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THEORIZING A HUMAN RIGHTS-BASED APPROACH TO RESOURCES EXTRACTION: ISSUES OF INTRAGENERATIONAL AND INTERGENERATIONAL EQUITY AND OF EXTRATERRITORIALITY[**]

ABSTRACT: The international community has recognized the importance of rethinking the current approach to extractive activities. A change is crucial for several purposes: primarily, for fighting climate change and meeting the goals set by the Paris Agreement; again, for promoting fossil fuel phase-out and energy transition; importantly, for ensuring the fair development of renewable sources of energy, which relies on mineral resources largely extracted in the Global South. On this premise, this study theorizes a human rights-based approach to extractive activities, by drawing inspiration from the rising climate litigation wave in international and domestic jurisprudence. Such concepts as intragenerational and intergenerational equity, extraterritoriality, sustainable development, and distributive justice are used to theorize an innovative approach to extractive activities.

1. — *Introduction.*

Since the 1970s[1], the international community has acknowledged and tackled the complexity of the relationship between the humankind and Na-

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[1] In particular, since the Stockholm Summit and the Stockholm Declaration.

ture, and the need to deeply rethink the way in which we use the resources that "our common home"[2] offers. For a very long time, this relationship has been characterized by a relentless exploitation, as «natural resources – notably fossil fuels – have underpinned our global economic system, shaping geopolitics and the course of human development»[3], leading to an increasing deterioration of the environment[4].

In 1987, the *Report of the World Commission on Environment and Development: Our Common Future*, also known as the *Brundtland Report*[5] introduced the concept of sustainable development, that is based on the relationship between the humankind and natural resources, and which was described as the «development that meets the needs of the present without compromising the ability of future generations to meet their own needs»[6]. This definition conveys intergenerational equity[7], distributive justice and solidarity. However, in practice, sustainable development has often been read from an anthropocentric perspective, that was used to perpetuate[8]

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[2] Holy Father Francis, *Encyclical Letter Laudato Si' Of The Holy Father Francis On Care For Our Common Home*, Rome, 2015.

[3] United Nations, *Transforming Extractive Industry for Sustainable Development*, New York, 2021, p. 3. Also see: International Renewable Energy Agency, *A New World. The Geopolitics of Transformation*, Abu Dhabi, 2019.

[4] United Nations, *Transforming Extractive Industry for Sustainable Development*, cit., p. 3 ss.

[5] World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, United Nations General Assembly document A/42/427, 1987, p. 41.

[6] World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, loc. cit.

[7] For an in-depth analysis of the concept of intergenerational equity, that this paper discusses further, see E. Brown Weiss, *Intergenerational Equity, in Max Planck Encyclopedia of Public International Law*, Oxford, 2021; D. Iglesias Márquez, B. Felipe Pérez, L. Martínez Hernández (eds.), *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance*, Newcastle upon Tyne, 2018.

[8] J. Jaria-Manzano, *Sustainability and Justice: A Constitution of Fragility*, in D. Iglesias Márquez, B. Felipe Pérez, L. Martínez Hernández (eds.), *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance*, cit., pp. 6-21.

mankind's voracious approach to the resources that the Earth offers [9].

Extractive activities are a prominent example of this voracity, especially when one considers the unfair exploitation of the natural resources in the Global South, in particular, fossil fuels and the so called "critical minerals" – that are crucial for the energy transition. This phenomenon has raised important issues of distributive and procedural justice for the local communities affected by extractive activities [10] and, since many extractive companies are domiciled in the Global North, it has also shone a spotlight on the need to ensure human rights' extraterritorial protection. In this regard, the need to prioritize «a reform of States' GHG emissions' responsibilities» [11] has emerged, in order to properly discuss an accountability mechanism that would encompass both production-based accountability (PBA) and consumption-based accountability (CBA) [12], as well as carbon leakage. What is more, as the United Nations have stressed, «[o]n a global scale fossil fuels account for a staggering 73 per cent of the world's green-

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[9] See, again, D. Iglesias Márquez, B. Felipe Pérez, L. Martínez Hernández (eds.), *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance*, cit., p. 74, and *Preface*, where it was argued that «Speaking of sustainable development is an exercise in ambiguity».

[10] United Nations, *Transforming Extractive Industry for Sustainable Development*, cit., p. 3. T. Addison, *Extractives for Development (E4D)- Risks and Opportunities*, UNU-WIDER, 2020.

[11] A.A. Shariati, L. Teillet, *COP27 did not seize the opportunity to open the debate around States' greenhouse gases emissions accountability, in International Law Blog*, 2022, available at *internationallaw.blog/2022/12/19/cop27-did-not-seize-the-opportunity-to-open-the-debate-around-states-greenhouse-gases-emissions-accountability/*.

[12] A.A. Shariati, L. Teillet, *COP27 did not seize the opportunity to open the debate around States' greenhouse gases emissions accountability*, cit. Also see A. Franzen, S. Mader, *Consumption-based versus production-based accounting of CO2 emissions: Is there evidence for carbon leakage?*, in *Environmental Science & Policy*, 2018, pp. 34-40; J.-L. Fan, Y.-B. Hou, Q. Wang, C. Wang, Y.M. Wie, *Exploring the characteristics of production-based and consumption-based carbon emissions of major economies: A multiple-dimension comparison*, in *Applied Energy*, 2016, pp. 790-799; S. Afionis, M. Sakai, K. Scott, J. Barrett, A. Gouldson, *Consumption-based carbon accounting: does it have a future?*, in *WIREs Climate Change*, 2016, pp. 1-19.

house gas emissions, placing the spotlight of climate mitigation efforts squarely on extractive industries»[13].

On this premise, in Section 2, this study draws inspiration from and explores the rising climate litigation wave that has been spreading before domestic courts all over the world, «asking state and corporate actors to reduce greenhouse gas emissions and redress the harms associated with the impacts of climate change»[14], and seeking innovative ways to close the accountability gap by also relying on intragenerational and intergenerational equity and, although to a lesser extent, on extraterritoriality. This case law, on several occasions, has specifically tackled extractive activities, adopting innovative solutions, as the definition of a States' specific duty of care towards future generations, which can inspire an effective idea of stewardship. In light of the analysis developed in Section 2, Section 3 theorizes the possible future horizons of litigation on extractive activities, by putting special emphasis on the current opportunities for the European Court of Human Rights. Finally, some conclusions are formulated, without overlooking the importance of States' human rights obligations and due diligence, and the growing wave of corporate liability cases.

2. — *An innovative wave of climate and environmental litigation.*

The idea that human rights treaties are the source of mitigation obligations has been affirmed in scholarship. In this sense, Michael Burger and Jessica Wentz have recognized that there is a «growing consensus that a mitigation obligation does exist under international human rights law»[15].

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[13] United Nations, *Transforming Extractive Industry for Sustainable Development*, cit., p. 7, which recalls Climate Watch, which provides the data about the Historical GHG Emissions at *www.climatewatchdata.org*.

[14] A. Savaresi, J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers, in Journal of Human Rights and the Environmen*t, 2022, pp. 7-34.

[15] M. Burger, J. Wentz, *Climate Change and Human Rights*, in M. Faure (ed.), *Elgar Encyclopedia of Environmental Law*, Cheltenham, 2015, pp. 198-212.

This perspective seems to be progressively gaining ground also in the innovative domestic and international human rights jurisprudence that was inaugurated by the landmark case *Urgenda*[16], that has been tackling climate change and, on various occasions, the need to phase out fossil fuels. This case law relies on a human rights-based or a constitutional rights-based approach, basically, as scholarship has suggested, for three different purposes: assessing States' failure to comply with their positive obligations in the field of climate change; assessing States' measures adopted to fight climate change; tackling the opposition to polluting projects or activities[17]. The approach adopted by this jurisprudence may be helpful for grappling with extractive activities, especially when it relies on the narrative of intragenerational and intergenerational equity, and on extraterritoriality. This is so because it may provide an effective legal paradigm for tackling sustainable development, stewardship of resources, and a fair accountability mechanism – with respect to PBA and CBA.

The judgment of the German Constitutional Court in the renowned case *Neubauer*[18] provides a powerful example of «sustainable development made justiciable»[19], where it affirms that «one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom»[20]. The Court expressed this eloquent view by relying

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[16] Staat der Nederlander v. Urgenda, Hoge Raad 20 December 2019, ECLI:NL:HR:2019:2006.

[17] In this respect, this study relies on the thorough analysis developed by F. Gallarati, *Il contenzioso climatico di tono costituzionale: studio comparato sull'invocazione delle costituzioni nazionali nei contenziosi climatici*, in *BioLaw Journal*, 2022, p. 161.

[18] Neubauer, et al. v. Germany, Bundesverfassungsgericht [BVerfG], 24 March 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (hereinafter, Neubauer).

[19] J. Bäumler, *Sustainable Development made justiciable: The German Constitutional Court's climate ruling on intra- and inter-generational equity*, in EJIL:Talk!, 2021, available at *www.ejiltalk.org*.

[20] Neubauer, cit., para. 192.

on the fundamental rights that «oblige the legislator to manage the CO2 emission reductions that are constitutionally required under Art. 20a [of the Basic Law]». Importantly, this provision contemplates a State duty of care towards future generations, which provides an effective legal paradigm for addressing sustainable development.

However, the existence in the legal order of a future-oriented Constitution or of a Constitution that contains ecological generational justice clauses[21] is not an indispensable precondition for achieving such results. *Sharma*[22] provides an outstanding example in this sense, since the Federal Court of Australia affirmed that «[t]he [Minister for the Environment] has a duty to take reasonable care […] to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere»[23]. *Sharma* is particularly relevant with regard to extractive activities, as the Court relied on the narrative of intragenerational equity and intertemporality for addressing the State's obligations in relation to the "catastrophic" consequences derived from «digging up and burning coal [that] will exacerbate climate change and harm young people in the future»[24]. In particular, the «[p]laintiffs sought an injunction to prevent the Minister from approving»[25] the extension of the Whitehaven Vickery coal mine, under the Environment Protection and Biodiversity Conservation Act.

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[21] A. D'Aloia, *Bioetica ambientale, sostenibilità, teoria intergenerazionale della Costituzione*, in *BioLaw Journal*, 2019, p. 651 ss.

[22] Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560, 27 May 2021, (hereinafter, Sharma).

[23] Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2) [2021] FCA 774, VID 607 of 2020, 8 July 2021, para. 58. It should be recalled that the Full Federal Court has overturned the decision of the Federal Court.

[24] See how Sharma is explored on the website climatecasechart.com; also see J. Peel, R. Markey-Towler, *A Duty to Care: The Case of Sharma v Minister for the Environment [2021] FCA 560*, in *Journal of Environmental Law*, 2021.

[25] Again, see *climatecasechart.com*.

What is more, the Court affirmed that his novel common law duty of care applied to all Australian young people, since they share the same interest as the (young) applicants, which echoes the idea of "class" elucidated by the pioneering environmental judgment of the Supreme Court of the Philippines in the *Minors Oposa* case[26], in the 1990s. In the Court's view, the "class" «appear[ed] to embrace everyone living in the country whether now or in the future»[27]. The Court took a step further where it also specifically recognized the legal standing of the «[p]etitioners minors […] [as] represent[atives] [of] their generation as well as generations yet unborn», as it was based on the principle of intragenerational and intergenerational equity and the stewardship of the resources[28]. This idea may be successfully used by courts to deal with the obstacles related to the legal standing of future generations – that were described by Parfit as the "non-identity problem"[29] – and that courts in the United States have been tackling by relying on the public trust[30].

The results achieved so far at the domestic level are more opaque with respect to extraterritoriality, "overseas" emission, and the rethinking of PBA and CBA. In the *People v. Arctic Oil* case (from which the *Greenpeace Nordic* case before the European Court of Human Rights originated), the Supreme Norwegian Court held that «if activities abroad over which the Norwegian authorities have a direct control, or against which they can implement measures, cause harm in Norway, they fall within the scope of the provision», and that «[o]ne example is combustion abroad of oil or gas produced in Norway, when it leads to harm in Norway as well». However, «the duty to

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[26] Minors Oposa v. DENR, Supreme Court of the Philippines, 33 I.L.M. 173 (1994) (hereinafter, Minors Oposa).

[27] Minors Oposa, cit., p. 16, Separate Concurring Opinion of Judge Feliciano.

[28] Minors Oposa, cit., p. 8.

[29] D. PARFIT, *Reasons and Persons*, Oxford, 1984.

[30] In this regard, see Robinson Twp. v. Commonwealth, 83 A.3d 901, 974 (Pa. 2013), consistently with article 27(1) of the Constitution of Pennsylvania, which provides that «Pennsylvania's public natural resources are the common property of all the people, including generations yet to come».

take care under Article 112 [which protects the right to a healthy environment] does not grant corresponding individual rights to challenge petroleum-related activities [and does not apply extraterritorially]»[31]. That being said, the fact that the Court of Appeal had considered that «[e]missions of greenhouse gases after export of oil and gas […] [fell] under Norwegian Regulation on Impact Assessment (NRIA)»[32], and, therefore, should be taken into account in the environmental impact assessment, has an interesting potential.

Neubauer adopted a less opaque perspective, where the German Constitutional Court «provided for some benchmarks in Germany's global responsibilities»[33]. In particular, the Court said that «no violation of a duty of protection arising from fundamental rights is ascertainable *vis-à-vis* the complainants who live in Bangladesh and Nepal»[34]. Nevertheless, as Bäumler[35] has illustrated, «[w]hile not directly confirming Germany's extraterritorial duty to protect, [the Court] still further evaluated the content of such a duty, including by stressing that the duty to protect individuals abroad might be different and, in fact, lower than the duty to protect those living in Germany (para. 181). In arguing that Germany fulfilled its duty to mitigate climate change by partaking in the global effort, by joining the Paris Agreement, but by also pointing towards Art. 9 of the Paris Agreement that obliges developed countries to financially assist developing countries, the Court ulti-

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[31] Greenpeace Nordic Association v Ministry of Petroleum and Energy (2020) Case no 20-051052SIV-HRET (Norwegian Supreme Court) (People v Arctic Oil), paras. 78-142, 149.

[32] D. Shapovalova, *Arctic Petroleum and the 2°C Goal: a Case for Accountability for Fossil-Fuel Supply*, in *Climate Law*, 2020, pp. 282-307. Also see Section 21, second paragraph of the Norwegian Regulations on Impact Assessments and the Judgment of the Court of Appeal on Arctic Oil, p. 41 (Greenpeace Nordic Association v Ministry of Petroleum and Energy (2020), Case no 18-060499ASD-BORG/03 (Borgarting Court of Appeal)).

[33] J. Bäumler, Sustainable Development made justiciable: The German Constitutional Court's climate ruling on intra- and inter-generational equity, cit.

[34] Neubauer, para. 173.

[35] J. Bäumler, *Sustainable Development made justiciable: The German Constitutional Court's climate ruling on intra- and inter-generational equity*, cit.

mately sketched out Germany's global obligations towards individuals living abroad»[36].

Otherwise, international human rights bodies have adopted a clear and innovative approach to extraterritoriality. Indeed, the Inter-American Court of Human Rights (IACtHR), in its Advisory Opinion OC-23/17 on the Environment and Human Rights (hereinafter, AO OC-23/17)[37], has conceptualized a new extraterritorial jurisdictional link that derives from a broad application of the principle of due diligence[38], and «departs from the criteria for extraterritorial jurisdiction of effective control over territory/persons»[39], as «it is based on the factual – or, as the Court formulates the 'causal' – nexus between conducts performed in the territory of the State and a human rights violation occurring abroad»[40]. This conceptualization was taken up by the Committee on the Rights of the Child (CRC), in *Sacchi et al*, to say that, in accordance with «the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location»[41]. As Section 3 discusses, this new extraterritorial link may be particularly helpful in the framework of extractive activities,

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[36] In this sense, see also Neubauer, para. 101, pp. 175-178.

[37] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights (IACrtHR), 15 November 2017, para. 104(h)).

[38] A. Berkes, *A New Extraterritorial Jurisdictional Link Recognised by the IACtHR*, in *EJIL:Talk!*, 2018, available at *www.ejiltalk.org*. Also see S. Besson, *Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!*, in *ESIL Reflection*, 2020, available at e*sil-sedi.eu*.

[39] A. Berkes, *A New Extraterritorial Jurisdictional Link Recognised by the IACtHR*, loc. cit.

[40] A. Berkes, *A New Extraterritorial Jurisdictional Link Recognised by the IACtHR*, loc. cit.; Advisory Opinion OC-23/17, para. 95, pp. 101-102.

[41] Chiara Sacchi et al v Argentina, Brazil, France, Germany and Turkey, Committee on the Rights of the Child, CRC 104/2019-108/2019 (23 September 2020), para. 10.10 (hereinafter, Sacchi et al).

as it may help not only to better elucidate States' responsibility with respect to the extraterritorial harm caused by the activities carried out in its territory and susceptible to generate GHG emissions (as extraction, for example), but could also be the starting point to better elucidate States' due diligence obligations with respect to the extractive industry for the activities carried out abroad[42].

3. — *The (possible) future horizons of litigation on extractive activities.*

In the 1890s, in his masterpiece "Heart of Darkness", Joseph Conrad wrote that «The conquest of the earth […] is not a pretty thing when you look into it too much». The results achieved by the case law analyzed in Section 2 show a viable way to not ignore Conrad's caveat in the field of extractive activities.

At the moment, the ECtHR has the opportunity to tackle several crucial issues in the pending cases *Portuguese Youth* and *Greenpeace Nordic*[43]. In *Portuguese Youth* the young applicants have shone a spotlight on intertemporality, where they said that «[the] harms/risks [posed by climate change] are set to increase significantly over the course of their lifetimes», affecting their rights under Article 2 and Article 8 of the ECHR[44]. The first critical issues that the Court is called to asses is the victim status of the applicants, which entails the opportunity to tackle the legal standing of young generations. In the words of Keller and Heri, it will be interesting to see whether the «Court

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[42] W. Tiruneh, *Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell*, in *EJIL:Talk!*, 2021, available at *www.ejiltalk.org*.

[43] European Court of Human Rights, Duarte Agostinho and Others v. Portugal and 32 Other States, Application no. 39371/20, 2020 (hereinafter, Portuguese Youth); European Court of Human Rights, Greenpeace Nordic and Others v. Norway, Application no. 34068/21, 2021 (hereinafter, Greenpeace Nordic).

[44] The applicant also argued that «the effects of climate change at its current level and trajectory expose them to harm/risk to their lives, to their health, to their family lives, and to their privacy, now and/or in the future». Portuguese Youth, Application, para. 8.

will allow claims from 'potential victims'[(45)] of climate harms by finding that they are '[…] directly concerned by the situation and have a legitimate personal interest in seeing it brought to an end'» and, therefore, whether it will «walk […] an occasionally fine line between ensuring human rights protection and allowing *actiones populares*, meaning public interest litigation that falls outside the scope of the right of individual application in Article 34 ECHR»(46). What is more, in terms of substantive law, the Strasbourg Court will have the chance to deal with preventive or protective obligations(47), in relation to which it «has clearly established that states must safeguard against harms to life and limb under Articles 2, 3, and 8 ECHR», with reference to «certain types of harms, especially where dangerous activities such as industrial emissions are concerned»(48). This may also entail «establishing an appropriate and deterrent legislative and administrative framework»(49). From this perspective, *Portugues Youth* has a significant potential for the definition of States' specific preventive or protective obligations related to extractive activities. In fact, the applicants have specifically targeted the harm that climate change poses to them, including in prospective and intertemporal terms, due to States' incompliance with their human rights obligations as well as their mitigation obligations under international environmental law, since they continue to extract fossil fuels in spite of the scientific ev-

(45) The young applicants argued that "the need for "effective protection" of ECHR rights requires that Article 34 not be applied in a «rigid, mechanical and inflexible way", and that "potential victimhood is sufficient if there is […] reasonable and convincing evidence of the likelihood that a violation affecting [an applicant] personally will occur», Portuguese Youth, Application, para. 7.

(46) K. Keller, C. Heri, *The Future is Now: Climate Cases Before the ECtHR*, in *Nordic Journal of Human Rights*, 2022, p. 4.

(47) Protective or preventive obligations are those «obligations to take measures that protect against a given impending or future harm»: K. Keller, C. Heri, *The Future is Now: Climate Cases Before the ECtHR*, loc. cit.

(48) K. Keller, C. Heri, *The Future is Now: Climate Cases Before the ECtHR*, cit., p. 14.

(49) K. Keller, C. Heri, *The Future is Now: Climate Cases Before the ECtHR*, loc. cit., referring to Budayeva and Others v. Russia, para. 158.

idence[50]. So far, international human rights case law has not yet tackled extractive activities in this way. However, a useful reference on how States' preventive or protective obligations towards young people related to climate change and mitigation obligations may be understood under international human rights law can be sought in *Sacchi*, where the CRC said that «as children, the authors are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken»[51].

As to young generations' peculiar vulnerability, interestingly enough, when the ECtHR communicated the case, consistently with the *jura novit curia* principle and being the «master of the characterisation to be given in law to the facts of the case»[52], it asked the parties to also comment on Article 3 of the ECHR. So far, this provision has not been successfully invoked in the Court's environmental case law, and it could be – promisingly – used to deal with the long-term exposure of young generations to the adverse impact of climate change. In this respect, should the Court consider that the severity threshold has been met[53] – which is a challenging point – an important, possible consequence of the application of Article 3 of the ECHR may be the recognition of "extensive positive obligations"[54], which might imply «adequate legislative and administrative measures to curb carbon emissions, including by corporate actors»[55]. In addition, the Court may additionally

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[50] Portuguese Youth, cit., Application, paras. 3 ff.

[51] Sacchi et al, para. 10.13.

[52] As the ECtHR has stated in its case law on various occasions. See, ex multis, Guerra v. Italy and Radomiljia and Oth. v. Croatia.

[53] See C. Heri, *The ECtHR's Pending Climate Change Case: What's Ill- Treatment Got To Do With It?*, in *EJIL:Talk!*, 2020, available at *www.ejiltalk.org*.

[54] C. Heri, *The ECtHR's Pending Climate Change Case: What's Ill- Treatment Got To Do With It?*, cit.

[55] The Author of this paper has developed some of these ideas also in relation to the forthcoming chapter *Theorizing a human rights-based approach to energy transition and its justiciability in international and domestic jurisprudence*, in D. Iglesias Márquez, B. Felipe Pérez, C. Esteve Jordà (eds.), Palgrave Macmillan, forthcoming.

use Article 14 of the ECHR – which was invoked in *Portuguese Youth* – to address young generations' peculiar vulnerability.

Importantly, *Portuguese Youth* and *Greenpeace Nordic* give to the ECtHR the opportunity to rethink its narrow concept of jurisdiction, given that «[s]ince its judgment in *Banković v Belgium*, it has largely displayed two models of jurisdiction: one based on territorial control, and one based on personal control»[56]. In *Portuguese Youth* – and, similarly, in *Greenpeace Nordic*, the applicants have "allege[d] specifically that the Respondents are failing to sufficiently reduce their "territorial" emissions and, further, to take responsibility for their contributions to «"overseas" emissions entailed by (a) their export of fossil fuels, (b) the import of goods containing "embodied" carbon and (c) the contributions to emissions abroad of entities domiciled within their respective jurisdictions (e.g. via fossil fuel extraction elsewhere or its financing)»[57]. *Portuguese Youth*, similarly to *Sacchi et Al.*, is a diagonal claim[58]. This kind of claims may be helpful for addressing States' responsibility for those activities on which they have control, that are carried out within the domestic context but have an extraterritorial impact, as well as «State responsibility [that] may encompass territorial effects of exported GHG emissions under a State's effective control»[59].

From this perspective, the applicants used the concept of the *espace juridique* of the ECHR, to affirm that «through their contributions to climate

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[56] K. Keller, C. Heri, *The Future is Now: Climate Cases Before the ECtHR*, cit., pp. 153-174, 161; also see S. Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To'*, in *Leiden Journal of International Law*, 2021, pp. 857-884.

[57] P. Clark, G. Liston, I. Kalpouzos, *Climate change and the European Court of Human Rights: The Portuguese Youth Case*, in *EJIL:Talk!*, 2020, available at *www.ejiltalk.org*. See Portuguese Youth, Application, para. 20(iv).

[58] M. Feria-Tinta, *Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions*, in *Europe of Rights & Liberties/Europe des Droits & Libertés*, 2021, pp. 52-71.

[59] J. Sandvig, P. Dawson, M. Tjelmeland, *Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?*, in *EJIL:Talk!*, 2021, available at *www.ejiltalk.org*.

change, each of the 32 Respondent States exercises significant control over the ECHR-protected interests of the Applicants»[60], and that «Portugal, through adaptation measures, cannot adequately protect the Applicants from the adverse impacts of climate change»[61]. Should «the 32 Respondent States […] not be held accountable under the Convention for breaches of human rights would result in a vacuum of protection within the legal space of the Convention»[62]. The idea that «the special character of the ECHR as a treaty for the "collective enforcement of human rights" does lend some support for a duty for Contracting States to "act jointly and to cooperate" in the context of transborder violations within Europe»[63] is not new to the ECtHR jurisprudence. Therefore, the Court might take into consideration the arguments of the young applicants on the *espace juridique* of the ECHR[64].

Secondly, but not less importantly, the Court could rely on judicial borrowing and use the "new extraterritorial jurisdictional link" recognized by the IACtHR in its AO OC-23/17 to successfully address extraterritoriality within and even beyond the *espace juridique* of the ECHR.

In this regard, there are several ways in which States – through legislation and appropriate measures that address fossil fuel corporations – may comply with their obligations of due diligence, and, thus, with their obligation to protect human rights, in relation to extractive activities. For example, some guidance may be sought in the UN Guiding Principles on Business and Human Rights[65]. States may provide guidance to corporations in relation

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[60] Portuguese Youth, Application, para. 21.

[61] Ibid., para. 21.

[62] Ibid., para. 20(vii).

[63] J. Sandvig, P. Dawson, M. Tjelmeland, *Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?*, cit, that recalls the cases Güzelyurtlu and Others, para. 232, and Castaño para. 81.

[64] For some interesting comparison with Neubauer, see L.J. Kotzé, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, in *German Law Journal*, 2021, pp. 1423-1444.

[65] United Nations, *Guiding principles on business and human rights*, December 2011.

to the adoption of codes of conduct, written policies, and risks and impact assessments[66], which would also be an effective way for improving social corporate responsibility and, furthermore, would help to create corporate accountability and to build trust with the communities affected by the extractive activities, related to either fossil fuels or "critical minerals". States' due diligence may as well imply the definition of mitigation standards and duties for extractive corporations, in a similar fashion as Article 15 of the proposed EU Directive on Corporate Sustainability Due Diligence does[67]. This idea might benefit from reference to the recent General Comment No. 26 (2022), where the CESCR clarified that «[m]itigation policies should lead to absolute emissions reductions through the phasing out of fossil fuel production and use»[68], including through «specific measures to support communities and people to prevent, mitigate and adapt to the consequences of global warming» as a means for «facilitat[ing] the sustainable use of natural resources»[69], as well as in the human rights-based approach promoted by IACHR in its Resolution n. 3/2021 on «Climate emergency: scope of the Inter-American Human Rights Obligations»[70].

However, addressing "overseas" emissions from the combustion of exported fossil fuels would require some additional efforts. In this sense, the Court might have to consider whether to extend the notion of "effective control" also to the harm related to the activities of those «companies and other entities domiciled on the […] territory [of the respondents States]

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[66] J. Drimmer, *Human rights and the extractive industries: Litigation and compliance trends*, in *The Journal of World Energy Law & Business*, 2010, pp. 121-139.

[67] See G. Ferrarini, *Corporate Sustainability Due Diligence and the Shifting Balance between Soft Law and Hard Law in the EU*, in *Faculty of Law Blogs/University of Oxford*, 2022, available at *blogs.law.ox.ac.uk*.

[68] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 26 (2022), of 24 January 2023, on 'Land and Economic, Social and Cultural Rights', E/C.12/GC/26 (hereinafter, CESCR, General Comment No. 26 (2022)), para. 56.

[69] CESCR, General Comment No. 26 (2022), para. 38.

[70] Inter-American Commission on Human Rights (IACHR) Resolution 3/2021 «Climate Emergency: Scope of Inter-American Human Rights Obligations» (hereinafter, IACHR, Resolution n. 3/2021), paras. 44, 55 and 56.

with operations *overseas*[71] which contribute to climate change», that is, for instance, «via fossil fuel extraction elsewhere or its financing»[72]. This is a view that both *Portuguese Youth* and *Greenpeace Nordic* require the ECtHR to consider with regard to the export of fossil fuels and their combustion abroad, in a fashion which would allow the Court to address CBA as well. Possibly, some support may be sought in the recent General Comment No. 26 (2022) of the CESCR, on the right to land as, when addressing States' obligation to protect, the Committee said that «States parties shall take the necessary steps to prevent human rights violations *abroad*[73] in land-related contexts by non-State actors [as business entities, including transnational corporations] over which they can exercise influence, without infringing on the sovereignty or diminishing the obligations of the *host*[74] States»[75].

What is more, the ECtHR may embrace the view that there is a «growing consensus that a mitigation obligation does exist under international human rights law»[76], through a combined reading of States' human rights obligations under the ECHR and under international environmental law, especially the Paris Agreement. Some support may be sought in the Individual Opinion by Committee Member Duncan Laki Muhumuza, in *Daniel Billy*, where he affirmed that the fact that Australia «has not taken any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use»[77] results in the violation of the authors' rights under Article 6 of the International Covenant on Civil and Political Rights. A viable way for the ECtHR to adopt the approach under consideration would be to incorporate the language of human rights into nationally determined con-

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[71] Emphasis added.

[72] P. Clark, G. Liston, I. Kalpouzos, *Climate change and the European Court of Human Rights: The Portuguese Youth Case*, cit. See Portuguese Youth, Application, para. 20(iv).

[73] Emphasis added.

[74] Emphasis added.

[75] CESCR, General Comment No. 26 (2022), para. 42.

[76] M. Burger, J. Wentz, *Climate Change and Human Rights*, cit., p. 205.

[77] Daniel Billy, Individual Opinion by Committee Member Duncan Laki Muhumuza, para. 11.

tributions (NDCs), as Desierto has authoritatively suggested[78], and consistently with the view respectively expressed by the CESCR[79] and by the IACHR in its Resolution n. 3/2021[80]. From this perspective, including in the NDCs the information related to exported emissions and «the contributions to emissions abroad of entities domiciled within their respective jurisdictions (e.g. via fossil fuel extraction elsewhere or its financing)»[81] may be an effective way for bridging the accountability gap and adequately address CBA, by also ensuring transparency under the Paris Agreement[82]. Similar considerations may be made, at the domestic level, with regard to EIAs, in the fashion suggested by the Borgarting Court of Appeal in *Arctic Oil*.

Taking such an ambitious step would be a major challenge for the Strasbourg Court, but also a great opportunity to innovate its jurisprudence and pave the way for other human rights bodies to rethink their approach to PBA and CBA, bridge the accountability gap, and promote sustainable development, stewardship and environmental distributive justice.

4. — *Conclusions.*

The words of Joseph Conrad sound prophetic in our days, when the voracity of our productive and, especially, extractive system has become

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[78] D. Desierto, *Just Transitions in Climate Change Actions: Are States Respecting, Promoting, and Considering Human Rights Obligations in Setting and Implementing NDCs?*, in *EJIL:Talk!*, 2021, available at *www.ejiltalk.org*.

[79] B. Mayer, *Climate change mitigation as an obligation under human rights treaties?*, in *The American Journal of International Law*, 2021, pp. 409-451, refers to the Committee on Economic, Social and Cultural Rights (CESCR), Statement: Climate Change and the International Covenant on Economic, Social and Cultural Rights, para. 6, UN Doc. E/C.12/2018/1 (October 31, 2018).

[80] Resolution n. 3/2021, para. 2.

[81] P. Clark, G. Liston, I. Kalpouzos, C*limate change and the European Court of Human Rights: The Portuguese Youth Case*, cit.

[82] J. Sandvig, P. Dawson, M. Tjelmeland, *Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?*, cit.

unsustainable. However, the climate case law explored by this study has demonstrated that Courts and human rights bodies can write a different story for the future.

The ECtHR has the chance to be a real game changer and tackle States' responsibilities in the extractive sector in an advanced way, both with regard to young generations and intertemporality, and extraterritoriality. This is a critical opportunity that, in the future, might also benefit other international human rights bodies and domestic courts, through judicial borrowing and dialogue. Addressing States' responsibilities, bridging the gap of accountability by also tackling PBA and CBA, and not overlooking extraterritoriality with regard to overseas emissions as well as "the contributions to emissions abroad of entities domiciled within their respective jurisdictions (e.g. via fossil fuel extraction elsewhere or its financing)", is all the more fundamental, as the challenges are multiplying. This is true for the rush for "critical minerals", especially in the Global South in the context of the energy transition, and for deep-sea mining, the claims of the Arctic States on their respective continental shelf, and the potential risks for Antarctica after 2048, when any of the Antarctic Treaty Consultative Parties will have the possibility to call for a review conference into the Protocol on Environmental Protection to the Antarctic Treaty's operation.

In 2022, a fascinating research published on Nature demonstrated that «The burning of fossil fuels is making Antarctica darker»[83]. As the voracity and "the darkness" of resource extraction will hardly subside, the responses that courts and human rights bodies have been providing will be more and more fundamental to pave the way to a "brighter" future.

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[83] R.R. Cordero, S. Feron, *The burning of fossil fuels is making Antarctica darker*, in *Sustainability (Springer Nature)*, 2022.