EXTRATERRITORIALITY AND JUDICIAL REVIEW OF STATE'S POLICIES ON GLOBAL WARMING: SOME REFLECTIONS FOLLOWING THE 2016 SCANDINAVIAN CLIMATE LAWSUITS

EXTRATERRITORIALIDAD Y REVISIÓN JUDICIAL DE LAS POLÍTICAS DE ESTADO SOBRE EL CALENTAMIENTO GLOBAL: ALGUNAS REFLEXIONES TRAS LAS DEMANDAS ESCANDINAVAS DE 2016

Pau de Vílchez Moragues*

Summary: I. OVERVIEW OF CURRENT TRENDS ON CLIMATE CHANGE LITIGATION. II. MAIN ELEMENTS OF THE SCANDINAVIAN CASES. III. SPECIFICITIES OF THE SCANDINAVIAN CASES. IV. CONCLUDING REMARKS

ABSTRACT: On the fall of 2016, the slowly but steadily growing list of climate lawsuits around the world welcomed two new legal disputes in Sweden and Norway. Previously, the lack of ambition in the struggle against climate change had given way to a rise in environmental activism around the world, where disappointment regarding governments' inability to act evolved in some instances into a legal strategy to challenge before the courts what was perceived as a renunciation by the State of its primal obligation to protect its citizens.

The recently filed lawsuits in Sweden and Norway are, undeniably, a part of that trend, but they have some characteristic features, regarding both the scope of the claim and the extraterritorial dimension of the cases, that open up new possibilities for the legal analysis of the obligations of States concerning climate change. In this article, an effort is made to analyse those new perspectives in relation to the previous case law as well as their possible grounding in international law.

RESUMEN: Durante el otoño de 2016, sendas demandas en Suecia y Noruega se añadieron a una creciente lista de litigios judiciales alrededor del mundo relativos al cambio climático. Anteriormente, la

Fecha de recepción del original: 19 de septiembre de 2017. Fecha de aceptación de la versión final: 20 de noviembre de 2017.

* Assistant Research Lecturer of International Law and PhD candidate, Faculty of Law, University of the Balearic Islands (UIB). E-mail: pau.devilchez@uib.eu. This article is a revised version of a study presented at the 2nd Tarragona International Environmental Law Colloquium (TIEC) - Longing for Justice in a Climate-Changed World: From Theory to Practice, that took place at the Centre d'Estudis de Dret Ambiental de Tarragona (CEDAT) of the University of Tarragona on may 2017. This article was undertaken within the framework of the research project DER2015-65486-R, funded by the Ministerio Español de Economía y Competitividad.

 DOI: 10.17103/reei.34.03

falta de ambición en la lucha contra el cambio climático había provocado un aumento del activismo medioambiental en todo el globo, el cual, alimentado por una profunda decepción a causa de la incapacidad de los gobiernos para dar una respuesta adecuada a dicho desafío, alumbró, entre otras, una estrategia legal que perseguía denunciar ante los tribunales lo que a todas luces parecía una renuncia por parte de los Estados a la obligación primordial de proteger a su ciudadanía.
Las recientes demandas presentadas en Suecia y Noruega pertenecen sin lugar a dudas a esta tendencia, pero manifiestan al mismo tiempo algunas características peculiares que apuntan nuevas e interesantes perspectivas para el análisis jurídico de las obligaciones de los Estados en materia de cambio climático, especialmente por lo que se refiere a la amplitud del objeto de la demanda y a la dimensión extraterritorial de dichos casos. En el presente artículo se pretenden analizar estas nuevas perspectivas situándolas en relación con sus precedentes más cercanos, así como su justificación desde la perspectiva del derecho internacional.

KEYWORDS: Climate Change, Climate Litigation, International Environmental Law, Human Rights, Extraterritoriality, Paris Agreement.

PALABRAS CLAVE: Cambio Climático, Litigación Climática, Derecho Internacional del Medio Ambiente, Derechos Humanos, Extraterritorialidad, Acuerdo de París.

I. OVERVIEW OF CURRENT TRENDS ON CLIMATE CHANGE LITIGATION

Two decades of climate change negotiations with results that can be considered, at best, as mitigated, and the lack of ambition that States have shown in the struggle against climate change, particularly during the failed COP 15 in Copenhagen in 2009, have given way to a rise in environmental activism around the world, where disappointment regarding governments' inability to act has evolved, in some instances, into a legal strategy to challenge before the courts what is perceived as a renunciation by the State of its primal obligation to protect its citizens.

1. The reasons for an inevitable selection of cases

It is not the objective of this article to analyse all climate change litigation of the last 15 years. Others have conducted remarkable studies of the first years of climate litigation around the world, which are very helpful in both understanding the evolution of climatic case law and conceptualising broader categories of cases.[1] The intention of this first section is rather to present the main common features of some of the recent cases

[1] Among the relevant literature published before the new wave of successful or, at least, promising cases that started in 2015, we can cite MARKELL, D. and RUHL, J.B., 'An Empirical Assessment of Climate Change In The Courts: A New Jurisprudence Or Business As Usual?', 64 *Florida Law Review*, at 15-86 (2012), GERRARD, M. B.; Macdougald, J. A., 'An introduction to climate change liability litigation and view to the future', *Connecticut Insurance Law Journal* 20(1), 2013, at 153-164, and WILENSKY, M. 'Climate Change in the Courts: As Assessment of Non-US Litigation', *Duke Environmental Law & Policy Forum*, nº 26, 2015, at 131-179., for a review of climate litigation outside the United States. For an analysis of early litigation in Australia, which is the second most relevant country, after the US, in climate litigation, see MILLNER, F. and RUDDOCK, K., 'Climate litigation: Lessons learned and future opportunities', *Alternative Law Journal*, Vol. 36, No. 1, Jan 2011, at 27-32.

DOI: 10.17103/reei.34.03

concerning global warming in order to be able to better highlight the specificities of the recent cases in Scandinavia.

It is also worth indicating that I will focus on lawsuits brought by either citizens or NGOs, or both, against State authorities for failing to adopt adequate policies concerning global warming (through action or inaction). Therefore, I won't be examining here litigation by or against corporations [2] or litigation brought by administrative authorities against other administrative authorities of the same State,[3] nor claims filed by States against other States.[4] Finally, this article does not deal either with proceedings brought before para-judicial institutions, either of national or international nature.[5]

The choice to exclude those types of lawsuits derives from some considerations. First of all, to facilitate a clearer analysis of comparatively similar cases that share some of their core elements (type of plaintiff and defendant and grounds).

Second, because States and corporations bear different kinds of responsibility towards the people. The former having a general, albeit diffuse, duty to protect its citizens from harm while the latter's responsibility is generally construed as circumscribed to its

[2] The classic example of which would be *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corporation et al*. For a brief analysis of the case, see for instance BORRAS PENTINAT, S., 'La justicia climática: entre la tutela y la fiscalización de las responsabilidades', *Anuario Mexicano de Derecho Internacional*, vol. XIII, 2013, at 38-40. A more recent case is *Saul Luciano Lliuya v. RWE*, where a Peruvian farmer demanded compensation to a German power company for its shared responsibility on GHG emissions that are causing the melting of a glacier just over the plaintiffs' village. The District court of Essen dismissed the claim alleging difficulties to establish a sufficiently proved causal chain and to provide effective redress. However, the Higher District Court Hamm recently quashed the decision and allowed the case to proceed to evidentiary phase. A summary of the case is available at https://germanwatch.org/en/huaraz and an unofficial translation of the lower court's decision can be found at http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/ .

[3] Massachusetts v. EPA probably being the most well-known example of this category of lawsuits. See, BORRAS PENTINAT, S., 'La justicia climática: entre la tutela y la fiscalización de las responsabilidades', *supra* note 2, at 28-31. MARKELL, D. and RUHL, J.B., 'An Empirical Assessment of Climate Change in The Courts: A New Jurisprudence or Business as Usual?', *supra* note 1, at 17-18.

[4] An avenue yet to be explored, but one that might materialize in the future when the harmful consequences of climate change become unbearable for some States. In that sense, it is interesting to note that the Pacific Island State of Palau has been considering for a few years already the possibility to ask for an advisory opinion to the International Court of Justice (ICJ) concerning climate change, through the UN General Assembly. See, for example, KYSAR, D., *Climate Change and the International Court of Justice*, Yale Law School, Public Law Research Paper No. 315, 2013.

[5] Two salient examples might be cited. On the one hand, the Inuit 'Petition to the Inter American Commission on Human Rights violations resulting from global warming caused by the United States', December 7, 2005. The petition (available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition-1.pdf) was dismissed in 2006. On the other hand, there is the current case before the Philippines Commission on Human Rights, brought in 2015 by many NGOs and people affected by recent typhoons against major oil and carbon corporations from all around the world for their role in causing climate change and the impairment of their human rights derived from it. *Greenpeace Southeast Asia et al. v. Carbon Majors*, Commission on Human Rights of the Philippines, Case No. CHR-NI-2016-0001. The complaint can be found at https://business-humanrights.org/sites/default/files/documents/Wentz-and-Burger-2016-12-Submission-Case-No.-CHR-NI-2016-0001.pdf.

DOI: 10.17103/reei.34.03

actions and the consequences that derive from them. In other words, while one could seek some corporation's responsibility only to the extent that this corporation has contributed to a specific harm, citizens might challenge a State's failure to act in the face of a threat to their well-being that might not even be the direct consequence of the State's actions.

Third, as it can be easily seen in their respective claims, the main motivation behind those lawsuits is not an economic or financial gain, but, rather, a question of well-being and altruism.

And last, because of the significant, although still limited, success of those cases and what might be an emergence of a holistic or complex approach to climate change that goes beyond one-dimensional legal considerations (be it a pure environmental perspective, a tort law approach or even a human rights perspective) to construe a multi-layered legal grounding that allows for the identification of legal obligations of States towards its citizens and even beyond (both geographically and from the perspective of time).

2. An emerging trend of promising, and some already successful, climate cases

Those cases are mainly composed of lawsuits were citizens and/or NGOs file a claim in court challenging the general climate policy of their government. Despite some early unsuccessful lawsuits in the years around 2008-2009, the trend appears to have switched since 2015.

Two early cases are worth mentioning. First, in 2007, Friends of the Earth filed a lawsuit against the Governor in Council and the Minister of the Environment of Canada for not complying with the Kyoto Implementation Act, a law that required Canada to fulfil its emissions reduction targets derived from the Kyoto Protocol.[6] The Court, both at First Instance and on Appeal, dismissed the application mainly because it considered it to be a matter of an inherently political nature.

A second lawsuit, filed in Ukraine in 2008, against the State's lack of action to reduce GHG emissions, which also relied extensively on the Kyoto Protocol, obtained a positive decision by the first instance Court, but was finally dismissed on appeal on quite specious grounds.[7]

However, as already mentioned above, things started to change in 2015. That year, we find three judicial decisions recognizing citizens' concerns over their governments' policies on climate change.

---

[6] *Friends of the Earth v. The Governor in Council and the Minister of the Environment*, first instance decision of 20 October 2008. T-2013-07. Available at: http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/55945/1/document.do.

[7] Environment People Law v. Ukraine, first instance decision of 22 July 2008. Appeals decision of 2 February 2010. For more details, please check EPL website: http://epl.org.ua/en/law-posts/natsionalne-agentstvo-ekologichnyh-investytsij-dostup-do-informatsiyi-v-natsionalnomu-elektronnomu-reyestri-antropogennyh-vykydiv-2/.

DOI: 10.17103/reei.34.03

First of all, the widely known *Urgenda* judgment, delivered on 24 June 2015.[8] This is the first case were a Court has actually declared a State responsible for not fulfilling its obligations towards its citizens in relation to climate change. The impact of the judgment, although currently under appeal, has been global, and many similar cases have been filed around the world since then. [9]

On 4 September 2015, the Green Bench of the Lahore High Court, in Pakistan, delivered its decision on *Ashgar Leghari v. Federation of Pakistan*, and it was, again, a decision upholding the citizen's claim and obliging the State to take more decisive steps regarding climate change.[10]

And just two months after Ashgar Leghari, in yet another continent, Judge Hollis R. Hill, of the King County Superior Court, in the United States, issued an order that acknowledged the validity of the claim presented by eight minors asking the Washington Department of Ecology to set a science-based rule on GHG emissions reduction.[11] The only reason why the Judge didn't order the Department to start the rule-making procedure was because the State's Governor had directed it to do so once the proceedings had started.[12]

The flow of cases since 2015 has been constant, although a judicial decision has been delivered only in some of them. First, the *Klimaatzak* case in Belgium, filed in April 2015, with a very similar line to *Urgenda*.[13] Then, in August 2015, 21 boys and girls filed the US Federal Climate Lawsuit, *Kelsey Juliana v. The United States*.[14] Just a few

---

[8] *The Urgenda Foundation v. The Netherlands*, Judgment, 24 June 2015, ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag (The Hague District Court). Available for downloading at: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196.

[9] From the vast literature on the case, we may cite, among others, COX, R., 'A Climate Change Litigation Precedent: Urgenda Foundation v. The State of The Netherlands', 79 *CIGI Papers* (2015); DE GRAAF, K. J. and JANS, J. H., 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change', 27 *Journal of Environmental Law* (2015) at 517–527; PAREJO, T., 'La victoria de Urgenda: El inicio de la lucha judicial frente al cambio climático', 177 *Revista Española de Derecho Administrativo* (2016) at 259 – 279.

[10] Ashgar Leghari v. Federation of Pakistan, Order, 4 September 2015 W.P. No. 25501/2015, Lahore High Court Green Bench. Available at http://sys.lhc.gov.pk/greenBenchOrders/WP-Environment-25501-15-08-09-2015.pdf.

[11] *Zoe and Stella Foster et al. v. Washington Department of Ecology*, Order No. 14-2-25295-1 SEA, 19 November 2015, Superior Court of the State of Washington for King County. The decision can be downloaded here http://ourchildrenstrust.org/sites/default/files/15.11.19.Order_FosterV.Ecology.pdf. For a detailed analysis of the case, see WOOD, M.; WOODWARD, C., 'Atmospheric trust litigation and the constitutional right to healthy climate system: Judicial recognition at last', *Washington Journal of Environmental Law and Policy* 6(2), at 668-684.

[12] The situation has evolved since then, as the Judge considered in December 2016 that the Governor and the Department were unduly delaying the rule-making procedure and, thus, allowed the plaintiffs to go to trial with a constitutional climate rights claim against the State of Washington and the Governor. https://static1.squarespace.com/static/571d109b04426270152febe0/t/58598d7dd1758e6ea45711d3/1482263935834/2016.12.20-WA+ATL+Constitutional+Case+NR.pdf.

[13] Asbl Klimaatzaak v. the State of Belgium, the Région Wallone, the Région Flamande, and the Région de Bruxelles-Capitale, summons issued on 27 April 2015, Tribunal de Première Instance de Bruxelles. The summons can be found at https://affaire-climat.be/documents/affaire_climat_Citation_fr.pdf.

[14] *Kelsey Juliana et al. v. The United States of America et al.* Case number 6:15-cv-01517-TC, Order and Findings and Recommendation, 8 April 2016, United States District Court, District of Oregon – Eugene

DOI: 10.17103/reei.34.03

months later, in New Zealand, a young student submitted, in November 2015, an application for judicial review against the Minister for Climate Change Issues.[15] In April 2016, a nine-year-old girl, Rabab Ali, filed a petition in the Supreme Court of Pakistan asking for the implementation of scientifically-based mitigation policies concerning climate change.[16]

In the fall of 2016 two more cases were filed. On 15 September, PUSH Sweden and Fältbiologerna filed the first one, against the Swedish government, following its decision to authorize the selling of its coal assets in Germany to a company from the Czech Republic.[17] On 18 October, Greenpeace Norway and Nature and Youth, presented a lawsuit opposing the Norwegian government's new oil drilling permits in the Artic.[18] Because of their specific features, those are the cases that we will be analysing more in detail in this article.

The trend has not stopped since then, and we can also find some interesting developments in 2017. On the 2nd of February, the Austrian Federal Administrative Court struck down the Lower Austria's Government decision to build a third runway at the Vienna Airport because of the impact it would have had on GHG emissions considering the international commitments on climate change adopted by the Austrian State, especially the Paris Agreement.[19] One month later, the High Court of South Africa sent back the authorisation of a new coal-powered station to the Minister of

---

Division. Judge Coffin decision can be downloaded at https://static1.squarespace.com/static/571d109b04426270152febe0/t/576195342fe1316f09d2eb8d/1466012983313/16.04.08.OrderDenyingMTD.pdf. The case, subject to an unrelenting strategy of procedural obstruction by the US administration, has already gone through a motion to dismiss, an appeal to the decision to reject that motion (The appeals judge, in a detailed, finely argued and almost passionate decision that is definitely worth reading, also considered, on 10 November 2016, that the case could move to trial), a denied request for interlocutory appeal and a denied motion to put trial on hold.

[15] *Sarah Lorraine Thomson v. The Minister for Climate Change Issues*, Statement of Claim dated 10 November 2015, High Court of New Zealand, Wellington Registry. The High Court issued its judgment on 2 November 2017, whereby it acknowledged the right of the plaintiff to address the courts to address climate change issues while, at the same time, dismissed the claims as the newly elected government had promised to substantially increase the GHG reduction targets for 2050. The claimant has already announced that she will appeal the decision. Both the complaint and the decision can be found at http://climatecasechart.com/non-us-case/thomson-v-minister-for-climate-change-issues/.

[16] Rabab Ali v. The federation of Pakistan et al., Supreme Court, filed on 5 April 2016. Available at https://www.ourchildrenstrust.org/s/PakistanYouthClimatePetition.pdf.

[17] *Push Sverige and Fältbiologerna v. The Government of Sweden*, filed on 15 September 2016. Available at https://drive.google.com/file/d/0BwNst9QrJa18Y2x6X1hMYmJmSEk/view.

[18] Greenpeace Norway and Nature and Youth v. The Government of Norway, known as *The People v. Arctic oil*. Available at http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf.

[19] AFLG Antifluglärmgemeinschaft v. Lower Austrian Provincial Government. Bundesverwaltungsgericht, W109 2000179-1/291E. 02/02/2017. The original judgment, in German, can be found at https://www.bvwg.gv.at/amtstafel/291_ERKENNTNIS_2.2.17_ee.pdf?61pfzd. The decision has been recently quashed by the Austrian Constitutional Court arguing that the lower court had, among other things, erroneously analysed air traffic emissions as well as the domestic effect of international climate agreements. It can be downloaded at https://www.vfgh.gv.at/downloads/VfGH_E_875-2017_Verkuendungstext_Flughafen.pdf.

DOI: 10.17103/reei.34.03

Environmental Affairs to properly consider its impacts on climate change.[20] And on 25 March 2017, another nine-year-old girl filed a petition at the National Green Tribunal of India demanding the Government to properly assess all climate change related issues affecting India and to take the necessary decisions to respond to them, e.g. conducting a national inventory of GHG and defining a carbon budget.[21]

3. A variety of cases with key common features

What is particular about those cases is that, even if they come from five different continents and different legal systems (Civil law, Common law, and different mixtures of one or the other, or both, with local or regional religious or customary law) they share many elements.

As I mentioned earlier, those are cases where individuals and NGOs challenge governments' actions or inaction regarding climate change. The interesting thing is that they do so based on a complex legal grounding composed of several sources or disciplines of law, an approach that is not far from the one suggested by the authors of the *Oslo Principles* in 2015.[22]

Considering the absence of a clear-cut, written norm, either at the international or national level, concerning climate change obligations of States, in terms of GHG emissions reductions that would be in phase with the reduction levels needed as identified by the majority of scientists,[23] plaintiffs delve into a plurality of sources, weaving them, like threads of a fabric, to construe an obligation to act to avoid «the greatest challenge and threat for mankind in living memory».[24] I won't be thoroughly analysing here those "threads", as it has already been done in some detail in a previous article,[25] and it is not the object of this study. Nonetheless, it might be worth citing them as it may help to better understand the underpinnings of those lawsuits.[26]

---

[20] *Earthlife Africa v. Minister of Environmental Affairs*. High Court of South Africa, Gauteng Division, Pretoria, 65662/16. The decision can be found at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170306_Case-no.-6566216_judgment.pdf .

[21] *Pandey v. India*. National Green Tribunal, New Dehli. The petitition can be retrieved at http://wordpress2.ei.columbia.edu/climate-change-litigation/files/non-us-case-documents/2017/20170325_Original-Application-No.-___-of-2017_petition-1.pdf.

[22] Expert Group on Global Climate Obligations, *Oslo Principles on Global Climate Obligations*, Eleven International Publishing, The Hague, 2015.

[23] Currently, the Intergovernmental Panel on Climate Change (IPCC) is widely considered the most respected source of climate change scientific advice.

[24] Oslo Principles on Global Climate Obligations, *supra* note 22, at 15.

[25] 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', *Spanish Yearbook of International Law*, No. 20, 2016, pp. 71-92. United Nations Environment Programme, *The Status of Climate Change Litigation. A Global review*, May 2017, available at

[26] Other relevant studies on the subject include a recent report, jointly edited by UNEP and the Sabin Center for Climate Change Law also provides an interesting analysis of those cases. *The Status of Climate Change Litigation – A Global Review*, United Nations Environment Programme, May 2017. Available at http://wedocs.unep.org/handle/20.500.11822/20767?show=full. See also CORSI, G., 'A bottom-up approach to climate governance: the new wave of climate change litigation', *ICCG Reflections* No. 57, October 2017.

DOI: 10.17103/reei.34.03

One of the main legal sources plaintiffs rely on is international environmental law, either from the perspective of its general principles or from the perspective of international environmental agreements. As regards the principles, claimants often refer to the no-harm principle, together with the prevention principle (with which there sometimes seems to be some confusion) [27] and the precautionary principle. The principles of equity (both from its intergenerational dimension and from the perspective of common but differentiated responsibilities) and sustainable development are also often cited. Concerning international agreements, the UNFCCC [28] and the Kyoto Protocol[29] were mostly cited until 2016, with the Paris Agreement appearing as a key instrument in the most recent lawsuits.[30]

The Paris Agreement is the most relevant international legal step towards addressing climate change since the Kyoto Protocol. Its extremely fast and almost universal ratification process shows how States' concerns about climate change have evolved since Copenhagen's disappointing COP15 and hints to the successful balance that the Paris Agreement might have achieved between global needs and national interests.[31] Parallel to the lively scholar debate on the legal character of the Agreement and its provisions,[32] the Paris Agreement has had, since its adoption on December 2015, a clear impact both on the lawsuits that have been filed and on the judicial decisions that have been delivered.[33] The relevance of the Paris Agreement in the Scandinavian lawsuits is twofold, as plaintiffs refer to the Agreement both as a legal and a factual basis for their case. Two elements of the Agreement deserve special attention in those cases, the temperature goal of 2ºC («*pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels*»), and Nationally Determined Contributions (NDCs), that are subject to the notions of *progression* and *highest possible ambition*.[34] Accordingly, claimants suggest, the Paris Agreement is key in identifying the legal obligations of the

[27] For a study of the origins, evolution and interaction between those two principles, refer to DUVIC-PAOLI, L-A. and VIÑUALES, J.E., 'Principle 2: Prevention', in VIÑUALES, J.E. (ed), *The Rio Declaration on Environment and Development*, Oxford University Press, Oxford, 2015, pp. 107-119.

[28] United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 ('UNFCCC').

[29] Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 UNTS 148.

[30] UNFCCC, Decision 1/CP.21, Adoption of the Paris Agreement (UN Doc. FCCC/CP/2015/10/Add.1, 29 January 2016).

[31] The Paris Agreement entered into force before a year had passed since its adoption in December 2015. The Agreement reached the required threshold of ratifications (both in terms of number of countries and volume of emissions) on 5 October 2016 and entered into force on 4 November 2016. According to the UN Treaty Collection website, as of 16 September 2017, 160 out of 197 parties to the UNFCCC had ratified the Paris Agreement.

[32] VOIGT, C., "The Paris Agreement: What is the standard of conduct for parties?", *QIL*, Zoom-in 26, 2016, pp. 17-28. BODANSKY, D., "The Legal Character of the Paris Agreement". *RECIEL* No. 25, 2016, pp. 142–150. VIÑUALES, J. E., "The Paris Climate Agreement: An Initial Examination", *C-EENRG Working Papers* No. 6, 2015.

[33] The High Court of South Africa referred to the Agreement in its decision dated 8th March 2017 concerning a new coal-fired power plant, as did the Austrian Federal Administrative Court in its decision dated 2nd February 2017 concerning a new runway at the Vienna Airport. Both courts considered that climate change considerations should have been analysed and given more weight in the decision-making process and thus overturned the decisions taken by the authorities.

[34] *Push Sverige and Fältbiologerna v. The Government of Sweden*, *supra* note 17, at 8.

DOI: 10.17103/reei.34.03

State concerning climate change, even when those legal obligations derive mainly from domestic norms, as we will see below.[35]

Another essential legal base of those cases are human rights. Using human rights to protect the environment has so far proven to be an interesting tool, although one with a limited scope. The main obstacle, both from a procedural and a substantive perspective, comes from the need to prove that a human right of the claimant has been effectively impaired by the harm inflicted on the environment.[36] However, regarding climate change, it seems highly reasonable to expect serious human rights encroachments from global warming (e.g. harm to life, physical integrity, health, property, access to water, sanitation, private and family life), thus paving the way for the application of fundamental rights as a legal foundation for judicially reviewing actions or omissions that enhance climate change or do not prevent its catastrophic effects.

Those are rights recognised by international instruments but also enshrined in national constitutions that sometimes go beyond the international standard, as with the right to a healthy environment.[37] In fact, the human rights' dimension of climate change seems gradually becoming so clear that some Courts have started pointing to previously unwritten rights,

> *Exercising my "reasoned judgment," (...) I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.*[38]

In addition to international environmental law and human rights law, we can identify some legal grounds that are more specific to certain legal systems, such as Tort Law, so

---

[35] *The People v. Arctic oil*, *supra* note 18, at 18-19. The references to the Paris Agreement in the Swedish case, as well as to the UNFCCC and the Kyoto Protocol, are sometimes approximate and lack some precision, especially in §98 and §107.

[36] The European Court of Human Rights was very clear on the subject in *Kyrtatos*: «the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such». *Kyrtatos v. Greece*, no. 41666/98, §52, Judgment 22 May 2003, ECtHR 2003-VI. For an analysis of the relationship between human rights and the environment, see, among others, BOYLE, A., 'Human Rights or Environmental Rights? A Reassessment', *First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability*, UNEP, 2011, pp. 1-31, or PAVONI, R., *Interesse Pubblico e Diritti Individuali nella Girisprudenza Ambientale della Corte Europea di Diritti Umani*, Editoriale Scientifica, Napoli, 2013.

[37] Like Article 112 of the Norwegian Constitution.

[38] *Kelsey Juliana v. USA*, United States District Court for the District Of Oregon, Opinion And Order, 10 November 2016, Case No. 6:15-cv-01517-TC. Similarly, in *Zoe and Stella Foster v. Washington Department of Ecology*, Judge Hollis stated that « Although a statutory duty cannot be created from the words of the enabling statue, this language does evidence the legislature's view as to rights retained under Article I, Section 30. If ever there were a time to recognize through action this right of preservation of a healthful and pleasant atmosphere, the time is now.» *Supra* note 11, at 9. The Court in Asghar Leghari also mentions the right to a healthy and clean environment, as a part of the legally recognised right to life, in §7 of its Order from 4 September 2015. *Supra* note 10.

DOI: 10.17103/reei.34.03

far circumscribed to cases in Europe, and the Public Trust Doctrine, an institution that is mainly relevant in Common Law systems.

Finally, Constitutional Law is a key element in all those lawsuits. Defining the fundamental obligations of States regarding its citizens, Constitutions, together with the abovementioned relevant grounds — which, incidentally, are often set forth in constitutional norms—, would allow for the identification of a duty of care of the State in relation to global warming.

It is, however, necessary to add another ground to those listed above. One that does not have a legal nature but is nevertheless essential as it provides the facts, actual or anticipated, that are necessary to identify a harm that would enable the intervention of the courts. I am referring to science. The scientific findings on climate change, periodically examined and presented by the IPCC, have been progressively warning us of the disastrous consequences of global warming, providing different probabilities of risk depending on the emissions reduction paths chosen by the international community. Two degrees Celsius seems to be the symbolic limit beyond which climate disruption would be much more harmful and difficult to manage and to adapt to.[39]

II. MAIN ELEMENTS OF THE SCANDINAVIAN CASES

Before delving into the most relevant specificities of those cases, as compared to the other climate change lawsuits mentioned above, it is necessary to examine to some extent the elements that are submitted to judicial scrutiny, properly identifying the decisions being challenged, the main claims of the plaintiffs and the legal grounds upon which they are based.

A) The Norwegian case: The People v. Arctic Oil[40]

a) The controverted decision

On May 2016, the Norwegian authorities offered 13 new production licenses for oil and gas in the Arctic, opening new licenses in the Arctic Barents Sea for the first time in more than 20 years and adding previously unexplored areas such as the polar marginal ice zone, a location with a very sensitive and fragile ecosystem. In addition, the distance between some of the licensed zones and the mainland is unprecedented (450 km, compared to prior 220 km), adding new challenges in terms of non-existing

[39] The 2ºC goal was first established by the Cancun Agreements: «(…) deep cuts in global greenhouse gas emissions are required according to science, and as documented in the Fourth Assessment Report of the Inter-governmental Panel on Climate Change, with a view to reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2 °C above pre- industrial levels.» *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Decision 1/CP.16, 15 March 2011, doc. FCCC/CP/2010/7/Add.1 at 3.

[40] By the time the final corrections to this article have been made before publication, the case hearings had just started before the District Court in Oslo.

DOI: 10.17103/reei.34.03

infrastructure and practicality of risk-response. Only a few days later, Norway ratified the Paris Agreement.

b) Claims

Contesting the validity of the decision, two NGOs, Greenpeace Nordic, a regional environmental organisation with headquarters in Sweden, and Nature and Youth, a Norwegian youth environmental organisation, filed a lawsuit at the Oslo District Court on 18 October 2016. In their complaint, the plaintiffs basically ask the court to declare the invalidity of the Government's licensing decision, additionally asking for the compensation of the legal costs, based on the following grounds.

c) Grounds

As previously mentioned above, those are cases with a complex legal justification that refers to multiple sources. First, plaintiffs argue, there have been *procedural errors* that violate the legal due process requirements, especially the absence of an impact analysis of the decision on the existing international agreements on climate change and GHG emissions, the absence of a cost-benefit analysis (especially relevant in terms of a not-so-distant decarbonised economy) and the lack of consideration of a «particularly valuable and vulnerable area» on the impact assessment or the lack of a management plan for that area (Barents Sea South-East).[41]

Second, the decision violates the Norwegian *Constitution* that sets forth in Article 112 the right to a healthy and sustainable environment.[42] Claimants remind the Court that the Constitution was revised in 2014 in order to clearly define this right as a «key human right». [43] According to the plaintiffs, this article establishes «an absolute threshold governing the extent and the damage and risk to which the environment can be exposed»,[44] and grants the Court jurisdiction to review administrative decisions.[45]

Third, the licensing decision violates *Human Rights* obligations as recognised in international instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[46] It is worth noticing that, in addition to the right to life (Article 2 ECHR) and the right to private and family life (Article 8 ECHR), plaintiffs also refer to the right to health as recognized not only by the International Covenant on Economic, Social and Cultural Rights (ICESCR)[47] but also by recent statements by the United Nations Human Rights Council (UNHRC) and the United Nations Committee on the Rights of the Child. Of particular interest is a 2016 Report by the UNHRC, cited by the plaintiffs, that recognizes the

[41] The People v. Arctic oil, *supra* note 18, at 25, 31-32.
[42] *Constitution of the Kingdom of Norway*, 17 May 1814, available at https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf.
[43] *Ibid.*, at 33-36.
[44] *Ibid*., at 6.
[45] *Ibid*., at 34-35.
[46] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[47] International Covenant on Economic, Social and Cultural Rights (United Nations [UN]) 993 UNTS 3.

DOI: 10.17103/reei.34.03

(…) affirmative obligation of States to take measures to mitigate climate change; to prevent negative human rights impacts; to ensure that all persons, particularly those in vulnerable situations, have adequate capacity to adapt to changing climactic conditions; and to regulate the private sector in order to mitigate its contribution to climate change and ensure respect for human rights.[48]

Last, the licensing decision would be contrary to *international environmental law* principles and treaties. This, in turn, has a constitutional dimension, plaintiffs argue, because Norwegian domestic law must be interpreted in accordance with international law, following what they call the «presumption principle».[49] We have already mentioned, above, the relevance of the Paris Agreement for the case, so here we will be focusing on two key legal principles.

To begin with, the *precautionary principle*, which has two legal implications for the case. On the one hand, the lack of complete certainty concerning the likely harmful consequences of the oil exploration and exploitation cannot be used as a justification to proceed with the licensing. On the other hand, plaintiffs go on saying, the application of the principle reverses the burden of the proof, thus imposing on the authorities the obligation to demonstrate that the licensed actions would, more likely than not, have an innocuous effect on the environment.[50]

Furthermore, claimants refer to the *no-harm principle*, although they use it rather as an equivalent to the prevention principle, citing the Pulp Mills' case before the ICJ.[51] In short, plaintiffs argue, Norway should refrain from conducting or authorizing activities that will have a negative impact on the environment of other States. It seems hardly disputable that the consequences of global warming derived from GHG emissions in Norway will not be limited to the Norwegian territory.

Overall, the summons concludes, the deleterious consequences that would derive from the licensing decision would be of such importance and be contrary to so many legal obligations, that it couldn't be justified by an uncertain economic gain and it should therefore be considered invalid.[52]

d) Double nature of the lawsuit

It is worth noting that, in addition to the climate dimension, which is quite a recent field in terms of judicial adjudication, the case filed against the Norwegian government also has a more "traditional" environmental dimension because some especially valuable and vulnerable parts of the arctic are threatened by the oil prospection, extraction and production.

---

[48] United Nations Human Rights Council, *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/32/23 (2016), §54, at 16, mentioned in *The People v. Arctic oil*, *supra* note 18, at 39.
[49] *Ibid.*, at 36.
[50] *Ibid*., at 37.
[51] Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), ICJ, Judgment of 20 April 2010. Mentioned in *The People v. Arctic oil*, *supra* note 18, at 38.
[52] *Ibid*., at 40.

DOI: 10.17103/reei.34.03

Indeed, the environmental fragility of the region, especially the *marginal ice zone* is particularly vulnerable to the consequences of human activities, such as black carbon particles emitted by combustion, drilling or construction activities. Furthermore, the distance and harsh conditions of the zone would add to the already high complexities of an emergency operation in case of, for instance, an oil spill.[53]

Parallel to that, one could say that there's a dimension of the case that deals with and relies mostly on impacts upon human beings and another dimension that focuses on the environment per se, i.e. regarding the biological value that is threatened irrespective of its relation to human beings. However, both dimensions meet in relation to the black carbon that would be emitted by the exploration and extraction process, for black carbon has been identified as a short-lived climate driver because, among other effects, it reduces the natural albedo effect of the ice, i.e. reducing the ability of the polar zones to reflect solar radiation both because the surface becomes darker and because the soot accelerates the melting of the ice.[54]

B) Climate litigation in Sweden: The Magnolia Case

a) Challenged decision

On 2 July 2016, the government of Sweden authorized the sale by the state-owned company Vattenfall of its lignite mines in Germany to the privately owned Czech holding EPH and its financial partners PPF Investments.

There are several reasons behind the sale, some legal while some others of a more political nature. Among the latter, we can find a Statement of Government Policy of 2014, where it is clearly stated that countries « must stop investing in that which destroy our planet».[55] Also in 2014, the Swedish authorities decided to cancel the expansion of coal operations previously allowed by the former government. A year later, the Fossil Free Sweden Initiative, a joint initiative by the government, municipalities, regions, industry and organizations from across Sweden, was launched.[56] Short after, in 2016, the Swedish Environmental Objectives Council issued its final report on the government's climate policy, calling for Sweden to become a leader on the global efforts to counter climate change.[57]

Concerning the legal motivation behind the sale, there are several government bills and ownership directives to take into account. On 1997, the Government approved the Swedish Environmental Objectives that set what is known as the «Generational Goal», approved by the Swedish Parliament in 1999, and set to be met by 2020 on 2000.[58] In

[53] *Ibid*., at 26-29.
[54] *Ibid*., at 27. The effect of black carbon upon the climate system has been analysed by the IPCC. See, for instance, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 2014, 151 pp., at 84, 90 and 125.
[55] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §26.
[56] *Ibid*., at §32. More information about the *Initiative* can be found at their official website.
[57] *Ibid*., at §33.
[58] *Ibid*., at §28-30.

DOI: 10.17103/reei.34.03

2009, Vattenfall's ownership directives were modified, switching the position of the company from its hostility towards renewable energy to a more sensible one towards global warming and extending its responsibility beyond Swedish borders.[59] In 2010, Vatenfall's by-laws were modified to transform Vattenfall into a leader in «sustainable energy production».[60]

In addition to the abovementioned legal and policy motives for divesting from coal-powered electricity generation in Germany, economic and financial considerations also played a significant role, as the future profitability of coal-powered energy production became more and more uncertain.[61] Thus, in 2015, a decision was reached in Vattenfall to reduce its involvement in German coal, as a consequence of converging legal, political and economic reasons.

b) Claims

The State considered this was a step towards Sweden becoming a greener country, but to domestic NGOs Push Sweden and Fälbiologerna and an additional 176 individual co-plaintiffs, the real effect of the operation would be that emissions will increase and, among other things, compromise the EU's ability to achieve its climate goals. This is why, on 15 September 2016, they filed a petition at the Stockholm District Court to declare the sale illegal.

If EPH and PPF were allowed to take over Vattenfall's coal operations in Germany, plaintiffs argue, they would most likely not only operate the active mines and power plants for a longer time than Vattenfall would have done, but they would probably open up to five new mines - something Vattenfall undertook not to do. If the five new mines were to be opened, GHG emissions would increase by about 1.2 billion tonnes of CO2, which corresponds to approximately 22 times the whole of Sweden's current annual emissions.[62]

This is why plaintiffs reached the Court with three main claims, i.e. to find that the State, by either allowing or not preventing the transaction, had not respected its duty of

[59] *Ibid*., at §44. « Vattenfall is today an international company with more than half of production and revenue from markets outside Sweden. The Nordic electricity market is so integrated that it is difficult to define exactly what is meant by "Swedish" energy. The Government considers that the Swedish state should be a responsible owner of the group Vattenfall, and the company will conduct exemplary operations based on current conditions regardless of the market in which the company operates. Thus all geographical boundaries should be deleted from the Articles of Association. »

[60] The use of the term "sustainable" instead of "renewable" is not an innocent choice, as Vattenfall continues to operate nuclear powered stations in Europe. More information can be found at their corporate website: https://corporate.vattenfall.com/about-energy/non-renewable-energy-sources/nuclear-power/nuclear-power-at-vattenfall/.

[61] This seems to be the trend, as pointed out in the 2017 World Energy Investment report by the International Energy Agency. *World Energy Investment 2017*, IEA Publications, 2017.

[62] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §52. On March 2017, EPH announced that it would not open two of the new mines while still considering what to do with the other three: https://www.cleanenergywire.org/news/new-owner-scraps-plans-expand-east-german-lignite-mine.

DOI: 10.17103/reei.34.03

care towards the Swedish citizens, to find the sale to be illegal, and to make available all documentation related to the sale.[63]

c) Grounds

As in many of the climate change lawsuits mentioned above, plaintiffs in the Magnolia case elaborate a complex legal argumentation composed of a wide range of legal grounds, that stretch from administrative and more procedural requirements to more substantive constitutional and international obligations.

First, plaintiffs argue, an *assessment of the buyer* is required in the sale of state-owned companies, and the sustainability perspective should be taken into consideration when conducting it. Such a sustainability assessment seems to be lacking in this case.[64] The required level of «sustainability», claimants argue, should be, at least, the same as required to state-owned companies – although they don't provide any legal basis for this assertion – and be based on the UN Global Compact as well as on the OECD Guidelines for Multinational Enterprises, two initiatives that, it is worth stressing, do not have any legally binding effect.[65]

The voluntary character of those international initiatives notwithstanding, it is clear, from a close inspection of the purchasers' activities, that their record in terms of environmental sustainability, and even law-compliance, is far from exemplary. As the plaintiffs recall, EPH considers environmental standards as a risk for profitability and a handicap for growth, and

> «(…) *has been condemned by the European Commission for obstructing a corruption investigation; lacks any kind of environmental and sustainability accounts; seeks increased use of coal in Europe; is owned by three oligarchs through a brassplate company in a tax haven and intends to finance the giant deal through a completely opaque company in a tax haven*. »[66]

Hence, plaintiffs go on, EPH is a company that does not stand by the sustainability and responsibility standards set by the OECD guidelines or the UN Global Compact, therefore contradicting the policy standards subscribed by the State.

Secondly, it is not clear whether the government did conduct an *assessment of the environmental, climate and sustainability implications* of the operation and it is worth noticing that although Greenpeace had requested access to that information prior to the beginning of the trial, the authorities rejected the request.[67] However, it is rather

[63] *Ibid*., at §125.
[64] *Ibid*., at §63.
[65] *Ibid*., at §65-67. The UN Global Compact is an initiative launched in 2000 by the United Nations, that seeks to involve companies in promoting sustainable practices around the world. The initiative is currently involved in promoting the 2015 Sustainable Development Goals and has a dedicated website. The OECD Guidelines for Multinational Enterprises are also a non-binding instrument addressing recommendations to multinational enterprises, and can be downloaded at the OECD's website.
[66] *Ibid*., at §68-75.
[67] *Ibid*., at §84-85.

DOI: 10.17103/reei.34.03

puzzling that plaintiffs do not give any further development to this point, besides briefly mentioning it again at the end of the summons to support their argument on the negligent conduct of the State[68] as well as asking for the disclosure of any assessment the Government might have conducted on either the sale or the acquiring company, EPH.[69] This lack of elaboration, that leaves unresolved even the essential question of whether plaintiffs are referring to an ordinary Environmental Impact Assessment (EIA) or to some other sort of assessment, is certainly remarkable, especially because environmental procedural obligations and the procedural dimension of human rights have become a crucial element of environmental litigation, particularly since the ESPOO and Aarhus conventions, and it could have been expected to find a slightly more developed argument in that regard.[70] In any case, plaintiffs could have at least referred to Article 4.1 (f) of the UNFCCC, which could provide an interesting basis for the need to conduct an impact assessment on climate related policies.[71]

Thirdly, the sale appears to be contrary to several *norms concerning Vattenfall*, especially its bylaws and the State's ownership and policy directives mentioned above. Claimants insist that those norms should be read in accordance to Swedish climate targets and international treaties to which it is party.[72] There also appears to be a dispute over whether the ownership directives established that priority should be given to commercial considerations over environmental ones, an argument that has been put forward by the Swedish government, who argues that in order to stop the deal, new ownership directives would be needed (and a majority vote in parliament required). On

[68] *Ibid*., at §103.
[69] *Ibid*., at §123.
[70] Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 UNTS 310 ('Espoo Convention'). For an analysis of the evolution of Environmental Impact Assessment, see CRAIK, N., 'Principle 17: Environmental Impact Assessment', in VIÑUALES, J.E. (ed), *The Rio Declaration on Environment and Development*, *supra* note 27, pp. 451-470. See also BOYLE, A., 'Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention', *Review of European Community & International Environmental Law*, 20(3), 2011, at 227-231. At the EU level, the key norm is the EIA Directive, Directive 2011/92/EU of 13 December 2011, as amended by Directive 2014/52/EU of 16 April 2014. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, Aarhus (Denmark), in force 30 Oct. 2001. The literature on the subject is vast. See, for a general overview, MORGERA, E., 'An Update on the Aarhus Convention and its Continued Global Relevance', 14 (2) *Review of European, Comparative & International Environmental Law,* (2005), pp. 138-147 [10.1111/j.1467-9388.2005.00434.x]. On the evolution of the Aarhus Convention in the EU context, see PALLEMAERTS, M., *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Europa Law Publishing, 2011. For an analysis of the impact of the Aarhus Convention on the climate change regime, see DUYCK, S., 'Promoting the Principles of the Aarhus Convention in International Forums: The Case of the UN Climate Change Regime', 22 (4) *Review of European, Comparative & International Environmental Law,* (2015), pp. 123-138.
[71] «Article 4.1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: (…) (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change», UNFCCC, *supra* note 28.
[72] Push Sverige, Fältbiologerna et al. v. Sweden, *supra* note 17, at §§101-102.

DOI: 10.17103/reei.34.03

the other hand, plaintiffs recall several legal experts saying that commercial considerations shouldn't be given priority according to the ownership directives and that, even if that were the case, the government could easily change those directives.[73]

Fourthly, plaintiffs cast serious doubts on the coherence of the operation with regard to *EU targets* for GHG emission reductions, as it would probably increase the overall level of GHG emissions in the EU as a consequence of an increase in emissions in Germany and that, according to the Swedish National Audit Office, would be contrary to national parliamentary decisions, such as the "Generational Goal", that calls for a transition without causing environmental problems outside of Sweden, [74] as well as being contrary to the notion of sustainability, that asks for a global reduction of GHG.[75] However, while plaintiffs do mention EU GHG emissions reduction targets, they do not make any reference to EU law, in notable contrast with other climate cases in other EU countries.[76] Indeed, EU law is only mentioned in the summons regarding the right of standing and in connection with the Aarhus Convention.[77]

Fifthly, the sale has been reported to the EU Commission by a German-Mongolian company under the accusation of including *illegal state subsidies* to EPH from the Swedish authorities.[78]

Sixthly, *human rights*, as recognised by the Swedish Constitution and international instruments, are being threatened by climate change, a danger that will be exacerbated by the increase in GHG emissions that would allegedly derive from the sale. As already mentioned at the beginning of this article, there is a clear link between the protection of the environment and a full enjoyment of human rights, and such a connection has already been drawn for some decades, not only in academic literature, but also in legal instruments as well as in courts.[79] Climate change is no exception when we consider the pervasive and severe effects that increased global warming would have upon some of our more fundamental rights.[80]

---

[73] *Ibid*., at §§80-82.
[74] *Ibid*., at §52 and §76.
[75] *Ibid*., at §78.
[76] Three main pieces of EU legislation are usually mentioned in similar climate change cases in Europe: Article 191 TFUE, the Emission Trading Scheme (ETS) Directive and the Effort Sharing Decision (ESD). See, for instance, paragraphs 2.53 to 2.77 and 4.26 to 4.80 of the *Urgenda* judgement, *supra* note 8, or paragraphs 42, 72 and 77 of the *Klimaatzaak* summons, *supra* note 13, or even p. 123 of the *Vienna Airport* judgement, *supra* note 19.
[77] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §116.
[78] *Ibid*., at §79.
[79] See *supra* note 36.
[80] The literature on the subject is vast. See, for instance, BODANSKY, D., 'Climate Change and Human Rights: Unpacking the Issues', *Georgia Journal of International and Comparative Law*, nº 3, vol. 38, 2010 pp. 511-524, for an analysis of a Human Rights approach to climate change. For a more recent and concise *tour de la question*, see UGOCHUKWU, B., 'Climate Change and Human Rights. How? Where? When?', CIGI Papers, nº 82, 2015, pp. 1-11. KNOX, J.H., 'Human Rights Principles and Climate Change', in CARLARNE, C., GRAY, K.R., and TARASOFSKY, R., eds., *Oxford Handbook of International Climate Change Law*, Oxford University Press, 2016. CULLET, P. 'Human Rights and Climate Change – Broadening the Right to Environment.', also in CARLARNE, C. et al., *Oxford Handbook of International Climate Change Law*, Oxford University Press, 2016, pp. 499-519.

DOI: 10.17103/reei.34.03

In the present case of study, claimants argue that the sale of part of Vattenfall's German coal assets to EPH would be contrary to Chapter 1, Article 2 of the Swedish Constitution, that enshrines a right to a «good environment for present and future generations»,[81] and that it would also violate the right to life and to private and family life, as recognized by the ECHR, as well as the right to health, established by Article 11 of the European Social Charter.[82]

Finally, the lignite sale would be contrary to *international environmental law* treaties and principles which, according to plaintiffs, generate an obligation for States to reduce the emission of GHG at a level that would avoid or reduce harm at the highest extent possible.[83] Again, no much detail is given on the subject, besides mentioning the UNFCCC, the Kyoto Protocol, the Paris Agreement, and the prevention and precautionary principles.

From the abovementioned grounds, together with *tort law*, which is mentioned only in passing while referring to the Oslo Principles,[84] would derive a *duty of care* of the State concerning climate change, that establishes an obligation to take the necessary measures to reduce GHG emissions, even beyond Swedish borders, to avoid a «major, immediate and foreseeable risk».[85] Failure to do so would amount to *negligence* and, hence, as an increase in GHG emissions is a very probable outcome of the sale, the State should be found to have failed its duty of care and the sale be declared illegal.

III. SPECIFICITIES OF THE SCANDINAVIAN CASES

Most of the abovementioned grounds can be found in many of the recent or ongoing climate lawsuits. However, there are some interesting features that set those cases apart from – most of – the rest, mainly the choice of tactical, instead of strategic, litigation, and the extraterritorial dimension of both lawsuits.

1. Project-based v. Strategic litigation

A) Overview

Most of the lawsuits filed so far by citizens against their governments challenge their climate policy as a whole, because it is deemed insufficient, or even contradictory, regarding the necessary actions to be taken to achieve a relatively safe level of GHG emissions. Thus, plaintiffs in *Kelsey Juliana*, *Urgenda* or *Ashgar Leghari* use litigation as a strategic tool to influence over climate policies, generally asking for more

[81] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §88.
[82] *Ibid*., at §89. Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, revised on 3 May 1996, ETS 163. Both plaintiffs in the Swedish and Norwegian cases refer to the right to health, but while the former refers to a regional human rights instrument, the European Social Charter, the latter builds upon international agreements and institutions, such as the ICESCR and the Human Rights Council.
[83] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §§95-98.
[84] *Ibid*., at §96.
[85] *Ibid*., at §104.

DOI: 10.17103/reei.34.03

ambitious action from their governments. Even when they refer to specific projects, such as in *Rabab Ali*, where the plaintiff questions a China-sponsored large coal-mining project, or in *Kelsey Juliana*, where claimants oppose the export of liquefied natural gas, those cases try to obtain a broad bolstering of climate-related policies.

Conversely, the cases in Sweden and Norway seem to limit themselves to a more project-related litigation framework, challenging in court a State's particular decision that might have a negative impact on the climate. They are, together with the abovementioned recent cases in Austria and South Africa, examples of what Wilensky calls 'tactical litigation'. [86]

B) Tactical litigation: an unexpected approach

Given the complexity of the legal grounding of those cases, the choice of a tactical approach instead of a more strategic one concerning the whole of the climatic policies of their respective states, is quite unexpected, especially when we consider the previous successful cases mentioned above and, even more so, the degree of criticism that can be found in the Scandinavian lawsuits towards not only the specific provisions submitted to judicial scrutiny, but also to the global warming policies of those countries.

In the Swedish case, for instance, claimants point out that

> *The annual monitoring of the Swedish Environmental Protection Agency noted in 2016 that 14 of the 16 Environmental Quality Objectives, including the objective Reduced Climate Impact, will not be achieved by 2020 with existing* [sic] *and policy instruments and measures.*[87]

As for the Arctic Oil case, plaintiffs insist that the climate targets set at the national level by the Norwegian Parliament won't be met, as the gap between those objectives and the reality of the actual emissions is considerable.[88]
Even in their references to climate science, plaintiffs cite scientists that call for more ambitious GHG reduction levels and time-frames than the IPCC.

> *Even with the more optimistic reading of Sweden's 2016-2100 carbon budget (the 336MtCO2 value), by 2025 emissions of energy-only CO2 will need to have been reduced by over 70% (cf 2016) reaching a reduction of almost 95% by 2035. Based on the more cautious budget (but still well in excess of what aligns with the Paris Agreement's temperature objectives), these reduction rates increase significantly to over 90% and 99% by 2025 and 2035, respectively.*[89]

---

[86] S*upra* note 1, at 144-145.
[87] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §34
[88] « (…) the targets represent the authorities' own assessment of what has been considered appropriate and necessary at given points in time» and «It is absolutely clear that the targets are not being met and that the discrepancy between the targets and the actual numbers is very large.» *The People v. Arctic oil*, *supra* note 18, at 21.
[89] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §8. Citing Kevin Andersson, University of Manchester, Tyndall Centre for Climate Change Research, Visiting Professor Uppsala University, who has provided scientific advice to plaintiffs.

DOI: 10.17103/reei.34.03

This is all even more intriguing when there is already the precedent of *Urgenda*, in the Netherlands, a striking example of successful strategic litigation. As a matter of fact, *Urgenda* is curiously only cited in the Swedish case in relation to the "right of standing", while it is not even mentioned in the summons submitted to the Norwegian court. And even though Swedish plaintiffs refer to the Dutch judgment as proving that a court might bring a claim «based on the failure of the government to undertake sufficient measures to combat climate change and urge the government to undertake additional measures», they chose instead to focus only on the illegality of the sale.

Such an approach appears also to be not entirely consistent with the Oslo Principles, cited both by plaintiffs in Sweden and Norway.[90] The authors of the *Principles* made it clear that, in application of the precautionary principle, if there were credible studies by a substantial number of scientists that showed the need for more stringent GHG reductions in order to reach a "safe" temperature increase (that is, 2ºC), the level of reduction of GHG should be based on those more demanding reduction scenarios.[91]

If the overall climate policies of the State are clearly insufficient, if there also seems to be scientific support for more demanding GHG reduction measures, if, moreover, there is scholar support for a strategic approach and if there are even successful precedents of that approach in court, why, then, reduce the scope of the demand to a particular decision by the authorities? I would suggest that plaintiffs might have considered more likely to obtain a favourable decision of the court regarding a specific action or omission by the State that would clearly have a negative impact on the climate system, especially when there are recent international agreements calling for State action on the matter (i.e. the Paris Agreement), than if they were challenging the absence of an ambitious enough general policy of the State concerning climate change where no mandatory level of ambition has been clearly legally defined so far.

Nevertheless, a question inevitably arises; does the absence of an overall challenge to the State's climate policy mean an endorsement to that climate policy? Although plaintiffs would surely answer in the negative, as we have already recorded their criticism of those policies, the potential inconsistency of such an approach appears in several instances of the summons. For example, in the Swedish case, plaintiffs argue that

> *In order to fulfill its duty of care, the State should ensure that operations are kept under Swedish ownership to allow for the responsible dismantling of lignite operations, or to ensure that the sale is to a responsible buyer who agrees to be bound by the restrictive conditions that applied to the operations under Swedish ownership.92*

Does that mean that it would be consistent with the State's duty of care in relation to climate change to keep burning coal at the same pace as before? The adoption of a limited, narrower approach could imply that the problem lies only in the increase of coal mining and burning, thus ascribing no relevance, in terms of climate change, to the

[90] Oslo Principles on Global Climate Obligations, *supra* note 22.
[91] *Ibid.*, at 56-57.
[92] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §106.

DOI: 10.17103/reei.34.03

current levels of coal use and exploitation. This, of course, would be an incongruous conclusion.

As a matter of fact, such a tactical choice, while having a greater likelihood of succeeding *a priori* – and the recent decisions in Austria and South Africa support such an approach–, is nonetheless no guarantee of success. On July 2017, the Stockholm District Court denied trial of the case without considering the substance of the lawsuit because «it can be concluded that the plaintiffs' action does not mean that they have been exposed in an indefensible manner to a real life threat, or that there have been any material harmful effects whatsoever».[93] Although the judicial decision might convey a limited understanding of the complexity of climate change and its deleterious effects, not least for human rights, it also brings up the question whether challenging a specific decision with limited – although relevant – effects over the State's contribution to climate change might have made it more difficult to identify the causal link between the challenged action and the alleged impairment to the plaintiffs.

2. Extraterritoriality

There is a second element that distinguishes the lawsuits in Sweden and Norway from the rest. In all the aforementioned cases, plaintiffs sue their governments for activities due to take place and have an impact on the territory of that government's State. What is most peculiar about the two Scandinavian cases is that they both have a very relevant extraterritorial dimension that appears at multiple levels: the place where the activity that prompts the judicial review would take place, the place where the emissions would be produced, the place where the harm would actually take place and the nationality and place of residence of the potential victims.

B) The place where the activity that prompts the judicial review would take place

The first level of extraterritoriality regards the place where the activities that have been decided or authorized by the State take place, with the peculiarity that the place in question is situated inside another State's borders, that is, outside the first State's jurisdiction.

This level does not apply in the Norwegian case, as the activity that is the object of the claim is the award of exploitation rights *in* Norwegian territory. It is, however, very relevant in the case of Sweden. There, the object of the controversy is the sale of several mines and power plants that are located in a foreign country (Germany) to a corporation from yet another State (Czech Republic).

According to the plaintiffs, this *extraterritorial* perspective has been clearly adopted by the Swedish authorities themselves with the amendment of Vattenfall's ownership directives in 2009. As claimants recall it,

[93] Stockholms Tingsrätt, Mål nr T 11594-16 m.fl., 30 June 2017, at 5-6. Plaintiffs have already announced that they will appeal the decision during the autumn of 2017.

DOI: 10.17103/reei.34.03

> The Government considers that the Swedish state should be a responsible owner of the group Vattenfall, and the company will conduct exemplary operations based on current conditions regardless of the market in which the company operates. Thus *all geographical boundaries should be deleted from the Articles of Association*.[94]

Extraterritoriality, however, is here limited to the activity taking place in a foreign country as far as the decision concerning that activity is being taken by the State of the court involved. It is thus not a case where domestic courts are asked to assess the legality of a decision taken by a foreign government concerning an activity taking place in its territory.

C) The place where the emissions would be produced

A second level of extraterritoriality, which is applicable to both Scandinavian cases, concerns the location of the GHG emissions that would be produced by the activities under scrutiny. In essence, in the Swedish case the extraction and burning of the coal to produce electric power would take place in Germany, and in the Norwegian one, the oil extracted from the Arctic would be mostly used in countries all around the world and sold by foreign companies (e.g. Chevron, Lukoil, Idemitsu, ConocoPhillips, among others).[95]

In both cases, even if the emissions were to take place outside the State's borders, plaintiffs hold that this would contribute to the invalidity of the State's decision. In Sweden, for instance, they refer to the Environmental Objectives Council's final report on the State's climate policy framework, which insists, in various occasions, that domestic decisions adopted concerning climate change should not lead to an increase of GHG emissions abroad.

> Sweden should be a leading country in the global efforts to implement the Paris Agreement's ambitious goals and take responsibility for the country's historical emissions. Sweden will also conduct an ambitious and sustainable national climate policy and be a model for other countries, while maintaining competitiveness and a ways [*sic*] that do not involve the emission of greenhouse gases increases abroad. [96]

In addition, claimants go on, the fact that emissions would increase outside Swedish territory shouldn't be an obstacle for reviewing the decision because international agreements (they refer to both the Kyoto Protocol and the Paris Agreement, although the reference is clearer regarding the former)[97] also call for minimizing adverse effects

[94] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §44

[95] The full list of companies that have been awarded a license can be found at https://www.regjeringen.no/en/aktuelt/announcement-23rd-licensing-round-awards/id2500936/ .

[96] Environmental Objectives Council's final report on the climate policy framework and overall air pollution control policies to the government (SOU 2016: 47), cited in *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §33. This idea is reiterated again at §37, « At the same time it is assumed that measures in Sweden will be implemented in such a way that they do not lead to increased emissions in other countries».

[97] Most probably, they are referring to Article 2.3 of the Kyoto Protocol: «The Parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects (…) on other Parties.», *supra* note 29.

DOI: 10.17103/reei.34.03

on other countries of decisions concerning climate change, and, not least, because the consequences of those emissions would also affect Swedish nationals inside Swedish borders.[98]

Claimants in Sweden refer to the impact of the decision in terms of increased GHG emissions in Germany and the EU, especially mentioning EU climate targets, although they don't develop the argument any further, leaving aside the discussion concerning whether a Swedish court could review the legality of a Government's decisions based on its its impact on the European Union global climate targets.[99] Plaintiffs also emphasize the fact that Vattenfall's emissions abroad are already larger than all GHG emissions from Swedish soil.[100]

In the Norwegian case, claimants also elaborate on the issue of "emissions' exportation", insisting on the fact that GHG reduction measures at home cannot compensate for the GHG emissions around the world that derive from the use of hydrocarbons obtained from Norwegian soil, while linking the issue to the necessary reduction of the "world's petroleum consumption (…) in order to prevent the extreme consequences global warming will entail".[101] As claimants put it,

> With regard to emission-reducing measures in Norway, the lag is considerable and such measures can in no way compensate for *the exporting of CO2 emissions* which occurs when Norwegian petroleum is used elsewhere in the world. It is nevertheless irrelevant to the planet's climate where the use of petroleum occurs. Reduced production of Norwegian petroleum will, however, reduce the quantity of petroleum offered in the world and thus global CO2 emissions. [102]

However, while the prior reasoning might be clear, the question of the role of the State where the emissions would actually take place remains and is not addressed by plaintiffs in any of both lawsuits. If GHG emissions in Germany will surge as a consequence of the opening of new coalmines, shouldn't it be the responsibility of Germany to assess whether those actions are in accordance with its climate policies? The same question applies to the EU.

---

[98] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §107.
[99] *Ibid*., at §38. The interaction between national and regional law is very relevant concerning climate change and the European Union, and has been discussed in *Urgenda* and commented upon in recent literature. *Urgenda v. The Netherlands*, *supra* n. 8, at §4.80. 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' (Case Note), 25 *Review of European Community & International Environmental Law* (2016), pp. 123-129, at 127-128. SQUINTANI, L. et al., 'Regulating greenhouse gas emissions from EU ETS installations: what room is left for the member states?', in PEETERS, M. et al. (eds), *Climate Law in EU Member States. Towards National Legislation for Climate Protection*, (Edgar Elgar, Cheltenham, 2012) 67. WYAT, D. et al., *Does the EU's proposed Directive On Industrial Emissions (IPPC) preclude member states from imposing emission limits for CO2 under national rules other than those implementing the proposed Directive?*, Legal advice, 9th February 2010.
[100] *Push Sverige, Fältbiologerna et al. v. Sweden*, *supra* note 17, at §38 and §§52-53,
[101] *The People v. Arctic oil*, *supra* note 18, at 21.
[102] *Ibid*., at 24.

DOI: 10.17103/reei.34.03

D) The place where the harm would actually take place

Global warming and climate change are phenomena of a global nature. It doesn't matter where the GHG emissions are produced, because it is the combined effect of the world's total emissions that leads to the increase in earth's mean temperature. In that sense, as we have just seen in the Swedish case, the extraterritorial quality of the emissions does not prevent the internal consequences of those emissions in terms of climate change. It is a question, then, of domestic harm. But not only.

Climate change will inevitably also cause harm to other States, and plaintiffs in both Sweden and Norway argue that the potential extraterritorial damage is also an element of invalidity of their respective governments' decisions. This relates directly to the principles of no-harm and prevention, although only claimants in the Norwegian case explicitly refer to the former. The summons in the Magnolia case refer more generally to the Kyoto Protocol and the Paris Agreement, without quoting any particular disposition of those treaties. Conversely, the argument is given more consideration in the Arctic Oil case, which, besides using a language representative of a more holistic vision – referring to « the planet's current needs» –, develops a constitutional and international law basis for extraterritoriality in terms of harm prevention.[103]

According to plaintiffs, the constitutional basis of such an approach lies on Article 112 of the Norwegian Constitution, as this provision would implicitly affirm the principle of non-discrimination, [104] allegedly further established in a more explicit way in the Pollution Control Act.[105] Such a reading of the constitutional text would be confirmed by international law, according to which Norwegian law should be interpreted. Thus, based upon the so-called 'presumption principle', claimants refer to the Pulp Mills case at the ICJ to affirm the applicability of the no-harm principle and to highlight the need to prevent the transboundary harm that would derive from the licensing decision.[106] It is, however, surprising that they don't mention the prevention principle as such, which was also fundamental in the *Argentina v. Uruguay* case; an omission that might be due to the early stage of the proceedings and that ought to be addressed should the case proceed to a more substantial phase.

[103] *Ibid*., at 37-38.
[104] The Article, which clearly does not explicitly mention the non-discrimination principle, reads as follows: « Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles. »
[105] «Pollution and waste problems resulting from activity in Norwegian territory shall be counteracted to the same extent irrespective of whether the damage or nuisance arises within or *outside* Norway. » *The People v. Arctic oil*, *supra* note 18, at 38 (emphasis added).
[106] *Case Concerning Pulp Mills on the River Uruguay*, *supra* note 51.

DOI: 10.17103/reei.34.03

E) Extending State's responsibility to protect the victims of climate change: from nationals to humanity

Plaintiffs in the Arctic Oil case state, at the end of their summons, that «[T]he planet's natural resources, including its climate, are protected by Article 112, first paragraph of the Constitution. *No territorial limitations* apply here. (…) The fact that a far warmer climate not only puts material values at risk, but also *life and health in many places in the world*, is well known. Article 112 of the Constitution provides protection against this. »[107]

That is a very interesting perspective of State responsibility concerning climate change that goes beyond the traditional notion of transnational environmental harm prevention and joins the extraterritorial application of human rights. The extension of human rights obligations beyond one State's borders has been the object of thorough considerations both by jurisprudence and academia for some time now, and provides a broad notion of jurisdiction that is indispensable to ensure the respect of international human rights treaties and obligations.[108] Interestingly enough, some recent developments point also to the extraterritorial responsibility of transnational corporations for human rights violations,[109] which might be relevant, for instance, in the Swedish case, as far as it

[107] *The People v. Arctic oil*, *supra* note 18, at 39 (emphasis added).

[108] The ICJ has dealt with this question in several cases, e.g. *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States), Merits, Judgment, ICJ Reports 1986, 14; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) (Judgment, Merits) ICJ Rep 2005, 168. The Human Rights Committee has also dealt with the issue, e.g. HRC General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905 (2004). For a study of the potential extraterritorial dimension of human rights regarding transboundary environmental harm, see BOYLE, A., 'Human Rights and the Environment: Where Next?', *The European Journal of International Law*, Vol. 23 no. 3, 2012, at 633-641. While Boyle emphasizes the relevance of such a broader perspective regarding ordinary cases of transboundary pollution, it also recognizes the practical difficulties in applying such an approach to complex phenomena like climate change, where the causality link or the jurisdiction of a State over foreign nationals abroad, just to mention a few, are much more challenging to establish. Also relevant is Boyle's reflection that, in the absence of a clear violation of an obligation of general international law, it is harder to assert the applicability of an extraterritorial dimension of human rights. For a more general analysis on the extraterritorial dimension of human rights, see MILANOVIC, M, Extraterritorial *Application of Human Rights Treaties. Law, Principles, and Policy*, Oxford University Press, Oxford, 2011, 302; KING, H., 'The Extraterritorial Human Rights Obligations of States', *Human Rights Law Review* 9(4) December 2009, pp 521-556; JOSEPH, S., 'Extraterritorial Human Rights Duties' in JOSEPH, S., *Blame It On the WTO: A Human Rights Critique*, Oxford University Press, Oxford, 2011, 327. Especially noteworthy are the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a group of experts in international law and human rights law in 2011 at a Meeting at the University of Maastricht, based on already existing obligations under International Law. An edited version of the Principles was published two years later: *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ETO Consortium, Heidelberg, 2013.

[109] See the on-going work of the intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, established by Resolution A/HRC/RES/26/9 of the Human Rights Council in 2014, which has the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. A draft of the treaty should be prepared at the third session of the group, to be held by the end of October 2017.

DOI: 10.17103/reei.34.03

concerns the decisions of a Swedish transnational corporation, even though of public ownership. Especially relevant in that sense are the Maastricht Principles, which attribute responsibility in some instances to the State for the violation of economic, social or cultural rights by corporations from that State acting abroad.[110] If there is an increasing pressure to hold States accountable for human rights violations of transnational corporations from those States, the responsibility should be even easier to identify when it is a public company acting abroad. In addition, even if an extraterritorial *duty to fulfil* by States is more difficult to establish – in terms of human rights protection –, it would be easier to prove the *need to respect* human rights, i.e. the necessity to refrain from taking an action that is harmful to human rights of people living in other countries.

Again, plaintiffs in the Swedish and the Norwegian climate cases only seem to hint to these questions, without delving any further into the possibilities of such an approach. It would undoubtedly add to the solidity of the cases' foundation should they proceed to trial. In any case, these considerations reaffirm the link between human rights and the protection of the environment.

IV. CONCLUDING REMARKS

Despite all of them having a very similar common grounding, made of the interweaving of different legal threads, the climate lawsuits in Sweden and Norway share some specificities that differentiate them from many of the climate change cases of the last three years, specially the more successful ones – i.e. Urgenda, Ashgar Leghari and Zoe and Stella Foster. First, those lawsuits were filed after the adoption of the Paris Agreement, and they largely refer to that instrument as it provides them with an additional layer of legal grounding regarding their States' commitment to act against climate change. Second, plaintiffs in Scandinavia have privileged, so far, a tactical approach over a more strategic one, focusing on specific projects and decisions instead of challenging the global climate policies of their countries. This might be a cautious choice, as courts might prove less reluctant to overturn a government's decision regarding a particular sale of assets or the award of some oil exploration permits – as they have recently done in Austria or South Africa – than to confront the State's general climate policies. But at the same time, the broad criticism over those policies that can be found throughout the lawsuits inevitably poses the question of the appropriate scope of the relief sought by claimants in both cases. Moreover, the difficulties associated to the identification of an actual harm and to proving the existence of a clear causality link in climate change cases are aggravated here, when challenging a very specific decision whose impact in terms of global warming would be even more diffuse and hard to prove. Finally, although narrow in terms of the scope of the relief sought, those cases adopt a very interesting approach in geographical terms, as they assume an extraterritorial perspective that is pertinent both regarding the physical behaviour of GHG emissions as well as from a legal angle, considering the combined perspectives of

[110] *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, *supra* note 108, at §12, §24, §25.

DOI: 10.17103/reei.34.03

environmental law – through the application of the no-harm and the prevention principles – and human rights law.

To conclude, some reflections on the role and impact of the Paris Agreement seem also necessary, as it represents a fundamental step in the evolution of the international legal and political framework to combat climate change. After the deep disappointment that followed Copenhagen in 2009, the Agreement reached during COP 21 represented a clear step forward in terms of commitment by the international community. A temperature goal was set, and the level of commitment expressed by countries through their initial mitigation pledges and posterior Nationally Determined Contributions (NDCs) might given the courts some firmer ground to base their decisions upon when considering State-supported projects with potential deleterious effects for the climate. Departing from a more top-down perspective, where targets were fixed at the international level, the Paris Agreement has introduced a strong bottom-up vision, each country periodically defining its own commitment in reducing GHG emissions.

So far, re-empowering States has proved to be a successful choice, at least in terms of the number of countries supporting the agreement – it is however too soon to evaluate it in terms of emissions reduction. Indeed, such a national perspective might serve as leverage for domestic litigation, as the precise terms of the State's obligations are defined at the domestic level. However, the cases in Sweden and Norway distinctly point out the shortcomings of a primarily domestic perspective in tackling climate change, as a transboundary perspective seems essential to avoid incongruous results when dealing with a global phenomenon. In the Swedish case, for instance, the State could take a decision to comply with its emissions objectives – i.e. sell its coal assets abroad – while at the same time increasing GHG emissions in another country and maybe even globally. Similarly, Norway could simultaneously cut its emissions by boosting the use of renewable energy at home while at the same time continuing to award licenses to foreign companies to extract oil and gas to be used and burned in other countries. Such a potential contradiction would not only be ridiculously absurd from a logical point of view, as well as legally incoherent, but it would also be disastrous for the world's environment and the human communities living in it.

These final reflections prove that, all things considered, domestic litigation on climate change, despite all the uncertainties about their final outcomes, is becoming a powerful and valuable tool to scrutinize climate change policies and challenge legal assumptions on the subject.[111]

[111] For an early reflection on the impact of climate change cases, even unsuccessful ones, on climate law and policy see HUNTER, D. B., *The Implications of Climate Change Litigation for International Environmental Law-Making*, American University, WCL Research Paper No. 2008-14, 2007.

DOI: 10.17103/reei.34.03