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The report on the promotion and protection of human rights in the context of climate change. A pragmatic analysis

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Abstract [It]: Il contributo analizza criticamente il contenuto del rapporto sulla promozione e la protezione dei diritti umani nel contesto dei cambiamenti climatici adottato il 26 luglio 2022 dal Relatore speciale Ian Fry. In particolare, il documento esamina tre questioni chiave: il rapporto tra le azioni di mitigazione e gli obblighi degli stati sui diritti umani; le perdite e i danni da cambiamento climatico; la partecipazione ai processi decisionali e la protezione dei difensori dei diritti climatici.

Title: The report on the promotion and protection of human rights in the context of climate change. A pragmatic analysis
Abstract [En]: The paper critically analyses the report on the promotion and protection of human rights in the context of climate change adopted on 26 July 2022 by Special Rapporteur Ian Fry. In particular, the article explores three key issues: the relationship between mitigation actions and human rights obligations; climate change loss and damage and participation in decision-making processes and the protection of climate rights defenders.

Parole chiave: diritti, clima, perdite, emissioni, report
Keywords: rights, climate, loss, emissions, report

1. Introduction

On 28 July 2022, the United Nations General Assembly adopted the resolution No. 48/15 recognising the human right of every individual to enjoy a clean, healthy, and sustainable environment, following the historic resolution adopted a year before by the Human Rights Council.[1] By a separate resolution, the

* Articolo sottoposto a referaggio.

[1] The United Nations General Assembly resolution of 28 June 2022, No. 76/300 reflects the content of the historic resolution 8 October 2021, No. 48/13 adopted by the Human Rights Council which first recognized the human right to a clean, healthy, and sustainable environment. As of 2012, 177 of the 193 member states of the United Nations provided for an explicit reference to this right in their constitutions or environmental legislation. Several regional human rights treaties explicitly refer to the right to a clean, healthy and sustainable environment, albeit in different forms: this is the case of the African Charter on Human and Peoples' Rights of 1981 (art. 24) or the 1988 San Salvador Protocol to the American Convention on Human Rights (art. 11). In the European Convention on Human Rights (ECHR), the right to a clean and healthy environment has been recognized by the European Court of Human Rights (ECtHR) as a

Council established the mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, currently covered by Ian Fry.[2] In July 2022, the Special Rapporteur adopted his first thematic report on the issue of the promotion and protection of human rights in the context of climate change (Report of 26 July 2022, No. 77/226, hereafter "2022 Report"[3]), one of the six priorities at the core of his mandate.[4] The report focuses on three main issues in the current international and domestic climate governance: the impact of mitigation actions on the enjoyment of human rights, particularly, actions that can limit or regulate greenhouse gas (GHG) emissions into the atmosphere

part of the obligation to protect the right to life or the right to respect for private and family life (articles 2 and 8 of the European Convention on Human Rights). See. P. DE VILCHEZ & A. SAVARESI, *The right to a healthy environment and climate litigation: a game change?*, in *Yearbook of International Environmental Law*, 2023, p. 1; E. CIMA, *The right to a Healthy environment: Reconceptualizing human rights in the face of climate change*, in *Review of European, Comparative & International Environmental Law*, 31, 2022, p. 43; D. PAUCIULO, *il diritto umano a un ambiente salubre nella risoluzione 76/300 dell'Assemblea generale delle Nazioni Unite*, in *Rivista di diritto internazionale*, n. 4, 2022, pp. 1118-1120; J. KNOX, *Human Rights*, in L. RAJAMANI and J. PEEL (eds), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2021, p. 791; B. PETERS, *Clean and Healthy Environment, right to, International Protection*, in *The Max Planck Encyclopedia of Public International Law* (*Online Edition*), 2021; D. R. BOYD, *The Constitutional Right to a Healthy Environment*, in *Environment: Science and Policy for Sustainable Development*, 54:4, 2018, pp. 3-5.

[2] §2 of the resolution No. 48/14 of 13 October 2021 adopted by the Human Rights Council defines the powers and duties of the Special Rapporteur. See Human rights Council, *Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, *Resolution adopted on 8 October 2021, n. 48/14*; V. KAHL, *A human right to climate protection – Necessary protection or human rights proliferation?*, in *Netherlands Quarterly of Human Rights*, v. 40, 2, 2022, p. 159.

[3] The 2022 Special Rapporteur's report is not binding, but its content corroborates the link between anthropogenic climate change, enjoyment of human rights and states' obligations following the previous developments reached in the United Nations context, such as the latest Report of the Special Rapporteur on Human Rights and the Environment of 15 July 2019. The link between climate change and human rights was first addressed by the Human Rights Council in the resolution March 2008, No. 7/23. In this situation, the Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to draw up a report to investigate the matter. Accordingly, the landmark *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* was produced in 2009. It stressed the cross-cutting impact that climate change causes and its interference with rights to life, adequate food, water or health or particular groups of people. The report stated that «*human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change*» (§71). Nevertheless, it emphasised the difficulty in reconstructing the cause-and-effect relationship between each state's emissions and the resulting climate disasters, as well as their localised impact on people's rights. Today, the link between human rights obligations and climate change is becoming increasingly apparent, as demonstrated by the joint statement adopted by 5 UN treaty bodies or the prominence given to this issue in several reports adopted by different Special Rapporteurs. The relationship between climate change and human rights has been invoked before national and international courts, as in the case of climate rights litigation or in the landmark advisory opinion OC-23/17 of the Inter-American Court of Human Rights on the relationship between human rights and the environment. Moreover, the Human Rights Council itself tends to evaluate the actions taken by states in this field in the Universal Periodic Review (UPR). See A. PISANÒ, *Il diritto al clima. Il ruolo dei diritti nei contenziosi climatici europei*, Editoriale Scientifica Italiana, Napoli, 2022, pp. 85-86; E. A. IMPARATO, *Climate change litigation in Asia between human rights and dignity. The Chinese case and the public interests*, in *Federalismi.it*, n. 26, 2022, pp. 58-59; F. SCALIA, *La giustizia climatica*, in *Federalismi.it*, n. 10, 2021, pp. 277-281; M. LA MANNA, *Cambiamento climatico e diritti umani delle generazioni presenti e future: Greta Thunberg (e altri) dinanzi al Comitato sui diritti del fanciullo*, in *Diritti Umani e Diritto internazionale*, v. 14, n. 1, 2020, pp. 223-224; M. WEWERINKE-SINGH, *State responsibility, climate change and human rights under international law*, Hart, Oxford, 2019, pp. 5-8; S. ATAPATTU, *Human Rights Approaches to Climate Change. Challenges and Opportunities*, Routledge, New York, 2016, pp. 71-72;

[4] HRC, *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, 26 July 2022, No. 77/226. On the six priorities of the Special Rapporteur's mandate, see HRC, *Initial planning and vision for the mandate Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, report 24 June 2022, n. 50/39.

produced both by States and non-states Actors (§§6-25); the economic and non-economic cost of loss and damage due to the impact of climate change, especially in the Global South (§§26-72); and finally, the tools and patterns to improve participation in decision-making processes and the protection of climate rights defenders (§§73-88). Furthermore, especially in the area of GHG mitigation, the 2022 Report integrates and updates the report of the Special Rapporteur on the issue of human rights obligations related to the enjoyment of safe, clean, sound and sustainable development (hereafter, the 2019 Report).[5] The report of 2022 was published after COP 26 in Glasgow and immediately before COP 27 in Sharm el-Sheikh, thus, based on the three above subjects, it allows to assess what is the trend of current climate governance and its compliance with evidence from the best available science, international legal sources and the latest commitments of States. To this end, the paper will first outline the content of the science-human rights-based approach adopted by the Special Rapporteur in the analysis of the three issues addressed in the report. Secondly, it will highlight the rapporteur's observations on each of the three topics covered by the report. Finally, it will critically examine the recommendations made by the rapporteur for each of them to verify whether they are achievable or States have followed them.

2. From science to climate treaties and human rights. Thinking about mitigation to justify a general science-human rights-based approach

On a legal perspective, based on physical science evidence, the due diligence of States in mitigating GHG emissions is an obligation of conduct that must be assessed based on a broad legal framework. This legal basis includes, *inter alia*, soft law declarations and climate treaties, general principles of international environmental law - some of which are customary rules - and, finally, the duty of States to respect and protect human rights based on several ratified international instruments. According to article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties such an interpretation or systemic integration is accepted as customary international law and can function as a legal basis for an «harmonisation of [potentially conflicting] rules of international law».[6] Otherwise, we should admit that there is no just one legal system of international law, composed of several interconnected branches, but rather many independent and autonomous legal systems. This systematic interpretation or approach is also supported by the Special Rapporteur Ian Fry in all the three subjects addressed in the 2022 Report. Therefore, given

[5] Notably, in §§4 and 89, the 2022 report recalls the section IV of the 2019 report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, see *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 15 July 2019, 74/161, p. 20 ss.

[6] A. PETERS, *The refinement of international law: From fragmentation to regime interaction and politicization*, in *International Journal of Constitutional Law*, 2017, pp. 692-694; C. MCLACHLAN, *The principle of systemic integration and article 31 (3) (c) of the Vienna Convention*, in *ICLQ*, vol. 54, 2005, p. 318; P. SANDS, *Treaty, custom and the cross-fertilization of international law*, in *Yale Human Rights & Development Law Journal*, vol. 1, 1998, p. 89 e 95.

its replicable, we will focus on its application in the context of GHG mitigation actions and then in all other subjects. In the context of international climate change law, the Paris Agreement (PA) is the international climate treaty designed to regulate the conduct of States on GHG mitigation adopted in the context of the 1992 United Nations Framework Convention on Climate Change (UNFCCC). Embracing a generic mitigating precautionary approach, art. 2 of the UNFCCC defines its ultimate objective, which is to achieve «the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. […] within a sufficient timeframe to allow ecosystems to adapt naturally to climate change».[7] Furthermore, in art. 3, the UNFCCC codifies several general (guiding) principles of international environmental law, partially defined in the 1972 Stockholm Declaration and then included in the 1992 Rio Declaration. Principles such as equity, intergenerational responsibility, sustainable development, common but differentiated responsibility and respective capabilities (CBDR-RC) and the duty of cooperation, which are constantly recalled by the Special Rapporteur along the 2022 Report to assess States' climate due diligence.[8] The UNFCCC defines a first regime of differentiated mitigation obligations between developed and developing countries (UNFCCC, art. 4).[9] At the same time, the approach used in the UNFCC and in the following 1997 Kyoto Protocol is rooted in the historical responsibility of developed countries for their higher GHG emissions compared to those of developing countries, considering also the greater economic, financial and technological capacities of the former.[10] Based on this differentiated regime, the Kyoto Protocol specifies

[7] See, United Nations Framework Convention on Climate Change, 09 May 1992, art. 2, p. 4.

[8] For instance, according to the principle of intergenerational responsibility, Parties are obliged to protect the climate system in the interest of present and future generations. Consequently, based on this principle, the Special Rapporteur considers the duty to limit GHG emissions «to prevent the current and future negative human rights impact of climate change». At the same time, those mitigating actions must be taken on the basis of equity and principle of common but differentiated responsibility and respective capabilities of States (CBDR-RC, art. 3§1); the same approach is strictly connected to the principle of sustainable development, according to which States are obliged to adopt appropriate policies and measures to protect the climate system, including through the integration of this principle at the national level (art. 3§4). Furthermore, based on precautionary principle, Parties must adopt "precautionary measures" to anticipate, prevent and minimize the causes of climate change and adverse effects, even if in the lack of scientific certainty. In fact, the latter should not constitute a reason for postponing the adoption of such measures in the face of a threat of serious and irreversible damage, as in the case of climate change (3§2). Another important principle is the duty of cooperation between the Parties to promote an open and supportive international economic system capable of guiding States towards a greater development and sustainable economic growth, especially for developing countries (art. 3§5). See C. VOIGT, *Sustainable development as a principle of International Law. Resolving conflicts between Climate Measures and WTO Law*, Brill, Leiden, 2009, pp. 61-67; D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, *International Climate Change Law*, cit., p. 126-129; B. MAYER, *The international Law on climate change*, Cambridge University Press, Cambridge, 2018, pp. 66-75.

[9] The distinction between developed and developing countries is established in art. 4 of the 1992 UNFCCC and the subsequent 1997 Kyoto Protocol. Such approach is based on the historical responsibility of developed countries in causing climate degradation as well as their greater financial capacities than developing countries. On the contrary, the concept of "developed economies" places more emphasis on the actual capacities of all States, included developing countries. See A. ZAHAR, *International Climate Change Law and State Compliance*, Routledge, 2015, pp. 86-90.

[10] According to the Convention, developing countries are exempted from any obligation or commitment to mitigate GHG emissions. On the contrary, Annex I Parties of the UNFCCC, in other words developed States and countries with

the UNFCCC' obligations, by introducing, at the international level, precise binding quantitative reductions for the Annex I Parties to achieve within a certain time frame 2008-2012.[11] This system of top-down obligations is integrated by three different economic "flexibility mechanisms" available to the Parties. [12] However, for many reasons, the protocol was not confirmed after 2012. [13] Nonetheless, these developments, together with the ultimate objective of the UNFCC, have contributed to the convergence of States towards a more elastic, hybrid and bottom-up approach characterised by binding procedural obligations and voluntary mitigation commitments relevant for both developing and developed countries. In fact, according to articles 2§1(a) and 4§1 of 2015 Paris Agreement, the Parties commit themselves to stabilise GHG emissions within 2°C from pre-industrial levels, continuing their efforts towards the more ambitious mitigation target of 1.5°C - a goal that would significantly reduce the negative impact of climate change, also with respect to the enjoyment of human rights - before gradually proceeding to rapid, steady, and drastic GHG reductions to achieve carbon neutrality by mid-century.[14] To achieve such mitigation objective all States «shall prepare, communicate and maintain their Nationally Determined Contributions» (NDCs) respecting information and procedural obligations concerning the clarity, transparency and comprehensibility of their contributions (art. 4§2 and 8). Basically, these contributions should lead States to gradually align their national policies, strategies and legislation covering their main production and

economies in transition, «shall adopt national policies and take corresponding measures on the mitigation of climate change». In the case of Annex II Parties, this obligation is integrated by the duty «[to] provide new and additional financial resources to meet the agreed full costs» to support developing countries in their efforts under the Convention, see. UNFCCC, art. 12, §1.

[11]In line with the ultimate objective set forth in Article 2 of the Convention, by ratifying the Kyoto Protocol the Annex I Parties oblige themself to reduce collective GHG emissions by 5 % within the period 2008-2012 in relation to pre-industrial levels, D. FREESTONE, *The International Climate Change Legal and Institutional Framework: An Overview*, in D. FREESTONE and C. STRECK (eds), *Legal Aspects of Carbon Trading*, Oxford University Press, Oxford, 2009, p. 11.

[12] For this purpose, the Protocol provides for three different market mechanisms: 1) the International Emissions Trading (ETS), which allows Annex I Parties to trade their excess emissions quotas to other countries (art. 17 of the Protocol); 2) the Clean Development Mechanism (CDM, art. 12) as a tool to improve States cooperation to implement projects aimed to reduce emissions in developing countries; 3) the Joint Implementation mechanism (JIM), enshrined in art. 6 of the Protocol, which allows Annex I countries to support projects to count related reductions of emissions. See P. BIRNIE, A. BOYLE and C. REDGWELL, *International Law & The Environment*, Oxford University Press, Oxford, 2009, pp. 363- 368; G. CORDINI, P. FOIS and S. MARCHISIO, *Diritto ambientale. Profili internazionali europei e comparati*, G. Giappichelli, Torino, 2017, p. 26.

[13] With the Doha amendments to the Kyoto Protocol, Parties tried to define a new implementation period with new and more ambitious mitigation commitments. Nonetheless, this attempt failed for several reasons: first, the repeated absence of reduction obligations for developing countries, such as China, Brazil or India, which have meanwhile become developed economies or large emitters on a global scale; second, the subsequent choice of the United States not to ratify the Kyoto Protocol and, finally, the Canadian decision to withdraw from the Protocol before the end of the first implementation period. On the issue see. T. LECLERC, *The notion of Common but Differentiated responsibilities and respective capabilities: A commendable but failed effort to enhance equity in climate law*, in B. MAYER and A. ZAHAR (eds), *Debating Climate Law*, Cambridge University Press, Cambridge, 2021, pp. 79-80.

[14] R. CADIN, *Profili ricostruttivi e linee evolutive del diritto internazionale dello sviluppo*, G. Giappichelli, Torino, 2019, pp. 172-176; D. BODANSKY, J. BRUNNÉE and L. RAJAMANI, *International Climate Change Law*, Oxford University Press, Oxford, 2017, pp. 231-235 s; M. MONTINI, *Riflessioni critiche sull'Accordo di Parigi sui cambiamenti climatici*, in *Rivista di Diritto Internazionale*, n. 3, 2017, pp. 734-738.

consumption sectors towards low-emission development (e.g., energy supply, transport, energy efficiency in buildings, forest management, animal husbandry, agriculture, see 4§§2 and 19). Industrialised countries retain the leading role in climate action. However, both they and developing countries must determine and implement all mitigation actions, promoting a progression of their NDCs from previous ones. [15] Additionally, the NDCs must reflect their highest possible ambition in line with best available science and the other guiding principles of the UNFCCC. In addition to the principles and the system of NDCs, the preamble of the Paris Agreement can play a supplementary integrating function to trace the content of States' mitigating obligation of conduct based on other rules of international law (art. 31, (3), lett. c). In fact, Paris Agreement is the first international environmental treaty to mention the human rights obligations in the context of climate change and the concept of climate justice.[16] Precisely, the preamble acknowledges that Parties «should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights» (see also §3 of the 2022 Report).[17] Consequently, based on Paris Agreement, states are just obliged to define their NDCs, even considering their human rights obligations. Nevertheless, they are not obliged to comply with their NDCs and there is no strict compliance mechanism to ensure this, as was the case under the Kyoto Protocol. Having defined the legal framework in which the duty to mitigate GHG emissions is embedded, the State GHG mitigation obligation of conduct must now be framed from a scientific perspective. According to the best available science, the steady increase in GHG emissions due to the activities of States and fossil corporations (hereafter, Carbon Majors) constitutes the main contributing factor to global warming and has now reached the highest level compared to any previous period in human history. Growing emissions contribute to increase global warming, which in turn exacerbates the frequency and severity of extreme events, posing a real and immediate threat to the enjoyment of human rights of all people – e.g., right to food, water, housing, health or life – impacting on sustainable development and exacerbating climate L&D.[18] In the 2018 special report on Global Warming 1.5 ºC, as well as in the following reports, the IPCC suggested which decarbonisation pathways could be taken in the main climate-changing sectors

[15] In the case of developing countries, we speak of "conditional NDCs" since their implementation, as well as for National Adaptation Plans (NAPs), depend on financial, technical and technological support from more developed economies or other conditions. For a consultation on NAPs see the following link. All NDCs communicated by States are kept at the UNFCCC Secretariat and are easily accessible at the following link.

[16] C. T. ANTONIAZZI, *What Role for Human Rights in the International Climate Change Regime? The Paris Rulebook Between Missed and Future Opportunities*, in *Diritti umani e diritto internazionale*, fasc. 2, 2021, p. 438-442.

[17] In this regard, the term "consider" and not "protect" creates a willing ambiguity about the possible inclusion of mitigative or adaptive actions as a part of the State's duty to protect human rights. Nevertheless, the preamble does not exclude this conclusion, See O. W. PEDERSEN, *The European court of Human rights and international environmental Law*, in J. KNOX and R. PEJAN (eds), *The Human Right to a Healthy Environment*, Cambridge University Press, Cambridge, 2018, p. 91.

[18] See points B1 and B2 in IPCC, *Climate Change 2022: Mitigation of Climate Change - Sixth Assessment Report – Summary for Policymakers*, 2022, pp. 6-8; WMO, *Provisional State of the Global Climate 2022*, p. 4.

(energy supply, transport, industry, agriculture, livestock, forest management and waste management cycle). To achieve the goal of limiting GHG emissions to 1.5°C and carbon neutrality in 2050, States should sharply cut GHG emissions from the above-mentioned sectors by 45 % from 2010 emission levels by 2030[19]. Therefore, in order to succeed in limiting global warming to 1.5°C, States must reduce their annual GHG emissions by at least 45% compared to current emissions, reaching this target within the next eight years to meet carbon neutrality by 2050 and preserve the global carbon budget available.[20] By doing so, according to the IPCC, States could reduce the severity of climate disasters and reduce resources allocated to adaptation and L&D costs. At the same time, reducing GHG emissions in line with the 1.5°C target would also constitute a proactive action to ensure the enjoyment of human rights. This is the case of communities and people affected locally by climate change for whom mitigation actions can ensure their health, livelihoods, food security, water supply, and human security. Nevertheless, according to the 2022 Emissions Gap Report, the current policies of States will result in the global warming of 2.8°C by 2030. These data are confirmed in the latest report produced by the IPCC in 2022 and its last AR6 published on 21 March 2023.[21] According to IPCC, the «mitigation actions, that prioritise equity, social justice, climate justice, rights-based approaches» can lead to more sustainable and transformative outcomes.[22] Nevertheless, the IPCC's 2023 report States that in the period 2011-2020 alone, unsustainable patterns of energy consumption, production, and exploitation have led to a global temperature increase of 1.1°C above 1850-1900 levels. At the same time, according to IPCC, anthropocentric climate change is already contributing to «many weather and climate extremes in every region across the globe», a situation that «has led to widespread adverse impacts and related losses and damages to nature and people».[23] Given these circumstances, science is becoming a yardstick for assessing the appropriateness of actions taken by States in the field of climate governance. Scientific reports are commonly recognised as knowledge capable of influencing and even limiting the discretion of legislators

[19] See point C.1. in IPCC, *Special report: globale warming of 1.5°C. Summary for Policymakers*, p. 12.
[20] UNEP, *Emissions Gap Report 2022, The Closing Window – Climate crisis calls for rapid transformation of societies*, p. IV.
[21] According to IPCC projections, policies implemented by the end of 2020 are expected to result in higher global greenhouse gas emissions than those in NDCs. Keeping global warming below 2°C would thus depend on a rapid acceleration of mitigation efforts after 2030. On this point see IPCC, *Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Climate Change 2022 - Mitigation of Climate Change - Summary for Policymakers*, p. 10; AR6, Synthesis Report: Climate Change 2023 includes the three reports elaborated by the three Working Groups: the quoted mitigation report of the Third Working Group, the *Physical Science Basis* of the second Working Group and the report *Impacts, Adaptation and Vulnerability* of the Third Working Group. Further, AR6 Synthesis report includes the other special reports developed in the meantime by the IPCC, namely "*Climate change and Land*", "*Ocean and Cryosphere in a Changing Climate*" and "*Global Warming of 1.5°C*".
[22] IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Summary for Policymakers*, 2023, point C. 5.2, p. 33.; S. JODOIN, A. SAVARESI and M. J. WEWERINKE, *Rights-based Approaches t Climate Decision-Making*, in *Current Opinion in Environmental Sustainability*, 2021, p. 47.
[23] See points A.1. and A. 2 in IPCC, *Climate Change 2023. Synthesis Report. Summary for Policymakers*, 2023.

and policymakers towards better climate action.[24] Nevertheless, due to the deflagration of the war in Ukraine and the energy dependence on the Russian Federation, current data show that many countries have revised their energy policies in a regressive direction, undermining their ability to comply with commitments made at COP 26 a few years ago.[25] In fact, in Glasgow, the PA Parties adopted the Glasgow Climate Pact (GCP), in which they declared their willingness to review and improve national climate policies and strategies in line with the Nationally Determined Contributions (NDCs) and the 1.5°C mitigation target.[26] The GCP envisaged rapid reductions of 45 % by 2030, compared to 2010 levels (§22, GCP), just as the IPCC and UNEP suggested in their latest reports mentioned above. This commitment has been also reaffirmed during COP 27 in Sharm el-Sheikh, where States emphasised the need for an immediate and drastic cut in GHG emissions by 2030 in line with the mitigation target in the Paris Agreement.[27] In both decisions, the States reaffirmed how the next decade will be decisive for the achievement of rapid and drastic reductions. In order to do so, States should take actions in line with principles of equity, best available science, CBDR-RC and sustainable development, respecting their human rights obligations as recalled in the preamble of the Paris Agreement (§12 of the *Sharm el-Sheikh implementation Plan* e il §23 del *Glasgow Climate Pact)*. Embracing a science- and human rights-based approach, in Report 2022 the Special Rapporteur traces the disconnect between what States are currently doing and what they should be doing in the three areas of GHG mitigation, L&D and participation and protection of climate rights defenders.

[24] For instance, the reports prepared by the IPCC always faces two rounds of review, the first one leaded by the scientific community and the second by government representatives, which precede the final acceptance of the report. The government representatives can only influence a modification of the Summary for Policymakers, but it is impossible modifying the content of the Final Synthesis Report, which includes the three reports prepared by the IPCC Working Groups. This approach shows that, apart from a few nuances, science cannot be negotiable by States and is able to frame the physical dimension of the climate obligations of State. On the role of Science in the UNFCCC regime, see S. JOHNSTON, *The role of science*, in B. MAYER and A. ZAHAR, *Debating Climate Law*, cit., p. 255- 260; see K. J. MACH, P. T. FREEMAN, M. D. MASTRANDREA and C. B. FIELD, *A multistage crucible of revision and approval shapes IPCC policymaker summaries*, in *Science Advance*, 2, , 2016, p. 1.

[25] CAT, *Global reaction to energy crisis risks zero carbon transition Analysis of government responses to Russia's invasion of Ukraine*, June 2022, p. i.

[26] See § 26 of the Glasgow Climate Pact, in which the parties address 20 paragraphs to GHG mitigation, compared to the six paragraphs (11-16) of the Sharm el-Sheikh Implementation Plan. In §35 of the Glasgow Climate Pact, the parties recall the importance of aligning their nationally defined NDCs with long-term low greenhouse gas emission development strategies. In order to fulfil this commitment, States should adopt policies and legislative measures to lead their consumption and production systems towards low-emission energy systems, stepping-up efforts towards a carbon phase out and subsequent elimination (see 23-29, Glasgow Climate Pact).

[27] According to the Sharm el-Sheikh Implementation Plan, this reduction is expected to be 43% by 2030 compared to 2019 levels based on the 2022 IPCC report, see IPCC, *Climate Change 2022: Mitigation of Climate Change - Sixth Assessment Report – Summary for Policymakers*, 2022, p. 17; §12 of the *Sharm el-Sheikh implementation Plan* e il §23 del *Glasgow Climate Pact.*

3. The actions to limit and regulate GHG as part of the obligation to protect human rights in the 2022 report

Generally speaking, States' human rights obligations can be distinguished in negative and positive obligations. This approach is also endorsed by the Special Rapporteur in the context of climate change in §3 of the 2022 report, who chose to focus exclusively on the mitigation actions to limit or regulate GHG emissions in the context of positive human rights obligations. First, the Rapporteur recalls the obligation of States to adopt mitigation measures aimed at directly limiting GHG emissions and preventing their current and future impact on the enjoyment of human rights (*obligation to prevent by limiting GHG emissions*). Secondly, States must adopt actions to regulate emissions produced by non-State actors acting in the territory or under the jurisdiction of individual States in order to prevent their foreseeable negative consequences on the enjoyment of human right (*obligation to prevent by regulating GHG emissions*).[28] Focusing on the first type of mitigation actions, according to the Special Rapporteur, some States alone are responsible for 67% of all global emissions of carbon dioxide (CO2), the most damaging GHG to our climate system. The reference is to EU Member States, China, India, Russia, the United Kingdom, Northern Ireland, Japan and the United States, which alone are the world's largest emitters of GHG.[29] Most of these countries are also members of the G20, a group of States that alone was responsible for 78 % of global GHG emissions over the past decade due to policies not in line with their NDCs, principles and provisions of the Paris Agreement.[30] Furthermore, the impact of these choices falls in a discriminatory and disproportionate manner «on the poorest and least able to cope», even though developed economies have more technical, technological and financial resources to address the climate

[28] In the first case, the negative obligation takes the form of the State's duty to refrain from taking any action that may interfere with the enjoyment of human rights of people within national territory or under State' jurisdiction, unless such interference is based on a legitimate and reasonable ground. On the other hand, States' positive obligations consist in taking all reasonable and necessary actions to prevent a foreseeable real and direct risk of human rights violation, even from actions taken by non-State actors, see D. BODANSKY, *Introduction: Climate Change and Human Rights: Unpacking the issues*, in *Ga J Int'l & Comp*, vol. 38, no. 3, 2010, pp. 519-520.

[29] In §12, the Special Rapporteur dwells on the role of the United States - considered «The highest historical emitter of greenhouse gas emissions» - highlighting its small progress in implementing the provisions of the UNFCCC and the Paris Agreement, including the adoption of the so-called "Clean Power Plan" that the current Biden administration intends to use as a tool to reduce GHG emissions. However, the adoption of the plan by the Environmental Protection Agency (EPA) prompted 28 States and several companies to challenge the EPA's jurisdiction, filing a lawsuit with the Court of Appeals for the District of Columbia Circuit to prevent the CPP from taking effect pending the US Supreme Court's decision on the issue. In upholding the so-called Major Questions Doctrines, the US Supreme Court held that the EPA lacked the power to regulate CO2 emissions from US power plants, holding that this prerogative belonged to Congress, which must expressly delegate this power to other administrative agencies. See R. J. LAZARUS, *The Scalia court: environmental law's wrecking crew Within the Supreme Court*, in *Harvard Environmental Law Review*, vol. 47, No. 2, 2023, p. 36; G. NAGLIERI, *Climate changes in Courts: different judicial approaches to government actions on cutting greenhouse emissions Comparing Europe and America through selected cases*, in *DPCE online*, 4, 2022, pp. 1920-1921.

[30] The Rapporteur refers to the 2022 report by the *Environmental Justice Foundation*, according to which, since the beginning of the pandemic, the G20 member States have confirmed their historical responsibility for GHG emissions by preferring to support hard coal, instead of fully supporting the use of renewable energy sources (on this point, see EJF, *In search of justice. How the climate crisis is driving inequality and eroding human rights*, 2022, p 34; §§10-11 of the 2022 report.

change impact, enjoy greater benefits from their climate unsustainable actions, and suffer less from the negative territorial impact of climate change (§2 of the 2022 report).[31] A climate injustice described by the Special Rapporteur as a modern form of "atmospheric colonisation", considering that, on the contrary, many developing countries, Small Island Developing States (SIDS) and communities most exposed to climate change emit less GHG and have fewer resources to deal with its territorial impact.[32] Additionally, the choice to use the concept of "developed economies" and not just developed/developing countries aims to stress the leading role of countries such as China, which is now the world's main emitter together with the United States and other Non-Annex I Parties of UNFCCC. In fact, globally, developed economies provide around USD 500 billion in subsidies to Carbon Majors every year, exposing people and communities to systematic violations of their human rights. A co-responsibility that is «adding fuel to the flames» of climate change. On the contrary, they should adopt stringent measures to break their dependence on carbon majors and support renewable energy to embark on decarbonisation pathways. On the issue of regulatory actions in GHG emissions, the Special Rapporteur focus on a few areas where States could be more incisive: the international aviation and civil shipping sector - globally one of the most polluting - and the thornier area of investor-state dispute settlement procedures under the Energy Charter Treaty (ECT, see §§ 14-15 of the 2022 report). For what concerns the first topic, UNEP estimated that the transport sector, especially civil aviation and maritime transport, represents the second largest source of CO2 emissions globally, covering around 25 % of their volume.[33] The Rapporteur expressed concern about the CO_2 offsetting scheme introduced by the International Civil Aviation Organisation (ICAO) through the "*Carbon Offsetting and Reduction Scheme for International Aviation*" (CORSIA), which is considered inadequate to produce a real mitigating impact, since it does not provide a drastic GHG emissions reduction. Globally, the inconsistency of CORSIA could lead to a 3 - 4 °C increase in emissions by mid-century, consuming 12 % of the globally available carbon budget in a 1.5 °C scenario. In fact, According to Climate Action Tracker, to align this sector with the 1.5°C mitigation target and the carbon neutrality of Paris Agreement, the international civil aviation would have to reduce its global CO_2 emissions by 90 % from 2019 levels by 2050.[34] Looking at the maritime transport sector,

[31] See E. A. POSNER and C. R. SUNSTEIN. *Climate Change Justice*, in *Georgetown Law Journal*, vol. 96, no. 5, 2008, pp. 1580.

[32] According to the Rapporteur, the most vulnerable countries are responsible for the emission of only 14 % of CO_2, while developed economies are responsible for 86 % of global CO2 emissions. See V. VANKATRAMANAN, S. SHAH and R. PRASAD, *Exploring Synergies and Trade-offs Between Climate Change and the Sustainable Development Goals*, Springer Nature, Singapore, 2021, p. 360s; J. HUANG, *Climate Justice: Climate Justice and the Paris Agreement*, in *JAEL*, vol. 9, no. 1 2017, pp. 25 – 26.

[33] See UNEP, *Emission Gap Report, 2022. The closing window*, pp. 46-47; B. M. ROMERA, *Aviation and maritime transport*, in L. RAJAMANI and J. PEEL, *The Oxford Handbook of International Environmental Law*, cit., pp. 593- 594.

[34] The CORSIA provides for measures concerning emissions produced directly by aviation only, excluding, for instance, indirect emissions. Furthermore, CORSIA requires operators to use more sustainable fuels which, in any case, are only

the actions taken to regulate GHG emissions are even worse. The choice of the International Maritime Organisation (IMO) to postpone the drastic cut in emissions over time weighs heavily, considering that such emissions are already set to increase by 2050 due to the expansion of international maritime trade.[35] In other cases, the climate ambition of States clashes with business obstructionism and some objective legal limitations, for instance when States wish to divest in the fossil fuel sector in order to foster alternative paths of energy decarbonisation. Precisely, this is the case of the International Centre for Settlement of Investment Disputes (ICSID) under the Energy Charter Treaty (ECT). Due to its generic provisions and to the absence of unanimity to explicitly ban support for fossil fuels, this instrument allows companies to sue States and obtain compensatory measures if they adopt mitigation policies that "discriminatorily" restrict subsidies or investments in fossil fuels. Such a litigation between States and corporations may cost quite $340 billion, constituting a serious setback to the decarbonisation process undertaken by the international community and major financial institutions. Finally, the Special Rapporteur devotes further attention to some mitigation actions, like forest management and the construction of hydroelectric dams, assessing their possible impact on vulnerable communities, such as indigenous peoples, when adopted without adequate participatory and consultative safeguards (§16-25 of the 2022 Report).[36] The first example mentioned by the Rapporteur is the forest conservation. If properly implemented, this activity can generate a low-emission impact from which States and communities can benefit at a very low cost. As it is well known, forests constitute natural sinks that can absorb or store emissions through the natural and ecosystem cycle. At the same time, organic waste produced by animals, plants or trees constitute a source of energy called "biomass", a carbon of natural origin that can be used

able to reduce emissions by 10 % compared to the use of other ordinary fuels (See CAT, *International Aviation*, 22 September 2022). Globally, this sector is responsible for 2 % of global GHG emissions, a percentage that is estimated to increase, between 300 and 700 % by 2050, due to the relative growth in demand for air transport and the concomitant inadequacy of the CORSIA system. See J. LARSSON, A. ELOFSSON, T. STERNER and J. ÅKERMAN, *International and national climate policies for aviation: a review*, in *Climate Policy*, 19:6, 2019, p. 788; C. CHRIS, *Beyond the ICAO's CORSIA: Towards a More Climatically Effective Strategy for Mitigation of Civil-Aviation Emissions*, in *Climate Law*, vol. 8, no.1-2, 2018, pp. 109-117.

[35] These emissions contribute to global warming, melting of glaciers, ocean acidification and salination, rise in sea levels, flooding and the progressive erosion of coastal areas. The emissions from these activities affect our ecosystems, human life and health, as they damage the quality of the air we breathe and impact on strategic sectors for the production and food security of States, see Y. SHI and W. GULLETT, *International Regulation on Low- Carbon Shipping for Climate Change Mitigation: Development, Challenges, and Prospects*, in *Ocean Development & International Law*, 49:2, 2017, pp. 134-138.

[36] In these cases, the lack of mechanisms for participation and consultation of local communities' or vulnerable groups can lead to possible human rights violations. For instance, the construction of wind turbines on indigenous lands without their prior free and informed consent can resolve in a damage to their natural resources or ecosystems (see § 25 of the 2022 report). In territories such as Asia or South America, the collective rights of indigenous peoples are often threatened by globalization and urbanization processes that result in the intensification of State policies promoting the construction of projects such as hydro dams, highways, wind turbines. See G. GIACOMINI, *Indigenous Peoples and climate justice. A critical analysis of international human rights law and governance*, Palgrave Macmillan, Cham, 2022, pp. 228-230; *Report of the Special Rapporteur on the rights of indigenous peoples, José Francisco Calí Tzay. The rights of indigenous peoples living in urban areas,* 21 July 2021, No. A/76/202, pp. 5-8.

as a sustainable energy source.[37] Notwithstanding these considerations, what concerns the Special Rapporteur is the growing demand for land to grow crops or plant trees useful for biomass production, which can exacerbate the environmental degradation already due to desertification process and forest fires or land grabbing phenomena, such as in the case of the Amazon. In fact, each year in the face of the loss of 15 billion trees due to fires and illegal logging, States or corporations proceed to plant only 5 billion trees overall. This results in a net loss of about 10 billion trees exacerbated by less storage and absorption capacity of newly planted trees. Corporations or States often use tree planting in their respective government plans or economic strategies to justify supposed programmatic reductions in their GHG emissions. A predatory and unsustainable market that involves illegal logging and misappropriation of indigenous ancestral lands.[38] Given these considerations, it is no wonder that the Special Rapporteur is concerned about the operation of the Reducing Emissions from Deforestation and Forest Degradation mechanisms adopted in the context of UNFCCC (REDD+). In fact, in a distorted way, such mechanisms risk reinforcing unfair neo-colonialist practices behind apparent sustainable forest management schemes. Thus, it is crucial that States or other actors provide tools and procedures to balance their interests with the overriding duty to respect and protect the environment, the ecosystems and the collective property rights of local communities. The overall review of GHG emission limitation and regulation actions taken by States described by the Rapporteur confirms their inconsistency with the international scientific and legal framework described at the beginning of our analysis. Not randomly, the Special Rapporteur pragmatically refers to the mitigation efforts as a "human rights catastrophe" (§7 of the 2022 report), a concept reiterated a few months later by the UN Secretary General, António Guterres, at the opening works of COP 27.[39]

[37] Unlike fossil fuels, under certain conditions, biomass can be a cleaner and renewable energy alternative, see §§21 - 22 of the report; see C. A. G. HUNT, *Carbon Sinks and Climate Change. Forests in the Fight Against Global Warming*, EE Elgar, Cheltenham, 2009, p. viii.

[38] In this regard, the enjoyment of the right to collective ownership is linked to several other fundamental rights: the right to respect for cultural identity and indigenous traditions, the access to water and adequate food, and the enjoyment of natural resources. In addition, States must delimit, demarcate and title indigenous lands, along with additional procedural obligations (the right to informed, free and prior consent in the case of public initiatives or projects that may interfere with indigenous rights, as well as the right to participate actively and freely in actions aim to plan, program and implement such initiatives (§§17-19 and §20-25 of the 2022 report).

[39] The Secretary General stressed that «We are on a highway to climate hell with our foot still on the accelerator» and that, therefore, «Humanity [States and Carbon Majors] has a choice: cooperate or perish». See A. GUTERRES, *Secretary-General's remarks to High-Level opening of COP27*, 07 November 2022.

4. The different costs of L&D before COP 27, the establishment of a loss and damage facility and the operationalising of the Santiago Network

The second issue addressed by the Special Rapporteur is loss and damage due to the adverse impacts of climate change. Preliminarily, it should be acknowledged that neither international climate treaties nor doctrine establishes a definition of L&D. Hence, according to the IPCC, L&D refer to those «impacts and risks that can surpass limits to adaptation and result in losses and damages».[40] Consequently, even where each state adopts an ambitious mitigation or adaptive policy, reducing global GHG emissions and taking actions to implement resiliency to the territorial impacts of climate change, it would still not prevent predictable L&D. Moreover, while in some cases having adequate financial resources can help in quantifying and repairing the damage caused by climate change disasters, in other cases such damage is either irreversible or the losses produced are immaterial, difficult to quantify or capable of being repaired.[41] The huge and physical impact of climate disasters is perfectly described in §§ 26-52. Floods, extreme rainfall, hurricanes, heat waves, and extreme drought due to the excessive concentration of CO_2 in the atmosphere predominantly affect Global South and the most vulnerable communities. Furthermore, the climate L&D can have a discriminatory impact on certain categories of individuals such as migrants, women,[42] people with disabilities or indigenous communities at risk of suffering the greatest cost of L&, even due to gender stereotyping, ethnic or racial prejudice (§§ 26-29 of the report).[43] For these reasons, states must adopt a human rights-based approach, taking actions to prevent or minimize the localized impact of L&D and globally cooperating by sharing technological capabilities, expertise and financial resources. In support of these considerations, the rapporteur points out that the Vulnerable Twenty Group of most fragile economies (V-20) have already lost $525 billion from 2000 to 2019 as a

[40] IPCC, *Sixth Assessment Report, Climate Change 2022: Impacts, Adaptation and Vulnerability 27 February 2022 - Summary for Policymakers*, p. 6.

[41] For instance, migration due to climate change and internal displacement involves 20 million people each year as a result of storms or floods. It is an increasing phenomenon and, by 2050, it is estimated that some 216 million people will be forced to migrate due to drought, water scarcity, rising sea levels, lower agricultural productivity and population growth. Contextually, such people find themselves forced to experience sudden conditions of economic vulnerability and social exclusion, increasing the possibility of becoming stateless with negative effect on the enjoyment of additional human rights depending on their citizenship status, see R. LYSTER, *Adaptation, loss and damage and climate justice*, in J. VERSCHUUREN (eds), *Research handbook on climate change adaptation law*, EE Elgar Cheltenham, 2022, p. 43-44.

[42] Frequently, women face systemic discrimination, stereotypes and structural social, economic and political barriers on all levels, including limited or unequal access to financial opportunities, education and participation in decision-making process. See §§ 4 -5 in OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights*, 1 May 2019, No. 41/26, p. 4.

[43]Some authors emphasize how a human rights-based approach would make possible a more sustainable and effective management of L&D. For instance, it could ensure greater involvement of victims and vulnerable groups in order to facilitate accountability and restorative remedies, as well as enhance transitional and redistributive justice solutions to protect victim. See S. L. SECK and M. DOELLE, *Pathways and prospects for loss & damage and climate justice*, in M. DOELLE and S. L. SECK (eds), *Research Handbook on Climate Change Law and Loss & Damage,* EE Elgar, Cheltenham, 2021, p. 438.

direct result of climate change.[44] By 2030, the economic costs of L&D will reach an annual value between $290 - 580 billion primarily due to the policies of few countries, such as the United States, China and the Russian Federation. Their unsustainable GHG emissions have so far caused global economic losses already quantifiable at almost $6 trillion, about 11% of the annual Gross National Product (GNP) on a global scale. From 2017 developed countries have met half financial of $15.5 billions demanded by developing countries in terms of L&D amounts.[45] In this context, the States' sovereign right to freely exploit natural resources within their territory on an egalitarian international level basis should be balanced with other customary norms of international law. Particularly, States have the obligation to refrain from carrying out or permitting activities under their jurisdiction or within their territory that may contribute to cause transboundary environmental damage in the territory of a neighbouring State or in any case beyond the State borders.[46] In fact, according to customary law, when several States have contributed to the determination of an injury due to their different unlawful conduct, their individual responsibility must be assessed on the basis of the conduct of each State in relation to their respective international obligations.[47] Accordingly, on 29 March 2023, the UN General Assembly (GA) adopted a landmark resolution requesting the International Court of Justice an advisory opinion on the obligations of States in the context of climate change, based on articles 96 of the UN Charter and 65 of the Statute of the ICJ. The aforementioned advisory opinion could lead to a possible opportunity to clarify whether there is a responsibility of States for their contribution in L&D. In fact, the request was grounded on several international treaties, included the two UN Covenants of 1966, the UNFCCC, the Paris Agreement and «the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment».[48] Notwithstanding these considerations, the special Rapporteur briefly addresses the regulatory and institutional evolution of L&D at the international level. The initial attention

[44] The group includes Afghanistan, Bangladesh, Barbados, Bhutan, Costa Rica, Ethiopia, Ghana, Kenya, Kiribati, Madagascar, Maldives, Nepal, Philippines, Rwanda, Saint Lucia, Tanzania, Timor-Leste, Tuvalu, Vanuatu and Vietnam.
[45]For instance, in South Asia, tropical storm as Cyclone Amphan not only affected some 10 million people, but also caused economic losses amounting to USD 15 billion, while in Durban, South Africa, floods caused economic damage amounting to USD 760 million (on the economic costs of L&D, see §§53-58 of the 2022 report).
[46] ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, judgment of 20 April 2010, § 101; B. MAYER, *The International Law on Climate Change*, cit., pp. 186-187.
[47] See ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, 2001, p. 125.
[48] See UN General Assembly, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, 1 march 2023, No. A/77/L.58. At the regional level, there are two important requests for advisory opinions in relation to the contribution and responsibility of States to climate change. A first opinion was issued on 12 December 2022 by the Commission of Small Island States on Climate Change and International Law before ITLOS. More recently, on 9 January 2023, Colombia and Chile requested, under the OAS, a similar Advisory Opinion from the Inter-American Court on Human Rights. See M. A. TIGRE, N. URZOLA and J. S. CASTELLANOS, *A Request for an Advisory Opinion at the Inter-American Court of Human Rights: Initial Reactions*, in *Climate Law. A Sabin Center Blog*, 17 February 2023.

to the subject of L&D coincides with 1991 and the (unsuccessful) attempt from the Alliance of Small Island States (AOSIS) during the negotiations for the adoption of the 1992 Convention (UNFCCC) to convince industrialized countries in providing a mechanism to ensure technical, technological and financial support for the most vulnerable countries affected by L&D. In the Bali Action Plan of 2007 and in the subsequent Cancun Adaptation Framework of 2011, there is a first explicit reference to L&D and the need to strengthen international cooperation in this field.[49] Along with a regulatory evolution there is also an institutional development of the topic with the milestone of COP 19 in 2013 and the establishment of the Warsaw International Mechanism (WIM). The WIM aims to consolidate collaboration and the expertise among States in the management of climate disasters and L&D.[50] In order to fulfil these functions, the WIM is supported by a subsidiary body with technical functions, the Executive Committee (ExCom), which recently adopted a new five-year work plan for 2018-2022.[51] During COP 25 in 2019, the UNFCCC Parties complemented this framework establishing the Santiago Network, which gathers together key international mandated actors who cooperate to provide technical assistance to developing countries to prevent, minimise and address L&D at local, national and regional levels.[52] To corroborate this institutional framework begun in 2013, article 8 of the 2015 Paris Agreement (PA) recognized for the first time in a legal treaty source the need to «averting, minimizing and addressing loss and damage associated with the adverse effects of climate change» (art. 8§1). The provision specifically mentions the WIM, whose progressive improvement is called for in the context of

[49] In the Bali Action Plan, the Parties to the UNFCCC call for measures to address «the loss and damage associated with the impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change». See UNFCCC, Decision 1/CP.13, 2007, lett. c), iii), p. 4, in UN Doc FCCC/CP/2007/6/Add, 2007; COP, Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, 2011, §§ 25-29.

[50] See COP, *Warsaw international mechanism for loss and damage associated with climate change impacts*, Decision 2/CP.19, §§ 1-17, p. 6. The WIM aims to strengthen knowledge of global approaches in risk management to cope with L&D related to the adverse effects of climate change, including slow onset impacts or climate phenomena. It also implements dialogue, coordination, coherence and synergies between key stakeholders working in the area of L&D, ensuring the strengthening of their action and support to developing countries. Finally, the WIM aims to consolidate capacity-building in the most vulnerable countries by ensuring that technological and financial resources are allocated to them in order to tackle L&D.

[51] Within its plan, the ExCom defined five priority areas for action in the context of L&D: the topic of slow onset events; non-economic losses; comprehensive approaches for risk management; the topic of climate change-induced migration, displacement and human mobility; and finally, the topic of actions and support, including financial, technological and capacity-building support for developing States affected by climate change-related losses and damages. See A. JOHANSSON, E. CALLIARI, N. WALKER-CRAWFORD, F. HARTZ, C. MCQUISTAN and L. VANHALA, *Evaluating progress on loss and damage: an assessment of the Executive Committee of the Warsaw International Mechanism under the UNFCCC*, in *Climate Policy*, vol. 22, 2022, p. 1200; S. DOMAINE, *Cambiamenti climatici e diritti umani: il divieto di refoulement in Teitiota c. Nuova Zelanda*, in *Federalismi.it*, n. 23, 2020, p. 30.

[52] Among the actors involved, for instance, there are the Green Climate Fund (GCF), the Global Environment Facility (GEF), the International Federation of Red Cross and Red Crescent Societies, IFAD, UNDP, UNEP and the World Bank. In addition, during the COP 26 in Glasgow, the Parties to the Paris Agreement established the six main functions of the Santiago Network, defining the funding resources to ensure its functioning and its institutional arrangements (all the information related to the WIM and the L&D issue can be found at the following link).

cooperation between PA Parties. Despite the above regulatory and institutional advances, the Paris Agreement is limited to enhance technical capacity and cooperation among States in a preventive capacity to effectively address L&D[53]. Nevertheless, no provision introduces an explicit responsibility or duty of reparation for the developed countries or economies most responsible for current climate degradation.[54] In addition, regardless any assessment on liability, the PA does not include an explicit obligation or commitment for developed economies to adequately and regularly support the financial costs of L&D faced by developing countries. Such resources could be allocated trough the operability of WIM and the Santiago Network with stable, adequate and predictable resources given the endemic nature of L&D. Unfortunately, how we will see in the final observations of the paper, before COP 27, the WIM has focused primarily on strengthening international cooperation, knowledge and understanding L&D among key stakeholders. Therefore, there is still a lack of real progress in advancing action and support for climate change loss and damage with adequate financial and technological resources, even though it is a key pillar of Article 8 of the Paris Agreement (§68 of the 2022 report). This organic inadequacy of the regulatory and institutional UN system was also reiterated during COP 26 in Glasgow. In that occasion, faced with rising L&D cost due to climate change impacts, the Group of 77 and China insisted for the creation of a new mechanism to finance loss and damage.[55] Nevertheless, the request was met with strong opposition from the industrialized countries, who believed that such financial support could already be ensured through the Green Climate Fund (GCF), which also had suitable expertise and resources for this objective.[56] On the contrary, developing countries were concerned that in this way developed countries could divert resources already allocated for mitigation and adaptation without

[53] E. FASOLI, *State responsibility and the reparation of non-economic losses related to climate change under the Paris Agreement*, in *Rivista di diritto internazionale*, n.1, 2018, pp. 98-100.

[54] This choice would be in line with several guiding principles enshrined in article 3 of the UNFCCC, such as the principle of equity, the duty of cooperation and the CBDR-RC, which should guide the conduct of states in implementing the Convention and the Paris Agreement. A possible responsibility of states was expressly excluded by the Parties to the Paris Agreement in the decision for its adoption (COP 21, §51 *Decision 1/CP.21*). For that reason, small island developing states (SIDS) and other developing countries submitted interpretive statements to the relevant paragraph reiterating that the ratification of the treaty did not constitute a derogation from the application of customary law and the general liability regime of states (including the duty to prevent transboundary environmental damage, which is also a *erga omnes obligation).* See C. VOIGT, *State responsibility for damages associated with climate change*, in M. DOELLE and S. L. SECK, *Research Handbook on Climate Change,* cit., pp. 176-177; S. MASON-CASE & J. DEHM, *Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present*, in B. MAYER and A. ZAHAR (eds), *Debating Climate Law*, cit., pp. 177-182.

[55] There have been bilateral and intermitted pledges of financial commitments from some states. For instance, Scotland pledged $2.4 million bilaterally through a fund and Germany pledged $10.4 million to support the Santiago Network. Nevertheless, these solutions are inadequate. At the same time, the absence of a structured mechanism, in which the main emitting countries contribute and cooperate financially, make these measures precarious and inappropriate to deal adequately with L&D (§§69-70 of the report). On the issue, the Rapporteur invited UNEP to produce an annual report on the L&D financial gap (§93(b) of the report).

[56] In the run-up to COP 27 and pending the arrangements necessary to operationalize the WIM and the Santiago Network, the Special Rapporteur calls UNFCCC Parties to establish a transitional financial window before the GCF to deal with the urgency of the economic cost of L&D (§93, lett. a) of the 2022 report).

providing new and additional funding. Indeed, industrialised countries were supposed to support developing countries with at least USD 100 billion per year from 2020, a target not met to date.[57] On the contrary, today, States seem to prefer to address L&D through bilateral funding agreements, national pre-disaster rapid response and standby funds, even though these subsidies are inadequate, intermittent and generate social, political or gender prejudice discriminations in accessing the resources for vulnerable categories, such as women or minorities (§§71-72 of the report).

5. The nexus between participation in decision-making processes and the role of climate rights defenders

The issue of participation in decision-making processes and the protection of "climate rights defenders" are the last subjects jointly explored by the Special Rapporteur. The definition of the latter category of actors can be derived from the expression "environmental human rights defenders". This term refers to individuals or groups of people that «in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment [climate and ecosystems], including water, air, land, flora and fauna».[58] It is clear why the Special Rapporteurs decide to jointly address the issue of participation and protection of climate rights defenders in the context of positive human rights obligations. In fact, States have an obligation to protect climate rights defenders based on negative and positive obligations, refraining from violating their human rights and simultaneously acting with due diligence to prevent and investigate violations committed by their own authorities or other non-State actors, ascertaining their responsibility, and punishing them before domestic courts, even though it often does not happen because of the complicity of States (§§85-86).[59] At the same time, States must promote the participation of these actors within the legislative and policy climate processes. Nevertheless, the report of 2022 stresses the existence of a serious participatory disconnect that penalises human rights defenders and victims of climate change impacts. Indeed, these actors often lack the opportunity to effectively participate in decision-making processes, even though their input can help to effectively

[57] P. TOUSSAINT, *Loss and damage and climate litigation: The case for greater interlinkage*, in *RECIEL*, 2020, p. 4; C. DI LEVA, *Financing climate mitigation and adaptation*, in *Carbon &Climate Law Review*, Vol. 11, No. 4, 2017, p. 324.

[58] For instance, indigenous human rights defenders can play a key role to promote a normative econcentric approach. At the same time, national authorities must refrain from intimidating actions and should protect them, even where such attacks come from private actors. Authorities must ensure expeditious, adequate and effective investigations in case of violations of the indigenous defenders' human rights, their non-repetition and appropriate reparatory measures. See §§ 19 e 21 in HRC, *Annual report of the Expert Mechanism on the Rights of Indigenous Peoples*, 28 July 2022, 51/49, p. 6.

[59] See OUNHC, *Report of the Special Rapporteur on the situation of human rights defenders*, 3 August 2016, No. A/71/281 pp. 4-6. Violations perpetrated against climate rights defenders include «killings, extrajudicial executions, enforced disappearances, torture, cruel, inhuman or degrading treatment, arbitrary detentions, physical and digital threats, criminalization, forced displacement, harassment, stigmatization, digital attacks, restrictions on appearing before international bodies and administrative restrictions on the holding of demonstrations and on their work». See §15 of the Report of the Special Rapporteur on the situation of human rights defenders, 15 July 2019, No. A/74/159.

complement and improve the domestic and international actions of States.[60] This is the case for contribution that migrants[61], indigenous peoples, persons with disabilities,[62] minorities,[63] children[64]and women can offer to the issue.[65] The other side of the climate injustice or participatory disconnection is the dominant role played by the Carbon Majors who maintain an hegemonic influence on the actions of national and international policy makers, despite their responsibility in global climate degradation. A toxic relationship of dependence between the State and fossil fuel multinationals that the rapporteur defines «corporate capture» §§73-75).[66] To make a paradigm shift on the issue, the Special Rapporteur distinguishes between levels of international and national participation. In the first category, namely the international level, the rapporteur emphasises the potential contribution the above-mentioned vulnerable groups and NGOs can make during international conferences (e.g., G20, UN bodies or UNFCCC and Paris Agreement COP and reunion). The structural involvement of these social groups can stimulate the integration of their needs and human rights into the national policies and energy and industrial strategies of countries. On the contrary, States aim to marginalize or reduce the involvement opportunities of these actors, leaving them symbolic roles far from planning, programming and political or legislative implementation contributions (§77-80 of the 2022 report). Climate litigation before international, national or local bodies sometimes used by those actors to obtain a judicial review of legislation, policies and

[60] See. *United Nations Special Rapporteur on the right to development - Climate Action and the Right to Development: a Participatory Approach. Policy Brief,* 21 October 2021, p. 13.

[61] §§ 83 and 87 of the *Report of the Special Rapporteur on the human rights of migrants*, 19 July 2022, No. A/77/189, pp. 20-21

[62] Several data show that persons with disabilities are often excluded from disaster preparedness and response plans, even though humanitarian emergencies stress situations of vulnerability for persons with disabilities due to a lack of services, accessible infrastructure, proper evacuation procedures or other essential arrangements. Women and children with disabilities are more exposed to forms of violence, sexual violence, exploitation and abuse during emergencies, especially in emergency camps. Their participation in decision-making processes can contribute to a paradigm shift in the enjoyment of their human rights in the context of climate change, see CRPD, *Joint statement on the situation of persons with disabilities affected by flooding in Pakistan*, 9 September 2022, pp. 1-2.

[63] Central and local government bodies of States must take action to ensure «the equal civil, political, economic, social, environmental, and cultural rights of minorities with the full and informed participation of minority communities in designing and implementing those policies». See point 11, in Regional Forums on the 30th anniversary of the UN Declaration on the rights of minorities (2022) *Americans Regional Forum 2022 Recommendations*

[64] The Committee on the Rights of the Child is currently finalising its General Comment No. 26 on Children's rights and the environment with a special focus on climate change.

[65] On the role of women, in §31 the report reiterates that States «have legal obligations to implement gender-responsive climate policies that empower women, protect their rights, and address the gendered impacts of climate change» also suggesting several international instruments to inform such approach. For instance, the CEDAW, UNFCCC, Paris Agreement, Agenda 2030 or the Sendai Framework for Disaster Risk Reduction 2015-2030 (See OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights*, 1 May 2019, No. 41/26, pp. 10-13). Unfortunately, women and girls continue to be excluded from risk, environmental and climate decision-making processes without adequate legal remedies to address possible violations of their rights (see Human Rights Council, *Women, girls and the right to a clean, healthy and sustainable environment. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd*, 5 January 2023, No. 52/33, p. 10*)*.

[66] See UN Working Group on Business and Human Rights*, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. Corporate influence in the political and regulatory sphere: ensuring business practice in line with the Guiding Principles on Business* 20 July 2022, No. A/77/201, §§38-39.

actions of States or Carbon Majors is another example of international level participation. On the other hand, under the umbrella of domestic participation instruments, the Rapporteur seems to allude mainly to participation in regulatory or legislative proceedings to influence the work of policymakers in the formulation and adoption of climate policies or legislative measures. This is the case of the potential contribution of young people or indigenous communities during the work of national parliaments or central and local level government (§81-83 of the report). [67]All the examples cited by the rapporteur, rather than falling under a purely national or international level of participation can fall under both participatory dimensions. In fact, the participatory contribution that individuals, groups of people or NGOs can make during the work of a national parliament or before a COP to influence the adoption of national framework law or a COP decision is similar. At the same time, the Rapporteur frames climate litigation as an international level tool, even though it has mainly developed at the national level, before national courts, with different outcomes also depending on the peculiarities of the legal systems of each State. On the contrary, to date, when called upon, international Courts or quasi-judicial bodies have quite always deemed inadmissible appeals or petitions filed by alleged victims in relation to the potential breach of their human rights. However, it is indisputable that climate litigation can be a useful and widespread procedural tool both nationally and internationally.[68] The operational modalities used by climate rights are different and vary depending on the specific purpose they aim to achieve. On the one hand, various NGOs carry out important outreach activities or organise events and demonstration actions to raise public awareness on climate issues to stimulate public participation and putting pressure on political decision-makers and the private sector. It aims to prompt these actors to review their climate policy priorities by influencing their political will to revise industrial policies or strategies at all levels. In other

[67] For example, indigenous communities, women and youth could participate more in the process of preparing, implementing and monitoring states' NDCs or NAPs on L&D. In this way, states could combine their human rights obligations with the need to pursue the sustainable development goals set out in the UN 2030 Agenda. At the same time, in line with intergenerational responsibility, climate demands from young people should find greater representativeness in national parliaments. In this regard, the Rapporteur recalls the case of the participation of 12 minors, members of the Children's Parliament organization, during the work of the Climate Assembly in Scotland (see §§82-83).

[68] Just in the past few months, the European Court of Human Rights (ECtHR) declared two pending climate complaints inadmissible and referred six of them to the Grand Chamber. These include the case of *Duarte Agostinho and Others v. Portugal and 32 others*, in which the ECtHR asked the appellants to investigate to prove, *inter alia*, that there had been violations of Articles 2, 3 and 8 of the European Convention of Human Rights (ECHR), alone or in conjunction with Article 14 and Article 1 of Protocol No. 1. to the ECHR read in light of international climate treaties. *This reference is not accidental, thus, the applicants must clarify whether states Parties to the ECHR, despite the margin of appreciation they enjoy in environmental matters, «se sont-ils acquittés des obligations qui leur incombent en vertu des dispositions de la Convention invoquées, lues à la lumière des dispositions et principes pertinents, tels les principes de précaution et d'équité intergénérationnelle, contenus dans le droit international de l'environnement, y compris dans les traités internationaux auxquels ils sont Parties»*. See ECHR, *Status of climate applications before the European Court*, 9 February 2023; ECHR, Fourth Chamber, *Duarte Agostinho and Others v. Portugal and 32 other states*, 7 September 2020, No. 39371/20, §3; C. HERI, *The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?*, in *Ejil:Talk*, 2020.

cases, climate rights defenders tend to the use more impactful tools such as the aforementioned climate litigation, whereby the strategic objective of some NGOs or groups is to obtain a reformulation of a national policy, industrial plan or national law by court in line with best available science, each country's domestic law and international sources. Having understood the potential impact of Climate Rights defenders actions on domestic and international climate governance, it is easier understand why they are exposed to frequent intimidation or repressive actions by fossil fuel companies.

6. The Special Rapporteur's recommendations to the General Assembly and Parties to the UNFCCC. A critical assessment and conclusions

The 2022 report offers an authentic and bleak snapshot of the gap between States' actions and their international climate commitments in light of their human rights and international law obligations. At the end of each section, in view of COP 27 in Sharm el-Sheikh, the Special Rapporteur makes some recommendations directly addresses to the UN General Assembly and the Parties to the UNFCCC, some of which deserve to be critically assessed. First of all, with regard to States' human rights obligations in the context of mitigation actions, the Rapporteur requests the Secretary-General to provide for a high-level forum on mitigation to be held as part of the work of the upcoming 2024 Summit of the Future.[69] This conference will host Member States, UN agencies, nongovernmental organizations (NGOs), and key private sector actors, thus, it can provide an opportunity to push States to reduce their global GHG emissions by at least 55 percent by 2030, in line with the abundant scientific evidence and the goal of climate neutrality by mid-century. At the same time, the Special Rapporteur presses Parties to strengthen information and assessments about their capacity to implement human rights obligations within their NDCs and to ensure effective domestic procedural remedies to protect potential victims (§91, lett. A)[70]. Nevertheless, the only way to solve the problem at its root is to stop supporting with economic and financial subsidies the over 100 Carbon Majors. In fact, just between 1988 and 2015 these subsidies produced about 71 % of all global GHG emissions (658 billion tons of CO2, see §76 of the 2019 report).[71]Contextually, States should discourage and shut down all exploration or mining of coal, oil or

[69] See A. P. LLOPIS, *The UN75 Declaration, Our Common Agenda and the development of international law*, in *International Review of the Red Cross*, 104, 2022, p. 2172. On the operational modalities of the Summit of the Future, see the resolution adopted by the UN General Assembly on 8 September 2022, No. 76/307 which requires to work urgently, in accordance with the UN Charter, to address global risks and challenges, find viable solutions and accelerate the implementation of UNFCCC and PA.

[70] Additionally, the Rapporteur endorses the recommendations made in the 2019 report expressed in Section IV A. of the document. Particularly, the steps to undertake to interrupt the toxic financial relationship between States and carbon fossil. This dependence contributes annually to depleting our available carbon budget-estimated at about 580 billion tons-and makes it difficult to achieve the 1.5°C mitigation target in the Paris Agreement (see report of 2019, §§ 76-79).

[71] In fact, 25 multinationals alone are responsible for 51 % of the emissions produced - among them, Peabody, Total, Nigerian National Pet, Shell, Gazprom - as can be seen from the "Carbon Majors Database" report compiled in 2017

liquefied natural gas (LNG) that placed on the market would contribute to degrading our climate system.[72] In this regard, obligations of transparency and information can indirectly contribute to the achievement of this result. Accordingly, on the one hand, Special Rapporteur points to the possibility of establishing an internationally legally binding financial disclosure mechanism related to the fossil fuel sector to make investments in fossil fuel and large emitting industries transparent and make policymakers and non-State actors more accountable to the public for their financial decisions. On the other hand, the Special Rapporteur recommends that the General Assembly, and thus, all States, proceed with the repeal of the Energy Charter Treaty (ECT) in line with Paris Agreement. This last hypothesis seems unlikely to be feasible since any amendment would require unanimity of the States, a circumstance that is hardly feasible given the obstructionism manifested on several occasions. Furthermore, according to art. 47 (3) of the ECT, the withdrawal would only take effect 20 years after its exercise. Within that period, protection of investments already undertaken would be ensured by postponing positive climate benefits and it could expose States to possible economic compensation (§90 lett. b) and c).[73] Nevertheless, this does not preclude such a choice from being better achieved at individual or even regional level. For instance, following COP 27, after a failed attempt to reform the ECT at the EU level because of the abstention of some member States, recently, the EU reiterated its willingness to take the appropriate legal arrangements to withdraw from the ECT in line with the recent energy and climate commitments. Particularly, following the choice of eight Member States to leave the ECT, the European Parliament urged the Commission to propose the withdrawal of the EU from the ECT and called on the Council to support this proposal, inviting the other contracting parties to do the same. At the same time, France, Germany and Poland, have notified their withdrawal from the ECT which shall take effect starting from December.[74] Excluding Italy, which has already withdrawn from the ECT, the 26 EU member States

by CDP. Moreover, around 32% comes from listed companies, 59% concerns state-owned enterprises and only 9% is based on private investments. Citing the IPCC's 2015 Fifth Assessment Report, CDP explains that if this trend continues over the next 28 years without a decarbonization transition, the average global temperatures could rise by around 4°C above pre-industrial levels by the end of the century. See CDP, *The Carbon Majors Database CDP Carbon Majors Report 2017*, 2017, pp. 7-8.

[72] In any case, according to the Special Rapporteur, States should halt the licensing or construction of new coal-fired power plants, providing mechanisms for CO_2 capture and storage, with a view to their gradual closure. In addition, States should enact laws to encourage zero-carbon transport technologies, both public and private, by disincentivizing the production and sale of petrol- or diesel-powered vehicles (§§77-79 of the 2019 report).

[73] According to Articles 36, §1, lett. a) and 42 of the ECT, the choice to abrogate the ECT or to amend some of its provisions, for example improving renewable energy sector instead of the fossil sector, would always require unanimity of the Parties. For instance, European Union or other States have expressed their views on the request for an amendment. However, some countries, responsible for the largest GHG emissions worldwide and included EU Member States, firmly oppose a reform since their economies dependent on the fossil sector. See A. BELYI, *The Energy Charter process in the face of uncertainties*, in *JWELB*, 2021, 14, pp. 370-371; P. V. THIESSEN, *Reforming the Energy Charter Treaty for sustainability?*, in *Journal of Energy & Natural Resources Law*, 40:4, 2022, pp. 486-489.

[74] M. D. BRAUCH, *Should the European Union Fix, Leave or Kill the Energy Charter Treaty?*, in *Columbia Climate School. Climate, Earth, and Society. State of planet*, 2020; M. DIETRICH BRAUCH, *Reforming International Investment Law for Climate Change*

represent about half of the ECT parties, thus, their compactness could facilitate the achievement of a treaty reform in line with ambitious European climate commitments based on Paris Agreement. Furthermore, in line with Art. 41 of the Vienna Convention on the Law of Treaties, by abandoning the ECT, the EU Member States could promote the adoption of a new and alternative «Framework Convention on Investment and Sustainable Development» between themselves. The new treaty could promote an explicit shifting away from carbon fossil subsidies, exclude certain substantive protections, such as the investor-state dispute settlement clause. Therefore, instead of proposing an unrealistic withdrawal of States from the ECT, pragmatically, the rapporteur could have emphasised the need for individual and regional pathways first. Secondly, both in the context of mitigation actions and about the issue of participation and protection of climate rights defenders, the Special Rapporteur recommends the establishment of different new international jurisdictions. On one hand, he promotes the institution of an «international human rights tribunal» to ensure the accountability of governments, business and financial institutions for their ongoing investments in fossil fuel and their impact on the enjoyment of human rights (§90). On the other hand, the Special Rapporteur recommends establishing «an international tribunal for the prosecution of perpetrators» responsible for violence against environmental and indigenous human rights defenders and for their killing. On this issue, the choice of establishing additional international jurisdictions should be rejected for several reasons. First, such a choice would contribute to the fragmentation of international jurisdictions, not to mention that the recognition of such international courts would always depend on the ratification of their statutes by States Parties or in any case on their will. Secondly, the responsibility of States for human rights violations perpetrated in the territory or under their jurisdiction must be distinguished from individual criminal responsibility under international criminal law. However, in both cases, rather than proceeding with the establishment of new international courts, States should implement the competence of pre-existing ones to hear such violations of human rights obligations or international criminal law. For instance, on the one hand, the adoption of unsustainable climate policies by both governments or fossil fuel corporations may constitute a breach of the territorial obligation of States to prevent a foreseeable and direct risk to the enjoyment of rights protected both in national constitutions and in human rights treaties ratified. Such violations can be ascertained before national courts, how demonstrated, for instance, by the growing and impactful trend of Climate Rights Litigation in the context of European legal space.[75] At the same time, this trend appears to become a growing phenomenon at the international level, as shown by the first case decided on the

Goals, in M. MEHLING and H. VAN ASSELT (eds), *Research Handbook on Climate Finance and Investment*, EE Publishing, 2020, p.35; See European Parliament, *Resolution of 24 November 2022, No. 2022/2934 on the outcome of the modernisation of the Energy Charter Treaty*, §§18-20.

[75] UNEP, *The status of climate change litigation: a global review*, 29 November 2017, pp. 14-15; UNEP, *Global Climate Litigation Report. 2020. Status Review*, 2020, p. 13.

merits by the Human Rights Committee[76] and the several cases pending before the European Court of Human Rights, some of which are currently under discussion.[77] On the other hand, the individual criminal liability of State authorities and non-State actors for their criminal conduct can be prosecuted by national courts when it constitutes a crime under national law. At the same time, to be prosecuted at the international level - e.g., before the International Criminal Court (ICC) - such offences should be introduced as typical crimes under the jurisdiction of the Courts and. Consequently, for instance, States should promote the inclusion of the crime of ecocide in the ICC Statute by referring to the International Law Commission for the elaboration of the legal definition of this complex offence, which could include, for example, all those actions against the environment, ecosystems, human rights defenders and indigenous peoples committed by individuals[78]. On this issue, in 2010 Polly Higgins proposed a definition of ecocide that would include «extensive damage to, of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished».[79] In such cases, the definition of ecocide may stress the connection between «social, cultural, spiritual, and physical health of particular group of people» and environment as a precondition for their existence.[80] For this reason, States should ratify this relevant

[76] At the international level, communications or applications filed before Treaty bodies or regional international courts generally fall short of admissibility due to the lack of prior exhaustion of domestic remedies, the absence of jurisdiction or a legitimate *locus standi* of the victims. Nevertheless, the Human Rights Committee has recently adopted a report in the case *Daniel Billy and others v. Australia*, recognizing that Australian authorities have failed to take appropriate mitigating and adaptive actions to protect the right to life, the right to private and family life, the right to home and the right to culture of some indigenous members in the face of climate change impacts. For an analysis of the first case decided at the international level, see R. LUPORINI and A. SAVARESI, *International Human Rights Bodies and Climate Litigation: Don't Look Up?*, in *RECIEL*, 2022, pp. 13-15 s; M. A. TIGRE, *U.N. Human Rights Committee finds that Australia is violating human rights obligations towards Torres Strait Islanders for climate inaction*, in *Climate Law. A Sabin Center blog*, 2022.

[77] Starting from the well-known *Duarte Agostinho and Others v. Portugal and others*, the ECtHR could clarify the boundaries between the margin of appreciation of State parties on GHG emissions and their positive obligations to protect conventional human rights, both corroborating the positions expressed by domestic Courts and indirectly influencing national policies and domestic laws of Member States of the Council of Europe, see H. HEISKANEN, *Climate Change and the European Court of Human Rights: future potentials*, in S. DUYCK, S. JODOIN and A. JOHL (eds), *The Routledge Handbook of Human Rights and Climate Governance,* Routledge, 2018, pp. 320-321; T. K. NISKA, *Climate Change Litigation and the European Court of Human Rights - A Strategic Next Step?*, in *Journal of World Energy Law and Business*, 13, 2020, p. 340.

[78] According to Schabas, there is a possible overlapping of the concept of ecocide and genocide in cases of threats to the systemic integrity of the environment on which the survival of a group of people depends when it can be demonstrated that the perpetrators intend to destroy a national, ethnic, racial or religious group in whole or in part. See W. SCHABAS, *Genocide in international law. The crimes of crimes*, Cambridge University Press, Cambridge, 2009, pp. 235-236

[79] Furthermore, the 2016 Policy paper on case selection and prioritisation of the Office of the Prosecutor (OTP) of the ICC highlighted the possibility of prosecuting international crimes involving the «destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land» See. P. HIGGINS, D. SHORT and N. SOUTH, *Protecting the planet: a proposal for a law of ecocide*, in *Crime, Law and Social Change*, vol. 59, no. 3, 2013, pp. 257; R. PEREIRA, *After the ICC office of the prosecutor's 2016 policy paper on case selection and prioritization: towards an international crime of ecocide?*, in *Criminal Law Forum*, 31, 2020, pp. 179-184.

[80] Consequently, the destruction or serious deterioration of this territories can undermine the very survival of these communities. Hence, if accepted by the Parties, the introduction of ecocide would be a way of simultaneously ensure «the protection of nature's right to life and the protection from group destruction», see T. LINDGREN, *Ecocide, genocide*

legal amendment to prosecute the crime of ecocide at the international level as emphasised by the Special Rapporteur in the paragraphs 90 (f) and 95 of the report. Nevertheless, the Special Rapporteur does not stress the importance to criminalise such conduct also at the domestic level as a way to ensure a real universal jurisdiction over these crimes. These aspects are relevant in light of the principle of complementarity that governs the relationship between the jurisdiction of the ICC and national courts. This principle preserves the sovereignty of States in a sensitive field such as criminal justice, where the ICC plays a supplementary role, with the exception of certain binding situation. These exceptional circumstances are well described in Article 17 §§ 2 and 3 of the ICC Statute according to which the Court may exercise jurisdiction over a given case, even when it is pending before a national court, whenever «the State is unable or unwilling genuinely to carry out the investigation or prosecution, or its decision not to prosecute the person concerned has resulted from its unwillingness or inability genuinely to prosecute that person».[81] Taking these elements into account, the importance of including the crime of ecocide in the national legal system and in the ICC Statute is based on two grounds. If the definition of ecocide were provided for only in the ICC Statute and not at the national level, the ICC would only be able to exercise its function where there is a jurisdictional link to the case or in the hypotheses falling under Article 17 §§ 2 and 3 ("unwillingness" and "incapacity"). On the one hand, this would reduce the opportunities for victim protection, and it could cause an overburdening of the ICC, jeopardising the effectiveness and efficiency of its activity. On the other hand, the only inclusion of ecocide at the national level would cover those cases where victims would not otherwise have protection due to the non-ratification of the ICC Statute or of the amendment concerning the new crime. In any case, in the latter hypothesis, it would not be possible to prevent potential inefficiencies due to the unwillingness or inability of national authorities in all those cases where a connection to the ICC jurisdiction cannot be admitted. The above-mentioned arguments confirm the benefits of acknowledging the crime of ecocide and its content both at national and international level. Finally, rather than setting up new international courts and tribunals, such violations of human rights law and/or international criminal law could be prosecuted by the existing international judicial bodies, such human rights jurisdictions or the ICC, and, in view of

and the disregard of alternative life-systems, in *The International Journal of Human Rights*, vol. 22, No. 4, 2018, pp. 433-534; M. RAFTOPOULOS and J. MORLEY, *Ecocide in the Amazon: the contested politics of environmental rights in Brazil*, in *The International Journal of Human Rights*, 2020, p. 10.

[81]The term "unwillingness" refers to those cases where the domestic proceedings are not conducted in an impartial or independent manner, are affected by unjustified delays or are intended to ensure a form of protection of the perpetrators, circumstances that demonstrate the unwillingness of the authorities to bring the person to justice (Art. 17§2). At the same time, the concept of "incapacity" refers to those cases where there is a collapse of the national judicial system that is no longer able to guarantee the proper conduct of internal procedural steps, such as the collection of evidence or the custody of the accused. This second hypothesis also includes limitations resulting from legislative or procedural impediments, such as amnesty laws for certain crimes (Art. 17§3). See A. CASSESE and P. GAETA, *Cassese's International Criminal Law*, Oxford University Press, Oxford, 2013, p. 296-298.

its complementary function, by implementing the role of national courts. Thirdly, there are some critical remarks on the recommendations made by the Special Rapporteur on loss and damage, although, undeniably, some of these were implemented at the last COP 27 in Sharm El Sheikh. On this issue, the Special Rapporteur, in his recommendations to the General Assembly towards COP 27, advocates for the establishment of a new "loss and damage finance facility" (hereinafter, L&D FF) and an experts' group aimed at defining its operational and working arrangements. The L&D FF should be composed of members appointed directly by the UN Secretary General among representatives of financial institutions, rights holders affected by L&D (including indigenous communities, youth activists and women) and climate negotiators from States. The expert working group will have one year to complete its work and recommend appropriate agreements ahead of the 78th session of the UN General Assembly (§92, lett. b), c) and d). The Rapporteur also defines the principles and modalities that should guide the working group (WG), whose action should be based on the polluter pays principle, embracing «an inclusive, human rights-based approach». Furthermore, the WG, when designing climate finance actions, must give priority to the needs and rights of the people most vulnerable to the impacts of climate change (§92 of 2022 report).[82] Waiting for the L&D-FF institution, the Special Rapporteur recommends the contextual establishment of «an interim financial window for funding urgent loss and damage under the Green Climate Fund». On these matters, during COP 27 in Sharm El Sheik, UNFCCC Parties reached an historic agreement to establish a L&D fund to financial support countries L&D due to climate change.[83] Additionally, the Parties provided for the establishment of a special «transitional committee on the operationalization of the new funding arrangements for responding to loss and damage» with the key role to define the governing instrument of the new L&D Fund, bodies, principles and rules.[84] The Committee will have to consider «innovative sources relevant to addressing loss and damage associated with the adverse effects of climate change» making appropriate recommendations ahead of the subsequent COP 28 in 2023, in Dubai, United Arab Emirates.[85] Overall, these measures must be new,

[82] The funding for the group should be new, additional and appropriate through innovative solutions coming from developed economies and non-States actors' financial resources (e.g.. a Carbon Majors tax or carbon fossil subsidies shift to cover L&D costs). See R. LYSTER, *A Fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, in *Transnational Environmental Law*, 4:1, 2015, pp 150-151; M. FITZMAURICE, M. S. WONG and J. CRAMPIN, *International Environmental Law. Text, Cases and Materials*, EE Elgar, Cheltenham, 2022, p. 92.

[83] For a summary of the work and results of COP 27, see IISD, *Summary of the Sharm El-Sheikh Climate Change Conference: 6-20 November 2022*, Vol 12. No. 818, 2022.

[84] UNFCCC, Decision -/CP.27 -/CMA.4, *Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage*, 20 November 2022.

[85] For instance, according to the recommendations expressed by the Special Rapporteur, a possible solution could be a carbon tax for the most responsible Carbon Majors or the end of carbon subsidies. In fact, according to the World Bank «a carbon tax at $40 per ton, applied to the 75% of annual emissions not currently priced, would generate $1.08 trillion annually. Sustainable Development Goal target 12. c) refers to the restructuring of taxation as it relates to fossil fuels», see *Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*,

additional, predictable and complementary to the public support of States and other international institutions.[86] Furthermore, in COP 27 the Parties to the UNFCCC also adopted the governing instrument to operationalise the Santiago Network on L&D and the UN Secretary-General launched the Executive Action Plan for the Early Warnings for All. The plan aims to strengthen actions to protect all people on earth over the next five years from the impact of disasters, by implementing Early Warning Systems through an initial financial commitment of $3.1 billion for the frame 2023-2027.[87] These developments are fully in line with the Rapporteur's recommendations. On the second issue, the effective involvement of the GCF in financial support of States affected by L&D, this choice requires an explicit reform of GCF's governing instrument and its fields of action. To date, in fact, L&D does not fall within the scope of the GCF which addresses exclusively the area of mitigation and adaptation on the basis of the objectives set out in Article 2 of the Paris Agreement. Furthermore, the funding procedures and the financial instruments used by the GCF do not always reconcile with the urgent and structural needs of L&Ds, especially due to the length of its procedures. However, these problems can be expressly addressed by the UNFCCC Parties trough the adoption of an explicit decision to include L&D into the GCF action, which may also depend on the contextual recognition of new and additional financial resources devoted exclusively to this topic.[88] In the meantime, indirectly the Board of the GCF already offers its contribution in the field of L&D, albeit in the context of adaptation. For example, this year alone, the GCF has started a new cooperation with several actors, including WMO, UNEP, UNDRR, UNDP and the World Bank within the SAP-CREWS Scaling-up Framework initiative. It is a program that aims to facilitate the development of early warning systems in the countries most exposed to the impact of climate change, by using a new simplified procedure that the GCF generally uses for small-

Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 10 August 2022, No. A/77/284, p. 18.

[86] After six years form the adoption of Paris Agreement, the world's 60 largest private sector banks have contributed some USD 4.6 trillion to finance the Carbon Majors (see *Banking on Climate Chaos. Fossil Fuel Finance Report 2022*, 2022, p. 3). In the same year, according to International Energy Agency (IEA), despite the mitigation commitments made by States in the Glasgow Climate Pact, the phasing out of fossil fuel subsidies has come to a halt in the current global energy crisis. Its consequence is that globally fossil fuel subsidies rising to over USD 1 trillion by 2022, the highest annual value ever recorded (see IEA, *Fossil Fuels Consumption Subsidies 2022*).

[87] A key role in its implementation is attributed to the WMO and it will be a key adaptive measure to preventively and timely reduce the impact of climate change disasters along with the costs associated with L&D produced. The Plan aims to strengthen efforts in the four core areas of the Multi-Hazard Early Warning System (MHEWS), which is an integrated system aimed at people, governments and communities to reduce the impact of disasters on them through knowledge, observation, early communication and building an appropriate response to risk. See WMO, *Early Warnings for All. The UN Global Early Warning Initiative for the Implementation of Climate Adaptation, Executive Action Plan 2023-2027*, 2022, pp. 5-6.

[88] On these aspects, see the Germanwatch report, *Potential for loss and damage finance in the existing UN- FCCC financial architecture*, 2021, p. 11 e 19- 22.

scale projects.[89] This procedure provides for a reduction in time and effort required for the Accredited entities before the GCF, in order to transform their financial project proposal in a concrete result (*the simplified Approval Process*).[90] In conclusion, the 2022 Report certainly offers the opportunity to highlight the key weaknesses of the current UN climate legal framework in view of States' human rights obligations. The primary concern remains the inadequacy of States' mitigation actions that have a domino effect on the enjoyment of human rights and the costs of L&D due to the impacts of climate change for which climate rights defenders strive. Considering these conditions, some of the recommendations made by the Special Rapporteur on mitigation, L&D and the protection and involvement of climate rights defenders have already been positively reflected at COP 27, such as the agreement to establish an L&D fund or the operationalization of the Santiago Network. In other cases, however, the rapporteur's recommendations impose a more pragmatic and realistic approach that promotes concrete and not just theoretical solutions to overcome the gaps in the current climate legal regime. For instance, these solutions could be the proposed individual or regional withdrawal from the ECT, the implementation of the role of existing international courts or the expansion of the scope of the Green Climate Fund.

[89] On SAP, see M. CALDWELL and G. LARSEN, *Improving access to the Green Climate Fund: how the fund can better support developing country institutions*, in *Working Paper. Washington, DC: World Resources Institute*, 2021, pp. 16- 17.

[90] The financial support offered by the GCF through the SAP-CREWS project is only available to those countries that demonstrate to have implemented effective measures for data collection, monitoring, forecasting, communication and timely response to hazards through the resources of the Climate Risk and Early Warning Systems (CREWS). See GCF, *Accelerating the deployment of climate financing for early warning systems*, 26 January 2023.