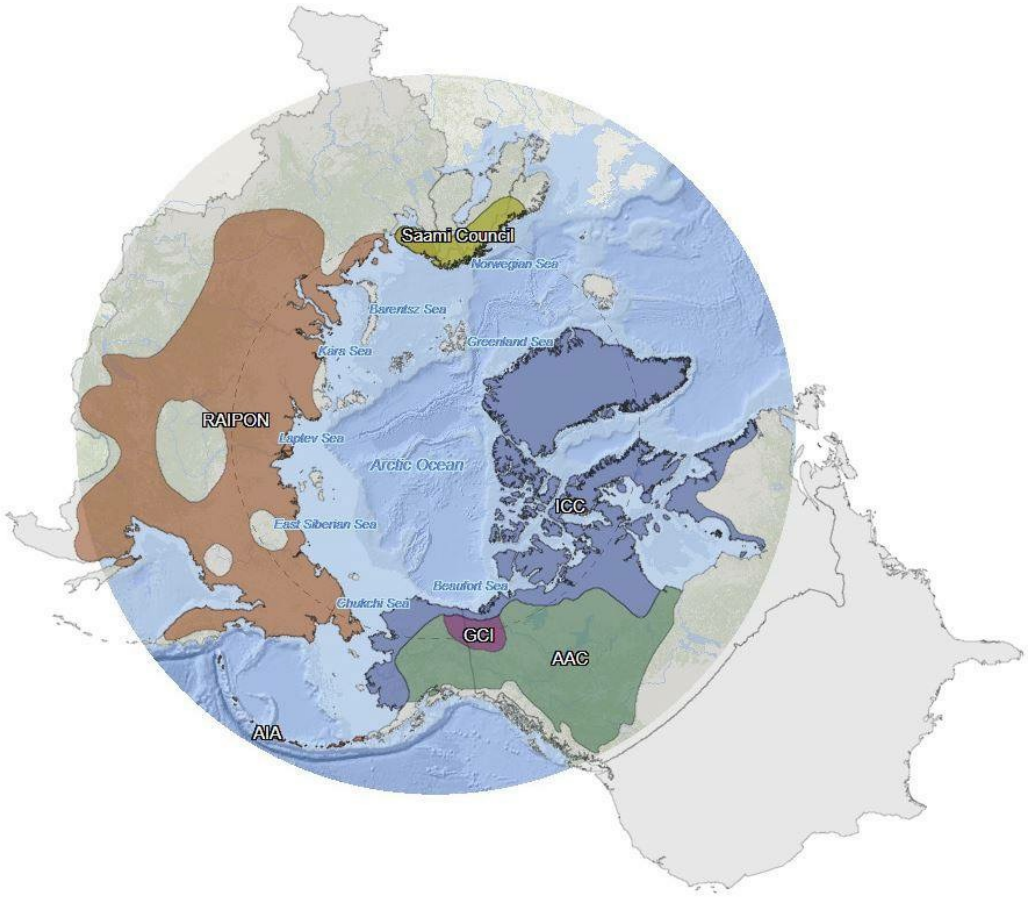
- The Gwich'in Council International (GCI)

This organisation represents the Gwich'in of Canada and the USA since 1999, when it was first established. Its main aim is to secure the participation of this indigenous group into the making of circumpolar policies, especially in its priority areas, which are: environment, youth, culture and tradition, as well as economic development and education.

- The Arctic Athabaskan Council (AAC)

Established in 2000 to defend the rights and further the interests of the American and Canadian Athabaskans, it comprises around 76 communities representing 45,000 peoples of Athabaskan descent.

Image: Arctic Indigenous NGOs and Permanent Participants to the Arctic Council



Source: Philippe Rekacewicz – GRID-Arendal.

Although the last three organisations are very recent, the collaboration among these indigenous NGOs – and particularly the Sámi Council and the ICC – began already in 1973 with the celebration of the first Arctic Peoples' Conference in collaboration with the International Work Group for Indigenous Affairs (IWGIA). Even if no Russian organizations participated to this meeting, the latter has had great relevance because it was celebrated within the Danish Parliament, and thus accepted by national and international authorities at a time where Greenlanders had initiated the process that would lead them to obtain the Home Rule in 1979. More broadly, it gave Arctic indigenous peoples renewed confidence and awareness of their condition, as they became familiar with the concept of 'indigeneity' and the provisions contained in the ILO Convention No.

169 for the first time. As Dahl has accounted reporting the testimony of Aqqaluk Lynge, former president of the ICC: "The Arctic Peoples' Conference was a turning point for us. We were first of all thinking of ourselves as "Inuit" but Helge Kleivan urged us to include the Saami in our organizing efforts and he inspired us to consider ourselves as part of a broader indigenous movement."[240]

The formalization of this cooperation arrived two years later during the First International Indigenous Conference in 1975 and developed during the '80s and the '90s, solidifying the efforts and exchanges among the Sámi and the Inuit within several United Nations bodies. The indigenous of the North became soon aware of the benefits of working together rather than independently towards the recognition of their rights. Indeed, the distance of their location did not allowed them to compete for funding or international attention, but rather to extend their efforts internationally. As Plaut has rightly pointed: "The Saami Council and the ICC seek to address multiple audiences and, without directly confronting them, demand accountability from all: the colonising nation-states, international governing bodies, and the larger world of transnational actors. It is not unusual for the ICC to publicly support initiatives promoted by the Saami Council (and vice versa)."[241]

Since its foundation, this cooperation primarily occurred through the membership of these organisations in the Arctic Council which, by creating a space and an institutionalised practice of participation at the regional level, has enabled Arctic IPs to gain normative weight and representation in intergovernmental negotiations, to influence the development of international (environmental) agreements and, finally, to claim their rights as peoples. In this regard, the following section of this chapter will detail the participation of Arctic IPs in the AC. The subsequent parts of this work will mostly analyse the advocacy strategy of Inuit peoples as one of the most empowered indigenous communities in the Arctic and internationally.

[240] J. DAHL, *IWGIA: a history*. Copenhagen: International Work Group on Indigenous Affairs, 2009, at 38. Helge Kleivan was a Norwegian anthropologist and the founder of the International Work Group for Indigenous Affairs.
[241] S. PLAUT, 2012, *loc. cit*., at 198.

3.3 From Observers to Permanent Participants: Arctic Indigenous Peoples in the Arctic Council

Tracing back the origins of the Arctic Council, Shadian has pointed out that "[…] the process leading to the establishment of the Arctic Council was based on the desire to break away from the limitations of the Cold War and focus on cooperation rather than security, in order to ensure the sustainable development of the Arctic."[242] Indeed, with the end of the confrontation between the two Cold War superpowers, an era of region-building revolved around scientific research and the protection of the Arctic environment led to the creation of a long-lasting and peaceful political cooperation in the region. This, in turn, had the direct effect of legitimising Arctic IPs as stewards of the region, prompting their inclusion in its environmental governance. As a matter of fact, the Sámi Council and the Inuit Circumpolar Council contributed since its beginning to the Rovaniemi Process initiated in 1989 as they, and afterwards the predecessor of RAIPON as well, assisted to the creation of the Arctic Environmental Protection Strategy (AEPS), being invited as observers.[243] The adoption of the Rio Declaration, and particularly the reference made to indigenous rights in Principle 22, had great influence on the following development of the AEPS, to the extent that in the Nuuk Declaration of 1993 a direct reference was made to this principle.[244]

Launched in 1991 with the Arctic Environmental Protection Strategy, the political governance of the Arctic region today builds on its successor – the Arctic Council – an intergovernmental forum serving the representation and cooperation between the eight Arctic States and the six non-governmental organisations representing the Arctic indigenous peoples, acting as Permanent Participants.[245] Created by the Ottawa

[242] J. SHADIAN, *The Politics of Arctic Sovereignty. Oil, Ice and Inuit Governance*. New York, London: Routledge, 2014, at 122.
[243] The Rovaniemi Process started as a Finnish initiative in 1989 and was aimed at commencing a stable scientific cooperation among the different Arctic States.
[244] Moreover, the declaration recites at paragraph 7: *"[We] recognize the special role of the indigenous peoples in environmental management and development in the Arctic, and of the significance of their knowledge and traditional practices, and will promote their effective participation in the achievement of sustainable development in the Arctic."* Arctic Environmental Protection Strategy, *The Nuuk Declaration on Environment and Development in the Arctic*, adopted on September 16, 1993. Available at http://arcticcircle.uconn.edu/NatResources/Policy/nuuk.html. (Last access 6 August 2018).
[245] For extensive reference to the AEPS and the AC, see: D. VANDERZWAAG, R. HUEBERT and S. FERRARA, "The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters" in A., G. OUDE

Declaration of 1996, this political forum also allows the contribution of diverse non-Arctic States, intergovernmental bodies and NGOs.[246] Though decision-making is limited to the Council Member States and PPs, non-Arctic states and organisations can be granted the right to attend its meetings as observers[247]. In the light of the status that the Council grants to northern indigenous peoples, and considering the success of its twenty years of work,[248] the forum has not only become an interesting example of regional cooperation, but a particularly interesting case study for the participation of non-State actors in decision-making processes.

Although international law today recognizes and protects the rights of indigenous peoples through different instruments,[249] the degree of representation and participation that indigenous peoples enjoy in the Arctic is rather unique. As an evolution of the system of

---

ELERINK and D., R. ROTHWELL (eds.) *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction.* The Hague: Martinus Nijhoff, 2001, pp. 225–248; D. NORD, *The Arctic Council: Governance within the Far North*. New York, London: Routledge, 2016; E., J. MOLENAAR, "Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea", *The International Journal of Marine and Coastal Law*, Vol. 27, No. 3, 2014, pp.553–595. It seems also important to specify here that, as recognised by all Arctic States, the Law of the Sea Convention is the major international legal instrument that governs the Arctic, being the latter an ocean surrounded by lands.

[246] It should be recalled here that the Council was created as a high-level intergovernmental forum and without legal personality. Its main objective is to ensure sustainable development and environmental protection in the Arctic, excluding from its agenda any issue related to military security. The work of the Council is primarily carried out by six Working Groups (Arctic Contaminants Action Program; Arctic Monitoring and Assessment Programme; Conservation of Arctic Flora and Fauna; Emergency Prevention Preparedness and Response; Protection of Arctic Marine Environment; Sustainable Development Working Group), which are responsible for the preparation of studies and scientific reports. These Groups are flanked by other subsidiary bodies (Expert Groups and Task Forces) and the Senior Arctic Officials (SAOs), in charge of directing the daily agenda of the Council and which meets in a plenary session every two years. Today the forum enjoys the participation of 39 observers and manages more than 80 different projects related to its main objectives. More details on the Arctic Council are available at: https://arctic-council.org/index.php/en/ (Last access 21 August 2018).

[247] Observers' rights and duties are detailed in the Roles of Procedure adopted by the Council in 1998 and revised in 2013, as well as in an Observer Manual for Subsidiary Bodies adopted in 2013 and amended in 2015 and 2016. See, Arctic Council, *Arctic Council Rules of Procedure*, as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting of Iqualuit, Canada, in September 1998, and revised by the Arctic Council at the Eight Arctic Council Ministerial Meeting of Kiruna, Sweden, in May 2013. Available at https://oaarchive.arctic-council.org/handle/11374/940 (Last access, 20 August 2018).

[248] O. YOUNG, "The Arctic Council at Twenty: How to Remain Effective in a Rapidly Changing Environment", *UC Irvine Law Review*, Vol. 6, No. 99, 2016, pp. 99–120.

[249] Currently, the only binding instrument that makes explicit reference to the collective rights of indigenous peoples is the Convention Concerning Indigenous and Tribal Peoples in Independent Countries: International Labour Organisation, *Indigenous and Tribal Peoples Convention, C 169*, of 27 June 1989 (28 ILM 1382). Although non-binding, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly in 2007 and enjoys the support of UN member states. See, UN General Assembly, *United Nations Declaration on the Rights of Indigenous People* of 02 October 2007 (UN Doc. A/Res/61/295). Finally, rights applicable to indigenous groups are recognized in general human rights instruments, such as the International Covenant on Civil and Political Rights. For an extensive review of the rights that apply to indigenous people, see J. ANAYA, *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2004; S. TORRECUADRADA GARCÍA-LOZANO, *Los pueblos indígenas en el orden internacional*. Madrid: Dykinson, 2001.

representation established by the AEPS which, as said, granted to three Arctic IPs organisations the same observer status accorded to non-Arctic states or international NGOs, the rights of active participation and full consultation enshrined in the Ottawa Declaration[250] were fully realised through the creation of the category of Permanent Participants. Tennberg has ascribed such a development to the negotiations for the establishment of the AC, where the discussion "on whether to use the term 'people' or 'peoples' opened up the opportunity for indigenous peoples to act in the Arctic Council as permanent participants instead of as observer NGOs."[251] In any case, respectively in 1998 and 2000, the Aleut International Association, the Arctic Athabaskan Council and the Gwich' in Council International were included in the work of the Council under the same category. While this development highlights the positive contribution made by PPs to the work of the Council, it should also be understood in the light of the progressive need to include more indigenous people in Arctic governance parallel to the development and greater recognition of their rights as today outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007).

At present, therefore, the six non-governmental organizations representing the indigenous peoples of the Arctic make up the core of the Council, since they are able to shape and influence the consensus-based decision-making process on which the AC operates. In fact, despite lacking proper voting rights, PPs hold the ability to block any measure discussed by the Council. Exercising what has been defined as a *veto-kind power*, they ultimately act on an equal footing with the eight Arctic States and are able to balance the voting rights exclusively granted to States. For instance, the resistance of Arctic PPs may be determinant on the decision to grant or deny the observer status to non-Arctic entities, as it may have occurred in the cases of the European Union and Greenpeace for their anti-sealing and conservationist positions, respectively.[252] Moreover, in their role as Permanent Participants, Arctic IPs can submit proposals and statements for decision, influencing the agenda setting of the Council, and actively participate in the research

[250] The Declaration affirms *"The category of Permanent Participants is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council"*. See: Arctic Council, *Declaration on the establishment of the Arctic Council* of 19 September 1996 (35 ILM 1382).
[251] M. TENNBERG, 2010, *op. cit*., at 268.
[252] See, on this, M. SCOPELLITI and N. SELLHEIM, "Sustaining a Conservationist Agenda? NGO-Influence on Arctic Sealing, Whaling and Hydrocarbon Regimes" in A. SHIBATA, L. ZOU, N. SELLHEIM and M. SCOPELLITI, 2019, *op. cit*., pp. 91–106.

activities of the AC's Working Groups. In any case, and this is exceptional, the PPs hold greater influence over decision-making than any other non-Arctic state entities which, as recalled above, are only entitled to observe the work of the Council.

As a result, the indigenous peoples living in different Arctic States now enjoy effective representation in this forum of cooperation. Furthermore, following the reform made with the adoption of the Nuuk Rules on the criteria for admission of new observers to the Council,[253] the weight of indigenous peoples in this forum has been strengthened in such a way that their position is not undermined by the large number of observers admitted after 2011. Quite the opposite, the rules establish the obligation for each new admitted observer to respect "[…] the values, interests, culture and traditions of Arctic indigenous peoples and other Arctic inhabitants" and to support the work of the Council "including through partnership with member states and Permanent Participants bringing Arctic concerns to global decision-making bodies", making the maintenance of their status as observer conditional to these criteria.[254]

It follows that the views and interests of Arctic IP should be reflected in the negotiating positions of all Arctic States and non-Arctic observer States, whenever they negotiate any legal order that is relevant for or directly applicable in the Arctic.[255] On this subject, the Arctic Council system has been praised by different commentators as a model for the advancement of participatory-rights of non-State actors and minority groups.[256] In 2012, the UNPFII also conducted a study, as example of good practice, on the participatory mechanism in the Arctic Council.[257] Yet, other critical voices still call for

[253] P. GRACZYK and T. KOIVUROVA, "A new era in the Arctic Council's external relations? Broader consequences of the Nuuk observer rules for Arctic governance", *Polar Record*, Vol. 50, No. 254, 2014, pp. 225–236.
[254] Arctic Council, *Arctic Council Rules of Procedure*, 1998, *op. cit*., at 14.
[255] This is the case in UNFCCC negotiations but also of other international and regional agreements. For instance, the negotiation process of the Agreement to prevent unregulated high seas Fisheries in the Central Arctic Ocean or of the International Code for Ships Operating in Polar Waters. On this topic, see S. DUYCK, *The Arctic Voice at the UNFCCC Negotiations. Interplay Between Arctic & Climate Governance.* LL.M. programme dissertation, 2015.; A. SHIBATA, L. ZOU, N. SELLHEIM and M. SCOPELLITI, 2019, *op. cit.*
[256] See, M. P. POTO and L. FORNABAIO, 2017, *loc. cit*.
[257] UNPFII, "Study, as an example of good practice, of the Indigenous participatory mechanisms in the Arctic Council, the Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat, and the Laponia management system", 2012. E/C. 19/2012/10.

more commitments by Arctic and non-Arctic states towards Arctic IPs, including the possibility to upgrade the status of Permanent Participants to that of voting members.[258]

To this end, if the real possibility for these peoples to participate in the work of the Council relates to their economic capacity, these new Rules of Procedure make it mandatory for all observers to provide financial assistance to this category. In this regard, it is also worth mentioning some problems that still affect this system of cooperation which, although very advanced, is not exempt from possible improvements. For instance, the lack of economic resources is an issue that still affects the capacity of PPs, although this question has been partially addressed since 2016 with the institution of the Álgu fund, created to distribute financial resources among all the PPs and aimed at supporting their work in the Council while ensuring their independence.[259] Moreover, despite the creation of the AC Indigenous Peoples' Secretariat to support the cooperation among the different indigenous peoples of the region, the lack of human resources is a problem that to date has made it difficult to monitor and follow the rapid development of regional policies.[260]

3.3.1 The Indigenous Practice within the Arctic Council: Regional and International Implications

Despite the non-binding nature of the AC declarations and decisions, the indigenous representation in the Council is of great relevance at the regional and international level for at least a number of reasons.

First, an affirmed practice of indigenous participation through the Working Groups that operate within the Council – particularly that on sustainable development – has made it possible to recognize the importance of their traditional knowledge. In 2015, the relevance of indigenous contribution to the work of the Council was fully endorsed

[258] D., S. DOROUGH, "The Rights, Interests and Role of the Arctic Council Permanent Participants" in R. BECKMAN, T. HENRIKSEN, K. DALAKER KRAABEL and others (eds.) *Governing Arctic Shipping*. Leiden, Boston: Brill, 2017, pp. 68–103.
[259] Extensive information on the establishment of the fund is provided by J. GAMBLE and J. SHADIAN, "One Arctic…But Uneven Capacity: The Arctic Council Permanent Participants" in W. LACKENBAUER, N. HEATHER and W. GRAVES (eds.) *One Arctic. The Arctic Council and Circumpolar Governance*. Ottawa, Waterloo: Canadian Arctic Resources Committee and Centre on Foreign Policy and Federalism, 2017, pp. 142–156.
[260] The Arctic Council Indigenous Peoples' Secretariat has been established in 1994 for the support of Permanent Participants. It primarily facilitates the participation of Arctic IPs' organisations in the Arctic Council but it also disseminates information on Permanent Participants, raising international public awareness on their work and status within the Council.

with the adoption of the *Ottawa Traditional Knowledge Principles*,[261] thirteen principles for the practical use of indigenous peoples' expertise and know-how within the Council. By virtue of this knowledge, Arctic indigenous peoples have substantially contributed to the drafting of regional reports on the state of the Arctic environment. This is the case of the *Arctic Monitoring Assessment Programme Report: Arctic Pollution Issues* of 1997, and of the above-mentioned *Arctic Climate Impact Assessment Report* of 2004.

The process that has led to the drafting of these reports can be considered as an example of good practice because it has promoted the fruitful cooperation between indigenous peoples and the Arctic scientific community. Besides its practical relevance, such a model of exchange and complementarity between scientific and indigenous knowledge empowers the indigenous peoples of the region by giving space to their expertise in processes that are normally guided by technocratic rationality. Moreover, as it will be discussed below, indigenous direct involvement in the drafting of these documents has on different occasions prompted international action towards the conclusion of binding international agreements of relevance to these populations and to the scientific community as a whole. In the case of climate change governance, the institution of a Local Communities and Indigenous Peoples Platform constituted for providing formal opportunities for IPs' knowledge, best practices and expertise to guide climate decisions-making at the international level, proves the importance of these contributions.

On the other hand, it should be remembered that the Council is increasingly more acting as a forum for policy-shaping and as a decision-making space for its members.[262] Since 2011, with the adoption of the first regional agreement negotiated under the

[261] Adopted by the Arctic Council and the Permanent Participants in 2015. Available at: http://www.saamicouncil.net/fileadmin/user_upload/Documents/Eara_dokumeanttat/Ottawa_TK_Principles.pdf (Last access 11 August 2018).

[262] In addition to the special importance accorded to indigenous peoples, perhaps the most interesting feature of this forum for cooperation is the quasi-normative role that it has come to play in serving as a forum for the negotiation of regional agreements. Indeed, the following binding regional treaties have been adopted under the auspices of the Arctic Council: Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (SAR), adopted on 12 May 2011, entered into force on 19 January 2013; Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (OPPRA), adopted on 15 May 2013, entered into force on 25 March 2016; Agreement on Enhancing International Arctic Scientific Cooperation, adopted on 11 May 2017, entered into force on 23 May 2018. On this, see L. HEININEN, H. EXNER PIROT and J. PLOUFFE (eds.) *The Arctic Council: 20 Years of Regional Cooperation and Policy-Shaping*, Arctic Yearbook 2016. Akureyri: Northern Research Forum, 2016.

auspices of the Council,[263] the contribution of Arctic IPs and knowledge has also been key to the adoption of sectoral regional agreements and this will likely continue in the future. Thus, the capacity of indigenous peoples to influence the decision- and law-making process undoubtedly reverberates in regional negotiations, reflected in binding agreements that include their perspectives and concerns. According to Poelzer, in fact: "[The Arctic Council] offers Indigenous Peoples' organizations and regional governments with unprecedented access to high-level international diplomatic conversations, providing a global model for indigenous engagement in the process. Although the Arctic Council operates in the realm of soft power, rather than hard power, there is no denying the enormous impact that indigenous people have played in shaping Arctic policy."[264]

Finally, the documents and declarations adopted by the Council following this pattern assume growing importance on the international level too. Each new State applying for observer status to the Council is obliged, through the above-mentioned Nuuk rules, to transmit and uphold an 'Arctic message' in any international institution, bringing the concerns of its indigenous peoples to the attention of global decision-making bodies, in partnership with the Arctic States and the PPs.

As the above demonstrates, the participation of Arctic indigenous peoples in the Arctic Council under the status of Permanent Participants has resulted in the recognition of Arctic indigenous peoples' interests, knowledge and normative weight as (limited) subjects of international law in this regional context. Over the past decades, the Council has made of the participation and representation of Arctic IPs one of its most distinguished and distinguishing features, indirectly endorsing and implementing those international instruments that, not always ratified by its Member States, enshrine indigenous rights. This, in turn, has significantly contributed to the advancement of Arctic IPs' rights regionally and internationally. Their representation under a unique category, has had the effect of rendering their status and weight in circumpolar governance uniform, regardless of the fact that their actual legal status may vary from State to State.[265] This ultimately,

[263] See, on the AC agreements, S., V. ROTTEM, "A Note on the Arctic Council Agreements", *Ocean Development &International Law*, Vol. 46, No. 1, 2015, pp. 50–59.
[264] G. POELZER, "Governance in the Arctic: Political Systems and Geopolitics" in J. NYMAND LARSEN and G. FONDAHL, 2014, *op. cit*., pp. 185–220, at 213.
[265] As of August 2018, only Norway and Denmark have ratified the ILO Convention No. 169. The USA has voted against the adoption of the UNDRIP and the Russian Federation has abstained from voting. On the other hand, Canada has signed the UNDRIP on May 2016.

and as it will be shown in the following section, has contributed to their empowerment and positioning on the international scene.

3.4 Going Global: Arctic Indigenous Internationalism Against Climate Change

Together with the land claims settlements of Canada and the self-government agreement achieved in Greenland, the exceptional degree of participation that the indigenous peoples of the Arctic enjoy within the largest forum devoted to circumpolar affairs, is arguably the feature that distinguishes them most from other indigenous peoples and non-State actors alike.

The status of Permanent Participants has allowed them to influence the regional cooperation and has been, in parallel with the influence of a wider indigenous movement, a factor that has substantiated their actions, aimed at strengthening the link between indigenous peoples' and self-determination, human rights and environmental protection at the transnational and international levels.

As it will be discussed below, the ability of these peoples to influence different international political processes has manifested through their ability to expand the political space in which they operate so as to accommodate their interests and rights, to make the traditional knowledge recognized and endorsed by the AC essential to the success of intergovernmental negotiations and, where this has not been sufficient, to internationalise their cause by filing complaints before human rights courts.

3.4.1. Beyond Westphalia: An Arctic Indigenous Diplomacy?

As we recalled in the first chapter of this work, the nation-State has traditionally been the primary unit for the conduct of international political and legal affairs. From this standpoint, the conduct of international law and relations is an attribute of statehood which will mostly reflect the interests of State entities, mainly focused on the maintenance of their sovereignty, security and national interests. While this has not necessarily changed over the last decades, the dawn of a human rights and environmental movements were largely characterised by the emergence of new political actors: individual advocates, non-profit organisations and indigenous peoples, among others.

Considered the fundamental importance that nature has for the realisation of individual and collective rights in an indigenous perspective, it is no surprise that the protection of the environment, the achievement of self-determination and the upholding of human rights coalesced under an indigenous movement in the Arctic and elsewhere. In this regard, the current Chair of the ICC and legal scholar Dalee Sambo Dorough, has recalled the key role that the Sámi Council and the ICC have played in the negotiation of the UNDRIP,[266] which enshrines the rights of IPs to environmental integrity, to culture and economic development *inter alia*, signalling the emergence of an Arctic indigenous diplomacy as early as in 1982 with the establishment of a United Nations Working Group on Indigenous Populations. Contextually to climate change, Ben Powless has given account of the emergence of a global indigenous movement and diplomacy in a recent contribution.[267]

It follows that trying to answer the question of whether an indigenous diplomacy exists implies, first of all, abandoning a state-centric conception of law and politics to consider a broader political space that accommodates and confers relevance to both State and non-State entities,[268] in this specific case indigenous peoples. In relation to this, the acknowledgement that the traditional idea of sovereignty as an unconditioned prerogative of States has been largely eroded by the emergence of new political agents, finds support in the context of indigenous advocacy. In her account of sovereignty, indigeneity and Inuit governance, Shadian has pointed that: "While states may remain a dominant political reality, examples of indigenous agency, such as the ICC, highlight the need to abstract, relocate and reconceptualize sovereignty altogether."[269]

Answering this question also requires understanding the importance of the transnational cooperation of these groups, which has enabled them to extend their efforts beyond borders, to gain greater weight on the international stage and, through this, to influence the national, regional and international politics of the States they inhabit. In this

[266] DOROUGH, 2017, *op. cit.*
[267] B. POWLESS, "The indigenous rights framework and climate change" in S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit*., pp. 213–221.
[268] In this regard, *Shadian* uses the notion of *polities*, entities that have the political capacity to mobilize people and resources for political ends. These units therefore represent an alternative to the model of sovereign states, often conceptualized as Eurocentric, a-historical and exclusive. In this sense, these political entities help to rethink the boundaries of political space and action. See J. SHADIAN, 2010, *loc. cit.*
[269] *Ibid*, at 494.

sense, Shadian has underlined that: "Indigenous diplomacies do not operate abstracted from global politics, namely interstate politics. The structures which they have created to engage in interstate politics are themselves manifestations of their historical interactions with global politics".[270]

As a consequence of the above, and assuming the existence of an indigenous diplomacy, the Arctic case and especially the advocacy of the Inuit Circumpolar Council is a case in point.

In a recent publication on circumpolar governance, Gamble and Shadian have highlighted how the Arctic Council is entering a new phase of *Westphalianisation*, i.e. a stage in which this forum is increasingly becoming a conventional intergovernmental regime. It is beyond doubt that, since 2008 and following the progressive geopolitical relevance assumed by the Arctic, the region has increasingly become the subject of the political claims of the Arctic coastal states (Canada, Denmark, Norway, Russia and the USA).[271] Evidence and culmination of this process has been, in fact, the celebration of the Ilulissat Summit in 2008,[272] where the five Arctic coastal states (A5) met to discuss the future of the region outside the framework of the Arctic Council, thus at the exclusion of the remaining Arctic countries (Finland, Iceland and Sweden) and all Permanent Participants.

The publication of the Ilulissat Declaration the same year – by means of which the A5 reaffirmed their sovereign rights in the region and their adherence to the Law of

[270] J. SHADIAN, "Reimagining Political Space: The Limits of Arctic Indigenous Self-Determination in International Governance" in K. KEIL and S. KNECHT, 2017, *op. cit*., pp. 43–58.

[271] Although following a peaceful fashion and the provisions of the LOS Convention, most Arctic coastal States have issued a claim to the Commission on the Limits of the Continental Shelf for extending their continental platforms beyond the 200 nautical miles. See, on the state of Arctic marine jurisdictions: https://www.dur.ac.uk/ibru/resources/arctic/ (last Access 20 August 2018). For more on this topic, see: E. CONDE PÉREZ and Z. VALERIEVA YANEVA "Outer Arctic continental shelf", in E. CONDE and S. SÁNCHEZ IGLESIAS, 2017, *op. cit*., pp. 19–41 and E. CONDE PÉREZ, "Delimitaciones marítimas y territoriales en el Ártico: Desarrollo y Tendencias", *Revista Española de Derecho Internacional* Vol. 68, No. 1, 2016, pp. 235-239.

[272] The 2008 Arctic Ocean Conference was held among the five Arctic coastal states, at the exclusion of the remaining Arctic countries and Arctic indigenous peoples. After its conclusion, the Ilulissat Declaration was issued. This is a document in which the Arctic coastal states have made clear their opposition to the possibility of negotiating a binding regional treaty, reaffirming their adherence to the Law of the Sea as the legal framework that applies to the region. See, Arctic Ocean Conference, *The Ilulissat Declaration*, Greenland, 2008. Available at http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf (Last accessed 20 August 2018).

the Sea in the settlement of any disputes – led to the mobilization of the ICC against what was perceived as a claim to exclusive sovereignty over their ancestral territories and resources, due to their marginalization from the regional decision-making process.

The *Inuit Circumpolar Declaration on Sovereignty in the Arctic*[273] and the *Inuit Declaration on Resources Development Principles in the Arctic*[274] represent, in this sense, the Inuit diplomatic responses to the attempt of minimizing their participatory rights in the regional governance. Indeed, these declarations have provided yet another opportunity to challenge the predominance of a Westphalian concept of sovereignty in the region and to reaffirm the principle of self-determination on which a legitimate Inuit participation in regional cooperation is based.[275] Thus, by claiming the need to reconcile the right to self-determination with the need for national States to maintain their sovereignty, the Inuit have claimed their role as peoples and as citizens of the Arctic, as well as the enjoyment of their rights and the use of the resources of the territory in which they have traditionally lived.[276]

While the above statements represent a manifestation of indigenous diplomacy at the primarily regional level – insofar as they reject any form of regional cooperation that fails to secure their inclusion in Arctic political, economic and developmental processes – these documents have been fundamental to the construction of a rights-based discourse

[273] The declaration reaffirms the indigenous' will to be part of the complex system of Arctic governance that, articulated at multiple levels, requires their inclusion. In this sense, the Inuit are presented as ideal partners for the conduct of international relations in the Arctic, who can help States achieving sustainable development in the region through their resilience strategies and knowledge of polar ecosystems. See Inuit Circumpolar Council *"Circumpolar Inuit Declaration on Sovereignty in the Arctic",* 2009. Available at: http://www.inuitcircumpolar.com/sovereignty-in-the-arctic.html (Last access 20 August 2018).

[274] This second document, which expressly refers to the development and use of regional resources and territories, advocates the obligation for Arctic States to include indigenous peoples in any decision that relates to the exploitation of resources and lands in the region. By recalling the principles enshrined in the Rio Declaration of 1992 and in the Aarhus Convention of 1998, and reminding that Arctic IPs will likely face the greatest changes in the Arctic, they advocate for playing a prominent role in any decision that will impact their livelihoods. Inuit Circumpolar Council "A *Circumpolar Inuit Declaration on Resources Development Principles in Inuit Nunaat*", 2011. Available at: http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/declaration_on_on_resource_development_a3_final.pdf (Last access 20 August 2018).

[275] N., C. FABBI, "Inuit foreign policy and international relations in the Arctic" in L., C. JENSEN and G. HONNELAND (eds.) *Handbook of the politics of the Arctic*. Cheltenham: Edward Elgar, 2015, pp. 482–500.

[276] See, on a revised concept of sovereignty as proposed by Inuit people, F. BORGIA and P. VARGIU, "The Inuit Declaration on Sovereignty in the Arctic Between the Right to Self-Determination and a New Concept of Sovereignty?" in G. ALFREDSSON and T. KOIVUROVA (eds.) *The Yearbook of Polar Law IV*, 2012, pp. 189–204.

and narrative, on which subsequent Inuit (and Arctic IPs) actions and claims have been built. Primarily, the claim of a right to participate in regional policy-making by virtue of their status as *right-holders*[277] and not as mere *stakeholders.* This discourse, already incorporated by the Convention on Biological Diversity (1993) and which will later be transferred by Inuit peoples in their legal claims on climate change,[278] is relevant to the objectives of this analysis. Adopting a rights-based framework (in the specific case based on human rights) can serve as a tool to address climate change and, above all, to improve the position of other non-State actors in the governance of this environmental problem. While this idea will be recalled and further analysed in the final chapter of this work, there are two other aspects of indigenous practice that, the author believes, are worth analysing for the purposes of this research.

3.4.2. Arctic Indigenous Peoples and International Environmental Law-Making

Different authors acknowledge the fundamental role that Arctic indigenous peoples have played, through their position in the Arctic Council and transnational cooperation, in the negotiation and conclusion of international agreements that, due to its environmental and fragile ecologic balance, have direct application in and relevance for the Arctic.[279] In an environmental context, this has happened for the first time with the negotiation of an international agreement on persistent organic pollutants (POPs).

Persistent organic pollutants are toxic chemicals that abound in the Arctic, as they are carried to the region by a process of volatilization and consequent condensation at high latitudes, and are able to accumulate in Arctic species influencing the food chain and lives of human beings. When the Working Group *Arctic Monitoring and Assessment Programme* (AMAP, 1991) was established as a scientific programme to assess pollution in the Arctic, three indigenous organizations were already participating in the AEPS

[277] In this regard, as recalled by Dalee Dorough and other authors, the status of IPs as right holders has been recognised through different national constitutions, national legislation, agreements and other instruments in which they are addressed as peoples. Moreover, despite the non-legally binding nature of the UNDRIP, it must be recalled here that the provisions set in the UN Declaration correspond to customary law and therefore create legal obligations for all States. As described by Borgia and Vargiu: *"The UNDRIP is indeed an example of how international instruments lacking binding force can nonetheless contribute to consolidate customary international law by means of recognition and state practice, taking the principles enunciated in them to a new, and legally relevant, level."* F. BORGIA and P. VARGIU, 2012, *op. cit*., at 197.

[278] See, on the subject, B. POWLESS, 2018, *loc. cit*.

[279] D. DOWNIE and T. FENGE, 2003, *op. cit*.; D., S. DOROUGH, 2017, *op. cit.*

programs as observers and could contribute to the AMAP *Assessment Report: Arctic Pollution Issues.* The document informed the international community about the effects that pollutants have on Arctic nature and on the well-being of its populations.[280]

Especially the discovery of high percentages of these contaminants in the breast milk of Inuit women alarmed about a public health problem for Arctic peoples, which would affect their well-being and culture. The pressure of the indigenous peoples of the North on the different national governments to act by taking political action at the international level, made it possible to initiate the negotiations that led to the conclusion of the Stockholm Convention in 2001,[281] which specifically mentions the Arctic and its peoples in its preamble.[282]

In his analysis of the process that led to the conclusion of the above-mentioned agreement, Fenge highlights three aspects that have particularly empowered Arctic indigenous peoples prior and as a result of their participation in intergovernmental negotiations. First, their inclusion in the development of pre-negotiation scientific programs, such as the AMAP Report, has allowed them to acquire a knowledge that, in addition to their traditional experience, has enabled them to act credibly and effectively in circumpolar and international negotiation forums. In fact, representatives of several Arctic IPs directly had the possibility to participate in the bargain of the agreement as members of the national delegations of the USA and Canada.

Second, the status of PPs within the Arctic Council has allowed them to put pressure on the respective national governments so as to negotiate common positions that they would maintain throughout the international law-making process. Finally, the recognition of the significant indigenous influence on this international process has set a

[280] The document has indeed made it possible to estimate the exposure of the Arctic region to these pollutants. Although, as in the case of short-lived pollutants and black carbon, these pollutants are not produced in the Arctic, they are transported in the region through the atmosphere, as well as deposited and accumulated in the natural environment. Particularly serious was the detection of these contaminants in the breast milk of different Arctic indigenous women and in Arctic IPs food chain due to the consumption of fish and marine mammals.

[281] See, T. FENGE, "POPs and Inuit: Influencing the Global Agenda" in T. FENGE and D. L. DOWNIE, 2003, *op. cit*., pp. 193–213.

[282] A detailed analysis of the process that has led to the conclusion of the 2001 Stockholm Convention on Persistent Organic Pollutants and other environmental convention can be found in H. SELIN, 2017, *op. cit*.

precedent for addressing other pressing regional and international environmental issues with their contribution.

Indeed, this experience of engagement and advocacy has fed into the negotiation of the Minamata Convention on Mercury (2017) too.[283] As for POPs, this chemical is long-transported to the Arctic from external sources and represents a severe health and environmental harm in the region. These clearly explains the engagement of the AMAP on this issue and the contribution that Permanent Participants have made by partaking in its work, which includes the report *Mercury in the Arctic* of 2011, with a section assessing the impacts of mercury on human health and in Arctic inhabitants' food webs. In an informative article on the role of the AC in the negotiation of the Minamata Convention, Platjouw and others have qualified the AC "[…] as a provider, broker and communicator of science related to the environmental problem of mercury."[284]

Although successful because they are primarily supported by Arctic States, the indigenous peoples of the region have been able to contribute to the scientific research carried out within the AEPS and AC, supporting the formation of scientific evidence that has catalysed the consensus and political action necessary for the negotiation of international environmental treaties. In this sense, and very relevant, this practice demonstrates the importance of an effective exercise of Arctic IPs procedural and participatory rights at the international level. Likewise, this can be understood as a tool for promoting the development of international law and of instruments capable of imposing binding obligations on States. In short, another way to foster the recognition and respect of indigenous rights.

3.4.3 The Inuit Petition before the Inter-American Commission on Human Rights.

"Arctic countries and non-state groups invoke the fact that the Arctic is a highly ecologically sensitive place where signs of important changes can be detected early to expand regional cooperation to reduce environmental and human health risks from hazardous substances and climate change. In parallel, they seek to promote an Arctic

[283] *Minamata Convention on Mercury* of 10 October 2013 (55 ILM 582).
[284] F., M. PLATJOUW, E., H. STEINDAL and T. BORCH, "From Arctic Science to International Law: The Road towards the Minamata Convention and the Role of the Arctic Council", *Arctic Review on Law and Politics*, Vol. 9, 2018, pp. 226–243, at 238.

agenda in international forums. However, the success of these external efforts has been mixed at best."[285]

In the comparative analysis of the processes that have led to the conclusion of several binding agreements relevant to the protection of the Arctic environment, Selin discusses the peculiarities of the climate change regime case. Due to the highly politicised nature of climate change and the relatively late involvement of the Arctic Council in this issue,[286] the regulation of global warming has been the international process in which the different Arctic actors have found it most difficult to successfully influence intergovernmental negotiations. The indigenous peoples of the region, largely involved in the negotiation of the Convention on Biological Diversity, did not take part in the climate decision-making process before 1998. It was only in 2001 that they were effectively recognized as one of the stakeholders along with other indigenous groups, primarily alarmed by the implementation of mitigation projects through sustainable forest management programmes.[287] Since then, and for long unsuccessfully, the Arctic Caucus operating within the UN Permanent Forum on Indigenous Issues has recommended the creation of a seat reserved to IPs at the negotiating table of the UNFCCC.

Arguably for these reasons, the strategy chosen by Arctic indigenous peoples to influence the creation, reach and implementation of an international climate regime that could effectively counteract the impacts of global warming, has resorted on all the instruments analysed so far but has also been complemented by the actions taken outside the UNFCCC process. For instance, recurring to a regional human rights court to advance the development and implementation of international environmental and human rights law on the subject.[288]

---

[285] H. SELIN, 2017, *op. cit*., at 102.

[286] The work of the Arctic Council on climate change has been primarily done at the regional level, including the establishment of an Expert Group on short-lived climate pollutants. Although different declarations of the Council explicitly refer to the need of addressing this environmental problem which, today, is also among the main priorities of the Finnish Chairmanship, the Council doesn't hold an observer status to UN climate negotiations. Nonetheless, the Council has organised several side-events showcasing the impact of climate change on the Arctic natural and human environment.

[287] For more details on this topic, see C. BETZOLD, *Non-State Actors in International Climate Change Negotiations*, Doctoral dissertation, 1984.

[288] While the Inuit petition to the IACHR is among the most visible legal actions undertaken by Arctic IPs at the international level, it should be recalled here that lawsuits related with environmental issues and human rights have also been filed to national courts. In Canada, for instance, the Supreme Court has ruled in favour of the Inuit community of Clyde River, Nunavut, who initiated legal proceedings against the decision to allow a 5-year seismic blasting project. Remarkable is that the case focused on the governmental

We have previously referred to the impacts that climate change is having on the indigenous populations living in the Arctic which, along with Amazonia, the Sahel and Central Asia, is one of the regions of the planet most dramatically affected by global warming. Faced with the impossibility to see their rights to life, health and land, *inter alia*, comprehensively guaranteed by conventional instruments, in December 2005 the then President of the ICC, Sheila Watt-Cloutier, filed a petition before the Inter-American Commission on Human Rights against the United States on behalf of herself and other Inuit living in the Arctic regions of the United States of America and Canada.[289] By alleging the violation of a number of human rights recognised in the American Declaration of the Rights and Duties of Man[290] and other international instruments (ICCPR, 1966; UNFCCC, 1992), the claimants have sought to hold the US accountable for the acts and omissions related to its greenhouse gases emissions' policy,[291] as well as to demonstrate the existence of a correlation between global warming and the (impaired) enjoyment of human rights.

As a regional human right body established by the Organization of American States (OAS), the IACHR has a jurisdiction that extends over the territories of the American and Canadian Arctic. While this explains why the petition does not represent the Inuit living in Greenland and Russia, the IACHR was also considered to be a preferable forum for the analysis of a complaint of this kind because, in terms of standing,

---

duty to consult and accommodate Inuit peoples' concerns when permits for industrial activities that might impact on Inuit rights are issued, highlighting the IPs' human right to free, prior and informed consent. See, Supreme Court of Canada, *Clyde River (Hamlet) v. Petroleum Geo‑Services Inc.* (Judgement). [2017] 1 SCR 1069 of 26 July 2017. Other cases related to the Canadian duty to consult with indigenous peoples prior to the authorisation of projects with negative environmental impacts have been reported in the IWGIA report on indigenous peoples. See, P. J. ANDERSEN, 2018, *op. cit*., at 65. The possibility for similar litigations to take hold in the USA, as for example in the case of the Pebble Mine in Alaska, has been favoured by the start of the Trump administration, which reversed several of the decisions made by the administration Obama in the context of resources exploitation and environmental policy.

[289] "Petition to the Inter-American Commission On Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of The United States". Available at: http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf (Last access 21 August 2018). For an analysis of the petition, see M. CASTILLO DAUDÍ, "Cambio Climático y Derechos Humanos: El Asunto de los Inuit Ante la Comisión Interamericana de Derechos Humanos" in R. GILES CARNERO (coord.) *Cambio Climático, Energía y Derecho Internacional: Perspectivas de Futuro*. Cizur Menor: Aranzadi, 2012, pp. 207–218.

[290] American Declaration of the Rights and Duties of Man, entered into force on 2 May 1948. Adopted by the Ninth International Conference of American States, Bogotá, 1948.

[291] Although a US policy on climate change is certainly the sum of the different policies adopted at the subnational and federal level, it was key for the petition that the USA decided to withdraw from the Kyoto Protocol under the Bush administration, in 2001.

it allows the reception of petitions from private citizens. Moreover, while the exhaustion of domestic remedies is usually determinant for the admission of an international litigation, the Commission allows a number of exceptions to this criterion when, as claimed in the case in point, the petitioners lack the resources necessary to exhaust domestic legal procedures or allege the absence of effective remedies at the national level. In the latter case, the burden to prove that existing remedies are in place but have not been used rests on the respondent government. Nonetheless, it should also be reminded that any declaration from the Commission is not directly enforceable, the IACH exclusively has the authority to establish human rights violations and prepare a report with recommendations. In any case, this did not conflict with the spirit under which the petition was filed. In the words of Ms. Watt-Cloutier: "Protecting human rights is ground occupied by both reasonable governments and civil society, including Inuit and other Indigenous peoples. This petition is our means of inviting the United States to talk with us and to put this global issue into a broader human and human rights context. Our intent is to encourage and to inform."[292]

In its substance, the relation between a human rights violation and the acts and omission of the American states was built on three main assumptions: (1) The USA substantially contributed and contributes to the global greenhouse gases emissions but is not taking adequate steps to reduce them. Quite the opposite, the US withdrawal from the Kyoto Protocol points to the fact that this will not likely change in the future. In this sense, the State's conduct is considered to be negligent. (2) The impacts derived from climate change have negative effects on Inuit livelihoods and on the environment in which they live and subsist on. To this end, the findings of the 2004 Arctic Climate Impact Assessment Report were largely cited in the petition. (3) The impact that human-induced climate change is having on Inuit lives amounts to a human rights violation. Arguably the most innovative aspect of this lawsuit, this argument has reframed the environmental problem of climate change through using the lenses of human rights.

[292] S. WATT-CLOUTIER, *The Climate Change Petition by the Inuit Circumpolar Conference to the Inter-American Commission on Human Rights*, Presentation held at the Eleventh Conference of Parties to the UN Framework Convention on Climate Change. Montreal: 2005. Available at: http://www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html (Last access 22 August 2018).

Sustaining that the evidence provided in the case was not sufficient to ascertain a violation of human rights, the Commission refused to consider the case in November 2006 but conducted a public hearing on the relationship between global warming and human rights in March 2007. Nevertheless, this case should be noted for several reasons. First of all, it is beyond doubt that the petition has had a major impact in giving a 'human face' to climate change, hitherto exclusively considered as an abstract environmental problem and mainly addressed through market-based instruments, such as the European emissions trading system. In this respect, it has undoubtedly contributed to the international publicity of the indigenous cause too. Notwithstanding the accuracy of certain criticisms moved to the Inuit petition by some commentators,[293] the case has been praised for being "[…] an important example of creative lawyering in both substance and form".[294] The case, at the intersection between an environmental rights litigation and a human rights petition, is a mix of a legal action aimed at securing the respect of human rights and an advocacy strategy targeted at addressing pressing environmental issues. In this regard, and particularly relevant in terms of participation of the public, Koivurova and others have maintained that: "The ICC's actions demonstrate how to effectively challenge both the basic rules prescribed by the climate change and the structure upheld by international law as a society of states. By raising the human rights petition against the US, the Inuit expanded society's notion of who is entitled to participate in the fight against climate change."[295]

In the framework of this work, the petition is of great value for the contribution that it has made to the legal doctrine, and for its capacity to generate a debate on the relationship between global warming and human rights within the legal scholarship and in UN bodies. Indeed, and primarily driven by the Inuit petition, since 2005 the issue of human rights has been a key element in the debate on global climate change, embodied in various resolutions of the Human Rights Council.[296] As Duyck, Jodoin and Johl have reported: "This petition, in combination with the Inuit Circumpolar Council's advocacy efforts in the UN climate negotiations, is generally considered to have played a critical

[293] M.CASTILLO DAUDÍ, 2012, *op. cit*.
[294] H. M. OSOFSKY, 2007, *loc. cit*., at 267.
[295] T. KOIVUROVA, S. DUYCK and L. HEINÄMÄKI, 2013, *op. cit*., at 324.
[296] A. JOHL and S. DUYCK, "Promoting Human Rights in the Future Climate Regime", *Ethics, Policy and Environment*, Vol. 15, No. 3, 2012, pp. 298–302. The role of UN bodies in the affirmation of such a relationship will be detailed in the last chapter of this research.

role in raising awareness of the human rights dimension of climate change".[297] Indeed, the Inuit efforts were joined in 2007 by the Small Island Developing States, which called for the commitment of the United Nations Human Rights Council to recognize the negative implications of climate change for human rights.

The petition, a pioneer in specifically linking human rights and global warming, has finally set a relevant precedent for other climate litigation that has taken place in different jurisdictions and judicial systems. In this regard, Arctic indigenous peoples have been the first to use the human rights framework to address a global environmental problem, paving the way for similar legal actions and advocacy strategies in the Arctic and elsewhere.[298] For instance, in 2013 a new petition was filed before the IACHR by the Athabaskan peoples of Canada and the United States. Although the case is still pending, the Commission has progressively recognised and expressed concern for the impacts of climate change on the enjoyment of human rights in the region, something that might influence its future decision on this case.[299]

In conclusion, the resort to a petition as a mean to obtain effective legal remedies against the detrimental impact that climate change has on human rights, has arguably been the most pioneering expression of indigenous diplomacy in the Arctic and internationally, also proving the ICC's ability to stand up for a broad international indigenous climate movement, which the Inuit petition has undoubtedly promoted and strengthened. Indeed, although unsuccessful from a strictly legal perspective, the case has at least called into question the premises on which the negotiation of a climate change regime has largely relied. Not only the Paris Agreement today expressively acknowledges the relationship between climate change and human rights in its Preamble, but climate litigation have surged as a transnational phenomenon aimed at promoting regulatory change and upholding procedural rights in the context of climate change law.

---

[297] S. DUYCK, S. JODOIN, A. JOHL, 2018, *op. cit*., at 5.

[298] Although it has attracted less media and public attention than the first Inuit petition, several authors have analysed the case. See, for example, V. DE LA ROSA JAIMES, "The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights", *California Western International Law Journal*, Vol. 2, No. 45, 2015, pp. 213–260; D. McCRIMMON, "The Athabaskan Petition to the Inter-American Human Rights Commission: Using human rights to respond climate change", *The Polar Journal*, Vol. 2, No.16, 2016, pp. 398–416.

[299] ORGANIZATION OF AMERICAN STATES, "IACHR Expresses Concern regarding Effects of Climate Change on Human Rights" *OAS*, 2 December 2015. Available at: http://www.oas.org/en/iachr/media_center/preleases/2015/140.asp (Last access 27 August 2018).

3.5 Concluding Remarks: The Arctic Case as a Paradigm of Non-State Actors Participation in International Climate Governance

The decision to analyse the practice of Arctic indigenous peoples in the Arctic Council and at the international level was justified by the intention to highlight the value of their model of participation, inspired by and constructed on the acknowledgement of their specific status as *peoples* who, under international law, are holders of specific collective and individual human rights.

The description of indigenous practice in the Arctic has shown that most of their actions as Permanent Participants and transnational non-governmental organisations have primarily relied upon their capacity to transmit their knowledge to political actors, as well as to influence the scientific research and decision- and law-making process. Likewise, and most importantly, they have resorted on their ability to claim, project and uphold their status as *right-holders* in regional and international negotiation forums, promoting their rights to participation through rights-based discourses and claims. As Aponte Miranda explains: "For indigenous peoples, the human rights discourse has offered a normative framework potentially capable of lending increased legitimacy to their local, anti-subordination struggles and to translating their contemporary claims into recognizable rights."[300]

The possibility of considering and proposing the Arctic case as a model for the participation of other non-State actors – primarily individuals and the organisations of the civil society representing them – for their participation in the process of climate change law-making may seem *prima facie* unsuitable. A reasonable commentator would object that is primarily because of their status as *peoples* within States, that indigenous peoples enjoy specific rights, as the right to self-determination. Yet, most of their claims have resorted upon the respect of international human rights which, by definition, pertain and are inherent to all individuals. In the specific case of climate change then, both the theory and practice of law have evolved towards a more sensible approach to a human rights dimension, as demonstrated by the integration of a rights-based perspective in the regime

[300] L. APONTE MIRANDA, "Introduction to indigenous peoples' status and rights under international human rights law" in R. S. ABATE and E., A. KRONK WARNER, 2013, *op. cit*., pp. 39–62, at 41.

tackling global warming and by those climate litigation cases that have relied on this body of law for their determination.[301] This, in turn, makes relying on the rights-based approach practice adopted by Arctic IPs a more plausible and acceptable option.

Far from being an easy task, the possibility to draw a legal analogy between the model of participation of Arctic IPs and that of other non-State actors so that they can enjoy improved rights of participation in international climate governance, is also related with the question of whether the consideration of climate change as a human rights issue has sufficiently affirmed internationally.

While answering this question, the final part of this work will more broadly look at a set of international law instruments that may be suitable to the improvement of procedural rights in the climate change context, primarily climate change litigation as a bottom-up approach to climate governance. Nevertheless, and due to the largely remedial character of such an instrument, the final chapter of this research will also consider the possible affirmation of an autonomous and independent *right to a healthy and safe environment* as the culmination of a human rights-based approach to climate change and, on the other hand, the possibility of linking a significant inclusion of non-State actors in international climate law-making to the affirmation of such a right, in analogy with the case of Arctic IPs as presented in this chapter.

[301] See, e.g., P. DE VILCHEZ MORAGUES, "Broadening the scope: The Urgenda case, the Oslo Principles and the role of national courts in advancing environmental protection concerning climate change", *The Spanish Yearbook of International Law*, Vol. 20, 2016, pp. 71–92.

PART IV – IMPROVING PUBLIC PARTICIPATION IN CLIMATE CHANGE LAW-MAKING: INTERNATIONAL LAW INSTRUMENTS

Chapter 4. Climate Change Litigation: Redressing the Lack of Participation in International Climate Change Law-Making?

4.1 Introduction

A recently published UNEP report surveying the state of climate change litigation counted that, as of March 2017, over 800 climate change-related cases were filed in 24 countries.[302] Around 600 of those appear to have been submitted before US courts, and roughly 200 have been filed across European and non-American States. At least to some extent, this trend relates and points to the fact that the number of national and international laws aimed at redressing climate change has grown recently.[303] Yet, the rise in the number of litigation cases challenges the content and application of those regulations in different ways. As a matter of fact, albeit a minority of cases involves private actors such as major companies or carbon producers, governments appear in courts as defendants in the vast majority of lawsuits.

[302] UNEP, *The Status of Climate Change Litigation – A Global Review*. Nairobi: UNEP, 2017, at 10. The Sabin Center for Climate Change Law maintains a data base on US and non-US climate change litigation. The databases are available at: http://climatecasechart.com/ (Last access 28 August 2018).

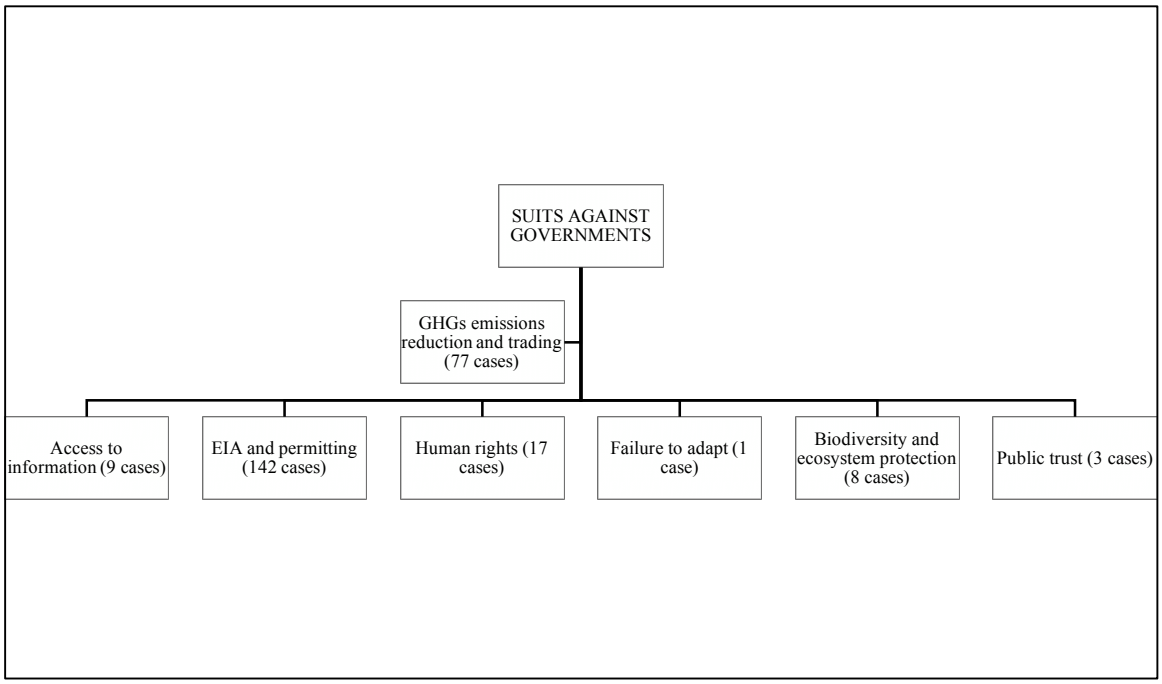
[303] Indeed, all of the signatories of the Paris Agreement have enacted at least one law or policy on climate change. The Grantham Research Institute on Climate Change and the Environment, in collaboration with the London School of Economics, maintains a data base on world climate change legislation and periodically publishes a report on the global progresses and setbacks found in this field. The report is available in Spanish too, see: M. NACHMANY and S. FANKHAUSER, "Estudio sobre legislación de cambio climático 2015. Informe sobre la legislación de cambio climático en 99 países". London: London School of Economics, 2015. While the data base is available at: http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/ (Last access 28 August 2018). For a detailed and overreaching analysis of climate change legislations, see: A. AVERCHENKOVA, S. FANKHAUSER and M. NACHMANY (eds.) *Trends in Climate Change Litigation.* Cheltenham: Edward Elgar, 2017.

Number of Climate Change Litigation Cases per Country

United States of America	654	Belgium	1
Australia	80	Colombia	1
United Kingdom	49	Czech Republic	1
New Zealand	16	Federated States of Micronesia	1
Canada	13	Ireland	1
Spain	13	The Netherlands	1
France	4	Nigeria	1
Germany	3	Norway	1
India	2	Philippines	1
Pakistan	2	South Africa	1
Ukraine	2	Sweden	1
Austria	1		

Source: UNEP, 2017

Suits Against Governments



Source: Sabin Center for Climate Change Law[304]

By taking a closer look at the reality of climate litigation, it will be noticed that just a small pool of these cases aims at challenging the implementation of specific projects, such as the extraction of resources in environmentally sensitive areas or the construction of invasive structures in territories at risk from erosion. On the contrary, corporations bring to court around half of the registered claims in order to overturn administrative decisions and sustain climate deregulation, in the interests of the projects they aim at implementing. Notwithstanding this, most of the scholarly analysis that has looked at the emergence of this new trend has rather focused on those cases that are brought by individuals, NGOs or subnational authorities. In the claims registered outside the USA, 68 of the lawsuits have been initiated by an individual, while NGOs have acted as representatives of groups of individuals around 48 times.[305] As said, this account does not consider those litigations initiated in the USA where, usually based on the doctrine of

[304] For a thorough analysis of these cases, see: D. MARKELL and J. B RUHL, "An Empirical Assessment of Climate Change In the Courts: A New Jurisprudence Or Business As Usual?", *Florida Law Review*, Vol. 64, No. 1, 2012, pp. 15–86.
[305] M. NACHMANY and J. SETZER, 2018, *op. cit.*

public trust and due to different standing requirements, (groups of) individuals appear as plaintiffs in the majority of cases.

The reason for such academic interest arguably rests on the relevance that climate change litigation may have as a mechanism for climate governance at the national and, alternatively international, levels. While the use of litigation in environmental context has usually related to the quest of environmental justice, several climate change-related litigations today maintain this characteristic but contemporarily assume a more strategic meaning too. Borrowing the definition used by the Grantham Research Institute on Climate Change: "[…] strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court. In this way, strategic litigation focuses on an individual case in order to bring about social change."[306]It follows that, as argued elsewhere, these cases stand at the intersection between legal actions aimed at obtaining remedies and a broader advocacy strategy promoted by climate advocates.[307]

In the context of the present research, climate change litigation is considered exactly for this specific feature, as a bottom-up strategy to climate governance, in which adjudication is used to push the improvement and reform of climate change laws and policies, as well as the defence and advancement of different rights, including procedural rights. By looking at how climate litigation has developed becoming an increasingly influent trend, this chapter aims at answering the question of whether – and how successfully – the resort to climate litigation is used as an instrument to redress the lack of participation in international climate change law-making, thus as an instrument to uphold participatory rights in this environmental context. While different international law instruments could be an object of scrutiny in this sense, the decision to focus on climate change litigation is motivated by the relatively new inception of this instrument and by its potential relevance as a trend that is developing in a transnational fashion. With this aim, the first section of this chapter will introduce the topic of litigation more broadly

[306] *Ibid.*
[307] See, e.g., S. JODOIN, R. FAUCHER and K. LOFTS, "Look before you jump: assessing the potential influence of the human rights bandwagon on domestic climate policy" in S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit.,* pp. 167–182; H. M. OSOFSKY, 2007, *loc. cit*.

and try to bring some clarity on the main characteristics and elements that constitute climate-related litigation.

4.2 Litigation in International Environmental Law

The affirmation of an environmental justice movement in the USA during the 1980s was mostly concerned with how to address disproportionate environmental harms to humans. The idea of achieving justice, in this sense, stemmed from the need to address inequalities in how the burdens and benefits derived from economic development had to be carried by different communities. A manifest discrimination would be constituted, for instance, by the concentration of toxic and hazardous waste in areas inhabited by black and poor people. Being the latter a common practice during the 1970s and 80s, this spurred the inception of the environmental justice movement, given that the degradation of the environment was adding another layer of vulnerability to the lack of resources and poor living conditions of those communities.

It follows that the achievement of justice in an environmental context requires the reconciliation of the social, environmental and economic dimensions that constitute the modern understanding of sustainable development: [308] an objective to be pursued by ensuring equal protection of people(s) against any environmental and health hazard, as well as by securing their equal access to decision-making processes.

In recent decades, the emergence of climate change as a global, transnational and transgenerational environmental problem has given new impetus to environmental justice, primarily due to the ethical questions raised by this issue. The anthropogenic nature of climate change as a human-caused harm has turned public attention towards questions regarding human-nature interactions and relationships. For example, is it possible – and if so, how – to strike a balance between the rights and duties carried by different generations? Is there any nation that is to be considered more responsible for the negative consequences of greenhouse gases emissions? While most of these interrogatives remain largely unanswered at date, a clear question of justice and equity refers to the fact that

[308] See, on the idea of sustainable development and its dimensions, the report of the Brundtland commission: WORLD COMMISSION ON ENVIRONMENTAL AND DEVELOPMENT, *Our common future. Report of the World Commission on Environment and Development*. Oxford: Oxford University Press, 1987.

those countries and communities that will likely be more affected by climate change, have contributed the least to causing this environmental harm. In this regard, climate change acts as an amplifier of pre-existing vulnerabilities and largely diminishes the resilience capacity of most developing states and communities.[309]

Against this background, the idea of environmental justice is reflected in that of climate justice,[310] where the latter arose as the response of those countries and communities that have been – and will likely be in the future - more exposed and disproportionally affected by the impacts of climate change. Counting on fewer resources to adapt, they are demanding a change in the way in which this environmental problem is being addressed, both in terms of distribution and equal enjoyment of resources, or with reference to procedural rights and compensation.[311] It is particularly in the context of these last dimensions of climate justice, the defence of procedural rights and remediation, that climate litigation has been used to strategically advance different rights at stake. Indeed, although these same issues have been brought to the attention of climate change law negotiators in different occasions,[312] and have been partially enshrined in the principles of common but differentiated responsibilities, intergenerational responsibilities or addressed in a loss and damage mechanism, the nature of negotiation is essentially political and rarely helps achieving a redistributive outcome.[313]

---

[309] See, S. HALLEGATTE, M. BANGALORE, L. BONZANIGO and others, *Shock Waves. Managing the Impacts of Climate Change on Poverty. Climate Change and Development*. Washington D.C.: World Bank Group, 2016. The report has estimated that, between 2015 and 2030, around 100 million people will end in poverty due to climate-related causes (damages in crops, raise in the prices of goods etc.). On the other hand, this factors are likely to impact on the growth of the so-called climate-induced migrations. See, on this topic, R. McLEMAN and F. GEMENNE (eds.) *Routledge Handbook of Environmental Displacement and Migration*. New York, London: Routledge, 2018.

[310] See, D. ROSER and C. SEIDEL, *Climate Justice. An Introduction*. New York, London: Routledge, 2013; D. STABINSKY, "Climate justice and human rights" in S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit.*, pp. 280–291; U. BAXI, "Towards a climate change justice theory?", *Journal of Human Rights and the Environment*, Vol. 7, No. 1, 2016, pp. 7–31. In the context of climate change negotiation, particularly the Small Island Developing States have been promoting an agenda on climate justice and a qualified reference to the latter is today included in the Preamble of the Paris Agreement which recognises the importance "for some" of the concept of climate justice.

[311] See, on this issue, S. BORRÁS PENTINAT, "Movimientos para la justicia climática global: replanteando el escenario internacional del cambio climático", *Relaciones Internacionales*, No. 33, 2017, pp. 97–119.

[312] See, S. BORRÁS PENTINAT, "Los litigios climáticos: Entre la tutela climática y la fiscalización de las responsabilidades por daños climáticos" in R. G. CARNERO, 2012, *op. cit*., pp. 91–104, at 103.

[313] It should be noted though that, in the framework of the Paris Agreement, the principle of common but differentiated responsibilities is less prominent than in the UNFCCC or the Kyoto Protocol. This answers to the willingness of imposing emission reductions targets on all Parties based on their NDCs, which are largely established on a voluntary basis. As regards the loss and damage mechanism established at the Warsaw Conference of 2013 and included in the Paris Agreement then, article 8 of the treaty expressively

Against this backdrop, climate change litigation is a rather new phenomenon, which has nonetheless exponentially increased since the mid-2000s. Preston reports that the first American decision relating to climate change dates back to 1990 and that, since then, climate change arguments have been primarily litigated in different national American and Australian courts[314] and are, increasingly more, considered under different national, regional and international jurisdictions beyond the USA. This, consequently, reflects the increasingly more prominent role that courts and tribunals have come to play in domestic and international climate change governance. Due to the great variety of actors, jurisdictions and legal sources that the analysis of climate change litigation entails, however, some preliminary questions related to the characteristics and legal elements of this new phenomenon are considered below.

4.3 Introducing Climate Change Litigation: Main Characteristics and Legal Elements

The appearance of climate-related suits in different national, regional and international jurisdictions has been attributed to the fact that no institution has legal jurisdiction and authority over the global scope of the climate change problem. Likewise, frustration has been caused by the slow pace at which climate negotiations have developed, as well as by the lack of adequate means to adjudicate the obligations of States in relation to climate change mitigation. The latter entailing the obligations that States owe to their counterparts and the International Community as a whole in respect and compliance of the agreements that they have endorsed internationally or on the basis of international law principles and, at the same time, the obligations that States have towards their citizens, including the respect of human rights.

Indeed, the UNFCCC does not foresee strong mechanisms for sanctioning the countries that are acting in violation of its provisions and exclusively affirms the competence of the ICJ to address climate change-related cases in article 14.[315] In this

tells that the reference to loss and damage does not provide a basis for any liability or compensation. It follows that the content of the article is largely symbolic.

[314] B., J. PRESTON, "Climate Change Litigation (Part 1)", *Carbon & Climate Law Review*, Vol. 5, No. 1, 2011, pp. 3–14, at 4.

[315] Under the UNFCCC compliance was assessed through a relatively weak pledge and review system. As detailed in the second chapter of this research, the latter has been also included in the Paris Agreement but in legally binding terms. As for dispute settlement mechanisms, instead, article 14 of the UNFCCC provides

regard, a possible avenue to assess the negligence of States would rely on the possibility to establish their responsibility in violation of the no-harm rule, which prescribes the obligation of a State to prevent, reduce and control the risk of environmental harm coming from its own territory to other States.[316] The first attempt in this sense was made in 2002 by the insular State of Tuvalu (Polynesia), who raised the possibility to denounce the USA and Australia before the International Court of Justice for the non-ratification of the Kyoto Protocol.[317] Ultimately, Tuvalu acknowledged the difficulty of bringing such a case and the claim was not submitted. Similarly, in 2011, the Pacific island of Palau proposed to the UN General Assembly to request an advisory opinion from the ICJ concerning the duties of States in the application of the no-harm rule.[318] Also in the latter case, however, the initiative was eventually not carried out. As a result, no climate case has been heard by the International Court of Justice to date and most climate-related litigation claims have been addressed in other international fora or presented at the national level. Notwithstanding this, the role of the ICJ and the potential for international adjudication in the context of climate change more broadly is still discussed in the scholarly debate.[319]

---

the possibility to resort to negotiation, conciliation and non-compulsory arbitration or adjudication. In the latter case, the International Court of Justice may be invoked exclusively if the Parties to a dispute have previously accepted its jurisdiction. To date, none of the mentioned mechanisms has been invoked.

[316] Primarily established in the Trail Smelter Arbitration, *United States v. Canada*, 16 April 1938 and 11 March 1941. 3 UNRIAA 1905, Principle 21 of the Stockholm Declaration of 1972 established that: *"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".* See, Declaration of the United Nations Conference on the Human Environment, *Principle 21* of 16 June 1972 (UN Doc. A/CONF/48/14/Rev.1). Although there is no agreement as if the rule reflects customary international law, the ICJ has reaffirmed the relevance of this principle in relevant case law. Although the rule is originally based on a clear separation of sovereign competencies between States, it has acquired the identity in environmental law of a principle aimed at preserving a healthy environment. See, for a detailed analysis, D. BODANSKY, J. BRUNNÉ and L. RAJAMANI, 2017, *op. cit*., at 40.

[317] See, M. GROMILOVA, "Rescuing the People of Tuvalu: Towards an I.C.J. Advisory Opinion on the International Legal Obligations to Protect the Environment and Human Rights of Populations Affected by Climate Change", *Intercultural Human Rights Law Review*, Vol. 10, 2015, pp. 233–289.

[318] UN NEWS, "Palau seeks UN World Court opinion on damage caused by greenhouse gases", *UN NEWS*, 22 September 2011. Available at: https://news.un.org/en/story/2011/09/388202 (Last access 28 August 2018).

[319] See, e.g., D. BODANSKY, "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections", *Arizona State Law Journal*, Vol. 49, 2017, pp. 689–712; P. SANDS, "Climate Change and the Rule of Law: Adjudicating the Future in International Law", *Journal of Environmental Law*, Vol. 28, No. 19, 2016, pp. 19–35. Involved in the adjudication of several cases related to environmental problems, the ICJ established a chamber for environmental disputes in 1993, although the latter has stopped operating in 2006 when no new judges where elected to the chamber. For a more general analysis of the ICJ role in environmental dispute settlement, see: R. GILES CARNERO, "La Corte International de Justicia frente a las controversias internacionales de carácter medioambiental", in E., M. VÁZQUEZ GÓMEZ, M., D. ADAM MUÑOZ and N. CORNAGO-PRIETO (coord.) *El arreglo pacífico*

Other attempts to obtain successful adjudication at the international level includes the already cited Inuit and Athabaskan petitions before the IACHR, as well as cases filed to the World Heritage Committee for violation of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the result of which has been the listing of several sited affected by climate change within the List of World Heritage in Danger.[320]

Due to the difficulties associated to the fact that most international jurisdictions are closed to individuals and relate instead to inter-state disputes, more proliferate and somewhat more successful have been the claims raised before national courts. While, as already said, the USA is the country where most of these petitions have been presented, including the landmark case *Massachusetts v. EPA*, civil suits have succeeded in Europe and the Middle East.[321] In the latter case, a mix of domestic (civil) law and international (human rights) law and principles have been relevant to adjudication. In fact, as this brief account has shown, the characteristics of climate-related litigation largely varies on the involved sources of law and the body, national or international, in which a claim is heard. Therefore, before assessing the potential relevance of this instruments and before going into the details or relevant cases, the following section of this chapter will explore the legal elements on which climate change litigation builds or can be constructed.

4.3.1 Commonalities Among Climate Change Litigation: Legal Elements

Climate change litigation is a very general term and different adjudication cases have been qualified using this one-fit all category. Quite intuitively, this is primarily because, beyond the heterogeneity of rights at stake and the broad spectrum of involved actors, these cases have climate-related claims at their centre. Furthermore, although the

---

de las controversias internacionales: XXIV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones internacionales. Valencia: Tirant lo Blanch, 2013, pp. 159–168; J. KLABBERS, 2017, *op. cit*., at 279.

[320] *Convention Concerning the Protection of the World Cultural and Natural Heritage* of 16 November 1972 (1037 UNTS 151). See, WORLD HERITAGE COMMITTEE, "Threats to World Heritage Properties", Decision 29 COM 7B.a, 2005; WORLD HERITAGE COMMITTEE, "Conservation of the World Heritage Properties: the Impacts of Climate Change on World Heritage Properties, Decision 30 COM 7.1, 2006.

[321] *Supreme Court of the USA, Massachusetts v. Environmental Protection Agency, 549 U.S. 497, Judgement of 2 April 2007*. More details on the case are available at: http://climatecasechart.com/case/massachusetts-v-epa/ (Last access 28 August 2018).

objectives pursued by a petition are to be considered on a case by case basis, there is at least a number of legal elements that are common to most adjudications. The latter are exposed and detailed in this section.

4.3.1.1 Justiciability

In general terms, justiciability refers to the possibility of a legal case to be heard and adjudicated in a court, in order to ensure the protection of recognised rights or redress their actual or potential violation. It follows that not all legal issues are justiciable, as well as not all courts are appropriate forums for adjudication. On the one hand, a test for justiciability usually entails the existence of an actual controversy between two or more parties and that their interest is adverse. Moreover, and differently from the request for an advisory opinion, the controversy must lead to a practical relief. On the other hand, the judicial authority of a specific court relates to its ability and entitlement to decide on a specific matter (competent body). Even when this authority is uncontested, a court has discretion in deciding whether or not it should adjudicate on a specific matter.

Standards of justiciability may vary from one jurisdiction to the other and, of course, differences are to be found in national and international legal systems too. At both of these levels, however, climate change has been a rather conflicting issue as far as standing requirements and separation of powers are concerned. The latter are, in fact, two of the main requirements to be satisfied when a claim is to be presented before an international court or a national tribunal. The satisfaction of this requirements in climate change litigation are here considered in more detail:

- The separation of powers doctrine

Due to the highly politicised nature of climate change and because of the key role that the legislative and executive powers maintain in this field, the exercise of what has been referred to as ‘judicial governance’ in this realm has been contentious. In fact, and common to most jurisdictions, the respect of the principle of separation of powers must be maintained when a court is considering to admit a climate change litigation. In different instances, this has constituted the basis for the rejection of a claim. Yet, cases heard both in American and European courts have established ground-breaking

precedents in this sense. For example, in the *Urgenda case* that will be detailed below, a district court found that Dutch law requires the judiciary to assess the actions of political bodies when the rights of citizens are at stake.[322] The same principle has been established by the US Supreme Court in its consideration of the case *Connecticut v. AEP*.[323] It follows that, common to different climate claims, has been the willingness of the judicial power to assume a progressively more prominent role in the determination of which are to be considered effective actions to address and revert climate change, as well as in establishing that climate change may entail a violation of rights. It is no coincidence that, as maintained by Bodansky and others, the regulation of climate change is increasingly influenced by judicial governance and that the latter will likely become a complement of climate negotiations in the future.[324] Directly related to the doctrine of balance of powers is the satisfaction of standing requirements by those presenting a claim to a tribunal. In fact, the latter has often been interposed as the circumstance to prevent the consideration of contentious hearings.

- Standing requirements (or *locus standi*)

The requirement of standing is used to ascertain who, based on the rules applied by different jurisdictions and legal systems, has sufficient interest in – and thus is allowed to – file a claim before a court or tribunal. Requirements for initiating legal proceeding may be more or less restrictive but usually refer to the ability of demonstrating causation – the existence of a relationship between an injury and the unlawful or negligent behaviour of the defendants – and injury – particularised or to the detriment of the public interest – something that, in the specific case of climate change, has proved challenging.

Given that climate change may be combined with other factors in producing its impacts, it may be difficult to prove a clear causal link between global warming and the violation of a right. Yet, several legal systems allow the consideration of cases on the

[322] See, District Court of the Hague, *Urgenda Foundation v. the State of the Netherlands*, HAZA C/09/00456689, Judgement of 24 June 2015. Available at: http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ (Last access 06 September 2018); UNEP, 2017, *op. cit*., at 30.
[323] United States Court of Appeals, Second Circuit, *Connecticut v. American Electric Power Company Inc*., 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009), Judgement of 21 September 2009.
[324] See, D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, 2017, *op. cit*, at 285; D. BODANSKY, 2017, *op. cit*., at 705.

basis of the so-called Public Interest Litigation (PIL), meaning that a lawsuit is brought to court to ascertain on an issue of public concern. PIL, as its denomination tells, it is largely used to advance public interests and policy change, the reason for which no injury or causation need to be alleged when bringing a case to court. Therefore, and being the second common element to different climate litigation cases, different NGOs and individuals have been able to access courts by bringing public interest claims. Very common in these cases is also to file a petition as a class action, where the representative of a group of people affected by the same alleged violations, will act as plaintiff on behalf of all class members.

4.3.1.2 Sources of Legal Rights and Obligations

After the exhaustion of procedural requirements and when a matter is eventually considered judiciable, the analysis of substantive merits will entail the consideration of which legal theories and legal sources have been used to frame the alleged violations, as well as their applicability to a determined case. Climate litigation is interesting in this sense because a broad range of legal arguments, doctrines, international legal principles or a mix thereof, have provided the basis for adjudication. Some of the most prominent and innovative features are considered here:

- Rights-based claims

Rights-based claims have been constructed to allege that the constitutional or fundamental human rights of citizens have been violated by those national climate laws and policies that are not able to adequately address climate change. In this regard, today more than 90 States directly protect the rights to a healthy environment in their constitutions.[325] Even when no express protection is given to such a right, the latter can be protected by relying on the right to life, health or property, among others. In national climate change litigation, therefore, the alleged violation of constitutional rights has been used as an instrument to hold governments accountable with regard to their climate policies. Likewise, to challenge those legislations that, not always ambitious, may prove to be incompatible with the protection of the above-mentioned rights. For instance, in the

[325] D., R. BOYD, *The Environmental Right Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: University of British Columbia Press, 2012.

Urgenda case, the plaintiffs claimed that the Dutch climate policy was in violation of art. 21 of the Dutch constitution, which enshrines the authorities' competence to keep the country habitable and to protect and improve the environment.

Similarly, human rights law has largely been used as an argument in support of national and international claims. In the latter case, the Inuit and Athabaskan petitions invoked the rights enshrined in the American system of human rights to denounce the inadequate regulation of climate change by the USA and Canada, respectively.[326] Extensive has also been the appeal to human rights law in national contexts, where a State violation of regional and international human rights instruments is often put forward alongside the violation of constitutional rights.[327] This is, for instance, the case in *The People v. Arctic oil*,[328] in which the infringement of articles 2 and 8 of the European Convention on Human Rights (ECHR) – concerning the rights to life and the right to private and family life, respectively – was complained along with the breach of article 112 of the Norwegian Constitution (right to environment). Since a good number of climate change litigation have occurred in European countries, the provisions of the ECHR have been largely invoked. Likewise, the procedural rights enshrined in the Aarhus Convention (Aarhus, 1998) have assumed relevance in climate change cases.[329]

[326] For a detailed analysis of human rights-based climate change litigation cases, see A. RUBINSON VOLLMER, "Mobilizing human rights to combat climate change through litigation" in S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit.*, pp. 359–371.

[327] Traditionally, socio-economic and cultural rights have been considered non-judiciable in national and international tribunals, meaning that they primarily constituted moral principles instead of being directly enforceable rights. In this sense, adjudication and enforcement of such rights are considered to be a competence of the legislative and executive powers, what brings back this issue to the separation of powers doctrine described above. Notwithstanding, it should be noted that these rights have in practice been adjudicated in a number of cases. See, as a general reference, D. McGOLRICK, "The Boundaries of Justiciability", *The International and Comparative Law Quarterly*, Vol. 59, No. 4, 2010, pp. 981–1019.

[328] Oslo Tingrett (Oslo District Court), *Föreningen Greenpeace Norden & Natur og Ungdom vs Staten ved Olje- og energidepartementet*, 16-166674TVI-OTIR/06, Judgement of 4 January 2018. At the time of writing, an appeal has been filed to the Norwegian Supreme Court by the NGOs Nature and Youth/Young FoE Norway and Greenpeace Norway, after the Oslo District Court has ruled in favour of the Norwegian government. See, M. SCOPELLITI and N. SELLHEIM, 2019, *op. cit*.

[329] The relevance of such rights has to be understood for their intrinsic value, thus for the rights and duties created by the Aarhus Convention and, in the context of Latin American countries, by the Escazú Agreement (2018), but also as a complement to substantive considerations. In this regards, Klabbers has underlined the relevance of two dissenting opinions issued by judges Al-Khasawneh and Simma in the resolution of the Pulp Mills case of 2010 by the ICJ. The author has underlined that the violation of procedural rights can help determine a substantive violation when particularly ambiguous concepts- such as sustainable development or the equitable and rational use of resources - are at stake. A substantive violation could be discernible because of the procedural obligations that such concepts bear. See, J. KLABBERS, 2017, *op. cit*., at 283.

An exception to this was the case *Ashgar Leghari v. Federation of Pakistan*, in which a Pakistani farmer sued the national government for the violation of its constitutional and fundamental rights, relying on the international human rights instruments ratified by Pakistan.[330] Different but equally interesting is the case *Greenpeace Southeast Asia et al. v. Carbon Majors*,[331] in which several individuals and organisations filed a claim against carbon producers and, among other requests, sought more engagement from policy- and lawmakers in assessing that corporations are acting according to human rights obligations.

Although different hurdles remain in terms of causation, these cases well illustrate why human rights-based claims can be relevant. First, this body of law usually provides individuals with direct standing to complain about a violation of their human rights. Moreover, when a violation has been caused by private actors, human rights law can be relevant in establishing States' duty to verify and monitor that those private actors are not acting in violation of its citizens' fundamental rights related to the environment.

- International law

Interestingly, international law has been used as a supportive argument in different national climate litigation cases. For instance, international treaties have provided the basis for reasserting that States have international obligations when it comes to addressing climate change. To this end, often employed have been the three instruments that constitute the international legal framework on climate change: the UNFCCC, but also the Kyoto Protocol and the Paris Agreement. For example, in *The People v. Arctic Oil*, the plaintiffs alleged that the decision of the Norwegian Government to grant new licences for the exploitation of oil in the Barents Sea was primarily in breach of art. 112 of the Norwegian Constitution, but also in opposition to the *spirit* of the Paris Agreement,

[330] Lahore High Court Green Bench, *Asghar Leghari v. Federation of Pakistan* (W.P. No. 255501/2015), Judgement of 4 September 2015. The ruling is available at: https://elaw.org/system/files/pk.leghari.090415_0.pdf (Last access 30 August 2018).
[331] Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change.* 2015. Available at: http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf (Last access, 30 August 2018).

ratified by Norway shortly before the licences were issued.[332] Ratification, indeed, entails refraining from any action that would undermine the object and purpose of a treaty.

In relation to this, Corsi has noted the potentially revolutionary impact that a positive adjudication of the case *Thomson v. Minister for Climate Change Issues* would have had if not dismissed by the High Court of New Zealand in 2017.[333] The petition alleged the illegality of New Zealand's NDCs under the Paris Agreement since, as argued by the plaintiff, the provisional reduction targets established in the national plan would have not stabilised the concentration of GHGs in the atmosphere at a safe level. The reliance on NDCs is interesting because, as maintained by the author: "This type of argument may open the doors to a new use of international law in climate change litigation, as it could be derived that NDCs represent an intention, and as such international law may have a reflex effect creating full-fledged obligations to the State."[334] Although the mentioned case was not successful, it could serve as a roadmap for future claims as States further define and implement their NDCs under the framework of the Paris Agreement.

Finally, principles of international environmental law, *inter alia* the principles of precaution – which puts an emphasis on mitigation measures –; prevention; intergenerational equity and sustainable development – which are used to claim more ambitious climate laws and policies –, have been employed to support the existence of States' duties in protecting their citizens from climate-related violations.[335]

- European law

In the European Member States, EU law, regulation and treaties provided a further basis for climate change litigation. The EU Directive on Emission Trading System (ETS),

[332] At the time of writing, an appeal has been filed by Nature and Youth/Young FoE Norway and Greenpeace Norway to the Norwegian Supreme Court, after the Oslo District Court has ruled in favour of the Norwegian government. See, FRIENDS OF THE EARTH EUROPE, "YFoE Norway takes government to supreme court over Arctic oil" *Friends of the Earth Europe*, 5 February 2018. Available at: http://www.foeeurope.org/yfoee/yfoe-norway-takes-government-supreme-court-050218 (Last access 20 August 2018).

[333] A review of the case is available at: http://climatecasechart.com/non-us-case/thomson-v-minister-for-climate-change-issues/ (Last access 30 August 2018).

[334] G. CORSI, "A bottom-up approach to climate governance: the new wave of climate change litigation", *ICCG Reflection*, No. 57, 2017, pp. 1–12, at 7.

[335] See, as a general reference, P. BIRNIE, A. BOYLE and C. REDGWELL, 2009, *op. cit.*

alongside with articles 191.1 and 191.2 of the TFUE, constituting the EU environmental policy, have been used as a basis to prove States' responsibility in relation to climate change mitigation.[336] At the moment of writing, the *People's Climate Case* has been admitted by the European General Court. The case concerns the suing of the European Parliament and the Council of the European Union by different families living in EU countries, on the basis of the ETS, the Effort Sharing Regulation (ESR) and the Regulation on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry (LULUCF).[337] At the core of the case is the demand for the EU to accelerate its climate action and upscale its 2030 climate target.

- Tort law

Particularly in common law jurisdictions, tort law has been used to prove the negligence of States in relation to climate change. Under this argument, the non-fulfilment of a State duty of care – for example, related to the protection of its citizens from climate impacts – is used to prove its tort or negligence.[338] Far from being straightforward, such claims entail the existence and proof of four elements: (1) a duty held by public authorities; (2) the breach of such an obligation; (3) causation; and (4) the existence of an injury. Primarily applied in the USA, although with difficulties in proving causation, claims of negligence have found prolific ground in civil law jurisdictions too. Always in the *Urgenda case*, the duty of care of the Dutch authorities has been inferred from the Dutch Civil Code and the definition of tortuous act found therein.

- Public trust

[336] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*, OJ L 275, 2003; *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 326, 2012. See, as a general reference, M. SCOPELLITI, "El Liderazgo Climático Europeo: ¿Qué Está En Juego?" in E. CONDE PÉREZ (coord.) *Occasional Paper ICEI OP03/18:* Proyecto Jean Monnet - La Unión Europea y la seguridad: defensa de los espacios e intereses comunes, 2018. Available at: https://www.ucm.es/icei/occasional-paper (Last access 28 April 2019).
(Madrid: ICEI Occasional Papers OP03/18, 2018, pp. 32–39.
[337] More details on the case are available at: https://peoplesclimatecase.caneurope.org/ (Last access 01 September 2018).
[338] See, e.g., D. HUNTER and J. SALZMAN, "Negligence in the Air: The Duty of Care in Climate Change Litigation", *University of Pennsylvania Law Review*, Vol. 155, 2007, pp. 1741–1794.

Always deriving from common law systems is the doctrine of public trust, according to which certain natural elements – including land, water and the atmosphere – inherently belong to people and are administered by public authorities who are, in turn, guardians of such elements and trust. It follows that, whenever a State is failing to take adequate care of the entrusted duties, it can be found in breach of the public trust doctrine. The latter was largely used in the USA and raised international attention in the case *Juliana v. United States*, in which a group of 21 young American plaintiffs and the climate scientist J. Hanses (on behalf of future generations) has brought a case against the USA and the Government of Oregon, claiming that the Federal and national states' actions and inaction were jeopardising the right to life and liberty of future generations.[339] At date, the case has been admitted and permitted to proceed on trial by a US district court, but it has not yet been heard on its merit.

- The use of climate science

Finally, although not a strictly legal element, modern climate science has been a determinant in most climate change litigation cases and reference to solid scientific evidence has been made to sustain causation in most of the cases considered so far. Particularly the IPCC assessment reports and national climate science research findings have been used as a basis in support of different legal arguments. For example, in order to establish and to prove the causal relationship between climate change and its anthropogenic nature, but also to show evidence of the impacts of climate change on human and natural life and thus support the existence of an injury. Moreover, as the Paris Agreement indicates for the first time a temperature threshold under which global temperature should be kept to avoid environmental disruption, climate science offers now a specific parameter against which the effectiveness or ambition of national policies and laws can be contrasted and decided upon.

4.3.1.3 The Strategic Choice of the Relevant Legal Forum

Together with the applicable sources of law and legal doctrine, also the forum in which a climate-related litigation is brought may change from one case to the other and

[339] *Juliana v. United States*, case no.: 6:15-cv-01517-TC. More details on the case are available at: https://www.ourchildrenstrust.org/us/federal-lawsuit/ (Last Access 01 September 2018).

influence its adjudication. Besides the great variety of national courts and tribunals, also at the international level the fora where climate change cases may be heard are numerous. As already discussed above, the International Court of Justice could be a forum for adjudication or for the request of an advisory opinion on climate change-related violations. As Bodansky has rightly pointed, the ICJ has the most general subject matter jurisdiction of any international tribunal and it could address climate change in a very comprehensive manner.[340] Given the small number of States currently accepting the compulsory jurisdiction of the ICJ, however, the request of an advisory opinion will be more likely than adjudication on a contentious case.

Besides the many international and regional human rights tribunals, among which are the Inter-American Court of Human Rights or the ECtHR, climate change litigation could be filed in different international tribunals that, due to their competence, are likely to exert their jurisdiction on the topic. The latter include, just to name a few, the International Tribunal for the Law of the Sea, where claims concerning the damage to the marine environment could be brought; or the World Trade Organisation Appellative Body, in which a case on how national climate policies impinge on economic rights could be considered.

4.3.2 Building on Climate Change Litigation: Main Problems

Despite the enthusiasm and euphoria generated by successful climate change litigation cases, many difficult issues pend on those willing to undertake such an avenue to address climate change-related violations. Some of this difficulties, including who has the standing to sue and how causation between climate change and the violation of rights can be determined, have been sketched in the section above. Yet, further delving into these issues may help considering potential solutions to overcome this hurdles.

- Causation and liability

Arguably together with the overcome of standing requirements, proving causation has been one of the most challenging features of climate-related litigation, particularly so

[340] D. BODANSKY, 2017, *op. cit.*, at 701. See, also on this topic, J. KLABBERS, 2017, *op. cit*., at 158.

when global warming is to be proved as being the source of violation of fundamental or constitutional rights. Equally challenging can be to demonstrate the existence of a nexus between the injuries claimed by the plaintiff and the conduct (active or omissive) of the defendant. In fact, characteristic of such environmental harm is its cumulative nature, global origin and reach, where the evidence of local impacts may be difficult to find or demonstrate, especially since the effects of climate change may be determined or amplified by different factors. In this regard, some courts have nevertheless resorted on the assessment of contributory action as a basis for liability, looking at the impact that, for instance, fossil fuel and transportation as public regulated sectors have in determining climate change and amplifying its impacts.[341]

Moreover, albeit not yet widespread, studies of climate attribution have been conducted recently. Their future appreciation is likely to be fundamental in the determination of historic contributions and also for the attribution of responsibility for specific emissions to different countries or companies.[342]

- The legitimacy of the judiciary power

At both the international and the domestic level, the rise in climate change litigation numbers has created some concern. Different commentators have argued on the legitimacy of what has been perceived, at least to some extent, as the *de facto* exercise of a policy or law-making functions by the judiciary power.[343] Despite the limited success of climate litigation which, in any case, does not amount to a frustration of the legislative or executive powers, the foreseen increase in such cases makes the question of legitimacy worth of consideration.

[341] See, on causation and other problems, J. PEEL, "Issues in Climate Change Litigation" *Carbon & Climate Law Review*, Vol. 5, No. 1, 2011, pp. 15–24.
[342] See, on this, P. GRIFFIN, *The Carbon Majors Database. CDP Carbon Majors Report 2017*. London: CDP Report, 2017. Available at: https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772 (Last access 03 September 2018).
[343] See, e.g., M. PEETERS, "Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States", *Review of European Community & International Environmental Law*, Vol. 25, No. 1, 2016, pp. 123–129; PEEL, 2011, *loc. cit.*

At the international level, the problem of global climate change has been handled since its inception through the negotiation of multilateral environmental agreements (MEAs), which shall evolve on the basis of scientific knowledge development. In this context, state negotiators and diplomats act – in democratic circumstances at least – as legitimate representatives of their electorate. Legitimacy in this sense primarily relates to the procedural question or to how ambitiously and fast decision-making evolves in relation to the electorate expectations. In this sense, the judiciary seems *prima facie* having no role to play on this ground beside law enforcement or redress. Yet, the specific nature of climate change as a transboundary environmental harm may put into question this assumption, challenging the authority of international negotiations too. As Bodansky has pointed with reference to national climate policies that are likely to have an impact beyond national borders: "In addressing problems of global externalities, such as climate change, the deference that negotiations afford to state sovereignty thus does not have a democratic justification." [344] It follows that, when the legitimacy of international negotiations and international adjudication are compared, no process has intrinsically more authority than the other. Thus, international adjudication may well form part of the most conventional legal governance approach that has characterised the creation of a climate regime to date, and adjudication in international contexts raises fewer legitimacy problems if compared with national adjudication.

The proliferation of climate change litigation at the domestic level, in fact, raises a question of legitimacy too, although with differences depending on the legal system under analysis. Particularly in countries of common law tradition, where judicial rulings constitute a source of law, the adjudication of climate change-related cases becomes relevant. As Peel has pointed with reference to such systems: "In the absence of strong government action to address climate change, rulings in climate change litigation may serve as a de facto source of national climate policy with very real impacts on the regulatory landscape."[345] Therefore, in this context, a legitimacy question is raised by the fact that the judiciary is not primarily acting in its natural realm – law enforcement – but

[344] D. BODANSKY, 2017, *op. cit*., at 703.
[345] J. PEEL, 2011, *op. cit.,* at 23. The author is also considering what can make adjudication by the judiciary more legitimacy. For instance, the fact that adjudication is grounded in scientific evidence and clear reasoning, instead of political considerations, will likely increase the authority of climate change judgement. Moreover, there is the possibility that, in addressing climate change, the judiciary power will overall gain legitimacy by finding innovative solutions to such an urgent environmental problem.

rather expanding its function by directly forcing the creation of laws and policies and contributing to regulatory change and development with a strategic purpose, notwithstanding the existence of a clearer division of powers in domestic contexts. In civil law systems instead, where adjudication is made on a case by case basis, legitimacy problems are less pronounced, although the emergence and maintenance of case law will likely influence adjudications in different jurisdictions. Altogether, these problems are amplified by the direct applicability of judicial decisions at the national level, since compliance with the ruling is usually higher than in international contexts.

- Limited authority of international courts as opposed to decisions made by national tribunals

Indeed, the limited applicability of international courts' decisions is another problem that, far from being new, has been discussed in relation to climate change litigation cases brought in international fora. This question was first raised by the Inuit petition in which, even if the case would have been admitted, the IACHR could only have prepared a report with recommendations for the USA and have set a deadline for compliance.

Although international adjudication might, in principle, be more legitimate than the resolution of climate change litigation cases by national tribunals, the enforcement of international rulings is far more complex at the international level. A potentially innovative aspect of national adjudication in this sense would be determined by the adjudication of claims related to States' nationally determined contributions. The establishment of what constitutes acceptable (even lawful) standards of GHGs emission reduction targets in one jurisdiction could have more diffuse impacts elsewhere. For instance, it could be adopted by other courts deciding on future cases and serve as a relevant precedent, influencing the assessment of the review mechanisms established by the Paris Agreement at articles 13, 14 and 15. Altogether, it would constitute a common basis for the evaluation of NDCs. On the contrary, however, the possibility of NDCs to be upheld and confirmed by national courts, should not be ruled out.

4.4 Functions and Potentially Positive Impacts of Litigation in the Context of a Changing Climate

As already pointed in the introduction to this chapter, climate change litigation cases may serve very different purposes and, on these bases, are built with very different characteristics and include a great variety of actors. Assessing who is acting as plaintiff or defendant in a specific case may, in fact, already tell about the purpose that a claim aims at satisfying. As the object of this chapter is to consider which implications climate change litigation cases may have – if any – for the improvement of procedural rights in the context of climate change law-making, this section will mostly consider those cases in which individuals or civil society representatives are acting as plaintiffs. Although around 100 of the climate change claims filed outside of the USA have been brought by corporations, the main function that these serve is to promote climate change deregulation and promote the overturn of administrative decisions which have, for instance, denied licensing or imposed the respect of stricter environmental standards in the implementation of one or another private project.[346] As such, the scope of these cases is not only far from the interest of this research, but also not particularly novel.

More relevant to this research is, instead, the analysis of the functions that climate change litigation may assume when a petition is filed by individuals or NGOs against governments, a trend that is increasing in Europe and the USA following the successful outcome of some trials, which will be analysed at a later stage. Indeed, while these cases may pursue very specific goals (ranging from the assessment of national mitigation and adaptation policies, to the redress of human rights violations), they all have a very strategic connotation and resonance, with impacts that extend to national and international environmental law-making and beyond it.

In this regard, the above-mentioned UNEP report on climate change litigation has identified the following as the main issues that climate change litigation aims at achieving:

1. Holding governments to their legislative and policy commitments;

[346] According to the Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy, corporations bring the 40% of cases to court against governments. See, M. NACHMANY and J. SETZER, 2018, *op. cit.,* at 5.

2. Linking the impacts of resource extraction to climate change and resilience;
3. Establishing that particular emissions are the proximate cause of adverse climate change impacts;
4. Establishing liability for failures to adapt to climate change.

Composed of all these – potentially overlapping – objectives, litigation can be conceived as a bottom-up strategy to climate governance because it is used to push compliance or regulatory change in the realms of climate mitigation and adaptation, pushing governmental action towards the development, adoption and implementation of more ambitious policies and laws to tackle climate change. In this sense, litigation may be considered as a form of advocacy aimed at influencing regulation at the national level and decision-making at the international one. Likewise, judicial governance is but another expression of the polycentric governance arisen around the problem of global warming, since policy or regulatory developments will likely follow to the obtainment of an enforceable court order.[347] As a matter of fact, the assessment that Osofsky has made of the Inuit petition as a 'bridge' (between environmental protection and rights' defence, as well as among the multiscale level of climate governance), can be extended to other cases filed at the national and international levels.[348] In both contexts, climate litigation can be referred to as something in between advocacy and litigation, as a strategy that aims at finding innovative and multilevel solutions to the problem of global warming.

Even if the impacts of climate change litigation cases should be assessed primarily on the basis of their real success, Hunter has noted the awareness-building impacts of climate litigation and the influence that such strategies may have on the development of climate change law and policy, even when claims are finally dismissed. Particularly relevant in this sense is the impact that climate litigation may have in creating "mechanisms for the integration of the climate regime with other institutions, such as human rights tribunals or other treaty regimes."[349] This, in turn, could help understanding climate change as primarily theorised by Keohane and Victor, a regime complex to be informed and complemented by the interaction with different regimes, mainly human

[347] On the idea of polycentric governance, see: A. JORDAN, D. HUITEMA, H. VAN ASSELT and others, 2018, *op. cit*.
[348] See, H. M. OSOFSKY, 2007, *op. cit*., at 686.
[349] D. B. HUNTER, "The Implications of Climate Change Litigations for International Environmental Law-Making", *Washington College of Law Research Paper*, No. 14, 2007, pp. 1–19, at 10.

rights or migration law.[350] Given the negative influence that climate change has and will have on the enjoyment of human rights, and being the trigger of climate-induced migrations, adopting such a framework of analysis may positively impact on and improve the overall effectiveness of the international climate change regime.

Another positive effect that climate litigation may have on climate change law, and international law more broadly, is the the promotion of its development into new directions. While international environmental law has developed fairly recently and with a rather modest involvement and contribution by courts, today the judiciary is increasingly driving the advancement of environmental law at the national and international levels. This is exemplified, for example, by the extensive scholarly debate that has revolved around the potential for human rights law to address global warming after the Inuit petition, as well as over the existence of a free-standing human right to a healthy environment.[351] The same can be said for the relationship between climate change law and international trade law or the law of the sea.[352] In relation to this, the framing of climate change as a legal problem could, at least in principle and particularly at the international level, improve the aptness of courts in dealing with environmental issues, potentially reinvigorating the practice of instituting special environmental chambers or of inviting external experts' opinions.

Finally, and arguably an effect of at least all successful climate-related cases, is the indirect validation of the science base upon which plaintiffs build links of causation or provide evidence of the alleged infringement of fundamental rights. In the context of the present US administration's position on climate change, for instance, the validation of the scientific basis of global warming in a courtroom may challenge the assumptions of climate change denials and, in turn, influence public opinion. At the same time, the assessment of national climate policies that are required to establish the existence of a

[350] See, R. O. KEOHANE and D. G. VICTOR, "The Regime Complex for Climate Change", *Perspective on Politics*, Vol. 9, No. 1, 2011, pp. 7–23.
[351] See, e.g., S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit.*; D. BODANSKY, "Introduction: Climate Change and Human Rights: Unpacking the Issues", *Georgia Journal of International and Comparative Law*, Vol. 38, No. 3, 2010, pp. 551–524; J., H. KNOX, "Climate Change and Human Rights Law", *Virginia Journal of International Law*, Vol. 50, No. 1, 2009, pp. 1–59; S. McINERNEY-LANKFORD, M. DARROW and L. RAJAMANI, *Human Rights and Climate Change: A review of the International Legal Dimensions*. Washington: The International Bank for Reconstruction and Development, 2011.
[352] See, e.g., W. BURNS, "Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention", *Sustainable Development Law & Policy*, Vol. 1, No. 2, 2006, pp. 27–51.

wrongful act or to express a reasoned judgement may entail the closure of important scientific knowledge gaps, what might set new standards for environmental impact assessments, the allocation of licences and the authorisation of projects with foreseeable externalities.

4.5 Climate Change Litigation: Analysis of Relevant Case Law

Although not directly concerned with the respect of procedural rights in a climate change law-making context, the successful outcome of particularly two climate change litigation cases has put emphasis on how domestic litigation can be conceived as a relevant instrument for the reaffirmation and upholding of public participation. While the improvement of procedural rights through litigation could be the direct or indirect outcome of climate litigation at all levels, in as much as litigation is conceived and used as a bottom-up and advocacy strategy, the following cases are detailed here for several reasons. Even though they have been heard in different jurisdictions and on the basis of different legal arguments, they involve similar allegations and outcomes and are, for such reasons, among the cases that have best underlined that shortcomings still exists in how public participation is realised and secured in the making of climate change law at the international level.

- *Urgenda Foundation v. the State of the Netherlands*[353]

In 2013 the Dutch Foundation Urgenda sued, together with other 886 Dutch citizens, the Government of the Netherlands for its inaction on climate change. As a consequence of such inertia, the plaintiffs argued, the Government was to be judged responsible for the infringements of its citizens' constitutional and fundamental rights, violated by the allowed greenhouse gases' emission levels. The claimants considered that the States' inaction on climate change amounted to a breach of its duty of care and invoked liability under tort law based on article 21 of the Dutch Constitution and article 6:162 of the Dutch Civil Code. Alleged were also the violation of different international rights, including articles 2 and 8 of the European Convention on Human Rights, the rights of future generations, the TFUE and the no-harm principle. Against these allegations, the

[353] *Urgenda Foundation v. the State of the Netherlands*, HAZA C/09/00456689, 2015.

Dutch State underlined the lack of causation between the Dutch emissions and the impacts of climate change against which the Urgenda Foundation sought protection, and also underlined the minor contribution that the national emission makes to the global climate change problem, thus arguing that the question could not be assessed on a national basis.

The requirement of standing didn't suppose a challenge to the case because, under the Dutch Civil Code, a foundation can bring an action pertaining to the protection of collective interests to courts. Being the primary objective of the Urgenda Foundation to foster "[…] a fast transition towards a sustainable society",[354] the Court considered that the Urgenda had *locus standi* and could also act in representation of current and future generations. Nonetheless, the Court acknowledged that being a legal person, the Foundation could not directly rely on the ECHR's provisions and exclusively considered the jurisprudence of the ECtHR on articles 2 and 8 as relevant to its interpretation of the Dutch civil law.[355]

By combining these sources of law in a unique precedent, the Hague District Court ordered on June 2015 that the Dutch government is to reduce the country's emission by at least 25% by 2020 compared to the 1990 levels, in order to fulfil its obligation to protect and improve the living environment against the dangers caused by climate change. As such, the court considered insufficient the original pledge of a 17% reduction rate decided by the Government. Its climate policy was judged inadequate and unlawful and the State conduct negligent.

In the words of Roger Cox, who issued proceedings against the Dutch Government on behalf of the Urgenda Foundation and concerned citizens, "[…] the ruling marks the first successful climate change action founded in tort law as well as the first time a court has determined the appropriate emission-reduction target for a developed state, based on the duty of care and regardless of arguments that the solution to global climate problem does not depend on one country's efforts alone."[356] While the judgment was provisionally

[354] See the website of the Urgenda Foundation. Available at: http://www.urgenda.nl/en/home-en/ (Last Access 10 September 2018).

[355] For extensive and detailed reference to the resolution of the case, see R. COX, "A climate change litigation precedent: Urgenda Foundation v The State of the Netherlands", *Journal of Energy & Natural Resources Law*, Vol. 34, No. 2, 2016, pp. 143–163. For a comparative perspective, see S. ROY and E. WOERDMAN, "Situating Urgenda v The Netherlands within comparative climate change litigation", *Journal of Energy & Natural Resources Law*, Vol. 34, No. 2, 2016, pp. 165–189.

[356] R. COX, 2016, *loc. cit*., at 144.

enforceable, the Dutch Government appealed the ruling in October 2015 objecting the interference of the District Court with the work of the Dutch Parliament. In May 2018 the appeal hearing took place before the Hague Court of Appeal, which rejected on 9 October 2018 the State's objection in a remarkable sentence.[357] By fully upholding the judgement of 2015, the Court concluded that "[…] the State is acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 ECHR) by failing to pursue a more ambitious reduction as of end-2020, and that the State should reduce emissions by at least 25% by end-2020."[358]

Despite the result of the appeal, several authors have especially questioned the competence of a District court to rule (somehow indirectly) over the adequacy of European climate law, since exclusively the Court of Justice of the European Union is entitled to such a function.[359] Likewise, objections have been raised as to the respect of the separation of powers doctrine, arguing that the decision is contrary to the State discretionary power in regulating climate change. Despite this, the case has had great international resonance and most of the climate change litigation cases brought before European courts resemble the claims of the Urgenda case.[360] As it will be recalled below, this somewhat signals to the emergence of a transnational climate change litigation movement that has implications on how procedural rights are exercised in the context of climate change law-making.

- *Asghar Leghari v. Federation of Pakistan*

Differently from the Urgenda case, this litigation was initiated by a natural person, Asghar Leghari, a Pakistani subsistence farmer. The latter decided to sue the Government

[357] Hague Court of Appeal*, The State of The Netherlands v Urgenda Foundation*, case 200.178.245/01, judgement of 9 October 2018. Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610 (Last access 21 October 2018).
[358] *Ibid*., final statement.
[359] M. PEETERS, 2016, *loc. cit*., at 125; L. BERGKAMP and J. C. HANEKAMP, "Climate Change Litigation against States: The Perils of Court-made Climate Policies", *European Energy and Environmental Law Review*, Vol. 24, No. 5, 2015, pp. 102–114.
[360] Based on similar allegations are the following cases: *Plan B v. UK* (2018); *VZW Klimatzaak v. Kingdom of Belgium* (2015); *PUSH Sweden, Nature and Youth Sweden and Others v. Government of Sweden* (2016); *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council* (2016). A review of these case is maintained by the NGO Our Children Trust. Available at: https://www.ourchildrenstrust.org/global-legal-actions/ (Last access 06 September 2018).

of Pakistan in 2015 for the violation of its fundamental constitutional rights. As for the case above, this was allegedly caused by the Governmental inaction towards global climate change. More specifically, the plaintiff denounced the inaction of the Government in implementing its National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy for the period 2014-2030, asserting the violation of articles 9, 14, 19a and 23 of the Pakistani Constitution concerning the right to life, human dignity, information and property, respectively.

Brought by a natural person asserting the violation of his rights, the *locus standi* did not suppose much hurdles for the admission of the case. In fact, no great discussion of the issue of standing was given by the Court, besides acknowledging that the petitioner was a citizen seeking the enforcement of his fundamental rights.

Contrarily to what ruled in the Urgenda case, where the court left to the Dutch Government discretion on how to pursue the prescribed emission reduction target, the Lahore High Court clearly identified a violation in that "[…] the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded" and prescribed very specific action as a remedy to the plaintiff.[361] Among those are: the nomination by different Ministries of a climate change focal person, who will ensure the correct and smooth application of the above-mentioned Framework for Implementation; the presentation by each Ministry of a list of action points against climate change; and, finally, the creation of a Climate Change Commission composed of representatives of the relevant Ministries, NGOs, individuals and technical experts, in charge of monitoring the Government's project on the implementation of its climate change policy. Although it is impossible to determine whether these measures will be incisive and effectively implemented by the Pakistani Government, at the moment of writing no appellation has been presented by the Federal Government.

4.6 Climate Change Litigation as an Instrument to Uphold Procedural Rights?

The decision to examine, among all successful climate change litigation claims, these two cases brings this research back to its main purpose, that of considering whether and how

[361] *Asghar Leghari v. Federation of Pakistan* (W.P. No. 255501/2015), 2015, paragraph 8. The ruling is available at: https://elaw.org/system/files/pk.leghari.090415_0.pdf (Last access 06 September 2018).

the participation of non-state actors in international climate change law-making should be enhanced. It is sustained here that the consideration of climate change litigation may provide an answer to the *if* and *how* of this research question.

A common characteristic of the analysed claims is that they aim at redressing States' inactions in climate change mitigation and adaptation policies. As such, the examined cases may be envisioned in at least two ways. First, simply because of their having been filed, they stem as an evidence of civil society disaffection with the regime created to tackle climate change. Therefore, they constitute a further argument in support of a more open international decision-making process. Second, the proliferation of these cases in a transnational fashion and their foreseeable increase in the future, can be linked to an increasingly widespread discomfort within society – or at least big portions of it – that feels underrepresented, frustrated and even excluded from the climate change national and international decision- and law-making processes and thus aims at reverting this direction by going to courts. In this sense, these cases open new views on how the enhancement of public participation can be pursued in national and international courts. This once again underlines, as also discussed in the second chapter of this research, that the measures taken to date to enhance public participation in the context of climate change law as required in article 12 of the Paris Agreement, have not been satisfactory.

Concerning the *how*, the question to be answered is whether climate change litigation, as a bottom-up strategy to climate governance, can be considered as an adequate instrument to improve the participatory rights of non-state actors in the context of climate change law-making. A query that requires very accurate consideration.

As argued elsewhere, climate litigation certainly aims at democratizing climate change law and policy-making. It does so by questioning the largely undisputed role that States and State-based entities maintain in different phases of the decision- and law-making process. Primarily, but not exclusively, litigation helps shaping the agenda of international negotiations by putting at the centre of discussion rights-based concerns, as well as by moving the debate on international climate change beyond the institutional framework of the UNFCCC. As maintained by Hunter: "Although the scale, scope, and methods of participation by civil society in the formal climate negotiations have been substantial, at the end of the day everything from the agenda to the final outcome of

international treaty negotiations is appropriately monopolized by governments. Civil society can observe, propose, pressure, prod, and even parody, but ultimately its role in international negotiations is limited. Not so in terms of litigation."[362] In this sense, climate change litigation cases have had, at least indirectly, the effect of empowering different climate advocates at the national and subnational levels, allowing them to better place their concerns at the international level too.

Although innovative in the use of the law – since it alternates the use of national, European and international law, and resorts to public interest litigation to overcome standing requirements –, it is maintained here that litigation should be regarded as a second best option to climate change governance and as an instrument to secure public participation in this context. Albeit, as seen above, litigation may be the driver of new developments in international environmental law, as well as relevant in pushing more ambitious responses to one of the most challenging issues that international environmental law has ever faced, judicial governance is but a distortion of the primary role of the judiciary power. The adoption of ambitious and effective legislation should be the central function of the legislative power.

Therefore, even though litigation might be an ill-suited instrument to improve procedural rights in the making of international climate change law due to its remedial character, the surge of climate litigation in a transnational fashion certainly has emphasised the need for more public participation in climate change law-making at the national and international level. Finally, the positive adjudication of rights-based claims has served to legitimise and underscored a rights-based discourse on which, instead, the improvement of public participation could be built.

4.7 Concluding Remarks

This chapter has considered the emergence of climate change litigation as a new phenomenon in the governance of international climate change. By analysing the broad range of actors involved in litigation, the different applicable sources of law and the

[362] D. B HUNTER, 2007, *loc. cit*., at 14.

potentially relevant fora of adjudication, the very diverse nature of climate-related cases have been spelled out.

Out of a growing number of climate change petitions filed against States and companies, this research has particularly focused on those strategic litigation cases in which individuals or NGOs are bringing claims against governments. This is primarily done in order to require and set more ambitious mitigations and adaptation law and policies, as well as to demand the implementation of existing pledges. In this sense, litigation is seen as a bottom-up (and often rights-based) approach to climate governance, in which both climate advocates and courts play an increasingly prominent role.

Despite the scholarly debate and interest generated by this trend, largely overlooked has been the significance that strategic litigation may have for upholding the participatory rights of non-State actors in the making of international climate change law. In this sense, litigation may be considered as an argument in support of a more open international decision-making process, since it unveils the disaffection created by a largely State-centred international decision-making system. By the same token, it may be considered as a way to empower those advocating for a more rights-based approach to climate change.

In this regard, the relevance of this instrument rests in its transnational character and in the possibility of replication in different countries and judicial systems. Despite not having public participation issues at their core, the expected increase and increasingly successful outcome of these cases may have the effect of opening up the international decision-making space to non-State actors in a way that their interests can be better represented in the negotiation phase, rather than in judicial fora.

Chapter 5. Exploring a Human Rights-Based Approach to Climate Change

5.1 Introduction

After the Inuit petition was filed to the IACHR in 2005, the possibility to envision and address global warming as a question of human rights has gained ground internationally, becoming not only an academically debated question but also the basis for the actions of diverse climate advocates and practitioners, as the previous chapter has discussed. As already commented, the petition has had the major effect to give a human face to a problem that, before so, had exclusively been addressed as an economic or an environmental question.

From 2008 onwards the existence of a relationship between human rights and global warming has been considered and established by UN bodies too. Particularly the Human Rights Council and the Special Rapporteur on human rights and the environment have worked on emphasizing and reaffirming that climate change has implications on a range of human rights, as well as the implementation of mitigation and adaptation projects have the potential to further impinge on human dignity.[363] These correlations have also been the object of debate of intergovernmental negotiations. Partially as a result of such efforts, today the Paris Agreement (2015) is the first global environmental treaty that makes an explicit reference to human rights in its Preamble. Nonetheless, the interaction between human rights law and international environmental law is not clear-cut and several questions remain open concerning the meaning of human rights obligations in an environmental context.

Against this background, the first sections of this chapter will discuss the relationship between human rights and the environment. After a brief introduction on human rights and human rights law, the relationship between human dignity and environmental protection will be explored. Besides the emergence of a converging

[363] The Special Rapporteur was created in 2012 by resolution 19/10 of the Human Rights Council, with the mandate to study human rights obligations related to the enjoyment of the environment and to identify best practices regarding States performance on human rights obligations in this area and in the formulation of environmental policies.

jurisprudence pointing to the idea that environmental harm can trump the enjoyment of fundamental rights, the link between the respect of human rights and environmental protection is not always evident. In this sense, a common approach has been that of introducing environmental considerations within human rights law by 'greening' human rights obligations more than by recognising a human right to environment, which so far has been enshrined in just a few regional human rights instruments. The hurdles that the recognition of a stand-alone right to a safe environment raises showcases the main problems of a human rights-based approach to climate change and environmental protection more broadly, while also allowing to consider the advantages of such a proposal.

In order to consider all these questions in further detail, the chapter will briefly introduce the law of human rights and review how environmental concerns has been incorporated into this body of law. Thereafter, the balance between the limitations and advantages derived from a human rights-based approach to climate change will be considered. Finally, the last section of the chapter will assess how the affirmation of a human rights-based approach to climate change can be instrumental to the enhancement of public participation in international climate change law-making.

5.2 Introducing Human Rights and International Human Rights Law: the Emergence of Third Generation Rights

After World War II and, particularly, with the adoption of the Universal Declaration of Human Rights by the General Assembly (1948), the ground was set for the development of human rights internationally.[364] Whereas the UN Charter contains just a few references to human rights, the UNGA competence in this area is based on article 55 of the Charter, which recites:

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

[364] *Universal Declaration of Human Rights* of 10 December 1948 (217 A (III)).

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[365]

This gave the UN the possibility to formulate human rights policies, something it first accomplished with the establishment of a Commission on Human-Rights, out of which the Universal Human Rights Declaration emerged in 1948.[366] Seventy years after its adoption as an UNGA recommendation, thus with no formal legally binding value, its content is considered customary law. As a matter of fact, the non-binding nature of the Declaration has not prevented the individual human rights contained therein to be elaborated in subsequent international and regional treaties, as well as in national constitutions and legislation.

Already during the period of the Cold war, two main sets of human rights were developed at the international level with the adoption of International Covenants.[367] The so-called first generation rights, largely influenced by a liberal tradition, are mainly civil and political rights. They include, for instance, the right to life, property, freedom of expression and liberty. The International Covenant on Civil and Political Rights of 1966 collects this set of rights,[368] whose characteristic is that they usually do not require any governmental action in order to be secured, but rather the abstention of States to engage in activities that may violate such obligations. Second generation rights attain, instead, to a more social tradition and are thus concerned with ensuring adequate standards of living

[365] *Charter of the United Nations* of 24 October 1945, article 55 (1 UNTS XVI).
[366] Following strong critics for allowing States with poor human rights records to become its members, the UN Commission on Human Rights has been dismantled and substitute in 2006 by the UN Human Rights Council (UNHRC) by the UNGA Resolution A/RES/60/251. The UNHRC is today responsible for investigating allegations of human rights violations within UN member States.
[367] More topic-oriented treaties are part of the major international human rights instruments. These are the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture (CAT); and the Convention on the Rights of the Child (CRC).
[368] *International Covenant on Civil and Political Rights* of 16 December 1966 (999 UNTS 171).

for humans, including the right to education, health and social security. The International Covenant on Economic, Social and Cultural Rights of 1966 has established the content of social rights,[369] which is usually vaguer if compared with that of civil and political rights. For instance, enacting the right to education or housing allows for more governmental discretion when it comes to enforceability than any provision requiring States to abstaining from torture.[370]

Therefore, although both International Covenants enjoy today nearly universal adherence, differences amount not only to the rights they aim at protecting but also the way in which such obligations can be secured and enforced. In this regard, two monitoring bodies have been created and entrusted with this function. The Human Rights Committee, which oversees the implementation of the ICCPR, and the Committee on Economic, Social and Cultural Rights, which supervises the enforcement of the ICESCR. Whereas both bodies are able to hear individual complaints for human rights violations, the effectiveness of their resolutions is somehow diminished by the non-binding nature of their decisions.[371]

Despite such limitations, some commentator has underlined how the idea that how States treat their citizens within their own jurisdiction is a matter of international concern, is novel.[372] Arguably, this is where the truly revolutionary impact of human rights law lies, in putting limits to States' sovereignty and in protecting individuals for their intrinsic value and dignity, since every State in the world has ratified at least one human right treaty concluded under the auspices of the UN.

Whereas the rights of first and second generation are primarily concerned with the protection of individuals against their governments, thus with the obligations that States owe to individuals, with the emergence of new needs – among which the concerns for the

[369] *International Covenant on Economic, Social and Cultural Rights* of 16 December 1966 (993 UNTS 3).
[370] With this regard, Klabbers has underlined that although the implementation of social rights may imply great hurdles, the possibility to enforce such rights has emerged from the jurisprudence of different human rights bodies. As it will recall below, particularly the African human rights system has given weight and secured enforceability of such provisions while, in other regional systems, social rights are often put in force through procedural obligations. See, J. KLABBERS, 2017, *op. cit.*
[371] While it is usually recognised that UN human rights bodies have continuously and positively contributed to the promotion and formulation of 'old' and 'new' human rights, a general critic refers to these bodies' ability to effectively protect human rights or prevent their violation.
[372] H. HANNUM, "Reinvigorating Human Rights for the Twenty-First Century", *Human Rights Law Review*, Vol. 16, 2016, pp. 409–451.

protection of the environment – also the affirmation of new rights came into being. With the progressive development of the so-called third generation rights, the focus of attention has increasingly displaced from the individual to the rights of society or social groups and thus supposed the possibility that also actors other than States are to be considered duty-bearers under human rights law. While this is novel, the relevance of third generation rights is often questioned and their content criticised for being indefinite. Besides the observance of the procedural rights that the respect of third generation rights may imply, in fact, there are difficulties in determining which substantive obligations these provisions suppose and how they should be applied as not to weaken the protection of other, arguably more relevant, human rights.[373]

5.2.1 Applying Human Rights Law: Particular Reference to the Right to a Healthy Environment

The application of human rights law, both internationally and regionally, entails the account and balancing of different considerations, among which are the nature of duties and obligations under human rights instruments, but also the balancing of different rights and interests at stake. Concerning the nature of duties, three main general obligations primarily loom on States due to human rights law: the right to respect, protect and fulfil human rights. As regards the respect of human rights, this entails the prohibition for States to engage in activities that may deprive individuals of their rights and freedoms. As well explained by the prohibition of torture as a fundamental right, the duty on each States to refrain from torturing its citizens is typified as a negative duty- to abstain from-. Conversely, a positive duty usually characterises the responsibility of States to protect their citizens from human rights' violations. In this sense, States are not only required themselves to abstain from human rights' violations, but also obliged by human rights law to take actions aimed at protecting the rights of individuals against violations that could be perpetrated by non-governmental actors. It follows that a breach of the duty to protect will happen by omission, rather than by a State action. Finally, the duty to fulfil human rights' obligations refers to the State duty to facilitate the satisfaction of human rights. As such, it is usually linked with the protection of second and third generations'

[373] In this regard, different authors fear that the increasing emphasis on the protection of third generation rights, whose scope, content and justiciability is usually more difficult to identify, may divert international attention from the protection of individuals from crimes against humanity, genocide or torture. See, e.g., H. HANNUM, 2016, *loc. cit*.

rights, which might require, for their effective respect, the enactment of specific legislation at the national level, the adoption and allocation of specific budget lines or any other possible measures aimed at facilitating and enabling the realization of these rights.

Therefore, the respect of any single human rights requires, to a minimum, the consideration of one of such duties, while nothing precludes the possibility to establish a human rights violation for the breach of these correlative obligations. By reviewing relevant case law, Bodansky, Brunnée, and Rajamani have well explained this point by considering the different ways in which the right to life may be put at risk by a polluted environment.[374] For instance, a State can violate the right to life by directly taking actions that will cause environmental harm, as it could be the construction of invasive infrastructures in an environmentally sensitive area. On the other hand, a State can infringe such a right by failing to prevent the disruption of the environment by private actors. Finally, the human right to life can be violated when a State fails to take positive actions aimed at protecting the environment, as increasingly is being established by the national case law on climate change.[375]

The existence of obligations under International law entails the existence of rights holders and duty bearers. While this is certainly true for human rights law, the spectrum of rights and duties holders under this body of law has evolved in recent decades. Since, as mentioned above, human rights law first developed to ensure the protection of individuals against their government, States have traditionally been considered the only entities holding human rights obligations. More recently, however, the possibility to hold private actors (and particularly corporations) accountable for their negative human rights records has been discussed in the literature and partially adjudicated in courtrooms.[376] On the other hand, the emergence of new rights, based on the assumption that their satisfactory enjoyment may be only carried out within a specific group or community, has spurred the emergence of collective rights. The central idea here is that individuals cannot be considered apart from the community in which they live, enjoy and exercise

[374] See, D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, 2017, *op. cit*., at 306.
[375] See, Chapter 4.
[376] See, e.g., A. CLAPHAM, "Human Rights Obligations for Non-State-Actors: Where are We Now? in F. LAFONTAINE and F. LAROCQUE (eds.) *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*. Cambridge: Intersentia, 2018, pp. 1–18; A. CLAPHAM, 2006, *op. cit.*

their rights. While this line of thought mostly applies in the context of second and third generation rights, slightly different is the case of minority rights, in which the main aim is to secure particularly vulnerable sections of society – such as women, children, and indigenous peoples – and the final scope of protection is to ensure the continued existence of these groups.

Whether or not human rights law may find extraterritorial application will also determine who holds human rights obligations – and towards whom – in a particular context. While the scholarship and case law have recognised that human rights law can apply beyond national borders where a State exercises effective control over a territory or people abroad – as in the case of occupied territories and cross-border activities by States' agents – the geographic scope of human rights duties is less clear when private or public activities are the cause of transnational environmental harm.[377] In general terms, the conflict is given by the need to reconcile the universal nature of human rights with the need to give to them actual application within the jurisdiction of determined States, while preserving the equal rights of individuals on the basis of the principles of non-discrimination and equality. The extraterritorial application of human rights in environmental context supposes in this sense more hurdles for the need to establish a link of causation between the activity (or the omission) of a State, the transnational environmental harm and the violation of rights. Problems are also at stake in terms of jurisdiction. For instance, does the protection of human rights exclusively fall within the jurisdiction of the State in which the polluting activity is taking place and the victims happen to live? Or, conversely, the responsibility to protect human rights can also be attached to the polluting State since the latter holds control over the source of harm? As it will be recalled below, the issue of extraterritorial applicability is being discussed with regard to the transboundary impacts of climate change.

Finally, the application of human rights law may require the balancing between different and potentially conflicting rights. Generally speaking, the freedom of expression,

[377] See, as a general reference, S. JOSEPH, "Extraterritorial Human Rights Duties" in S. JOSEPH, *Blame it on the WTO?: A Human Rights Critique*. Oxford: Oxford University Press, 2011, pp. 245–264; J. ABRISKETA and M. NAGORE CASAS, "Extraterritorial Application of Human Rights Treaties", *Oxford Bibliographies in International Law*, 2016; J., E. VIÑUALES, "A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment", in N. BHUTA (ed.) *The Frontiers of Human Rights*. Oxford: Oxford University Press, 2016, pp. 177–221.

religion, and speech are often said to find limitations in the respect and exercise of the freedoms of someone else. Likewise, the right to economic development pursued by States as an attribute of their sovereignty comes with certain limitations when lucrative activities are likely to impair, for instance, the rights to life or health of their citizens. Although the notion of balancing is somehow hampered in the context of environmental harm, since few human rights instruments recognise the right to an environment of a certain quality, a balancing between the protection of socio-economic rights and the protection of the environment is increasingly gaining foothold in the literature. This considers the environment to have a value on itself, as well as in application of the concept of sustainable development in which the protection of the environment as a precondition to prosperous societies is implied.

While these key questions have been only briefly introduced here, they will be resumed and further analysed below, when discussing the possibility of approaching climate change from the perspective of human rights.

5.2.2 Regional Human Rights Systems

Besides the above-mentioned International Covenants, human rights have also been elaborated within regional human rights systems. The European Convention on Human Rights of 1950 is among the most advanced human right charts, developed immediately after the adoption of the Universal Declaration of Human Rights.[378] Largely influenced from a liberal human rights' tradition, it prohibits torture, human trafficking, and slavery; it secures the right to life, property, to a fair trial, along with the protection of the freedom of expression, assembly and religion. In the literature, the Convention is always regarded to as a 'living instrument', pointing to its ability to evolve and progressively incorporate the protection of new rights through the adoption of Protocols or the incorporation of the European Court of Human Rights' judgements and jurisprudence. While the content of the Convention applies to the 47 member countries of the Council of Europe, all additional protocols are binding only for ratifying States. The competence of the European Court of Human Rights, instead, extends to all member States and its judgements are binding on all concerned countries. A well-known

[378] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14 of 04 November 1950 (ETS 5).

characteristic of the ECtHR is that it allows complaints from both States and individuals, provided that all national remedies have been exhausted, among some other procedural requirements.

Individual human rights cases may also be heard by the Inter-American Court of Human Rights that, together with the Inter-American Commission on Human Rights, comprises the Inter-American human rights system. The latter is a regional system too, which monitors, promotes and protects the human rights enshrined in the American Declaration of the Rights and Duties of Man[379] and the American Convention on Human Rights[380] in the 35 countries that are members of the Organization of American States. More specifically, the Inter-American Court of Human Rights can hear cases on violation of the American Convention on Human Rights when these are brought by a State party to the Convention or by the IACHR. In such cases, the sentences are binding and cannot be appealed. A second and non-binding possibility of adjudication is given by the request for advisory opinions on both the American Convention and the American Declaration by one of the OAS Member States or the same IACHR.

The African human rights system is often set apart for its focus on collective rights. The central instrument of such a system is indeed the African Charter on Human and Peoples' Rights of 1981,[381] whose content is secured by the African Commission on Human and Peoples' Rights, as well as by the African Court on Human and Peoples' Rights. While the Court can rule over the interpretation and application of the African Charter and other relevant human rights instruments, the Commission is tasked with the promotion and protection of human individual and collective human rights in the African continent. To this end, it can hear complaints brought by individuals for the violation of the rights enshrined in the African Charter. With the creation of the Economic Community of West African States (ECOWAS), the Community Court of Justice has been mandated with hearing complaints in the area of human rights protection too.

[379] *American Declaration of the Rights and Duties of Man* of 02 May 1948 (OEA/Ser. L. V/II.82 doc.6 rev.1 at 17).
[380] *American Convention on Human Rights* of 22 January 1969 (1144 UNTS 123).
[381] *African Charter on Human and Peoples' Rights* of 27 June 1981 (21 ILM 58).

The Arab Charter on Human Rights,[382] although first adopted by the League of Arab States in 1994, has entered into force just in 2008 following a partial revision of its content. The treaty establishes the Arab Human Rights Committee as the body in charge of supervising its implementation. Finally, very recent is the Asian human rights system, developed in 2012 with the adoption of the Association of Asian Nations (ASEAN) Declaration on Human Rights,[383] which also established the ASEAN Intergovernmental Commission on Human Rights as the first Asian institution in charge of overseeing the respect of human rights in the region.

5.3 Human Rights and the Environment

While the interconnection between climate change and human rights is fairly recent, more established is the link between environmental integrity and the enjoyment of human rights. In this sense, a sound environment is considered to be a precondition for the enjoyment of very fundamental human rights, including the right to life and health.[384] This idea was first considered by the General Assembly in 1968[385] and lately affirmed in the Stockholm Declaration on the Human Environment of 1972, Principle 1, which establishes that: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."[386]

Principle 1 was re-taken in 1994 by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which proposed the adoption of a Declaration of Principles on Human Rights and the Environment.[387] The latter document somehow recalled the Stockholm Declaration (1972) in that it put emphasis on the value

[382] *Arab Charter on Human Rights* of 15 September 1994 (237 UNTS 70).
[383] *ASEAN Human Rights Declaration* of 18 November 2012.
[384] The term "sound" could be interchangeably exchanged with the following qualifications: secure, healthy, stable and safe. The problem of defining uniform standards and definition of what constitutes environmental integrity will be recalled later on in this chapter, when assessing the possibility of affirming a stand-alone human rights to the environment.
[385] Resolution adopted by the UN General Assembly on 3 December 1968 on Problems of the Human Environment, UNGA Res. 2398 (XXIII).
[386] Declaration of the United Nations Conference on the Human Environment, *Principle 1,* of 16 June 1972 (UN Doc. A/CONF/48/14/Rev.1).
[387] Draft Principles On Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex I (1994). Available at: http://hrlibrary.umn.edu/instree/1994-dec.htm (Last access, 19 September 2018).

of a sound environment as well as on inter-generational responsibility, but it also went a step further by envisioning for the first time the possibility to establish at the international level an autonomous human right to a healthy and decent environment. Nonetheless, the proposal was not substantially discussed at the UN level and was finally abandoned.[388]

It follows that the relationship between a secure environment and human rights is not always straightforward. While a great number of national constitutions appreciate a right to the environment, human rights law instruments differ in their recognition of such a right and, as explained below, largely derive its protection from the defence of other human rights. Knox has qualified as anomalous such a trend while affirming that the absence of a universally acknowledged right to a healthy environment is rather irrelevant to the application of human rights to the environment, since there is well-established evidence that environmental harm can interfere with the enjoyment of human rights.[389] We will consider in another section of this chapter the work done by the former UN Special Rapporteur and the United Nations General Assembly on the subject.

To date, exclusively four regional human rights instruments explicitly recognise the right to an environment of some kind. Fairly recent is the inclusion of such a provision in the 2004 Arab Charter on Human Rights and in the 2012 ASEAN Human Rights Declaration. In both instruments, the right to environment is set as a part of the right to an adequate standard of living and has not given rise, thus far, to relevant case law. Somehow more established is this right in other two regional systems. The Additional Protocol to the American Convention on Human Rights, provides at article 11 that "Everyone shall have the right to live in a healthy environment and to have access to basic public services"[390], while the 1981 African Charter of Human Rights and Peoples' Rights recognises a more substantive right in article 24 by establishing that: "All peoples shall have the right to a general satisfactory environment favourable to their development"[391] While the former right refers to an obligation owed to individuals, is worth noting that

[388] K. WOLFE, "Greening the International Human Rights Sphere? Environmental Rights and the Draft Declaration Principles on Human Rights and the Environment", *APPEAL Review of Current Law and Law Reform*, Vol. 9, No. 1, 2003, pp. 45–58.
[389] J., H. KNOX, "Human Rights Principles and Climate Change" in C. P. CARLARNE, K. R. GRAY and R. TARASOFSKY (eds.) *The Oxford Handbook of International Climate Change Law*, 2016, pp. 214–235.
[390] *American Convention on Human Rights* of 22 January 1969 (1144 UNTS 123), article 11.
[391] *African Charter on Human and Peoples' Rights* of 27 June 1981 (21 ILM 58), article 24.

the African Charter expresses the right in collective terms. A limited, though relevant case law, has also developed under these two instruments.

A well-known decision is the one made in the *Ogoniland case*,[392] which substantiated both procedural and substantive obligations as to how such a broad provision as the one established in article 24 of the African Charter, should be interpreted and applied in practice. The case relates to the widespread environmental contamination and consequent health problems caused to the Ogoni people by oil exploitation activities carried out by the Nigerian National Company and the Shell Petroleum Development Corporation in the region of the Niger River delta. In 2001 the African Commission on Human and Peoples Rights ruled in favour of the claimants, Ogoni peoples, who denounced the violation of Articles 2, 4, 14, 16, 18, 21 and 24 of the African Charter.[393] While this first ruling assessed both the violation of article 16 (right to health) and article 24 (right to a satisfactory environment), recognising that the latter imposes obligations on States "[…] to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources"[394], the assessment made in 2012 by the ECOWAS has had even more relevant implications for the ascertainment of a free-standing human right to the environment.[395] As noted by Adinolfi: "The autonomy of the right to a healthy environment from other human rights has been acknowledged, and its violation has been ascertained without assessing whether poor environmental quality has undermined human health or life."[396] In effect, the judgement represents a precedent concerning the justiciability of a right to environment.

By the same token, although with less resonance, the IACHR has recognised the value of the environment upon which different communities depend on in adjudicating

[392] *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, ACHPR SERAC Decision, Comm. 155, 2001.
[393] See, for a detailed account of the case, F. COOMANS, "The Ogoni Case Before the African Commission on Human and Peoples' Rights", *International and Comparative Law Quarterly*, Vol. 52, No. 3, 2003, pp. 749–760.
[394] SERAC Decision, par. 52.
[395] Case *Socio-Economic Rights and Accountability Project v. Federal Republic of Nigeria*, ECW/CCJ/JUD/18/12, 2012.
[396] G. ADINOLFI, "The Right to a Healthy Environment. Delineating the content (and contours) of a slippery notion" in F. ZORZI GIUSTIGNIANI, E. SOMMARIO, F. CASOLARI and G. BARTOLINI, 2018, *op. cit*., pp. 211–227.

the *Maya Indigenous Communities of Toledo Case*.[397] The latter concerns the oil exploitation and logging activities carried out by different private companies – in acquiescence with State agents – to the detriment of the lands traditionally inhabited by the Maya communities of Belize. While the resolution of the case largely relied on the ascertainment of the rights of indigenous people, the IACHR also acknowledged in its Merits Report the value that the environment has for the well-being of such populations and that economic development should not proceed at the expense of the fundamental rights of persons, including the value of the environment itself.

Concerning universal human rights instruments where, as already said, no autonomous human right to the environment has been recognised up to the moment of writing, the environmental dimension of different human rights has nevertheless been indirectly ascertained. As discussed above, this is largely due to the failure of adopting the Draft Declaration of Principles on Human Rights and the Environment of 1994, in which one of the first principles declared that: "All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible." The interdependency of different human rights has been also underlined by the Committee on Economic, Social and Cultural Rights of the UN with regard, for instance, to the right to food and health and the need to prevent or avoid environmental contamination or detriment. Likewise, the Human Rights Committee has underlined the relevance that the use of land resources has for different communities and with regard to the enjoyment of minority rights.

Alan Boyle has maintained that environmental rights can be found and tracked down in all generations of human rights.[398] For example, the exercise of civil and political rights can empower individuals and favour their participation in environmental decision-making – particularly in those countries that have ratified the Aarhus Convention – as well as force States to meet standards of protection for their citizens' right to life, securing them from environmental harm, as it is now increasingly the case in the European

[397] *Maya Indigenous Community of Toledo District v. Belize*, Case 12.053, Report No. 40/04, IACHR, OEA/Ser. L. /V./II.122 Doc. 5 rev. 1, 2004.
[398] A BOYLE, "Human Rights or Environmental Rights? A Reassessment", *Fordham Environmental Law Review*, Vol. 18, No. 3, 2008, pp. 471–551.

jurisprudence. In this sense, different authors have signalled the existence of a substantial case law that has, in fact, 'greened' general human rights. Indeed, also when no direct mention to the right to the environment is found in universal or regional human rights treaties, the case law has pointed to an indirect protection of the environment or of environmental rights. This practice has been so extensive in the case of the European Convention on Human Rights that the adoption of an environmental protocol to the ECHR was recommended by the Parliamentary Assembly of the Council of Europe in 2005. Nonetheless, up to the point of writing, only the Courts' decisions on this subject have been summarised in a Manual on Human Rights and the Environment, adopted by the Council of Europe the same year.[399] As some landmark cases, including *Lopez Ostra v. Spain*[400] or *Guerra v Italy*[401] have showed, the ECtHR jurisprudence on the environment has mainly relied on the substantive obligations included in articles 2 (right to life) and 8 (right to private and family life) of the ECHR, as well as on the procedural duties established by the Aarhus Convention of 1998. Extensive reference and analysis of this case law have been made in previous research works.[402]

Another possibility would be to treat the environment as a social and economic right, thus as a kind of public good to be protected and balanced against other human rights' obligations for its own value. As it will be discussed when assessing the potential affirmation of a free-standing right to the environment, the advantage of such approach will rest on the possibility to adequately balance its protection against the still largely pre-eminence of other social and economic rights. As again Boyle has rightly maintained: "Lacking the status of a right means that the environment can be trumped by those values which do have that status, including economic development and natural resources exploitation."[403] In this sense, the establishment of such a right would close what seems to be a still pending normative gap. Finally, as already said, the environment as a third generation right would put more emphasis on how communities – and not only

[399] The Manual is available at: https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf (Last access 25 September 2018).
[400] *Lopez Ostra v. Spain*, 20 Eur. Ct. H.R. 277, 1994.
[401] *Guerra v. Italy*, 26 Eur. Ct. H.R. 357, 1998.
[402] See, e.g., A. BOYLE, 2018, *loc. cit.*; L. LOUCAIDES, "Environmental Protection through the Jurisprudence of the European Convention on Human Rights" in L. LOUCAIDES (ed.) *The European Convention on Human Rights. Collected Essays*. Leiden: Brill, 2005, pp. 167–191;
[403] A. BOYLE, "Human Rights and the Environment. Where Next?" in B. BOER, 2015, *op. cit.*, pp. 201–239, at 222.

individuals – exercise a right to determine the quality of the environment in which they live, sustain their lives and activities. This is a perspective that holds great value for indigenous peoples and local communities, for instance in the management of biodiversity.

Interestingly, all these approaches also highlight an ongoing debate on how the relationship between human rights and the environment should be reconsidered, arguably putting more emphasis on the intrinsic value that the environment has in itself and not exclusively as an attributed for the flourishing and prosperity of human life, namely, as Davies and others have put it, *as a resource base to meet human needs*.[404] In this sense, several commentators have been critical towards what is considered to be a purely anthropocentric view and approach to the protection of the environment through a human rights' lenses. Nature, so the argument goes, should be valued for itself, as an essential element of social life of which humans are but one part. While the promotion of a more biocentric – as opposed to anthropocentric – perspective holds great ethical value, it seems problematic to construct solid legal arguments on such a basis. Part of such limitations certainly derive from the Eurocentric conception of law, which builds on a clear separation of categories – such as human and non-human – and on the distinction between objects and subjects of law. While, in this regard, the concept of stewardship as exercised in indigenous peoples' cultures may prove relevant, it seems too far a development for international law as a State-centred discipline to allocate duties and rights to non-human entities.[405] Also in the context of climate change, an anthropocentric viewpoint has been prominent and this environmental harm has been framed as a common concern of Mankind or as a threat to human rights at best. In this regard, a half-way and perhaps more balanced perspective may be found in the *Framework Principles on Human Rights and the Environment*, elaborated by the former UN Special Rapporteur J. Knox, which establish: "Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights […]. At the same time, the exercise of human rights, including rights to freedom

[404] K. DAVIES, S. ADELMAN, A. GREAR and others, "The Declaration on Human Rights and Climate Change: a new legal tool for global policy change", *Journal of Human Rights and the Environment*, Vol. 8, No. 2, 2017, pp. 217–253, at 233.

[405] On the other hand, the increasing research focused on the potential establishment or existence of animal rights is in opposition with this assumption. See, e.g., A. PETERS, "Global Animal Law: What It Is and Why We Need It", *Transnational Environmental Law*, Vo. 5, No. 1, 2016, pp. 9–23. Different, although still debated, is the consideration of the rights of future generations as 'humans to be'.

of expression and association, to education and information, and to participation and effective remedies, is vital to the protection of the environment."[406]

Although still largely anthropocentric, the latter perspective of interdependency between the exercise of human rights and the protection of the environment seems the most adequate framework of analysis for this research.

5.4 When Climate Change Became a Human Rights Issue: The Role of the United Nations in Establishing the Climate Change-Human Rights Nexus

"It is now beyond debate that the adverse effects of climate change will, in their severity, threaten a range of human rights, including the right to life, health, food and housing."[407]

Bodansky, Brunné, and Rajamani recognised this in 2017 in the opening of a chapter on the intersection between climate change regulation and human rights law. The implication that climate change is and will likely have on human rights was, nonetheless, discussed and made public much earlier than 2017.

As already underlined, the Inuit petition to the Inter-American Commission on Human Rights has served as a springboard for framing climate change in terms of human rights violations. By linking rising temperatures to the US failure to take effective steps to reduce its GHGs' emissions – what, in turn, resulted in the alleged violation of Inuit's human rights – these populations tried to make the USA accountable for such omissions. Therefore, the case was framed as to demonstrate that the USA failed in protecting the rights of this populations, as well as to ascertain whether the State fulfilled their rights by enacting adequate federal legislation.

Since then, the analysis and assessment of climate-induced human rights violations have gained momentum and, also thanks to the scientific evidence gathered by

[406] The Framework Principles on Human Rights and the Environment have been elaborated by the former Special Rapporteur on human rights and the environment, John Knox, in his last annual report of 2018, UN Doc. A/HRC/37/59. The Principles are available at: https://www.ohchr.org/en/issues/environment/srenvironment/pages/annualreports.aspx (Last access 18 September 2018).
[407] D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, 2017, *op. cit*., at 296.

the IPCC from 1988 onwards, there is now consensus on the idea that rising temperatures impinge on the exercise and enjoyment of general human rights. Certainly, such a development has also been the result of a lively academic debate, of the active work of several UN human rights bodies, international and non-governmental organisations, and of a few committed nation States.[408] Particularly the case of the Small Island Developing States (SIDS) is remarkable in this sense. As for the Arctic region, SIDS are highly vulnerable to the impacts of climate change and since 2007 have voiced their concerns on this issue. This same year, SIDS adopted the first-ever intergovernmental statement on the human dimension of climate change, requesting to the UN Human Rights Council to hold a discussion on this topic and that the Office of the UN High Commissioner for Human Rights (OHCHR) studied the impacts of rising temperatures on human rights.[409] The following analysis of the role played by the UN in establishing a link between climate change and human rights will depart from this point and try to set the ground for better understanding what it actually means to frame climate change in terms of human rights' violations.

Once the debate on climate change and human rights had been opened by the SIDS, UN human rights bodies assumed a very prominent and central role in studying and making public the interconnections between climate change and human rights.[410] The first resolution of the Human Rights Council was issued in 2008 and, while expressing its concern that *climate change poses immediate and far-reaching threat to people and has implications for the full enjoyment of human rights*, requested to the OHCHR to conduct a detailed study on the relationship between climate change and human rights.[411]

[408] For instance, the Center for International Environmental Law have issued several publications on the topic, as well as a Declaration on Human Rights and Climate Change was developed in 2016 by the Global Network for the Study of Human Rights and the Environment. See, on the latter, K. DAVIES, S. ADELMAN, A. GREAR and others, 2017, *loc. cit.*

[409] The full text of the Malé Declaration on the Human Dimension of Global Climate Change, adopted on 14 November 2007, is available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (Last access 25 September 2018).

[410] Such a role has to be understood in a broader context in which, more generally, the Human Rights Council and different appointed Special Rapporteurs have continued to investigate and report on the relationship human rights-environment. Under such a perspective, in fact, climate change is but one – although especially disruptive – of many environmental harms that may impair human rights.

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

Already in 2009, the Office of the High Commissioner for Human Rights reported that an increase in global temperatures could interfere with the exercise and enjoyment of different human rights. Likewise, the implementation of mitigation and adaptation projects under the Clean Development Mechanism could further undermine these rights, for instance by failing to respect the right of free, prior and inform consent of indigenous communities that are usually affected by the projects developed under the scheme.[412] The report was followed by another Human Rights Council resolution, in which the Council more specifically noted that climate change-related impacts have implications for the effective enjoyment of human rights including, *inter alia*, the right to life, to adequate food, to the highest attainable standard of health, and also recognised that these implications will be felt most acutely by those segment of the population who are already in vulnerable situations. Remarkable is that the Council affirmed that human rights obligations and commitment have the potential to inform and strengthen international and national policy-making in the area of climate change.[413]

Since the presentation of the first OHCHR report, the Human Rights Council has warned in subsequent resolutions about the correlation between climate change and human rights.[414] It also decided in 2012 to appoint an independent expert (later renamed Special Rapporteur) to assess and report on human rights and the environment. Parallel to such developments, the discussion on the relationship climate change-human rights also entered the 2010 climate negotiations and, with more force, the 2015 climate talks.

As a matter of fact, the Cancun Agreement of 2010 incorporated for the first time a direct reference to the Human Rights Council Resolution 10/4 on human rights and climate change. Kirchmeier and Lador have carefully reconstructed the steps that have

[412] See, for a discussion of CMD projects and REDD initiatives, S. DUYCK, 2015, *loc. cit.*
[413] Resolution adopted by the Human Rights Council on 25 March 2009 on Human rights and climate change, Res. 10/4, UN Doc. A/HRC/10/4.
[414] The following UN Human Rights Council resolutions have considered the relationship human rights-climate change: Resolution adopted by the Human Rights Council on 17 October 2011 on Human rights and climate change, Res. 18/22, UN Doc. A/HRC/RES/18/22; Resolution adopted by the Human Rights Council on 15 July 2014 on Human rights and climate change, Res. 26/27, UN Doc. A/HRC/RES/26/27; Resolution adopted by the Human Rights Council on 30 June 2015 on Human rights and climate change, Res. 29/15, UN Doc. A/HRC/RES/29/15; Resolution adopted by the Human Rights Council on 1 July 2016 on Human rights and climate change, Res 32/33 UN Doc. A/HRC/RES/32/33; Resolution adopted by the Human Rights Council in 7 July 2017 on Human rights and climate change, Res. 35/20, UN Doc. A/HRC/RES/35/20; Resolution adopted by the Human Rights Council on 5 July 2018 on Human rights and climate change, Res. 38/4, UN Doc. A/HRC/RES/38/4.

favoured the recognition of human rights' obligations in the text of the Paris Agreement which, to date, is the first international environmental treaty to make explicit reference to human rights in its Preamble: "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity." [415]

Whereas, *prima facie*, the reference made to human rights in the Paris Agreement may seem irrelevant in such a wording and because exclusively included in the Preamble, its potential impact deserves further discussion. In a previous draft of the climate accord, a reference to human rights was to appear in both the Preamble and in Article 2 in the following form: "This Agreement shall be implemented […] while ensuring […] and the respect, protection, promotion and fulfilment of human rights for all, including the right to health and sustainable development […]."[416] Nonetheless, due to the opposition of different States, among which particularly Norway and the USA, the reference was finally relegated to the Preamble.[417] Arguments concerning the discretion of States in choosing how to implement their international obligations, together with the discrepant adherence of States to international or regional human rights legal instruments, have been brought against the inclusion of a stronger and more demanding reference to human rights in the body of the text.

Albeit the mention to human rights as made in the Preamble of the Agreement does not create new rights for its parties and besides being articulated with little legal force (in that the word 'should' resembles more a declaration of intentions rather than as a full obligation for its signatories), such a reference is important for several reasons. It seems appropriate to remember at this point that, under the Vienna Convention on the

[415] See, F. KIRCHMEIER and Y. LADOR, "From Copenhagen to Paris at the UN Human Rights Council. When climate change became a human rights issue" in S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit*., pp. 145–164; *Paris Agreement* of 12 December 2015, Preamble.
[416] S. ATAPATTU, "The Paris Agreement and human rights: is sustainable development the "new human right"?, *Journal of Human Rights and the Environment*, Vol. 9, No. 1, 2018, pp. 68–88, at 72.
[417] According to Ferreira, USA and Norway agreed to champion the position of those States that feared that the inclusion of a human rights language in the Paris Agreement would open the door to legal liability mechanisms for human rights violations derived from climate change. See. P., G. FERREIRA "Did the Paris Agreement Fail to Incorporate Human Rights in Operative Provisions? Not if You Consider the 2016 SDGs", *Centre for International Governance Innovation Paper*, No. 113, 2016, pp. 1–11, at 5.

Law of Treaties (1969, art. 31.2), the preamble to each agreement has great interpretative value and carries weight as to applying the obligations contained therein. Therefore, apart from having a great symbolic value, different authors have referred to the Paris Agreement as potentially innovative, insofar as it could help to substantiate the obligations of the parties to the agreement, having paved the way for the adoption of a human rights-based approach to climate governance.

Indeed, well established legal experts and scholars have underlined the importance of the Agreement. In his analysis of how human rights should be internalised in different international regimes in order to cope with the most pressing challenges of the twenty-first century – among which there is certainly climate change – John Knox has directly equated the Agreement to a human rights treaty. As he has noted: "The Paris Agreement will be remembered not only as the first major climate agreement of the century, but also as the first international environmental agreement to recognize that human rights are part of the framework it creates."[418] In a very acute reflection that discusses the human rights provisions included in the Paris Agreement in the wider context of sustainable development, Atapattu underlines how the binding nature of the climate treaty (in which the link between human rights and global warming is recognised) gives significance to such a reference.[419] First, because it definitely recognises that human rights are relevant when addressing climate change, something criticised by those sceptical towards this approach, and also because it underlines the legal duty that States have under human rights law when acting against climate change.

Looking at the intersection between human rights law and international environmental law, Savaresi has assessed the potential that the Paris Agreement Preamble may have in redirecting the fragmentation between different branches of international law.[420] In this sense, human rights law and climate change law are increasingly less compartmentalised and the emergence of environmental human rights law specific to climate change may be on the rise. This, in turn, will likely have positive effects on other fields of international law, for instance on refugees' law. Likewise, the process that has

[418] J., H. KNOX, "The Paris Agreement as a Human Rights Treaty" in D. AKANDE, J. KUOSMANEN, H. McDERMOTT and others, 2019, *op. cit*., pp. 1–26, at 26.
[419] S. ATAPATTU, 2018, *loc. cit.*
[420] A. SAVARESI, "Climate change and human rights. Fragmentation, interplay, and institutional linkages" in S. DUYCK, S. JODOIN and A. JOHL, 2018, *op. cit*., pp. 31–42.

led to the inclusion of a human rights language into the Paris Agreement has certainly promoted institutional cooperation between UN human rights bodies and the UNFCCC system, something that will likely continue in the future.

Finally, it is the maintained here that, while the actual reference made in the Preamble exclusively concerns the human rights obligations that States have assumed already or will assume in the future, nothing precludes the possibility that it will gain more normative relevance and enforceability as the relationship between climate change and human rights will develop more clearly. In this sense, as it will be resumed when talking about the opportunities derivable from a human rights-based approach to climate change, the inclusion of a human rights language in the Paris Agreement is an important turning point whose implications are yet to be seen.

5.5 Framing Climate Change as a Human Rights Issue: Limitations and Opportunities

While the existence of a relationship between the effects of global warming and human rights is now well affirmed, more complicated is to ascertain what this actually means in terms of rights and obligations. In other words, what does it mean to frame climate change as a human rights issue? And, equally important, which problems does the adoption of such a framework supposes?

As a base argument, it follows from the recognition of climate change as a threat to human rights, that global warming constitutes a severe enough environmental harm so as to be framed as a human rights problem. As emerged by converging case law, the disruption of the environment is increasingly considered as negatively impacting or interfering with human rights. Furthermore, the essence of climate change as a global, intergenerational and particularly severe environmental problem makes it stand out as a particularly dangerous threat to these rights and thus allows the application of such jurisprudence to this environmental harm. It follows that, even in the context of climate change, States human rights' duties will relate to the respect of procedural and substantive obligations, particularly so in the case of most vulnerable people.[421] As maintained by

[421] In this regard, procedural obligations may require the conduct of environmental impact assessments, that the full and effective participation of all concerned people within the decision-making process is guaranteed and that effective remedies are available when States fail to comply with such obligations. Substantive duties refer, instead, to the respect of human rights when States decide on the appropriate level

Atapattu, human rights law imposes a general obligation on States to respect, protect and fulfil their human rights obligations when taking action relating to climate change, including mitigation and adaptation law and strategies.[422]

Nonetheless, the interference of a particularly serious environmental harm may not be sufficient for determining the violation of human rights' provisions. To be established as a violation of human rights, any disturbance must be traced back to the action or inaction of a certain State or non-State entity holding human rights obligations, whose activity have resulted to be inconsistent which such duties. It follows that there are several obstacles as to how a jurisprudence that has largely developed around the violation of rights caused by a specific source and usually occurred in one country, may be applied to a global and transnational environmental harm. In this sense, global warming is often regarded as a question that requires novel legal strategies and approaches to be adequately addressed, particularly so if considering that the first generations of human rights were developed at a moment where the pollution of the environment was not ranging high on the international agenda.

One of the main problems encountered when trying to assess a climate-induced human rights' violation lies in the difficulty of demonstrating the existence of a causal link between a governmental or non-governmental contribution to climate change and the negative impact that the latter will have on human rights. As in the Inuit case, the difficulty of establishing a causal relationship between the GHGs emission rates of individual States and the damages suffered by individuals may weight on the decision of human rights courts to start legal proceedings. This is further hampered by the progressive impact of climate change. While this phenomenon is already producing devastating effects on the human and natural systems, the impacts of global warming are extensive and will be experienced for generations even after a stabilisation of present GHGs emissions. As a result, not all negative effect of rising temperatures may be assessed in the present.

---

of environmental protection or to the protection that States must provide to their citizens against environmental harm caused by non-State entities.

[422] S. ATAPATTU, 2018, *op. cit*., at 71.

This problem was also noted in the first report on human rights and climate change of the Office of the UN High Commissioner for Human Rights, that alerted that "[…] while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense."[423] As previously discussed in the context of climate change litigation, however, it seems today increasingly more possible to trace back causation with the help of attribution studies. The progressive development of such a field will likely help the determination of causation in the future. On the other hand, already traceable are the aggregate contributions of major climate polluters, such as the USA, the EU, and China.

While causation mainly refers to a State obligation to respect human rights, the missing link between its contribution to climate change and the infringement of human rights does not prevent to consider if a State has taken adequate steps to protect or fulfil human rights when the harm derived from different sources. As maintained by Knox: "Every State has an obligation to protect against the infringement of human rights by the effects of climate change, whether or not the State is directly responsible for the cause of the infringement. This conclusion follows from the nature of their obligations to protect against environmental harm generally. Human rights bodies have made clear that States should protect against foreseeable environmental impairment of human rights whether or not the States directly cause the harm."[424]

In addition to this causal nexus, there are problems of jurisdiction and related to the transboundary nature of climate change. As discussed in a previous section of this chapter, the question of whether States' human rights obligations extend beyond their territory is one difficult to answer. Human rights treaties often include explicit jurisdictional limits, as it is the case of the ICCPR and the European Convention on Human Rights.[425] On the contrary, no clause has been included in the ICESCR and the

[423] OHCHR, *Report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights*, 2009 (UN. Doc. A/HRC/10/61), par. 70.
[424] J. H. KNOX, "The Paris Agreement as a Human Rights Treaty" in D. AKANDE, J. KUOSMANEN, H. McDERMOTT and others, 2019, *op. cit*., pp. 1–26, at 13.
[425] Such limits are, for instance, found in the ECHR at article 1 or in article 2 of the ICCPR. Boyle has nonetheless reported on how jurisdiction has been interpreted in broad terms in several cases concerning military operations abroad or the occupation of foreign territories. See, A. BOYLE, 2015, *op. cit*., p. 231. In any case, and since the focus of this research is on public participation, it seems important to note that in the case of the Aarhus Convention, no distinction is made between the public living within one State or

Committee on Economic, Social and Cultural Rights has interpreted the International Covenant to give rise to extraterritorial duties. This seems reasonable in the light of the rights it aims at securing which, in most cases, require international assistance and cooperation to be effectively fulfilled. The same is often said about climate change that, being a global issue, cannot but be effectively addressed through the cooperation of the international community. Authors such as Viñuales, Knox, and Boyle have reflected on the extraterritorial application of human rights obligations in the context of climate change.[426]

As a minimum requirement, even when human rights law is intended as not to give rise to extraterritorial obligations, any State faced with the challenges derived from climate change will be required to ameliorate the effects that global warming may have on the rights of those falling within its jurisdiction. Knox has criticised such an approach for being incomplete when facing an environmental issue of global proportions, and has rather put forward the argument that the principle of international cooperation could provide an answer for applying extraterritorial obligations with regard to climate change.[427] Under the UN Charter, so the argument goes, States have committed to cooperate in addressing global challenges to human rights. In light of this duty of cooperation, States could negotiate and implement international climate agreements that are able to meet a minimum core of human rights standards. While Boyle has pointed to the inconsistency of human rights case law on this question, he has nonetheless recognised that the application of a non-discrimination principle has emerged when considering the reach and scope of States' human rights obligations in cases of transnational pollution. In a few words, it would be discriminatory to allow a State to violate its human rights obligations on the territory of another State when, on the contrary, it would not be allowed to do so in its own territory. It follows that, has maintained by the author, "[A] state which fails to control harmful activities within its own territory

beyond its borders, since the provisions of the treaties generally apply to the "concerned public". Moreover, article 3 of the Convention expressively recognise the duty of States to apply treaty provisions in a non-discriminatory fashion, *without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.* If, as sustained by different authors, the Conventions may be considered as a human rights treaty, it follows the possibility to apply procedural human rights obligations extraterritorially in this context.

[426] See, e.g., J. E. VIÑUALES, 2016, *loc. cit*.; J., H. KNOX, "Diagonal Environmental Rights" in M. GIBNEY and S. SKOGLY (eds.) *Universal Human Rights and Extraterritorial Obligations*. Philadelphia: University of Pennsylvania Press, 2010, pp. 148–178.

[427] J. H. KNOX, 2016, *loc. cit.*

which cause or risk causing foreseeable environmental harm extraterritorially does owe certain human rights obligations to those affected, because they are within its jurisdiction and control, even if they are not within its territory."[428] Of course, in this case too, the possibility to identify the exact causal link between States' action or inaction and the violation of rights is essential.

As challenging as it may be, the possibility to apply human rights obligations extraterritorially may be done by resorting to different principles and core values that inspire international law. Particularly the principle of cooperation, solidarity, non-discrimination, and equal treatment hold great value in this sense. While more research may be necessary on this point in order to clarify and reach consensus on this question, more prominent is the need to improve the knowledge on historical contributions and attribution studies as to be able to establish clearer links of causation and thus apply human rights law to climate change more forcefully. In conclusion, while problems remain in determining climate change impacts as a violation of human rights, it seems nonetheless worth exploring the relevance of a human rights-based approach for the reasons that will be explored in the following section.

5.5.1 A Human Rights-Based Approach to Climate Change: Main Opportunities.

Similar to how the jurisprudence on environmental human rights has differently developed internationally and regionally, there are at least two ways in which a human rights-based approach to climate change could be constructed. The first, arguably more complex and still emerging road, would require the establishment of an internationally recognised right to a healthy environment. Alternatively, as a second way, existing and well-established human rights provisions could be re-interpreted in the context of climate change. As it will be discussed at a later stage, both options hold some value for the improvement of public participation in the context of international climate change law-making.

While different commentators have for some time contended that the human right to a healthy environment is emerging in international law,[429] largely due to the

[428] A. BOYLE, 2015, *op. cit*., at 235.
[429] See, e.g., D. HUNTER, J. SALZMAN and D. ZAELKE, 2015, *op. cit.*

jurisprudence of regional human rights systems on this issue, in recent years this idea has been resumed and more forcefully promoted by the former UN Special Rapporteur on human rights and the environment and by the United Nations General Assembly.

After the Stockholm Declaration and the failed attempt of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to recognise a human right to environment, the Special Rapporteur Ksentini invoked its establishment as early as in 1994, issuing the Draft Principles on Human Rights and Environment in her final report to the Human Rights Committee. While this possibility encountered resistance over the following years and would be finally dismissed, it has been resumed with the appointment of John Knox as Special Rapporteur in 2012, whose mandate was renewed in 2015 as Special Rapporteur on human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment.[430]

Regardless of the difficulties involved in agreeing on the content, scope, and justiciability of a human right to a healthy environment,[431] in a recent report that the now former Special Rapporteur Knox presented to the Human Rights Council in March 2018, he once again underlined the interdependence between human rights and the environment.[432] Furthermore, in a joint statement with UN Environment, the former Rapporteur expressively required the recognition of a human right to a healthy environment and underlined: "Recognising the human right to a healthy and sustainable environment would not solve all environmental problems. But it would make clear that a healthy environment is on the same level of importance as other human rights and that,

[430] The Human Rights Council established the mandate for the Independent Expert on human rights and the environment in 2012, by UNGA Resolution A/HRC/RES/19/10. The mandate was extended in 2015 with the adoption of the UNGA Resolution A/HRC/RES/28/11.

[431] At the moment of writing, there is no unified and qualitative definition of such a right. For instance, to which level the environment should be protected? Should one advocate for a clean, safe, decent, healthy or satisfactory environment? Problems of scope and justiciability have also been discussed in the literature. Nonetheless, different authors have diminished the relevance of such questions, reminding that several of the now protected human rights have also encountered such hurdles in their early articulation. See, e.g., S. AMINZADEH, "A Moral Imperative: The Human Rights Implications of Climate Change", *Hastings International & Comparative Law Review*, Vol. 30, No. 2, 2007, pp. 231–265.

[432] That is a healthy environment is necessary for the enjoyment of different human rights and, at the same time, the exercise of the latter, including the right to participation, is fundamental for the protection of the environment. See, HUMAN RIGHTS COUNCIL, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, of 24 January 2018 (UN Doc. A/HRC/37/59).

like other rights, it must be fulfilled in order for all people to enjoy lives of dignity, equality and freedom."[433]

In relation to the latter, a notable development has taken place with the adoption of Resolution 72/277 by the UN General Assembly, which has established an *ad hoc* open-ended working group that works on the adoption of a Global Pact for the Environment, a draft text reflecting the principles of environmental law found in the majority of constitutions, international environmental agreements and Declarations. Presented by the former President of the COP21, Ms. Laurent Fabius and by the French *Club des Juristes*, the text has been conceived as a human rights instrument, which aims at codifying and establish a third generation of fundamental rights, associated with the protection of the environment. Composed of 26 Articles that recall all general principles of international environmental law, the Pact also propose the codification of a right to an ecologically sound environment in its Article 1.[434] The latter is intended as a two source principle, in which a right to a healthy environment and a duty to take care of the environment are interrelated. At the moment of writing, the Second Substantive Session of the Ad Hoc Open Ended Working Group have been held in Nairobi, Kenya, with the purpose of advancing on the negotiation and adoption of the Pact.[435]

Pending such developments, the recognition of a right to a healthy environment holds value for several reasons and could be conceived at the international level with, at least, a dual purpose. On the one hand, and as a culmination of the process launched in 2008 following the Inuit petition, it would provide a stronger framework for the implementation and justiciability of existing obligations under human rights instruments. Particularly so in the context of climate change, given that the Paris Agreement now expressively requires States to respect, promote and consider their human rights' obligations when taking action on climate change. As said, while the right to environment

[433] The full text of the joint statement is available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23162&LangID=E (Last access 21 September 2018).

[434] A first draft of Article 1 of the Global Pact for the Environment reads as follows: "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment". A paper copy of the preliminary draft of the group of experts has been retrieved by the author during the Conference "Towards a Global Pact for the Environment" held at the European Parliament on the 6th of February 2019.

[435] See, on the meetings held up to the moment of writing: https://www.unenvironment.org/events/conference/towards-global-pact-environment (Last access 26 March 2019).

is recognised in a few regional human rights instruments and in over 100 national constitutions, its unequivocal affirmation at the international level would provide for more homogeneity among different human rights systems and thus enhance legal certainty for different human rights holders. On the other hand, the right to a healthy environment could contribute to the development of more abstract human rights that, for example in the case of the rights of future generations, are not yet contemplated in current human rights law. This would lay the foundation for considering intergenerational responsibility as a legal issue and not exclusively as a largely unanswered ethical question.[436] However, whether the work carried out by Knox will be followed by the newly appointed Special Rapporteur David Boyd [437] and whether the on-going negotiations will bring the adoption of a Global Pact for the environment cannot be assessed at the moment of writing.

It is the author's view to consider that the debate developed around the relationship between climate change and the enjoyment of human rights has created new momentum for the establishment of higher standards of protection for the environment, in UN bodies as well as at the level of nation States. Particularly at a time in which a great deal of attention and mobilisation has been raised in international public opinion by the climate change question, it will be difficult for States and UN bodies to delay the recognition and codification of existing third generation rights.

A more traditional re-interpretation of human rights in the light of climate change would instead underline the already recognised environmental component of existing and well-established human rights, such as the right to health or the right to life. While this seems to be the most straightforward interpretation of how human rights law may find application in the context of climate change, Cullet has elaborated a more ambitious perspective. Following the author's argument, a human rights-based approach to climate change requires a broader contamination between international environmental law and human rights law, and to put emphasis on solidarity rights. The latter are basically third

[436] For an overreaching discussion on the establishment of a right to a healthy environment, see J., H. KNOX and R. PEJAN (eds.), *The Human Right to a Healthy Environment*. Cambridge: Cambridge University Press, 2018; J., G. MERRILLS, "Environmental Rights" in D. BODANSKY, J. BRUNNÉE and E. HEY, 2018, *op. cit*., pp. 665–675

[437] The mandate of the Special Rapporteur on human rights and the environment was further extended by the Human Rights Council in August 2018, with the adoption of the UNGA Resolution A/HRC/RES/37/8.

generation rights, whose focus of attention is displaced from the individual to the collectivity, and where the human rights' duties of States are better addressed when they take common action towards the protection and promotion of human rights. In the authors' words: "Solidarity therefore provides a model from which to bridge human rights and climate change. It constitutes an appropriate basis to rethink States' rights and obligations in these areas. While States have a duty to cooperate, most of them are unable to fulfil their human rights' commitments linked to climate change alone and most of them should not be expected to shoulder the cost of adaptation for a problem they have contributed little to cause. Solidarity rights can establish the framework within which the global nature of human rights can be considered beyond individual claims in individual countries."[438] Framed in such terms, a human rights-based approach would especially emphasise pending question of climate justice.

Independently from how the human rights-based approach to climate change will be envisioned in the future, there are already evident opportunities to be seized from such a proposition. Moreover, its consideration seems topical if only because after the inclusion of a reference to human rights in the Paris Agreement this will likely become the preferred viewpoint to look at climate change in the future.

The most evident positive contribution that a human rights-based approach to climate change would bear in addressing this harm, is a direct consequence of the pedigree of human rights law as a well-established system of rights and obligations centred on the dignity of human beings, whose institutions are able (although with limitations) to hear complaints, solve disputes and provide redress to victims. As Cullet has made clear: "International human rights law goes beyond other areas of international law by providing a framework wherein individuals are the subject of its obligations. As a result, a human rights approach to climate change can contribute to addressing questions that environmental law has failed to address effectively."[439]

In general terms, this approach would add a legal argument and ethical burden to an issue that has been largely addressed for its environmental and economic implications,

[438] P. CULLET, "Human Rights and Climate Change. Broadening the Rights to Environment", in C., P. CARLARNE, K. GRAY, R. TARASOFSKY and C. CARLARNE, 2016, *op. cit*., pp. 495–515, at 513.
[439] *Ibid.*, at 500.

more than for the impacts that has on human life and dignity. Being considered exclusively as an environmental harm, climate change regulation has often been subject to the ability of negotiating States to find a political compromise rather than ambitious solutions that take into account the integrity, indivisibility, and respect of people's rights. While conceiving global warming as an issue linked to human dignity would allow, for instance, a better conciliation among the different economic, political and environmental interests surrounding this anthropogenic phenomenon, the emphasis on human rights may well substantiate what constitutes an illegal practice as far as the enjoyment of human rights is concerned, irrespective of States adherence to the international climate change regime. This seems increasingly important as major polluters like the USA plan to withdraw from the Paris Agreement in the near future.[440]

As the work of the former UN Special Rapporteur on human rights and the environment has assertively affirmed, there is a clear interdependence between the exercise of human rights and the protection of the environment. It follows that any approach that draws on human rights to address climate change is not aimed at diverting attention from other human rights objectives, but rather intended to reinforce their respect. Since a characteristic of human rights is that their protection, respect, and fulfilment does not depend on reciprocal relationships, but are obligations that States owe to each individual, another important contribution of human rights law to the making of climate law would be that "[…] the presently dominating inter-state perspective of the climate change regime would have to be reconciled with the normative focus on the individual that comes necessarily with human rights".[441] This includes, as will be considered below, putting greater emphasis on the participatory rights of individual rights holders.

Finally, in addressing climate change litigation, this research has underlined how the international climate change regime built on the UNFCCC is not able to provide effective mechanisms for the resolution of claims, and for sanctioning those countries that are acting in violation of the Framework Convention's provisions. In opposition to this,

[440] According to what established by article 28 of the Paris Agreement, however, States may withdraw from the Treaty only after three years from the date on which the Agreement has entered into force. Moreover, any withdrawal will take effect upon expiry of one year from the date of receipt of the notification of withdrawal. In any case, therefore, the USA will not be able to depart from the Paris Agreement before 2020.

[441] A. CARDESA-SALZMANN, "Reflections on the Sustainability of a Human Rights Approach in the Context of the Climate Change Regime", in R. GILES CARNERO, 2012, *op. cit.*, pp. 169–178, at 175.

international and regional human rights systems have established tribunals for hearing complaints, assess human rights violations and eventually provide remedies to victims. As the discussion above has shown, the UN human rights system is well equipped with bodies and appointed Special Rapporteurs able to oversee the status of human rights internationally, as well as to work towards the advancement of international law, as the effective tackling of climate change seems to require.[442]

5.6 Improving the Participation of Non-State Actors in International Climate Change Law-Making by Framing Climate Change as a Human Rights Issue

Twenty years ago, following the enunciation of Principle 10 of the Rio Declaration of 1992, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was signed by UNECE countries. While Principle 10 has yet to be considered a general principle of international law, the Aarhus Convention was adopted with the specific commitment, under article 3.7, that "[…] each Party shall promote the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment". Following these twenty years of implementation, several works have traced the development and setbacks occurred in application of the three pillars enshrined in the Convention: access to information, public participation in decision-making, and access to justice in environmental matters.[443] Alan Boyle, for example, has qualified procedural rights as the most relevant environmental addition to human rights law since the Rio Declaration of 1992. Anyway, it is no coincidence that the Preamble of the Aarhus Convention directly recalls Principle 1 of the Stockholm Declaration of 1972 and its main provisions have constituted the basis for the adjudication of human rights violations, at least under the jurisdiction of the ECtHR.[444]

---

[442] See, on the role that UN Human Rights bodies may play in the implementation of the Paris Agreement, S. DUYCK and Y. LADOR, "Human Rights into Climate Action After Paris: Opportunities for the UNFCC, the Human Rights Institutions and the G-20", *Human Rights and International Climate Politics Study*, 2016, pp. 3–20.

[443] See, e.g., a dedicated monography recently published in the 9th Volume, No.1, of the 2018 Catalan Journal of Environmental Law. The publication is available at: https://revistes.urv.cat/index.php/rcda/issue/view/115 (Last access 24 September 2018). S. DUYCK, "Promoting the Principles", 2015, *loc. cit.*

[444] As, for instance, in the case Taskin and Others v. Turkey, judgement of 10 November 2004.

Looking at the international implementation of Principle 10 and of the Aarhus Convention, however, it should not be forgotten that while the first is still largely considered as *lex ferenda,* the Aarhus Convention exclusively applies today to 46 countries and the EU. It follows that the promotion of Principle 10 beyond the UNECE region has thus far been rather limited. Notwithstanding this, in 2018 a positive turn has been marked with the adoption of the Escazú Agreement, a treaty on public participation adopted by Latin American and Caribbean countries. While this is a much-welcomed development, the impact that this new Agreement will have on public participation in international environmental decision-making processes cannot be assessed here, since it has not yet entered into force at the moment of writing.

Contextually to the application of Principle 10 and of the second pillar of the Aarhus Convention in international climate change law-making, the second chapter of this research has underlined that the lack of a coherent and systematic approach to public participation in intergovernmental negotiations has at time impaired the right of the public to participate in international climate change law-making. While this has been reported by different authors, Duyck has underlined that: "[…] although the Parties to the UNFCCC have developed rules that describe the ways in which public participation can be exercised in intergovernmental processes, the exclusion of NGOs from crucial phases of the climate negotiations (most recently in Paris) is an issue that must be addressed."[445]

Mindful of the latter, the focus of attention of this work has been the enhancement of public participation in international climate change decision- and law-making. After exposing the emergence of non-State actors in international law and in the light of the essential contributions that they provide in the negotiation of environmental agreements, the third chapter of this work has drawn a case study on Arctic IPs, proposing their model of participation in circumpolar affairs as a paradigm for the improvement of NSAs participatory rights in international climate governance. What is particularly relevant of Arctic IPs' practice is that their national and international advocacy and actions have been focused on promoting their rights to participation through human rights-based discourses and claims.[446] While, as seen in the fourth chapter, the appeal to climate change litigation

[445] S. DUYCK, "The Paris Agreement", 2015, *loc. cit*., at 41.
[446] "The ICC's actions demonstrate how to effectively challenge both the basic rules prescribed by the climate change and the structure upheld by international law as a society of states. By raising the human

as a strategy of advocacy – which also has Arctic IPs practice as a forerunner – seems to expand transnationally, its efficacy has been (so far) limited at the international level. In this sense, litigation remains a second best option to the improvement of participatory rights in international intergovernmental processes but nonetheless unveils the disaffection created by a largely State-centred international decision-making system and stands as an argument in support of a more open international climate change decision-making process.

Bearing this in mind, this last section wants to assess whether a human-rights based approach to climate change can serve the improvement of public participation in international climate change law-making. In other words, can the participation of non-State actors in international climate change law-making be improved by framing and approaching climate change as a human rights issue?

Hereafter, three main considerations on how a human rights-based approach to climate change could benefit and enhance the participation of non-State actors in international climate change law-making are presented:

1) Reinterpreting the scope of procedural rights in inter-governmental negotiations.

As recalled above, the inclusion of a human rights language within the Paris Agreement has paved the way for the consideration of States' human rights obligations in the context of international climate change law. While conceiving climate change as a violation of human rights still supposes the overcome of different legal questions (primarily the establishment of causation and jurisdiction), nothing precludes the possibility to consider which procedural obligations may bear on States in the context of climate change law-making, in light of existing human rights instruments.

The right to participate in the formulation and implementation of decisions at the international level has been recognized as an aspect of article 25 of the International

rights petition against the US, the Inuit expanded society's notion of who is entitled to participate in the fight against climate change." T. KOIVUROVA, S. DUYCK and L. HEINÄMÄKI, "Climate Change and Human Rights" in E., J. HOLLO, K. KUVOLESI and M. MEHLING, 2013, *op. cit*., pp. 287–325, at 323.

Covenant on Civil and Political Rights. In its general comment on Article 25, the Human Rights Committee has in fact interpreted this provision as allowing the participation of the public in the conduct of international affairs and as an obligation that States owe to their citizens.[447] More generally, since all fundamental rights are indivisible and interdependent, the exercise of already established procedural rights in the context of international climate change governance becomes an expression of human rights.

Since the establishment of a relationship between human rights and global warming, States are required to promote, protect and fulfil these rights under the Paris Agreement. This is relevant when considering that public participation has been at time impided in climate change governance. Provided that article 12 of the Paris Agreement expressively requires its Parties to cooperate in taking measures to enhance public participation, the implementation of the Agreement offers an opportunity for reinterpreting the scope of procedural rights in intergovernmental processes, in the light of States' human rights obligations.

2) Differentiating among non-State actors and identifying rights-holders.

On the other hand, and largely based on Arctic IPs practice, the affirmation of a human rights-based approach to climate change may also have the effect to empower non-State actors and favour their broader representation in international climate change law-making. What sustained here is that it is the condition of individuals as right-holders under human rights law (as opposed to stakeholders), that justifies and requires their inclusion in this law-making process, being therefore the legal basis on which their entitlement to actively participate in the making of international climate change law builds. As such, the intersection between international climate change law and human rights law as enshrined in the Preamble of the Paris Agreement, may constitute a valid legal argument for the enhancement of the participatory rights of non-State actors. In the latter case, and resembling the right to self-determination on which Arctic IPs practice have been authorised, the affirmation of a free-standing human right to environment would give greater normative content to this proposal. Pending such development,

[447] Human Rights Committee, *General Comment No. 25; Article 25 – Participation in Public Affairs and the Right to Vote,* 12 July 1995, par. 5 (UN Doc. CCPR/C/21/Rev. 1/Add.7).

however, the protection of the environment as a *sine qua non*-condition for the enjoyment and exercise of human rights seems already sufficiently established internationally.

This proposal appears particularly appropriate in dealing with climate change, because it might help to strike a balance between different and potentially conflicting interests that the participation of NSAs integrated into the UNFCCC systems as observers aim at upholding. For instance, balancing the interests of the business community with those that work in the promotion of the public good and rights-based claims. To secure the rights of those that will be disproportionally affected by climate change, as it seems to be in the case of indigenous and local communities, women and youth, as well. Whereas a specific arrangement for improving the participation of local communities and indigenous peoples in the context of climate change law-making is now being established, the same could be provided at least for those vulnerable groups that hold specific rights under human rights law, including women and children, or that enjoy a direct democratic legitimization, as in the case of local authorities.

3) Ensuring meaningful public participation in international climate change law-making.

Finally, and more broadly, the hierarchical elevation that would follow from approaching climate change as a question of human rights would broaden the spectrum of state obligations on mitigation and adaptation, while placing greater emphasis on the participatory rights of individuals. Thus, according to a publication on human rights and climate change: "Human rights can inform processes by placing a focus on participation as a right in itself, including ensuring that those whose rights are affected by climate change have an effective voice in setting national and international mitigation targets and policies, and that affected communities can participate in and have ownership of the design and implementation of adaptation initiatives. International human rights legal standards help establish normative foundations and essential guarantees for active, free and meaningful participation, including the rights to freedom of expression and association and self-determination."[448]

[448] S. McINERNEY-LANKFORD, M. DARROW and L. RAJAMANI, 2011, *op. cit.*, at 30.

5.7 Concluding Remarks

This chapter aimed at exploring the relevance of a human rights-based approach to climate change. The consideration of this strategy has allowed a broader reflection on how environmental considerations have been integrated into human rights law over time. While this has primarily been done by 'greening' human rights obligations, the potential establishment of a free-standing human right to environment has also been weighted.

More importantly, and with regard to climate change law, the introduction of a human rights language in the Paris Agreement offers the opportunity to rethink the scope and application of human rights in all actions aimed at addressing climate change, including international climate change law-making.

Whereas obstacles remain as to characterise global warming as a violation of human rights, this body of law provides some useful opportunities in addressing this global environmental harm. From the viewpoint of public participation, for instance, a human rights-based approach to climate change may help to put emphasis on participation as a right in itself, as well as on the condition of individuals as right-holders under human rights law. For the latter reason, entitled to participatory rights that should be enhanced – rather than derogated – in the context of international climate change law-making.

PART V – CONCLUSIONS

The main objective of this research was to study the application of the principle of public participation in international climate change law-making, in order to explore *whether* and *how* the participation of different non-State actors should be improved in the making of the international regime that regulates climate change.

A second and auxiliary research question considered whether a human rights-based approach to climate change could be used as a relevant legal approach for the improvement of non-State actors' procedural rights.

In light of these objectives and in order to propose a reform of the present climate change law-making process that meaningfully includes non-State actors, a case study focused on Arctic indigenous peoples has been build, leading to the conclusions that are detailed hereafter.

1. On Non-State Actors and International Law-Making

1.1 A preliminary examination of the status and role of non-State actors in the context of international law-making, has revealed that great uncertainty revolves around this heterogeneous category of non-State entities. To date, the scholarly debate has not agreed upon a clear definition for these entities and they are usually identified by what they are not, namely States.

1.2 It should follow from the above that no role in the making of international regimes should be authorised to non-State actors. This assumption finds support in a traditional interpretation of the theory of subjects of international law, as well as in art. 38 of the Statute of the International Court of Justice, which recognises as valid sources of law those conventions, customs or principles to which States have implicitly or explicitly consented to. However, the analysis of the conclusion of different multilateral treaties has unveiled that non-State actors *de facto* participate to and greatly determine the creation of manifold international norms. This is particularly true in the realm of international

environmental law where, largely due to the impossibility of nation States to cope with transnational environmental harms, the contribution of non-State entities is essential. Interestingly, this has pointed to the existence of a gap between the theory and the practice of international law.

1.3 In relation to this, the analysis has also discussed the problem of legitimacy inherent to international law-making. A preliminary inquiry underlined the cleavage between a sociological and a normative understanding of legitimacy, emphasising that a blurred divide exists between who is perceived as legitimate and who, in fact, is entitled to legitimacy in the making of international norms.

1.4 As discussed in section 1.3.2 of Chapter 1, the shortcomings of a purely State-centred law-making system rest in that, although the consent payed by States to a treaty is meant to respect and represent the will expressed by their citizens through direct democratic legitimisation, the creation of norms at the international level makes the 'chain of delegation' secured by national elections less straightforward. Undoubtedly then, this deficit is hampered in non-democratic countries. Albeit the opening of international law-making to different non-governmental entities has been conceived with the aim of injecting transparency and a sense of ownership with the international decision-making process, the non-democratically elected nature of non-governmental 'representatives' diminishes their normative capacity. Thus, the construction of a truly complementary model of international law-making requires the reconsideration of the legitimacy premises of State and non-State actors alike.

2. On Public Participation in International Climate Change Law-Making

2.1 The analysis of the principle and legal frameworks that regulate the participation of the public in environmental matters has demonstrated that, although procedural rights are recognised as a key aspect of environmental democracy, to date no global binding treaty regulates how procedural rights should be exercised and secured in international negotiations on environmental matters. Albeit the recent adoption of the Escazú Agreement (2018) by Latin American and the Caribbean countries complements and expands the rather limited geographical scope of the Aarhus Convention (1998), thus

contributing to the overall protection of procedural rights, this does not clarify the international dimension of the rights to participation of the public.

2.2 Contextually to international climate change law-making, it is now beyond debate that public participation is key to ensuring the implementation of climate action and, as such, is instrumental to the achievement of the objectives of the Paris Agreement of 2015 and of the UNFCCC. In light of this, the research has particularly considered the progresses made with the institution of the Local Communities and Indigenous Peoples Platform and the celebration of the first Open Dialogue between Parties and non-Parties Stakeholders. These developments feed the reflection and debate on how to enhance the participation of observers in the making of international climate change law. Therefore, they also represent an opportunity for reform, including the introduction of the model of participation exposed in Chapter 3 of this dissertation.

3. On the Relationship between Human Rights and Climate Change

3.1 In discussing a human rights-based approach to climate change as the proposed instrument for improving the participation of the public in international climate change law-making, a key preliminary analysis concerned enquiring the existence of a relationship between human rights and climate change. The study of the resolutions adopted by the Human Rights Council on the subject, has served to clarify the correlation between climate change and the infringement of human rights. On the one hand, rising temperatures impede the enjoyment of basic human rights and the implementation of mitigation and adaptation projects further impinge on fundamental rights, on the other. The climate change litigation cases that, as exposed in Chapter 4, have been adjudicated on the basis of human rights considerations add legal argument to this posture.
Finally, the existence of this relationship has also resulted by the analysis of the legal content of the Paris Agreement. The hermeneutical interpretation of the provisions of the Agreement, sustained by the analysis of the vivid academic debate developed around it after its conclusion in 2015, has demonstrated that the application of the treaty entails the consideration, respect and promotion of States' human rights obligations. As such, the Paris Agreement is the first global environmental agreement that recognises human rights as a key component of the framework it creates.

3.2 Concerning the enhancement of procedural rights in international climate change law-making, the relevance of a human rights-based approach consists of building the condition of individuals as rights-holders under human rights law, thus entitled to actively engage in the regulation of an environmental harm that is likely to impinge on the enjoyment of their rights. In this order of ideas, section 5.5.1 of Chapter 5 has discussed the emergence of a human right to a healthy and sustainable environment which, despite the work carried out by the UN Special Rapporteur on Human Rights and the Environment and other UN Human Rights bodies, is yet to be affirmed. However, the potential adoption of a Global Pact for the Environment in which the right to an ecologically sound environment is codified, stands as evidence of the progress made towards the recognition of such a right.

3.3 Either way, section 5.6 of Chapter 5 has discussed why this approach holds value when considering the enhancement of procedural rights in the context of international climate change law-making. First, since a link between climate change and human rights has been established in the Paris Agreement, it was concluded that the right to participate in the conduct of international affairs as interpreted by the general comment of the Human Rights Committee on art. 25 of the ICCPR, forms an integral part of the regime created to address climate change. Thus, States' hold obligations to respect the right to participation of the public in international climate change law-making even in the absence of a comprehensive regime that ensures and regulates this right internationally.

Second, it has been demonstrated that a human rights-based approach is appropriate in dealing with climate change because it helps to strike a balance between different and potentially conflicting interests that the participation of non-State actors aims to uphold. For instance, putting emphasis on the rights of minorities and most vulnerable people would help securing the rights of those that will be disproportionally affected by climate change, as in the case of indigenous and local communities, women and youth.

Finally, it was resolved that, resorting on a body of law that is concerned with the respect and advancement of human dignity, the right to participation in the context of international climate change law-making would be settled as a right in itself, from which no derogation should be authorised.

4. Towards a New Significance for Non-State Actors in International Climate Change Law-Making: A Proposal for Reform.

Considering the above, the concluding part of this work aims to offer a proposal for reform of the UNFCCC institutional arrangement through which non-State actors participate in international climate change law-making. The proposal builds on the Arctic indigenous peoples' model of participation exposed in Chapter 3, discussing the positive aspects of such a paradigm and the obstacles that may currently be encountered to its replication.

As recalled, Chapter 3 of this dissertation has discussed why the participation of Arctic indigenous peoples in the Arctic Council is exceptional to the models of participation of the public found in other intergovernmental fora. By virtue of their status as Permanent Participants, Arctic indigenous peoples hold a right to full and effective participation in the decision-making process of the Arctic Council which, despite being a soft-law body, has recently served as the forum for the negotiation of binding treaties. Being participants of a deliberative model in which decisions are made by consensus, Arctic indigenous peoples act in a position that is half way between membership with full voting rights and observership.

Hereafter, we consider to which extent the model could be applied to the nine major groups established in the Agenda 21, which already act as observers' constituencies to the UNFCCC system: Business and industry NGOs; Environmental NGOs; Farmers and agricultural NGOs; Indigenous Peoples Organisations; Local Government and municipal authorities; Research and independent NGOs; Trade union NGOs; Women and gender constituency and Youth NGOs.

The expansion of what we call the 'Arctic model of participation' is primarily relevant for other indigenous populations that, such as those living in the Pacific Islands or Amazonia, are already suffering the impacts of global warming. As has been already requested by the Inuit Circumpolar Council before and during the celebration of COP21, this expansion could be carried out by promoting the right to full and effective

participation in the recently established Local Communities and Indigenous Peoples Platform. In this sense, the expansion of such model would entail nothing more than the recognition of the status of aboriginal populations as *peoples* under International Law. Although the operationalisation of the Platform is still on-going, it seems important to recall here that no opposition to this prospect has been raised by other UNFCCC observer constituencies.

This model could also be relevant to enhance the normative capacity of those sub-national entities that, such as regions, cities, provinces or local governments, already enjoy sufficient legitimisation as to intervene in the process of international rule-making on climate change. By virtue of the principle of subsidiarity, which establishes that decisions should be taken as closely as possible to the concerned citizens, greater relevance should be given to those entities that already are the legitimate representatives of sub-national instances. This proposal is fully in line with the bottom-up approach to climate change governance promoted by the Paris Agreement, which expressively recognises the importance of local governments and municipal authorities in the achievement of the treaty's objectives. Furthermore, the introduction of such model would only systemise a reality in which subnational actors – such as networks of cities and majors–, have already step up their action towards climate change, complementing and sustaining the mitigation and adaptation policies initiated by nation States or acting in lack thereof.

On the other hand, the possible extension of this model to those non-governmental organisations, through which individuals or the civil society participate in climate change governance, certainly requires more efforts, in both theoretical and practical terms.

Theoretically, endorsing such a proposal would imply going beyond the classic and still prevalent approach of international law, which exclusively recognizes States and International Organizations as legitimate actors in the formulation of international binding norms. Undoubtedly, ensuring a more prominent role to non-State actors would help to redress the existing conflict between the proliferation of non-governmental entities that already contribute –though largely informally– to the making and implementation of international climate change law and the rather exclusive, central role that is still granted to States. In turn, this would overall reinforce those concepts of sovereignty and international subjectivity weakened by the processes of globalization and

fragmentation of international law. Likewise, a more formal and firm recognition of the role played by civil society organizations in the different processes of elaboration of climate change law, would bring greater transparency to decision-making. For instance, forcing those organizations that work on hidden agendas or in promotion of particular interests to be accountable for their actions.

In this regard, the possibility to build a system of participation based on the 'Arctic model of participation' also allows to draw on Arctic indigenous peoples' advocacy and rights-based discourse. In analogy to the right to indigenous self-determination on which Arctic IPs have built their claims of participation, the establishment of a right to a healthy environment would constitute the legal basis for improving the participation of those non-State actors that work in the promotion of public good and whose rights are endangered by a changing climate. Even though individuals do not yet hold a human right to a healthy environment on which to build their status as rights-holders, the conclusions drawn from the analysis carried out in Chapter 5 allow us to speculate that its codification is incipient. Pending this development, the possibility that a human rights-based approach prevails in future climate change negotiations seems relevant to the demand of a better positioning of non-State actors in climate change governance, particularly to enhance the participation of those constituencies' members whose rights, as in the case of women and youth, are directly affected by global warming. In this regard, the adoption of the UN Climate Gender Action Plan which, among other actions, aims to achieve the full, equal and meaningful participation of women in the UNFCCC process, is a promising first step to be followed and institutionalised.

Although, as in the case of the tripartite system of the International Labour Organisation, examples of non-elected NGOs acting on the same level as sovereign States exist, the possibility to enhance *tout court* the participatory rights of, for instance, environmental and business NGOs in international climate change law-making, seems difficult to sustain. This would not sufficiently consider the question of legitimacy and democratic representation as embodied by State consent in international law. Therefore, mechanisms for ensuring that the members of different constituencies are real representatives of the interests for which they claim to speak for should also be foreseen, for example by instituting the direct election of constituencies representatives with elections secured by block chain.

Alternatively, a mechanism for striking a better balance between constituencies upholding different interests could be once again found in the Arctic model of participation, which confers different degrees of participation to different entities: States with voting rights, Permanent Participants that exercise a *de facto* veto-kind power and, finally Observers. In this sense, a renewed UNFCCC institutional arrangement could be built on a progressive basis. Participation with voting rights could be granted to those States and non-State entities that enjoy democratic legitimisation. Descending a scale of legitimisation then, the status of Permanent Participants could be authorised to those non-State actors that, by virtue of their status as rights-holders, should be able to fully and effectively participate in climate change law-making. Finally, the status of Observers would be exercised by non-democratically elected NGOs.

All things considered, because of the efficacy that this paradigm has demonstrated at the regional and international level, the 'Arctic model of participation' represents a relevant and potentially innovative precedent for improving the participation of non-State actors in international climate change law-making. In spite of its complex realisation, the need to promote a more open international climate change law-making process is manifested in the proliferation of climate change litigation cases before national and international courts, which are symptomatic of a general disaffection of non-State actors with the commitments reached by national States at the intergovernmental level and, more broadly, of the emergence of a transnational movement that advocates for the respect of their rights, including the right to participate in the making of international climate change norms.

While the Parties of the climate change regime have already recognised the need to reconsider the participation of the public in international climate change law-making, the conclusions of this study shows that, although further research must be conducted on who is to be considered a legitimate actor in international law-making, a model for improving the participation of individuals and societies in the formation of international climate norms already exists.

References

a) Textbooks

Climate change law

BODANSKY, D., BRUNNÉE, J. and L. RAJAMANI, *International Climate Change Law*. Oxford: Oxford University Press, 2017.

KLEIN, D., CARAZO, M., P., DOELLE, M. and others, *The Paris Agreement on Climate Change*. *Analysis and Commentary*. Oxford: Oxford University Press, 2017.

International law

BIRNE, P., BOYLE, A. and C. REDGWELL, *International Law and the Environment.* Oxford*:* Oxford University Press, 2009.

BROTONS, A., R., RIQUELME CORTADO, R., ORIHUELA CALATAYUD, E. and others. *Derecho Internacional. Curso General*. Valencia: Tirant lo Blanch, 2010.

CONFORTI, B., *Diritto Internazionale. VII edizione*. Napoli: Editoriale Scientifica, 2006.

KLABBERS, J. *International law*. Cambridge: Cambridge University Press, 2017.

PASTOR RIDRUEJO, J. A. *Cursos de Derecho Internacional Público y Organizaciones Internacionales*, Madrid: Tecnos, 2017.

Indigenous peoples

ANAYA, J. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2004.

TORRECUADRADA GARCÍA-LOZANO, S. *Los pueblos indígenas en el orden internacional*. Madrid: Dykinson, 2001.

b) Monographs and edited volumes

Non-State actors

ABAD CASTELOS, M. *¿Una alternativa solidaria frente a la barbarie? Las ONG en la nueva sociedad global*. Madrid: CIDEAL, 2004.

BETSILL, M and E. CORELL, (eds.) *NGO Diplomacy. The Influence of Nongovernmental Organisations in International Environmental Negotiations*. Cambridge, London: The MIT Press, 2008.

CLAPHAM, A. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006.

HOFMANN, R. (ed.) *Non-State Actors as New Subjects of International Law – From the Traditional State Order Towards the Law of the Global Community.* Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law March 25 to 28 1998. Berlin: Duncker und Humblot, 1999.

NOORTMANN, M, REINISH, A. and C. RYNGAERT (eds.) *Non-State Actors in International Law*. Oxford, Portland: Hart Publishing, 2015.

OBERTHÜR, S., BUCK, M., MÜLLER, S. and others (eds.) *Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience*. Berlin: Ecologic-Institute for International and European Environmental Policy, 2003.

PETERS, A., KOECHLIN, L., FÖRSTER, T. and G. FENNER ZINKERNAGEL (eds.) *Non-State Actors as Standards Setters*. Cambridge: Cambridge University Press, 2009.

Climate change law and governance

ABATE, R., S. and E., A. KRONK WARNER (eds.) *Climate Change and Indigenous Peoples. The Search for Legal Remedies*. Cheltenham, Northampton: Edward Elgar, 2013.

AVERCHENKOVA, A., FANKHAUSER, S. and M. NACHMANY (eds.) *Trends in Climate Change Litigation.* Cheltenham: Edward Elgar, 2017.

BIERMANN, F. *Earth System Governance. World Politics in the Anthropocene*. Cambridge, London: The MIT Press, 2014.

GILES CARNERO, R. (coord.) *Cambio Climático, Energía y Derecho Internacional: Perspectivas de Futuro*. Cizur Menor: Aranzadi, 2012.

HICKMANN, T. *Rethinking Authority in Global Governance. How transnational climate initiatives relate to the international climate regime*. Oxon, New York: Routledge, 2016.

HOLLO, E., J., KUVOLESI, K. and M. MEHLING (eds.) *Climate Change and the Law*. Dordrecht: Springer, 2013.

JORDAN, A., HUITEMA, D., VAN ASSELT, H. and J. FORSTER (eds.) *Governing Climate Change. Polycentricity in Action?* Cambridge: Cambridge University Press, 2018.

RIEDEL, A. and R. BODLE, *Local Communities and Indigenous Peoples Platform – potential governance arrangements under the Paris Agreement*. Denmark: Nordic Council of Ministers, 2018.

ROSER, D. and C. SEIDEL, *Climate Justice. An Introduction*. New York, London: Routledge, 2013.

STEVENSON, H. and J., S., DRYZEK, *Democratizing Global Climate Governance.* Cambridge: Cambridge University Press, 2014.

International law

BESSON, S. and J. TASIOULAS (eds.) *The Philosophy of International Law*. Oxford: Oxford University Press, 2010.

BODANSKY, D., BRUNNÉ, J. and E. HEY, (eds.) *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2007.

BOYLE, A. and C. CHINKIN, *The Making of International Law*. Oxford: Oxford University Press, 2007.

HIGGINS, R. *Problems and Process: International Law and How We Use It.* Oxford, Oxford University Press, 1994.

HUNTER, D., SALZMAN, J. and D. ZAELKE, *International Environmental Law and Policy*. St. Paul MN: Foundation Press, 2015.

KLABBERS, J., PETERS, A. and G. ULFSTEIN, *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2009.

PETERS, A. *Beyond Human Rights. The Legal Status of the Individual in International Law.* Cambridge: Cambridge University Press, 2016.

WOLFRUM, R. and V. RÖBEN (eds.) *Legitimacy in International Law*. Heidelberg: Springer, 2008.

Indigenous peoples

ANDERSEN, P. J. (ed.) *The Indigenous World 2018*. Copenhagen: The International Work Group for Indigenous Affairs, 2018.

CASSESE, A. *Self-Determination of Peoples. A Legal Reappraisal*. Cambridge: Cambridge University Press, 1995.

DAHL, J. *IWGIA: a history*. Copenhagen: International Work Group on Indigenous Affairs, 2009.

HEINÄMÄKI, L. *The Right to Be a Part of Nature – Indigenous peoples and the Environment.* Rovaniemi: Lapland University Press, 2010.

HUSSAIN K. and A. PETRÉTEI (eds.) *Understanding the Many Faces of Human Security: Perspectives of Northern Indigenous Peoples*. Leiden, Boston: Brill Nijhoff, 2016.

Human rights and the environment

BOYD, D., R. *The Environmental Right Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: University of British Columbia Press, 2012.

McLEMAN, R. and F. GEMENNE (eds.) *Routledge Handbook of Environmental Displacement and Migration*. New York, London: Routledge, 2018.

ZORZI GIUSTINIANI, F., SOMMARIO, E., CASOLARI, F. and others (eds.) *Routledge Handbook of Human Rights and Disasters*. New York, London: Routledge, 2018.

Human rights-climate change nexus

DUYCK, S., JODOIN, S. and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Governance*. New York, London: Routledge, 2018.

McINERNEY-LANKFORD, S., DARROW, M. and L. RAJAMANI, *Human Rights and Climate Change: A review of the International Legal Dimensions*. Washington: The International Bank for Reconstruction and Development, 2011.

The Arctic region

BYERS, M. *International Law and the Arctic.* Cambridge: Cambridge University Press, 2014.

CONDE, E. and S. SÁNCHEZ IGLESIAS (eds.) *Global Challenges in the Arctic Region*. London, New York: Routledge, 2017.

DOWNIE, L. and T. FENGE, *Northern Lights Against POPs*. Montreal: McGill-Queen's University Press, 2003.

HEININEN, L., EXNER PIROT, H. and J. PLOUFFE (eds.) *The Arctic Council: 20 Years of Regional Cooperation and Policy-Shaping*, Arctic Yearbook 2016. Akureyri: Northern Research Forum, 2016.

KEIL, K. and S. KNECHT (eds.) *Governing Arctic Change. Global Perspectives*. London: Palgrave Macmillan, 2017.

NORD, D. *The Arctic Council: Governance within the Far North*, New York, London: Routledge, 2016.

NYMAND LARSEN, J. and G. FONDAHL (eds.) *Arctic Human Development Report. Regional Processes and Global Linkages*. Copenhagen: Nordic Council of Ministers, 2014.

SHADIAN, J. *The Politics of Arctic Sovereignty. Oil, Ice and Inuit Governance*. New York, London: Routledge, 2014.

SHIBATA, A., ZOU, L., SELLHEIM, N. and M. SCOPELLITI (eds.) *Emerging Legal Orders in the Arctic: The Role of non-Arctic Actors.* New York, London: Routledge, 2019.

STEINBERG, P., TASCH, J., GERHARDT, H. and A. KEUL, *Contesting the Arctic. Rethinking Politics in the Circumpolar North*. London: I.B. Tauris, 2015.

c) Chapters

Non-State actors

CLAPHAM, A. "Human Rights Obligations for Non-State-Actors: Where are We Now? in F. LAFONTAINE and F. LAROCQUE (eds.) *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*. Cambridge: Intersentia, 2018, pp. 1–18

D'ASPREMONT, J. "Non-State Actors and the Social Practice of International Law" in M. NOORTMANN, A. REINISCH and C. RYNGAERT (eds.) *Non-State Actors in International Law*. London: Hart Publishing, 2015, pp. 11–31.

SPIRO, P. "Non-Governmental Organizations and Civil Society" in D. BODANSKY, J. BRUNNÉ and E. HEY (eds.) *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2007, pp. 770–790.

WHEATLEY, S. "Democratic governance beyond the state: the legitimacy of non-state actors" in A. PETERS, L. KOECHLIN, T. FÖRSTER and G. FENNER ZINKERNAGEL (eds.) *Non-State Actors as Standards Setters*. Cambridge: Cambridge University Press, 2009, pp. 215–240.

ZYBERI, G. "Non-state actors from the perspective of the International Law Commission" in J. D'ASPREMONT (ed.) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law.* New York, London: Routledge, 2011, pp. 165–178.

Climate change law and governance

BÄCKSTRAND, K., ZELLI, F. and P. SCHLEIFER, "Legitimacy and Accountability in Polycentric Climate Governance" A. JORDAN, D. HUITEMA, H. VAN ASSELT, and J. FORSTER (eds.) *Governing*

Climate Change. Polycentricity in Action? Cambridge: Cambridge University Press, 2018, pp. 338–356.

BORRÁS PENTINAT, S. "Los litigios climáticos: Entre la tutela climática y la fiscalización de las responsabilidades por daños climáticos" in R. GILES CARNERO (coord.) *Cambio Climático, Energía y Derecho Internacional: Perspectivas de Futuro*. Cizur Menor: Aranzadi, 2012, pp. 91–104.

CHRISTIANO, T. "Climate Change and State Consent" in J. MOSS (ed.) *Climate Change and Justice*. Cambridge: Cambridge University Press, 2015, pp. 17–38.

GILES CARNERO, R. "La Corte International de Justicia frente a las controversias internacionales de carácter medioambiental", in E., M. VÁZQUEZ GÓMEZ, M., D. ADAM MUÑOZ and N. CORNAGO-PRIETO (coord.) *El arreglo pacífico de las controversias internacionales: XXIV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones internacionales*. Valencia: Tirant lo Blanch, 2013, pp. 159–168.

NASIRITOUSI, N., HJERPE, M. and L., B., LINNÉR, "The roles on non-state actors in climate change governance: understanding agency through governance profiles", *International Environmental Agreements: Politics, Law and Economics*, Vol. 16, No. 1, 2016, pp. 109–126.

SCOPELLITI, M. "El Liderazgo Climático Europeo: ¿Qué Está En Juego?" in E. CONDE PÉREZ (coord.) *Occasional Paper ICEI OP03/18:* Proyecto Jean Monnet - La Unión Europea y la seguridad: defensa de los espacios e intereses comunes, 2018, pp. 32–39.

VAN ASSELT, H. "The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement", *Climate Law*, Vol. 6, 2016, pp. 91–108.

International law and legitimacy

BODANSKY, D. “Legitimacy” in D. BODANSKY, J. BRUNNÉ and E. HEY (eds.) *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2007, pp. 705–721.

BUCHNAN, A. “The Legitimacy of International Law” in S. BESSON and J. TASIOULAS (eds.) *The Philosophy of International Law*. Oxford: Oxford University Press, 2010, pp. 79–96.

CHRISTIANO, T. “Democratic Legitimacy and International Institutions” in S. BESSON and J. TASIOULAS (eds.) *The Philosophy of International Law*. Oxford: Oxford University Press, 2010, pp. 119–137.

CONDE PÉREZ, e. “El control democrático del segundo pillar o un supuesto de déficit democrático” in F. ALDECOA LUZÁRRAGA (coord.) *Los tratados de Roma en su cincuenta aniversario. Perspectivas desde la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*. Madrid: Marcial Pons, 2008, pp. 1439–1450.

MARTÍ, J., L. “Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law” in S. BESSON and J. D’ASPREMONT (eds.) *The Oxford Handbook on the Sources of International Law*. Oxford: Oxford University Press, 2017, pp. 724–745.

WOLFRUM, R. “Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations” in R. WOLFRUM and V. RÖBEN (eds.) *Legitimacy in International Law*. Heidelberg: Springer, 2008, pp. 1–24.

Indigenous peoples

ABATE, R., S. and E., A. KRONK WARNER, “Commonality among unique indigenous communities: an introduction to climate change and its impacts on indigenous peoples”, in R., S. ABATE and E., A. KRONK WARNER (eds.) *Climate Change and Indigenous Peoples. The Search for Legal Remedies*. Cheltenham, Northampton: Edward Elgar, 2013, pp. 3–18.

APONTE MIRANDA, L. “Introduction to indigenous peoples’ status and rights under international human rights law” in R., S. ABATE and E., A. KRONK WARNER (eds.) *Climate Change and Indigenous Peoples. The Search for Legal Remedies.* Cheltenham, Northampton: Edward Elgar, 2013, pp. 39–62.

POWLESS, B. “The Indigenous rights framework and climate change”, in S. DUYCK, S. JODOIN and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Change*. London, New York: Routledge, 2018, pp. 213–221.

Human rights and the environment

ADINOLFI, G. “The Right to a Healthy Environment. Delineating the content (and contours) of a slippery notion” F. ZORZI GIUSTINIANI, E. SOMMARIO, F. CASOLARI and others (eds.) *Routledge Handbook of Human Rights and Disasters*. New York, London: Routledge, 2018, pp. 211–227.

BOYLE, A. “Human Rights and the Environment. Where Next?” in B. BOER (ed.) *Environmental Law Dimensions of Human Rights*. Oxford: Oxford University Press, 2015, pp. 201–239.

JOSEPH, S. “Extraterritorial Human Rights Duties” in S. JOSEPH, *Blame it on the WTO?: A Human Rights Critique*. Oxford: Oxford University Press, 2011, pp. 245–264.

KNOX, J., H. “Diagonal Environmental Rights” in M. GIBNEY and S. SKOGLY (eds.) *Universal Human Rights and Extraterritorial Obligations*. Philadelphia: University of Pennsylvania Press, 2010, pp. 148–178.

LOUCAIDES, L. “Environmental Protection through the Jurisprudence of the European Convention on Human Rights” in L. LOUCAIDES (ed.) *The European Convention on Human Rights. Collected Essays*. Leiden: Brill, 2005, pp. 167–191.

VIÑUALES, J., E. "A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment", in N. BHUTA (ed.) *The Frontiers of Human Rights*. Oxford: Oxford University Press, 2016, pp. 177–221.

Human rights-climate change nexus

CARDESA-SALZMANN, A. "Reflections on the Sustainability of a Human Rights Approach in the Context of the Climate Change Regime", in R. GILES CARNERO (coord.) *Cambio Climático, Energía y Derecho Internacional: Perspectivas de Futuro*. Cizur Menor: Aranzadi, 2012, pp. 169–178.

CASTILLO DAUDÍ, M. "Cambio Climático y Derechos Humanos: El Asunto de los Inuit Ante la Comisión Interamericana de Derechos Humanos" in R. GILES CARNERO (coord.) *Cambio Climático, Energía y Derecho Internacional: Perspectivas de Futuro*. Cizur Menor: Aranzadi, 2012, pp. 207–218.

CULLET, p. "Human Rights and Climate Change. Broadening the Rights to Environment", in C., P. CARLARNE, K. R. GRAY and R. TARASOFSKY (eds.) *The Oxford Handbook of International Climate Change Law*, 2016, pp. 495–515.

JODOIN, S., FAUCHER, R. and K. LOFTS, "Look before you jump: assessing the potential influence of the human rights bandwagon on domestic climate policy" in S. DUYCK, S. JODOIN and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Governance*. New York, London: Routledge, 2018, pp. 167–182.

KIRCHMEIER, F. and Y. LADOR, "From Copenhagen to Paris at the UN Human Rights Council. When climate change became a human rights issue" in S. DUYCK, S. JODOIN and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Governance*. New York, London: Routledge, 2018, pp. 145–164.

KNOX, J., H. "The Paris Agreement as a Human Rights Treaty" in D. AKANDE, J. KUOSMANEN, H. McDERMOTT and others (eds.) *Human Rights and 21st*

Century Challenges: Poverty, Conflict, and the Environment. Oxford: Oxford University Press, 2019, pp. 1–26.

KNOX, J., H. "Human Rights Principles and Climate Change" in C., P. CARLARNE, K. R. GRAY and R. TARASOFSKY (eds.) *The Oxford Handbook of International Climate Change Law*, 2016, pp. 214–235.

RUBINSON VOLLMER, A. "Mobilizing human rights to combat climate change through litigation" S. DUYCK, S. JODOIN and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Governance*. New York, London: Routledge, 2018, pp. 359–371.

SAVARESI, A. "Climate change and human rights. Fragmentation, interplay, and institutional linkages" in S. DUYCK, S. JODOIN and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Change*. London, New York: Routledge, 2018, pp. 31–42.

STABINSKY, D. "Climate justice and human rights" in S. DUYCK, S. JODOIN and A. JOHL (eds.) *Routledge Handbook of Human Rights and Climate Change*. London, New York: Routledge, 2018, pp. 280–291

Public participation

EBBESSON, J. "Principle 10. Public Participation" in J., E. VIÑUALES (ed.) *The Rio Declaration on Environment and Development*. Oxford: Oxford University Press, 2015, pp. 288–309.

EBBESSON, J. "Public Participation" in D. BODANSKY, J. BRUNNÉ and E. HEY, (eds.) *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press, 2007, pp. 681–703.

KOIVUROVA, T., DUYCK, S. and L. HEINÄMÄKI, "Climate Change and Human Rights" in E., J. HOLLO, K. KUVOLESI and M. MEHLING (eds.) *Climate Change and the Law*. Dordrecht: Springer, 2013, pp. 287–325.

The Arctic region

ARENAS HIDALGO, N. "Climate Change Induced Displacement: Migration as an Adaptation Strategy also in the Arctic?" in E. CONDE and S. SÁNCHEZ IGLESIAS (eds.) *Global Challenges in the Arctic Region*. London, New York: Routledge, 2017, pp. 254–277.

BORGIA, F. and P. VARGIU, "The Inuit Declaration on Sovereignty in the Arctic Between the Right to Self-Determination and a New Concept of Sovereignty?" in G. ALFREDSSON and T. KOIVUROVA (eds.) *The Yearbook of Polar Law IV*, 2012, pp. 189–204.

CONDE PÉREZ, E. and Z. VALERIEVA YANEVA "Outer Arctic continental shelf", in E. CONDE and S. SÁNCHEZ IGLESIAS (eds.) Global Challenges in the Arctic Region. London, New York: Routledge, 2017, pp. 19–41.

DOROUGH, D., S. "Our homeland. Arctic Indigenous peoples' perspectives on non-Arctic states" in A. SHIBATA, L. ZOU, N. SELLHEIM and M. SCOPELLITI (eds.) *Emerging Legal Orders in the Arctic: The Role of non-Arctic Actors.* New York, London: Routledge, 2019, pp. 69–90.

DOROUGH, D., S. "The Rights, Interests and Role of the Arctic Council Permanent Participants" in R. BECKMAN, T. HENRIKSEN, K. DALAKER KRAABEL and others (eds.) *Governing Arctic Shipping*. Leiden, Boston: Brill, 2017, pp. 68–103.

DUYCK, S. "Which Canary in the Coalmine? The Arctic in the International Climate Change Regime", in T. KOIVUROVA, G. ALFREDSSON and W. HASANAT (eds.) *The Yearbook of Polar Law, Volume 4.* Leiden, Boston: Brill, 2012, pp. 583–617.

FABBI, N., G. “Inuit foreign policy and international relations in the Arctic” in L., C. JENSEN and G. HONNELAND (eds.) *Handbook of the politics of the Arctic*. Cheltenham: Edward Elgar, 2015, pp. 482–500.

FENGE, T. “POPs and Inuit: Influencing the Global Agenda” in T. FENGE and D. DOWNIE (eds.) *Northern Lights Against POPs*. Montreal: McGill- Queen’s University Press, 2003, pp. 193–213.

GAMBLE, J. and J. SHADIAN, “One Arctic…But Uneven Capacity: The Arctic Council Permanent Participants” in W. LACKENBAUER, N. HEATHER and W. GRAVES (eds.) *One Arctic. The Arctic Council and Circumpolar Governance.* Ottawa, Waterloo: Canadian Arctic Resources Committee and Centre on Foreign Policy and Federalism, 2017, pp. 142–156.

HELENIAK, T. “Arctic Populations and Migration” in J. NYMAND LARSEN and G. FONDAHL (eds.) *Arctic Human Development Report. Regional Processes and Global Linkages*. Denmark: Nordic Council of Ministers, 2014, pp. 53–103.

POELZER, G. “Governance in the Arctic: Political Systems and Geopolitics” in J. NYMAND LARSEN and G. FONDAHL (eds.) *Arctic Human Development Report. Regional Processes and Global Linkages*. Copenhagen: Nordic Council of Ministers, 2014, pp. 185–220.

SCOPELLITI, M. and N. SELLHEIM, “Sustaining a Conservationist Agenda? NGO-Influence on Arctic Sealing, Whaling and Hydrocarbon Regimes” in A. SHIBATA, L. ZOU, N. SELLHEIM and M. SCOPELLITI (eds.) *Emerging Legal Orders in the Arctic: The Role of non-Arctic Actors*. New York, London: Routledge, 2019, pp. 91–106.

SELIN, H. "Global Environmental Governance and Treaty-Making: The Arctic's Fragmented Voice" in K. KEIL and S. KNECHT (eds.) *Governing Arctic Change. Global Perspectives*. London: Palgrave Macmillan, 2017, pp. 101-120.

SHADIAN, J. “Reimagining Political Space: The Limits of Arctic Indigenous Self-Determination in International Governance” in K. KEIL and S. KNECHT (eds.)

Governing Arctic Change. Global Perspectives. London: Palgrave Macmillan, 2017, pp. 43–58.

STEPIEN, A., PETRÉTEI, A. and T. KOIVUROVA, "Sámi Parliaments in Finland, Norway and Sweden" in T. H. MALLOY, A. OSIPOV and B. VIZI (eds.) *Managing Diversity through Non-Territorial Autonomy: Assessing Advantages, Deficiencies, and Risks*. Oxford: Oxford University Press, 2015, pp. 117–138.

TORRECUADRADA GARCÍA-LOZANO, S. and R., M. FERNÁNDEZ EGEA, "Environmental challenges for Arctic peoples" in E. CONDE and S. SÁNCHEZ IGLESIAS (eds.) *Global Challenges in the Arctic Region*. London, New York: Routledge, 2017, pp. 236–253.

VANDERZWAAG, D., HUEBERT, R. and S. FERRARA, "The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters" in A., G. OUDE ELERINK and D., R. ROTHWELL (eds.) *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction.* The Hague: Martinus Nijhoff, 2001, pp. 225–248.

d) Encyclopedias and courses of The Hague Academy of International Law

BYERS, M. "Arctic Region". *Max Planck Encyclopedia of Public International Law*, 2010.

Available at:http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e96.

CONDE PÉREZ, E. and M. SCOPELLITI, "Arctic Region", in A. CARTY (eds.) *Oxford Bibliografies in International Law.*

Available at: http://www.oxfordbibliographies.com/abstract/document/obo-9780199796953/obo-9780199796953-0090.xml?rskey=1Kg6wj&result=1&q=arctic+region#firstMatch

EBBESSON, J. "Public Participation in Environmental Matters". *Max Planck Encyclopedia of Public International Law*, 2009.
Available at:http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1769.

PHARAD, D. "The legal status of the Arctic regions". *Collected Courses of the Hague Academy of International Law*, vol. 163, 1979, pp. 49–117.

e) Journal articles

Non-state actors

BÄCKSTRAND, K., KUYPER, J., W., LINNÉR, B. and others, "Non-state actors in global climate governance: from Copenhagen to Paris and beyond", *Environmental Politics*, Vol. 24, No. 4, 2017, pp. 561–579.

BERNAUER, T. and C. BETZOLD, "Civil Society in Global Environmental Governance", *The Journal of Environment & Development*, Vol. 21, No. 1, 2012, pp. 62–66.

FALK, R. and A. STRAUSS, "Toward Global Parliament", *Foreign Affairs*, Vol. 80, No. 1, 2001, pp. 212–220.

HARROFF-TAVEL, M. "The International Committee of the Red Cross and the promotion of international humanitarian law: Looking back, looking forward", *International Review of the Red Cross*, No. 96, 2014, pp. 817–857.

MAGGIO, G., F. "Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity", *UCLA Journal of Environmental Law & Policy*, Vol. 16, No. 1, 1997, pp. 179–226.

MARTENS, K. "Examining the (Non-) Status of NGOs in International Law", *Indiana Journal of Global Legal Studies*, Vol. 10, No. 2, 2003, pp. 1–24.

SIMMONS, P., J. “Learning to Live with NGOs”, *Foreign Policy*, No. 112, 1998, pp. 82–96.

THIRLWAY, H. “The Role of Non-State Actors: A Response to Professor Ryngaert”, *Netherlands International Law Review*, Vol. 64, No. 1, 2017, pp. 141–153.

WILSON, W., J. “Legal Foundations for NGO Participation in Climate Treaty Negotiations”, *Sustainable Development Law and Policy*, Vol. 10, No. 2, 2010, p. 54.

Climate change law and governance

BAXI, U. “Towards a climate change justice theory?”, *Journal of Human Rights and the Environment*, Vol. 7, No. 1, 2016, pp. 7–31.

BETSILL, M. “Trump’s Paris withdrawal and the reconfiguration of global climate change governance”, *Chinese Journal of Populations Resources and Environment*, Vol. 15, No 3, 2017, pp. 189–191.

BETZOLD, C. “Responsiveness or influence? Whom to lobby in International Climate Change Negotiations”, *International Negotiations*, Vol. 19, 2014, pp. 35–61.

BETZOLD, C. “Business insiders and environmental outsider? Advocacy strategies in international climate change negotiations”, *Interest Groups & Advocacy*, Vol. 2, No. 3, 2013, pp. 302–322.

BORRÁS PENTINAT, S. “Movimientos para la justicia climática global: replanteando el escenario internacional del cambio climático”, *Relaciones Internacionales*, No. 33, 2017, pp. 97–119.

CHAN, S., VAN ASSELT, H., HALE , T. and others, “Reinvigorating International Climate Policy: A comprehensive Framework for Effective Nonstate Action”, *Global Policy*, Vol. 6, No. 4, 2015, pp. 466–473.

DOELLE, M. “The Paris Agreement: Historic Breakthrough or High Stakes Experiment?”, *Climate Law*, Vol. 6, 2016, pp. 1–20.

JACOBS, M. “High pressure for low emissions. How civil society created the Paris climate agreement”, *Juncture*, Vol. 2, No. 4, 2016, pp. 314–323.

KEOHANE, R., O. and D. G. VICTOR, “The Regime Complex for Climate Change”, *Perspective on Politics*, Vol. 9, No. 1, 2011, pp. 7–23.

LÁZARO TOUZA, L. “Cambio climático en 2018: de la gobernanza climática global post Trump a España”, *ARI 22*, 2018, pp. 1–7.

MARKELL, D. and J. B RUHL, “An Empirical Assessment of Climate Change In the Courts: A New Jurisprudence Or Business As Usual?”, *Florida Law Review*, Vol. 64, No. 1, 2012, pp. 15–86.

OSTROM, E. “Polycentric systems for coping with collective action and global environmental change”, *Global Environmental Change*, Vol. 20, No. 4, 2010, pp. 550–557.

PRIOR, T. and L. HEINÄMÄKI, “The Rights and Role of Indigenous Women in The Climate Change Regime”, *Arctic Review on Law and Politics*, Vol. 8, 2017, pp. 193–221.

RAJAMANI, L. “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations”, *Journal of Environmental Law*, Vol. 28, No. 2, 2016, pp. 337–358.

RUIZ, X. “El Papel de la Unión Europea en las Negociaciones sobre el Cambio Climático”, *UNISCI Journal*, No. 39, 2015, pp. 105–126.

SANDS, P. “Climate Change and the Rule of Law: Adjudicating the Future in International Law”, *Journal of Environmental Law*, Vol. 28, No. 19, 2016, pp. 19–35.

SAVARESI, A. “The Paris Agreement: a new beginning?”, *Journal of Energy & Natural Resources Law*, Vol. 34, No. 1, 2016, pp. 16–26.

Climate change litigation

BODANSKY, D. “The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections”, *Arizona State Law Journal*, Vol. 49, 2017, pp. 689–712.

BURNS, W. “Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention”, *Sustainable Development Law & Policy*, Vol. 1, No. 2, 2006, pp. 27–51.

BERGKAMP, L. and J. C. HANEKAMP, “Climate Change Litigation against States: The Perils of Court-made Climate Policies”, *European Energy and Environmental Law Review*, Vol. 24, No. 5, 2015, pp. 102–114.

CORSI, G. “A bottom-up approach to climate governance: the new wave of climate change litigation”, *ICCG Reflection*, No. 57, 2017, pp. 1–12.

COX, R. “A climate change litigation precedent: Urgenda Foundation v The State of the Netherlands”, *Journal of Energy & Natural Resources Law*, Vol. 34, No. 2, 2016, pp. 143–163.

DE VILCHEZ MORAGUES, P. “Broadening the scope: The Urgenda case, the Oslo Principles and the role of national courts in advancing environmental protection concerning climate change”, *The Spanish Yearbook of International Law*, Vol. 20, 2016, pp. 71–92.

HUNTER, D. “The Implications of Climate Change Litigations for International Environmental Law-Making”, *Washington College of Law Research Paper*, No. 14, 2007, pp. 1–19.

HUNTER, D. and J. SALZMAN, "Negligence in the Air: The Duty of Care in Climate Change Litigation", *University of Pennsylvania Law Review*, Vol. 155, 2007, pp. 1741–1794.

McCRIMMON, D. "The Athabaskan Petition to the Inter-American Human Rights Commission: Using human rights to respond climate change", *The Polar Journal*, Vol. 2, No.16, 2016, pp. 398–416.

OSOFSKY, H. M. "The Inuit Petition as a Bridge? Beyond Dialectic of Climate Change and Indigenous Peoples' Rights", *American Indian Law Review*, Vol. 31, No. 2, 2007, pp. 675–697.

PEEL, J. "Issues in Climate Change Litigation" *Carbon & Climate Law Review*, Vol. 5, No. 1, 2011, pp. 15–24.

PEETERS, M. "Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States", *Review of European Community & International Environmental Law*, Vol. 25, No. 1, 2016, pp. 123–129.

PRESTON, B., J. "Climate Change Litigation (Part 1)", *Carbon & Climate Law Review*, Vol. 5, No. 1, 2011, pp. 3–14.

ROY, S. and E. WOERDMAN, "Situating Urgenda v The Netherlands within comparative climate change litigation", *Journal of Energy & Natural Resources Law*, Vol. 34, No. 2, 2016, pp. 165–189.

International law and legitimacy

BESSON, S. "State Consent and Disagreement in International Law-Making. Dissolving the Paradox" *Leiden Journal of International Law*, Vol. 29, 2016, pp. 289–316.

BESSON, S. and J., L. MARTÍ, "Legitimate actors of international law-making: towards a theory of international democratic representation", *Jurisprudence*, 2018, pp. 1–38.

MORAVCSIK, A. "Is there a "Democratic Deficit" in World Politics? A framework for Analysis", *Government and Opposition*, Vol. 39, No. 2, 2004, pp. 336–363.

Indigenous peoples

BARNABAS, S., G. "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law", *International Human Rights Law Review*, Vol. 6, 2017, pp. 242–261.

TENNBERG, M. "Indigenous peoples as international political actors: a summary", *Polar Record*, Vol. 46, No. 238, 2010, pp. 264–270.

Human rights and the environment

ABRISKETA J. and M. NAGORE CASAS, "Extraterritorial Application of Human Rights Treaties", *Oxford Bibliographies in International Law*, 2016.

BOYLE, A. "Human Rights or Environmental Rights? A Reassessment", *Fordham Environmental Law Review*, Vol. 18, No. 3, 2008, pp. 471–551.

COOMANS, F. "The Ogoni Case Before the African Commission on Human and Peoples' Rights", *International and Comparative Law Quarterly*, Vol. 52, No. 3, 2003, pp. 749–760.

GROMILOVA, M. "Rescuing the People of Tuvalu: Towards an I.C.J. Advisory Opinion on the International Legal Obligations to Protect the Environment and Human Rights of Populations Affected by Climate Change", *Intercultural Human Rights Law Review*, Vol. 10, 2015, pp. 233–289.

HANNUM, H. “Reinvigorating Human Rights for the Twenty-First Century”, *Human Rights Law Review*, Vol. 16, 2016, pp. 409–451.

McGOLRICK, D. “The Boundaries of Justiciability”, *The International and Comparative Law Quarterly*, Vol. 59, No. 4, 2010, pp. 981–1019.

PETERS, A. “Global Animal Law: What It Is and Why We Need It”, *Transnational Environmental Law*, Vo. 5, No. 1, 2016, pp. 9–23.

WOLFE, K. “Greening the International Human Rights Sphere? Environmental Rights and the Draft Declaration Principles on Human Rights and the Environment”, *APPEAL Review of Current Law and Law Reform*, Vol. 9, No. 1, 2003, pp. 45–58.

Human rights-climate change nexus

AMINZADEH, S. “A Moral Imperative: The Human Rights Implications of Climate Change”, *Hastings International & Comparative Law Review*, Vol. 30, No. 2, 2007, pp. 231–265.

ATAPATTU, S. “The Paris Agreement and human rights: is sustainable development the “new human right”?, *Journal of Human Rights and the Environment*, Vol. 9, No. 1, 2018, pp. 68–88.

BODANSKY, D. “Introduction: Climate Change and Human Rights: Unpacking the Issues”, *Georgia Journal of International and Comparative Law*, Vol. 38, No. 3, 2010, pp. 551–524.

DAVIES, K., ADELMAN, S., GREAR, A. and others, “The Declaration on Human Rights and Climate Change: a new legal tool for global policy change”, *Journal of Human Rights and the Environment*, Vol. 8, No. 2, 2017, pp. 217–253.

DUYCK, S. “The Paris Agreement and the Protection of Human Rights in a Changing Climate”, *Yearbook of international Environmental Law*, Vol. 26, No. 1, 2015, pp. 3–45.

DUYCK, S. and Y. LADOR, “Human Rights into Climate Action After Paris: Opportunities for the UNFCC, the Human Rights Institutions and the G-20”, *Human Rights and International Climate Politics Study*, 2016, pp. 3–20.

FERREIRA, P., G. “Did the Paris Agreement Fail to Incorporate Human Rights in Operative Provisions? Not if You Consider the 2016 SDGs”, *Centre for International Governance Innovation Paper*, No. 113, 2016, pp. 1–11.

JOHL, A. and S. DUYCK, “Promoting Human Rights in the Future Climate Regime”, *Ethics, Policy and Environment*, Vol. 15, No. 3, 2012, pp. 298–302.

KNOX, J., H. “Climate Change and Human Rights Law”, *Virginia Journal of International Law*, Vol. 50, No. 1, 2009, pp. 1–59.

Public participation

CASADO CASADO, L. “Acceso a la Información, Participación Pública y Acceso a la Justicia en Materia de Medio Ambiente: Veinte Años del Convenio de Aarhus”, *Revista Catalana de Dret Ambiental*, Vol. IX, No. 1, 2018, pp. 1–10.

DUYCK, S. “Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime”, *Review of European Community & International Environmental Law*, Vol. 22, No. 4, 2015, pp. 123–137.

DUVIC-PAOLI, L., A. “The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence”, *Yearbook of International Environmental Law*, Vol. 23, No. 1, 2012, pp. 80–105.

JODOIN, S., DUYCK, S. and K. LOFTS, “Public Participation and Climate Governance: An Introduction”, *Review of European Community & International Environmental Law*, Vol. 24, No. 2, 2015, pp. 117–122.

KONRAD, C. “UNFCCC and the Aarhus Convention. An Analysis of Existing Rules”, *Justice and Environment*, 2011, pp. 1–9.

KRAVCHENKO, S. “Procedural Rights as a Crucial Tools to Combat Climate Change”, *Georgia Journal of International and Comparative Law*, Vol. 38, No. 3, 2010, pp. 614–648.

SCONFIENZA, U. “The Narrative of Public participation in Environmental Governance and its Normative Presuppositions”, *Review of European Community & International Environmental Law*, Vol. 24, No. 2, 2015, pp. 139–151.

VAN BEKHOVEN, J. “Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact”, *National Taiwan University Law Review*, Vol. 11, No. 2, 2016, pp. 219–260.

The Arctic region

CONDE PÉREZ, E. “Delimitaciones marítimas y territoriales en el Ártico: Desarrollo y Tendencias", *Revista Española de Derecho Internacional* Vol. 68, No. 1, 2016, pp. 235-239.

DE LA ROSA JAIMES, V. "The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights", *California Western International Law Journal*, Vol. 2, No. 45, 2015, pp. 213–260.

GRACZYK, P. and T. KOIVUROVA, “A new era in the Arctic Council’s external relations? Broader consequences of the Nuuk observer rules for Arctic governance”, *Polar Record*, Vol. 50, No. 254, 2014, pp. 225–236.

HEINÄMÄKI, L. “Towards an Equal Partnership between Indigenous Peoples and States: Learning from Arctic Experiences?”, *The Yearbook of Polar Law*, Vol. 3, No.1, 2011, pp. 193–246.

KOIVUROVA, T. “The Draft for A Nordic Saami Convention”, *European Yearbook of Minority Issues*, Vol. 6, 2006, pp. 103–136.

KOIVUROVA, T. and L. HEINÄMÄKI, “The Participation of Indigenous Peoples in International Norm-Making in the Arctic”, *Polar Record*, Vol. 42, No. 221, 2006, pp. 101–109.

KOIVUROVA, T. and A. STEPIEN, “How International Law Has Influenced the National Policy and Law Related to Indigenous Peoples in the Arctic”, *Waikato Law Review*, Vol. 19, No. 1, 2011, pp. 123–143.

LOUKACHEVA, N. “Arctic indigenous peoples’ internationalism: in search of a legal justification”, *Polar Record*, Vol. 45, No. 23, 2009, pp. 51–58.

MOLENAAR, E., J. “Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea”, *The International Journal of Marine and Coastal Law*, Vol. 27, No. 3, 2014, pp.553–595.

PLATJOUW, F., M., STEINDAL, E., H. and T. BORCH, “From Arctic Science to International Law: The Road towards the Minamata Convention and the Role of the Arctic Council”, *Arctic Review on Law and Politics*, Vol. 9, 2018, pp. 226–243.

PLAUT, S. "Cooperation is the story: best practices of transnational indigenous activism in the North", *The International Journal of Human Rights*, Vol. 16, No. 1, 2012, pp. 193–215.

POTO, M., P. and L. FORNABAIO, “Participation as the Essence of Good Governance: Some General Reflections and a Case Study on the Arctic Council”, *Arctic Review on Law and Politics*, Vol. 8, 2017, pp. 139–159.

ROTTEM, S., V. "A Note on the Arctic Council Agreements", *Ocean Development &International Law*, Vol. 46, No. 1, 2015, pp. 50–59.

SHADIAN, J. "Rethinking Westphalian Sovereignty: The Inuit Circumpolar Council and the Future of Arctic Governance", *Working Papers on Arctic Security*, No. 8, 2013, pp. 1–58.

SHADIAN, J. "From States to Polities: Reconceptualizing sovereignty through Inuit governance", *European Journal of International Relations*, Vol. 16, No. 3, 2010, pp. 485–510.

YOUNG, O. "The Arctic Council at Twenty: How to Remain Effective in a Rapidly Changing Environment", *UC Irvine Law Review*, Vol. 6, No. 99, 2016, pp. 99–120.

f) Legal and official documents

i. Legal documents (by subject)

International human rights

Universal Declaration of Human Rights of 10 December 1948 (217 A (III)).

International Covenant on Civil and Political Rights of 16 December 1966 (999 UNTS 171).

International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (993 UNTS 3).

Regional human rights

African Charter on Human and Peoples' Rights of 27 June 1981 (21 ILM 58).

American Convention on Human Rights of 22 January 1969 (1144 UNTS 123).

American Declaration of the Rights and Duties of Man of 02 May 1948 (OEA/Ser. L. V/II.82 doc.6 rev.1 at 17).

Arab Charter on Human Rights of 15 September 1994 (237 UNTS 70).

ASEAN Human Rights Declaration of 18 November 2012.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 of 04 November 1950 (ETS 5).

Multilateral Environmental Agreements

Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972 (1037 UNTS 151).

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (2161 UNTS 447).

Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973 (993 UNTS 243).

Minamata Convention on Mercury of 10 October 2013 (55 ILM 582).

Paris Agreement of 12 December 2015 (UN Doc. FCCC/CP/2015/10/Add, 1).

Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean of 4 March 2018 (open for signature)

United Nations Framework Convention on Climate Change of 09 May 1992 (1771 UNTS 107).

Indigenous Peoples Law

Indigenous and Tribal Peoples Convention, C 169, of 27 June 1989 (28 ILM 1382).

United Nations Declaration on the Rights of Indigenous People of 02 October 2007 (UN Doc. A/Res/61/295).

Founding treaties and other conventions

Charter of the United Nations of 26 October 1945 (1 UNTS XVI).

Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 2012.

Statute of the International Court of Justice of 18 April 1946.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 (Doc. A/CONF.129/15).

ii. Official documents (by date)

International

Draft Principles On Human Rights and the Environment of 1994 (E/CN.4/Sub.2/1994/9, Annex I).

Rio Declaration on Environment and Development of June 1992 (UN Doc. A/CONF.151/26 (Vol.1)).

Declaration of the United Nations Conference on the Human Environment, Principle 21, of 16 June 1972 (UN Doc. A/CONF/48/14/Rev.1).

Regional

Arctic Council, *Arctic Council Rules of Procedure*, as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting of Iqualuit, Canada, in September 1998, and revised by the Arctic Council at the Eight Arctic Council Ministerial Meeting of Kiruna, Sweden, in May 2013.

ICC*, A Circumpolar Inuit Declaration on Resources Development Principles in Inuit Nunaat* of May 2011

ICC*, Circumpolar Inuit Declaration on Sovereignty in the Arctic* of April 2009

A5*, The Ilulissat Declaration* of May 2008.

Arctic Council*, Declaration on the establishment of the Arctic Council* of 19 September 1996 (35 ILM 1382).

Arctic Environmental Protection Strategy, *The Nuuk Declaration on Environment and Development in the Arctic* of 16 September 1993.

iii. UN documents and resolutions (by date)

UNPFII, *Study, as an example of good practice, of the Indigenous participatory mechanisms in the Arctic Council, the Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat, and the Laponia management system*, 2012 (E/C. 19/2012/10).

United Nations, Conference on Sustainable Development, *The Future We Want. Outcome document of the United Nations Conference on Sustainable Development*, 2012

OHCHR, *Report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights*, 2009 (UN. Doc. A/HRC/10/61).

United Nations, Economic and Social Council, *Resolution on Consultative relationship between the United Nations and nongovernmental organizations*, 1996 (Resolution 1996/31).

HUMAN RIGHTS COUNCIL, Resolution adopted by the Human Rights Council on 5 July 2018 on Human rights and climate change, Res. 38/4, UN Doc. A/HRC/RES/38/4.

HUMAN RIGHTS COUNCIL, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, of 24 January 2018, UN Doc. A/HRC/37/59.

HUMAN RIGHTS COUNCIL, Resolution adopted by the Human Rights Council in 7 July 2017 on Human rights and climate change, Res. 35/20, UN Doc. A/HRC/RES/35/20.

HUMAN RIGHTS COUNCIL, Resolution adopted by the Human Rights Council on 1 July 2016 on Human rights and climate change, Res 32/33 UN Doc. A/HRC/RES/32/33.

HUMAN RIGHTS COUNCIL, Resolution adopted by the Human Rights Council on 30 June 2015 on Human rights and climate change, Res. 29/15, UN Doc. A/HRC/RES/29/15.

HUMAN RIGHTS COUNCIL, Resolution adopted by the Human Rights Council on 15 July 2014 on Human rights and climate change, Res. 26/27, UN Doc. A/HRC/RES/26/27.

HUMAN RIGHTS COUNCIL, Resolution adopted by the Human Rights Council on 17 October 2011 on Human rights and climate change, Res. 18/22, UN Doc. A/HRC/RES/18/22.

HUMAN RIGHTS COUNCIL, Resolution adopted by the Human Rights Council on 25 March 2009 on Human rights and climate change, Res. 10/4, UN Doc. A/HRC/10/4.

HUMAN RIGHTS COUNCIL, Resolution adopted by Human Rights Council on 28 March 2008 on Human rights and climate change, Res. 7/23, UN Doc. A/HRC/RES/7/23.

g) Case law (by date)

European case law

ECtHR, *Di Sarno and Others v. Italy*, Application no. 30765/08, Judgement of 10 January 2012.

ECtHR, *Guerra and Others v. Italy*, Application no. 14967/89, Judgement of 19 February 1998.

ECtHR, *López-Ostra v. Spain*, Application no. 16798/90, Judgement of 9 December 1994.

National case law

Oslo Tingrett (Oslo District Court), *Föreningen Greenpeace Norden & Natur og Ungdom vs Staten ved Olje- og energidepartementet*, 16-166674TVI-OTIR/06, Judgement of 4 January 2018.

Hague Court of Appeal*, The State of The Netherlands v Urgenda Foundation*, case 200.178.245/01, judgement of 9 October 2018.

Supreme Court of Canada, *Clyde River (Hamlet) v. Petroleum Geo‑Services Inc.* (Judgement). [2017] 1 SCR 1069 of 26 July 2017.

District Court of the Hague, *Urgenda Foundation v. the State of the Netherlands*, HAZA C/09/00456689, Judgement of 24 June 2015.

Lahore High Court Green Bench, *Asghar Leghari v. Federation of Pakistan* (W.P. No. 255501/2015), Judgement of 4 September 2015.

United States Court of Appeals, Second Circuit, *Connecticut v. American Electric Power Company Inc*., 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009), Judgement of 21 September 2009.

Supreme Court of the USA, Massachusetts v. Environmental Protection Agency, 549 U.S. 497, Judgement of 2 April 2007.

h) Petitions (by date)

Sheila Watt-Cloutier*, Petition to the Inter-American Commission On Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of The United States.* Available at: http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf

Earthjustice on behalf of the Arctic Athabaskan Council*, Petition to the Inter American Commission on Human Rights seeking relief from violations of the rights of Arctic Athabaskan Peoples resulting from rapid Arctic warming and melting caused by emissions of black carbon by Canada. 2013. Available at: http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf.*

Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*. 2015. Available at: http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf

i) Comments, decisions and opinions of international bodies (by date)

WORLD HERITAGE COMMITTEE, *Conservation of the World Heritage Properties: the Impacts of Climate Change on World Heritage Properties*, Decision 30 COM 7.1, 2006.

WORLD HERITAGE COMMITTEE, *Threats to World Heritage Properties*, Decision 29 COM 7B.a, 2005.

HUMAN RIGHTS COMMITTEE, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25),* (CCPR/C/21/REV.1/Add.7, General Comment No. 25, 1996).

ICJ advisory opinion *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 178.

j) Legislation (by date)

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 2003.

Ley General de Cambio Climático, art. 7o(XII), Diario Oficial de LA Federación de México, 6 de junio de 2012.

k) Reports

ABRAMOWITZ, M., J. *Freedom in the World 2018*. Freedom House, 2018.

COMMISSION ON GLOBAL GOVERNANCE, *Our Global Neighbourhood. The Report of the Commission on Global Governance*. Oxford: Oxford University Press, 1995.

GRIFFIN, P. *The Carbon Majors Database. CDP Carbon Majors Report 2017*. London: CDP Report, 2017.

HALLEGATTE, S., BANGALORE, M., BONZANIGO, L. and others, *Shock Waves. Managing the Impacts of Climate Change on Poverty. Climate Change and Development*. Washington D.C.: World Bank Group, 2016.

HASSOL, S., J. *Impacts of a Warming Arctic. Arctic Climate Impact Assessment*. Cambridge: Cambridge University Press, 2004.

ILA COMMITTEE ON NON-STATE ACTORS, *Final Report on Non-State Actors in International Law*. ILA Conference in Johannesburg, 2016.

ILA COMMITTEE ON NON-STATE ACTORS, Second Report of the Committee, *Non-State Actors in International Law: Law-making and participation rights*. ILA Conference in Sofia, 2012.

NACHMANY, M. and J. SETZER, "Global Trends in Climate Change Legislation and Litigation: 2018 Snapshot". Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, 2018.

NACHMANY, M. and S. FANKHAUSER, "Estudio sobre legislación de cambio climático 2015. Informe sobre la legislación de cambio climático en 99 países". London: London School of Economics, 2015.

UNEP, *The Status of Climate Change Litigation – A Global Review*. Nairobi: UNEP, 2017.

UNEP, *Climate Commitments of Subnational Actors and Business. A Quantitative Assessment of Their Emission Reduction Impact*. Nairobi: UNEP, 2015.

WORLD COMMISSION ON ENVIRONMENTAL AND DEVELOPMENT, *Our common future. Report of the World Commission on Environment and Development*. Oxford: Oxford University Press, 1987.

l) Dissertations

BETZOLD, C. *Non-State Actors in International Climate Change Negotiations*, Doctoral dissertation, 1984.

DUYCK, S. *The Arctic Voice at the UNFCCC Negotiations. Interplay Between Arctic & Climate Governance*. LL. M. programme dissertation, 2015.

m) Online resources

ADELMAN, S. and S. HOSSAIN, "Blog: Climate Change Law, Litigation and Governance", *Global Network for the Study of Human Rights and the*

Environment, 18 April 2018. Available at: http://gnhre.org/2018/04/18/blog-climate-change-law-litigation-and-governance/

COPPES, M. "Canada's Acceptance of the United Nations Declaration on the Rights of Indigenous Peoples: Implications for the Inuit" *The Arctic Institute*, 09 August 2016. Available at: https://www.thearcticinstitute.org/canadas-acceptance-declaration-rights-indigenous-peoples/

FRIENDS OF THE EARTH EUROPE, "YFoE Norway takes government to supreme court over Arctic oil" *Friends of the Earth Europe*, 5 February 2018. Available at: http://www.foeeurope.org/yfoee/yfoe-norway-takes-government-supreme-court-050218

ORGANIZATION OF AMERICAN STATES, "IACHR Expresses Concern regarding Effects of Climate Change on Human Rights" *OAS*, 2 December 2015. Available at: http://www.oas.org/en/iachr/media_center/preleases/2015/140.asp

STEPHEN, K. "Arctic indigenous cookbook wins Gourmand World Cookbook Award", *High North News*, 30 May 2018. Available at: http://www.highnorthnews.com/arctic-indigenous-cookbook-wins-gourmand-world-cookbook-award/.

TAYLOR, M. "Antarctic ice melting faster than ever, studies show", *The Guardian*, 13 June 2018. Available at: https://www.theguardian.com/environment/2018/jun/13/antarctic-ice-melting-faster-than-ever-studies-show. Available at: https://news.un.org/en/story/2011/09/388202

UN NEWS, "Palau seeks UN World Court opinion on damage caused by greenhouse gases", *UN NEWS*, 22 September 2011.

WATTS, J. "Arctic's strongest sea ice break up for first time on record", *The Guardian*, 21 August 2018. Available at:

https://www.theguardian.com/world/2018/aug/21/arctics-strongest-sea-ice-breaks-up-for-first-time-on-record.

n) Presentations held at international congresses

BORGIA, F. *The Arctic Council: from soft law body towards international organization?*. Presentation held at the 10th Polar Law Symposium 2017. Rovaniemi: Nov. 2017.

WATT-CLOUTIER, S. *The Climate Change Petition by the Inuit Circumpolar Conference to the Inter-American Commission on Human Rights*, Presentation held at the Eleventh Conference of Parties to the UN Framework Convention on Climate Change. Montreal: 2005.

o) Relevant websites

ARCTIC COUNCIL:
https://arctic-council.org/index.php/en/

GLOBAL PACT FOR THE ENVIRONMENT:
https://www.unenvironment.org/events/conference/towards-global-pact-environment

OUR CHILDREN TRUST:
https://www.ourchildrenstrust.org/us/federal-lawsuit

SABIN CENTER FOR CLIMATE CHANGE LAW:
http://climatecasechart.com/