What future for environmental and climate litigation?

Exploring the added value of a multidisciplinary approach from international, private and criminal law perspectives

Edited by
Stefano Zirulia, Lidia Sandrini
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Towards Climate Democracies? Legal Systems' Adaptation to Climate Change Litigation*

Carlo Maria Masieri
University of Milan
ORCID: https://orcid.org/0000-0003-2442-8151
DOI: 10.54103/milanoup.151.c194

The fight against global warming and its tragic effects has become a political issue. Climate change litigation arose as an important way to pursue this value, but it could also lead to significative changes in legal systems. In climate change litigation cases, international law becomes the main ground for claiming domestic remedies – especially those of tort law – that may undergo relevant modifications, putting also into discussion EU legal standards. Courts seem to be playing – even in Civil Law countries – a quasi-legislative role through trials, at the end of which they order governments or legislatures to adopt new mitigation policies. But effective enforcement tools are still to be shaped. This contribution focuses on the need to govern these aspects of climate change litigation in order to create real climate democracies.

Keywords: climate change litigation; international law; European Convention on Human Rights; European Union law; tort law; negligence; standard of care; injunctions; effectiveness; courts; policymaking.

1. Introduction

In the last few decades legal systems and law scholars have given considerable attention to the phenomena related to climate change, and especially to global warming, which is the well-known process of rise of temperatures happening since at least the half of the 20th century. On these aspects and on their causes

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– primarily human activities and especially the use of fossil fuels – there is an overwhelmingly wide consensus among scientists.[1]

Moving from the analysis of phenomena to policymaking, the fight against global warming and its tragic effects has also become a political goal itself. It must be noted that since the beginning of '90s governments and legislatures have been dealing with these issues at international,[2] European,[3] national[4] and local[5] level.

Academics – also in Italy – have been discussing even longer about mitigation and adaptation strategies,[6] including how to combat earth temperature rise.[7]

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1 See Intergovernmental Panel on Climate Change (IPCC), *Technical Summary*, in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge (UK) and New York (USA), 2021, p. 41: "It is unequivocal that the increase of CO2, methane (CH4) and nitrous oxide (N2O) in the atmosphere over the industrial era is the result of human activities;" p. 80, Box TS.5: "Based on multiple lines of evidence using interhemispheric gradients of CO2 concentrations, isotopes, and inventory data, it is unequivocal that the growth in CO2 in the atmosphere since 1750 (see Section TS.2.2) is due to the direct emissions from human activities. […] Of the total anthropogenic CO2 emissions, the combustion of fossil fuels was responsible for about 64% ± 15%, growing to an 86% ± 14% contribution over the past 10 years. The remainder resulted from land-use change;" p. 60: "The *likely* range of human-induced change in global surface temperature in 2010–2019 relative to 1850–1900 is 0.8°C to 1.3°C, with a central estimate of 1.07°C (Figure Cross-Section Box TS.1, Figure 1), encompassing the best estimate of observed warming for that period, which is 1.06°C with a very likely range of [0.88°C to 1.21°C], while the *likely* range of the change attributable to natural forcing is only –0.1°C to +0.1°C. […] Over the same period, well-mixed greenhouse gas forcing likely warmed global surface temperature by 1.0°C to 2.0°C, while aerosols and other anthropogenic forcings likely cooled global surface temperature by 0.0°C to 0.8°C."

2 See, e.g., the United Nations Framework Convention on Climate Change (UNFCCC), which entered into force on 21 March 1994; on this topic, see generally B. Pozzo, voce *Tutela dell'ambiente (dir. internaz.)*, in *Enciclopedia del diritto. Annali*, III, Milano, Giuffrè, 2010, p. 1163.

3 See, e.g., Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).

4 In Italy, see d.l. 14 ottobre 2019, n. 111, converted with modifications into l. 12 dicembre 2019, n. 141.

5 See, e.g., l. r. Emilia-Romagna 17 giugno 2019, n. 7, a regional statute.

6 See, inter alia, B. Pozzo, *Verso una strategia per l'adattamento al cambiamento climatico in Italia*, in *Rivista giuridica dell'ambiente*, 2015, 1, p. 1 ff.; S. Fanetti, *Adattamento ai cambiamenti climatici e proprietà edilizia in contesti urbani*, in *Annuario di diritto comparato e di studi legislativi*, 2019, p. 227 ff.; S. Bruno, *Cambiamento climatico e organizzazione delle società di capitali a seguito del nuovo testo dell'art. 2086 c.c.*, in *Banca Impresa Società*, 2020, 1, p. 47 ff.; F. E. Celentano, *Il sistema internazionale di contrasto al cambiamento climatico tra inefficacia e astrattezza. Il necessario coinvolgimento dei privati*, in *La Comunità Internazionale*, 2020, p. 43 ff.

7 See, e.g., T. Scovazzi, *Il riscaldamento atmosferico e gli altri rischi ambientali globali*, in *Rivista giuridica dell'ambiente*, 1988, 3, p. 707 ff.

Lately, also the judiciary has been asked to consider the same problems: climate change litigation[8] took the stage as an important way to reach the aforementioned political goal. There are in truth several kinds of climatic lawsuits: besides cases related to climate refugees,[9] which are not analysed herein, citizens and associations sue states for their inaction before domestic,[10] international[11] or supranational[12] courts. Sometimes the defendants are companies, which claimants deem responsible of excessive greenhouse gasses (GHGs) emissions.[13]

As of today, most of the successful legal actions have taken place in Civil Law jurisdictions.[14] Among pending cases, some involve Italy, both at supranational

8 For a definition, see V. Jacometti, *La sentenza Urgenda del 2018: prospettive di sviluppo del contenzioso climatico*, in *Rivista giuridica dell'ambiente*, 2019, 1, p. 122-123, n. 5.

9 At the international level, see Human Rights Committee, *Teitiota v. New Zealand*, Communication No. 2728/2016, Views of 24 october 2019, on which see A. Maneggia, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee*, in *Diritti umani e diritto internazionale*, 2020, 2, p. 635 ff.; G. Citroni, *La "stagione dell'ambiente" del Comitato delle Nazioni Unite dei diritti umani*, in *Rivista giuridica dell'ambiente*, 2020, 1, p. 20-27; T. Scovazzi, *Gli effetti del cambiamento climatico su Kiribati di fronte al Comitato dei diritti umani*, in *Rivista giuridica dell'ambiente*, 2020, 1, p. 199 ff.; in Italy, see Cass. civ., sez. II, ord. 24 febbraio 2021, n. 5022, in *De Jure*.

10 See, e.g., Juliana v. United States, 947 F.3d 1159 (2020). In Australia, see the recent *Sharma* case: the decisions of the court of first instance are *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, and *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [No 2]* [2021] FCA 774; the appeal decisions are *Minister for the Environment v Sharma* [2022] FCAFC 35 and *Minister for the Environment v Sharma [No 2]* [2022] FCAFC 65; on this case, see C. M. Masieri, *La Law of Torts alla prova dei cambiamenti climatici*, in *Rivista giuridica dell'ambiente*, 2022, 2, p. 457 ff.

11 See UN Committee on the Rights of the Child, cases n. 104-108/2019, *Sacchi et al. v. Argentina et al.*, on which see M. La Manna, *Cambiamento climatico e diritti umani delle generazioni presenti e future: Greta Thunberg (e altri) dinanzi al Comitato sui diritti del fanciullo*, in *Diritti umani e diritto internazionale*, 2020, 1, p. 217 ff.

12 See for example ECJ, Case T-330/18, *Carvalho and Others v Parliament and Council*, Order of the General Court (Second Chamber) of 8 May 2019, ECLI:EU:T:2019:324.

13 In the Netherlands, see the *Shell* case: Rechtbank Den Haag, 26 mei 2021, C/09/571932 / HA ZA 19-379 (engelse versie), hereinafter 'Shell', which is the decision of the court of first instance; appeal is pending.

14 First of all, see the famous *Urgenda* case: in particular, the decision of the court of first instance, Rechtbank Den Haag, 24 juni 2015, C/09/456689 / HA ZA 13-1396 (English translation), hereinafter 'Rechtbank Den Haag', on which see T. Scovazzi, *La corte condanna lo stato a ridurre le emissioni di gas a effetto serra*, in *Rivista giuridica dell'ambiente*, 2015, 2, p. 305 ff.; the appeals decision, Gerechtshof Den Haag, 9 oktober 2018, 200.178.245/01 (Engelse vertaling), on which see E. Corcione, *Diritti umani, cambiamento climatico e definizione giudiziale dello standard di condotta*, in *Diritti umani e diritto internazionale*, 2019, 1, p. 197 ff., and see also V. Jacometti, *supra* note 8, at p. 121 ff.; the Supreme Court decision, Hoge Raad, 20 december 2019, 19/00135 (Engels), on which see S. Dominelli, *Sui limiti – giurisdizionalmente imposti – all'emissione di gas serra: i giudici olandesi diventano i 'front-runners' nella lotta ai cambiamenti climatici*, in *Rivista giuridica dell'ambiente*, 2020, 4, p. 749 ff.; F. Passarini, *Cedu e cambiamento climatico, nella decisione della corte suprema dei Paesi Bassi nel caso Urgenda*, in *Diritti umani e diritto internazionale*, 2020, p. 777 ff. In Germany, see the *Neubauer* case decided by the Bundesverfassungsgericht,

and domestic level: a group of young Portuguese citizens brought 33 countries – including the Italian Republic – to the European Court of Human Rights (ECtHR);[15] after a few months, two young Italian women seem to have filed similar suits in Strasbourg;[16] citizens and associations summoned the Italian State to a civil trial in Rome, also known as the *Giudizio Universale* case;[17] lastly, while this contribution was under peer review a suit known as the *Giusta causa* has been brought against an Italian oil company and its controlling shareholders, including the Italian Ministry of Economy and Finance.[18]

Thus, quite recently, climate change litigation itself has been studied by scholars.[19] While almost everyone would agree that these cases may induce states and companies to make greater mitigation efforts, less attention has been given to the fact that they could also lead to significant changes in legal systems.

As will be illustrated below, in climate change litigation, international law becomes the main ground for claiming domestic remedies – especially those of tort law – that may undergo relevant modifications, putting also into discussion EU legal standards. Courts seem to be playing – even in Civil Law countries – a quasi-legislative role through trials, at the end of which they order governments or legislatures to adopt new mitigation policies. But effective enforcement tools are still to be shaped.

This contribution will thus focus on the need to govern these aspects of climate change litigation in order to create real climate democracies.

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i.e., the Federal Constitutional Court: BVerfG, Beschluss des Ersten Senats vom 24. März 2021 – 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20. In France, see the *Affaire du Siècle*: TA Paris, 3 février 2021, N° 1904967, 1904968, 1904972 et 1904976; TA Paris, 14 octobre 2021, N° 1904967, 1904968, 1904972, 1904976/4-1.

15 See ECtHR, Requête n° 39371/20, *Cláudia Duarte Agostinho et autres contre le Portugal et 32 autres États*; the Complaint has been published in the Online Climate Change Litigation Databases of the Sabin Center for Climate Change Law.

16 See ECtHR, Application number 14615/21, *Uricchio v. Italy and 31 others states;* ECtHR, Application number 14620/21, *De Conto v. Italy and 32 other States*, on which very limited information is available in the Online Climate Change Litigation Databases of the Sabin Center for Climate Change Law.

17 See Trib. Roma, sez. II, R.G. n. 39415/2021, giudice dott.ssa Canonaco. Some information about this lawsuit can be found on the claimants' website, including an English translation of the *Atto di citazione* [Summons].

18 See Trib. Roma, sez. II, R.G. n. 26468/2023, giudice dott. Cartoni. Extensive information about this lawsuit can be found in Italian on the website of Greenpeace Italia, while an English translation of the *Atto di citazione* [Summons] has been published in the Online Climate Change Litigation Databases of the Sabin Center for Climate Change Law.

19 See, e.g., W. Kahl, M-P. Weller (eds.), *Climate change litigation. A Handbook*, Hart-Beck-Nomos, München-Oxford-Baden-Baden, 2021; B. Pozzo, *Climate change and the individual*, in *Annuario di diritto comparato e di studi legislativi*, 2018, p. 459 ff.; E. Fasoli, *State responsibility and the reparation of non-economic losses related to climate change under the Paris agreement*, in *Rivista di diritto internazionale*, 2018, 1, p. 90 ff.; M. Montini, *Verso una giustizia climatica basata sulla tutela dei diritti umani*, in *Ordine internazionale e diritto umani*, 2020, 3, p. 506 ff.; S. Valaguzza, *Liti strategiche e cambiamento climatico*, in *Rivista giuridica dell'ambiente*, 2021, 1, p. 67 ff.

2. The Rise of International Law, the Mutations of Tort Law and the Defeat of EU Law

In cases framed within the scope of tort law, the main argument of the claimants is that the defendant states or companies are acting below a standard of care, which would somehow derive from international law.

This path has been very successful in the *Urgenda* case. The Urgenda Foundation – a citizens' platform that develops plans and measures to prevent climate change –, acting also on behalf of 886 individuals, sued the Netherlands, claiming that "The current global greenhouse gas emission levels, particularly the CO2 level, leads to or threatens to lead to a global warming of over 2 °C, and thus also to dangerous climate change with severe and even potentially catastrophic consequences," that "The greenhouse gas emissions in the Netherlands additionally contribute to the (imminent) hazardous climate change," that their "levels are excessive, in absolute terms and even more so per capita," and that this would have made "the greenhouse gas emissions of the Netherlands unlawful," also "towards Urgenda,"[20] according to art. 6:162 *Burgerlijk Wetboek* [BW] [Civil Code], which is the general tort rule under Dutch Law.[21] The claimants asked the District Court of The Hague to issue an order against the State "to reduce or have reduced the joint volume of annual greenhouse gas emissions in the Netherlands […] by 40% by the end of 2020, in any case by at least 25%, compared to 1990."[22]

To prevent an excessive increase of earth temperatures, such an emissions reduction was deemed necessary by relevant scientific documents, such as the Fourth Assessment Report (AR4) of the Intergovernmental Panel on Climate Change (IPCC),[23] to which the Netherlands and the European Union contributed and later publicly praised,[24] without being under any legal obligation to adopt the aforementioned emissions reduction. Nonetheless, the court found

20 See *Rechtbank Den Haag* para. 3.2.

21 "1. A person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.
2. Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.
3. A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles," see H. Warendorf, R. Thomas, I. Curry-Sumner, *The Civil Code of the Netherlands*, Kluwer Law International, Alphen aan den Rijn, 2013, p. 676.

22 *Rechtbank Den Haag* para. 3.1.

23 See *id.* paras. 2.8. ff., 4.13. ff., 4.23.-4.24. As stated on its website – on which the AR4 is also available – the IPCC "is an organization of governments that are members of the United Nations or WMO," and provides "governments at all levels with scientific information that they can use to develop climate policies."

24 See *Rechtbank Den Haag* paras. 3.49.-2.51., 2.64., 4.14.-4.15., 4.24., 4.31.

for the claimants, construing the negligence rule of art. 6:162 BW – especially as regards the existence and the breach of a duty of care – in light of international law: the decision made reference to climate conventions and protocols and to the "no harm" principle,[25] as well as to European Convention on Human Rights (ECHR) art. 2 and art. 8,[26] and to general principles of EU law.[27]

The Court of Appeals of The Hague and the Supreme Court of the Netherlands went even further: they directly applied the ECHR,[28] even in the absence of Strasbourg precedents on the matter of climate change.

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25 See *id.* paras. 4.42.-4.43.: "4.42. From an international-law perspective, the State is bound to UN Climate Change Convention, the Kyoto Protocol (with the associated Doha Amendment as soon as it enters into force) and the 'no harm' principle. However, this international-law binding force only involves obligations towards other states.
4.43. This does not affect the fact that a state can be supposed to want to meet its international-law obligations. From this it follows that an international-law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and concepts, including social proprietary, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a 'reflex effect' in national law."

26 ECHR art. 2, para. 1: "Everyone's right to life shall be protected by law. […];" ECHR art. 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
According to *Rechtbank Den Haag* para. 4.46.: "both articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation when detailing and implementing open private-law standards in the manner described above, such as the unwritten standard of care of Book 6, Section 162 of the Dutch Civil Code."

27 See *Rechtbank Den Haag* para. 4.44.: "citizens cannot directly rely [on the Treaty on the Functioning of the European Union (TFEU) stipulations]. The Netherlands is obliged to adjust its national legislation to the objectives stipulated in the directives, while it is also bound to decrees (in part) directed at the country. Urgenda may not derive a legal obligation of the State towards it from these legal rules. However, this fact also does not stand in the way of the fact that stipulations in an EU treaty or directive can have an impact through the open standards of national law described above".

28 See *Gerechtshof Den Haag* para. 37: "individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect;" *Gerechtshof Den Haag*, para. 76: "the State is acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 ECHR) by failing to pursue a more ambitious reduction as of end-2020, and […] the State should reduce emissions by at least 25% by end-2020;" see also *Hoge Raad*, paras. 5.6.1.-5.6.2.

In the *Shell* case, the association Milieudefensie – also on behalf of 17,379 individuals – together with other associations sued Royal Dutch Shell (RDS), a public limited company established under the laws of England and Wales but headquartered in The Hague. The defendant is the top holding of the Shell group, therefore being "the direct or indirect shareholder of over 1,100 separate companies established all over the world" and determining "the general policy of the Shell group."[29] This owns in turn assets and infrastructure, with which it produces and trades in oil, gas or other energy sources, having also permits for the exploitation, production or extraction of oil.[30]

The claimants argued that "RDS has an obligation, ensuing from the unwritten standard of care pursuant to" art. 6:162 BW, "to contribute to the prevention of dangerous climate change through the corporate policy it determines for the Shell group,"[31] and asked the District Court of The Hague to order that the defendant, "both directly and via the companies and legal entities […] with which it jointly forms the Shell group, […] limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy products of the Shell group to such an extent that this volume at year-end 2030: principally: will have reduced by at least 45% or net 45% relative to 2019 levels."[32]

The court stated that "when determining the Shell group's corporate policy," the defendant "must observe the due care exercised in society"[33] according to art. 6:162 BW. In order to identify the "unwritten standard of care" owed by the company, several factors have been considered, among which "the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region."[34] Referring to *Urgenda*, the court recalled that according to ECHR art. 2 and art. 8 these rights are protected from violations committed by the states, and added that the same is done under International Covenant on Civil and Political Rights (ICCPR) art. 6 and art. 17.[35] Even if they are inapplicable "in relationships between states and citizens" so that the

29 See *Shell* paras. 2.2.2.-2.2.3, 2.5.1. ff.

30 See *id.* para. 2.2.2.

31 *Id.* para. 3.2.

32 *Id.* para. 3.1.

33 *Id.* para. 4.4.1.

34 *Id.* para. 4.4.2.

35 ICCPR art. 6, para. 1: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life;" ICCPR art. 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks."
See *Shell* para. 4.4.10.: "From the Urgenda ruling it can be deduced that Articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to Co2 emissions induced global warming. The UN Human Rights Committee, which decides on violations of the ICCPR, determined the same as regards Articles 6 and 17 ICCPR."

claimants "cannot directly invoke" them with respect to the defendant company, "Due to the fundamental interest of human rights and the value for society as a whole they embody" they "may play a role in the relationship between" the parties of this case, and so the court considered them "in its interpretation of the unwritten standard of care."[36]

The Dutch judges availed themselves also of soft law, mentioning the UN Guiding Principles on Business and Human Rights (UNGP),[37] according to which there is a "duty to respect human rights" owed by companies, requiring them to "avoid causing or contributing to adverse human rights impacts through their own activities," to "address such impacts when they occur," to "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts"[38] and to "take 'appropriate action'."[39] Even if the UNGP are just a "'soft law' instrument" and "do not create any new right nor establish legally binding obligations," they are "authoritative and internationally endorsed," they "are in line with the content of other, widely accepted soft law instruments, such as the UN Global Compact (UNGC) 'principles' and the OECD Guidelines for Multinational Enterprises (the OECD guidelines)" and "Since 2011, the European Commission has expected European businesses" to abide by them: therefore, the court considered "the UNGP […] suitable as a guideline in the interpretation of the unwritten standard of care."[40]

The claimants in the *Giudizio Universale* case are trying to take great advantage of international law too. Their summons mentions a report from Climate Analytics, a German foundation that has some Italian (also governmental) agencies as partners.[41] This document, which was prepared using IPCC methodology and official data from the Italian government, indicates that "in order to put in place climate actions that are consistent with a global temperature increase within +1.5°C – the long-term temperature objective of the Paris Agreement – Italy is required, by 2030, to cut its emissions by 92% from 1990 levels."[42] From the perspective of the claimants, "Italy's climate actions" – which are not intended to reach such an emissions reduction – "are insufficient and inadequate

36 *Shell* para. 4.4.9.
37 See *id.* para. 4.4.2.
38 *Id.* para. 4.4.17.
39 *Id.* para. 4.4.21.
40 See *id.* para. 4.4.11.
41 *Summons* para. III.15. A copy of the Climate Analytics report can be found on the foundation's website.
42 *Summons* para. III.15.

for the purposes of combating anthropogenic climate change,"[43] and thus the State would be liable either in tort[44] or for breach of an obligation.[45]

As in *Urgenda*, the Italian claimants do not seek monetary compensation, but ask the Court to "order the defendant, pursuant to art. 2058, paragraph 1, of the Italian Civil Code, to take all necessary steps to reduce, by 2030, the artificial national emissions of CO2-eq to 92% compared to 1990 levels."[46] The above-mentioned statutory provision allows specific remedy instead of damages, provided that it wouldn't be excessively onerous for the defendant.[47]

As regards the duty of care – or the source of the obligation – the summons in *Giudizio Universale*, going even further than the *Urgenda* decisions, asserts firstly that the United Nations Framework Convention on Climate Change (UNFCC)[48] and the Paris Agreement[49] should have a direct effect on the Italian legal system, creating a climatic obligation of the State towards its citizens,[50]

43 *Id.* para. III.9.

44 In particular, the *Summons* mentioned art. 2043 *Codice civile* [C.c.] [Civil Code], which is the general tort law rule in Italy, stating that: "[a]ny fraudulent, malicious, or negligent act that causes an unjustified injury to others obliges the person who has committed the act to pay damages," see *The Italian Civil Code and Complementary Legislation*, trans. by M. Beltramo, G. E. Longo, J. H. Merryman, Oceana, New York, 1991; in the alternative, art. 2051 C.c. has been invoked, which contains "the discipline of liability for injury caused […] by things […] the defendant uses or controls […]," see M. Bussani, B. Pozzo, A. Venchiarutti, *Tort Law*, in J. S. Lena, U. Mattei (eds.), *Introduction to Italian Law*, Kluwer Law International, The Hague-London-New York, 2002, p. 220.

45 The claimants refer both to a climatic obligation theory – further discussed in this paragraph – and to the *contatto sociale qualificato* [qualified social contact] doctrine, on which see Cass. civ, 22 aprile 1999, n. 589, in *Giustizia civile*, 1999, I, p. 999 ff.; C. Castronovo, *L'obbligazione senza prestazione ai confini tra contratto e torto*, in *Le ragioni del diritto. Scritti in onore di Luigi Mengoni*, I, Giuffrè, Milano, 1995, p. 147 ff.; C. Castronovo, *La nuova responsabilità civile*, Giuffrè, Milano, 2006, p. 443 ff.

46 See the Conclusions of the *Summons*.

47 For a translation of art. 2058 C.c., see A. Gambaro, U. Mattei, *Property Law*, in J. S. Lena, U. Mattei (eds.), *supra* note 44, at p. 311, n. 99: "The injured party can demand specific redress when this is wholly or partially possible.

The judge however can order that the redress be made only by providing an equivalent, if specific redress would prove to be excessively onerous for the debtor."

48 See *supra* note 2.

49 On which see M. Montini, *Riflessioni critiche sull'accordo di Parigi sui cambiamenti climatici*, in *Rivista di diritto internazionale*, 2017, 3, p. 719 ff.; M. Gervasi, *Rilievi critici sull'accordo di Parigi: le sue potenzialità e il suo ruolo nell'evoluzione dell'azione internazionale di contrasto al cambiamento climatico*, in *La Comunità Internazionale*, 2016, 1, p. 21 ff.

50 See *Summons* para. IV.14: "the UNFCCC climate obligation integrates the open catalogue of obligations, enabled by art. 1173 of the Italian Civile Code, thus assuming relevance also at the level of domestic civil law, for the specific matter of combating climate change; (e) consequently, the UNFCCC (with its additional 'legal instruments') interacts with the rights of private parties, according to the Italian Civil Code."

which would have been breached by Italy. The claimants seem to have been inspired here by innovative scholarly work.[51]

On the opposite side, the State may argue that the Paris Agreement does not mandate to keep the temperature increase at +1,5°C, but requires just "Holding" it "to well below 2°C above pre-industrial levels and pursuing efforts to limit" it "to 1.5°C above pre-industrial levels,"[52] as the *Bundesverfassungsgericht* – the Federal Constitutional Court of Germany – already noted in the *Neubauer* case,[53] another climate change litigation lawsuit.

The defendant could also point to the fact that the international legal sources mentioned by the claimants are not self-executing,[54] and that they give considerable discretion to governments regarding their implementation.[55]

Moreover, as of today, in Italy there has been no room for a direct application of international treaties – even after they have been ratified and executed – in favour of citizens, who may not invoke them against other private subjects, nor against the Italian government or against foreign states.[56] Accordingly, the adoption of the "direct effect" thesis would make quite a change to the Italian legal system.

Because there were no Strasbourg precedents on these issues, the claimants in *Giudizio Universale* referred much to *Urgenda* when they came to invoke the ECHR.[57] Here another interesting interaction between international and domestic law might happen.

Differently from what is allowed in Germany under art. 93(1) no. 4a *Grundgesetz* [GG] [Basic Law], Italian citizens who suffer from violations of their fundamental rights committed by the state do not have the possibility to file complaints into the *Corte costituzionale* – the Italian Constitutional Court – and have consequently to go to civil courts seeking noneconomic damages.

In particular, claimants can be awarded a sum of money if some constitutional right has been infringed. However, according to the *Corte di cassazione* – the highest Italian civil court – this is not the case when there has been a violation of the ECHR, which in Italy is not deemed a constitutional source of the law.[58] Of course, fundamental rights enshrined into the Italian Constitution are sometimes the same enumerated into the ECHR, and in that case the claimant

51 See M. Carducci, voce *Cambiamento climatico (diritto costituzionale)*, in *Digesto delle discipline pubblicistiche*, 2021, in *Leggi d'Italia*.

52 Paris Agreement art. 2, para. 1, lett. a.

53 See *Neubauer* paras. 160 ff.

54 On this topic, see R. Baratta, *L'effetto diretto delle disposizioni internazionali self-executing*, in *Rivista di diritto internazionale*, 2020, 1, p. 13.

55 It has also been argued that these treaties do not even create an "obligation of result" towards other states, see E. Fasoli, *supra* note 19, at p. 94.

56 See S. Dominelli, *supra* note 14, at p. 759-761.

57 See *Summons* paras. V.17 ff.

58 See Cass. civ., sez. un., 11 novembre 2008, n. 26972, in *De Jure*.

can seek damages.[59] Luckily enough, in the *Giudizio Universale* case the claimants invoked rights that are expressly protected by the Italian Constitution, like e.g., art. 32 *Costituzione* [Cost.] [Constitution],[60] whose contents seem to overlap at least in part with those of ECHR art. 2.[61]

Nonetheless, as will be discussed below, the issuance of the specific remedy sought in this suit seems still to be difficult under current Italian law, because of the nature of the defendant and of the purported illicit conduct, i.e., insufficient or lacking policymaking by the government or by the legislature.

Climate change litigation leads also to conflicts between international law and European law.

Many EU legal acts carry plenty of climate change provisions – well known by the claimants[62] – that leave some discretion to Member States regarding their implementation,[63] also providing specific control mechanisms.[64] Consequently, these acts do not seem to grant the citizens damages in case of non-implementation by EU countries.[65]

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59 See Cass. civ., sez. un., 1 febbraio 2017, n. 2611, in *De Jure*.

60 See *Constitution of the Italian Republic*, translation supervised by the Senate International Affairs Service, Senato della Repubblica, Roma, 2018, p. 16: "The Republic shall safeguard health as a fundamental right of the individual. […]"

61 "Everyone's right to life shall be protected by law. […]"

62 See, e.g., *Summons* para. IV.3., which refers to "EU Regulations nos. 2018/842, 2018/1999, 2020/852, 2021/241."

63 See, e.g., Regulation (EU) 2018/1999 art. 4, para. 1: "Each Member State shall set out in its integrated national energy and climate plan the following main objectives, targets and contributions […]."

64 See, e.g., Regulation (EU) 2018/1999 art. 31, para. 3: "Where, on the basis of its assessment of the integrated national energy and climate plans and their updates pursuant to Article 14, the Commission concludes that the objectives, targets and contributions of the integrated national energy and climate plans or their updates are insufficient for the collective achievement of the Energy Union objectives and, in particular, for the first ten-year period, for the Union's 2030 targets for renewable energy and energy efficiency, it shall propose measures and exercise its powers at Union level in order to ensure the collective achievement of those objectives and targets. With regard to renewable energy, such measures shall take into consideration the level of ambition of contributions to the Union's 2030 target by Member States set out in the integrated national energy and climate plans and their updates."

65 See ECJ, Joined Cases C-46/93 and C-48/93, Judgment of 5 March 1996, *Brasserie du Pêcheur – Factortame*, ECLI:EU:C:1996:79: "Where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the state must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation."

In the *Urgenda* case, the Netherlands did not breach European standards, which nonetheless were deemed to be too loose by Dutch judges, relying mostly on international law.[66] The claimants in *Giudizio Universale* brought their case to court despite the Italian government has recently been considered more than complying with European policies.[67]

Accordingly, it's no surprise that climate advocates do not seek any EU remedies but rather base their domestic claims primarily on international law and on general principles. Of course, this is possible because even one of the most important climate advocates in the World – namely the European Union – can better combat global warming. And everyone is aware that Member States can adopt more stringent protective measures.[68] Still, this requires some international or constitutional legal source. Otherwise, it would need national political will, which however the judiciary might be not in the best position to formulate, as will be argued below.

3. Some Shortcomings of Climate 'Policy by Litigation'

Some scholars are aware that climate change litigation may give judges the power to make very relevant political or administrative choices,[69] especially when legislatures and governments are tried for their inaction. Some courts refrain from exercising this power, and this seems to happen especially in Common Law countries.

Here the judiciary benefits from doctrines that have been elaborated by case law for decades, in order to abide by the constitutional principle of separation of powers.

For instance, in the *Juliana* case the plaintiffs sought a declaratory relief and an injunction ordering the U.S. government to implement a plan to phase out fossil fuel emissions and reduce excess atmospheric carbon dioxide, but a

66 See *Rechtbank Den Haag* para. 4.84.: "It is an established fact that with the current emission reduction policy of 20% at most in an EU context (about 17% in the Netherlands) for the year 2020, the State does not meet the standard which according to the latest scientific knowledge and in the international climate policy is required for Annex I countries to meet the 2°C target;" *Hoge Raad* para. 2.3.2.: "The State cannot hide behind the reduction target of 20% by 2020 at EU level."

67 See *Commission Staff Working Document. Assessment of the final national energy and climate plan of Italy*, Brussels, 29.1.2021, SWD(2020) 911 final/2, p. 7: "On the basis of information in the NECP, with planned policies and measures (WAM scenario), Italy would achieve 34.6% reductions in the ESR sectors in 2030 compared to 2005. Annual emission allocation budgets are only presented for 2025 and 2030. For the EU ETS sector, the EU-wide target of -43% compared to 2005 is applied, but under the WAM scenario the NECP shows an overachievement, assessing the reduction to -55.9%."

68 See TFEU art. 193.

69 Cfr. S. Valaguzza, *supra* note 19, at p. 68.

majority of the United States Court of Appeals for the Ninth Circuit – examining plaintiffs' standing[70] – held that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan," because it "would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. […]. And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades. See Nat. Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1300 (9th Cir. 1992). […] Rucho v. Common Cause, […] 139 S. Ct. 2484 […] (2019) reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority [otherwise they] would inject 'the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role.' Id. at 2507."[71]

In Australia – even if the statutory requirements for standing are less stringent[72] and even if the "political question" doctrine has not been formally accepted by case law[73] – the majority of the Federal Court, sitting in Full Court on appeal, held that the choice between authorizing or denying the expansion of a coal mine, which could cause an increase of GHGs emissions, has to be considered core or high policymaking, which should not ultimately belong to the judiciary.[74] This conclusion derives from the nature and the features of this kind of choices, which can't be adequately reviewed through trials: they involve scientific, social, economic, and political assessments – to be made also in an international framework – that belong to the executive or to the parliament, and there would be a lack of legal standards in order to review them.[75] Another Justice concurred with the decision considering – among other things – that parties' procedural behaviour can have an excessive influence on the outcome

70 See 13A C. A. Wright, A. R. Miller et al., *Fed. Prac. & Proc. Juris.* §§ 3531 ff. (3d ed. 2008), Westlaw, (April 2022 Update); D. L. Parker, *La legittimazione ad agire nella giurisprudenza delle Corti americane: la lezione dell'esperienza italiana*, in *Rivista di diritto civile*, 1996, 1, p. 107 ff.

71 *Juliana*, at 1171-1173.

72 See A. Edgar, *Standing for environmental groups: Protecting private and public interests*, in M. Groves (ed.), *Modern Administrative Law in Australia*, Cambridge University Press, Port Melbourne, 2014, p. 140 ff., comparing Australian law with British and American law.

73 See *Melbourne Corporation v Commonwealth* [1947] HCA 26; 74 CLR 31, at 82; *Thorpe v Commonwealth (No 3)* [1997] HCA 21; 144 ALR 677 at 692; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1998) 19 FCR 347 at 370–373.

74 See *Minister for the Environment* [2022] FCAFC 35.

75 See *id.*, [7], [15]–[17], [103], [230], [237]-[238], [246]-[251], [253], [255]-[260], [265]-[266], [291]-[293], [344]-[346] (Allsop CJ), [836], [853]-[868] (Wheelahan J.).

of the case, which in turn would have significative consequences for the public at large.[76]

Conversely, in the *Urgenda* case, the Court of Appeals of The Hague and the Supreme Court of the Netherlands – which had to answer to the claimants' request for an order against the government to reduce the aggregate volume of annual GHGs in that country – found that the ECHR offers legal standards for evaluating the conduct of the State, leaving to the discretion of the defendant only the specific measures to achieve the goal set by the district court order.[77] This – it is worth recalling – without any Strasbourg precedent on climate change.

These cases show first of all that the existence of legal standards in this matter is still questioned. Anyways, if we assume that the fight against climate change is a political value – and unless it is an absolute one – it should be balanced with other social goals: i.e., it requires making political compromises, which doesn't seem the ordinary task of a court. This appears to be particularly true in a field where decisions may influence each and every aspect of human life, including housing, transportation, freedom of movement, immigration, energy, business and – on a wider scale – international relations.

'Policymaking by courts' also raises time issues. And this is not only because compliance with decisions can take several years, but also because adaptation measures need to be adjusted to sudden changes or contingencies, such as war, energy crises, economic crises and so on. Such a flexibility does not seem to characterize judicial orders.

In addition, 'policy by litigation' might prove to be less democratic in some countries than in others. In some jurisdictions, justices are elected by citizens, including many state supreme courts in America.[78] More often, judges are appointed by the executive and/or by the parliament, i.e., by someone who holds a direct (or at least an indirect) electoral mandate, as it happens in the United States[79] and in Germany[80] at the federal level. In Italy, criminal and civil courts – even the *Corte di cassazione* – do not have such a link with constituencies,[81] because candidates for the office of judge are selected only by exams. Such

76 See *id.*, [368]-[372] (Beach J.); the argument was made also by another Justice: see *id.*, [278], [292] (Allsop CJ).

77 See *Gerechtshof Den Haag* para. 69; *Hoge Raad* para. 8.

78 This happens in 21 states out 50; in the others, judges are appointed by governments or parliaments.

79 See U.S. Const. art. II, s. 2.

80 See *Commission Staff Working Document. 2020 Rule of Law Report. Country Chapter on the rule of law situation in Germany*, (SWD(2020) 304 final), p. 2, n. 2; M. Maiwald, *Il ruolo dei magistrati in Germania*, in *Studi Urbinati, A – Scienze giuridiche, politiche ed economiche*, 2008, 2, p. 306.

81 See N. Zanon, F. Biondi, *Il sistema costituzionale della magistratura*, Zanichelli, Bologna, 2008, p. 175.

features of the judiciary may be tough to change, as they are enshrined in constitutions[82] and have been shaping the "mentality" of jurists[83] for years.

In Civil Law countries – even leaving aside the absence of *stare decisis*[84] – further obstacles to a democratic use of strategic litigation may be found. For instance, some hurdles derive from Civil Procedure Rules. In Italy, non-parties in civil trials may receive only limited and anonymized data about cases (e.g., dates of hearings),[85] and only if they already possess certain key information (e.g., the Court, and the docket number of the case or the date of the first hearing according to summons, and the names of the parties). Copies of the parties' filings and evidence are unavailable to third parties, unlike the orders of the judge,[86] which may be anonymized.[87] The hearings, during which the evidence is taken (e.g., court appointed expert testimonies, interrogatories of the parties), are usually not open to the public.[88] Thus, most information received by outsiders prior to judgment is provided by the parties.[89] Furthermore, in Italian civil courts – and even in *Cassazione* – amici curiae are not allowed,[90] so that little or no contribution can be formally offered to the decision making process from the outside. For a 'policy by litigation' to be democratic, all these aspects must be reconsidered.

4. Some Shortcomings of Current Remedies

Climate change litigation is also creating a new set of legal remedies. Again, this happens especially when the defendant is a state. When courts detect governments' unlawful or unconstitutional inaction, traditional judicial review disapplication of statutes or declaratory reliefs are inherently useless. Therefore, in these cases claimants request injunctions.

82 See art. 106 Cost.

83 See R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, in *The American Journal of Comparative Law*, Vol. 39, No. 2, (Spring, 1991), p. 387-388.

84 See generally U. Mattei, *Stare decisis. Il valore del precedente giudiziario negli Stati Uniti d'America*, Giuffrè, Milano, 1988.

85 See art. 51 d.lgs. 30 giugno 2003, n. 196, so-called *codice della privacy* [Privacy Code].

86 See artt. 743-744 *Codice di procedura civile* [C.p.c.] [Code of Civil Procedure]; art. 76 r.d. 18 dicembre 1941, n. 1368, so-called *Disposizioni per l'attuazione del Codice di procedura civile e disposizioni transitorie* [disp. att. C.p.c.] [Provisions for the implementation of the Code of Civil Procedure and transitory provisions]; but see art. 90, co. 3 r.d. 16 marzo 1942, n. 267, so-called *l. fallimentare* [Bankruptcy Law]; art. 199, co. 3 d.lgs. 12 gennaio 2019, n. 14, so-called *codice della crisi d'impresa e dell'insolvenza* [Code of Business Crisis and Insolvency].

87 See art. 52 *codice della privacy*.

88 See art. 128 C.p.c.; art. 84 disp. att. C.p.c.

89 See *supra* notes 17-18.

90 See Cass. civ., sez. un., ord. 31 maggio 2016, n. 11387, in *De Jure*.

Judges tend not to order defendants to adopt specific measures, but rather set emission reductions targets – like in the *Urgenda* case[91] – or at least point to gaps in legislation that must be filled – like in the *Neubauer* case[92] – and set deadlines for complying with their decisions. This happens even in countries where the legislature allows courts to specify the measures that shall be adopted by the defendant,[93] like in France, because – as it has been recalled while adjudicating in the *Affaire du Siècle* case – "concrete measures to enable the damage to be made good may take different forms and reflect the Government's freedom of discretion."[94]

But suits that are framed within tort law – like the *Urgenda* and the *Giudizio Universale* cases – could raise further issues.

Speaking again of Italian law, as stated above, damages are available when fundamental rights enshrined in the Italian Constitution are violated by the state. This is certainly true when the illicit conduct is an action. But government or parliament inaction – and especially insufficiency or lack of policymaking – might undergo a different treatment: as of today, Italian civil courts do not award damages for failure to adopt legislation – apart from transposition measures that EU law mandates to pass – nor when a statute is deemed void for violation of the Constitution, and this seems to be done for separation of powers issues.[95] As said before, in *Giudizio Universale* claimants have sought an injunction, which aims to give them a specific remedy: this is certainly more than merely requesting damages, and thus an Italian civil court issuing that kind of order would constitute a very relevant innovation.[96]

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91 See *Rechtbank Den Haag* para. 5.1., where the Court "orders the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf."

92 See *Neubauer*, at p. 6: "3(1) second sentence and § 4(1) third sentence of the Federal Climate Change Act of 12 December 2019 (Federal Law Gazette I, p. 2513) in conjunction with Annex 2 are incompatible with fundamental rights insofar as they lack provisions on the updating of reduction targets for periods from 2031 that satisfy the constitutional requirements as set forth in the reasons. […] The legislator must enact provisions by no later than 31 December 2022 on the updating of reduction targets for periods from 2031 as set forth in the reasons."

93 See art. 1252 *Code civil* [C.c.] [Civil Code].

94 See TA Paris, 14 octobre 2021, an English translation of which has been provided by the claimants, at p. 44.

95 See Cass. civ., sez. III, 22 novembre 2016, n. 23730, in *De Jure*; Cass. civ., sez. I, 13 dicembre 2021, n. 39534, in *De Jure*.

96 See R. Fornasari, *La struttura della tutela inibitoria ed i suoi possibili utilizzi nel contrasto al cambiamento climatico*, in *Responsabilità civile e previdenza*, 2021, pp. 2061 ff., suggesting a wider use of injunctions in climate change litigation.

New remedies must also be effective. For instance, the scenario might be uncertain if the defendant moves to another country after the judgment.[97] Enforcement may be problematic also for decisions issued against states, both at domestic and supranational levels.

In Germany, new legislation in compliance with the *Neubauer* decision was passed in a few months.[98] But when specific targets must be met by a state in the short run, difficulties may arise. Some legislatures might not make it at all, and the Italian Parliament could be one of them.[99] Others may pass insufficient legislation: it has been argued that the Netherlands' compliance with *Urgenda* has more to do with Covid-19 restrictions than with reforms passed after the courts' decisions.[100]

Moreover, in case of non-compliance of an order setting just targets and timelines, the court charged with the task of enforcement would have to specify what measures should be taken by the non-compliant party,[101] which may be as difficult as it was at trial.

It has been said above that, in addition to domestic litigation, climate advocates accessed supranational jurisdictions, e.g., the Strasbourg Court.[102]

For instance, a suit has been brought against Switzerland[103] by "the umbrella of the Association Verein KlimaSeniorinnen Schweiz, and by four individual women over the age of 80."[104] According to their Application, "Recent summers in Switzerland have been the warmest ever recorded, resulting in climate change-induced excess mortality and temperature-related morbidity," which is especially threatening to the individual claimants and the other members of the Association;[105] the Swiss Confederation is failing to meet its GHGs emission targets,[106] thus violating the rights to life and to family of the claimants,

97 After the Judgment of 26 May 2021 entered by the Court of first instance, Royal Dutch Shell moved its headquarters from The Hague to London in December 2021.

98 See Erstes Gesetz zur Anderung des Bundes-KIimaschutzgesetzes 18. August 2021.

99 See E. Borghetto, M. Giuliani, *A Long Way to Tipperary: Time in the Italian Legislative Process 1987–2008*, in *South European Society and Politics*, Vol. 17, No. 1, 2012, p. 32: "On average, in Italy, successful bills take 11 months (328 days) to get adopted, although their lifetime ranges from a minimum of one day to a maximum of more than four years. These are remarkable records. As far as we know, they take respectively twice and three times as long as legislative processes in the Netherlands and in Germany, regardless of whether we look at the average time or the maximum duration."

100 See B. Mayer, *The Contribution of Urgenda to the Mitigation of Climate Change*, in *Journal of Environmental Law*, 27 September 2022.

101 See art. 612 C.p.c.

102 See *supra* notes 15-16.

103 See ECtHR, Requête n° 53600/20, *Verein KlimaSeniorinnen Schweiz et autres c. Suisse*; the Application, as well as other filings and updates, can be found on the claimants' website.

104 See *Observations on the facts, admissibility and the merits* of 2 December 2022 para. 1, on the claimants' website.

105 See *Application* paras. E.2-4; and see also Additional Submission paras. 1.1.-1.2.

106 See *Application* paras. E.9-12; and see also Additional Submission paras. 1.3. ff.

protected respectively by ECHR art. 2 and art. 8;[107] its government and courts have not granted domestic remedies despite the claimants' requests, thus violating ECHR art. 6 and art. 13.[108] Therefore, the ladies and the Association ask the court both to award them "non-pecuniary damages" – i.e., noneconomic damages – and to order the "Respondent to adopt the necessary legislative and administrative framework to protect their rights, which is to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels," including "a. ensuring a greenhouse gas emission level in 2030 that is net-negative as compared to the emissions in 1990;

b. reducing domestic emissions by 61% below 1990 levels by 2030, and to net-zero by 2050, as the domestic component of a.;

c. preventing and reducing any emissions occurring abroad that are directly or indirectly attributable to the Respondent, in line with the 1.5°C above pre-industrial levels limit;

d. permanently removing greenhouse gas emissions from the atmosphere and storing them in safe, ecologically and socially sound greenhouse gas sinks, if, despite a., b., c., any greenhouse gas emissions continue to occur within the control of the Respondent, or the concentration of greenhouse gases in the atmosphere is exceeding the level corresponding to the 1.5ºC above pre-industrial levels limit."[109]

In the *Duarte* case, the claimants assert that none of the 33 defendant States "has adopted adequate legislative or administrative measures which mandate the off-setting of emissions released through the production of goods that they import (or the restriction of such imports)," nor "which restrict the extent to which entities within their jurisdiction may contribute to the release of emissions overseas,"[110] putting thus at risk "lives and wellbeing" of the young Portuguese claimants,[111] who have already "experienced reduced energy levels, difficulty [with] sleeping and a curtailment on their ability to spend time or exercise outdoors during recent heatwaves,"[112] as well as "anxiety about the effects which climate change may have on them and their families, and the families they hope to have in future."[113] This would amount to violations of ECHR art. 2, art. 8 and art. 14 committed by the defendants,[114] and "Immediate action" would be "required to prevent or mitigate, to the extent possible, the risks (of yet greater magnitude) that the Applicants stand to endure later in their lives."[115]

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107 See *Application* para. F.; and see also Additional Submission para. 3.2.

108 See *Application* para. F.; and see also Additional Submission paras. 3.1. and 3.3.

109 See *Request for Just Satisfaction and General Measures* of 31 October 2021 paras. 1 and 3, on the claimants' website.

110 *Complaint* paras. E.12-13; and see also Annex para. 4.

111 See *Complaint* para. E.23.

112 *Id.* para. E.21.

113 *Id.* para. E.22.

114 See *id.* para. F.

115 Annex para. 8; and see also *Complaint* para. 28.

Some official information on Mr. Damien Carême's case[116] is currently available to the public: his individual domestic claim was dismissed by the French *Conseil d'État* for lack of standing, whereas other claimants succeeded on the merits, and afterwards he brought France to the ECtHR, "Relying on Articles 2 and 8 of the Convention" and complaining "that the action taken by" the defendant "to deal with global warming had been insufficient, including the authorities' failure to take all appropriate measures enabling the State to meet its own targets for maximum levels of greenhouse gas emissions."[117]

All the aforementioned cases have been recently reassigned to the Grand Chamber,[118] which means that they either raise "a serious question affecting the interpretation of the Convention or the Protocols thereto" or imply "the resolution of a question" that may "result inconsistent with a judgment previously delivered by the Court,"[119] while the Court decided to adjourn its examination of other seven climate change cases – including *Uricchio* and *De Conto* – until the Grand Chamber has ruled on those before it.[120]

Of course, claims have also to meet the admissibility criteria set by the Convention,[121] and this is at least questionable for *Duarte*, because the young claimants completely skipped litigation in Portuguese courts for reasons that do not seem so convincing.[122] As far as it can be known, the same could be said also for *Uricchio* and *De Conto*.[123]

116 See ECtHR, Requête n° 7189/21, *Carême c. France*.

117 See the Information Note on the Court's case-law 263.

118 See the Press Releases ECHR 142 (2022) of 29.04.2022, ECHR 184 (2022) of 07.06.2022 and ECHR 226 (2022) of 30.06.2022 issued by the Registrar of the Court.

119 See ECHR art. 30.

120 See the Press Release ECHR 046 (2023) of 9 February 2023 issued by the Registrar of the Court.

121 See ECHR art. 34: "The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right;" ECHR art. 35, para. 1: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken;" ECHR art. 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

122 They argue that Portugal couldn't evaluate the conducts of other states; that after *Urgenda* the defendant States should all give the claimants remedies for violations of ECHR art. 2 and art. 8, but also that there are compelling time reasons to sue them jointly in Strasbourg instead of accessing each State's jurisdiction separately; that claimants' families have insufficient means to afford litigation in multiple domestic *fora*, see *Complaint* para. G and Annex paras. 35 ff.

123 As said before, the *Uricchio* and *De Conto* cases are told to be similar to *Duarte*, but information on them is very limited.

If climate change cases were to address the merits – and this is likely at least for *KlimaSeniorinnen* and *Carême* – the justices could ascertain whether the defendant States have committed violations of the ECHR. If the court finds for the claimants, in addition to declaratory relief – which is ECtHR's "principal remedy"[124] – it may order the States to give them "just satisfaction," i.e., to pay – in addition to costs and expenses – damages,[125] which – if noneconomic – are usually modest.[126]

Moreover, the Strasbourg Court may order the defendant to take remedial measures – both individual and general ones[127] – and since 2011 it can also start "a pilot-judgment procedure […] where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications."[128] Judgments issued for the claimants at the end of this procedure shall "identify […] the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment,"[129] and may set deadlines for state compliance.[130] These measures can be "compensatory," such as – again – "damages to persons subjected to the violations caused by the [systemic] problem" of the defendant, or "Preventive remedies," which in turn "aim to resolve the actual problem" but are usually left quite unspecified by the judgment.[131]

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124 See A. Nussberger, *The European Court of Human Rights*, Oxford University Press, Oxford, 2020, p. 161.

125 See ECHR art. 41: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

126 See V. Fikfak, *Changing State Behaviour: Damages before the European Court of Human Rights*, in *The European Journal of International Law*, Vol. 29, No. 4, 2019, p. 1107-1108: "Even in the most serious cases, the awards tend to be modest – for example, € 20,000 for torture and about € 50,000 for the disappearance of a loved one. Figure 2 contains all of the non-pecuniary awards made in the last 13 years for violations of Article 3 (torture, inhuman and degrading treatment) and Article 5 (arbitrary detention). It clearly shows that the amounts of damages are low: 74.5 per cent of all Article 3 applicants are awarded compensation below € 10,000, and 94.8 per cent of victims are awarded compensation below € 20,000. For violation of Article 5, 80.7 per cent of victims receive below € 5,000, and 94.8 per cent of victims receive below € 10,000;" see also A. Nussberger, *supra* note 124, at. p. 162: "In comparison to non-pecuniary damages paid eg in the United States the sums granted are very modest indeed."

127 See generally A. Nussberger, *supra* note 124, at p. 164-172.

128 ECtHR Rules of Court 61, para. 1.

129 *Id.* para. 3.

130 See *id.* para. 4.

131 See L. R. Glas, *The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice*, in *Netherlands Quarterly of Human Rights*, 2017 34:1, p. 52-55.

In any event, the ECHR system – while promising on the merits – might face effectiveness issues. States could *de facto* not abide by judgments entered for the climate change advocates. "Supervision" of their execution is left to the Committee of Ministers of the Council of Europe, which may "refer to the Court the question whether that Party has failed to" comply with them; if the latter finds so, it refers in turn to the first "for consideration of the measures to be taken."[132] This procedure may put political pressure on the non-compliant state,[133] but it does not provide for any further specific sanction.[134]

5. Some Proposals

If litigation is going to be the way of pushing better climate policies, it must also be democratic, and remedies have to be effective.

At the domestic level, orders like those sought by climate advocates against the states seem to fit better with supreme courts vested with judicial review powers, like the *Bundesverfassungsgericht* in Germany, or the *Corte costituzionale* in Italy.

The latter doesn't seem to issue injunctions of that kind yet, despite having elaborated a procedural solution for other recent cases, which might be adopted also in the field of climate change litigation. In particular, since 2018, the *Consulta* – another name for the *Corte costituzionale* – allows the Parliament to avoid declarations of unconstitutionality of some statutes: before giving the decision, the court sets a deadline for Parliament to amend them, if the legislature wishes to do so.[135]

It must also be observed that art. 9 Cost. has been recently amended,[136] now requiring the Republic to safeguard the environment, biodiversity and ecosystems, also in the interest of future generations, improving the odds that

132 ECHR art. 46.

133 See F. Viganò, *Fonti europee e ordinamento italiano*, in *Diritto penale e processo*, 2011, *Speciale Europa*, p. 7.

134 See A. Szklanna, *Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues*, in W. Benedek, P. Czech, L. Heschl, K. Lukas, & M. Nowak (Eds.), *European Yearbook on Human Rights 2018*, Intersentia, Cambridge (UK), 2018, p. 447, arguing that "in case of failure to implement a judgment, the ultimate sanction that is available for the [Committee of Ministers] is Article 8 of the 1949 Statute of Council of Europe, 3 which provides that a Member State which has seriously violated Article 3 of the Statute (according to which a Member State shall respect rule of law and human rights) may be suspended from its rights of representation or even expelled from the organisation. So far this provision has not been used and it is often believed that its mere existence is sufficiently dissuasive."

135 See. Corte cost., ord. 23 ottobre 2018, n. 207; Corte cost., 22 novembre 2019, n. 242; Corte cost., ord. 26 giugno 2020, n. 132; Corte cost., 12 luglio 2021, n. 150; Corte cost., ord. 11 maggio 2021, n. 97.

136 See l. cost. 11 febbraio 2022, n. 1.

climate change litigation will reach the *Consulta*, which by the way has recently allowed amici curiae.[137]

In private law, a new Italian act – which allows class-actions for damages and for orders "inhibiting acts and conducts" of the defendant[138] – recently entered into force: further cases may reveal whether this statute allows injunctions such as those usually sought by climate advocates against companies and governments.

Anyways, a "Public-interest litigation flag" for all climate change litigation cases should be adopted by the legislature, giving public access to information, dockets and hearings, and allowing amici curiae to offer their contribution also to civil courts.

With the aim of improving the effectiveness of court orders that merely set targets and timelines, it should be kept in mind that legal systems have already developed economic disincentives for the non-compliant party, like *astreintes* in France[139] or the sum of money owed by the defendant according to art. 614-*bis Codice di procedura civile* [C.p.c.] [Code of Civil Procedure]. As long as sums are available, these 'side-orders' may put significant economic pressure on the defendants if they delay or try to avoid execution.

There are also criminal law provisions, which punish contempt of court,[140] but when the non-compliant party is a state – leaving separation of powers aside – individual liability could be hardly found given the composition of the executive and of the legislature, i.e., a host of people changing quite frequently, as occurs – again – in Italy.[141]

Paradoxically, traditional tort remedies could be more effective than those currently sought by climate advocates. Once a domestic court has ascertained that the state or a company committed a tort or breached an obligation towards the claimants, the same might be found in subsequent suits brought by a multitude of other victims, who could in turn request payment of damages. While the quantification of the awards might be difficult at trial, it seems less difficult

137 See Cort cost., delib. 8 gennaio 2020, in G.U. 22 gennaio 2020, n. 17.

138 See artt. 840-*bis* ff. C.p.c., on which see P. F. Giuggioli, *L'azione di classe. Un nuovo procedimento collettivo*, Wolters Kluwer, Milano, 2019; M. Stella, *La nuova azione inibitoria collettiva* ex *art. 840* sexiesdecies *c.p.c. tra tradizione e promesse di deterrenza*, in *Il Corriere giuridico*, 2019, 12, p. 1453 ff.

139 On which see S. Patti, voce *Pena privata*, in *Digesto delle discipline privatistiche. Sezione civile*, XIII, Torino, Utet, 1995, p. 356; in case of environmental harm in the French system, see art. 1250 C.c.

140 See, e.g., artt. 388 and 650 *Codice penale* [C.p.] [Criminal Code] in Italy.

141 See E. Borghetto, M. Giuliani, *supra* note 99, at p. 24: "Between 1987 and 2008, […] citizens have been represented by six different parliaments, elected by three diverse electoral systems; they have been governed by 15 executives, with varied degrees of alternation under completely different political alliances representing the whole range of formal types of coalitions: from minority governments to oversized ones, from minimal winning to technical governments."

to enforce such decisions (provided funds are available), creating concern for defendants in such matters.

At the supranational level, if climate advocates prevail in – at least some of – the ECtHR pending cases, they can uncover "structural or systemic problems" about mitigation policies of the defendant States, and many more suits could be filed afterwards, because almost everyone else may assert to be a victim of States' inaction.

On the one hand, the risk of small but innumerable awards to be issued by Strasbourg may alarm the defendants – and also other states that are committing similar violations of the ECHR – and could induce things to change. However, if the Court adopted the pilot-judgment procedure, it could properly manage such a litigation flood. The ECtHR could achieve both results if it went for a pilot-judgment and adjourned all similar pending applications after the time for its execution has expired.[142] But the issue of effectiveness of Strasbourg decisions would remain.

142 See L. R. Glas, *supra* note 131, at p. 56; A. Nussberger, *supra* note 124, at p. 170.

What future for environmental and climate litigation?

Exploring the added value of a multidisciplinary approach from international, private and criminal law perspectives

Zirulia, Sandrini, Pitea (eds.)

The book provides in-depth analysis and innovative insights on the prospects of climate and environmental litigation, namely by exploring the ability of judicial remedies and sanctions to affect public and private decision-making in every context where natural resources, climate as well as human health are at stake. The chapters reproduce, with additional elaborations, the papers presented at the international workshop that gives the volume its title, held at the University of Milan on 16 September 2022. The underlying question is whether and to what extent, in the face of unsatisfactory and unreasonable political choices on the balance between the different interests at stake, resorting to national and supernational courts represents a valid alternative for a more sustainable future. The relevant contexts covered by the book include, for instance, industrial development, exploitation of natural resources, agricultural production, manufacturing techniques, as well as policies on energy, public and private transport, and urban development. The book is composed of three parts, each one addressing, from multiple perspectives, a specific category of judicial remedies in a certain area of legal studies: I) international human rights law; II) private international law and international trade law; II) domestic and international criminal law.

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