



Towards a European Charter of the Rights of Nature

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Abstract

Combating climate change entails operating a systemic shift in our society, economy and narratives. This shift must be sustained by a strong legal infrastructure based on the Rule of Law and effective enforcement set to protect the environment and humankind as a whole.

The EU Environmental *acquis* comprises of more than 500 legal documents, including strategic ones in the areas of climate change and environmental protection. Yet, there is not a European formal statement of the rights pertaining to the environment as a whole (such as a Charter). This article investigates how the adoption of a EU Charter enshrining the rights of Nature could constitute the much needed paradigm shift and what are the external and internal drivers pushing for the adoption of such instrument.

More precisely, this article focuses first on how climate change has drastically changed the landscape of international and European environmental law, inevitably leading to the urgency for a new global environmental governance and an in-depth remodelling of our institutional structures. The second section will analyse more in detail the state of art of European environmental protection. Specifically, it will focus on the widespread lack of access to justice and judicial review at EU level, on the scarce compliance with environmental objectives and rules and on the recurrent issues related to legal standing in environmental and climate-related matters.

Ultimately, this article identifies the political and legal drivers to the adoption of a European overarching legal apparatus relating to the protection of our ecosystem such as the environmental equivalent of the Charter of Fundamental Rights of the European Union. The research hence shows how a EU Charter of the Rights of Nature could be a useful tool in the fight against climate change.

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Introduction

Climate change is a scientifically evidenced phenomenon and many reports illustrate the alarming condition of our planet,¹ indicating we are facing a climate emergency that requires urgent action: civilisation is under threat.² Against this background, the international community has set the objective to limit global warming to 2°C.³ Unfortunately the current trends are not consistent with achieving this objective and scientists expect the actual pledges under the Paris Agreement will likely lead to an increase between 3 and 5°C by 2100.⁴ Accordingly, policies and risk-management frameworks on climate change should ‘differ fundamentally from conventional practice’⁵ and the normative framework should impose targets and regulations to avoid catastrophic consequences bypassing national, and regional boundaries. There is general consensus on the fact that more has to be done to tackle the ‘tragedy of the commons’ at every level of law and sector of governance.⁶

The European Union (EU) is in line with this global concern: in the *New Strategic Agenda 2019-2024*⁷ issued in June 2019, the European Council defines climate change as

¹ IPCC, 'Climate Change 2014: Synthesis Report' (IPCC 2015); IPCC, 'Summary For Policymakers. In: Global Warming Of 1.5°C' (IPCC 2018); IPBES, 'Summary For Policymakers' (IPBES 2019); WMO, 'Statement On The State Of The Global Climate In 2018' (WMO 2019) and this [Bibliography of reports from the UN](#).

² Breakthrough - National Centre for Climate Restoration, 'Existential Climate-Related Security Risk: A Scenario Approach' (Breakthrough - National Centre for Climate Restoration 2019); Figueres C and others, 'Three Years To Safeguard Our Climate' (2017) 546 Nature; Bendell J, 'Deep Adaptation: A Map for Navigating Climate Tragedy' [2018] IFLAS Occasional Paper 2; Xu Y, Ramanathan V and Victor DG, 'Global warming will happen faster than we think' (2018) 564 Nature 30.

³ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) Art. 2.

⁴ Breakthrough - National Centre for Climate Restoration, 'Existential Climate-Related Security Risk: A Scenario Approach' (Breakthrough - National Centre for Climate Restoration 2019) 6

⁵ *ibid.* 7

Xu Y and Ramanathan V, 'Well below 2 °C: Mitigation strategies for avoiding dangerous to catastrophic climate changes' 114 Proceedings of the National Academy of Sciences of the United States of America 10315

⁶ Murillo J, 'Common Concern of Humankind and Its Implications in International Environmental Law' (2008) 5 Macquarie J Int'l & Comp Env'tl L 133; Ansari S, Wijen F, Gray B, 'Constructing A Climate Change Logic: An Institutional Perspective On The “Tragedy Of The Commons”' (2013) 24 Organization Science.

⁷ Council, 'A New Strategic Agenda 2019-2024' (European Council 2019)

an ‘existential threat’⁸ that we urgently need to manage stepping up our actions. The strategy also reaffirms that the EU ‘can and must lead the way [...] to achieve climate neutrality’.⁹ It can be therefore inferred that Europe is not only in line with the global fight against climate change, but it wants to lead it. However, to lead to and achieve carbon neutrality, the EU needs to operate a more radical shift in its institution. As it will be discussed, granting rights to nature could contribute essentially to this scope.

Climate change has been defined as a “super wicked”¹⁰ policy problem, capable of resisting even substantial efforts by policymakers.¹¹ Three particular features that make climate change a “super wicked” policy problem emerge from the work of Levin et al. and Lazarus: (1) the fact that time is not costless, with the result that the more time it takes to deal with the climate emergency, the more it becomes progressively difficult and expensive to remediate it; (2) the actors who are best positioned to address climate change are those who are primarily responsible for causing it—and who lack incentives to take action; and (3) no institution has legal jurisdiction and authority aligned with the global scope of the problem.¹²

It is this very third feature that this research proposes to tackle. Climate change is imposing a new global environmental order: environmental issues, because of their very

⁸ *ibid.* 5

⁹ *ibid.* 5

¹⁰ “‘classic’ wicked problems are policy problems that ‘defies resolution because of the enormous interdependencies, uncertainties, circularities and conflicting stakeholders implicated by any effort to develop a solution. Sometimes described as “social messes,” classic wicked problems include AIDS, healthcare, and terrorism.’ Lazarus RJ, ‘Super wicked problems and climate change: Restraining the present to liberate the future’ 94 *Cornell Law Review* 1159. See generally Rittel H and Webber M, ‘Dilemmas in a general theory of planning’ (Dordrecht) 4 *Integrating Knowledge and Practice to Advance Human Dignity* 155; Horn R E Robert P. Weber, *New Tools for Resolving Wicked Problems: Mess Mapping and Resolution Mapping Processes* 3 (MacroVU(r), Inc. & Strategy Kinetics LLC, 2007)

¹¹ Levin K et. al., ‘Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change’ (2012) 45 *Integrating Knowledge and Practice to Advance Human Dignity* 123; Lazarus RJ, ‘Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future’ (2009) 94 *Cornell L Rev* 1153.

¹² *ibid.*

nature¹³, are posing significant challenges to the traditional international legal order:¹⁴ the very international structure based on States' sovereignty as established since the treaty of Westphalia is being challenged as no individual State can tackle efficiently transnational problems.¹⁵

As it will be highlighted, there are no supranational institutions with judicial review powers in environmental matters, since this would explicitly go against the principle of sovereignty. Nonetheless, the EU Member States (MSs) granted the EU exclusive and shared competences in some areas:¹⁶ EU is a supranational institution that has judicial review power on some matters. This research will analyse how this could be applied to environmental matters, putting the EU in the forefront of the fight against climate change.

The climate emergency is also coupled with social inequalities. Lower socio-economic groups are disproportionately exposed to environmental health hazards, this being both witnessed at regional level (in Europe as well),¹⁷ and on a global scale: the areas of the world the most vulnerable to climate change are also the ones who contributed the least to it.¹⁸ This has been acknowledged by the scientific, politic and international law

¹³ 'ecological interdependence does not respect national boundaries and issues once considered to be matters of national concern have international implications.' Sands P, Peel J, *Principles of international environmental law* (Fabra Aguilar A and Mackenzie R eds, 4th ed. edn, Cambridge : Cambridge University Press 2018) 4

¹⁴ See Sands P, Peel J, *Principles of international environmental law* (Fabra Aguilar A and Mackenzie R eds, 4th ed. edn, Cambridge : Cambridge University Press 2018)10; Lehmen A, 'The Case for the Creation of an International Environment Court: Non-State Actors and International Environmental Dispute Resolution' (2015) *Colorado Natural Resources, Energy & Environmental Law Review* 179; and more generally see: Desombre ER, *Global environmental institutions* (Second edition. edn, London, England ; New York, New York : Routledge 2017)

¹⁵ Lehmen A, 'The Case for the Creation of an International Environment Court: Non-State Actors and International Environmental Dispute Resolution' *Colorado Natural Resources, Energy & Environmental Law Review* 179; at EU level see: Kingston S, Heyvaert V, Čavoški A, *European Environmental Law* (Cambridge University Press 2017) 275.

¹⁶ Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ L 326/49, art. 3 and 4. See *infra II. The European Union*, p. 24

¹⁷ Kaźmierczak A, *Unequal exposure and unequal impacts: social vulnerability to air pollution, noise and extreme temperatures in Europe* (EU Publications - European Environment Publication 2018).

¹⁸ Gardiner SM, *Climate Justice* (Oxford University Press 2011); see also, for a wider and detailed analysis of the concept of climate justice: Schlosberg D, *Defining environmental justice : theories, movements, and nature* (Oxford : Oxford University Press 2007).

community; in fact, it features in the IPCC 5th assessment report¹⁹ and in the preamble of the 1992 United Nations Convention on Climate Change (UNFCCC).²⁰ Tackling effectively climate change imposes to establish a regime of justice and equity that has been conceptualised under Climate Justice.²¹ The climate crisis cannot be reverted without imposing a fair and equitable transition.

Reverting climate change thus entails operating a systemic change in our society, economy and narratives. Most importantly this shift must be sustained by a strong legal infrastructure based on the Rule of Law and effective enforcement set to protect the environment and humankind as a whole, fostering intra- and inter- generational equality.²²

It might be politically difficult to create a new global environmental governance, but could Europe make a difference and effectively lead the process?

Europe and the world have faced emergencies in the past: the atrocities of the WWII brought the international community to adopt the Universal Declaration of Human Rights. Since, fundamental human rights have been enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which established the European Court of Human Rights (ECtHR). Since the court's establishment as a full-time institution in 1998,²³ it has been described as “the most effective human rights regime in

¹⁹ Ipcc . Climate Change 2014: Impacts, Adaptation and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Field, C. B., V. R. Barros, D. J. Dokken, K. J. Mach, M. D. Mastrandrea, T. E. Bilir, M. Chatterjee, K. L. Ebi, Y. O.. Estrada, R. C. Genova, B. Girma, E. S. Kissel, A. N. Levy, S. MacCracken, P. R. Mastrandrea and L. L. White (eds.)]. (Cambridge University Press, 2014).

²⁰ United Nations Framework Convention on Climate Change (adopted on 9 May 1992 and entered into force on 21 March 1994) GE.05-62220 (E) 200705 (UNFCCC)

²¹ UNFCCC see *supra* note 20, Preamble

²² The concept of climate justice is introduced for the first time in international law in the preamble of the Paris Agreement: “Noting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of "climate justice", when taking action to address climate change,..”. See also: Sands P and Peel J, Principles of international environmental law (Fabra A and Mackenzie R eds, 4th ed. edn, Cambridge : Cambridge University Press 2018) 818 n. 56

²³ Although the ECtHR was established in 1959 through the relevant optional clause to the ECHR, it became a full-time institution only in 1998. For more information, see: Lovat H and Shany Y, The European Court of Human Rights (Oxford University Press 2014) 254

the world”.²⁴ Recently, another milestone has been embedded in the European Union legal system of human rights protection: The Charter of the Fundamental Rights of the European Union (CFR).²⁵

Should we act with the same strength to solve the climate emergency?

To answer this question, this article analyses three different aspects that build the reasoning towards adopting a EU Charter of the Rights of Nature.

The first section investigates the global context in which Europe is inserted: International Environmental Law and Climate action. This section illustrates the international drives and shortcomings calling for a greater climate action. In this sense, this section puts European environmental protection and climate action in relation to the wider international one to understand what can be achieved at EU level, and if it is a (more) suitable ground.

The second section focuses on European environmental law. Specifically, it focuses on the lack of access to justice in environmental matters and the gaps in the consideration of the environmental protection as environmental (human) rights. It then outlines how a Charter enshrining the Fundamental Rights of Nature might contribute to solving those identified issues.

The last section is dedicated to the political drivers and opportunities that adopting such Charter could present, followed by a reasoning on why EU should grant legal personhood to nature.

²⁴ For a more extensive recollection on the ECtHR efficiency, see: Lovat H and Shany Y, *The European Court of Human Rights* (Oxford University Press 2014) 255 n2.

²⁵ The CFR was proclaimed in 2000 and entered into force in 2009 with the Treaty of Lisbon. A further analysis of the CFR and of its effect will be drawn in the following section.

I. The context

According to article 47 of the TEU, ‘Europe shall have legal personality’²⁶. This means that the EU is subject to legal obligations and responsibility under international law. Furthermore, Europe has also (amongst others) the right to conclude treaties, the right to submit claims or act before an international court or judge and the right to become party to international conventions.²⁷ In other words, Europe must comply with international law, but can also influence it and take an active part in its continuous evolution. Hence the international rules and mechanisms regulating the environmental and climate actions are of preliminary relevance for this research.

This chapter analyses how environmental protection and climate action have been integrated in international law with the aim of individuating strengths and gaps. The main objective is to understand what is the role of the EU, how it could influence it and to which extent the EU institutions can be suitable to fill the legislative gaps (at EU level) left by the international community.

International Environmental Law (IEL)

The international regulation of the environment is not recent, but, since the 1970s, the necessity to protect the environment has grown becoming one of the most pressing policy issues in the international agenda.²⁸

Since Stockholm declaration²⁹, different principles and rules of international environmental law have been developed and recognised as such in treaties, state practices,

²⁶ Consolidated Version of the Treaty on European Union [2012] OJ C 326/41

²⁷ Craig P, de Búrca G, EU Law (6th edn, Oxford University Press 2017) 322; TFEU, art. 2.

²⁸ An in-depth analysis of international environmental law would deserve another full research. For the scope of this article, the following section will just highlight the main and most relevant developments on the matters. For a more in-depth analysis, see: Dupuy PJ Viñuales, *International Environmental Law* (2nd edn, Cambridge University Press 2018); Sands P, Peel J, *Principles of international environmental law* (Fabra Aguilar A and Mackenzie R eds, 4th ed. edn, Cambridge : Cambridge University Press 2018); see also: Gillespie A, *The Long Road to Sustainability: The Past, Present, and Future of International Environmental Law and Policy* (Oxford University Press 2018).

²⁹ Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972).

judicial decisions and soft law commitments.³⁰ Moreover, some procedural obligations have been developed under IEL. These include environmental impact assessment, notice, consultation, access to information, public participation, effective access to judicial and administration redress and remedy, and prior informed consent for some activities. Besides the environmental impact assessment, those procedural obligations are gathered in the "Convention on access to information, public participation in decision-making and access to justice in environmental matters" (the Aarhus Convention), which was ratified by the EU in 2001. This convention represents the cornerstone of stakeholder engagement in environmental issues, granting citizens the right to access environmental information, securing a transparent and reliable regulation, and the right to access justice in environmental matters. Procedural rights are fundamental to foster substantial rights relating to environmental issues, and, as we will consider in the following section, they are at the heart of the shortcomings identified in the European system of environmental protection and climate action.

Although there has been a consistent evolution of IEL, it is sure that more has to be done, since new norms and principles have not yet changed human behaviour significantly and urgent action is required to protect our planet and ecosystem.³¹ Two issues need to be tackled: (i) the lack of overarching instruments enshrining the international environmental principles and the lack of related international judiciary mechanisms; and (ii) the anthropocentric conception of the environment.

(i) International mechanisms of environmental protection

Even if we have developed different principles relating to the protection of the environment, and some even argue that the no-harm principle is an *erga omnes* obligation,³² there is no overarching legal document that enshrines them. In fact, different

³⁰ Sands P, Peel J, *Principles of international environmental law* (Fabra Aguilar A and Mackenzie R eds, 4th ed. edn, Cambridge : Cambridge University Press 2018) 197

³¹ *ibid.* 940

³² Lehmen A, 'International Environmental Court', Max Plank Encyclopedias of International Law (Oxford Public International Law 2018); Robinson N, 'Environmental Law: Is An Obligation Erga Omnes Emerging?', Panel discussion on the historic Advisory Opinion of the Inter-American Court of Human Rights on "human rights and the environment." (the Permanent Mission of Colombia to the United Nations 2018) .

initiatives and legal theories have been conceptualised such as the Global Pact for the Environment (GPE)³³ and the legal theory of the global environmental constitutionalism.³⁴

The other major gap in IEL concerns the lack of accountability mechanisms.³⁵ There are no supranational institutions invested with the authority of holding accountable polluters, whether they are private or public. Three measures to improve accountability in environmental matters are gathering more importance: the creation of a new central authority, the establishment of an international environmental court³⁶ and the recognition of environmental crimes (ecocide) as the fifth crime against humanity.³⁷

(ii) The anthropocentric conception of the environment

It still remains that the socio-ecological crisis of the Anthropocene³⁸ requires ‘sweeping and radical interventions at all regulatory levels.’³⁹

‘While there is little doubt that international environmental law (IEL) will continue to play an important part in humanity’s efforts to navigate the

³³ The initiative was launched in 2017 with the objective of drafting a legally binding international instrument under the United Nations that synthesizes the international general principles of law relating to the environment to solidify the environmental rule of law around the world and to achieve the 2030 Agenda for Sustainable Development.

³⁴ As illustrated by Kotzé ‘The mainstream internationalist approach to global environmental constitutionalism mostly focuses on the constitutionalisation of international environmental law and its institutions, including on aspects related to the existence or emergence of: an international environmental organization, a global environmental constitution, and a hierarchy of environmental norms such as environmental *jus cogens* obligations and rights.’ Kotzé L, 'Global Environmental Constitutionalism In The Anthropocene.' (PhD, University of Tilburg 2019) 261

³⁵ Weiss E, Jacobson H, *Engaging Countries : Strengthening Compliance With International Accords* (MIT Press 2000)

³⁶ Pedersen O, 'An International Environmental Court And International Legalism' (2012) 24 *Journal of Environmental Law*; Lehmen A, 'The Case for the Creation of an International Environment Court: Non-State Actors and International Environmental Dispute Resolution' (2015) 26 *ColoNat Resources Energy & Envtl L Rev* 179.

³⁷ Higgins P, Short D, South N, 'Protecting The Planet: A Proposal For A Law Of Ecocide' (2013) 59 *Crime, Law and Social Change*; Carocchia T, 'Rescuing the International Criminal Court: Crimes against Humanity and Environmental Destruction' (2018) 70 *Rutgers UL Rev* 1167

³⁸ Crutzen P, 'The “Anthropocene”' (2002) 12 *Journal de Physique IV (Proceedings)*; Steffen W and others, 'The Anthropocene: Conceptual And Historical Perspectives' (2011) 369 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*.

³⁹ Kotzé L, 'A Global Environmental Constitution For The Anthropocene?' (2018) 8 *Transnational Environmental Law*, 12

Anthropocene, the more pertinent question that is increasingly being asked is what version of IEL should this be?⁴⁰

In IEL, environmental protection has been generally conceptualised in terms of human rights.⁴¹ The debate on whether the human rights approach to environmental protection is adequate has endured for more than twenty years and growing literature is criticising how environmental protection has been progressively translated into an anthropocentric conceptual and operational legal framework.⁴²

In the light of the previous analyses, Europe, as an international actor and a subject of IEL, could benefit from reshaping its regional institutional architecture to enhance compliance with environmental and climate objectives.

In the absence of any international adjudicative mechanism in environmental matters, which also reflects the lack of a comprehensive legal instrument enshrining the principles on international environmental law, the EU could fill this gap at regional level adopting itself an overarching legal instrument enshrining the rights of nature.⁴³ Moreover, the EU is the only international organisation that has judiciary and legislative powers over its region as delegated by its Member States. As an example, Europe is the most successful actor in protecting human rights and it has a successful system of compliance and accountability on the matters. This system could be replicated for the protection of nature's rights, enhancing environmental protection at regional level.

From an external perspective, an architectural reshaping such as granting rights to nature through a EU Charter could put Europe at the forefront of the fight against climate

⁴⁰ *ibid.* 12

⁴¹ Dupuy P, Viñuales J, *International Environmental Law* (2nd edn, Cambridge University Press 2018) 358; Bodansky D, Brunnée J, Hey E, *The Oxford Handbook Of International Environmental Law* (Oxford University Press 2010) 664; Kingston S, Heyvaert V, Čavoški A, *European Environmental Law* (Cambridge University Press 2017) 152.

⁴² Gillespie A, *International Environmental Law, Policy, And Ethics* (2nd edn, Oxford University Press 2014); Petersmann M, 'Narcissus' Reflection In The Lake: Untold Narratives In Environmental Law Beyond The Anthropocentric Frame' [2018] *Journal of Environmental Law*. For the definition of Anthropocene.

⁴³ While there are very few or none supranational institutions that have the power to carry out judicial review of State actions, Europe can, to some extent, through its regional mechanisms and supranational institutions (e.g. ECJ).

change and equipping the institution with stronger negotiating power at the international table. In this sense, the increasing demand for a new environmental global governance and the actual IEL crisis can constitute a political opportunity for Europe.

Climate Action

The shortcomings of international law when protecting common goods such as the environment become even more evident when related to climate change. The climate crisis we are facing has in fact exacerbated the international debate due to the urgency and (ir)reversibility constraints it poses.

Concerns about climate change have been growing in the last century amongst the scientific community long before it dominated the international agenda. Climate change became matter of international law in 1992, during the Rio conference. As a result, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted and entered into force in 1994. Its overall target is “to achieve [...] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.⁴⁴ The convention also established the Conference of the Parties (COP), a meeting to be held regularly by the Parties and that has contributed significantly to the development of international climate action.⁴⁵ Reversing Climate Change has also entered the international political agenda as the 13th goal of the Agenda 2030. The goal states the need to “Take urgent action to combat climate change and its impacts”.⁴⁶

According to UNEP, it is with the entry into force of the Paris Agreement⁴⁷ under the UNFCCC (COP21) that the international community adopted the first international instrument dealing thoroughly with the coordination problem of international action on GHG emissions.⁴⁸ The main objective of the agreement is the following:

⁴⁴ UNFCCC, see *supra* note 20, Article 2

⁴⁵ Woerdman E, Roggenkamp M, Holwerda M, *Essential EU Climate Law* (Edward Elgar 2015) 16

⁴⁶ Transforming our world: the 2030 Agenda for Sustainable Development, UNGA A/RES/70/1 (25 September 2015)

⁴⁷ Paris Agreement, (Signed 12 December 2015, entered into force 4 November 2016)

⁴⁸ UNEP, 'The Status Of Climate Change Litigation: A Global Review' (Law Division UN Environment Programme 2017), 27

‘(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;’⁴⁹

On the implementation, the Agreement leaves many details for future negotiation-round and the critical gap remains whether the NDCs will be sufficient to meet the treaty objective of limiting global warming to 2°C.⁵⁰ Additionally, the Paris agreement establishes no specific targets for emissions reduction (unlike the Kyoto protocol): the key obligations is to ‘prepare, communicate and maintain’⁵¹ successive NDCs. According to their own objectives, the Parties then identify which of concrete measures to adopt, like criminalising any act that causes significant harm or risk to the environment, restricting coastal development, foregoing development of coal-fuelled power plants and imposing fees and taxes on activities reliant on fossil fuels.⁵² Hence, implementing the Paris Agreement requires a stable, long-term and overarching approach to climate governance, rooted in law. Within the set of possible legislative interventions, ‘overarching’ framework laws play a foundational and distinctive role in supporting effective climate governance.⁵³

At national level, a study⁵⁴ from the Grantham Research Institute on climate change and the environment shows that all 197 Paris Agreement parties have now at least one law or policy on climate change. The study reported, at the time of its publication (2017), that there were 1500 climate laws and policies around the world compared to the 72 in 1997, but that there has been a recent substantial drop in the proliferation of climate related laws (from 64 in 2016 to 37 in 2017). The Paris Agreement requires countries to implement their NDCs, and to higher their ambitions over time. This is fundamental to keep the global

⁴⁹ Paris Agreement, see *supra* n 47, Art. 2 (a)

⁵⁰ Rogelj J and others, 'Paris Agreement Climate Proposals Need A Boost To Keep Warming Well Below 2 °C' (2016) 534 Nature; 'Summary For Policymakers. In: Global Warming Of 1.5°C' (IPCC 2018)

⁵¹ Paris Agreement, see *supra* n 47, art 4

⁵² UNEP, see *supra* n 48, 8

⁵³ Averchenkova A et al., *Trends In Climate Change Legislation* (Edward Elgar Publishing 2017); Grantham Research Institute on Climate Change and the Environment, 'Global Trends In Climate Change Legislation and Litigation' (2017).

⁵⁴ Grantham Research Institute, see *supra* n 53, art 4.

temperature well below 2°C,⁵⁵ nevertheless, the study pointed out that, in order to keep up with increased ambitions, countries have either to introduce new laws and policies, or to revisit, revise and strengthen their existing laws and policies. Therefore, a sustained low level of legislative developments could be a sign for concern.⁵⁶

Besides the considerations on the proliferation of climate related laws, it is difficult to evaluate the overall evolution of the Paris Agreement, since it strongly depends on national implementation. Each state has to be evaluated on the basis of its commitments in the first place (if the NDCs are sufficiently high to achieve the objectives set by the agreement) and on the verification of its compliance with them. Moreover, there are no standards imposed neither for the NDC nor for the monitoring process and the last IPCC concluded that the NDCs submitted under the Paris Agreement are not sufficient to limit global warming to 2°C.⁵⁷

Against those poor results, at the moment, there is no specific legal mechanism to seek justice in climate related matters and to oblige governments to comply effectively with their national objectives and with the ones set by the Paris Agreement. NGOs and citizens have tried to seek justice in a varied number of ways, recurring to different courts and basing their claims on different sources of law. As it will be discussed below, the unsatisfactory results of some strategic litigation unveil mechanism failures and legislative gaps in addressing compliance and accountability in climate change matters. Moreover, the anthropocentric approach adopted by the Agreement, due to strong lobbying from some countries during the negotiations,⁵⁸ has recurrently obstructed access to justice and judicial review in matters related to climate law/governance. Specifically, it renders standing in environmental matters harder,⁵⁹ even more significantly in the context of the European Court of Justice (ECJ). Hence, access to justice or, in the ECJ case, access to judicial review should be granted, overall within the EU, since it has adopted and integrated the

⁵⁵ Rogelj J and others, 'Paris Agreement Climate Proposals Need A Boost To Keep Warming Well Below 2 °C' (2016) 534 Nature; 'Summary For Policymakers. In: Global Warming Of 1.5°C' (IPCC 2018).

⁵⁶ Grantham Research Institute on Climate Change and the Environment, 'Global Trends In Climate Change Legislation and Litigation' (2017).

⁵⁷ IPCC, 'Summary For Policymakers. In: Global Warming Of 1.5°C' (IPCC 2018)

⁵⁸ Sands P, Peel J, *Principles of international environmental law* (Fabra Aguilar A and Mackenzie R eds, 4th ed. edn, Cambridge : Cambridge University Press 2018)

⁵⁹ For more information on the trends in climate litigations, please see annex II.

Aarhus Convention.⁶⁰ This shortcoming can be seen in climate litigations brought to the ECJ, as it will be analysed below.

In this context, Europe should provide climate specific mechanisms to resort to and legislative sources to rely on. Those could be encompassed in a broader environmental protection frame such as a EU Charter of the rights of nature.

Climate litigations

Although the binding nature of the Paris Agreement can be arguable,⁶¹ it has provided a legal predicate for pushing governments that have adopted climate-oriented laws to implement them. In fact, plaintiffs have begun to make use of these codifications in arguments against the inadequacy of efforts by national governments against climate change and its impacts.

Most of the strategic litigations are designed to press national governments to be more ambitious on GHG emission reduction targets or to enforce existing legislation: they consist of lawsuits against governments and public bodies seeking increased mitigation ambition, enforcement of existing mitigation and adaptation goals, or consideration of climate change as part of environmental review and permitting.⁶²

In May 2019, the Grantham Research Institute on Climate Change and the Environment counted 1,328 court cases across 28 non-USA jurisdictions and 1,023 court cases just in the USA.⁶³ Climate litigations have emerged as the new tool for citizens and NGOs to close the accountability gap in the tragedy of the commons. Those litigations have posed a series of legal questions that are unprecedented. Not only they uncover the loops in the European and national judicial systems (listed in Annex II), but they also represent the urgent need for better accountability, compliance, enforcement and access to justice in environmental matters.

⁶⁰ See supra p. 9

⁶¹ Bodansky D, 'The Legal Character Of The Paris Agreement' (2016) 25 Review of European, Comparative & International Environmental Law.

⁶² Grantham Research Institute on Climate Change and the Environment, 'Global Trends In Climate Change Litigation: 2019 Snapshot' (2019).

⁶³ *ibid.* 3; see also www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/; <http://climatecasechart.com/us-climate-change-litigation/> and the Sabin Centre [World Database on Climate Change Litigation](https://www.sabin.com/resources/publications/world-database-on-climate-change-litigation/).

The cases gathered in Annex I present citizens or NGOs as plaintiffs, different EU governments (and Switzerland) as defendants and the claims are concerning the lack of compliance with greenhouse gas emission reduction targets. The claims vary in terms of the applicable law and in the court they resort to, and most of them are still pending. Therefore it is too early to make some sounded considerations on the impact of those strategic litigations on the environmental governance at EU and MS level, as noted in the Grantham report, ‘as yet there is insufficient evidence of the impacts of climate change litigation. Greater assessment is needed of impacts beyond the courtroom.’⁶⁴ Nonetheless, those cases are highly indicative of some procedural and substantive shortcomings of the actual system in terms of access to justice and to judicial review, which are at the hearth of this research, since it is those very shortcomings that the proposal of a EU Charter of the Rights of Nature wants to address.

To the aim of this research, one highly representative case (out of the list in Annex I) deserves further analysis: *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*, (the People’s Climate Case).⁶⁵

*The People's Climate Case*⁶⁶

In May 2018, 10 families from Portugal, Germany, France, Italy, Romania, Kenya, Fiji, and the Saami Youth Association Sáminuorra filed a lawsuit against the European Parliament and the Council of the EU to the European Court of Justice. The lawsuit challenges the emissions targets set out in the 2030 climate and energy framework, which aims at a 40% overall reduction compared to 1990 levels. Claimants argue that the targets are not sufficient to tackle climate change. Thus they are asking the European General Court to rule on the protection of their fundamental rights (enshrined in the CFR) such as the right to life, health, occupation and property as the impact of climate change will affect their lives significantly.

⁶⁴ See *supra* n. 57, 1

⁶⁵ Case T-330/18 Carvalho and Others v Parliament and Council [2018] OJ C 285, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1572541047116&uri=CELEX:62018TN0330>

⁶⁶ All the information about the case are gathered from: [The People's Climate Case website](#); Berthier A, 'The General Court Of The EU Rejects The People Climate Case As Inadmissible' *Clientearth* (2019) <https://www.clientearth.org/the-general-court-rejects-the-people-climate-case-as-inadmissible/>.

On 8 May 2019, the General Court rejected the case as inadmissible holding that the applicants were not individually concerned for the purpose of Article 263(4) TFEU, which sets standing requirements before the Court of Justice of the EU (CJEU). The court justified its decision reasserting that for an applicant to be individually concerned, the contested provision should have ‘infringed their fundamental rights and distinguished them individually’⁶⁷ from others who are affected by climate change. The infringement of their fundamental rights is not sufficient in itself to establish that their action is admissible.⁶⁸ That made the case inadmissible.

Hence we are in presence of a shortcut of the EU judicial system in granting access to judicial review to its citizens. This shortcut will be the focus of the following section.

⁶⁷ Case T-330/18 see *supra* 65, 13

⁶⁸ *ibid.* 54

II. The EU Environmental Protection

As laid down in art. 4.2.(e) of the Treaty of the Functioning of the European Union (TFEU)⁶⁹, the EU has shared competence with the Member States (MSs) for what concern the protection of the environment. This means that both the States and the European Union can draft legislations and establish policies to protect the environment.

The specific competences of the European Union in environmental matters, on which its environmental policies are based, are laid down in articles 191, 192 and 193 of the TFEU.

“1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”⁷⁰

To achieve these goals, since the EU and MSs have shared competences, the EU has to act according to the principle of subsidiarity, laid down in the Treaty on European Union (TEU) (art.5)⁷¹ and in the Protocol II of the TFEU, which defines the circumstances in which it is preferable for action to be taken by the Union, rather than the Member States. In this context, the “scope and volume of the EU environmental policy has grown vastly”: it is estimated that 80 % of all national environmental law is now derived from EU law,⁷² which comprises more than 500 environmental Directives, Regulations and

⁶⁹ Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ L 326/1

⁷⁰ *ibid.*, art 191.

⁷¹ Consolidated Version of the Treaty on European Union [2012] OJ C 326/41

⁷² Kingston S, Heyvaert V, Čavoški A, *European Environmental Law* (Cambridge University Press 2017) 11.

Decisions⁷³, including strategic documents in the areas of climate change.⁷⁴ The EU environmental strategic policy is illustrated in the 7th Environment Action Programme.⁷⁵ The programme, entitled *Living well, within the limits of our planet* runs until 2020 and focuses on three priority areas for action: a) to protect, conserve and enhance the Union's natural capital, b) to turn the Union into a resource-efficient, green, and competitive low-carbon economy, and c) to safeguard the Union's citizens from environment-related pressures and risks to health and wellbeing.

This notwithstanding, a growing number of authors 'posits that the existing models of protecting nature are failing'⁷⁶ and contests the fact that the EU system of environmental protection is still based on the system of economic growth.⁷⁷ The EU Commission found that there is also widespread lack of implementation of EU environmental law, which effectiveness depends on its implementation at Member State, regional and local levels. The commission recorded complaints concerning non-compliance with EU environmental law and a high number of infringement cases.⁷⁸ Two issues that obstruct the achievement of these goals could be solved with the adoption of a EU Charter of the Rights of Nature: (i) the problem of standing in environmental matters and (ii) the lack of access to justice and judicial review at EU level. If the first issue constitute a dilemma of substantial law, the second represents an obstacle in the procedural rights granted to the public.

(i) Legal standing in environmental matters

The environment (or nature as a whole) does not have substantive rights: its protection depends on procedural mechanisms (such as the EIA) and regulatory techniques (such as directives and regulations in some specific areas and the market-based and network-based

⁷³ 'Nature's Rights: The Missing Piece Of The Puzzle European Parliament', Report of the conference *Nature's Rights: The Missing Piece of the Puzzle European Parliament* (European Parliament, 2017).

⁷⁴ For more information, please see the section of the Commission Website: [EU law on climate change and protection of the ozone layer](#)

⁷⁵ European Commission, 'Living Well, Within The Limits Of Our Planet' (European Commission 2014)

⁷⁶ Schoukens H, 'Granting Legal Personhood To Nature In The European Union: Contemplating A Legal (R)Evolution To Avoid An Ecological Collapse? (Part 1)' (2018) 15 *Journal for European Environmental & Planning Law*, 310.

⁷⁷ *Ibid.* 320

⁷⁸ European Commission, 'Study: The Costs Of Not Implementing EU Environmental Law' (European Union 2019); Schoukens H, 'Balancing On Or Over The Edge Of Non-Compliance' [2016] *European Energy and Environmental Law Review*.

mechanisms).⁷⁹ Another means of achieving environmental protection is the adoption of a the human-rights based approach. Nonetheless, this approach, which has been leading in Europe, poses some problems of implementation, as the *People's Climate Case* already partially illustrates.⁸⁰ Since a complete analysis of the European human rights approach to environmental law is out of the scope of this article, only the most relevant sources of environmental rights will be revised: European Convention on Human Rights,⁸¹ European Court of Human Rights⁸² and Charter of the Fundamental Rights of European Union.⁸³

The European Convention on the Protection of Human Rights and Fundamental freedoms (ECHR) does not contain any express provision concerning the environment. Although the European Court of Human Rights (ECtHR) has consistently refused to recognise any rights to a healthy and decent environment, case law analysis show consistent jurisprudence related to environmental rights concerning different articles.⁸⁴ Even if efforts have been made in recent years to insert a right to a decent environment, its absence still raises concern when considering access to justice.⁸⁵ Effectively, this hinders standing requirements and does not provide for a source of law on which a claim can be based.

Article 37 of the Charter of Fundamental Rights of the European Union (CFR) states: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' The CFR has a constitutional value at EU level and is therefore at the highest hierarchical level of EU law. This means that any rule emanated by the EU must comply with the Charter, otherwise, parties can resort to the ECJ.⁸⁶ Besides the discussion on whether the ECJ is

⁷⁹ Kingston S, Heyvaert V, Čavoški A, *European Environmental Law* (Cambridge University Press 2017) 120.

⁸⁰ See also Annex II - *admissibility*.

⁸¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

⁸² As established by the ECHR (ibid.) in the *SECTION II - EUROPEAN COURT OF HUMAN RIGHTS*

⁸³ Charter of Fundamental Rights of the European Union [2000] OJ 1 361/01 (CFR)

⁸⁴ Kingston S, Heyvaert V, Čavoški A, *European Environmental Law* (Cambridge University Press 2017) 153

⁸⁵ *ibid.* 153

⁸⁶ Craig P, de Búrca G, *EU Law* (6th edn, Oxford University Press 2017) 382.

the adequate arena to settle environmental disputes, Art. 37 does not constitute a right. In fact, as the explanations specify, it should be considered as a principle rather than a right.⁸⁷ Its very nature, hence, does not grant access to judicial review under the ECJ. Lastly, as the *People's Climate Case* exemplifies, it does not cover any consideration for wider concerns such as climate change. Because of this lack of an overarching legal framework on environmental matters that obstructs legal standing in EU law, this article proposes to grant legal personhood to nature. The reasons supporting the recognition of legal personhood to nature will be explored more in detail in the last section.

(ii) The lack of access to justice and judicial review at EU level

Access to judicial review is the possibility for citizens and NGOs to challenge their government's decisions in front of the ECJ, if they reckon that public authorities did not respect their rights and fulfil the requirements created by environmental laws, to protect health and nature.⁸⁸ At national level, a MS "shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."⁸⁹ Both judicial review at EU level and access to justice at national level are fundamental to grant justice in environmental matters and cases like the *People's Climate Case* raise concern over the compliance with them.

Access to justice

Unfortunately, the lack of access to justice, which infringes the above-cited article 9(3) of the Aarhus convention, impeding NGOs and individuals to challenge decisions that

⁸⁷ Kingston S, Heyvaert V, Čavoški A, *European Environmental Law* (Cambridge University Press 2017) 167

⁸⁸ Jayatilaka T, 'Rights Of Nature: The Right Approach To Environmental Standing In The EU?' (Ghent University 2017); Shelton D, 'Nature As A Legal Person' [2015] Vertigo.

⁸⁹ Convention on Access to Information, Public Participation in decision-Making and Access to Justice in Environmental Matters (adopted on 25 June 1998, it entered into force on 30 October 2001) (Aarhus Convention) Article 9 (3)

harm the environment in court, is widespread across Europe.⁹⁰ The Aarhus Convention Compliance Committee (ACCC) pointed out repeatedly⁹¹ even in its last report in 2017,⁹² that there was a diffuse lack of access to justice in the EU Member States, which is directly reflected in the lack of accountability and enforcement in environmental matters.

The European Environmental Bureau report identifies five current barriers to access to justice⁹³: a) standing: the entitlement and ability of a party to demonstrate to a court sufficient connection to action challenged to support that party's participation in the case; b) time: environmental damages need fast and effective remediation; c) knowledge: the recurrent lack of capacity of the judges to handle environmental matters; d) money: ⁹⁴ lawsuits are often costly and unaffordable; and e) repercussions: companies and investors can use intimidation and retaliation tactics against NGOs and citizens.

Access to judicial review

This brings us to the last part of this section: judicial review under the EU law at the ECJ. While at national level, the standing requirements for judicial review can differ widely according to the legislation, court and type of issue, at the Union level, according to art. 263 of the TFEU, any natural or legal person may recur to the Court of Justice of the European Union (ECJ) for judicial review for matters regulated by the EU law. This should technically allow citizens to challenge their government decision and to seek better compliance with EU laws.⁹⁵ Nevertheless, even if this could grant access to judicial review, because of the very restricted interpretation of the standing criteria by the ECJ, citizens and NGOs still face serious obstacle in holding their governments accountable for

⁹⁰ European Environmental Bureau, 'Challenge Accepted? How To Improve Access To Justice For EU Environmental Laws' (European Environmental Bureau 2018). It must be noted that this is applicable also to companies and private entities challenging governments decision. In fact, many of the climate cases reported in the Sabin Center database have for applicants businesses and economical actors who deems unlawful some measures (or lack of) imposed on them.

⁹¹ For more information see:
<https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html>

⁹² Findings and recommendations of the compliance committee with regard to communication concerning compliance by the European Union ACCC/C/2008/32 (EU), Part II

⁹³ This report analyses any type of access to justice, including litigations brought to national courts under private law (which include non-state actors, such as corporations ecc.)

⁹⁴ Ibid. 3

⁹⁵ Krämer L, 'The EU Courts And Access To Environmental Justice', *Environmental Law Dimensions of Human Rights* (Ben Boer ed., Oxford Scholarship Online 2015); see also Annex II.

not protecting the environment.⁹⁶ In fact, article 263 of the TFEU requires that the natural or legal person wanting to start a proceeding is directly and individually concerned with the misconduct. A strict interpretation of this provision, which has been the view of the Court until now, as in the *People's Climate Case*, makes the standing criteria almost impossible to fulfil: it might be difficult for a person or an NGO to establish an adequate causal connection between the defendant's allegedly unlawful actions or inactions and an injury linked to climate change.⁹⁷ Moreover, if art. 37 of the CFR is not a right, there is no legal source for judicial review at EU level.

Because of this constant lack of admissibility established by the ECJ, the NGO ClientEarth, in 2008, filed a complaint to the Aarhus Convention Compliance Committee (ACCC). With the resultant *Findings II ACCC/C/2008/32*⁹⁸, the ACCC found that both the EU and the MSs were not compliant with Art.9 (3) and that neither EU Regulation on the integration of the Aarhus Convention at EU level,⁹⁹ nor the Court of Justice case law fully comply with the provisions of the Aarhus Convention.¹⁰⁰ The EU Commission is still revising how to ensure the EU fully complies with the provisions of the Aarhus Convention.

Thus, in order to strengthen the EU's environmental governance, a structural rearrangement is needed to ensure compliance with the EU environmental law and with the climate change objectives. This can be achieved through the development of a framework based on the rights of nature, supported by the administrative capacity needed for its implementation and application. In other words, it would solve the two identified issues

⁹⁶ Shelton D, 'Nature As A Legal Person' [2015] VertigO; Jayatilaka T, 'Rights Of Nature: The Right Approach To Environmental Standing In The EU?' (Ghent University 2017).

⁹⁷ Krämer L, 'The EU Courts And Access To Environmental Justice', *Environmental Law Dimensions of Human Rights* (Ben Boer ed., Oxford Scholarship Online 2015) 133; Berthier A, 'The General Court Of The EU Rejects The People Climate Case As Inadmissible' *Clientearth* (2019) <https://www.clientearth.org/the-general-court-rejects-the-people-climate-case-as-inadmissible/>.

⁹⁸ Findings And Recommendations Of The Compliance Committee With Regard To Communication ACCC/C/2008/32 (Part II) Concerning Compliance By The European Union (Adopted by the Compliance Committee on 17 March 2017)

⁹⁹ Regulation on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ 2 264/14

¹⁰⁰ Agence Europe, 'Aarhus Convention – Council Calls On Commission To Provide Options To Address Lack Of Public Access To Justice' (Agence Europe 2018).

linked procedural rights and substantial rights, which are equally important and interdependent to secure environmental protection.¹⁰¹

In light of all the exposed so far, it becomes clear that accessing judicial review for actions related to climate change is crucial for the correct implementation of the Paris Agreement goals.¹⁰² In other words, the possibility of challenging governments' action or inactions towards climate change can foster compliance and the gradual adoption of more ambitious targets. Nevertheless, as previously illustrated, this is a complicated mechanism since there are no international courts/tribunals/mechanisms where citizens can appeal to and very few jurisdictions impose constitutional duties to protect the common good such as the Dutch one.¹⁰³ Furthermore, because of the principle of sovereignty, very few supranational institutions have the power to review states' actions. Nevertheless, amongst them figures the ECJ.

In this context, granting rights to nature would put the EU in a forefront position in the fight against climate change and could remove the obstacles identified previously to access justice and judicial review in environmental matters.

¹⁰¹ Brunnée J, 'International Environmental Law And Community Interests' [2018] Oxford Scholarship Online; Peters B, 'Unpacking The Diversity Of Procedural Environmental Rights: The European Convention On Human Rights And The Aarhus Convention' (2017) 30 *Journal of Environmental Law*.

¹⁰² See supra *Climate Action*

¹⁰³ See in the Annex II the case *Urgenda v. The Netherlands*.

III. Towards a Charter of the fundamental rights of nature

In the light of the previous analysis, this section illustrates the reasons supporting the adoption of a EU Charter granting personhood to nature. The first part is dedicated to the political value of such action in the global fight against climate justice, and how it would affect internal and external mechanisms. The second part will then focus on the justification supporting the need and the possibility to grant rights to nature.

The EU role in the global fight against climate change

Europe has a long history of aiming at leading or effectively leading the global fight against climate change. It has been expressed both through (a) actions: EU countries and the EU as a single actor have increasingly promoted more ambitious objectives at the international negotiations tables; and (b) through explicit commitment: the commission sets the action of leading the fight against climate change as a goal of the 2009 proposal on the matter.¹⁰⁴ Hence, the EU has been motivated by ‘twin aspirations: to make a real difference when it comes to addressing the climate change challenge, but also to utilize this issue as a platform for establishing itself as a leading actor on the global political scene.’¹⁰⁵ In fact, more specifically, EU has demonstrated a fluctuating, but generally strong international leadership in the past through partial and total successes. the partial success in the UNFCCC negotiations (Europe pushed for the adoption of legally binding commitment, but it only included aspirational goals); the initial partial success in the negotiations of the Kyoto protocol that mutated in a great leadership given by the vacuum left by the USA withdrawal; the credibility gained at the 2009 Copenhagen COP and finally, the partial success in the negotiations at the COP 21 in Paris (the EU wished for

¹⁰⁴ European Commission, 'EU Action Against Climate Change: Leading Global Action To 2020 And Beyond' (European Communities 2008).

¹⁰⁵ Parker C F, Karlsson C, 'The European Union As A Global Climate Leader: Confronting Aspiration With Evidence' (2016) 17 *International Environmental Agreements: Politics, Law and Economics* 445.

legally binding targets).¹⁰⁶ EU has recently reconfirmed its intention to lead the global fight against climate change. The 2019-2024 strategy issued by the Commission clearly states that the EU ‘can and must lead the way [...] to achieve climate neutrality’.¹⁰⁷ But how is Europe going to lead this fight?

With the current international scenario, the increasing pressure of climate change, the social unrest and the general uncertainty over the implementation of the Paris agreement’s goals, the demand for climate leadership has never been higher.¹⁰⁸ The literature has identified different types of leadership over the years, but four main ones have emerged:¹⁰⁹ (a) the structural leadership, the position an actor occupies in the international system related to its power (e.g. monetary or military) that provides the actor with leverage over other players; (b) the entrepreneurial leadership, which depends on a party’s diplomatic, negotiating and bargaining skills in facilitating compromised solutions and agreements;¹¹⁰ (c) the cognitive leadership: the ability define or redefine interests through ideas and embody them in concepts and solutions, such as the sustainable development paradigm; and (d) the exemplary leadership, in other words, leading by example.¹¹¹ According to the

¹⁰⁶ For a more detailed history of the EU climate leadership, please see: Afionis S, Fenton A, Paavola J, 'EU Climate Leadership Under Test' (2012) 2 *Nature Climate Change*; Parker C F, Karlsson C, 'The European Union As A Global Climate Leader: Confronting Aspiration With Evidence' (2016) 17 *International Environmental Agreements: Politics, Law and Economics* 445; Parker C, Karlsson C, Hjerpe M, 'Assessing The European Union’S Global Climate Change Leadership: From Copenhagen To The Paris Agreement' (2017) 39 *Journal of European Integration*; Walker H, Biedenkopf K, 'The Historical Evolution Of EU Climate Leadership And Four Scenarios For Its Future' (2018) *EU Climate Diplomacy*.

¹⁰⁷ Council, 'A New Strategic Agenda 2019-2024' (European Council 2019), accessible at: <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024-en.pdf>

¹⁰⁸ Walker H, Biedenkopf K, 'The Historical Evolution Of EU Climate Leadership And Four Scenarios For Its Future' (2018) *EU Climate Diplomacy*; Parker C F, Karlsson C, 'The European Union As A Global Climate Leader: Confronting Aspiration With Evidence' (2016)

¹⁰⁹ Liefferink D, Wurzel R, 'Environmental Leaders And Pioneers: Agents Of Change?' (2016) 24 *Journal of European Public Policy*, 956; Similar categories have been identified also recently in: Parker C, Karlsson C, 'The European Union As A Global Climate Leader: Confronting Aspiration With Evidence' (2016) 17 *International Environmental Agreements: Politics, Law and Economics*, 449

¹¹⁰ ‘we do not count as entrepreneurial leadership actions which water down or prevent environmental agreements’, Liefferink D, Wurzel R, 'Environmental Leaders And Pioneers: Agents Of Change?' (2016) 24 *Journal of European Public Policy*, 956

¹¹¹ *Ibid.* 956; Walker H, Biedenkopf K, 'The Historical Evolution Of EU Climate Leadership And Four Scenarios For Its Future' (27) 34

literature, an effective global leadership can be achieved only through the *mise-en-place* a mix of the above ones, as they are interdependent. This is even more evident when related to climate change mitigation. More specifically, Walker and Biedenkopf, who set out four scenarios for EU's future leadership in climate action, concluded that the EU, in order to ensure credibility and legitimacy will need to (amongst other actions) overcome the political internal turbulence, 'deliver on its pledge', continue to reduce GHG emissions and that 'further mitigation measures will require greater effort and structural changes'.¹¹²

To overcome the internal political turbulence

The recent political turmoil is composed by a set of different events. Brexit and sparse populism rise have been very disruptive, social unrest in different areas (e.g. Catalonia's recent violent clashes over independency) and climate activism contributed to aliment the turmoil in the region and the general lack of trust in the institutions. This can affect Europe's credibility as a unified actor. In the past, climate change has been targeted as an ideal issue to build a common EU identity and a united foreign policy profile.¹¹³ Now more than ever, there is growing general concern about climate change that the population manifested not only through the proliferation of climate activism in the continent, but also at the EU elections in May 2019.¹¹⁴

Against this background, Europe could actually turn this challenge into an opportunity by re-uniting European citizens and governments in the fight against climate change. This could allow the EU to present itself as a strong united front in the fight against climate change.¹¹⁵ Adopting a Charter granting rights to nature would serve this very purpose. On one hand its adoption would respond coherently to the political demands of the citizens, which could possibly lead to a renewed trust in the institution (crucial for the European democratic pact). On the other hand, climate action could bind all EU Member states and enable them to develop a common vision for the future of Europe.¹¹⁶ It is very important to note that adopting Nature's Charter, which would harmonise the EU environmental legal

¹¹² Walker H, Biedenkopf K, 'The Historical Evolution Of EU Climate Leadership And Four Scenarios For Its Future' (2018) EU Climate Diplomacy, 43.

¹¹³ Parker C F, Karlsson C, 'The European Union As A Global Climate Leader: Confronting Aspiration With Evidence' (2016) 448

¹¹⁴ Henley J, 'European Elections: Triumphant Greens Demand More Radical Climate Action' The Guardian (2019)

¹¹⁵ See *supra* note 31 and 32.

¹¹⁶ See *supra* note 31.

framework, would legitimise the EU institutions as a unified actor to negotiate at the international negotiations. This could hence improve EU's entrepreneurial leadership.

To deliver on its pledge and to continue to reduce GHG emissions

For the scope of the article only two pledges will be taken into consideration: (a) the implementation of the goals under the Paris Agreement and (b) the claims made by the new EU Commission and Council.

Following limited participation in the Kyoto Protocol and the lack of agreement in Copenhagen in 2009, the EU helped build a broad coalition of developed and developing countries in favour of high ambition that shaped the outcome of the Paris conference. Further, the EU was the first major economy to submit its intended contribution to the new agreement in March 2015. The EU's nationally determined contribution (NDC) under the Paris Agreement is to reduce greenhouse gas emissions by at least 40% by 2030 compared to 1990, under its wider 2030 climate and energy framework. All key legislation for implementing this target has been adopted by the end of 2018.¹¹⁷

Giving a comprehensive judgement on whether EU as a bloc is complying with its commitments under the Paris agreement is very hard.¹¹⁸ First, the commitments declined in different sections of policy implementations (the EU has set overarching targets of GHG emission reduction through a combination of energy efficiency and the use of renewable energy) with different levels of implementation (regional, national and local governments), which renders difficult a general analysis. Moreover, NDCs are difficult to compare since there is limited guidance on their formulation.¹¹⁹ Second, all the Parties to the Paris Agreement were supposed to tightened their commitment over time, and it has not been the case for all of them.¹²⁰ This improves the difficulty of considering the general evolution of EU as a bloc. Third, there is scientific evidence that the NDCs are insufficient to

¹¹⁷ 'Paris Agreement - Climate Action - European Commission' (*Climate Action - European Commission*, 2019)

¹¹⁸ Pauw W and others, 'Beyond Headline Mitigation Numbers: We Need More Transparent And Comparable Ndc's To Achieve The Paris Agreement On Climate Change' (2017) 147 *Climatic Change*

¹¹⁹ UN climate negotiations have so far provided limited guidance on NDC formulation, which has resulted in varying scopes and contents of NDCs, often lacking details concerning ambitions.

¹²⁰ See discussion *supra* section *Climate Action*

effectively achieve the objective of maintaining global warming under 2°C.¹²¹ Fourth and most importantly, there are some countries that are in the course of falling to achieve their targets.¹²²

Hence, considering the uncertain outcome of the Paris Agreement, commitments and NDC have to be tightened, as the former EU Commissioner for Climate Action and Energy, Miguel Arias Cañete, confirmed in June 2018.¹²³ Concerns about climate change and the need to adequately fight it has been expressed also by the new commission and council.

The new president of the European Commission, Ursula von der Leyen, has set as the first goal of her Agenda for Europe to make Europe the ‘first climate-neutral continent’.¹²⁴ Accordingly, she committed to deliver within the first 100 days in office a European Green Deal. The deal comprises a series of interventions that include the general goal of preserving Europe’s natural environment, setting more ambitious targets for 2030 and creating a just transition fund. The council, on the other hand, in the *New Strategic Agenda 2019-2024*¹²⁵ issued in June 2019, defines climate change as an ‘existential threat’¹²⁶ that we urgently need to manage stepping up our actions. The strategy also reaffirms that the EU must engage ‘in an in-depth transformation of its own economy and society to achieve climate neutrality.’¹²⁷ Nevertheless, the strategy has been harshly criticised for avoiding important details such as targets and numbers and for not proposing any concrete solutions involving effective commitment.¹²⁸

¹²¹ Rogelj J and others, 'Paris Agreement Climate Proposals Need A Boost To Keep Warming Well Below 2 °C' (2016) 534 *Nature*; 'Summary For Policymakers. In: Global Warming Of 1.5°C' (IPCC 2018).

¹²² Climate Action Network Europe, 'Off Target: Ranking Of EU Countries' Ambition And Progress In Fighting Climate Change' (Climate Action Network Europe 2018); browse also: EU | Climate Action Tracker' (Climateactiontracker.org, 2019).

¹²³ See Miguel Arias Cañete speech at: http://europa.eu/rapid/press-release_SPEECH-18-4236_en.htm http://europa.eu/rapid/press-release_SPEECH-18-4236_en.htm

¹²⁴ von der Leyen U, 'A Union That Strives For More. My Agenda For Europe' (European Commission 2019).

¹²⁵ Council, 'A New Strategic Agenda 2019-2024' (European Council 2019), accessible at: <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024-en.pdf>

¹²⁶ *Ibid.* 5

¹²⁷ *Ibid.* 5

¹²⁸ Rankin J, 'EU Climate Goals 'Just A Collection Of Buzzwords', Say Critics' *The Guardian* (2019).

Missing the Paris targets will most probably damage substantially Europe's image to the outside world. Moreover, even if the targets are met, further mitigation measures (that will require greater effort and structural changes should be implemented as 'the low-hanging fruits of emissions reductions have already been harvested.'¹²⁹

Adopting a Charter granting rights to nature, the European Union will gain in leadership position in both cognitive and exemplary leadership. The idea of granting rights to nature is not new, but it can be renewed within the European Union Institution. Hence, even if it would not be the first institution implementing it, it would be the first time that nature is granted rights at supranational level. This could put Europe in the position of forefront in the fight against climate change.

The Charter would definitely also grant access to justice and judicial review in environmental matters, and therefore foster a correct implementation and compliance with the Paris Agreement and other sources of binding commitment relate to the environment and climate change. Technically, the Charter would constitute a legal source under the ECJ jurisdiction and provide rights and obligations. This would clear once and for all the problem of standing at EU level. Hence the adoption of the charter would not only allow Europe to lead by example, but would also constitute the much needed greater efforts and structural changes that both politicians and citizens have been advocating for.

Adopting the Nature's Charter would give Europe several political gains, both internally and externally. It could back up political statement with effective actions and rendering Europe a strong entity in the global climate action, where it could lead by example: Europe has to boost its climate objectives if it wants to gain credibility at international level.¹³⁰ Besides the concurrency for climate leadership related to the Paris Agreement,¹³¹ it is important to note that different initiatives are being pursued by other regional entities, such as the Escazú Agreement¹³², and some countries have already

¹²⁹ Walker H, Biedenkopf K, 'The Historical Evolution of EU Climate Leadership and Four Scenarios for Its Future' (2018) EU Climate Diplomacy, 43.

¹³⁰ Schreurs M, 'The Paris Climate Agreement And The Three Largest Emitters: China, The United States, And The European Union' (2016) 4 Politics and Governance

¹³¹ Paris Agreement, (Signed 12 December 2015, entered into force 4 November 2016).

¹³² Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean

granted legal personhood to nature.¹³³ Lastly, Europe (or some countries in EU) has been very supportive of new international law initiatives, specially the Global Pact for the Environment¹³⁴. If the EU is recognising the need at international level to adopt a global covenant enshrining the general principles of international law protecting the environment, there should be space for a similar reasoning at regional level with a stronger and more radical tone.

The Rights of Nature (RoN)

Since the expansion of human rights provisions to some measures of environmental protection, those two fields of law have mutually influenced each other. Technically, it means that human rights (provided in treaties but also in domestic constitutions) and their institutional apparatus are bearing on questions of environmental regulation.¹³⁵

This ‘superposition of fields’ has sparked harsh debates in the academic field.¹³⁶ Dinah Shelton, in 1991, summarised it as follow:

‘A third view, which seems to best reflect current law and policy, sees human rights and environmental protection as each representing different, but overlapping, societal values. The two fields share a core of common interests and objectives, although obviously not all human rights violations are necessarily linked to environmental degradation. Likewise, environmental issues cannot always be addressed effectively within the human rights framework, and any attempt to force all such issues into a human rights rubric may fundamentally distort the concept of human rights. This approach recognizes the potential conflicts between environmental protection and other human rights, but also the contribution each field can make to achieve their common objectives.’¹³⁷

¹³³ For a recollection of the other countries granting rights to nature see: Jayatilaka T, 'Rights Of Nature: The Right Approach To Environmental Standing In The EU?' (Ghent University 2017) 5-14; 'The Rights Of Nature' <<https://therightsofnature.org/>>.

¹³⁴ See *supra* in the section: International Law

¹³⁵ Dupuy P, Viñuales J, International Environmental Law (2nd edn, Cambridge University Press 2018) 357

¹³⁶ Kingston S, Heyvaert V, Čavoški A, European Environmental Law (Cambridge University Press 2017) 150

¹³⁷ Shelton D, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stan J Int'l L 105

Given the current ecological crisis and the need for a complete restructure of environmental governance, some proponents assert that it is not possible to address this crisis within the existing economic, political and legal systems and see 'RoN as possible catalyst for a necessary change of the existing societal views, even if it will not immediately stop all damaging human activities.'¹³⁸

Although rights of nature have been developed around the world in the past decades,¹³⁹ they have passed quite unnoticed in Europe, with the exception of a proposal for a EU directive on the Rights of Nature by the NGO *Nature's Rights*.¹⁴⁰ In the light of all the previous analysis, the time is ripe to undergo a drastic structural change and Europe should seize this opportunity.

Moreover, granting rights to nature corresponds to a strong shift in the narrative, it could mean passing from a growth oriented and utilitarian approach of environmental protection to a more balanced eco-centred protection of our planet, as Stone was already advocating almost 50 years ago.¹⁴¹

Creating rights for Nature would mean giving legal standing not only to the environment, but to the earth's ecosystem as a whole (and sub ecosystems within it), including natural objects in the environment and their ability to function properly. Rights of nature is a tradition of legal and political scholarship that advocates that nature's well-being, as a right holder itself, must be guaranteed as all of its life forms have "the right to exist, persist, maintain and regenerate its vital cycles"¹⁴²

Granting rights to nature, per se, is not such a revolutionary concept, as the law can give rights to all kind of entities. There are already non-human entities that have been granted rights: corporations, trade unions and States have all rights and duties under the law.

¹³⁸ Schoukens H, 'Granting Legal Personhood To Nature In The European Union: Contemplating A Legal (R)Evolution To Avoid An Ecological Collapse? (Part 1)' (2018) 15 *Journal for European Environmental & Planning Law*, 313; see also Boyd D, *The Rights Of Nature* (ECW Press 2017).

¹³⁹ For more in-depth information, in a recent publication, Dina Shelton carries out an investigation on the consequences, benefits and drawbacks, of granting personality to nature: Shelton D, 'Nature As A Legal Person' [2015] *VertigO*.

¹⁴⁰ See supra Schouckens n. 130, 312

¹⁴¹ Stone C, 'Should Trees Have Standing? Toward Legal Rights For Natural Objects' (1974) 26 *Stanford Law Review*

¹⁴² *Ibid*.

Under an operational point of view, granting rights to nature would pose some questions, which will require further examination, on the substance (e.g. the legal definition of nature, individuation of the rights pertaining to nature) and question of implementation¹⁴³ (e.g. how to integrate those rights in our anthropocentric legal system and, the identification of the legal representative, how to effectively implement those rights). Moreover, Dinah Shelton, in the light of her analysis, individuated other specific issues that need to be tackled when granting rights to nature.¹⁴⁴

¹⁴³ Chapron G, Epstein Y, López-Bao, 'A Rights Revolution For Nature' (2019) 363 Science, 2.

¹⁴⁴ Shelton D, 'Nature As A Legal Person' [2015] VertigO. Art.45-50.

Conclusions

The previous analysis clearly shows how a better, stronger and more efficient protection of our ecosystem is needed. To this end, it is necessary to strengthen the protection of nature's fundamental rights enshrining those rights in a EU Charter.

Despite the fact that the body of EU environmental policy and regulation is very advanced and comprehensive, they are not providing the results they should. The lack of implementation of EU environmental laws also erodes the rule of law and public trust in both national authorities and EU institutions. Nevertheless, this can constitute a great opportunity for the new Commission and Parliament. Upholding the creation of a Charter of the Rights of Nature would constitute a strong message of will and commitment towards reversing environmental degradation, biodiversity loss and combating climate change impacts, all of which threaten a stable society. This would not only make Europe effectively the world leader in the battle against Climate Change, but it would also respond to a precise urgency that citizens have now expressed for years, through climate activism and litigations and the last EU elections. It would be a strong political signal of the democratisation of the reaction to climate change.

Granting rights to Nature at a European constitutional level will provide a moral blueprint to protect the nature and combat climate change. Ideas about rights have changed over time. The idea that universal rights in the shape of rights that governments cannot take away had already emerged just before the Enlightenment with the 1689 English Bill of Rights. Universal rights or fundamental rights constituted then the heart of the 1776 American *Declaration of independence*, the 1789 French *Declaration of the rights of the men and the citizens* and to the 1791 first 10 amendments to the American Constitution making up the American *Bill of Rights*. During the XX century, the atrocities of the WWII led the international community to adopt the Universal Declaration of Human Rights. Since then, Fundamental Human Rights were developed resulting, at EU level, in the adoption of the European Charter of Fundamental Rights (CFR) and creation of its Court.

Hence, humanity has dealt with emergencies in the past, responding with a paradigm shift sustained by strong legal infrastructures. Granting rights to a new group has always been met with resistance in the past, from rights that abolished slavery to rights for workers, the poor and women, but passed governances dared to take a step further and restructured entire societal systems.

Will the new European Parliament and Commission act with similar strength to solve the environmental emergency?

Developing the environmental alter ego of the EU Charter for Fundamental Rights would respond to several necessities. First and foremost, it would grant Nature overarching rights and therefore, the protection of the environment and of its functioning will be considered an obligation at constitutional level. The Charter would operate at a level of supremacy in the Community legal system, and should be therefore at the apex and prevail conflicting norms of lower value. Moreover, Nature's rights should be integrated into national system by virtue of transfer of sovereignty. However, this would not prevent nations to adopt stronger regulations, but would set the minimum rights to be granted to Nature. Hence, any act from the Member States that is considered in contrast with those rights would be considered invalid.

Furthermore, this would also enhance access to justice and judicial review at EU level, closing the gap regarding access to justice exposed previously. The standing problem would be solved. First, lack of causality nexus between the applicants and the claim will no longer pose a problem. Second, a Charter would provide an effective source of law under the ECJ jurisdiction on which applicants can base their claims.

Under a political point of view, given the momentum that the international Law initiatives are gaining to adopt an international covenant to protect the environment, Europe should be in line with it or, as stated many times by its representatives, should lead the path in guiding the international community out of the current impasse the international environmental law is facing.

Ensuring strong substantive environmental standards is fundamental to protect our planet and combat climate change, this notwithstanding, fundamentals are meaningless if they are unable to be enforced through procedural mechanisms. The creation of a Charter together with a gradual implementation within the existing framework is therefore necessary. This, in fact can be considered just a thought in the beginning of a wider reasoning around the reconceptualization of EU environmental law, starting with the very definition of the right barriers: nature.

Annex I – The list of relevant climate litigations

Selected Climate Change litigations from the Sabin Center for Climate Change Law and the Grantham Research Institute on Climate Change and the Environment:

- BE - VZW Klimaatzaak v. Kingdom of Belgium & Others, available at: <http://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/>
- CH - Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others, available at: <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>
- DE - Friends of the Earth Germany, Association of Solar Supporters, and Others v. Germany, available at: <http://climatecasechart.com/non-us-case/friends-of-the-earth-germany-association-of-solar-supporters-and-others-v-germany/>
- DE - Family Farmers and Greenpeace Germany v. Germany, available at: <http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government/>
- ECJ – The people’s climate case, available at: <http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/>
- European Committee of social rights - Marangopoulos Foundation for Human Rights (MFHR) v. Greece, available at: <http://climatecasechart.com/non-us-case/marangopoulos-foundation-human-rights-mfhr-v-greece/>
- FR - Commune de Grande-Synthe v. France, available at: <http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/>
- FR - Notre Affaire à Tous and Others v. France, available at: <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/>
- IE - Friends of the Irish Environment v. Ireland, available at: <http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/>
- NL - Urgenda Foundation v. State of the Netherlands, available at: <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>
- UK - Claire Stephenson v. Secretary of State for Housing and Communities and Local Government, available at: <http://climatecasechart.com/non-us-case/claire-stephenson-v-secretary-of-state-for-housing-and-communities-and-local-government/>

- UK - Plan B Earth and Others v. Secretary of State for Transport, available at: <http://climatecasechart.com/non-us-case/plan-b-earth-v-secretary-of-state-for-transport/>
- UK - R (on the application of People & Planet) v. HM Treasury, available at: <http://climatecasechart.com/non-us-case/r-on-the-application-of-people-planet-v-hm-treasury/>

Others:

- External Contribution to the French Constitutional Council (CONSEIL CONSTITUTIONNEL CONTRIBUTION EXTERIEURE, ‘Dans le cadre du contrôle constitutionnel a priori du projet de loi relatif à l’énergie et au climat’ Présentée au nom de : NOTRE AFFAIRE À TOUS, Association loi 1901, ayant son siège 63 rue du Chemin Vert, 75011 Paris), available at: <http://climatecasechart.com/non-us-case/external-contribution-to-the-french-constitutional-council/>

Annex II – Trends in climate litigations

UNEP identified three types of recurrent legal issues in climate change litigations¹⁴⁵ that have been analysed in comparison with the selected climate change litigations:¹⁴⁶

a) Admissibility of the case

Generally, even if there are differences among States, a court can find admissible or not a case depending on the alleged causal connection between the injury and the alleged wrongful action (or inaction). In Climate Change litigation, this can hinder the admissibility of the suit as it may be difficult for an individual plaintiff to establish an adequate causal connection between a defendant's allegedly unlawful actions or inaction and an injury that is linked to climate change impacts. In jurisdictions requiring plaintiffs to establish a "particularized injury" can pose serious obstacles for standing purposes. The *People's Climate Case* and the *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others case* were dismissed because the courts found the plaintiffs were lacking standing. It is interesting to note that in both cases the courts justified their position claiming that the plaintiff are not the only population affected by climate change impacts, hence the claim was lacking causality nexus.¹⁴⁷

b) Separation of powers

Another obstacle to the admissibility of a case is related to the separation of powers. In order for a case to be admissible, a court must be able to articulate what authority empowers them to find fault or direct the agency to revise its approach. In most of the climate change litigations, being the defendants mainly governments and public authorities, separation of powers poses a serious challenge. The decision awarded in the *Urgenda case* was path breaking in separation of powers jurisprudence because it grounded its instruction to the government to tighten emissions limits on a rights-based analysis

¹⁴⁵ UNEP, 'The Status Of Climate Change Litigation: A Global Review' (Law Division UN Environment Programme 2017), 27-30.

¹⁴⁶ The references to the case will be listed below.

¹⁴⁷ *Verein KlimaSeniorinnen Schweiz et al v Federal Department of the Environment, Transport, Energy and Communications (DETEC)* [2018] Federal Administrative Court, Section 1 of 27 November 2018, Judgment A-2992/2017 (Federal Administrative Court, Section 1 of 27 November 2018 Unofficial translation prepared on behalf of KlimaSeniorinnen) 25, 27; *Carvalho and Others v Parliament and Council* [2019] The General Court of the European Union, Case T-330/18 Case T-330/18 (The General Court of the European Union) 10,11.

rather than through reference to statutory requirements. Unlike in other cases, this was possible because the claim was based on constitutionally imposed duty of care.

c) Sources of climate obligations

Climate change litigations can draw on various sources of legal authority, including international law, constitutional provisions, statutes, or common law. In some cases, plaintiffs identify more than one of these, or a combination of them, as providing the legal basis for their claims. In instances where a statutory provision spells out climate change mitigation commitments and that statute also authorizes citizens to sue for noncompliance, the task of applying the law to the facts alleged is straightforward. In cases where the rule does not expressly contemplate application to climate change, courts tend to adopt a more restricted view, lest they be seen as legislating.

Once the court has declared it has jurisdiction to hear the matter, it evaluates the substantive merits. As climate change litigations have rapidly increased, attorneys and judges have engaged with a multiplicity of legal theories relying on a variety of sources of legal rights and obligations. Some sources of legal rights and obligations incorporate constitutional, common law and statutory elements.¹⁴⁸ In the *Urgenda* case, the Hague District Court found that the government must “do more to avert the imminent danger caused by climate change” because it owed its citizens a “duty of care to protect and improve the living environment.” This duty was codified in the Dutch constitution, but a similar duty also exists in common law, as the concept of “negligence” is typically defined as a breach of the duty of due care owed to another person.¹⁴⁹

d) Remedies

Courts can only grant remedies authorized by the law. If the remedy sought is more ambitious climate action from a government agency, courts must identify the basis for instructing that agency to comply, or else to specify how exactly the agency should alter its approach. The conventional remedies include declaratory judgments on the legality of contested actions or inactions, injunctions to undertake certain actions or to halt others, and the imposition of liability and award of damages for harms suffered by plaintiffs.

¹⁴⁸ UNEP, 'The Status Of Climate Change Litigation: A Global Review' (Law Division UN Environment Programme 2017), 38

¹⁴⁹ *Urgenda Foundation v State of the Netherlands* [2015] THE HAGUE DISTRICT COURT, C/09/456689 / HA ZA 13-1396 (THE HAGUE DISTRICT COURT, unofficial translation) 1.

Unconventional remedies include injunctions aimed at changing basic features of national energy and transportation policy.

This issue highlight once more the need for a new institutional arrangement. Environmental matters, and more specifically environmental and climate conflicts are generally extremely complex.¹⁵⁰ On this matter, there is abundant literature on the necessity to grant different types of remedies pointing at restoring the environment and on the growing need for ad hoc, permanent and specialised environmental courts.¹⁵¹ Albeit being a very relevant debate, the discussion on the adequacy of the actual court systems to deal with environmental matters will need a further dedicated research.

¹⁵⁰ Di Salvatore L, 'Encouraging Public Entities To Settle Environmental Disputes Through Mediation In Italy' (2018) 2 *IusPublicum.com*, 28.

¹⁵¹ Lehmen A, 'The Case for the Creation of an International Environment Court: Non-State Actors and International Environmental Dispute Resolution' (2015) 26 *Colo Nat Resources Energy & Env'tl L Rev* 179

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