Multinational corporations and climate change: towards a new "right to a safe climate"?

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Abstract

Il presente contributo propone un approfondimento sul rilievo progressivamente assunto dalle imprese multinazionali in tema di c.d. *climate governance*. Muovendo dall'analisi della recente giurisprudenza in materia di contenzioso climatico, l'articolo si pone l'obiettivo di identificare (se) e quali obblighi, imposti a livello internazionale, possano direttamente influenzare l'esercizio dell'attività d'impresa delle imprese multinazionali. Più nello specifico, ricorrendo all'applicazione analogica dei princìpi vigenti in materia di tutela dei diritti umani, ci si interroga circa la possibilità di identificare un nuovo obbligo di "*climate due diligence*" in capo agli Stati ed alle imprese. In tal senso, è possibile affermare la sussistenza ed il progressivo riconoscimento di un nuovo "diritto ad un clima protetto", come tale scaturente dai consolidati pilastri della tutela del diritto alla vita (Art. 2 CEDU) e del diritto alla vita familiare (Art. 8 CEDU)?

1. Introduction. Few can ignore the pivotal role that enterprises play in climate change. More specifically, the increase of critical social issues, mainly arising from the international exercise of a business activity, has led to the growth of a global cultural awareness on the need to foster *corporate sustainability*, with a focus on the influence that corporations play in making a positive contribution to the society[1].

However, adequate implementation and effective enforcement of international obligations against companies represent a concrete and long-standing challenge for international human rights and environmental law. The main difficulty encountered with multinational corporations is represented by the

[1] Companies could (and should) support the introduction of new practical and more ethical business models, designed for enterprises which intend to achieve a social purpose, still being driven by the economic rationality of the market, as to fight the idea that a *social purpose* and the *maximization of profits* cannot be simultaneously achieved through the adoption of a market-based approach. *See* the so-called *Human-Centered Business Model* (HCBM) promoted by the Global Forum on *Law*, Justice and Development - World Bank Legal Vice Presidency.

absence of a specific corporate regulation at the international level[2], from which the discussion regarding the international personality of business entities has risen[3].

According to traditional international law, internal subjects of rights (*soggetti di diritto interni*) - including corporations - are not entitled with international legal personality (*soggettività giuridica*)[4], being them generally subject only to the domestic laws of the States in which they operate[5]. In this sense, if multinational corporations violate international standards regarding human rights and the environment, these infringements will become relevant under international law as (and only if) they trigger State liability[6].

Following a different approach, multinational companies are deemed as international subjects, but still with limited and functional legal personality[7]. In this

[2] P. PUSTORINO, *Lezioni di tutela internazionale dei diritti umani*, Cacucci Editore, 2019, Bari, p. 214 ss.

[3] International legal personality is meant to be the entity's capacity of possessing international rights and duties, including the capacity to protect its rights by bringing international claims. See, *ex pluribus*, D. FELDMAN, *International Legal Personality*, in *Recueil des Cours*, Vol. 191, 1985, p. 343- 414; H. LAUTERPACHT, *The Subjects of the Law of Nations* I, in *Law Quarterly Review*, 1947, p. 438 ss; G. ARANGIO RUIZ, voce *Stati ed altri enti* (*soggettività internazionale*), in *Novissimo Digesto Italiano*, 1971, p. 132 ss.; G. SPERDUTI, *Sulla soggettività internazionale*, in *Rivista di diritto internazionale*, 1972, p. 277 ss..

[4] *See* G. SACERDOTI, *Le società e le imprese nel diritto internazionale: dalla dipendenza dallo Stato nazionale a diretti destinatari di obblighi e responsabilità internazionali*, in *Rivista del commercio internazionale*, 1, 2013, p. 112; S.M. CARBONE, *I soggetti e gli attori nella comunità internazionale*, in CARBONE, LUZZATTO, SANTA MARIA (a cura di), *Istituzioni di diritto internazionale*, IV ed., Torino, 2011, pp. 41- 42; M. IOVANE, *Soggetti privati, società civile e tutela internazionale dell'ambiente*, in A. DEL VECCHIO, DAL RI JÙNIOR (a cura di), *Il diritto internazionale dell'ambiente dopo il Vertice di Johannesburg*, Napoli, 2005, p. 179.

[5] «In senso più tradizionale in termini giuridici, le entità societarie sono collegate ad uno o più Stati, dove esse sono costituite e localizzate. Spetta a questo ordinamento disciplinarle, secondo criteri non univoci ma largamente condivisi, su cui il diritto internazionale non si pronuncia […] rinviando agli ordinamenti interni così individuati come competenti» (G. SACERDOTI, , *Le società e le imprese nel diritto internazionale: dalla dipendenza dallo Stato nazionale a diretti destinatari di obblighi e responsabilità internazionali*, in *Rivista del commercio internazionale*, n. 1, 2013, p. 121).

[6] This condition would be favorable for multinational corporations, given that they are not «interessate a godere di una personalità giuridica internazionale, in quanto per esse risulterebbe più vantaggioso agire al di sotto della barriera della sovranità degli Stati» (P. ACCONCI, *Imprese multinazionali*, in CASSESE (a cura di), *Dizionario di diritto pubblico*, Milano, 2006, p. 2955).

[7] This theory found its cause on the principle that international subjects, entitled to rights and subject to duties, are not all necessarily identical. It has been inspired by ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, in *ICJ Reports*, 1949, p. 174. See also A. CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford, 2006, p. 63; N. JÄGERS, *The Legal Status of the Multinational Corporations*, in ADDO (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999.

sense, States are fully entitled with rights and subject to duties at the international level, while «other subjects», such as corporations, «enjoy only limited capacities which are assigned to specific purposes»[8]. For instance, States' obligations arising from international investment treaties - aimed at granting the promotion and the protection of investments - would entitle multinational corporations with substantial and procedural rights, anytime investment contracts are entered between States and business entities[9].

Moreover, it has been argued that «the whole notion of "subjects" and "objects" has no credible reality and […] no functional purpose. […]» as «there are no "subjects" or "objects", but only participants». Following this view, «individuals are participants, along with States, international organizations […], multinational corporations, and indeed private non-governmental groups»[10]. From it, the need for international law to implement its *de facto* efficacy beyond formal categorization, as to prove its adequacy to the changes occurring at the international level.

In light of the above, it is clear that the lack of a specific regulation in the field of business activities and (their) liabilities at the international level places the concrete protection of *people's* and *planet's* interests at an (extremely) early stage. The need to fill the above-mentioned gap, with effective legal instruments aimed at granting the *substantial* respect of international obligations, is thus compelling.

Therefore, as climate change represents a serious threat for the protection of international interests[11], the following analysis will consider the implications

[8] International Arbitral Tribunal, *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of Lybian Arab Republic*, Arbiter R. J. Dupuy, Awards on the Merits, Geneva, January 19th, 1977.

[9] P. DAILLIER, - A. PELLET, *Droit International Public*, 2009, VIII ed, Paris, p. 713; P. DEUMBERRY, *L'entreprise, sujet de droit international ? Retour sur la question à la lumière des développements récents du droit international des investissements,* in Revue generale de droit international public, Vol. 108, n. 1, 2004, p. 103-122.

[10] R. HIGGINGS, *Problems and Process. International Law and How We Use It*, Oxford, 1994, pp. 49-50.

[11] ClientEarth, 'Understanding Human Rights and Climate Change', Submission to COP21 (2015), https:// www.business-humanrights.org/sites/default/files/CHRNI20160001%20%20Amicus%20Curiae%20Brief%20Presented%20by%20ClientEarth%20%20Annex%20A.pdf (accessed 21 January 2022).

both towards the state duty to *protect*[12] and the corporate responsibility to *respect* human rights and environmental interests [13].

2. The role of States and multinational corporations in climate governance. It is clear that today's economy is deeply off-balance with the world's natural resources[14]. While some have argued that sustainable development represents a principle of international law[15] – or customary international law – it is remarkable that the ICJ has more generally defined it as an "international objective"[16].

Regarding States, the existence of a general obligation, as to ensure that activities within their jurisdiction and control respect the environment of other States, is now deemed as «part of the *corpus* of international law relating to the environment»[17] (so-called *duty of prevention*). However, the above-mentioned obligation entails «not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control, applicable to public and private operators, such as the

[12] In this sense, Art. 1 of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*: «States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights» (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)).

[13] OHCHR, 'Climate Change and the UNGPs', https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change- and-the-UNGPs.aspx (accessed 18 May 2020).

[14] This principle clearly emerges from the UN Human Rights Committee, *General comment* 2018, n. 36, par. 62, which states that «environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life».

[15] C. VOIGT, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law*, 2009, Martinus Nijhoff Publishers.

[16] *Pulp Mills on the River Uruguay Case* (Argentina v Uruguay) (2010) ICJ Rep 14, at 177.

[17] ICJ, *Case Concerning the Gabcikovo-Nagymaros Project*, Hungary v. Slovakia, Judgement, September 25th, 1997, par. 53. Moreover, according to Principle 21 of the *Declaration of the United Nations Conference on the Human Environment* «States have 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» (Stockholm Declaration, 1972).

monitoring of activities undertaken by such operators […]»[18] (so-called *due diligence*).

Considering multinational corporations, they are often referred as part of the problem in the field of environmental protection; however, they may also be part of the solution[19]. First, by providing significant expertise in technology, private actors have become active players in the field of climate change and its governance. Secondly, multinational corporations have gained more awareness of the fact that climate risk equals financial risks[20], considering that the impact of climate change on business activities might jeopardize their investment returns[21]. Accordingly, not only environmental attention is rapidly growing at the international level, but also business enterprises are *voluntarily* joining a stronger compliance with the environment for economic opportunities.

Shifting the view to the existing instruments of regulation, a general distinction can be made between the adoption of formal and informal ones. The former include State-based initiatives aimed at regulating international law in the environmental and climate change areas (such as multilateral international treaties, protocols, as well as domestic legislation[22]); on the contrary, informal mechanisms generally include *corporate social responsibility* (CSR) and code of

[18] ICJ, *Case Concerning Pulp Mills on the River Uruguay*, Argentina v. Uruguay, Judgement April 20th, 2010, par. 193, par. 80 ss.

[19] See J. PATCHELL – R.HAYTER, , *How Big Business Can Save the Climate: Multinational Corporations Can Succeed Where Governments Have Failed*, in *Council on Foreign Relations*, September/October 2013, Vol. 92, No. 5, pp. 17-22.

[20] According to the European Union framework, initiatives aimed at better granting human rights and the environment have led to the strengthening of stakeholder-oriented corporate governance. This can be seen through the European Parliament's Directive Proposal on *Corporate Due Diligence and Accountability*, which has considered that «voluntary due diligence standards have limitations and have not achieved significant progress in preventing human rights and environmental harm and in enabling access to justice» (European Parliament Resolution, March 10th, 2021, containing recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available at *https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html*.). See L. ENRIQUES, *The European Parliament Draft Directive on Corporate Due Diligence and Accountability: Stakeholder-Oriented Governance on Steroids*, in *Rivista delle società*, n. 2-3, 2021, p. 319.

[21] S. KALLIOJÄRVI, *Climate Change, Security and the Role of Transnational Corporations*, in *Arctic Yearbook*, 2020, p. 2.

[22] P. SANDS and J.PEEL, *Principles of International Environmental Law* (3rd ed., Cambridge University Press 2012) 51.

practice and principles. Moreover, lacking any international "environmental parliament" or lawmaking body, international organizations – particularly the UN and its subsidiary bodies – have become leading actors in the field of international environmental regulation[23].

Indeed, starting from the 1970s, the rapid growth of multinational companies has led international efforts at granting responsible business conduct. As a consequence, the OECD *Guidelines for Multinational Enterprises* (1976) were first introduced as non-binding guidelines for multinational companies and still represent international measures directly applicable to them. It is worth noting that, according to the purposes of the *Guidelines*, «a precise definition of multinational enterprises is not required», as they address enterprises which «operate in all sectors of the economy» and usually «comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways» (Part I, paragraph 4) [24].

Advancing in time, the international environmental movement has sought the introduction of the *United Nations Framework Convention on Climate Change* 1992 (UNFCCC)[25], which contains non-binding emission reduction targets for States, but also a series of principles directly applicable to them. During this phase, absent a specific definition of "dangerous anthropogenic interference"[26], parties to the UNFCCC agreed - in 2010 - to contain temperature increase to 2° C above pre-industrial levels. Above all, the UNFCCC is deemed to have failed because of its lack of powerful directives for companies to implement and apply technologies aimed at reducing their greenhouse gas emissions[27]. However, the

[23] P.BIRNIE and A.BOYLE, *International Law & The Environment* (3rd ed., Oxford University Press 2009), p. 13.
[24] Part. I, Par. 4 «Concepts and Principles».
[25] Besides providing non-binding emission reduction targets, the UNFCCC also includes a series of principles and obligations directly applicable to States, as «it is considered to be the main umbrella framework on international climate law» (L. BENJAMIN, *Companies and climate change: theory and law in the United Kingdom*, 2021, Cambridge University Press, p. 84).
[26] P. B.BRIAN FISHER, in '*Shifting Global Climate Governance: Creating Long-Term Goods through UNFCCC Article 2*' (2011) 8(3) *PORTAL* 23.
[27] See J.PATCHELL, and R. HAYTER, , *How Big Business Can Save the Climate: Multinational Corporations Can Succeed Where Governments Have Failed*, in *Council on Foreign Relations*, September/October 2013, Vol. 92, No. 5, pp. 17.

above-mentioned lack of any international binding environmental framework[28], since the 1990s, has brought business entities to voluntarily assume initiatives at the corporate level, till the point that their actions and initiatives created a sort of "coerced" form of voluntarism related to climate change.

In this context, after decades of unsuccessful climate negotiations, the Paris Agreement (2015) has represented a remarkable achievement, serving as a powerful normative catalyst to many actors, including "non-state" ones[29]. Unlike the Kyoto Protocol (1997)[30], *all* parties to the Paris Agreement - thus not only the developed States parties - are required to «prepare, communicate and maintain successive nationally determined contributions»[31] in order to ensure the reduction of greenhouse gas emissions as rapidly as possible[32]. From a general perspective, the above-mentioned Agreement represents a binding legal treaty, which provides strong normative pressures even if many of its provisions are not legally binding - or merely represent *soft law* obligations. Therefore, the adoption of a "bottom-up" approach to global climate regulation relies on quasi-voluntarily

[28] The UN *Global Compact* initiative was also aimed at creating a framework in which business entities, intergovernmental organizations and non-governmental bodies shall cooperate in the adoption of policies for the social and environmental accountability of multinational corporations. See MONSHIPOURI, M. - E. WELCH, - E. J. KENNEDY, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, in *H.R. Quart*., 2003, pp. 978-979; OSHIONEBO, E. *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, in *Florida Journal of International Law*, 2007.

[29] Among the European initiatives, the *Green Deal* has recently represented a sustainable growth strategy for the coming thirty years endorsed by the European Commission from December 2019. In sum, it provides a number of reallocation mechanisms aimed at shifting to a climate neutral Europe, thus promoting a sustainable, clean and circular economy and cutting polluting and unsustainable activities. L. OHNESORGE, – R. EBBE, *Europe's Green Policy: Towards a Climate Neutral Economy by Way of Investors' Choice*, in *European Company Law Journal* 18, no. 1 (2021): 36–41.

[30] It consists in a protocol agreed under the framework of the UNFCCC and its negotiations have included debates on the costs of mitigation actions. See A. GOLUB, - A. MARKANALYA, - D. MARCELLINO, "*Does the Kyoto Protocol Cost Too Much and Create Unbreakable Barriers for Economic Growth*?", 2006, 24(4) *Contemporary Economic Policy,* 520.

[31] Art. 4, par. 2, Paris Agreement.

[32] It has been argued that the Agreement still embraces the concept of common but differentiated responsibility – which has been a basis of the UN climate regime – but with a renewed approach (L. RAJAMANI, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, in *International & Comparative Law Quarterly* , 2016, Vol. 65, Issue 2, Cambridge University Press, p. 493).

and national-based initiatives[33], which confer States the power to undertake actions aimed at fulfilling the agreed obligations[34].

For the purpose of our analysis, notwithstanding the fact that companies are not formally included as parties to international treaties, the pivotal role played by non-state actors in tackling climate change[35] was thus made clear during the Paris Agreement negotiations, which were deemed to reflect the States' awareness of the influence (either positive or negative) exercised by companies in the field of environmental sustainability.

In other words, even if internationally binding agreements on climate change are applicable to States only, it is clear that they exercise an undeniable *direct* pressure on States and an *indirect* one on companies[36]. In this sense, the active participation of companies to the phase of negotiations may justify the domestic and international efforts – carried out over the years – to extend the application of environmental obligations also towards non-state actors.

3. Climate litigation against multinational corporations. Whether for decades international climate initiatives have been deemed as an intergovernmental process with little space for business involvement, we have seen that the attitude toward multinational corporations in climate action has been changing lately. From the pivotal influence recognized towards business entities

[33] «The 2015 Paris Agreement on climate change is relevant to human rights law, not for what it says about human rights— which is next to nothing—but for what it says about the need to address the risk of climate change taking global temperatures above 1.5 or 2 °C.» (A. BOYLE, *Climate Change, The Paris Agreement and Human Rights*, in *International & Comparative Law Quarterly*, Vol. 67, Issue 4, 2018, p. 759).

[34] P. PUSTORINO, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, 2021, p. 599; VIÑUALES J.E., *The Paris Agreement on Climate Change: Less is More*, in *German Yearbook of International Law*, 2016, p. 11 ss.

[35] It has been stated that «The Paris Agreement is historic as it encourages commitments from non-state actors, and over 1200 stakeholders signed the Paris Pledge of Action» (L. BENJAMIN, *Companies and climate change: theory and law in the United Kingdom*, 2021, Cambridge University Press, p. 89).

[36] *See* F. JOHNS, *The Invisibility of the Transnational Corporation: an Analysis of International Law and Legal Theory*, in *Melb. Univ. Law Review*, 1994, pp. 897-899; T. KAMMINGA, *Corporate Obligations under International Law*, in *International Law Association* (ed.), *Report of the Seventy-First Session*, 2004, p. 422; C.M. VÁZQUEZ, *Direct v. Indirect Obligations of Corporations under International Law*, in *Columbia J. Trans. L.*, 2005, p. 927.

in *climate governance*, relevant implications have emerged in Courts' climate judgements.

In this context, the leading case *Urgenda Foundation v. State of the Netherlands*[37] – ruled by the Dutch Supreme Court – is fundamental to assess the consequences and implications that an extensive interpretation of the human right to life might causes against multinational companies and their "duty of care"[38].

More specifically, the Supreme Court's decision sanctioned the Dutch government for not having taken adequate measures to prevent an unacceptable danger of climate change[39], thus imposing a reduction of CO_2 emissions by the end of 2020 by 25% (compared to 1990). In doing so, the Dutch Supreme Court assessed the State's obligation to use care in preventing harm to others, grounding its decision primarily on the State's *positive obligation* to protect the right to life[40] (Art. 2 of the European Convention on Human Rights - ECHR) and the right to family life (Art. 8 ECHR). As declared by the Court, these rights require the State to take measures to grant people against "dangerous climate change". In other words, not only should the State prevent violations of the right to a safe climate, but also make a positive contribution for its realization, by means of climate-policy.

[37] *The State of the Netherlands v Urgenda Foundation*, Judgment of 9 October 2018, C/09/456689/ HA ZA 13- 1396, para 35 (Urgenda, CA), https://elaw.org/system/files/attachments/publicresource/Urgenda_2018_Appeal_ Decision_Eng.pdf (accessed 17 December 2019)).

[38] Corporations' "duty of care" - or, more generally, "due diligence" – has also been defined as «a process put in place by an undertaking in order to identify, assess, prevent, mitigate, cease, monitor, communicate, account for, address and remedy the potential and/or actual adverse impacts on human rights [...] and on the environment, including the contribution to climate change» (European Parliament Resolution, preambulatory clause n. 20, March 10th, 2021, containing recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL). See also L. BERGKAMP, *The Dutch Supreme Court's Climate Judgement: Its Consequences and Implications for Business – Revolution Through Litigation*, in *European Energy and Environmental Law Review, 2020,* p. 91.

[39] L. BERGKAMP, and J. HANEKAMP, *Climate Change Litigation Against States: The Perils of Court-Made Climate Policies,* in *European Energy and Environmental Law Review,* 2015, 102–114.

[40] «Article 2 ECHR protects the right to life […] According to that case law, this obligation applies, *inter alia*, if the situation in question entails hazardous industrial activities, regardless of whether these are conducted by the government itself or by others, and also in situations involving natural disasters» (*The State of the Netherlands v Urgenda Foundation* par. 5.2.2.).

At first sight, the strong link between the application of human rights and the protection of environmental interests clearly emerges from this ruling. More specifically, through the extensive interpretation of articles 2 and 8 of the ECHR, the above-mentioned judgement seems to foster and to grant a new "right to a safe environment"[41], which is not expressly contained in the European Convention on Human Rights[42]. In doing so, the Dutch Supreme Court's reasoning is grounded on the fact that «a remedy is considered effective as meant in Article 13 ECHR if it will prevent or end the violation or if the remedy offers adequate redress for a violation that has already occurred», as the judgement must grant «effective legal protection from possible violations of the rights and freedoms ensuing from the ECHR» (par. 5.5.2.-3).

Secondly, the extensive interpretation of ECHR principles produces pivotal consequences in the field of climate-related litigations against multinational corporations. More specifically, by extending the scope of the human right to life, the *Urgenda* case raised the question whether the new "right to a safe climate" shall be deemed as an obligation for companies – as opposed to States – in climate litigations.

Besides the fact that companies are not States – and thus, as above-discussed, they are not *directly* subject to the emission reduction targets provided in international treaties – it must be stressed that, in any case, the ECHR right to life is *indirectly* applicable to companies, according to the State's *positive obligation* to impose duties on private actors as to protect life. Considering the

[41] In this sense, a rare example of inclusion of a "right to a healthy environment" in legal binding instruments can be seen in Art. 24 of the African Charter of Human and People's Rights, according to which: «All peoples shall have the right to a general satisfactory environment favorable to their development».

[42] Critics have been raised against the extensive interpretation of the principles stated ECHR by who considers that «the case law of the European Court of Human Rights fails to support the Dutch Supreme Court's conclusion. Under the rulings of the European Court of Human Rights, the right to life requires that the state address unacceptable risks to human life. The European Court cases to which the Supreme Court refers, however, were about individual rights, not about general policy making, and concerned imminent threats, not threats in the far future. In other words, none of the European Court's rulings requires that a state adopt novel policies or legislation. The enforceable right to a 'safe climate' therefore was not mandated by the Convention or the European Court's case law» (L. BERGKAMP, *The Dutch Supreme Court's Climate Judgement: Its Consequences and Implications for Business – Revolution Through Litigation*, in *European Energy and Environmental Law Review,* 2020*,* p. 92).

theory of positive obligations and its "horizontal effects"[43], companies may thus be found responsible of a "duty of care" to protect the right to life, even if they are not *directly* subject to the obligation stated by Art. 2 of the ECHR.

In light of the above, if companies are deemed to have a duty to protect the right to life, more precise guidelines shall indicate the way the "right to a safe climate" should affect corporations' obligations. This urgency has clearly emerged in *Milieudefensie et al. v*. *Royal Dutch Shell Plc*, according to which, on April 5th, 2019, the environmental group Milieudefensie/Friends of the Earth Netherlands and other co-plaintiffs sued Shell. The former argued that the company's contributions to climate change had violated the "duty of care" under Dutch law, thus endangering the human rights to life and family life. Contrary to the *Urgenda* case - in which the claim was brought against the State - in *Milieudefensie et al. v*. *Royal Dutch Shell Plc* the plaintiffs *directly* sued a private company (herein after Shell or RDS)[44], asking the Court to impose a reduction of the company's CO_2 emissions, in compliance with the Paris Agreement, by 45% by 2030 (compared to 2010) and to zero by 2050.

Being moved by the will to ride the long way of the *Urgenda* case, the plaintiffs tried to extend its conclusions, *mutatis mutandis*, to private actors[45]. In doing so, they founded their the legal reasonings on relevant features of an emergent "climate due diligence"[46]. First, it has been alleged that the corporation's violation of its "duty of care" stemmed from the Dutch law[47], human

[43] L. BERGKAMP, *The Dutch Supreme Court's Climate Judgement*, above-cited, p. 95.

[44] Starting from this point, it has been stated that «it remains to be seen if climate litigation on the basis of international human rights law can succeed against multinationals like Shell. The Court needs to be persuaded that *Milieudefensie* can base a claim against Shell on the ECHR, in spite of the fact that Shell obviously is not a Party to this treaty. If the Court can be so persuaded, we will have yet another tool in the fight for climate justice» (O. SPIJKERS, *Pursuing climate justice through public interest litigation: the Urgenda case,* 2020, in *Völkerrechtsblog International Law & Legal Thought*).

[45] Sabin Center for Climate Change Law, '*Milieudefensie et al v Royal Dutch Shell plc'*, http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ (accessed 17 December 2019).

[46] C. MACCHI, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "climate due diligence"*, in *Business Human Rights Journal*, Vol. 6, Issue 1, Cambridge University Press, 2021, p. 98.

[47] «RDS' (*Royal Dutch Shell Plc*) reduction obligation ensues from the unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful. From this standard of care ensues

rights law and the Paris Agreement[48]. The proponents' approach has thus raised an integrated interpretation of corporate *human rights due diligence* (so called HRDD) grounded on both human rights law and climate law standards[49]. In addition, the allegations against RDS - by including its scarce action to reduce GHG emissions and its attempt to misrepresent the sustainability of its operations towards the public - also refer to the Dutch law standard of care invoked in *Urgenda*. In this sense, it has been claimed that «Articles 2 and 8 of the ECHR also color the duty of care we should be able to expect from Shell», considered «the extent of the control Shell – like the State – has over individuals on account of its substantial share in global emissions and the solutions to climate change» (par. 723-724).

In conclusion, being clear that a single multinational corporation is not empowered (neither required) to solve the ongoing global climate emergency by itself, «this does not absolve the RDS of its individual *partial responsibility* to contribute to the fight against dangerous climate change according to its ability» (par. 4.4.37).

Following this reasoning, the substantial recognition of a "climate due diligence" upon multinational corporations was held by referring both to the application of the Dutch Law and international treaties on the protection of human rights. In doing so, notwithstanding the *vexata quaestio* on the international legal personality of multinational corporations, the Court has referred to international human rights law as to interpret and correctly apply the Dutch Law – *directly* against Shell – and to protect "environmental rights".

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that when determining the Shell group's corporate policy, RDS must observe the due care exercised in society» (*Milieudefensie et al v Royal Dutch Shell plc* par. 4.4.1).

[48] *Milieudefensie et al v Royal Dutch Shell plc*, File no. 90046903, Summons (5 April 2019), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_ 8918_summons.pdf (accessed 27 October 2020).

[49] More specifically, climate change-related implications against human rights are deemed to represent a pivotal aspect of the HRDD processes that business must develop in order to fulfill their duty to respect. See European Commission (EC), 'Study on Due Diligence Requirements Through the Supply Chain' (2020) 185, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en (accessed 21 May 2020).

In conclusion, as we have already seen in the *Urgenda* case – where the Supreme Court has addressed The Netherlands a "collective responsibility" under the UNFCCC to prevent dangerous climate change[50] – also the approach followed by the Court in *Milieudefensie et al.* seems to lead towards the recognition of a mutual responsibility both of the State and private actors, such as multinational corporations, for harmful emissions[51].

4. Conclusive remarks. Climate change represents an intergenerational problem with extreme implications against human rights[52]. More specifically, the focus on "intergenerational" interests has recently emerged in the decision adopted by the UN Committee on the Rights of the Child, according to which States can be found liable for the negative impact produced by their carbon emissions – both within and outside their territories – as a foreseeable violation of the children's right to life, health and culture protected under the Convention on the Rights of the Child[53]. For the aim of this article, by clarifying the extent of the States' duties – and by solving jurisdictional issues – the afore-mentioned ruling significantly outlines the scope of the discussed obligations in the field of climate change[54]. Accordingly, the Committee stresses that the State's "effective

[50] It has been stated that the Supreme Court has found its reasoning on theories of "proportional causation", first developed in the context of product liability as market share liability. See L. BERGKAMP, *The Dutch Supreme Court's Climate Judgement, above-cited, p. 96;* A. M. HONORE', *Causation and Remoteness of Damage*, in *XI International Encyclopedia Comp*arative *Law*, Torts Ch. 7, nr. 112.

[51] P. PUSTORINO, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, above-cited, p. 603.

[52] «The basic concept is that all generations are partners caring for and using the Earth» (E. B. WEISS, *Climate Change, Intergenerational Equity, and International Law*, in *Vermont Journal of Environmental Management*, 2008, Vol. 9, p. 616). Therefore, the urgency of avoiding climate change emerges from the fact that «some natural capital—including the global climate—must be preserved in order to meet the needs of future generations and prevent ultimate catastrophe» (A. BOYLE, *Climate Change, The Paris Agreement and Human Rights*, in *International & Comparative Law Quarterly*, above-cited, p. 762). *See* also D. HELM, *Natural Capital: Valuing the Planet*, 2015, Yale University Press.

[53] See UN Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.* (CRC/C/88/D/104/2019), October 11th, 2021.

[54] On a different ground, the decision shows the existence of concrete obstacles related to the possibility for the petitioners to obtain effective measures in the field of climate protection. More specifically, according to Article 7(e) of the Optional Protocol to the Convention on the rights of the Child on a Complaints Procedure (OPIC), «[t]he Committee shall consider a communication inadmissible when […] All available domestic remedies have not been exhausted […]». Following

control" over multinational corporations plays a remarkable role in preventing environmental damages that are likely to raise, also beyond the national borders, from the exercise of business activities, thus causing human rights violations[55]. Indeed, through the review of recent climate change-related litigations, we have seen that environmental interests represent a pivotal expression of the State *duty to protect* and the corporate *responsibility to respect* human rights[56]. Not only States are required to adopt appropriate rules and measures to protect the environment against pollution and climate change, but they are also required to «preserve the environment and [to] protect it against harm, pollution and climate change caused *by public and private actors*»[57].

The increased attention towards harmful emissions has shown how a new "climate due diligence" upon States and multinational corporations is gradually consolidating. This is the approach lately endorsed by national courts, which justifies their tendency to implement international human rights law as a catalyst for the protection of "environmental rights".

On a different ground, corporate responses to climate change are rapidly arising from the realization that it does not represent a potential threat, but an emergency that is already impacting on their operations and responsibilities[58]. Therefore, the transition to more sustainable economies is now shifting from a choice to a matter of necessity. It will require the adoption of visionary strategies

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this provision, the United Nations (UN) Committee on the Rights of the Child held that the petitioners should have first brought lawsuits before each of the five States' national courts – Argentina, Brazil, France, Germany, and Turkey – notwithstanding the fact that, according to evidence, none of those cases would have succeed at the domestic level.

[55] Accordingly, «in cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the *effective control* over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory» (para 10.5).

[56] OHCHR, 'Climate Change and the UNGPs', https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change- and-the-UNGPs.aspx (accessed 4 February 2022).

[57] *General comment* 2018, n. 36, par. 62 of the UN Human Rights Committee.

[58] «In questo contesto la spontanea adozione di codici di autodisciplina o l'adesione a linee-guida e *best practices* promosse a livello transnazionale devono essere lette come l'attuazione, realizzata dalle imprese multinazionali e indotta dagli Stati e dalla comunità internazionale, di principi già sanciti a livello internazionale» (A. BONFANTI, *Imprese multinazionali, diritti umani e ambiente*, Giuffrè Editore, Milano, 2012, p. 422).

and effective government regulations, which shall foster the introduction of innovative and international (human-centered) business models, aimed at expanding the scope of the company interest. According to this view, the acknowledgement of social and environmental needs, along with profit-making purposes, represents a pivotal occasion for corporations to simultaneously foster the protection of human (and environmental) rights, to increase productiveness and to chase market expansion.