

**T.C.**  
**MARMARA ÜNİVERSİTESİ**  
**AVRUPA ARAŞTIRMALARI ENSTİTÜSÜ**  
**AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI**

**THE SIGNIFICANCE OF EUROPEAN HUMAN RIGHTS APPROACH IN THE  
EFFECTIVENESS OF CLIMATE CHANGE RELATED POLICIES**

**YÜKSEK LISANS TEZİ**

**BENGÜ BELLEK**

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## **ABSTRACT**

Even though climate change is one of the most important problems humanity is facing in recent years, states fail to take necessary measures and fulfil their obligations to protect their citizens against the threats caused by climate change. The European Union, however, can be excluded from this because of researches that have been conducted on climate change and its human rights implications and even decisions by courts on this matter. Negative consequences of climate change on human rights have become apparent lately and states' inaction forced people affected by this to take the matter to courts. Even the European Union itself has been a party of such cases due to its in compliance with its obligations in the fight against climate change.

In the scope of this research, climate change and environment policy of the European Union will be analysed, historical development and current situation of these policies will be put forward. Following this analysis, the relationship between climate change and the affected human rights will be explained. At this stage, EU legislation and related literature have to be looked into. At the final section of the research, related case law will be reviewed, Court of Justice's views on this matter and whether the human rights approach makes law a more effective tool will be discussed.

With this research, I am aiming to find the most effective way to deal with climate change, giving the European Union as an example. As an important actor in the fight against climate change, the EU's way of handling the matter and with which procedures it encourages member states to comply with their obligations may have an effect on the policies of other developed countries.

**Keywords: Climate change, human rights, European Law, Environment**

## ÖNSÖZ

İklim değışikliđi, son yıllarda insanlığın karşılaştığı en önemli sorunlardan birisi olmasına rağmen devletler, böylesine ciddi bir soruna karşı gerekli önlemleri almamakta, vatandaşlarını, iklim değışikliđinden kaynaklanan tehditlere karşı koruma yükümlülüklerini yerine getirmemektedir. Avrupa Birliđi, bu genellemenin dışında tutulabilir. Zira, son zamanlarda iklim değışikliđi ve bunun insan hakları çerçevesinde değerlendirilebilecek zararları hakkında çalışmalar yapılmakta ve hatta bu yönde kararlar verilmektedir. İklim değışikliđinin insan hakları üzerindeki olumsuz etkileri son yıllarda daha da görünür hal almış, politikacılar ve Devletlerin bu konuya karşı tepkisizliđi, bu durumdan etkilenen insanları yasal yollara başvurmaya itmiştir. Avrupa Birliđi'nin kendisi dahi, iklim değışikliđine karşı mücadelede yükümlülüklerini yerine getirmekte geciktiđi için bu tarz davaların taraflarından biri olmuştur.

Bu çalışma kapsamında öncelikle, uluslararası çevre hukuku ve bu kapsamda iklim değışikliđi politikalarını tarihsel gelişimi, sonrasında ise Avrupa Birliđi'nin iklim değışikliđi ve çevre politikaları incelenerek, řu anda hangi noktada olduđu ortaya konacaktır. Daha sonra, uluslar arası alanda korunan hangi insan haklarının iklim değışikliđi sonucunda zarar gördüđu ile bu haklar iklim değışikliđi arasındaki iliřki incelenecektir. Bu aşamada, Ab mevzuatı ve literatür taraması önem arz etmektedir. Tezin son kısmında, konuya iliřkin olarak verilmiş ve halen görülmekte olan davalar incelenerek, Avrupa Adalet Divanı'nın bu konudaki görüşleri ortaya konulacak ve konuya insan hakları yönünden yaklaşımın, iklim değışikliđiyle mücadelede hukuku daha etkili bir hale getirip getirmediđi tartışılacaktır.

Bu çalışma ile, son yıllarda etkisini fazlaca görmeye başladığımız iklim değışikliđi ile, hukuku kullanarak nasıl daha etkili mücadele edilebileceđini göstermeyi hedefliyorum. İklim değışikliđi ile mücadelede önemli aktörlerden olan Avrupa Birliđi'nin meseleyi ne şekilde ele aldıđı ve hangi yöntemleri kullanarak üye devletleri yükümlülüklerini yerine getirmeye teşvik ettiđinin, iklim değışikliđinde payı olan gelişmiş devletlerin bu alandaki politikalarında yapacakları değışikliklerde etkili olacađı düşüncesindeyim.

**Anahtar Kelimeler: İklim değışikliđi, İnsan Hakları, AB Mevzuatı, Çevre**

# CONTENTS

ABSTRACT	i
ÖNSÖZ	ii
CONTENTS	iii
ABBREVIATIONS	iv
INTRODUCTION	1
I. INTERNATIONAL CLIMATE CHANGE POLICY	3
A. What Is Climate Change?	3
B. International Protection Against Climate Change	6
II. EVOLUTION OF HUMAN RIGHTS AND CLIMATE CHANGE POLICIES IN THE EU	17
A. Climate Change Policy of The EU	17
1. Introduction	17
2. Evolution	19
B. Human Rights Policy of The EU	36
III. HUMAN RIGHTS AND CLIMATE CHANGE	39
A. Human Rights' Evolution	39
B. Relationship Between Human Rights And Climate Change	40
1. Human Rights Affected By Climate Change	51
C. The Effects Of A Human Rights-Based Approach	55
1. The Benefits Of Human Rights Approach for Europe	56
2. Case-Law Related to Climate Change and Human Rights	59
CONCLUSION	64
BIBLIOGRAPHY	65

## ABBREVIATIONS

<b>COP</b>	Conference of The Parties
<b>CFREU</b>	Charter of fundamental rights of the European Union
<b>CESCR</b>	The Committee on Economic, Social and Cultural Rights
<b>COE</b>	Council of Europe
<b>EU</b>	European Union
<b>ECE</b>	Economic Commission for Europe
<b>ELD</b>	Environmental Liability Directive
<b>EP</b>	European Parliament
<b>ECSC</b>	European Coal and Steel Community
<b>ECtHR</b>	European Court of Human Rights
<b>ECHR</b>	European Convention on Human Rights
<b>ECSR</b>	European Committee of Social Rights
<b>ESC</b>	European Social Charter
<b>ETS</b>	Emissions Trading System
<b>GHG</b>	Greenhouse Gases
<b>IPCC</b>	Intergovernmental Panel on Climate Change
<b>ICJ</b>	International Court of Justice
<b>ILC</b>	International Labour Conference
<b>ILO</b>	International Labour Organization
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>IOM</b>	International Organization for Migration
<b>MDG</b>	Millennium Development Goals
<b>MS</b>	Member States
<b>NDC</b>	Nationally Determined Contribution
<b>NGO</b>	Non-Governmental Organizations
<b>OECD</b>	The Organisation for Economic Co-operation and Development
<b>OHCHR</b>	The Office of the United Nations High Commissioner for Human Rights
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN</b>	United Nations
<b>UNHRC</b>	United Nations Human Rights Council
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNEP</b>	United Nations Environment Programme
<b>WCP</b>	World Climate Programme
<b>WMO</b>	World Meteorological Organisation

## INTRODUCTION

Since the Industrial Revolution, human impact on nature has increased. As a result of this impact, today climate change is one of the most important problems humanity is facing. What makes this problem more serious than the others is the fact that it is threatening the only home humanity shares, the planet Earth. A recent study has shown that the wildlife population has fallen 60% in the last 40 years.<sup>1</sup>With the increasing number of environmental issues that were experienced on both natural and human systems worldwide such as air pollution, water pollution, and loss of biodiversity and the acknowledgement of threatening consequences on the life-sustaining services of nature, international community has become aware of the gravity of the situation and thus began discussing environmental problems as political issues in the 1960s. Even though environmental problems show their effects differently in different parts of the world, it is no doubt that this is an international problem that is not limited to the national borders. For this reason, common action is needed. Despite the urgency of such a problem and the risks it's posing on the enjoyment of human rights, governments have only recently started discussing the human rights dimension of climate change and the potential role that human rights law could play in responding to such a threat.

According to the United Nations (UN) Human Rights Council's resolution 2009, which was adopted by 88 UN member states, climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.<sup>2</sup>

It is generally agreed that human rights force the states to not only respect these rights but also to protect and fulfil them. For human rights to be infringed, it is thus not necessary for the state

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<sup>1</sup>Carrington, Damian. "Humanity has wiped out 60% of animal populations since 1970, report finds", The Guardian. 30.10.2018

<sup>2</sup>United Nations Human Rights Council (HRC) Resolution 10/4, Human Rights and Climate Change, UN Doc. A/HRC/10/L.11, 12 May 2009.



itself to interfere with people's rights through its own actions, an infringement can also occur if the state fails in its duty to protect people against infringements by third parties. If rights are infringed, those affected by the infringement should be able to take legal actions. Even though, climate change influences the enjoyment of human rights and human rights themselves, the problem has not been seen as a human rights matter and it has not played a strong role in how climate change is perceived as a problem. Even though climate change related lawsuits against States alone will not be enough but it is no doubt effective and forces policymakers to make rules and take measures that provide effective protection for citizens.

As an important actor in the global area, the European Union (EU) with its 28 - soon -to-be 27 Member States- made some needed changes in its policies through the years. One of the main objectives of the EU is the constant improvement of the living and working conditions of the citizens. Based on this objective, the Community has the responsibility to ensure high standards of environmental quality and therefore to have compatible policies. The EU is one of the leading actors in making such legislations in the global area. But is the current legislation sufficient?

In this research I'm aiming to have a better understanding of the climate policy of the EU, in which ways it can be improved and whether the human rights approach would provide a more efficient protection against climate change and its consequences. In order to do this, I will analyze the development of climate change-related policies in the international area and in the EU itself, how much the EU keeps its promises in the fight against climate change and whether the fight against climate change is seen as a human rights problem through related case-law and whether this approach strengthens the power of law in this fight.

## I. INTERNATIONAL CLIMATE CHANGE POLICY

### A. What Is Climate Change?

One of the most alarming trends the world now faces is the rise in global temperatures resulting from increasing concentrations of greenhouse gases (GHGs) in the atmosphere. This human-induced pollution problem<sup>3</sup> threatens us with global climate change, also called “global warming,” on a scale unprecedented in human history. Few issues in international environmental law have been as polarizing as climate change. Because the emission of GHGs is closely linked to materials, products, and processes that are integral to economic growth and development, many countries have been unwilling to commit to significant reductions.

Climate change and its implications nowadays are highly discussed topics. Students are skipping school to protest against the inaction of States against such a serious problem. The argument of Greta Thunberg, a 16 year old who started an international reaction after her solo protest in front of the Swedish Parliament is a pretty solid one which goes “... Why should I be studying for a future that soon will be no more?”<sup>4</sup> But what is climate change and why is it worrying school children and not those who have the power to do something against it? In this chapter I will thus explain what ‘climate change’ means, how is it protected in international law, why is it necessary to take a global action against it and finally the human factor in all of this.

The atmosphere, oceans, land surface along with animal and plant ecosystems form the global climate. “Climate” may be defined as “the organized summary over time of the planetary land, atmosphere and water system”.<sup>5</sup> Climate change is a change in the pattern of weather, and related changes in oceans, land surfaces and ice sheets, occurring over time scales of decades or longer.<sup>6</sup> This could be a change in how much rain a place usually gets in a year or in a place's

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<sup>3</sup> It is the human-caused or “anthropogenic” GHG emissions that the majority of scientists view as substantially increasing GHG concentrations. UN Intergovernmental Panel on Climate Change (IPCC), see <http://www.ipcc.ch/>

<sup>4</sup> <https://www.fridaysforfuture.org/> (14 May 2019)

<sup>5</sup> Verheyen, R.K.A.. *Climate Change Damage and International Law : Prevention Duties and State Responsibility*. Boston: BRILL, 2005. Accessed March 29, 2019. ProQuest Ebook Central. p. 11

<sup>6</sup> What is climate change? 2019

<https://www.science.org.au/learning/general-audience/science-booklets-0/science-climate-change/1-what-climate-change> ( 23 May 2019)

usual temperature for a month or season. Climate takes hundreds or even millions of years to change.<sup>7</sup>

Article 1.2 of The UN Framework Convention on Climate Change (UNFCCC) defines climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”. The UNFCCC is one of the most important texts in the international area addressing climate change along with the Kyoto Protocol which was signed in 1997. The Convention was then signed by 166 nations at the Earth Summit in Rio de Janeiro in 1992 and came into force in 1994. Even though, no targets were specified in the Convention, it nevertheless set out the key points and principles that constituted the basis for the following international climate change debates and processes. One of its objectives was to stabilize the climate in order to prevent “dangerous anthropogenic interference with the climate system”<sup>8</sup> in a period of time that would allow natural systems to adapt without major damage to food systems and economic development. According to the Convention, the States, having different limits of their own, would have to control their level of greenhouse gas emissions depending on the level of responsibility of each country.

Adopted in 1992 and entered into force in 1994, the convention represents the first international text on environmental protection that has recognized the existence of global warming. However, developed countries were more involved in the fight against the phenomenon as the Convention provided them with specific commitments which are adopting national policies to reduce their greenhouse gas emissions in 2000 to their 1990 level, helping particularly vulnerable developing countries cope with the cost of adaptation, providing financial resources to developing countries to meet their commitments, including inventories, encouraging, finance and facilitate as appropriate, transfer or access to environmentally sound technologies and know-how. The ambitious objectives of the Convention were however handicapped by the not so effective nature of the convention. No sanctioning mechanism was provided for the State which does not respect the commitments mentioned above. Most of the international texts have non-binding nature. The state is by definition a sovereign legal entity. This reality prevents the creation of a supranational

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<sup>7</sup>What is Climate Change? 2014 <https://www.nasa.gov/audience/forstudents/k-4/stories/nasa-knows/what-is-climate-change-k4.html> (23 May 2019)

<sup>8</sup> Article 2 of UNFCCC

authority with the possibility of controlling the application of the State's commitments. In addition, it was a framework convention advancing a certain number of realities and theoretical principles devoid of concrete action to be carried out on the ground. The international community therefore felt the need for an instrument to achieve the objectives of the convention, hence the adoption of the Kyoto Protocol.

Climate change has been the subject of many researches in both scientific and legal circles. However, “climate change law”, is mostly focused on the reduction of greenhouse gases, the ways to achieve that goal both nationally and internationally. As the ongoing debates are mostly on how to deal with emissions trading and energy efficiency standards, it seems that the problem of damages caused by climate change has been put aside.<sup>9</sup> According to the Intergovernmental Panel on Climate Change (IPCC), sectors concerning food and fibre production, along with human settlements are sensitive to changes in climate. Biodiversity and the hydrological cycle are expected to be affected by the climate change which will have serious effects on marine life and carbon storage capacity.<sup>10</sup>

It wasn't until the late-21st century that the society realized the effect human activities have on our planet and its climate and the seriousness of emissions of greenhouse gases. According the IPCC report dated 2018, human activities have caused the Earth's temperature to rise approximately 1.0 degrees above pre-industrial levels and with its current rate, if humanity fails to act, it is likely to reach 1.5 degrees between 2030 and 2052.<sup>11</sup> Another report of the IPCC published in 2001 showed that most part of the last 50 years of warming is the result of human activities.<sup>12</sup> The IPCC uses the data from when people started using fossil fuels as a reference for its assessment reports.<sup>13</sup>

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<sup>9</sup>Verheyen, R.K.A.. Climate Change Damage and International Law : Prevention Duties and StateResponsibility, *op.cit* p.2

<sup>10</sup> Ibid p.3

<sup>11</sup> IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. In Press.

<sup>12</sup> Climate Change Information Kit <https://unfccc.int/resource/iuckit/cckit2001en.pdf> (23 February 2019)

<sup>13</sup>Verheyen, R.K.A.. Climate Change Damage and International Law : Prevention Duties and StateResponsibility, *op.cit.* p 36

At the United Nations Conference on Human Development, the term “global warming” was discussed. Subsequently, the first World Climate Conference was held in 1979. During that conference, the World Climate Programme was launched during which several workshops and conferences were held and paved the way for further scientific research and cooperation.<sup>14</sup> World Meteorological Organisations (WMO) together with the United Nations Environment Programme (UNEP) also organized an important meeting concerning climate change in 1985. It was the first time in the history of climate change talks, as it was when a consensus was reached on the problem of human-induced climate change. It was concluded in Villach that climate change has to be considered as a serious problem and if it continues in the same pace, “a rise in global mean temperature greater than any in man’s history” could occur in the first half of the 21st century. They made a call to the policy makers to take an action “begin active collaboration to explore the effectiveness of alternative policies and adjustments” and in order for these action to be effective, they suggested that these efforts should be supported with a global convention. Following this call, at the 2<sup>nd</sup> World Climate Conference held in Toronto, with the attendance of both scientists and policy makers, they made a call on governments to take action concerning their CO<sub>2</sub> emissions level.

## **B. International Protection Against Climate Change**

International law is based on treaties and customary international law. Article 38 of the Statute of The International Court of Justice (ICJ) defines the main sources of international law. According to the said article, treaties, custom, and general principles of law form the basis of international law. *Jus cogens* norms which are norms that are “accepted and recognized by the international community of States as a whole” as defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties and which can only be modified by subsequent norms of general international law “having the same character”.<sup>15</sup>

In protecting the environment, international law and institutions are considered to be the important actors regarding the cooperation of the members of the international community. The principles and rules of international law, public international law in this case, make different members cooperate within a framework. International environmental law, along with the legal

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<sup>14</sup>Ibid p.18

<sup>15</sup>McInerney-Lankford, Siobhan, Mac Darrow, and Lavanya Rajamani. Human rights and climate change: a review of the international legal dimensions. The World Bank, 2011. p.25

factors, is also influenced by a number of non-legal ones which can range from scientific concerns to increased public concern on the issue.<sup>16</sup> Here, it is important to mention the “sustainable development” concept which can be found in many environmental treaties. The concept is defined as “the development that meets the needs of the present without compromising the ability of future generations to meet their own needs” in the Brundtland Report which is considered as the corner stone for when sustainable development became a concept in global policy.<sup>17</sup>

The international climate change regime is regulated principally by the UNFCCC and its Kyoto Protocol. As of today there are 192 Parties (191 States and 1 regional economic integration organization) to the Kyoto Protocol.<sup>18</sup> Both of these treaties are legally binding with their own established institutions to facilitate negotiation process and encourage emissions reductions, as well as to supervise the States’ compliance with their obligations derive from these treaties.<sup>19</sup> Apart from the case of climate change, under these treaties extensive compliance mechanisms have been established in order to supervise the compliance of States’ with their international human rights commitments. Different from the UNFCCC’s mechanisms which gives standing to States alone, the ones established under these treaties have a more independent nature which would possibly allow individuals and relevant groups to take violations to court.<sup>20</sup>

Despite being signalled in the 19<sup>th</sup> century, climate change problem started to be discussed only in 1979 at the 1<sup>st</sup> World Climate Conference which led off a range of conferences all around the world, most significant ones being the ones in Villach (1985), Hamburg (1987) and Toronto (1988). World Commission on Environment and Development Commission led by Brundtland who served as the prime minister of Norway, placed the climate change problem among the other

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<sup>16</sup> Hahn, R, Richards, K., The Internationalisation of Environmental Regulation, Harvard International Law Journal, 433–40, 1989, p. 436

<sup>17</sup> Sands, P., Principles of International Environmental Law, Cambridge University Press Second Edition, 2003, p. 10

<sup>18</sup>The Kyoto Protocol - Status of Ratification

<https://unfccc.int/process/the-kyoto-protocol/status-of-ratification> (23 February 2019)

<sup>19</sup>Verheyen, R.K.A.. Climate Change Damage and International Law : Prevention Duties and StateResponsibility. *op.cit.* p.4.

<sup>20</sup>McInerney-Lankford, S. et al. Human rights and climate change: a review of the international legal dimensions. P46.

environmental and development problems. An advisory group on GHGs was then established and paved the way for the establishment of the IPCC in 1988.<sup>21</sup>

The first report of the IPCC provided the primary consensus on knowledge of climate change. It also made clear that if the stabilization of greenhouse gas (GHG) at 1990 levels is necessary, and that CO<sub>2</sub> emissions have to be reduced globally by more than 60%, methane by 15–20%, nitrous oxide and chlorofluorocarbons (CFCs) by about 70–85%.<sup>22</sup> The IPCC also made some suggestions regarding the ways to mitigate climate change with the efforts of different sectors. Concerning the adaptation to the crisis, it focused on coastal zone management and resource use and management; and, finally. At the international level, public education and information, technology development and transfer, economic mechanisms, financial mechanisms, and legal and institutional mechanisms were recommended.<sup>23</sup>

With the contribution of many environmental non-governmental organizations (NGOs), the Climate Action Network and the International Council for Local Environmental Initiatives were established in March 1989 and in 1990. The industry, however, was hardly engaged in the issue at that time. With regard to country awareness, there was strong emphasis on the differences between developed and developing countries, and most political statements emphasized this difference.<sup>24</sup>

In the early stages of climate change negotiations, a number of significant meetings were held mostly on the seriousness of the climate change problem, which measures are necessary and finally how the States will share the responsibility. Countries' having different levels of development caused them to have different roles which also meant different responsibilities. As a result of this, it was decided that with the leadership and the assistance of the developed countries in reducing their own emissions of GHGs, developing countries would also be able to adapt to climate change along with the new technologies that can be used to reduce emissions growth levels. During this period, the United Nations Economic Commission for Europe (ECE) and the Second World Climate Conference Declarations promoted new ideas and principles such as the

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<sup>21</sup>Gupta, Joyeeta. "A history of international climate change policy." *Wiley Interdisciplinary Reviews: Climate Change* (2010): 636-653. p 637

<sup>22</sup> World Meteorological Organization, United Nations Environment Programme, First Assessment Report, 1990.

<sup>23</sup> Gupta, Joyeeta. "A history of international climate change policy." *op.cit.* p 638

<sup>24</sup> *Ibid*, p 638

precautionary principle and goals for developed countries as well as resources produced by the developed for the use of developing countries. The precautionary principle was initially taken quite seriously and most The Organisation for Economic Co-operation and Development (OECD) countries except Turkey and the United States had political targets by 1990. The European Community and the EFTA Countries agreed to stabilize their CO<sub>2</sub> emissions by 2000 at 1990 levels.<sup>25</sup>

As an important actor in the debates and processes concerning climate change policies, with its first assessment report which was published in 1990 the IPCC made some contributions to the drafting of the UNFCCC. However, despite the efforts, as mentioned above, due to lack of specific targets the UNFCCC failed to satisfy the expectations of many environmentalists. It was however a milestone in the climate change debate as it established the foundations and principles to be based on in the following negotiations. Concerns of the lack of targets were mentioned in the third Conference of Parties (COP 3) meeting in Kyoto in 1997 where delegates agreed on the Kyoto Protocol. With the protocol, the parties agreed on targets that need to be followed by the developed countries during the 2008-2012 period along with three main mechanisms; an emissions trading scheme (ETS), Clean Development Mechanism (CDM), Joint Implementation (JI). Signed in 1997 and entered into force in February 2005, the Kyoto Protocol is an inter-state agreement setting greenhouse gas reduction thresholds to be respected by the various signatory States.<sup>26</sup> As the main implementing text of the UNFCCC, the text had to respond to the three basic principles of the convention: the precautionary principle of taking action against global warming, right to a healthy environment; and finally, the principle of a common but differentiated responsibility of States in the face of climate change.

In accordance with this latter principle, the commitments requested from developed countries are not the same as those required by developing countries. Reduction targets have been set based on projections of emissions growth in each country, its ability to pay and its political commitment to combat climate change. The protocol has been ratified by 175 countries committed to achieving a reduction in greenhouse gas emissions by around 5% in 2012 compared to 1990 emissions.<sup>27</sup> Not

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<sup>25</sup> Ibid, p 638

<sup>26</sup> Syrine Ismaili, « La lutte internationale contre le réchauffement climatique comme étant une source de dégradation des ressources marines », *Études caribéennes*, 2010, accessed 25 July 2019. URL : <http://journals.openedition.org/etudescaribeennes/4421> ; DOI : 10.4000/etudescaribeennes.4421

<sup>27</sup> Ibid., p. 17



all developed countries have shown the same desire to act. Thus the European Union of 15 set a collective reduction target of 8% spread over the different states: Germany has a reduction target of 21% whereas Spain can increase its emissions by 15%. However, the effectiveness of the protocol is limited, and this for several reasons: first, several industrialized countries including the United States, responsible for 33% of emissions from developed countries, have not signed the agreement.<sup>28</sup> The official withdrawal of this State from the Protocol in March 2001 marked a considerable retreat of the instrument, which, as a result, did not achieve its objective. The American reluctance to sign the agreement can not be explained solely by the absence of a desire to preserve the environment. It comes back mainly to the existence of a US resolution dating from 1997 that states that the United States will ratify no agreement on the environment if there are no obligations of preservation of the environment for the emerging countries such as China and India. In addition, the financial cost of achieving the objectives of the protocol is excessive: it corresponds in developed countries to an annual cost of 0.1% of GDP. Knowing that the costs are incurred in the short term while the benefits are perceived only in the long term and are, moreover, difficult to evaluate in a precise manner; the financial argument alone could explain the reluctance of some states to implement the objectives set by the agreement.<sup>29</sup>

The protocol nevertheless has the great merit of having given a frame of reference to international political action and of promoting collective action to combat this scourge. The setting of legally binding quantitative targets has the advantage of clarity and readability and is a strong political signal for each country at national level.<sup>30</sup> The protocol's commitments ending in early 2013, other agreements to fight global warming were to take over.

The Bali Conference of 2007 officially launched the post-Kyoto negotiations and decided on a new climate change summit in Copenhagen in December 2009. In addition, some unilateral initiatives mark the attachment of certain countries to the question of the stabilization of the temperature of the atmosphere. Following the signing of the Kyoto Protocol, the European Union has set up an instrument with the objective of facilitating the greenhouse gas reduction operation: the "European CO2 emissions trading market", better known as the "carbon market". This market concerns the main industrial plants in the combustion, metal, cement, glass and paper production

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<sup>28</sup> Vieillefosse, A. (2009). *Le changement climatique: quelles solutions?*. Documentation française. Vieillefosse, A. (2009). *Le changement climatique: quelles solutions?*. Documentation française.

<sup>29</sup> Ibid. P. 63

<sup>30</sup>Ibid. p.65

sectors for which an emission cap in the form of annual quota allocations is defined for each type of installation. Each quota gives the right to emit one tonne of CO<sub>2</sub>. In application of this instrument, the Union saw its emissions reach a level 13.6% below that of 1990.<sup>31</sup> Moreover, the adoption of the energy-climate package in April 2009 confirms the European Union's desire to fight against global warming. Under this instrument, the Union sets itself a unilateral target of 20% reduction of greenhouse gas emissions in 2020 compared to 1990. These ambitious goals will however be difficult to achieve, the scientists of the European Environment Agency only foresee a reduction of 6% of emissions. The United States, for its part, passed the Waxman-Markey Act in 2009, the first legal instrument to reduce greenhouse gas emissions by 17% from 2005 to 2020 and establishing a federal quota market. The text encourages the development of coal capture and storage techniques which costed around ten billion dollars. Despite the apparent importance of this figure, the doctrine has reservations about the effectiveness of the application of this instrument since its implementation depends on the pledges given to limit its impact on the US economy and particularly in states whose economies are based on coal.<sup>32</sup> Any initiative to fight against global warming has the merit to exist and to be welcomed. However, a better response can only be global given the cross-cutting nature of global warming. For example, the Copenhagen summit, bringing together the majority of the world's states, was of great interest and represented a better way of combating the phenomenon.

Two objectives were blunted from the Copenhagen Summit that culminated in the Conference: to implement the commitments made under the Kyoto Protocol and to adopt a long-term and broader international agreement than its predecessors, including the United States and China, the first two global polluters. To this end, numerous meetings and negotiations preceded the summit, the aim being to take stock of climate change and to define the means of struggle. Yet the Copenhagen conference is considered a real failure. The text that should succeed the Kyoto Protocol has not been signed as the states have not agreed on measures to reduce greenhouse gas emissions to be implemented in their country. No timetable for financial and technological assistance to developing countries has been agreed and no breakdown of the financial contributions to be made by the donor countries specified, any more than the countries likely to benefit. In addition, several notable absentees are noted as the level of development of renewable

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<sup>31</sup> Ibid. P. 67

<sup>32</sup> Delbosc, A., & De Perthuis, C. (2010). *Négociations climatiques: les enjeux du post-Copenhague*. *L'Economie politique*, (2), 70-81. p.75

energies, the reduction of the use of fossil fuels, the improvement of the energy performance of buildings, the constraints on certain polluting industries, the use of vehicles with lower emissions. CO<sub>2</sub>, the development of public transport.<sup>33</sup>

The reasons for this failure seem to be attributable to different factors coming from the same source: the financial interest. Some countries that are big suppliers of fossil fuels have every interest in blocking the outcome of this agreement.<sup>34</sup> Other large states such as China and the United States have fuzzy positions. In general, governments' reluctance to tackle global warming is explained by the known conflict between the economy and the environment. Developed countries want to preserve their way of life and competitiveness while developing countries claim the right to develop. Finally, the fact that the United Nations is deprived of all means of compulsion vis-à-vis States, by definition sovereign, does not facilitate things.

With the increased media coverage of the climate crisis, growing scientific evidence on the seriousness of the impacts, public awareness on the existence and dangers of climate change increased. It was also because of the 4<sup>th</sup> assessment report published by the IPCC by the end of the 2000s. National governments however had second thoughts on the differences of each country's contribution to international reductions in global emissions of greenhouse gases and the costs of related investments even though it is widely recognized that emissions are needed to be reduced. Their main hesitation was about the competitive disadvantages the difference between emission allowances would possibly cause. According to their argument, developed countries are obliged to pay high costs in terms of economic and social adjustments to make significant emission reductions, while developing countries are subject to lower emissions per capita. Having said that, developing countries need to be helped financially in order to deal with the impacts of climate change in a proper way and also to adapt to those impacts.<sup>35</sup> It can therefore be said that developing countries are relying on their developed counterparts to finance a big part of their obligations to reduce emissions as they are the ones that caused the climate change with

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<sup>33</sup> Syrine Ismaili, « La lutte internationale contre le réchauffement climatique comme étant une source de dégradation des ressources marines », *op.cit.p.8*

<sup>34</sup> *Ibid* p.8

<sup>35</sup> Climate Change and Development

[https://www.soas.ac.uk/cedep-demos/000\\_P524\\_CCD\\_K3736-Demo/unit1/page\\_14.htm](https://www.soas.ac.uk/cedep-demos/000_P524_CCD_K3736-Demo/unit1/page_14.htm) (24 February 2019)

developing countries, are the most vulnerable ones to climate change while it is mainly caused by developed countries.<sup>36</sup>

However, while interest in the impacts of climate change is increasing day by day, the fight against this phenomenon remains lacking. Its application is confronted with several obstacles and mainly the lack of state will to preserve the environment, the economic interest in the short term continues to prevail. Marine resources, like all natural resources, will continue, in the current state of things, to suffer the effects of climate change with all the serious consequences that this could have not only on the elements of the environment, but also on humans.

During the initial period of climate talks, countries were divided into two different categories, “first world” countries consisted of the developed countries whereas the developing countries were in the “third world” group along with the small island states. The main difference between the developed and the developing countries was about the contribution to GHG emissions and wealth per capita. These distinctions were nevertheless not systematically applied or made explicit. Even though the developed countries had promised leadership which also meant providing financial assistance to the developing countries as the countries with economies in transition were in considerable financial difficulties. This caused a new category of countries to be created (Annex II)<sup>37</sup>. A new category comprised of developed countries which would have the obligation to provide assistance to the developing countries was then established. Only Turkey among the Annex II countries did not ratify the Climate Convention. The other acted rapidly and ratified the Convention as it did not impose any major obligation on these countries; plus, they were portrayed as leaders and not polluters. The Convention was rapidly ratified by the developing countries in order to put some pressure on the developed countries and in order to have a say in the rule-making period or because the Convention would have financial benefits for them even though they expressed their concerns in some interviews about their fears of developed countries’ preventing their development. The G77 consisted of 130 countries, whereas the non-Annex I group<sup>38</sup> consisted of 150 countries. Realizing their vulnerabilities to climate

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<sup>36</sup> Ibid

<sup>37</sup> Annex II Countries of the UNFCCC

<sup>38</sup> Annex I Countries of the UNFCCC

change impacts, small island states then established the Alliance of Small Island States in 1991. Along with the States, there were a number of NGOs present at international negotiations.<sup>39</sup>

After the failure to finalize a global agreement on emissions that has binding effects at the COP15 in Copenhagen, negotiation parties realized that another approach to the problem was needed to succeed and have more support from the international community. The main disagreement between the parties was about the level of obligations of developing countries on emission cuts. Some of the developed countries, namely the US, stressed that reductions should apply to all the countries while the developing countries had fears of having their economic development limited.<sup>40</sup>

After several failures, negotiators came up with the idea to let the parties propose their own goals whether they are high or low, with the hope that this would encourage parties to set ambitious goals within their reach.<sup>41</sup> Thanks to this strategy, foundations for a global agreement were laid at the COP 21 in Paris. During the period before the COP21, 186 countries submitted their Nationally Determined Contributions (NDC) showing their willingness to contribute to a possible agreement. After the negotiations of 195 national delegations, the parties agreed on the Paris Agreement. As the NDCs of the States' were not effective enough to reach the goal of keeping global warming under 2° C, the parties will review their pledges every 5 years in order to reach more ambitious goals. With this strategy, it was aimed to put some pressure on the parties in order for them to carry out their own pledges and to boost them over time. The agreement has a strong transparent nature based on regular reports on the countries' progress towards their goals and regular review by expert teams.<sup>42</sup>

The Paris agreement entered into force by the end of 2016 with representatives from over 80 countries just a year after it was negotiated.<sup>43</sup> Despite being rejected by the Trump administration, the agreement remains in force. Developing countries benefit from the Paris

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<sup>39</sup>Gupta, Joyeeta, A History of International Climate Change Policy, p 640

<sup>40</sup> Harris, Jonathan M., and Brian Roach. Environmental and natural resource economics: A contemporary approach. Routledge, 2017. p. 21

<sup>41</sup> Ibid

<sup>42</sup> Harris, J. M., & Roach, B. (2017). *Environmental and natural resource economics: A contemporary approach*. *Op.cit* p. 21

<sup>43</sup> The Paris Agreement is in form a protocol to the 1992 UN Framework Convention on Climate Change, with which it shares the same institutional features. It was adopted by decision of the parties to the UNFCCC and only parties to the UNFCCC may become parties to the Paris Agreement. It entered into force on 21 November 2016.

Agreement as it provides them continuing financial and technical support to help them adapt to the destructive impacts of climate changes. The Agreement also includes a support system for the developing countries during the period when they will return to renewable energy sources rather than fossil fuels. Even though it does not accept liability or provide for compensation, the agreement offers several conditions where support may be given.<sup>44</sup> Developed countries agreed to provide financial and technical aid that is worth \$100 billion a year to developing countries to fight climate change starting from 2020.<sup>45</sup>

The Paris Agreement sets out a new agenda for implementing the UNFCCC and the UN sustainable development goals post-Kyoto. Its first aim is to hold global temperature increases below 2 °C and if possible below 1.5 °C.<sup>46</sup> In order to achieve this goal, all parties are required to “prepare, communicate and maintain successive nationally determined contributions” in order to reduce greenhouse gas emissions.<sup>47</sup> It also promotes low carbon emissions development to increase adaptation and climate resilience through similar provisions on finance of the UNFCCC.<sup>48</sup>

The Paris Agreement maintains the same kind of responsibility for the parties on which the UN climate regime has been based<sup>49</sup> until now but in a very different form. What differs the Paris Agreement from the Kyoto Protocol is the fact that all parties, not just the developed countries, are expected to contribute in order to ensure that greenhouse gas emissions reach their peak as soon as possible and afterwards reduce rapidly so as to stabilize in the second half of the century. The contributions of each party have not yet been specified but will be determined by each country depending on their own capabilities. Main reasoning is to increase the reductions gradationally within a period of time “on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty”.<sup>50</sup> The process will still be led by developed states with developing states still in game of emissions reduction unlike Kyoto.

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<sup>44</sup> Ibid. p. 21

<sup>45</sup> “Adoption of the Paris Agreement” <http://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf>

<sup>46</sup> Art 2 of The Paris Agreement

<sup>47</sup> Ibid. Art. 3 and 4.

<sup>48</sup> Ibid. Arts 6, 7 and 9.

<sup>49</sup> Ibid. Preamble, 3rd recital.

<sup>50</sup> Ibid. Arts 3 and 4(3)

With a more realistic approach in Paris, developed states are no longer recognised as the sole responsible of climate change.<sup>51</sup> This is an important step in the evolution of the UN climate regime, as all the important actors share the same goal of reducing greenhouse gas emissions despite having different levels of responsibilities.<sup>52</sup> However, considering what has been done so far individually, unless States are more committed to reducing their emissions, temperatures will keep rising globally beyond 2 degrees.<sup>53</sup> The Agreement could work if those who want to influence the outcome including the human rights community, work towards the goals set by the Agreement.



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<sup>51</sup> Boyle, A. (2018). Climate Change, The Paris Agreement And Human Rights. *International and Comparative Law Quarterly*, 1–19. doi:10.1017/s0020589318000222 p. 7

<sup>52</sup> *Ibid.* p.7

<sup>53</sup> UNEP, *The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2 °C or 1.5 °C? A Preliminary Assessment* (Nairobi 2010).

## II. EVOLUTION OF HUMAN RIGHTS AND CLIMATE CHANGE POLICIES IN THE EU

### A. Climate Change Policy of The EU

#### 1. Introduction

The EU is a *sui generis* international organization with its own system and principles. European law has supremacy over national law in all member states. The EU also has the power to perform certain functions that are traditionally within the realm of sovereign states. One of the features of the EU that differs it from a state relates to the degree of competence. Rather than the comprehensive competence of a sovereign state, it only has competency to the extent that member states have granted it.<sup>54</sup> In a few areas, the member states have decided that the EU should be solely responsible for dealing with issues that may arise pertaining to a particular subject matter. But it is not the case for the field of environmental policy. In the environmental policy field, the EU shares its competences with the member states which means that both the organization and the member states can take action, be it legislative or not concerning environmental protection. Member states can act only if the EU has not done so in the related field or they can strengthen their existing measures.

According to Article 5/3 of Treaty on European Union (TEU) which explains the ‘subsidiarity’ principle states that the Union’s actions are limited and can only be possible if the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but in any case, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>55</sup> Subsidiarity restricts the Community’s scope of action in the environmental field.<sup>56</sup>

Member States of the EU have high environmental standards, evolved over decades. EU’s environment policy works in a way to help the EU economy become more environmentally friendly, protect the natural resources of Europe, and safeguard the health and wellbeing of people living in the EU. Environmental quality is of vital importance for our health, our economy and our well-being. However, it faces several serious challenges, not least those of climate change, unsustainable consumption and production, as well as various forms of pollution. With

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<sup>54</sup>Craig, Paul, and Gráinne De Búrca. EU law: text, cases, and materials. Oxford University Press, 2011. P.173

<sup>55</sup> TEU Art. 5/3

<sup>56</sup> Tillotson, J., & Foster, N. (2013). Text, cases and materials on European Union law. Routledge-Cavendish. p.53



the environmental policies and legislation of the EU, natural habitats are protected as well as the air and water quality.

Leading the way in the international area on climate change, the EU formulates and implements climate policies and strategies. It is committed to its goals and ensuring the successful implementation of the Paris Agreement and implementing the EU's Emissions Trading System (ETS).<sup>57</sup> In this regard, EU member states have agreed to meet various targets in the years to come. The EU wants to make sure that climate concerns are taken on board in other policy areas and also promotes low-carbon technologies and adaptation measures.

Climate change ranks high on Europe's political agenda and continues to be a key area of foreign policy for the EU. In fact, the EU and its member states have, for over a decade, claimed domestic and international leadership in this field. The EU has historically supported both the UNFCCC, as well as its 1997 Kyoto Protocol.<sup>58</sup> Article 3(3) Treaty on European Union (TEU) defines the objectives of the EU: "The Union (...) shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." EU environment policy is based on Articles 11 and 191-193 of the TFEU. Under Article 191, tackling climate change is explicitly shown as an objective of EU environmental policy.

Environmental policy of the EU follows a few principles which are the principles of precaution, prevention and rectifying pollution at source, and on the "polluter pays" principle. According to the precautionary principle, when human health or the environment is threatened by a risk caused by a certain action or policy, precautionary measures should be taken.<sup>59</sup> It works as a risk management tool that may be invoked when there is scientific uncertainty about a suspected risk to human health or to the environment emanating from a certain action or policy. Stopping the distribution of a product following doubts about the potentially harmful effects according to an objective scientific evaluation can be counted as a precautionary measure. Such measures have to be based on scientific evidence.

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<sup>57</sup> Harris, Paul G., ed. *Europe and global climate change: Politics, foreign policy and regional cooperation*. Edward Elgar Publishing, 2007. p.200

<sup>58</sup>Ibid. p.211

<sup>59</sup> Ibid. P.211

With the Environmental Liability Directive (ELD), the EU implemented the “polluter pays” principle which aims to establish a framework of environmental liability and to prevent and remedy environmental damage to protected species or to natural habitats, water and soil.<sup>60</sup> With the ELD the EU tried to ensure that there is remediation of damage to animals, plants, natural habitats water resources and soil damages to a reasonable cost for society. The Member States have to implement necessary measures to achieve the objective of the directive. Maintaining an EU wide environmental liability system is of particular importance as environmental protection is a global task and environmental damages do not stop at national borders, thus a uniform system for the prevention and remediation of damages must be applied at least at European level.

According to Article 191 of TFEU which defines the objectives and principles of EU environmental policy “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.”

The EU has always expressed its commitments to international efforts to tackle climate change. Through effective policy-making in Europe, it wanted to set an example. In the following part, I will thus explain how the environmental and climate change policy of the EU evolved through time.

## **2. Evolution**

As with other areas, the framework and limits of EU action are first determined by the Treaties, which define the overall context. The evolution of the legal basis of the environmental policy of the EU can be divided into 5 periods. In the first period before the 1<sup>st</sup> of July, 1987, the then EEC lacked explicit competence to adopt environmental measures, in the second period it was given such competence with the Single European Act (SEA), in the third one, Treaty of Maastricht established the EU and gave the community more competencies regarding environmental protection. The following period comes after the Treaty of Amsterdam comes into effect. The 5<sup>th</sup> and the last period is when the Lisbon Treaty came into effect.<sup>61</sup>

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<sup>60</sup>European Commission Directorate General for Environment website. <http://ec.europa.eu/environment/legal/liability/pdf/Summary%20ELD.pdf>

<sup>61</sup> Langlet, D., & Mahmoudi, S. EU environmental law and policy. Oxford University Press. 2016. P.99

As it was explained in the previous section of this chapter, the EU has a legal basis which allows and even requires it to act in the field of the environment. Global warming is not explicitly mentioned, but it is now clear that it is an essential aspect of protecting the planet. While the provisions contained in the treaty undeniably encourage action, they are obviously very general. The main framework for European action against global warming is rather defined by the various programs launched by the EU, the most important of which are the Community Action Program for the Environment and the European Program on Climate Change (ECCP).

It is especially in the 6th Action Program<sup>62</sup>, which covers the period 2001-2010, that climate change becomes a priority. Objectives and targets are then defined, and many actions are proposed, both internally and internationally. The first European program specifically dealing with climate change (PECC I)<sup>63</sup> was launched in 2000, mainly to help achieve the Kyoto targets. The ECCP also identified, assessed and implemented measures, such as the European Emissions Trading Scheme (ETS).

The fact that the EU is a big institution allows it to have significant financial resources to fight against global warming. It maintains a special environmental bureaucracy (Environment DG, about 700 employees)<sup>64</sup> and working groups in various projects on global warming. It also has the necessary resources and infrastructure to publish and disseminate information and documents. In addition, the EU has the funds to support many actions or organizations outside its institutions. The EU can also rely on other institutions that are more or less linked to it, such as the European Investment Bank, which for example funds research on global warming or promotes projects on renewable energies.

The European Environment Agency (EEA) is also a valuable relay for the EU. This EU agency, funded largely by the EU, has 32 member countries (the 27 plus Iceland, Liechtenstein, Norway, Switzerland and Turkey) and has also made global warming one of its priorities. Its main tasks are to produce independent information on the environment in order to make it available to creators of environmental policies, such as the EU and the states, as well as populations.

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<sup>62</sup> European Commission, Environment 2010 : Our Future, Our Choice, 6th EU Environment Action Programme, 2001. p. 14

<sup>63</sup> Communication from the Commission on the implementation of the 1st phase of the European Climate Change Programme. COM (2001) 580 final.

<sup>64</sup> See on the official website of the Directorate-General for Environment;  
[https://ec.europa.eu/dgs/environment/index\\_en.htm](https://ec.europa.eu/dgs/environment/index_en.htm)

The overall goal of the EU in relation to climate change is of course to minimize this phenomenon and its effects, but also to adapt as best as possible. Its goal is to improve the situation by acting on two different levels: mitigation and adaptation. The main areas on which the EU focuses its expectations and action are energy, transport, industry, agriculture and forestry.<sup>65</sup>

Regarding the first part of its action, mitigation strategies, the EU is trying to minimize the sources of global warming, namely GHGs. Its purpose is to "stabilize atmospheric concentrations of GHGs at a level that will not cause artificial variations of the climate on earth".<sup>66</sup> For this, the EU must propose and take measures to reduce its GHG emissions. Its short-term objective is to reach the targets set under the Kyoto Protocol (-8% in total for the EU-15 compared to the 1990 level), but it also aims to maintain the rise in below 2 ° C compared to the pre-industrial level.<sup>67</sup> Moreover, it is committed to reducing its emissions by at least 20% by 2020, or even 30% if a global agreement is concluded<sup>68</sup>, and it plans to save 20% more energy and more energy. increase the share of renewable energies to 20%. In the longer term, the EU wants the level of emissions in 2050 to reach 50% of the 1990 values.<sup>69</sup> On the external front, the objective of the European Union is to continue to support global emissions reduction treaties and to convince other states to act in this direction. But the EU is aware that some climate change is now unavoidable, regardless of the mitigation measures put in place. In parallel with these measures, it encourages society and the States to anticipate the expected changes in order to minimize their consequences. When the EU produces legal acts that need to be implemented or when it finances projects, climate change adaptation should be taken into account, in particular with regard to infrastructure and management planning. Space. The EU also aims to improve risk, disaster and crisis management, for example by putting in place an alert plan. It also aims to encourage research on the consequences of global warming and strategies to adapt to it, and to better inform the various

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<sup>65</sup> Langlet, D., & Mahmoudi, S. EU environmental law and policy. *op. cit.*p. 102

<sup>66</sup> European Commission, Environment 2010: Our Future, Our Choice, 6th EU Environment Action Programme. *Op. cit.* p.4

<sup>67</sup> European Commission, Limiting Global Climate Change to 2 degrees Celsius The way ahead for 2020 and beyond, COM(2007) 2 final, 2007

<sup>68</sup> European Commission, White paper - Adapting to climate change: towards a European framework for action, 2007.

<sup>69</sup> European Commission, Climate Change and the EU's response, MEMO/07/515, 2007

actors. Finally, the EU wishes to promote the development of adaptation strategies abroad, especially in developing countries.<sup>70</sup>

On a more general level, the EU has also set itself the objectives of improving the implementation of existing policies and broadening climate protection legislation. It also wants climate change considerations to be integrated into as many decisions and actions as possible, regardless of the area concerned. Research must be encouraged, whether on the phenomenon of climate change itself or on possible ways of curbing it, with particular attention to innovation and technology development. Finally, the EU wants to improve information for citizens and businesses and increase the participation of the different actors.<sup>71</sup>

To achieve these objectives, the EU makes use of different measures and instruments. The possibilities for reducing global warming and its impacts are very numerous, and the EU mixes different types of actions. Some measures are based on legislation and are therefore mandatory under the law, others are soft governance, and many actions combine these two aspects.<sup>72</sup> A first instrument that the EU uses is the production of rules of law. There is such a directive which obliges states to promote electricity from renewable energy, while the Kyoto Protocol took shape in Europe by its transposition into community law.<sup>73</sup>

A second group of measures includes market-based instruments. These are instruments such as taxes or the market for emission permits that seek, through market mechanisms, to internalize environmental costs and find the most cost-effective solutions possible. The most important European achievement in this area is the introduction of the Emissions Trading Scheme, which creates a market for CO<sub>2</sub> emissions. In concrete terms, the industries concerned receive a quota of emissions determined by the different states and validated by the EU, which they can sell or buy freely on the market according to their real needs. If at the end of a year they have emitted less CO<sub>2</sub> than the allowances allocated to it, they can sell the excess permits or keep them for

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<sup>70</sup> European Commission, White paper - Adapting to climate change: towards a European framework for action, *op. cit*

<sup>71</sup> Hässig, Léna. *La lutte contre le changement climatique en Europe: Union européenne et ONG environnementales, deux acteurs différents pour un objectif commun*. Diss. University of Geneva, 2009. p.33

<sup>72</sup> CREITARU, Ioana. "How keen of being green." *The EU Climate Change Strategy under the Lens of Multi-level Governance*. [Online] (2008): 4-116.

<sup>73</sup> Directive 2002/358/EC: Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments there under, 2002

later.<sup>74</sup> Companies thus have the choice between making changes and investments to reduce CO<sub>2</sub> production and be able to sell permits, or occur with a lot of pollution and buy emission permits. There are also other market-based instruments such as environmental taxes on certain products, subsidies in the form of loans, exemptions or aid for research<sup>75</sup>, or the three flexibility mechanisms accompanying the Kyoto Protocol.

The EU also uses various other instruments, which are not necessarily based on coercion. For example, it encourages companies to adhere to codes of conduct or to make voluntary commitments to improve their environmental performance. It also promotes renewable energies and the use of eco-labels which provide information to the consumer on the environmental cost of the product, and imposes standards, for example on the construction of new buildings. The EU therefore has a wide range of possibilities to try to improve the situation in the different areas that strongly contribute to global warming.<sup>76</sup> Measures of various kinds are often associated to face the same challenge. For example, in order to reduce CO<sub>2</sub> emissions for newly produced cars, the EU has managed to convince European, Japanese and Korean manufacturers to voluntarily commit to reducing the emissions of cars they sell in Europe. It also made it mandatory to display information on CO<sub>2</sub> consumption and CO<sub>2</sub> emissions from cars to encourage consumers to buy less greedy models, and finally proposed taxing vehicles based on their consumption.

Europe has achieved results on several aspects of climate protection. The first achievement to highlight is of course the drop in the level of GHG emissions. Between 1990 and 2005, they decreased by 7.9% in the EU-27. The 1990s saw the largest declines, while emissions increased between 2002 and 2004. For the years 2004, 2005 and 2006, the trend is again slightly down (-0.8%). In the future, the EEA predicts that with the current measures the level in 2010 will be around that of 2005 (7.5% below the 1990 rates). If the planned additional policies are implemented on time, the result could be much better: about 11% below the 1990 figures.<sup>77</sup>

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<sup>74</sup> European Environment Agency, *Greenhouse gas emission trends and projections in Europe 2006*, Luxembourg, Office for official publications of the EC, 2006.

<sup>75</sup> European Environment Agency, *Using the market for cost-effective environmental policy*, Luxembourg, Office for official publications of the EC, 2006

<sup>76</sup> See for example: European Commission, *The European climate change programme*, 2006.

<sup>77</sup> European Environment Agency, *Greenhouse Gas emission trends and projections in Europe 2007*, p.7  
[http://reports.eea.europa.eu/eea\\_report\\_2007\\_5/en/Greenhouse\\_gas\\_emission\\_trends\\_and\\_projections\\_in\\_Europe\\_2007.pdf](http://reports.eea.europa.eu/eea_report_2007_5/en/Greenhouse_gas_emission_trends_and_projections_in_Europe_2007.pdf)

The results are very different depending on the country. Most of the new Member States have reduced their greenhouse gas emissions since 1990, per capita emissions have declined on average there in larger proportions than the EU15. These GHG reductions can not be entirely attributable to EU action. Other external factors, such as the replacement of coal and oil by gas for electricity generation in Great Britain, or the restructuring of the economy in former East Germany are largely responsible for the observed fall in the 1990s.<sup>78</sup> In addition, many other actors took part in the fight against global warming, which could not have been done in particular without the contribution of Member States. However, a part of the decline in emissions has most probably come about thanks to the EU's fight against climate change, whether directly through the measures and directives put in place, or through its contribution to awareness-raising. the dangers of global warming. In this sense, reducing GHG emissions can be considered one of the EU's achievements in the area of global warming.

The implementation of consistent tools to combat global warming can be considered as a second achievement. From nothing, the EU has gradually developed and put in place a whole battery of measures and instruments against climate change. The emissions trading system is probably the most recent and most important recent achievement. If the number of permits granted was too large in the beginning, very positive consequences are expected for the period 2008-2012.<sup>79</sup>

The EU is constantly producing new rules that help to limit global warming, such as guidelines for the promotion of electricity from renewable energies (2001) or biofuels (2003).<sup>80</sup> Many other tools have of course also been developed by the EU, such as environmental taxes or voluntary agreements with certain industries. It has been mentioned that one of the objectives of the EU is to integrate environmental considerations into all policies and actions.

The EU has not only succeeded in making the environment part of the it, for example through the Environment DG, or in setting up action programs, but it has also succeeded in encouraging Member States, populations or NGOs to act. Most European countries have now developed

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<sup>78</sup> Ibid, p. 25

<sup>79</sup> Ibid, p.44

<sup>80</sup> European Commission, *Integrating environmental considerations into other policy areas- a stocktaking of the Cardiff process*, 2004.

national programs against climate change.<sup>81</sup> By encouraging and supporting all these actors, the EU has indirectly made significant progress against global warming.

Advancing knowledge about global warming and how to deal with it is also a priority for Europe, and it is actively participating in it. The EU devotes a substantial budget to environmental research, in particular under the 7th Research Framework Program. Global warming is one of four priorities for research in the environmental field, which has a total budget of nearly 2 billion euros.<sup>82</sup> The results are, of course, difficult to assess, but the many publications coming from the EU, for example, that offer simulations on the future effects of global warming or expose new instruments to combat this phenomenon, are a sign that European research is very active in this area. Disseminating information on the warming and growing awareness of people and economic actors can count as another victory for the EU. Although it is not solely responsible, the EU has contributed to the fact that global warming is now perceived by a large number of Europeans as a worrying phenomenon, against which action must be taken. In particular, it offers a large number of publications intended for various audiences (companies, specialists, children ...), and it has become a very important source of information on the subject.<sup>83</sup>

More recently, the EU has been at the forefront of international negotiations for the post-Kyoto period: for example, it has proposed a new strategy and new goals, and is fighting for a new agreement. The EU has therefore managed to move towards its goals in the fight against global warming, developing a favourable framework and using many instruments. It had established or contributed to several achievements that represent important progress in the fight against global warming. We can therefore say that its commitment to climate change is undeniable.

The EU's first goal in the fight against global warming is to reduce its GHG emissions and reach the targets set by the Kyoto Agreement. Europe of 15, the experts consider that the EU is not today on the road to success and that it will be able to achieve its objectives only if the existing measures and the additional measures planned are rapidly and fully implemented. Of course, it is not solely responsible for these results and is very dependent on the behaviour of other actors, but

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<sup>81</sup> European Environment Agency, *Europe's environment: The third assessment*, Luxembourg, Office for official publications of the EC, 2003.

<sup>82</sup> Ioana CREITARU, *How keen of being green?*, *op. cit.*, p. 58.

<sup>83</sup> *Ibid.*, p. 59



for now and even though GHG emissions have tended to decrease, the EU does not show a result if positive about this point.

Europe continues to develop environmental legislation and complies with this objective. However, it is emphasized that legislative procedures are often long and require the agreement of many players. As a result, legislation does not always evolve quickly and some overly sensitive issues tend to be left out. In addition, forces opposed to climate protection can sometimes weaken the scope of the law, as German carmakers have recently done on the question of GHG emissions from new vehicles. The EU is therefore developing its legislation well, but within the limits of its functioning as a major institution bringing together actors with different convictions and interests. With regard to the other tools, the EU has managed to build a very diverse palette and to put in place some interesting instruments, such as the emissions trading system. It should be kept in mind, however, that they are not all well developed, and some problems may have occurred, such as a poor estimate of the number of permits to be placed on the market or excessive speculation on these securities. Another objective of the Union is the integration of environmental considerations into all areas of society. The Cardiff process, supported by other strategies, has led to some concrete improvements, for example in the field of energy or agriculture.<sup>84</sup> In addition, environmental consequences are more often examined within the EU. But the Union is still far from its goal: many actors and some formations of the Council do not give any importance to this point or are limited to declarations of intention. It is more difficult to judge the effectiveness of research and the dissemination of information to the public. What is certain is that the EU is devoting resources to these areas and producing results. In the field of research, it leads about twenty important projects. Some aim to develop knowledge about warming-related processes while others study more specific issues such as the impact of transport on climate and the prospects for climate change.<sup>85</sup>

The EU therefore seems to be on the right track to achieve these two goals, disseminate information to the public and develop research. Finally, one can still point out that the EU fulfils its international commitments. The EU has therefore set itself ambitious goals, and in general

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<sup>84</sup> Platjouw, F. M. (2016). *Environmental Law and the Ecosystem Approach: Maintaining ecological integrity through consistency in law*. Routledge. p.112

<sup>85</sup> Ioana CREITARU, *How keen of being green?*, *op. cit.*, p. 58.

seems to be committed to achieving them. In most cases, much remains to be done, but overall Europe seems to be moving towards the goals pursued.<sup>86</sup>

The beginning of the European climate change policy goes back to 1989, when the international community started to be committed in the preparatory process of the Rio Summit and is preparing to start negotiations under the auspices of the United Nations in order to conclude a global convention establishing a legal framework for the organization of international cooperation in the field of climate change. In a resolution dated 21 June 1989<sup>87</sup>, the Council underlined the importance and the global dimension of the greenhouse effect and the need for the Community and the Member States to play their full part in the definition and implementation of a global response to this problem, and invited the Commission to submit their proposals concerning effective measures on the CO<sub>2</sub> problem before the end of 1990. A year later, the issue of climate change already attracted the attention of Heads of State and Government. At its Dublin meeting in June 1990, the European Council also called for the adoption of targets and strategies as soon as possible to limit greenhouse gas emissions. In response to this call, the Council, at a joint meeting of the Environment and Energy Ministers on 29 October 1990, adopted conclusions in which it was agreed that the Community and the Member States, assuming that other major countries will make similar commitments are willing to take measures to stabilize the total CO<sub>2</sub> emissions at the 1990 level throughout the Community by the year 2000. It was also stated that the Member States with relatively low energy consumption and thus low levels of emissions measured per inhabitant or other appropriate base have the right to objectives and / or strategies in relation to their economic and social development, while continuing to improve the energy efficiency of their economic activities.

These Council Conclusions, setting a common and seemingly ambitious policy objective, while refraining from clarifying the contribution of each Member State to the joint effort and leaving sufficient room for manoeuvre for national policies, laid the groundwork concerning the position of the European Community in international negotiations, enabling it to position as a key player at the forefront of the industrialized world. They also lasted for a long time as an internal policy within the EU, since they were not immediately followed by operational Community measures

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<sup>86</sup> Hässig, Léna. *La lutte contre le changement climatique en Europe: Union européenne et ONG environnementales, deux acteurs différents pour un objectif commun.* op. cit p. 40

<sup>87</sup> Council Resolution of 21 June 1989 on the greenhouse effect and the Community (89/C 183/03), p. 4.

aimed at achieving the set objective. It is true that it was originally a conditional political commitment, subject to the taking of "similar commitments" by other OECD countries. It should be noted, however, that the Commission submitted to the Council, on the eve of the Rio Conference, a highly controversial proposal for a directive introducing a tax on carbon dioxide and energy emissions<sup>88</sup> the implementation of which would have allowed the EC to initiate a significant reduction in its emissions.

The UNFCCC signed in Rio in June 1992, did not impose on developed countries a clear obligation neither to stabilize nor to reduce their greenhouse gas emissions, but rather established a legal and institutional framework for the gradual development of a more operational international regime. As a first step, the EC<sup>89</sup> and its Member States ratified this Convention without having a concrete internal Community policy. The eco-tax proposal on CO<sub>2</sub> and energy was never adopted and the Community left it up to the Member States to draw up national programs for the control of their emissions, while establishing a mechanism for the exchange of energy and leaving the coordination and leadership to the Commission. The first package of Community measures adopted on the occasion of the Community's conclusion of the UNFCCC was essentially symbolic. This package of measures included a Directive on the improvement of energy efficiency (Save), a decision on the promotion of renewable energies (Altener) and a decision creating a Community mechanism for monitoring greenhouse gas emissions. and exchange of information on the national policies of the Member States. The "Save" Directive commits Member States to establish and implement "programs" aimed at limiting carbon dioxide emissions by improving energy efficiency, particularly in areas such as energy certification of buildings, thermal insulation of new buildings, periodic inspection of boilers.<sup>90</sup>

In the preamble to this directive, the Council considers that a collective effort by all Member States, involving measures at Community level, is necessary to limit CO<sub>2</sub> emissions and to promote rational use. of energy on the one hand while adding that the measures must be defined by the Member States in accordance with the principle of subsidiarity. The Community legislature therefore did not set any quantitative targets and left the scope, scale and exact content

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<sup>88</sup> COM (1992) 226: Proposal For A Council Directive Introducing A Tax On Carbon Dioxide Emissions And Energy

<sup>89</sup> Council Decision of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (94/69/EC) p. 11.

<sup>90</sup> Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (SAVE), p. 28.

of the programs in question at the discretion of the Member States, which only report to the Commission every two years. Together with the "Save" Directive, the Council adopted the "Altener" program, a financial tool for the promotion of renewable energies<sup>91</sup> considering that a significant increase in the use of renewable energies will contribute to achieving the objective of stabilizing CO2 emissions and that, if these energies are not yet competitive, this is due to the fact that the current price system does not always fully take into account the economic cost of the main traditional sources of energy. The program refers to "Community indicative targets for renewable energies", whose overall objective is "to increase the contribution of renewable energies to the coverage of total energy demand from 4% to 8% in 2005 throughout the Community."<sup>92</sup>

In the same year, the Council also adopted a decision addressed to the Member States establishing what it describes as a "mechanism for monitoring CO2 and other greenhouse gas emissions in the Community".<sup>93</sup> This Decision transposes into Community law, without any objective of harmonization of national legislation, a number of general obligations deriving from the UNFCCC, in order to enable the Community to fulfil its obligations also as a Contracting Party to the UNFCCC. By Decision 93/389 / EEC, Member States are required to implement and communicate to the Commission 'national programs for the control of anthropogenic emissions of CO2 throughout the Community.'<sup>94</sup> in order to contribute to the stabilization of by the year 2000. They must also submit each year to the Commission a national inventory of their anthropogenic CO2 emissions, drawn up in application of a common methodology to be established by the Commission according to a comitology procedure.<sup>95</sup> Data on the emissions of other greenhouse gases must also be provided to the Commission. On the basis of this information, the Commission is given a mandate to evaluate the national programs in order to verify whether the progress achieved throughout the Community is sufficient to ensure compliance with international commitments and to report thereon to the European Parliament and to the Council.<sup>96</sup>

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<sup>91</sup> Council Decision of 13 September 1993 concerning the promotion of renewable energy sources in the Community (Altener programme) (93/500/EEC), p. 41

<sup>92</sup> Ibid, art. 1

<sup>93</sup> Council Decision of 24 June 1993 for a monitoring mechanism of Community CO2 and other greenhouse gas emissions (93/389/EEC), p. 31.

<sup>94</sup> Ibidem, art. 2/1

<sup>95</sup> Comitology Procedure

<sup>96</sup> Ibid, art. 5/3.

The issue of burden sharing<sup>97</sup> was carefully avoided until 1997 when the Kyoto Protocol was adopted.

Since the entry into force of the Framework Convention in 1994, the attention of national and Community policy makers has focused on the next phase of international negotiations, at the expense of internal implementation measures. The COP1, meeting in Berlin in April 1995, launched negotiations aimed at "strengthening" the commitments made by the developed countries Parties to the Convention "through the adoption of a protocol or other instrument which would develop "broad guidelines and measures" and set "quantified targets for limiting and reducing greenhouse gas emissions within specific timeframes".<sup>98</sup> As a key player in these negotiations, the Community was confronted with the constant need to position itself in the diplomatic game by maintaining its common position, while continuing the unfinished internal debate on the national and Community policies and measures to be implemented for reduce greenhouse gas emissions. In the work of the Council, this internal debate was always linked and virtually subordinate to the international negotiating strategy, which mobilized all political attention and served as a pretext for postponing decisions on internal policies, conditioned by the still uncertain results of the ongoing negotiations.<sup>99</sup> It was only a few months before the end of the negotiations on the Kyoto Protocol, and in order to give credibility to its negotiating position on the objectives to be set by the Protocol, the Council decided for the first time, in its conclusions of 3 March 1997, a provisional table of allocation of emission limitation and abatement efforts between Member States, together with a catalogue of policies and measures to be considered at Community and national level, making it clear that was a "negotiating position of the Community for the current negotiations (...) and not a unilateral commitment".<sup>100</sup> It only partially succeeded the exercise, since the total quantified efforts of the Member States corresponded only to an overall reduction for the EC of 10% in 2010 compared to 1990, when the Council proposed to set a target of reduction of 15% for all developed countries in the Kyoto Protocol.

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<sup>97</sup> Ibid. preamble.

<sup>98</sup> Conference of the Parties First session Berlin, 28 March - 7 April 1995 Report of the Conference of the Parties On Its First Session, Held at Berlin From 28 March to 7 April 1995, p. 4 -6.

<sup>99</sup> Pallemarts, Marc. "Le cadre international et européen des politiques de lutte contre les changements climatiques." *Courrier hebdomadaire du CRISP* 33 (2004): 5-61. P. 43

<sup>100</sup> Ibid. p.43

In the end, the Protocol adopted by the 3rd Conference of the Parties (COP 3) to the Framework Convention in Kyoto on 11 December 1997 and set a much less ambitious target for the 2008-2012 period compared to the level of emission benchmark of 1990.

The adoption of the Protocol did not mark the end of the multilateral negotiation process, which continued for many years until the adoption of the Marrakesh Accords in November 2001. Even if the Kyoto Protocol was, since it was signed in March 1998, from the point of view of international law, a treaty in due form, most of the signatory developed countries did not consider it to be "ratifiable" in the state, before the elaboration of the implementing rules which would specify the exact scope of their commitments and, above all, the ways to fulfil it. As we saw above, the negotiation of these rules proved extremely complex and difficult.<sup>101</sup>

Throughout this endless negotiating process, the international agenda continued to garner the full attention of community policymakers, who made little progress on domestic policies and measures. It is important to keep in mind, however, that the political agreement reached in the Council in June 1998 on the distribution between the Member States of the 8% overall reduction effort imposed on the then EC by the Protocol, which was even more difficult to obtain than the agreement signed in March 1997 on the sharing of a more ambitious (but conditional) reduction target of 10%. The Council's conclusions of 16 June 1998, although obviously devoid of any legal effect, are of a solemn nature by the terms used. They state that the Council "has now determined the contributions of the Member States" to the 8% reduction target, referring to "the commitment of each Member State" in a table annexed to the conclusions. They also consider from the outset the subsequent legal formalization of this burden-sharing by stipulating that the terms of the agreement will be included by the Council in its decision on the conclusion of the Protocol by the Community.<sup>102</sup> As in March 1997, the Council accompanied its political decision on the burden sharing of a reminder of "the importance of developing and implementing common and coordinated policies and measures which are a necessary contribution to enable the Community and its Member States to achieve the Kyoto target, alongside and in addition to

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<sup>101</sup> Broughton, Emma, Morgane CRÉACH, and Meike FINK. "Climat: une Union européenne affaiblie dans une politique fragmentée?." *L'Europe et le monde en 2020*, 2011., p.53

<sup>102</sup> Pallemarts, Marc. "Le cadre international et européen des politiques de lutte contre les changements climatiques." *Op.cit.* p.45

national policies and measures”.<sup>103</sup> This declaration of intent is once again followed by a list of planned measures, which will take time to materialize, as revealed by the examination of the Community measures adopted between June 1998 and November 2001, the date of the Marrakesh Accords.

The EU's proposal to move from a target of -20% to -30% of GHG emissions in 2020 in the event that an international treaty is signed in Copenhagen has not affected the negotiation process.<sup>104</sup> The leadership strategy by example should therefore not be maintained in a still weakened bargaining environment. Instead, we will see a change in the European strategy in the future. With its economic weight and relatively ambitious climate policies, the EU will remain an important player in the negotiations, but its desire to find global solutions will be less and a step-by-step approach will be favoured, accompanied by a search for bilateral coalitions, or coalitions of the willing, on specific topics. This strategy should not lead to major advances in climate policy at the international level.

If the processes of weakening the UN framework and the EU position feed one another, the same goes for the opposite processes: the EU strengthens the overall framework of which it is the biggest defender, benefiting in turn an influential position within the UN institutions. The EU must therefore become a coordinator of states and reinvent its role as a leader in climate policy. The search for bilateral coalitions on specific topics can move the negotiations forward on an ad hoc basis. The decentralization of architecture will also enable the Union to strengthen its position by creating new strategic alliances. In return, it will have to accept being more dependent on its allies, in a system of volatile coalitions.

It is strategically important for the Union that there is greater coherence between its Member States on the one hand, and between its reduction objectives and the recommendations of science on the other hand.<sup>105</sup> The EU has every interest in adopting a proactive negotiating position by offering an unconditional unilateral target of - 30% for 2020. This could contribute to a revival of the negotiations in the UN framework by establishing an atmosphere of confidence facilitating

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<sup>103</sup> Hässig, Léna. *La lutte contre le changement climatique en Europe: Union européenne et ONG environnementales, deux acteurs différents pour un objectif commun. op. cit. p.40*

<sup>104</sup> The energy climate package, adopted by the 27 EU heads of state, includes three goals for 2020: 20% increase in energy efficiency; a 20% reduction in GHG emissions, or even 30% in the case of an international agreement; proportion of 20% renewable energy in the EU's total energy consumption.

<sup>105</sup> In March 2010, proposals of developed countries varied between 13,2% and 17,8% for 2020.

the search for compromises. Europe must find a balance between positioning itself as an important player in the new forums and maintaining its commitment within the UN institutions.<sup>106</sup> To succeed in this multi-forum game, it is crucial that the energy policy of the Member States falls under Community competence and that the EU speaks with one voice, thus becoming a legitimate intermediary between the industrialized countries and the poor countries. For this, the 3.3 billion euros pledged annually by the EU<sup>107</sup> between 2010 and 2012 must be made available quickly and the Union must make a commitment to support the developing countries in their long-term adaptation efforts.

To reinvigorate the negotiations in the UN framework, the EU must not hesitate to multiply bilateral and regional agreements, particularly with the BASIC group and medium-sized emerging countries like Ecuador. The competences of the Union should enable it to invest and improve its diplomatic position: assistance to energy-intensive countries such as countries in transition, coordination of the fundraising promised in Copenhagen. The implementation of these proposals could help to get the negotiations out of the current inertia while increasing the role and influence of the EU within them.<sup>108</sup>

In its press release<sup>109</sup> published on the 28<sup>th</sup> of November, 2018, the European Commission called for a climate neutral Europe by 2050. It presented its long-term strategic vision for a prosperous, modern, competitive and climate-neutral economy by 2050. The strategy shows how Europe can lead the way in achieving climate neutrality by investing in realistic technology solutions, empowering citizens and adapting action to be implemented in key areas. such as industrial policy, finance or research, while guaranteeing the social justice necessary for a just transition. In line with the wishes expressed by the European Parliament and the European Council, the Commission's vision of a climate neutral future covers almost all EU policies and respects the

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<sup>106</sup> Kremer, M., & Müller-Kraenner, S. Europe's Green Diplomacy. Global climate governance is a test case for Europe. *Internationale Politik—Global Edition*, 2, 26-29. 2010. P.27

<sup>107</sup> Conclusions of the European Council of 10-11 December, 2009

<sup>108</sup> Broughton, Emma, Morgane CRÉACH, and Meike FINK. "Climat: une Union européenne affaiblie dans une politique fragmentée?." *Op. cit.* p.53

<sup>109</sup> European Commission - Press release The Commission calls for a climate neutral Europe by 2050. Available on: [https://europa.eu/rapid/press-release\\_IP-18-6543\\_en.htm](https://europa.eu/rapid/press-release_IP-18-6543_en.htm)



objective of the Paris Agreement to maintain the increase in the temperature of the planet well below 2 ° C and continue efforts to maintain it at 1.5 ° C.<sup>110</sup>

With this strategic call of the Commission on all EU institutions, national parliaments, businesses, non-governmental organizations, cities and communities, but also citizens, and especially young people, to commit themselves, in order for the EU to continue to play a leading role and encourage other international partners to follow suit. Through this debate, the EU aimed to adopt and present an ambitious strategy at the union level to the UNFCCC in early 2020, as foreseen by the Paris agreement. The Commission then adopted its strategic vision on 28 November 2018, right before the COP 24.

As the European action against climate change is based on a clear and comprehensive body of legislation, this regulation covers almost all European emissions and is guided by the Paris Agreement and the Union's contribution, in this context, to reduce its emissions by at least 40% by 2030.<sup>111</sup> Thus, since 2015, the European Union has revised its emissions trading scheme for the energy sector and industry and set national targets by member state for any other sector. It has, for the first time, adopted legislation on land and forest use to ensure carbon sinks and, in support of national targets, has strengthened fleet emission standards as well as the first standards for heavy goods vehicles. This is in addition to the effects of an integrated approach to the energy system. In addition to direct emissions legislation, the Union is working on the structural conditions for a lower carbon energy transition. The key elements of this system are undeniably the directives on renewable energy and energy efficiency, both supported by quantified objectives at European level. Less known, but no less important, is the electricity market legislation, whose main aim in the Commission's proposal is to allow greater penetration of renewable energy by making the electricity market more flexible and by changing its modes of operation. functioning taking into account its variability.

The European Union is also very distinct from its partners by proposing, less than three years after Paris, the legislation necessary to fulfil its commitment in terms of reducing emissions but also closed the legislative negotiations on these issues. Thus, when the Union speaks of its

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<sup>110</sup> L'action de l'UE pour lutter contre le changement climatique L'Union européenne à la tête de l'action mondiale à l'horizon 2020 et au-delà Luxembourg: Office des publications officielles des Communautés européennes 2007

<sup>111</sup> Schellekens, Pierre. "Retour sur la COP 24. L'Union européenne: vers la neutralité climatique." *Revue juridique de l'environnement* 44.1 (2019): 9-11. P.9

contribution to the Paris Agreement, these words correspond to legislative action to match its ambitions. Among the world's major economies, this remains a unique phenomenon. In addition, these legislative negotiations have allowed a de facto increase in its level of ambition. Negotiations on the Renewable Energy and Energy Efficiency Directives have resulted in agreement on higher targets than those proposed by the Commission, 32% for renewable and 32.5% for efficiency energy.<sup>112</sup>

According to the Commission's analysis, this will reduce European emissions by 45% without accounting for carbon sinks. In addition, as the world's largest economy, the European Union has begun work on its long-term 2050 strategy, with the Commission's Communication of November 2018. It plans to achieve emissions neutrality by 2050, with remaining emissions offset by carbon sinks. An ambition reflected in the IPCC special report on actions needed to limit climate change to 1.5 degrees Celsius. This European action internally allows the Union to speak with a strong and united voice at the international level as well as in the context of the UN. This commitment to ambitious global action, based on the results of the IPCC, did not stop after the Paris Agreement. The Union has remained mobilized to ensure that the framework for global action, established in Paris, is complemented by implementing rules, ensuring its effectiveness on the ground. The European Union therefore went to Katowice with a key objective: to have the Paris Agreement's implementing rules covering all areas such as transparency, financing, mitigation and adaptation approved.<sup>113</sup> Indeed, it is these rules that will determine the intrinsic quality of the Paris Agreement. On this point, the record is undeniably positive. The Katowice COP created the first-ever universal system for parties to monitor and report on progress in addressing climate change, while providing accommodations for those countries that really need it. All parties will thus be encouraged to improve their practices over time and to communicate, in comparable terms, the progress they have made. In addition to this objective, the ambition debate, grouped under the name Talanoa Dialogue, or now Katowice, aims to trigger the global assessment, ie the future evaluation of collective action. that the Union considered vital for the Paris Agreement. Here too, the results of the COP have matched the European ambition. They provide a solid basis for specifying the process. The global assessment will invite parties to regularly assess progress and the level of ambition, based on the latest available scientific data. The EU also remains

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<sup>112</sup> Ibid p.9

<sup>113</sup> Ibid p.10

committed to the collective goal of mobilizing \$100 billion a year by 2020, and by 2025, to finance climate action in developing countries from a variety of public and private sources. In 2017, the EU, its Member States and the European Investment Bank provided a total of € 20.4 billion for the financing of climate action, an increase of about 50% compared to 2012 levels. Katowice was therefore a balanced agreement, making it possible to translate the Paris Agreement into a comprehensive body of law. In this context, the European Union has played a decisive role, working in partnership with its allies in developed and developing countries and with the major economic powers, particularly China, to raise the level of ambition and strengthen global efforts. This responds to the urgent need for action by scientists in endorsing the IPCC special report on a global warming of 1.5 ° C. It is also a victory for multilateralism.

However, despite being a text acknowledging the role of human rights in tackling climate change as a result of years of advocacy by civil society organizations the latest draft of the Paris Agreement rulebook, a set of guidelines on how to put the climate accord into action, makes no references to human rights.<sup>114</sup>

## **B. Human Rights Policy of The EU**

The protection of human rights is of high importance for the EU legal order, where human rights are given a ‘foundational’ status. Initially, there were no specific place for human rights, the concept has instead developed gradually through its case law. At first, general principles of Union law provided grounds for human rights protection. With the Charter of Fundamental Rights a written bill of rights was added on in the legal order of the Union. And even before the accession by the EU, the European Convention of Human Rights has provided an external source and inspiration.<sup>115</sup>

As mentioned above, human rights protection in the EU developed through case-law. One of them is the Stork case which concerned a claim against a decision by the High Authority. Friedrich Stork, wanted the decision to be annulled as it was infringing the fundamental principles of German Constitution. It was then denied by the ECJ saying that the Court could only make a decision on the interpretation and the application of the Treaty. Since European Institutions at the

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<sup>114</sup> Jong, N. Hans. “COP24: Human Rights concerns cast a shadow over U.N. climate summit <https://news.mongabay.com/2018/12/cop24-human-rights-concerns-cast-a-shadow-over-u-n-climate-summit/> (10 December 2018)

<sup>115</sup> Schütze, R. European constitutional law. Cambridge University Press, 2012., p.445

time could only apply European laws “without regard for their validity under national law”. The ECJ then decided that it did not have the competence to judge whether fundamental rights, as described in national constitutions, were being upheld.<sup>116</sup>

The Court’s view evolved with regard to the existence of implied European fundamental rights. Even though there were no guarantees concerning the maintenance of right in European law, the Court discovered that “fundamental human rights enshrined in the general principles of European law”.<sup>117</sup> It was in 1969 that the ECJ recognized itself competent to provide protection for fundamental rights.

In another case brought to it, the ECJ stated that between the interpretations of an EU provision, the Court must apply the one that does not violate fundamental rights. It was the first time the ECJ acknowledged the existence of certain rights in the Treaty and that it has the competence to judge whether there’s an infringement of a right.<sup>118</sup> Member States had the freedom to decide how to implement the decision concretely. National courts were still, therefore, left with a choice between refusing to apply EU law and neglecting fundamental liberties enshrined in their national constitutions.<sup>119</sup> In this case, while emphasizing the concordance between EU law and established notions of fundamental rights, the CJEU did not grant these fundamental rights a structural status which would allow them to be used both as a basis for directing the actions of EU authorities and as a ground for judicial review.<sup>120</sup>

During the accession process to the ECHR, the common will for a written source regarding the protection of fundamental rights were expressed. The European Council came up with the idea of strengthening the protection of fundamental rights in Europe ‘by making those rights more visible in a Charter’. It was then declared in 2000, however, it was not binding at first. With that feature, it was similar to the ECHR, providing information without being binding. It wasn’t until the Lisbon Treaty that it finally had the same legal value as the Treaties. Since the Treaty of Lisbon entered into force, the Charter of Fundamental Rights of the European Union has the same legal situation. with the TEU and the TFEU and thus is primary EU law.

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<sup>116</sup>CJECSC, Friedrich Stork & Cie v High Authority of the European Coal and Steel Community, 1/58, 04.02.1958

<sup>117</sup> Schütze, p. 86

<sup>118</sup>CJEC, Erich Stauder v City of Ulm – Sozialamt, Case 29/69, 12.11.1969.

<sup>119</sup>Chalmers, Damian, Gareth Davies, and Giorgio Monti. European Union law: cases and materials. Cambridge university press, 2010., p.233

<sup>120</sup>Ibid., p.233

At the Nice European Council, agreement on the legal status and consequences of the Charter could not be reached. Instead, it was 'proclaimed' by the Council, the Commission and the Parliament, with its final status to be resolved by the Constitutional Treaty.<sup>121</sup> The Charter was included in Part II of the Constitutional Treaty. Following the failure of the Constitutional Treaty in 2006, the Court of Justice also began to refer to the Charter as a source of fundamental rights. The Charter was not seen as a constitutive document but a statement of rights that are seen as fundamental in the EU. This approach has been continued in Article 6(1) TEU, which states that the Union recognises the rights, freedoms and principles as set out in the Charter. The Charter was re-announced by the three EU institutions following the signing of the Lisbon Treaty.<sup>122</sup>

Since the Charter has become primary EU law, it has some functions. Like the general principles of EU law, the Charter also provides a legal basis for interpretation for both EU secondary law and national law falling within the scope of EU law. It also provides grounds to be relied upon for judicial review for EU acts that are in violation of an article of the Charter.<sup>123</sup> With more visible fundamental rights along with a single written source, the Charter is no doubt an important step in the process of European integration.<sup>124</sup>

The Lisbon Treaty changed the situation regarding the protection of human rights in the EU. Since the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union stands on an equal treatment with the TEU and the TFEU. The ECJ has pointed out that the principle document in the EU concerning human rights is the Charter of Fundamental Rights.

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<sup>121</sup> Ibid., p. 238

<sup>122</sup> Ibid., p. 238

<sup>123</sup> Lenaerts, Koen. "Exploring the limits of the EU Charter of Fundamental Rights." *European Constitutional Law Review* 8.3 (2012): 375-403, p. 376

<sup>124</sup> Ibid., p. 375

### **III. HUMAN RIGHTS AND CLIMATE CHANGE**

#### **A. Human Rights' Evolution**

In order to assess the relationship between human rights and climate change, it is important to have an understanding of what human rights are. As the subject of the thesis is limited to the relationship of human rights and climate change, human rights concept and its evolution in the international field will be explained briefly in the first part of this chapter. In the second part, the relationship between human rights and climate change will be explained, in the last part the question of whether the human rights approach to the climate crisis makes law a more effective tool in the fight against climate change will be discussed.

The concept of human rights was introduced by the United Nations with the Universal Declaration of Human Rights (UDHR) in 1948 in the world of international law after two World War experiences and violence against humans in many countries. Human rights notion, however, originates from the enlightenment era and reflects the concerns of the philosophers over the States as their focus changed from the protection of the individual by the state onto protection from the state. Economically and therefore politically more powerful bourgeois class demanded protection from the states interference along with spheres of freedom which guaranteed life and property, as well as personal freedom and the freedom to conduct certain activities.<sup>125</sup> Early documents mentioning individual rights, such as the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791) are the written sources to many of today's human rights documents. Having said this, many of these documents, when transformed into policy, excluded women, people of colour, and members of certain social, religious, economic, and political groups.<sup>126</sup>

Modern international human rights law and the establishment of the United Nations (UN) have important historical precedents. Prohibition of the slave trade and limiting the horrors of war can be given as examples. In 1919, International Labour Organisation (ILO) was established to oversee treaties protecting workers with respect to their rights, including their health and

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<sup>125</sup>Ruppel, O. C., Roschmann, C., & Ruppel-Schlichting, K. (Eds.). Climate change: international law and global governance. Nomos. 2013.p. 208

<sup>126</sup>Flowers, Nancy. A Short History of Human Rights <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm> 12 October 2018)

safety.<sup>127</sup> The idea of human rights emerged stronger after World War II especially after the termination of Nazi Germany and trials held in Nuremberg and Tokyo against officials from the defeated countries for committing war crimes, "crimes against peace," and "crimes against humanity."<sup>128</sup> Governments then committed themselves to establishing the United Nations, with the primary goal of promoting international peace and preventing conflict. People wanted to make sure that nobody would be denied life, freedom, food, shelter, and nationality. These efforts played an important role in the San Francisco meeting that drafted the United Nations Charter in 1945.<sup>129</sup> Member states of the United Nations pledged to promote respect for the human rights for all. In order to achieve this goal, the UN established a Commission on Human Rights which was given the task of drafting a document spelling out the meaning of the fundamental rights and freedoms proclaimed in the Charter.

In December 1948, 56 members of the UN adopted the UDHR. With the UDHR how a government treats its own citizens has become a matter of legitimate international concern, and not simply a domestic issue. According to the UDHR all rights are interdependent and indivisible. The influence of the UDHR has been essential since its principles have been incorporated into the constitutions of more than 185 nations which are now in the UN. Despite not being a legally binding document, the Universal Declaration has achieved the status of customary international law because people regard it "as a common standard of achievement for all people and all nations." The protection of human rights is now of pivotal importance in many modern constitutions.

As the evolution of both climate change and human rights policies in the international area and in the EU were discussed in the previous chapters, in order to avoid repetition I would now like to focus on the relationship between human rights and climate change in the next part of this chapter.

## **B. Relationship Between Human Rights And Climate Change**

Despite scientific evidence on the effects of climate change on human vulnerabilities, human rights concept has recently been receiving attention from the international community.

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<sup>127</sup>Ibid.

<sup>128</sup>Ibid.

<sup>129</sup>1945: The San Francisco Conference <https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> (15 November 2018)

Stakeholders have been discussing the relationship between human rights and climate change policies since the late 2000s. As a result, attention has been drawn on the weaknesses of human rights to tackle climate change related issues such as inefficient responsibility regimes with a complexity of attribution, second generation human rights being non-effective and the contradictions between certain imperatives for human rights and a number of climate change policy priorities.<sup>130</sup>

The consideration of human rights during the climate negotiations began shortly before the Conference of the Parties (COP) in Cancún and became clear in the COPs preceding the adoption of the Paris Agreement. While the consecration of a binding instrument with some mentions and themes relating to human rights was a milestone, it is still limited. Regardless of the normative force of human rights in the climate regime, the human rights-based approach is now interfering in certain climate disputes that are developing before national judges in order to support the demands of potential users, climatic victims.<sup>131</sup> The human rights concept has entered the climate regime, but it has undergone considerable variations regarding its scope in the face of the various interests involved in the negotiations.

The Bali Action Plan of 2007 and the failure of Copenhagen in 2009 reinforced the need to integrate human rights into the climate regime for many developing countries, international organizations and non-governmental organizations. While the discussions on these issues were still embryonic in 2009, they have progressively integrated the spheres of the negotiations. Between 2008 and 2010, some Latin American countries began to promote the human rights-based approach to climate policies under the Framework Convention by highlighting the adverse effects of clean development mechanisms (CDM) put in place. However, no state made specific proposals at the time to incorporate the human rights vocabulary into negotiation sessions before 2009. Only in the run-up to Cancún in 2010 Bolivia did some work for its integration. It is ultimately only in the Cancun Agreements of 2010 that direct and indirect references to human rights have been inserted. The Preamble to Cancún Decision 1/CP.16 makes specific reference to the 2009 Human Rights Council Resolution No. 10/4 on Human Rights and Climate Change. The

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<sup>130</sup> Directorate-General For External Policies Of The Union Directorate B Policy Department Study Human Rights And Climate Change: Eu Policy Options, European Union, 2012. P.14

<sup>131</sup> Cournil, Christel, and Camila Perruso. "Réflexions sur «l'humanisation» des changements climatiques et la «climatisation» des droits de l'Homme. Émergence et pertinence." *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux* 14 (2018).p.3



Decision also cites the United Nations Declaration on the Rights of Indigenous Peoples<sup>132</sup>, stating that this category of persons is particularly exposed to the impacts of climate change because of their way of life. The Decision focused for the first time on a provision that "Parties should fully respect human rights in all measures related to climate change".<sup>133</sup> It explicitly inscribes respect for human rights in the climate regime, in this text of secondary legislation.

At the Durban Conference in 2011, references to the "human rights" vocabulary were less precise since it merely recalled the commitment of "Parties to give due consideration to the positive and negative impacts of implementation of response measures to mitigate the effects of climate change on society and all vulnerable groups, especially women and children".<sup>134</sup> The debate on human rights has slowly moved towards the need to link human rights obligations and climate governance.

The 2012 Conference of the Parties in Doha opened the debate on the establishment of a mechanism to address the "loss and damage" associated with the impacts of climate change. Discussions around this mechanism followed proposals for financial compensation for victims of climate change and demands for the protection of climate "refugees". At the COP held in Warsaw in 2013, human rights were not, as such, included in the agenda of international climate negotiations. In 2013, most state delegations still seemed to ignore the normative scientific debate that links human rights to climate change. Human rights appear, however, punctually and indirectly, for example, in two Decisions on the Loss and Damage Mechanism by addressing the "human mobility"<sup>135</sup> aspect and the decision on gender equality<sup>136</sup>. In the face of this failure, some representatives of non-governmental organizations and States Parties reactivated their request for the integration of human rights into the Paris negotiating text.

The appointment in 2014 of Mary Robinson, former United Nations High Commissioner for Human Rights, as United Nations Special Envoy for Climate Change, has certainly helped to disseminate the human rights. It supported Costa Rica's initiative during the eighth part of the

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<sup>132</sup>Gerrard, Emily. "Climate change and human rights: issues and opportunities for indigenous peoples." UNSWLJ 31 (2008): 941., p. 941.

<sup>133</sup> Ibid p.941

<sup>134</sup>Conference of the Parties Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, FCCC/CP/2011/9/Add.1. point 90.

<sup>135</sup> Decision 2/CP.20 Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, FCCC/CP/2014/10/Add.2. p. 2-3.

<sup>136</sup> Decision 18/CP.20 Lima work programme on gender, FCCC/CP/2014/10/Add.3. pp. 42-44.

second session of the Special Working Group of the Durban Platform for Enhanced Action. Thus, on February 13, 2015, Costa Rica, joined by 17 countries, launched "Geneva's Commitment to Human Rights in Climate Action".<sup>137</sup> This non-binding commitment by 33 states marked a turning point in climate diplomacy. It has strengthened the capacity of some States to promote human rights in the climate regime and in the future agreement.

The Geneva commitment, however, did not go further than proposing "turnkey" human rights provisions to be included in the future Paris Agreement. It has established a crucial dialogue by raising the negotiators' awareness for further climate negotiations. In short, it has constituted an acceleration of human rights in climate diplomacy. In the process, one of the first drafts of the Paris 2015 negotiating text explicitly mentioned human rights on a number of occasions taking into account the categories of vulnerable people (indigenous peoples, women, children, etc.).<sup>138</sup>

The main objective of the defenders of the human rights approach was to insert direct or explicit references in the articles of the Paris Agreement. In doing so, a legal basis would have been built creating international obligations to States regarding human rights in their climate policies. The adoption of such references in a treaty would provide a greater authority and legal force than a mere mention in the decision of the Conference of the Parties of Cancún, as it is only a question of soft law whose legal significance remains debated.<sup>139</sup>

During the year 2015, in the draft negotiating text of the Paris Agreement, Article 2/2 was rewritten several times due to inter-state tensions. This autonomous provision aimed to link human rights to the main objective of the Agreement. The draft Agreement also provided for the inclusion of human rights in the context of adaptation measures in Article 4. This reference, however, was not retained in the Paris Agreement.<sup>140</sup> This absence was disappointing since in the end the Agreement contained only one reference to human rights which is in the Preamble of the Agreement in paragraph 11 as follows: "Parties should respect, promote and take into account their obligations. human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and persons in vulnerable situations

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<sup>137</sup> Geneva pledge for Human Rights in Climate Action. Available on:

<http://carbonmarketwatch.org/wp-content/uploads/2015/02/The-GenevaPledge-13FEB2015.pdf>

<sup>138</sup> Cournil, Christel, and Camila Perruso. "Réflexions sur «l'humanisation» des changements climatiques et la «climatisation» des droits de l'Homme. Émergence et pertinence." *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux* 14 (2018). p.5

<sup>139</sup> Ibid. p.6

<sup>140</sup> Ibid. p.6

and the right to development, as well as the right to gender equality, women's empowerment and intergenerational equity".<sup>141</sup> It is therefore a very minimalist insertion that has been devoted to Paris with regard to the various options proposed in the preparatory versions of the Paris Agreement. Paragraph 11 mentions "vulnerable persons" and a unique reference to migrants. This wording is far below what could be expected in terms of the protection of human mobility linked to climate change.<sup>142</sup>

In addition to the direct reference to paragraph 11 of the Preamble, there are "indirect" references, human rights-related topics or the application of human rights in the Preamble and certain articles of the Agreement. The objective of the Human Rights and Climate Change Working Group was to defend the adoption of key themes related to human rights such as the promotion of human rights, intergenerational equity, equality of gender, gender, food vulnerability, sustainable development, the eradication of poverty. They have been entered in the final text.

The procedural environmental dimension of human rights is also present in the Agreement, especially on the public participation and the transparency aspects. In addition, there are principles and concepts that guide the general philosophy of the Agreement and are related to the "human rights" themes. Thus, climate justice, intergenerational equity, are mentioned without it being really possible to determine the operational scope they will generate.

The climate issue is gradually entering the agenda of the universal system of human rights. Beyond the establishment by the UN human rights system of the contours of human rights obligations in the climate field, it is necessary to check how they can be implemented. It turns out that even if the link between "climate change and human rights" is indisputable, the demonstration of a violation of human rights obligations due to human participation in global warming is not without difficulties. In order for there to be a violation of human rights, the action or inaction of an entity with legal obligations in this area must be proven. Moreover, the link between these obligations and the inter-temporal aspect of climate change, which is consequently preventive, is not easily removed from human rights obligations.

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<sup>141</sup> Paris Agreement Preamble, 2015

<sup>142</sup> Christel CURNIL et Benoît MAYER, *Migrations environnementales, enjeux et gouvernance*, Presses Sciences Po, Bibliothèque du Citoyen, 2014, p. 166

The nature of climate change raises the question of how international human rights standards would apply to a global environmental threat. Combining a state's responsibility for greenhouse gas emissions and the violation of human rights is a difficult task when it comes to challenging a state's climate policy with respect to climate change. The major difficulty lies in establishing the causal link between anthropogenic emissions that cause climate change and its effects on the enjoyment of human rights. Added to this obstacle is the question of extraterritoriality. Human rights bodies have responded to the environmental issue within the jurisdiction of a state. The problem of climate change goes beyond national borders. The identification of a state's human rights obligations outside its territory is a sensitive issue, as evidenced by the 2005 petition to the Inter-American Commission of the Inuit People against the United States.<sup>143</sup> International human rights law is not yet adapted to provide answers to human rights violations related to environmental degradation when extraterritoriality is at stake. vertical obligations and it would be necessary to extend these obligations diagonally for those who are outside the jurisdiction of a State. Moreover, even though this issue of extraterritorial environmental obligations has recently been apprehended by the Inter-American Court of Human Rights, it has reaffirmed that the State is bound by human rights obligations only within the limits of its obligations. This possibility of seeking extraterritorial liability for environmental damage from a state, through human rights mechanisms, remains limited.<sup>144</sup>

However, some ideas can be formulated with regard to the State's obligation to cooperate, as developed by the UN Committee on Economic, Social and Cultural Rights with respect to the right to health, food and water. According to John Knox, the duty to cooperate is the most realistic basis for extending human rights jurisprudence on the environment to climate change. This is true even if the case law does not participate in attributing the responsibility of the State, but in defining the milestones for the protection of human rights in the climate regime. This obligation is based on the International Covenant on Economic, Social and Cultural Rights and the United Nations Charter, which, like the genocide, establish that certain threats to human rights must be solved on a global scale. Recognizing that states would have an obligation to cooperate on the basis of human rights to deal with climate change, the standards developed by the environmental jurisprudence of human rights, particularly those relating to participation in the

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<sup>143</sup> Cournil, Christel, and Camila Perruso *op.cit* p. 17

<sup>144</sup> *Ibid.* p.18

process of decision-making, would directly apply to States in the definition of their national contributions to reduce greenhouse gas emissions.

The apprehension of the damage is diametrically opposed between the architecture of climate regimes and human rights. While the former focuses on prevention, the second normally occurs after a breach of an obligation. International human rights law requires the identification of harm, the alleged victims and the person responsible for litigation. The climate regime focuses in particular on the prevention of harm that, even if on the basis of common but differentiated responsibilities, would be, if necessary, collective, with multiple victims, or even humanity as a whole.<sup>145</sup>

Traditionally, human rights bodies have to identify victims in order to rule on the violation of their rights. It would be only indirectly that the protection of the rights of future generations could be part of the scope of the decisions of these mechanisms and in particular through the prevention of risks of human rights damages. Thus, even if future generations are not likely to have their rights protected by a human rights control mechanism, they would benefit from the protection afforded to the present generations. The determination by the human rights protection bodies of environmental and social impact studies is an illustration of this. According to the Inter-American Court, the environmental assessment takes into account various aspects related to the protection of the environment, but its objective is, in its "social" aspect, the safeguarding of the rights of the indigenous peoples so that no exploitation permit on their territories does not imply a denial of their existence as a people.<sup>146</sup> This concern with the cultural peculiarity of the indigenous peoples of the Inter-American Court has led some judges to refer to future generations. From the cultural aspect, it would be conceivable to take into account the obligation to protect the environment in order to safeguard it for future generations.

It should not be ignored, however, that the progressive affirmation of economic, social, cultural and environmental obligations also helps to reinforce the obligations of prevention. Although the delineation of these obligations is still in its infancy, the case law of human rights bodies already recognizes their importance in the face of environmental degradation. Thus, through recognized rights and the evolving interpretation of human rights instruments, the obligation of

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<sup>145</sup> Counil, Christel, and Camila Perruso *op.cit* p.3

<sup>146</sup> *Ibid* p.18

environmental prevention is increasingly recognized as a condition for the exercise of human rights.

The capacity of treaty bodies to receive individual communications should be considered. Thus, jurisdictional and quasi-jurisdictional bodies can be a powerful tool for dealing with the adverse effects of climate change on human rights. On the one hand, because they constitute an opportunity for individuals to carry individual communications, meaning infringements of their rights before an international body.<sup>147</sup> On the other hand, because the human rights bodies could have a role to play in further defining the obligations of states in the face of the climate problem, if they were to make decisions there.

The EU on the other hand, since the adoption of the UNFCCC, has continually called for ambitious goals and pushed for the adoption of the Kyoto Protocol. Contrary to the US who has rejected the Protocol, the EU had implemented it even before it entered into force, showing its willingness to be a leader in this area. Since the entry into force of the Lisbon Treaty which gave the CFREU a binding character, human rights policy of the EU can be considered to be in the same light as it also implies the ratification by the European Union of ECHR and favours an increasing role of the European Union on the international scene.<sup>148</sup> Consequently, the main focus of European Union choices with respect to climate change and human rights relates to an internal requirement that may have external influences.<sup>149</sup>

According to the fourth report of the IPCC, human rights are seriously affected by climate. Indeed, events such as sea level rising, flooding and extreme weather events have become more frequent and their effects have become more visible. Consequently, these will affect and change the lives of people, harden the access to fresh water and food resources especially in coastal areas with high population. Climate change will also have effects on human health for people around the world.

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<sup>147</sup> Daniel BODANSKY, « Introduction Climate Change and Human Rights. Unpacking the Issue », Pour les possibilités de juridictionnalisation des changements climatiques au sein des systèmes régionaux de protection des droits de l'Homme, Ottavio QUIRICO, Systemic integration between climate change and human rights in international law ? », Netherlands Quarterly of Human Rights, 2017, vol. 35, n° 1, pp. 31-50. p.35

<sup>148</sup> Ibid p.35

<sup>149</sup> Directorate-General For External Policies Of The Union Directorate B Policy Department Study Human Rights And Climate Change:, 2012. *Op.cit* p. 12

In its fifth report that they published, the IPCC states that human rights play a bigger role as according to it, consequences of climate change on human lives are now visible to the eye and therefore it is crucial to include human rights notion in the policies concerning climate change. Inclusion of human rights has thus become an important topic in mitigation and adaptation policies.

It is now known that climate change has some serious effects on human rights. Human rights such as the rights to health, food, water, housing, self-determination and even the right to life are threatened by climate change, and there are more people and interested parties who are relying on the human rights approach in their claims against climate change and its impacts.

A range of rights and duties concerning the environment are included in environmental human rights law. Article 25(1) of the UDHR states that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing...”<sup>150</sup> Principle 1 of the Stockholm Declaration includes the following; “Man has the fundamental right to ... adequate conditions of life in an environment of a quality that permits a life of dignity...” Although, abovementioned principle does not explicitly indicate the right to a healthy environment, the reference to the right to adequate conditions of life in an environment that is safeguarded for future generations implies that a healthy environment is necessary for the enjoyment of other human rights.<sup>151</sup>

Environmental issues can affect human rights either directly or indirectly. An individual will no doubt be affected by the environment surrounding himself. That person’s ability to enjoy a specific right will be limited in the case of a poor environment.<sup>152</sup> It thus must be possible to consider environmental damages as human rights law breaches. However, for human right approach to be successful, the right has to be interpreted well and what kind of obligations the States have must be defined.<sup>153</sup> It is also worth keeping in mind that, when deciding on a matter related to climate change, decision makers are affected by other interests such as economic development. We can therefore say that there are clashing interests in some cases.

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<sup>150</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 28 July 2019]

<sup>151</sup> Ertan, İ. Mert , Early Beginnings of Environmental Protection in International Human Rights Law, 1. Basım, İstanbul: Beta Basım, 2015, p. 5

<sup>152</sup> Ibid p.5

<sup>153</sup> Ibid p.16

Even though the human rights implication of climate change became clear in the 2000s, the relationship between the two is part of a much older approach related to the awareness and its implications on human rights. Today, only a handful of international and national instruments have a direct concern with “human rights and the environment”. As mentioned in the previous chapters, after WWII, international texts on human rights aimed at protecting individuals against states, dealing primarily with individual, civil and political rights. Even though, economic and social rights then attained more recognition they are still regarded as second rank rights. As a consequent, breach of these rights don’t necessarily require effective enforcement.<sup>154</sup> Despite the amount of evidence on the effects of climate change on human rights, international policy makers continue to be disinterested in the issue. As the study of climate change began among meteorologists, the main reason for this disinterest seem to be a disciplinary path-dependence.<sup>155</sup> Human rights that have weaker protection mechanisms are mostly the ones affected by climate change.<sup>156</sup> Due to lack of institutions to enforce policies neither at national or international level, it is not very easy to establish extraterritorial responsibility.<sup>157</sup>

Under human rights law, governments have the duty to act in case of a violation of rights. Although countries that lack economic resources and infrastructure are least likely to be major emitters of greenhouse gases, they are most likely to suffer the effects of climate change of which the human rights affecting consequences will be worsened by their low capacity to adapt. Resource constraints inevitably impair a state’s ability to provide quality public goods to its population. This problem, which causes inadequate fulfilment of social and economic rights in some countries, has caused these rights to be realized progressively under international law.<sup>158</sup> If it’s not possible to hold a state accountable for not protecting a right appropriately, then it will be even harder to hold it responsible for circumstances it did not create.<sup>159</sup>

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<sup>154</sup>Directorate-General For External Policies Of The Union Directorate B Policy Department Study Human Rights And Climate Change 2012. *Op cit.* P.44

<sup>155</sup> Humphreys, Stephen, and Mary Robinson, eds. Human rights and climate change. Cambridge University Press, 2010.. P.4

<sup>156</sup> However, some human rights bodies, notably the ECHtR, have found rights violations due to environmental impacts, including of the right to health.

<sup>157</sup> Humphreys, Stephen, and Mary Robinson, eds. Human rights and climate change. *Op.cit.* P.4

<sup>158</sup> Humphreys, Stephen, and Mary Robinson, eds. Human rights and climate change. *Op.cit.* P.7

<sup>159</sup> Ibid. p.7



Apart from the written sources of law, national courts are also establishing and strengthening this relationship between human rights and the environment through case-law.<sup>160</sup> In 1994, Draft Declaration of Principles on Human Rights and the Environment was proposed by the then UN Special Rapporteur and was attached to the Special Report on "human rights and the environment."<sup>161</sup> "The right to a safe and healthy environment for the needs of present generations, without compromising the rights of future generations" was included in the draft declaration.<sup>162</sup> The effects of global environmental change on humans being very complex have made the relationship between human rights and climate change more visible at the UN level. The UNEP along with the The Office of the OHCHR organised a seminar in 2002 with the aim to establish a source comprising of different texts and relevant case law on the relationship between "human rights and the environment" which has so far been strengthened by the doctrine. It can be considered as a preliminary work as a preparation for the adoption of Resolution No. 2005/60 by the OHCHR. According to the Resolution, human rights can be affected by environmental damage in a negative way and sustainable development is necessary as it contributes to the welfare of populations.<sup>163</sup>

For more than 20 years, the UN has been committed to integrating human rights within its various activities by developing especially the approach based on the right to development. As a result of this active period, in 2003 the Human Rights Council of the UN published a resolution on the relationship between climate change and human rights which eventually pushed the OHCHR to conduct a study on this relationship. Based on the results of this study, Resolution 10/4 was adopted. In the following period, the OHCHR received feedback from states, UN agencies, NGOs as well as the European Commission who has made some valuable contributions by highlighting the few European initiatives underway on these themes through financing related projects and adopting reports concerning the climate change. Because of these various consultations, the importance and the awareness of climate change as well as its inclusion with human rights have grown.

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<sup>160</sup> Oberthür, Sebastian. The new climate policies of the European Union: internal legislation and climate diplomacy. No. 15. ASP/VUBPRESS/UPA, 2010. p. 320

<sup>161</sup> Directorate-General For External Policies Of The Union Directorate B Policy Department Study Human Rights And Climate Change: Eu Policy Options, European Union, 2012 p.78

<sup>162</sup> <https://sustainabledevelopment.un.org/milestones/unced> (12 March 2019)

<sup>163</sup> Directorate-General For External Policies Of The Union Directorate B Policy Department Study Human Rights And Climate Change: Eu Policy Options, European Union, 2012 p. 14

Human rights approach to climate change has some features of its own that distinguishes it from other perspectives the reason of this is the fact that not all human or social impacts result in having human rights related impacts. This also means that, while assessing the effects of climate change through a human rights perspective, it is important to keep in mind just because the enjoyment of a specific right is threatened or interfered does not mean that those who are supposed to be under the obligation to protect that right have violated their obligations.<sup>164</sup> The report published by the OHCHR in January 2009, it is stated that even though climate change has obvious effects for the enjoyment of human rights, it might be unclear whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.<sup>165</sup> As the OHCHR stated in its report mentioned above “adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.”<sup>166</sup>

The difficulty in measuring the specific impact of any given emission on climate change makes it impossible to sue any specific wrongdoer or any state on the grounds of human rights violations. This also applies to human rights violations under international Conventions as well as under customary law.<sup>167</sup> Under customary international law, individual compensation claims as well as claims for injunctions can only be brought if a specific emitter can be identified and a breach of customary law could possibly have occurred. In the case of climate change however, in practice many cases result in failure due to the factual problem of identifying emitters.

### **1. Human Rights Affected by Climate Change**

The most violent threat climate change poses is to life and health. Climate change does not destroy life however, by destroying human habitats it destroys the foundations of one’s livelihood and life. Due to increasing temperatures, water resources and plants are affected. People have difficulties finding food and thus starve and die. The most vulnerable and defenceless when it comes to these violations are children or indigenous peoples without lobbies. There can be no doubt that the right to life is the most basic that any person has; and it is a moral obligation for

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<sup>164</sup> McInerney-Lankford, Siobhan, Mac Darrow, and Lavanya Rajamani. Human rights and climate change: a review of the international legal dimensions. *Op.cit.*

<sup>165</sup> Knox, John H. "Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report." United Nations Human Rights Council, A/HRC/34/49 (2017).

<sup>166</sup> *Ibid.* . p35

<sup>167</sup> Ruppel, Oliver Christian, Christian Roschmann, and Katharina Ruppel-Schlichting, eds. Climate change: international law and global governance. *Op. cit.* p.234

any state to protect the lives not only of its citizens, but of every individual existing within its boundaries. Thus, there is a moral claim against states to actively protect each person from activities that can cause her/his death, and those that are more deeply affected can rightfully claim increased protection. Another human right which can be violated is the right to health. It is safe to say that the causes of death mentioned above are also causes of health prejudice when consequences of human activities reach a mitigated harmful level.<sup>168</sup> Arguably, what can be said about protection from activities that can cause death can also be said about protection from health hazards, especially since those are the same activities whose impacts are somewhat weaker. Even if one argues that, in an industrial society, prejudice to health is inevitable to a certain extent, and that the exact course of causation of each emission cannot be determined, incremental overall increases in GHG emissions can well be linked causally to health prejudice. For these reasons, every state has a moral obligation to protect human rights. What makes it difficult to assess the extent of the necessity of this protection considering that zero emissions causes zero negative consequences is that any protective measure may threaten the human rights of GHG emitters as well as those of consumers: and they, too, are entitled to the same consideration as anyone else. Further moral human rights that may be threatened are claims to secure the substances of survival, such as food, water and shelter.<sup>169</sup> These claims are being discussed as specific rights,<sup>46</sup> mainly in the sphere of legal rights. In effect, they are necessary ancillary claims to the right to life and health. Without them, life is impossible – or, in the case of the right to shelter, at least devoid of human dignity. The second sphere of freedom affected is that of enjoying personal property. Rising water levels submerge land and, thus, destroy property. Desertification caused by rising temperatures makes land useless. So do uncontrollable diseases. Human dwellings, commercial real estate and infrastructure will be destroyed or will have to be abandoned. Arable land and pastures dry up, and animals and plants die. There can be no doubt that property is the material basis of well-being and, therefore, of paramount importance to humankind, and that any state is under a moral obligation to protect it. The corresponding material basis of human life is a person's ability to earn a living. In most cases, this is done on markets. People's abilities enable them and their interests motivate them to do so. The possibility of interacting on markets gives people's lives purpose and meaning to a large extent. Seen from a macro level, that possibility is

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<sup>168</sup> Beck, G., Ditzel, C., Ganter, S., Perov, O., « Mind the gap : The discrepancy between the normative debate and actual use of human rights language in international climate negotiations », *Consilience : The Journal for Sustainable Development*, n° 2, 2015, pp. 25–45. P. 35

<sup>169</sup> *Ibid.* P.38

the essence of any economy: it secures the survival and wealth not only of countries, but of humankind as a whole. The freedom to exercise commercial activities can be violated by existing businesses being destroyed or business opportunities being frustrated through the destruction of agricultural space in the wake of climate change. These repercussions are brought about in two ways. The first entails agricultural businesses dying or shrinking. The second entails dehabitation and emigration reducing the number of potential customers for any business, whether agricultural or not. Markets simply fade away and, with them, opportunities in all lines of business. With diminishing markets, the set-back on individuals' commercial opportunities takes on a new dimension: it creates an emergent negative effect by allowing the micro level to influence the macro level. By limiting individual economic activities, the size of the economy as a whole shrinks. People get poorer. This state of the economy again influences the individual. In a shrinking economy, on average, each individual loses opportunities and wealth. As the same phenomenon influences the position of individuals and of groups (an economy being a group that consists of individuals), it should be treated as a human rights violation on both the micro and macro level. On the macro level, the phenomena described above in this section as human rights violations on the micro level present a threat to the right to prosperity or, as far as developing countries are concerned, to development (into prosperous economies). By the same token, the right to life and health and their ancillary rights to food, water and shelter can of course be – and indeed are – seen on a macro level and be named the “right to a healthy environment”, i.e. an environment that is propitious to life.<sup>170</sup>

In cases of severe environmental degradation the right to life may be threatened. Within this ambit, the right to life that is protected by many human rights treaties, is the most fundamental of them all and is a prerequisite for the enjoyment of all other human rights. Indeed, ‘[l]ife is tantamount to human existence’; it is ‘the foundation of man as a citizen and as a member of society’.<sup>171</sup> Article 6 of the ICCPR provides that every human being has the inherent right to life. According to the broad definition adopted by the Human Rights Committee, the right to life imposes positive obligations on States to protect against threats to life, including specifically

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<sup>170</sup> Beck, G., Ditzel, C., Ganter, S., Perov, O., « Mind the gap : The discrepancy between the normative debate and actual use of human rights language in international climate negotiations », *op.cit.* p. 33

<sup>171</sup>El Boudouhi, Saïda. "Christian Tomuschat, Évelyne Lagrange and Stefan Oeter (eds), *The right to life*, Leiden, Martinus Nijhoff, 2010." *Annuaire Français de Droit International* 56.1, 1006-1007. 2010. P. 100

malnutrition and epidemics.<sup>172</sup> The right to life can therefore be violated where States allow conditions to exist which present an imminent threat to life. It can thus be described as the right “to access to the means of survival; realise full life expectancy; avoid serious environmental risks to life; and enjoy protection by the State against unwarranted deprivation of life”.<sup>173</sup>

The right to life has been recognized as a legal principle since the 1776 Virginia Bill of Rights, it also has been included in national constitutions and thus become the cornerstone of all international and regional human rights instruments. The States that are parties to these instruments have committed themselves to respect, protect and fulfil the right to life for all persons within their jurisdiction. This commitment has given these states both negative and positive obligations. While States have to refrain from violating this right themselves, they also have to adopt of adequate legislative, administrative and other measures, and the provide an effective remedy in case of violation of these rights.<sup>174</sup>

The Human Rights Committee, in its General Comment on the interpretation of the scope of the right to life under Article 6 of the ICCPR, the Human Rights Committee stated that the “inherent right to life” should have a broader interpretation rather than a restrictive one. It also added that in order to protect this right, States are obliged to take positive measures.<sup>175</sup> Right to life can be directly or indirectly affected by climate change. According to its statement included in its January 2009 report on climate change and human rights, the OHCHR states that on the basis of the 2007 IPCC assessment that climate change will affect human lives directly and indirectly. In its report, the IPCC pointed out an increase in people suffering from death, disease and injury from heat waves, floods, storms, fires and droughts. Similarly, due to an increase in hunger malnutrition and related disorders impacting on child growth and development, cardio-respiratory morbidity and mortality related to ground-level ozone right to life will be affected. Climate change related disasters which already have devastating effects on people and their enjoyment of the right to life will increase, particularly in the developing world.

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<sup>172</sup> Human Rights Committee (1982) General Comment 6: Article 6 (Right to Life) UN Doc HRI/ GEN/1/Rev.9 (Vol 1) (30 April 1982)

<sup>173</sup> Stephens, Pamela. "Applying human rights norms to climate change: The elusive remedy." *Colo. J. Int'l Envtl. L. & Pol'y* 21 (2010): 49.

<sup>174</sup> Knox, John H. "Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mission to Costa Rica." United Nations Human Rights Council, A/HRC/25/53 Add 1 (2014).

<sup>175</sup> McInerney-Lankford, Siobhan, Mac Darrow, and Lavanya Rajamani. Human rights and climate change: a review of the international legal dimensions. *Op cit.* p.65

In 2009, the OHCHR report suggested that; “Human rights guaranteed in the context of climate change include: (a) adequate protection of housing from weather hazards (habitability of housing); (b) access to housing away from hazardous zones; (c) access to shelter and disaster preparedness in cases of displacement caused by extreme weather events; (d) protection of communities that are relocated away from hazardous zones, including protection against forced evictions without appropriate forms of legal or other protection, including adequate consultation with affected persons.”<sup>176</sup>

### **C. The Effects of A Human Rights-Based Approach**

One of the main questions in the debate on the human rights-based approach to climate change is whether States are required to reduce greenhouse gas emissions on the basis of their human rights obligations. According to the ICESCR, States are under the obligation to promote human rights internationally.<sup>177</sup> Every action that jeopardizes higher standards of living should therefore be considered to be against international human rights law.

Another question that need to be answered is whether States can be held responsible either individually or collectively for climate change impacts. Unfortunately, this question does not seem to have a solid answer yet as the issue of climate change litigation is an area that has not yet been fully explored.<sup>178</sup> In actions due to damages caused by climate change, human rights approach provide an accountability framework.<sup>179</sup> At this point, it is up to the human rights institutions to expand the principles for the international responsibility and liability of States concerning climate change impacts on the enjoyment of human rights. In the case of human rights, States are actually required to fulfil their obligations. And their compliances are monitored to see if they adopt necessary measures. Therefore, with the human rights approach to climate change, States would be judges by their performance in terms of obligations both at the national and international level.<sup>180</sup>

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<sup>176</sup> OHCHR 2009 Report, p. 146 Available at: [https://www.ohchr.org/Documents/Publications/I\\_OHCHR\\_Rep\\_2009\\_complete\\_final.pdf](https://www.ohchr.org/Documents/Publications/I_OHCHR_Rep_2009_complete_final.pdf)

<sup>177</sup> Art. 2 ICESCR

<sup>178</sup> Koivurova, Timo. "International legal avenues to address the plight of victims of climate change: problems and prospects." *J. Envtl. I. & Litig.* 22 (2007): 267.

<sup>179</sup> Knur, Franziska. "The United Nations Human Rights-Based approach to climate change—Introducing a human dimension to international climate law." *Climate change as a Threat to Peace* (2014): 37. p. 47

<sup>180</sup> Knox, 'Climate Change and Human Rights Law' (n 27) 209–210

Lawsuits and petitions, despite significant procedural obstacles, pave the way for further exploration of the possibilities of international climate change litigation.<sup>181</sup> As it will be explained in the last part of this chapter, the Inuit case, caused quite the publicity. Media coverage of such issues not only raise awareness but also provide the necessary environment for possible political debates between decision makers and interested NGOs. Taking into account all of these, it is up to the human rights institutions to apply a human rights based approach. They should also check on the States' compliance with their obligations.<sup>182</sup>

So far, the most promising step towards the application of human rights based approach to climate change has been the OHCHR's report on the relationship of climate change and human rights. However, even the said report has not been very effective.<sup>183</sup> The fact that there is no consensus on the degree to which it is required to compensate for greenhouse gas emissions causes States to not feel to be under the human rights obligation to reduce their emissions.

All these aside, human rights-based approach has significant benefits for the fight against climate change. One of which is that with this approach, it is possible to access international institutions. With this possibility, human rights can be discussed in a much better environment. The climate change problem would be analysed from a human rights angle.

With the connection between human rights and climate change, the nature of the obligations of States would change. General rules on climate change requires States to reduce their greenhouse gas emissions which puts them under an obligation towards other states. In the case of human rights however, an individual is entitled to a certain act or omission by a State.<sup>184</sup> It nevertheless makes it possible for individuals to take the matter to courts. It can therefore be said that human rights law could help "fill important gaps in the existing international climate change regime".<sup>185</sup>

### **1. The Benefits Of Human Rights Approach for Europe**

Along with the other problems it has caused, climate change also causes inequality as developing countries are the most vulnerable ones to the impacts of climate change despite being the least

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<sup>181</sup> Knur, Franziska. "The United Nations Human Rights-Based approach to climate change—Introducing a human dimension to international climate law." *Op. cit.* p.48

<sup>182</sup> *Ibid.* p.50

<sup>183</sup> *Ibid.* p.51

<sup>184</sup> Bodansky, Daniel. "Introduction: Climate Change and Human Rights: Unpacking the Issues." *Ga. J. Int'l & Comp. L.* 38 (2009): 511.

<sup>185</sup> Limon, Marc. "Human rights and climate change: Constructing a case for political action." *Harv. Envtl. L. Rev.* 33 (2009): 439.

responsible ones for greenhouse gas emissions. Plus, they are deprived of the benefits of industrialisation which is one of the main reasons of greenhouse gas emissions.<sup>186</sup> With its effects becoming visible and understood, climate change is becoming a human rights issue.<sup>187</sup>

During the negotiation process for the Paris Agreement, there were evident differences of opinions on the role human rights should play within climate change responses. A number of States and non-government organisations supported the idea of human rights in the text of the agreement. Even though human rights were initially included in the early drafts of the text, due to the pressure of some states it was excluded except for a single provision which urges States when taking action on climate change, to “respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations”<sup>188</sup>. This being in only in the Preamble of the Agreement, lessens the contribution of the Agreement to furthering a human rights-based approach to climate change.<sup>189</sup> However, the fact that there is a reference to existing obligations makes it possible for other international law to be applied to the challenge of climate change.

In 2016, the former Special Rapporteur published a report on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment while pointing out the potential of climate change for broad and important interferences with human right. It was also emphasized that the States should fulfil their obligations and commitments made in the Paris Agreement so as to avoid the negative human rights consequences of climate change.<sup>190</sup> With its recommendations and continuous studies, the OHCHR leads the way in monitoring the process and States’ compliance with their obligations and whether their responses are consistent with human rights standards.

Along with the OHCHR, the EU has always been very encouraged to support the fight against climate change. However, even though the environmental policy of the EU sets a good example

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<sup>186</sup> Lewis, Bridget. *Environmental Human Rights and Climate Change*. Springer, 2018. p.151

<sup>187</sup> Doelle, Meinhard. "Climate Change and Human Rights: The Role of the International Human Rights in Motivating States to Take Climate Change Seriously." *Macquarie J. Int'l & Comp. Env'tl. L.* 1 (2004): 179.

<sup>188</sup> Paris Agreement 2015, Preamble

<sup>189</sup> Savaresi, Annalisa. "The Paris Agreement: a new beginning?." *Journal of Energy & Natural Resources Law* 34.1 (2016): 16-26. P.22

<sup>190</sup> Human Rights Council (2016) Report of the Human Rights Council on its thirty-first session. UN Doc A/HRC/31/2 (22 July 2016)



in the world, it is inevitable for the implementation of an effective policy to tackle climate change to fail as there is no supranational authority to implement appropriate instruments.

As Europe has a leading role in climate negotiations, it has aimed to show the feasibility of such a strategy. In order to achieve this, the EU's climate strategy mainly focused on introducing an economically satisfactory argument to serve as a model. However, it has been shown by the climate negotiations that a collective action is particularly difficult and that finding another common denominator such as approaching the issue by placing the human being at the center of the discussions may give another dimension to the process. To achieve an effective policy, it is important to provide scientific data on the matter and communicate with the other states and the human rights standard must remain unchanging. Human rights approach and its commitment to this approach to climate change would certainly strengthen the EU's credibility internationally and consolidate its foreign policy domestically.

Although it is not easy to invoke human rights in areas of the future and hypothetical projections, this weakness can be turned into an advantage if we approach the question from another point of view. Human rights could become the standard legal instrument for determining the threshold of minimum acceptance of the impacts of climate change on the living conditions of human beings.<sup>191</sup>

While climate change is a global problem, its impacts are in fact highly differentiated according to the location of the planet. As we have seen, inequality is increasing, be it between rich and poor or between rich and poor countries. Given this situation, human rights could serve not only as an ethical reference that would translate into legal obligations, but also as an instrument for protecting those most exposed and vulnerable to the impacts of climate change.<sup>192</sup>

Many legal doctrines and procedures have evolved within the principles of human rights. For this reason, human rights can be used to support the development of a normative framework for the fight against climate change.<sup>193</sup> Many researchers see the forthcoming Copenhagen Conference, to be held in December 2009, as the keystone for creating a truly autonomous protocol after

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<sup>191</sup> International Council On Human Rights Policy, 2008, Op. cit., p. 2-3.

<sup>192</sup> Cometti, Geremia. "6. Réchauffement climatique, migrations forcées et droits de l'homme". Réchauffement climatique et migrations forcées : le cas de Tuvalu. By Cometti. Genève : Graduate Institute Publications, 2010. Web. <<http://books.openedition.org/iheid/214>>.

<sup>193</sup> International Council On Human Rights Policy, 2008, Op. cit., p. 8.

Kyoto, able to address the problem without going through the human rights instruments. But this is far from being achieved and that is why countries like the Maldives prefer to take the "human rights path". Indeed, it has the merit of raising awareness of international public opinion and structure the debate.

## **2. Case-Law Related to Climate Change and Human Rights**

As part of a contentious civil society strategy, new types of appeal have been lodged with national courts, drawing a bit more the contours of climate justice for the general public. Indeed, this national litigation begins to be known by developing in several places of the world. This is in addition to the already existing major climate litigation, bringing together actions in liability against companies and actions brought by companies against climate regulation. Human rights NGOs, environmental NGOs and citizens are joining forces to launch national contentious actions using human rights as a weapon of resistance.<sup>194</sup>

Recent work has shown that in the main Climate Change Public Interest Litigation cases, a significant space is made for arguments relating to "fundamental rights" or "human rights" in the applicants' repertoires of actions. They occupy an important place especially to justify the protection of the individuals impacted by climate change, the interest to act and the quality of victim in the requests.

Two petitions from Indigenous peoples in the Arctic to the Inter-American Commission on Human Rights directly addressed the violation of human rights due to greenhouse gas emissions. Based on the obligations that flow from the environmental issues previously decided by the inter-American system, the Inuit and Athabaskan peoples were the first to ask a quasi-judicial body to make the link between climate change and the violation of human rights.<sup>195</sup>

The first petition of December 7, 2005, submitted on behalf of the Inuit people against the United States, was not found admissible in the inter-American context. Little information regarding non-admissibility is available. However, the rejection would be based on the lack of a causal link between greenhouse gas emissions from the United States being the origin of the violation of the

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<sup>194</sup>Kaswan, Alice. "The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives." *USFL Rev.* 42 (2007): 39. P.77

<sup>195</sup> Inuit Circumpolar Conference, Petition to the Inter American Commission on Human Rights seeking relief from Violations resulting from Global Warming caused by Acts and Omissions of The United States. (Dec. 7, 2005), available at [http://www.earthjustice.org/library/legal\\_docs/petition-to-the-inter-americancommission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf](http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-americancommission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf). The Petition number is N° P-1413- 05.

rights of a people in the Arctic. The extraterritorial element would also be one of the reasons that prevented the Inter-American Commission from hearing the case, since the petition was also brought by the Inuit people of Canada against the United States. Since that petition of 2005, the inter-American system has consolidated its jurisprudence on the rights of indigenous peoples and the environment. The latter have an intrinsic relationship with their environment, and the threats to their territories due to environmental degradation run counter to their ability to develop their traditional way of life. Thus, the second petition, presented to the quasi-judicial inter-American body on April 23, 2013 by the Athabaskan people against Canada, although still pending, could have a favourable outcome in view of the development of case law of this regional system, unless it is settled amicably.

It is hoped, however, that the Commission will draw on the recent Advisory Opinion issued by the Inter-American Court in 2018 to hear this second petition. Indeed, the San José jurisdiction considers that the environment must be protected under the American Convention, given its interdependence with human rights. In addition to specifying the scope of environmental obligations under the Convention, the Court must consider climate change as an environmental factor to be part of that protection.<sup>196</sup>

In the case of *Urgenda v The Netherlands*, in which the complainant used human rights principles to give content to the Dutch government's duty of care for its citizens. In the case, a Dutch environmental group called the Urgenda Foundation along with 900 Dutch citizens sued the Dutch government for its inaction against climate change. The regional court in the Hague ordered the State of Netherlands reduce their greenhouse gas emissions and ruled that the government's existing pledge to reduce emissions was not sufficient to meet the state's contribution toward the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions. The court decided that the state has the duty to take necessary measures and that the rights were in fact breached by a failure to adopt adequate policies on climate change.<sup>197</sup> The Court made reference to Article 191 TFEU which contains the environmental objectives of the EU and stated that "In order to implement its environmental

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<sup>196</sup> Cournil, Christel, and Camila Perruso. "Réflexions sur «l'humanisation» des changements climatiques et la «climatisation» des droits de l'Homme. Émergence et pertinence." *Op. cit.* p.20

<sup>197</sup> *Urgenda Foundation v The State of The Netherlands* Case No: HAZA C/09/00456689

policy, the EU has established many directives, including the so-called 2003 ETS Directive<sup>198</sup>, subsequently amended. When the ETS Directive was amended in 2009, the European Council communicated its objective of achieving “an overall reduction of more than 20%, in particular in view of the European Council’s objective of a 30% reduction by 2020, which is considered scientifically necessary to avoid dangerous climate change (...) that the Netherlands will have to achieve an emission reduction of 16% relative to 2005.... Based on this, the Court is of the opinion that the State fails to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020.”<sup>199</sup>

In a similar case<sup>200</sup> the UN Special Rapporteur on Human Rights and Environment, drew attention to Ireland’s clear, positive and enforceable obligations to protect its citizens against the infringement of human rights caused by climate change. He concluded his statement by saying that the Government of Ireland “must reduce emissions as rapidly as possible, applying the maximum available resources”.<sup>201</sup> As these human rights-based approaches to climate change litigation are drawing more attention, it is expected that more relevant parties will benefit from the human rights approach and human rights law in such a manner.<sup>202</sup>

Filed on October 25, 2016, the Swiss case<sup>203</sup> is part of this contentious strategy of reinterpreting the "climate" of fundamental rights in order to assess the lack of ambition of the public authorities and its consequences on a group of vulnerable populations. In the present case, the applicants ask the judge to assess the public action with regard to the respect for the right to life and health of a particularly vulnerable and vulnerable population group: women of a certain age (the "Grandmothers") whose health is more strongly impacted than that of the rest of the population during periods of heat exacerbated by global warming. The Belgian association *Klimatzaak* also provided an argument based on the articles of the ECHR coupled with the

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<sup>198</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC

<sup>199</sup> *Urgenda v The Netherlands. Op.cit*

<sup>200</sup> *Friends of the Irish Environment CLG v the Government of Ireland* 2017 No. 201 JR

<sup>201</sup> Statement on the human rights obligations related to climate change, with a particular focus on the right to life | David R. Boyd, UN Special Rapporteur on Human Rights and Environment October 25, 2018. p. 13

<sup>202</sup> Lewis, Bridget. *Environmental Human Rights and Climate Change. Op.cit* p.6

<sup>203</sup> *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council* Judgment A-2992/2017 of 27 November 2018

constitutional obligations. The remedy is built on the negligence of the state, and particularly on the obligation to protect the lives of citizens and to inform them of dangerous situations.<sup>204</sup>

Constitutional arguments have a more and more consistent place in petitions.<sup>205</sup> The year 2017 offered two major disputes in South Africa and in Austria on public decisions authorizing projects impacting the climate by their emission of greenhouse gases on the basis of arguments of constitutional fundamental rights. In the South African decision, the judge states that Article 24 of the Constitution emphasizes the conciliation between the environment and development. Socio-economic environmental considerations need to balance to achieve sustainable development. The judge concludes that "sustainable development is integrally linked to the principle of intergenerational justice which obliges the State to take reasonable measures to protect the environment for present and future generations (...)".<sup>206</sup>

In the United States, the NGO called "Our Children's Trust" has sought to renew the climate action strategy by feeding its appeals or those it coordinates, allegations demonstrating the infringements of the human rights of future generations and by linking the Doctrine of the Public Trust. In the case of *Juliana v. the United States of America* 21 youth filed an appeal in the Oregon District Court in 2015 against the federal government for lack of protection from its climate policy. The complainants raise serious omissions that violate their fundamental rights. The young people invoked, on the one hand, the violation of the Constitution, including a series of fundamental rights, such as the right to life, liberty, health and property and on the other, the doctrine of the Public Trust. In November 2016, Ann Aiken, the Oregon District Judge, on the basis of a dynamic interpretation of the Constitution, upheld the applicants' allegations of violation of a fundamental right by the public authorities who have their share of responsibility in causing the current climate crisis. The stake of this judgment is thus crucial in the United States for the continuation of the contentious climate and also for the consideration of the climatic changes like stake of the human rights.<sup>207</sup>

Another very interesting decision was issued by the Supreme Court of Colombia on April 5, 2018. The request of a group of 25 children and young adults living in areas of risk raised that the

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<sup>204</sup> Cournil, Christel, and Camila Perruso. "Réflexions sur «l'humanisation» des changements climatiques et la «climatisation» des droits de l'Homme. Émergence et pertinence." *Op.cit.* p. 9

<sup>205</sup> *Ibid.* p.9

<sup>206</sup> *Ibid.* p.9

<sup>207</sup> *Ibid.* p.10

Colombian State did not respect its commitments in terms of climate. They claimed the status of future generations as they will suffer the adverse consequences of climate change in the years to come. By invoking an ethical duty of intergenerational solidarity and the intrinsic value of nature as the basis of the environmental rights of future generations, the Supreme Court has analyzed the failure of the Colombian State to fulfill its international commitments under the of the Paris Agreement to reduce Amazon deforestation. It has granted the Colombian Amazon legal personality for effective protection of this ecosystem, considered essential for Colombia and for humanity. This measure reinforces the need for the government to put in place all measures to counter deforestation and hence climate change. It then orders that the government, the president and local municipalities, create and implement a plan of action to stop deforestation in the Amazon. It requires local municipalities to update their land management plans to include measures to address climate impacts. This judgment sets a precedent for climate litigation that combines the protection of the fundamental rights of future generations and elements of nature as a subject of law, which can inspire the development of the arguments of climate disputes at the national level and perhaps beyond.

## CONCLUSION

As examined in the research, climate change has significant effects on the enjoyment of human rights. As a consequence of climate change, in some areas of the world, people are forced to resettle and therefore leave their homes and lives behind. Human rights is now also considered as a part of environmental policies in several international texts. However, it is not sufficient and still has a long way to go.

Adding a human factor to the climate crisis would embody the problem and draw more attention in the international area. Also, human rights law being more developed could provide the necessary framework in order to establish new and more effective climate change policies. Climate change obligations are mostly regarded as political negotiations and are seen as voluntary targets while the obligations derived from human rights law put States under pressure as there are sanctions in case of a breach. Therefore, acknowledging the climate change problem as a human rights-related matter would provide the necessary environment and possibilities such as severe problem needs. Approaching the problem from a human rights point of view, transforms the problem into a matter of international area rather than a political one.

As mentioned above, existing human rights institutions could be of help in monitoring the compliance of states. Climate change is such a big problem that the every second the policy makers delay making efficient policies, they steal from the future generations. It is therefore necessary to consider the matter as a human rights problem rather than an obligation that will probably not be fulfilled by the States.

With the recent case law related to climate change, it is shown that in some circumstances, States can be held accountable for their inaction or insufficient action with regard to their climate change obligations. However, there is still a long way to go. The more the climate change is seen as a human rights matter, the more power law will have as a tool in the fight against climate change.

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