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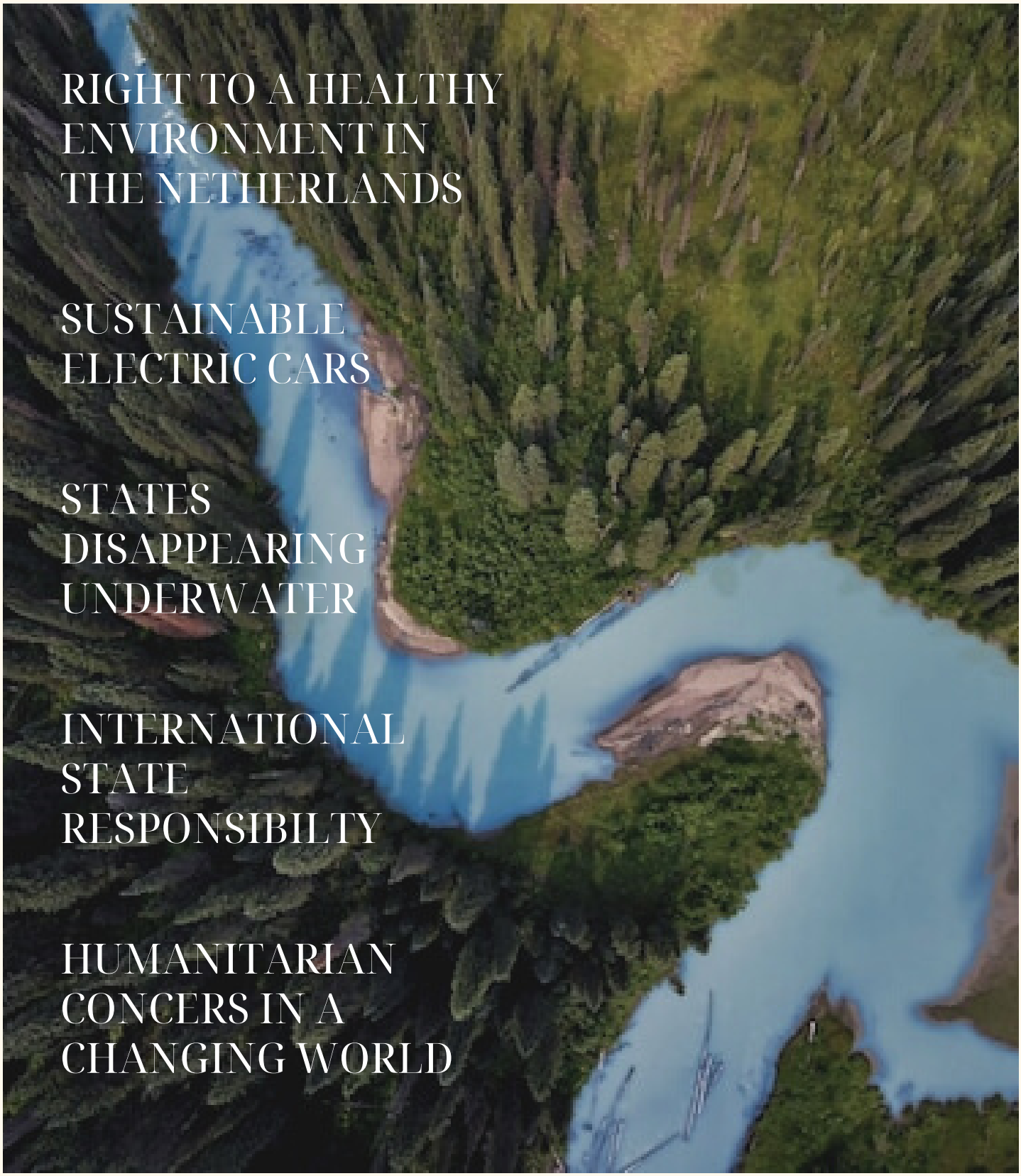
CLIMATE CHANGE AND ENVIRONMENTAL LAW



RIGHT TO A HEALTHY ENVIRONMENT IN THE NETHERLANDS

SUSTAINABLE ELECTRIC CARS

STATES DISAPPEARING UNDERWATER

INTERNATIONAL STATE RESPONSIBILTY

HUMANITARIAN CONCERS IN A CHANGING WORLD

OUR TEAM

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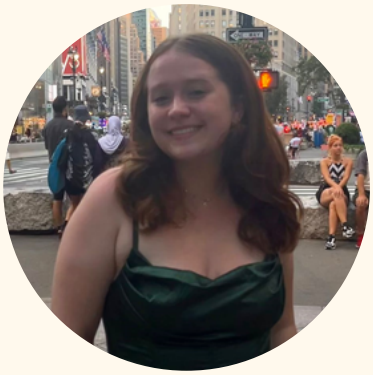

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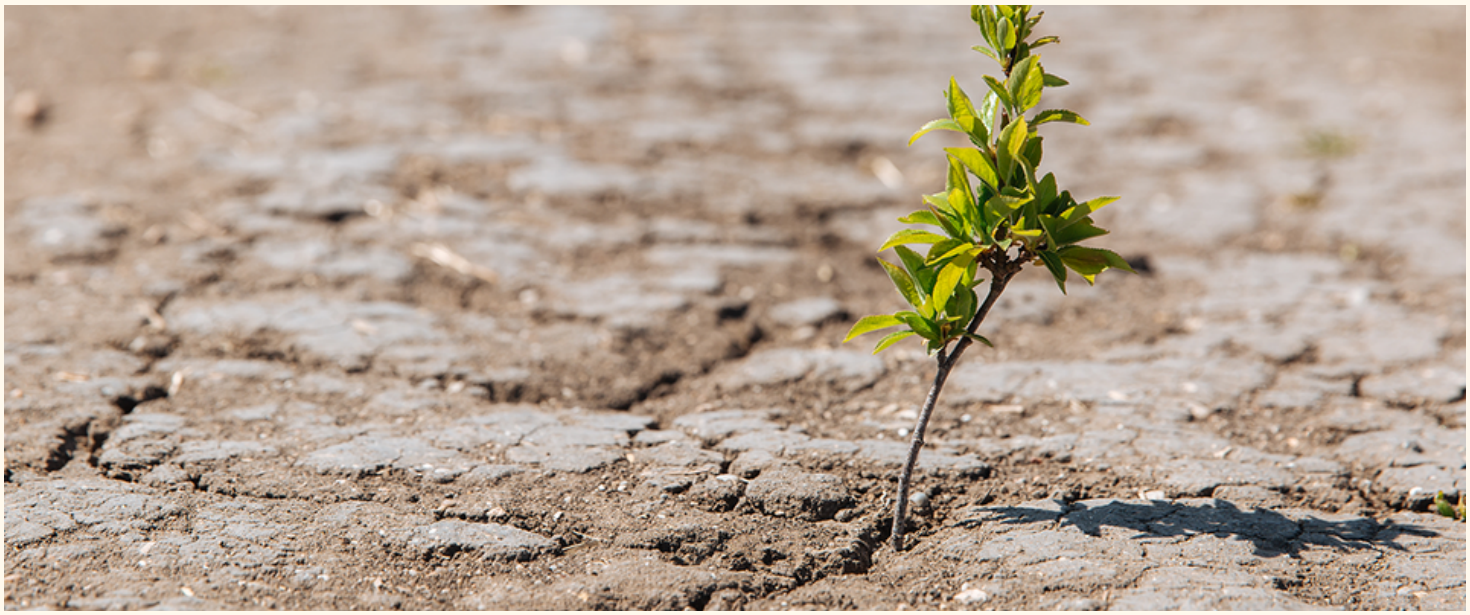
EDITOR'S NOTE

Law is an ever-evolving organism. As new challenges arise – it adapts. Climate change is not merely another conundrum to be solved; rather, it brings about a tsunami of legal problems spanning virtually all areas of law, exposing lacunas deep like the Mariana Trench.

In this issue, we will take a closer look at a few legal challenges posed by climate change. We will start by investigating the axis between climate change and humanitarian concerns. We will analyse pressing legal challenges posed by the effects of climate change, including state liability and the evolving notion of statehood. We will also argue for the inclusion of the right to a healthy environment in the Dutch legal regime. Lastly, we will examine how law can be utilised to accelerate the green transition by ensuring sustainability of electric transportation.

Above all, we hope to raise awareness of the multifaceted issues the environment – and humanity at large – are facing. Our generation has the power to slow down, if not stop, climate change. As law students, we have the knowledge to, one day, shape policies. If we use our skills for a good cause, together we have a chance in the fight for a better, greener tomorrow.

Martyna Hanak, Editor-in-Chief



THE HUMAN DIMENSION OF CLIMATE CHANGE

CLIMATE CHANGE THROUGH HUMANITARIAN LENSES

BY LIA SURU

"*The climate crisis is the biggest threat to our survival as a species and is already threatening human rights around the world*" - the UN

The shifts in temperature caused by greenhouse gas emissions due to human activity contribute to the collapse of ecosystems. Thus, our rights and freedoms will become limited in time. The question is what can we do about it?

Climate Refugees

According to UNEP expert Essam El-Hinnawi the term "climate refugees" defines people who have been "forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption". However, these migrants are not recognised as refugees by the 1951 Geneva Convention Relating to the Status of Refugees for protecting against violence, war, or fleeing persecution. This issue has not been resolved due to expert concerns that including protection for climate refugees in international law would diminish the safety of existing refugees.

The UN Refugee agency already struggles to aid the 22.5 million existing ones.

Nevertheless, many studies assert that there will be 200 million environmental migrants by 2050. Ergo, regardless of how difficult it may be, organizations advocating human rights must acknowledge the urgency of this matter and start devising strategies to protect all.

The acceptance of immigrants has been one of the most controversial issues in Western societies in recent years. However, this is not a matter of preference anymore, it is a matter of life and death which forces us to set aside our differences and misconceptions, and act in favour of fellow human beings. Acceptance is the first step.

Reproductive Choice

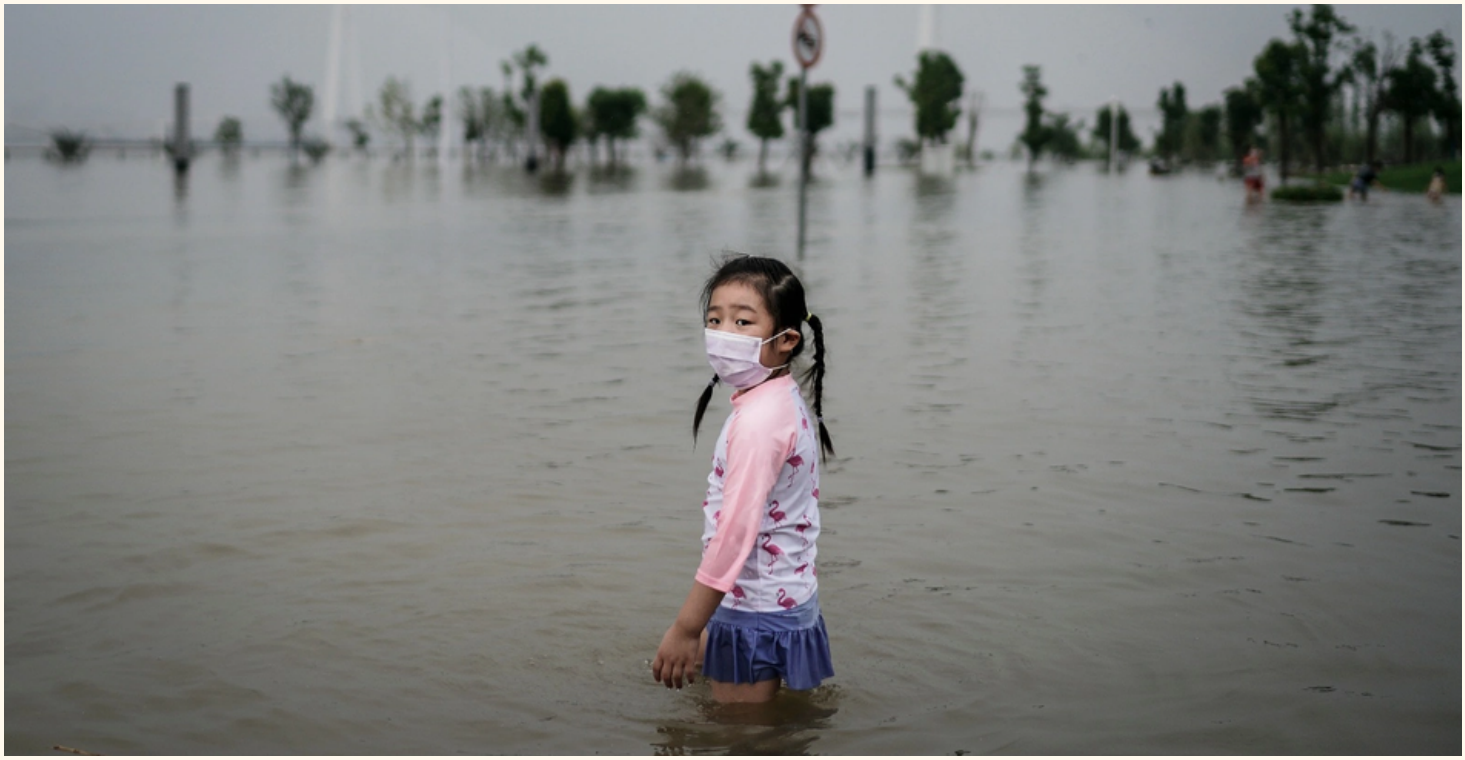
Most women who do not have access to prevent unintended pregnancies come from climate-affected countries. According to MSI Reproductive Choice, 11.5 women lost access to contraceptive methods due to climate-related disruption. Furthermore, one in five women and girls report experiencing sexual violence, thus increasing the need for sexual and reproductive care. MSI further estimates that unless these women are given protection, around 6.2 million unwanted pregnancies, 2.1 unsafe abortions, and 5800 maternal deaths will happen.

This will not only lead to an increase in population but also one in refugees and an infringement on human rights. With reproductive choice, women will be given a better chance of survival as well as a chance to complete their education and build a career and therefore the possibility to also find climate solutions.

Right to Health

Air pollution in urban areas continues to impact the health of more and more citizens every day. WHO attests that 99% of the population breathes highly contaminated air, with low and middle-income countries being the most affected. In New Delhi, the world's most polluted city, 40% of children suffer from lung conditions. The most powerful pollutants are greenhouse gas emissions, therefore complying with and developing new combat policies can help protect the population's right to health. We need to refrain from putting our comfort first and start using public transport and other sustainable means.

Furthermore, extremely warm or cold temperatures increase the risk of acquiring diseases by prolonging the season for infectious illnesses and causing respiratory problems, heat exhaustion, or strokes.



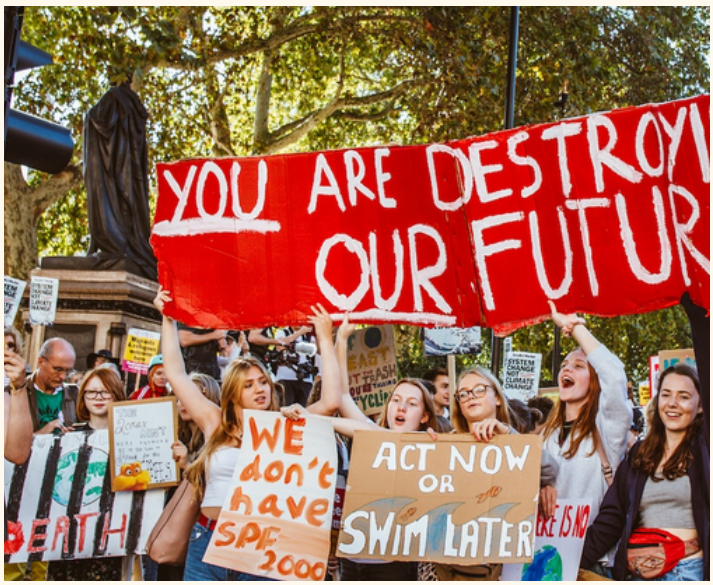
Right to Food

The temperature increase due to climate change poses a serious threat to agricultural output. Experts state that there will be a 60% increase in the need for food by 2050. Declines in production will cause prices to strike and therefore increase the risk of malnutrition.

What's more, ocean temperatures are said to rise by 1-4% by 2100, affecting not only marine life but fish stocks and the absorption of greenhouse gas emissions as well. 83% of the carbon cycle is circulated through large expanses of sea, therefore making it vital to manage them in a sustainable way. Effective monitoring and management of fisheries could reduce the negative impact on the environment and display that is possible to level economic and environmental priorities in order to safeguard oceans and seafood supplies.

Impact on Work Environments

Working conditions will be adversely affected by climate change disasters and the need to adapt will only become more pressing. Adaptation includes hiring practices, meeting customer demand, supplying skills, finding human capital resources, and stimulating productivity. Thus, preserving workplace cultures and values, organisational structures, and getting ahead of these issues through safety protocols has become crucial.



Conclusion

As individuals and global citizens, we have as much responsibility as an international organisation does in preserving the environment and aiding each other. We need to first acknowledge how rapidly our needs and duties are going to change and develop and take a step toward our future.

In addition to organisations, world governments must step up in developing policies and guidelines to prevent or at least prepare for upcoming disasters or unfortunate events caused by climate change. They also need to acknowledge the danger faced by climate refugees, the importance of investing in both physical and mental health programmes, encourage volunteering for disaster relief organizations and provide incentives for green transportation. Collective effort plays a crucial role in our survival.

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CLIMATE HOMELESSNESS

HOW RISING SEA LEVELS CALL FOR THE REFORM OF STATEHOOD

BY MARTYNA HANAK

As global temperatures continue to increase, sea levels rise year by year. The ocean begins to knock on humanity's door, claiming more and more land.

Small island developing states (SIDS), located mainly in the Pacific and the Caribbean, are among its first victims. According to scientists, the likes of Tuvalu, Kiribati and the Marshal Islands will disappear within the next century, engulfed by the invincible force that is water.

Mitigation and adaptation efforts, however necessary, might be merely postponing the inevitable. With an aggregate population of 65 million, the inundation of the SIDS will see a mass exodus of a scale far greater than any climate-induced migration to date. Where will the refugees go? The policymakers are already trying to conceive of ambitious relocation plans; the matter was recognised in the 2030 Sustainable Development Goals.

For lawyers, on the other hand, this opens a whole other Pandora's box.

The ILC recently began an inquiry, setting up a study group on 'Sea-level rise and International Law', acknowledging that "*more than 70 States are or are likely to be directly affected by sea-level rise, a group which represents more than one-third of the States of the international community.*"[1] The group will continue its work, hopeful to solve unprecedented legal problems, among them – what happens to the state whose territory fell victim to climate change?

The notion of state

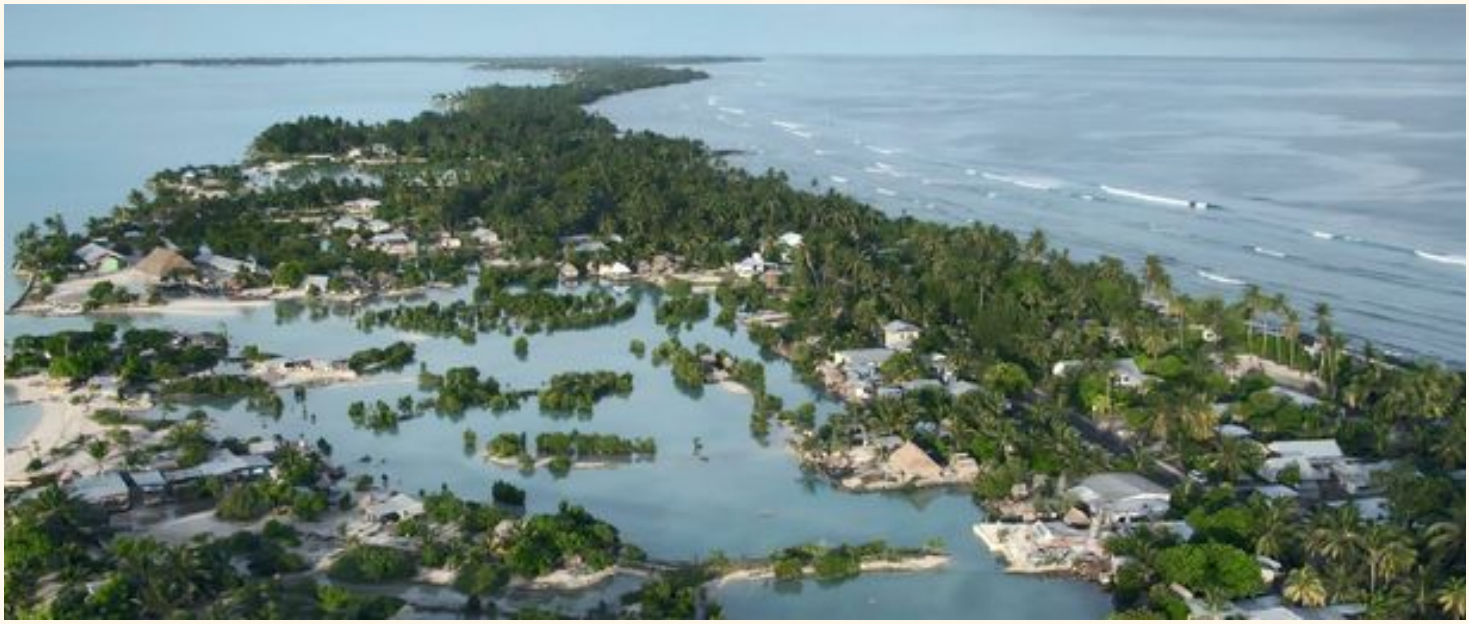
The discussion on sinking islands raises quasi-philosophical questions of what constitutes a nation in the first place – is it the place or the people? Law doesn't ponder, however, law demands answers. In international law statehood is governed by the Montevideo Convention on the Rights and Duties of States, which includes the most

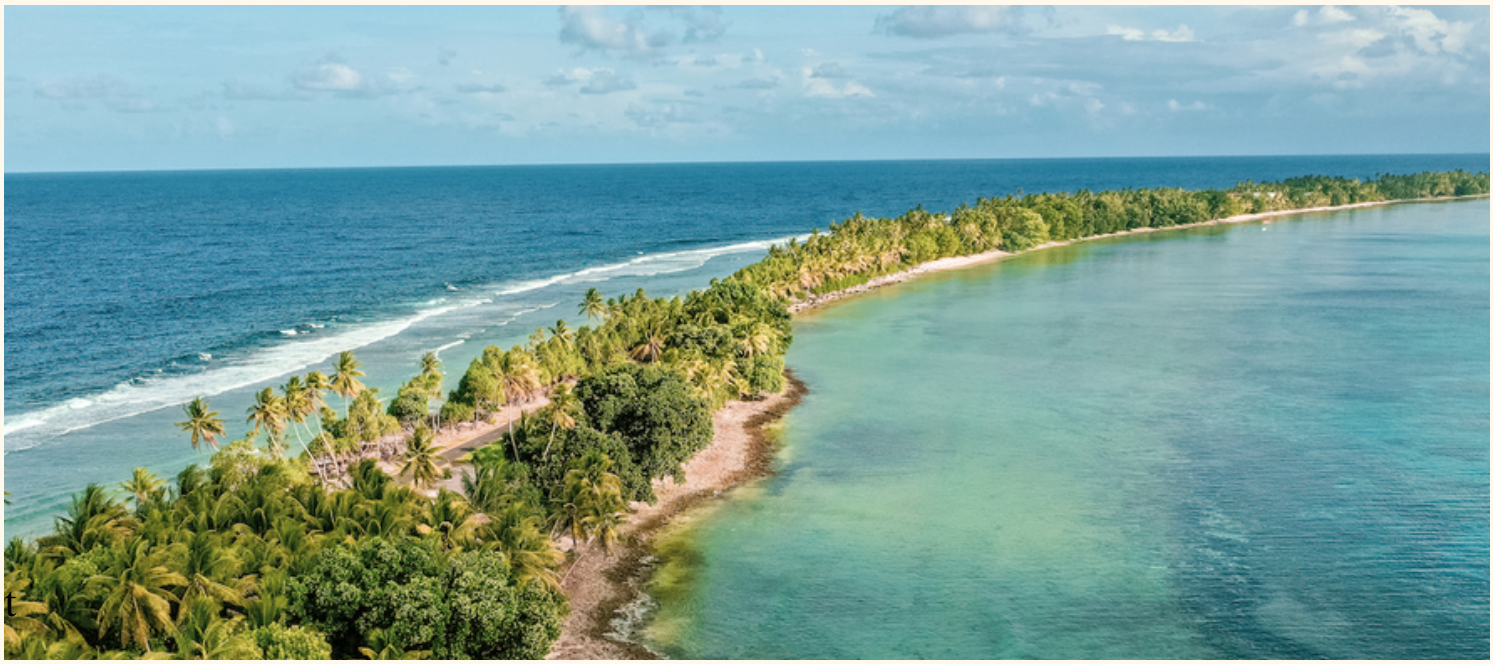
universally accepted, albeit not the only one, the definition of a state. Albeit signed at the International Conference of America States, it codifies already existing customary international law and is widely recognised as the primary regime. Under the Convention, statehood entails "*a permanent population; a defined territory; government; and capacity to enter into relations with other states.*"[2] The loss of a government is not a novelty; in the past, certain states with governments in exile have been able to retain their status despite not meeting all the criteria. Could the same apply if a state becomes devoid of its population or territory? There exists case law, dating back over a hundred years, that would indicate the contrary;[3] its relevance today, however, can be put into question. The notion of a state has evolved over time as questions of self-determination became ever more relevant.[4]

While the ICJ confirmed that the existence of fully delimited territory is not a requirement of statehood,[5] this applies only for as long as the waves continue to consume the land piece by piece. What happens when the ocean finally devours the last stone?

The drafting parties envisaged scenarios where one country is conquered by another or when a nation splits into two due to separatist movements. However, these scenarios all predict the merely political shifting of the borders like in the computer game of *Civilization*. A state literally submerged by the ocean was a vision so outlandish it could only belong in a sci-fi novel, not a legal document.

The aforementioned ILC Report identified several burning questions which inevitably arise in regards to statehood, including the possibility of a transfer of another state's territory





for the benefit of the ‘sinking’ nation, or a merger between the two.[6]

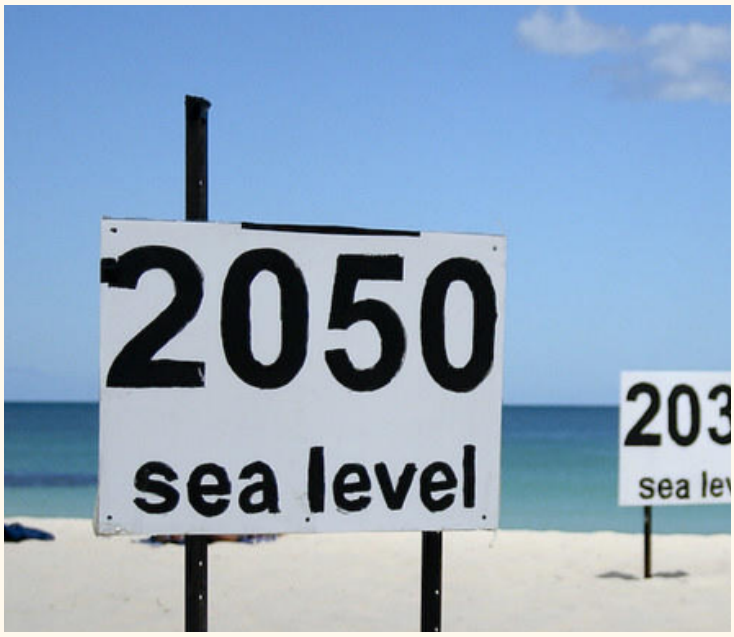
Despite an entire legal regime in place, it appears that it failed to develop an adequate framework to address the statelessness question, whichever the cause thereof.

New islands, new solutions

In an ideal world, one governed by sheer feelings of brotherhood and goodwill, other countries could opt to cede a part of their lands to the disappearing states. In reality, purchase of foreign land is a more feasible option. Indeed, Kiribati acquired some 20 square kilometres from Fiji. Nevertheless, a large-scale ‘market’ for national territories is unlikely.[7]

Certain islands already began intense mitigation efforts. Maldives, for instance, is building an artificial island ready to welcome relocating Maldivians.[8] The idea of artificial islands appears at the forefront of the discussion. While extremely expensive and technically challenging, this is not an impossible venture. However, it entails numerous legal difficulties. For instance, artificially-created islands don’t possess the status of an island for the purposes of the UN Convention on the Law of the Sea (UNCLOS).[9] While it doesn’t necessarily have a bearing on whether artificial islands constitute ‘territory’ for the purposes of the Montevideo criteria,[10] it remains relevant because UNCLOS determines the existence of maritime zones. For instance, at present Tuvalu enjoys a 12-nautical miles territorial sea, 24-nm contiguous zone, and 200-nm exclusive economic zone. A hypothetical artificial version of Tuvalu, erected in the exact same location, might lose rights to it all.

Even if an artificial island met all the prerequisites for territoriality, this cannot be the only viable solution. The SIDS tend to be economically underdeveloped and couldn't possibly afford it unaided.



Even if the richer nations chose to fund the projects, riddled with guilt for driving climate change in the first place, it is hardly conceivable that all the islands at risk will be rebuilt in just two or three decades.

The most realistic option appears to be the newly-minted notion of a state ex-situ. It would retain its sovereignty as a political entity, while its nationals migrate overseas.[11] A promising alternative, it would nonetheless require fundamental changes in international law and its approach to statehood.[12] Recognition of the newly created state by the international community will be a starting point.

Ultimately, a formal amendment of the Montevideo Convention might be necessary – or perhaps, the adoption of a new legal document altogether.

A meta-state?

Recently, an avant-garde idea reached the headlines. In a desperate attempt to preserve its statehood, Tuvalu announced its plan to recreate itself in the metaverse as the first-ever digital nation.[13] To those of the readers who have been living under a rock for the past few months, the metaverse is a virtual world, an immersive 3-dimensional environment where people can interact as avatars. Naturally, an online copy of Tuvalu will not solve the very real challenges of relocation faced by its nationals, but it can prove an interesting legal solution. Nonetheless, it brings about a number of novel dilemmas. How to govern a virtual community? How to safeguard privacy? Will hackers be a threat?

Ethical considerations are no closer to resolution than legal questions.[14] Still, this rather dystopian vision might be our only chance. The digital revolution is not stopping anytime soon, indeed it seems to only accelerate – eventually, the law will be forced to employ it for its benefit.

Conclusion

The death of a state is by no means a new concept. It has been tested in the past and evolved accordingly. The new notion of statehood is bound to crystallise, too, with a combination of soft law, new international agreements and revised interpretation of existing definitions. However, amidst the letters of law, the real issue must not be forgotten – millions of people forced to flee their homes due to a real-time apocalypse we, humans, helped create ourselves. Only through the concerted efforts of scholars, policymakers and scientists can we even begin to look for solutions.

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INTERNATIONAL STATE RESPONSIBILITY

HOW STATES CAN BE HELD RESPONSIBLE FOR THEIR CONTRIBUTIONS TO CLIMATE DAMAGE

BY ABIGAIL SHANAHAN

Introduction

Climate change is an imminent threat to our world that cannot be easily ignored. Always in the news, climate change has become an essential component of international, as well as domestic politics. We have already committed to a degree of climate change, and also simultaneously committed to future generations. This is explained since "*due to the anthropogenic emissions of greenhouse gasses, the commitment to change within the climate system is such that many climate change impacts are currently inevitable, absent any actions taken to reduce vulnerability to these impacts"*.[1] As such, efforts to reduce emissions feel inadequate since the reductions made today will only weaken the impacts of climate change over the very long term.[2] That being said, there are no 'quick fixes' to climate change. So what can be done on the international level?

States are the main subjects of international law, which begs the question of who is responsible for acts by private entities that affect the environment and contribute to climate change damage. This is the guiding question for this piece.

Relevant Climate Change Legislation

The "climate change regime" consists of provisions of the FCCC and the Kyoto Protocol (KP) of 1997.[3] These provisions outline strategies and obligations for damage prevention. But in the past decades, there has been a shift when discussing State responsibility and the environment. This is a result of the 'ineffective' law of State responsibility in climate law as seen in the relevant primary rules,[4] as was not created to regulate damage or liability for damage caused. Therefore, the focus is not on whether States are responsible for the behavior, but rather on looking for what conditions cause legal consequences to arise.

State Responsibility in International Law

When discussing the international responsibility of States in a general manner, a key source is the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), abbreviated to ARSIWA. While ARSIWA is not adopted by the UN's General Assembly, it is taken note of by the GA and commended to States. It is not a treaty and therefore not binding as

such, but does reflect customary international law to a large extent (everything up to and including 'circumstances precluding wrongfulness and remedies' is customary). ARSIWA is crucial because it is the default document that is used for issues of responsibility in any specific field of international law.

There are certain distinctions to be made concerning the nature of State responsibility. The first is between civil and criminal responsibility. In national legal systems, there is usually a division into civil law, criminal law, and administrative law. However, under international law, there is no such distinction since there is no criminal responsibility of States. This can be explained due to the vertical relationship between State authorities and subjects of law in national systems, compared to the horizontal relationship between sovereign States in international law. Since States are sovereign, they cannot take binding decisions or punish each other. This shows how most international law is about public regulation, not about individual benefits. The second distinction is between subjective and objective responsibility. Subjective responsibility refers to fault in hoping to attribute responsibility with the goal of reproach or blameworthiness. Objective responsibility does not require fault on the part of State officials; only attribution of conduct and breach of an obligation needs to be proved here. International law uses the model of objective responsibility because States are legal persons and not individuals there is no need to establish fault on behalf of the State. Therefore, action that breaches international law, either directly by conduct of individuals attributed to the State, is all that is needed.

To establish an "internationally wrongful act", two conditions, enshrined in Article 2 ARSIWA, must be met. First, the conduct, whether an act or omission, is attributable to the State. The second condition is that the conduct, whether an act or omission, constitutes a breach of international obligation. As seen from the conditions, there is no need to prove damage or fault. Generally, States are not engaging in activities with the intent to induce climate change, rather they are part of general economic activities. Attribution of conduct is to determine which persons can act on behalf of the State. The basic rule, in Article 4 ARSIWA, is that conduct of organs is attributable to the State. There are other rules within ARSIWA if the action is not taken by a State

organ, but that is not relevant for now. Generally, the conduct of private individuals/groups/entities cannot be attributed to the State (with exceptions to this in Articles 8, 10 and 11 ARSIWA).

The second condition of breaching an international obligation includes both acts and omissions. It must also be a breach of an international obligation, which requires a link to a source of international law. Under this criterion, there is something called "due diligence obligations". Traditionally, these are obligations to act in relation to the harmful activities of private individuals in violation of the rights of other States.

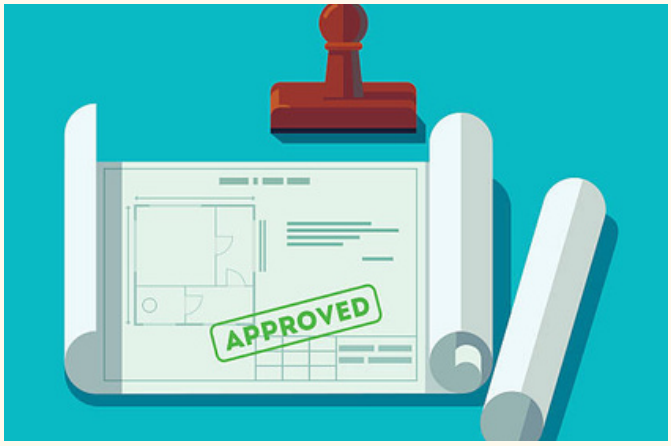
State Responsibility in terms of climate change

Now we come to the guiding question of this piece, what to do when damage is caused by private entities. As mentioned above, States are the main subjects of international law and are the ones with direct rights and obligations. However, private entities mostly undertake polluting activities in the context of damage caused by environmental pollution.[5] When determining State responsibility, it is the State's obligations that determine whether the conduct is lawful and not private conduct. For example, if an environmental treaty is breached because certain compliance measures were not put in place correctly or at all, that breach is attributable to the State, regardless of the source of the emissions.[6] This means that just because the State was not directly producing emissions from state-owned facilities, does not mean they did not breach obligations under the treaty, and therefore can be held responsible. Situations such as this are not explicitly covered in ARSIWA, but once again due to its general nature it can be interpreted to apply to climate change damage.

As previously mentioned, due to ARSIWA's general nature, it can be applied to really any specific field of international law. This means its rules on attribution are compatible when discussing the responsibility of States concerning climate change. The rules contained in Articles 8 and 11 of the document are especially relevant for establishing responsibility in this context. They read as follows:

Article 8
Conduct directed or controlled by a State
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

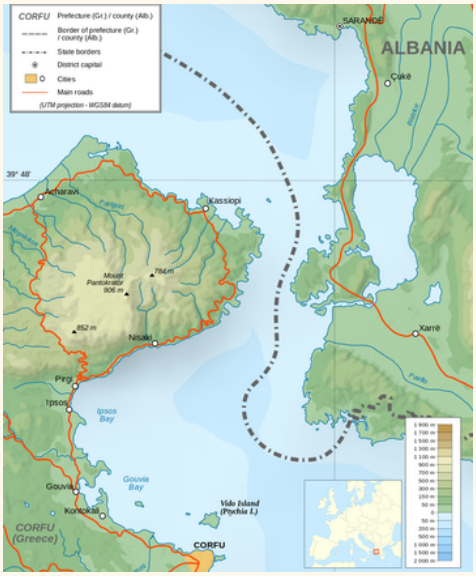
Article 11
Conduct acknowledged and adopted by a State as its own
Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.



For Article 8, scholar Verheyen argues that a State may exercise effective control over polluting activities carried out by private actors.[7] Verheyen also argues that for Article 11 States technically adopt the conduct as its own by 'approving such private conduct through active (permitting) policies'.[8]

However, these arguments are not too convincing at first glance since interpreting Article 8 in such a broad manner would essentially make all private conduct attributable to States. Therefore, it must not be interpreted in that way but rather interpreted strictly after determining which organs or agencies in the government of a State approved of the conduct.

Additionally, Article 4 of ARSIWA is relevant when discussing climate change since it allows omissions to be attributed if, for instance, there is a failure on the part of State organs to carry out international obligations. There are positive obligations on States when it comes to human rights law and climate change, meaning if they do not act they violate their obligations under international law. The Corfu Channel (*UK v Albania)* case is a good example of how omissions can be attributed to States. In that case, Albania was held responsible for the consequences of mines in its territorial water. However, they were not held responsible for laying the mines, but because of their failure to eliminate the danger by removing them from the territorial waters. In order to attribute the conduct that led to the internationally wrongful act, it needs to be shown exactly which part of the State's government authorized the activity relevant to the damage.[9]



Article 13 ARSIWA is also important in attributing State responsibility since the international obligation must be in force for the State at the time of the breach. A key example of this provision is that the United States and Australia cannot be held responsible for actions that seem to amount to a breach of an obligation under the Kyoto Protocol concerning reduction targets.[10] This is due to the fact that neither State has ratified KP, meaning that they are not bound by the obligations within it.

When discussing climate change, it is not just one State that is usually involved. This, therefore, brings into question how State responsibility works with the involvement of multiple States. Article 47 ARSIWA states, "*Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act*". The commentary on this article stresses the principle that States are 'individually and independently responsible' for breaches of their international obligations.[11] It is important to note the connotation of 'sameness' in Article 47's wording. This shows that the article does not apply to joint conduct that results in different wrongful acts for the States involved. In this sense, Article 47 is a clarification that the default rules of individual attribution apply to joint wrongful conduct.[12] Once again, the *Corfu Channel* case is relevant here. In that case, there was conduct of multiple States which then led to a separate internationally wrongful act of one State (Albania) based on its individual obligations. As previously mentioned, Albania was held responsible for committing an internationally wrongful act since the State knew about the mines and did not warn vessels to protect them. Once again, Albania did not lay the mines (another State did), but this did not diminish Albania's responsibility.[13]

There are human rights scholars who have pushed for the introduction of a principle of 'joint and several responsibility' to address cases of damage caused by joint State conduct, such as regional biofuel policies and agricultural subsidies.[14] This has not progressed past the realm of academia into practice yet, but it would not be surprising if it appears in cases in the future or new legislation.

Some scholars argue for responsibility for damage prevention and compensation for 'industrialized countries'. Essentially this means that these States are responsible for preventing further greenhouse gas emissions in addition to damage caused to the economies and peoples of other States.[15]

Let's specifically look at transboundary pollution and environmental degradation. These are cases when actions in one State cross borders and negatively impact other States. State responsibility's function is twofold: to support prevention rules (whether in treaties or custom) and to provide injured States with reparations (either in the form of restoration or compensation. [16]

Article 42(a) ARSIWA concerns obligations breached that were owed to the claimant State individually, such as through a bilateral treaty, while Article 42(b) is owed to the community as a whole. An example given by the ILC of the latter is if Article 194 UNCLOS (United Nations Convention on the Law of the Sea) was violated.[17] That provision prohibits pollution on the high seas, making it an obligation to all State Parties. Regardless, Article 42(b) is relevant for climate change since the "*emissions behavior of a State will affect the atmosphere as a global commons, but will also affect certain States in particular*".[18] Unlike UNCLOS, the obligations with regard to climate change are not owed to a specific State, but rather to all States since all will be affected. In other words, it could be said the obligations are erga omnes and can be enforced against any infringing them.

Also found in ARSIWA, in addition to establishing State responsibility, is also the ability to use countermeasures (Articles 22, 49-54). The injured State can resort to countermeasures, but so can other States when obligations are owed to multiple parties. In terms of climate change, the concept of an 'injured State' should be broadly interpreted since most of the obligations are not bilateral. And as mentioned above, the 'climate regime' is concerned with "general prevention duties, and not with an individual country's damage". [19]

Finally, the legal consequences of an internationally wrongful act are threefold in ARSIWA. The first part, found in Article 29, states that the "*legal consequences [...] do not affect the continued duty of the responsible State to perform the obligation breached*". This means that even after being found to breach an obligation, it does not mean the State no longer has to perform said obligation moving forward. Secondly, Article 30 requires the State to cease the wrongful conduct, and also guarantee non-repetition. And thirdly, Article 31 calls for reparation for injury caused.

Conclusion

To answer the guiding question of this article, yes, it is possible to invoke State responsibility for climate change related damage. It does depend on a case-by-case basis which primary rules of international law have been breached, such as treaty obligations or erga omnes obligations.

As discussed, legal consequences follow after breaches of treaty obligations or customary international law,

without having to show the intent of the State. The damage usually occurs as a result of conduct or activities they engaged in for their general economic interest.[20] But this does not preclude them from being held internationally responsible.

Additionally, greenhouse gas emissions originating from within a State, whether from private or State-owned entities, can be attributable to the State. States either have treaty obligations or are required to exercise regulatory power to prevent breaches.[21] They have to take positive action and may be held responsible for actions or omissions of their organs or conduct it adopts as their own. States also have the right to demand that wrongful conduct be stopped. Since climate change damage is a global issue and affects the international community as a whole, any State can invoke State responsibility.

Once again, climate law is a developing field. There are no codified rules yet in relation to State Responsibility specific to climate change damage. Therefore, general rules on State Responsibility have to be interpreted in a way to hold States accountable. As more cases about climate change appear on the international level, the field will develop accordingly. In the meantime, this general framework is used and results differ depending on the primary or secondary rules assessed in each case.

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SHOULD THE DUTCH CONSTITUTION GO NORWEGIAN?

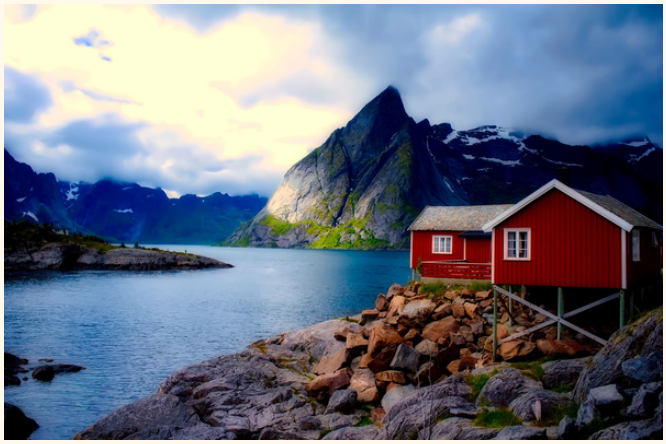
SHOULD WE IMPLEMENT A CONSTITUTIONAL PROVISION ON THE RIGHT TO A HEALTHY ENVIRONMENT IN THE NETHERLANDS?
A COMPARISON WITH NORWAY.

BY FROUKE MINKEMA

Both Norway and the Netherlands have made the commitment to a healthy environment by ratifying EU law as well as United Nations law. However, Norway has gone one step further. Article 112 of the Norwegian Constitution contains the right to a healthy environment and the right to information about the environment. On paper, it would seem that in Norway it is easier to hold the government accountable for the right to a healthy environment as it is encompassed in a constitutional right and duty. However, in practice, it is not so simple. The question remains whether the constitutional Norwegian provision offers more protection than here in the Netherlands where the Constitution lacks such an explicit right. In this article, I will assess the right to a healthy environment in the Netherlands and Norway by comparing the Urgenda case from the Dutch Court to the Arctic oil case in Norway.[1] This piece will examine whether a constitutional provision offers higher protection for the right to a healthy environment when looking at the case law and if we should consider implementing it in the Dutch Constitution.

Article 21 of the Dutch Constitution:
'*It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.*'

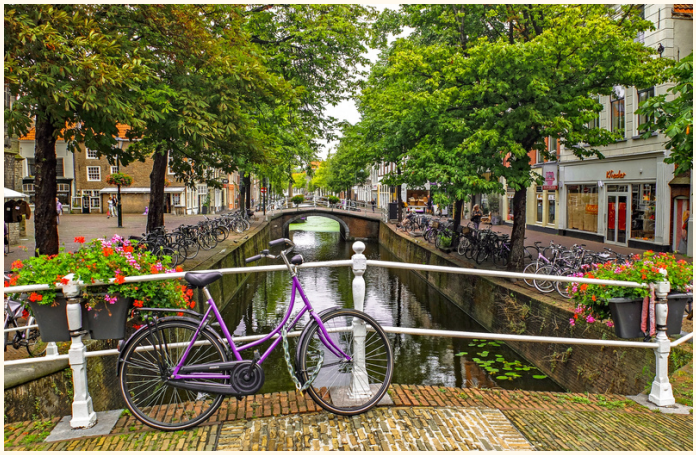
Article 112 of the Norwegian Constitution:
'Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained.'



The Urgenda case

The Constitution of the Netherlands does not contain the right to a healthy environment. It is bound by the law of the United Nations and the European Union that protects this right in various forms.[2] For example, UN Resolution 48/13, the UN Special Rapporteur on Human Rights and Environment, and the EU Congress want to implement the right as well following the UN Resolution.[3] Despite not having a constitutional provision on the right to a healthy environment the Dutch Civil Court ordered that the Netherlands needs to reduce its CO2 emission by 25% in comparison to the 1990 emissions in the infamous Urgenda case.[4] Urgenda is an organization that strives to make the Netherlands more sustainable. [5]

Urgenda's claim was based on the Civil tort law in the Netherlands and also international law. The Dutch court ruled that Urgenda could not invoke the international provision as they only focus on the relations between States. Article 21 of the Dutch Constitution, containing the duty of the government to provide care of the good habitability of the Netherlands, also could not be seen as a basis for a legal obligation towards Urgenda. Article 21 imposes a duty of care from the government, but Urgenda wasn't a 'victim' as such. In the end, the Court concluded that Urgenda could derive a right to a healthy environment and duty of care for the Dutch government from articles 2 and 8 ECHR.[6]

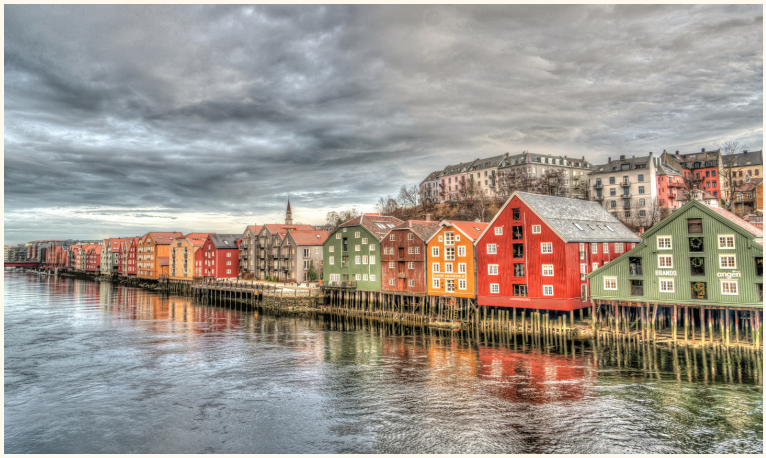


The Urgenda case shows that even though the Dutch Constitution does not contain a provision on the right to a healthy environment, parties can still invoke it before a court. The question that remains unresolved is whether a constitutional provision would make this process easier. As such, a comparison with a Norwegian case needs to be drawn.

The Artic Oil Case

In Norway, article 122 of the Constitution circumscribes the right to a healthy environment and the right to information about a healthy environment. In the Arctic Oil case the government had issued oil and gas licenses for deep-sea extraction in the Barents Sea. Environmental groups disagreed with these licenses and wanted a judgement from the court stating a violation of article 122. Emissions from abroad that are exported from Norway were deemed irrelevant when it came to the violation of the right.[7] The threshold for a violation of article 112 of the Constitution is thus very high.

However, the Norwegian Court ruled that Article 112 was not breached by the government. It had fulfilled its duties regarding the licensing of CO2 emissions, oil, and gas.



Future emissions were also not able to be considered as they are too uncertain. This case shows that the right to a healthy environment may look good on paper, but in practice the question is whether it actually offers more protection than European and international law.

The threshold to hold the government accountable for a violation of the constitutional right is very high. This is an indication that suggests a constitutional right does not necessarily mean more protection for the environment.

Conclusion

Consequently, when looking at the two abovementioned cases there is no sufficient evidence to claim that a constitutional provision on the right to a healthy environment offers more protection than international and European law. The Urgenda case in the Netherlands shows that through national tort law and international human rights law claims for the protection of the environment can be made when it comes to private parties holding the government accountable. In contrast to the Urgenda case, the Arctic Oil case shows that a constitutional provision on the right to a healthy environment doesn't guarantee a claim from a private party holding the government accountable for a healthy environment.

The Norwegian threshold is high. This makes it very difficult for a private party to hold the government liable for violating a constitutional duty. Moreover, a constitutional provision on the right to a healthy environment in the Netherlands could be implemented as a statement. It would show that the Government holds the environment in high regard and has environmental protection on its political agenda. However, implementing it is unnecessary to gain more environmental protection as this can be achieved through other legal means. Furthermore, the Dutch Constitution already contains Article 21 which imposes a duty on the government to provide a habitable country. An additional provision containing a duty for a healthy environment would probably not offer more protection as Urgenda could not use this provision in their case.

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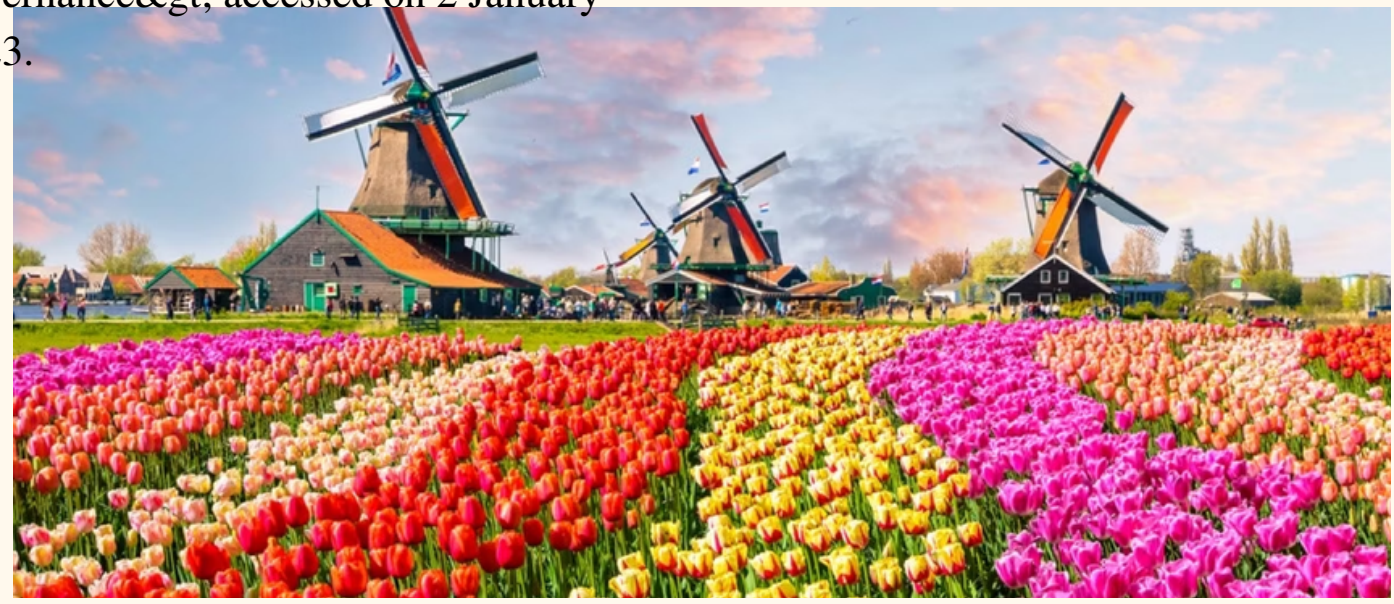

DRIVING THE GREEN TRANSITION?

SUSTAINABLE ELECTRIC CARS AND THEIR UNSUSTAINABLE PRODUCTION

BY MARIA HADJJIONA

As climate change continues to worsen and reach new climaxes, the field of technology is attempting to shift towards a more sustainable future by creating vehicles that emit less greenhouse gasses. However, what is often overlooked when it comes to these electric vehicles, is the environmental damage that results from the manufacturing of such machines and the harvesting of the materials needed for it. Lithium, which used to be primarily known for its aid in the medical sector and in the making of glass and ceramics, has experienced a massive increase in its extraction in recent years, as it is being utilized in the production of the batteries used in cell phones, computers, and electric and hybrid cars. It is common knowledge that electric cars do not produce greenhouse gasses, and are therefore much more eco-friendly than cars that operate on fossil fuels such as gasoline and diesel. Even so, the batteries used in electric vehicles are far more carbon-intensive to manufacture, hence they contribute to the heightening of the irreversible environmental decline caused by carbon emissions.

The establishment of certain laws to regulate the extraction of lithium and production of lithium-ion batteries is crucial to ensure that the negative environmental impact arising from these activities is minimized.

The problematic metal

The potential environmental effects of lithium extraction can be dire. Water pollution, for example, is deeply intensified by the mining of metals. Over two thirds of the world's lithium is located in an area known as the "Lithium Triangle" which covers the borders of three different countries of South America: Argentina, Bolivia, and Chile. Studies have found a connection between the lithium extraction from salt brines in the Andes Mountains of South America, which extend over the previously mentioned countries, and the rise in the concentration of salt in the freshwater of these regions. The water shortage resulting from the salinisation of freshwater negatively affects the locals and constitutes a huge threat to the ecosystem of these regions.

Additionally, a fairly common outcome that impacts the quality of the water in mining sites is Acid Mine Drainage, which occurs when sulfuric acid is produced from the sulfide in rocks exposed to air and water. This leads to the acidity of the water to increase, allowing for the development of certain bacteria which accelerate the process of oxidation and acidification, subsequently further degrading the quality of the water.[1]

Moreover, the mining sector is responsible for 4 to 7 percent of greenhouse gas emissions on a global scale.[2] The extraction and processing of lithium require energy originating from fossil fuels that emit carbon dioxide, a greenhouse gas. For instance, as documented, 15 tons of CO2 are emitted per ton of mined lithium. The production of lithium batteries also increases this process' carbon footprint, as it entails extreme temperatures that require the burning of fossil fuels. An example of an electric car functioning on a lithium-ion battery is the Tesla Model 3. The manufacturing of this vehicle's 80-kWh battery causes between 3 and 16 tons of carbon emissions to be released into the atmosphere.[3]

Current legal regime

While no international standard that controls the supply chains of this metal exists at the moment,[5] some countries have developed their own policies to protect the environment from activities such as extensive mining. The US adopted a thorough system that regulates ongoing mining operations and ensures the restoration of areas impacted by previous ones. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), allows the US government to clean any regions affected by substances resulting from mining or other harmful activities and to hold the people accountable for the costs needed to restore these areas. Furthermore, the National Environmental Policy Act (NEPA) 1969 describes the criteria for allowing new mining operations.

These requirements include that minimal environmental consequences must result from these projects.[6] These policies, while beneficial, ought to be updated to fit into the standards of the growing need for more metals and thus mining projects that are larger in size and in quantity. Therefore, it is necessary that mining regulations are updated and incorporated into more national legal systems.

Conclusion

While lithium is often used to produce environmentally-compliant vehicles, it is important to acknowledge the ecological damage occurring its extraction, as well as from the production of lithium batteries. National governments and international organisations must become aware of the major issues in the manufacturing of electric cars that contribute to the worsening of the environmental crisis and set regulations to correct the hazardous practices deriving from them. Environmental due diligence is crucial in all aspects of the production of eco-friendly vehicles, beginning with the extraction of the metals needed for them, and culminating in their manufacturing.

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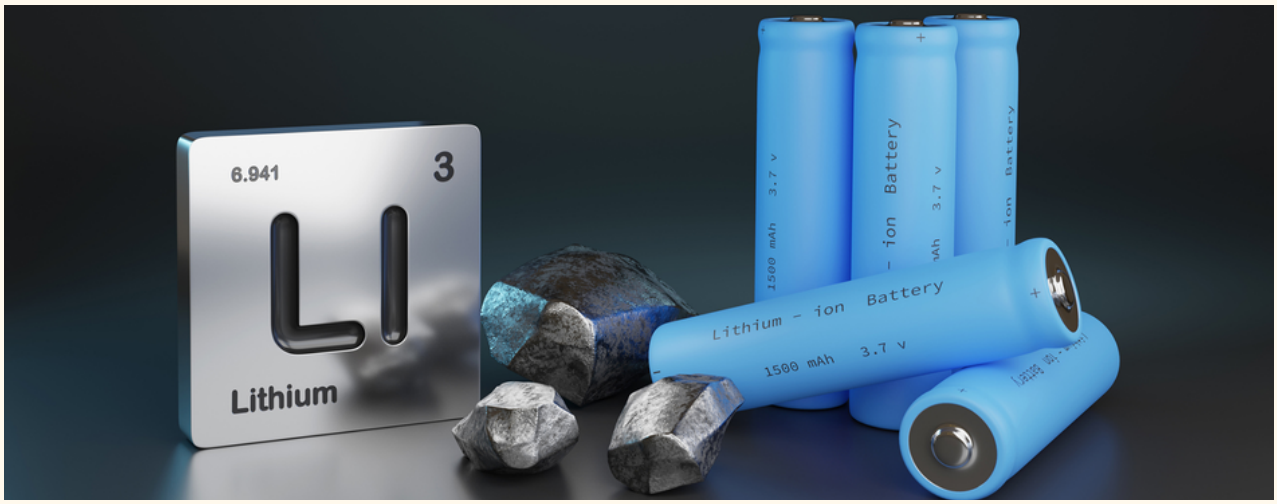
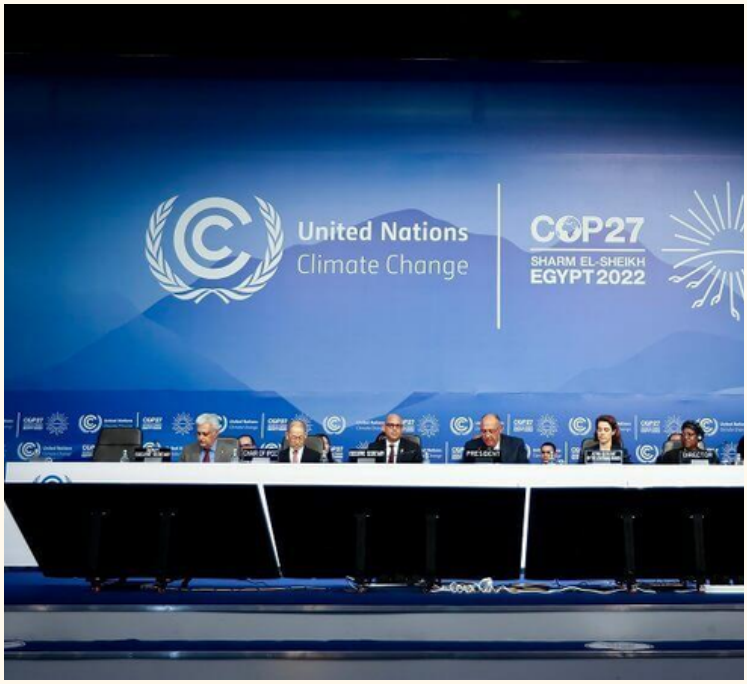


ALL IS NOT LOST!

REASURRING CLIMATE NEWS AND TRENDS TO LOOK FORWARD TO IN 2023

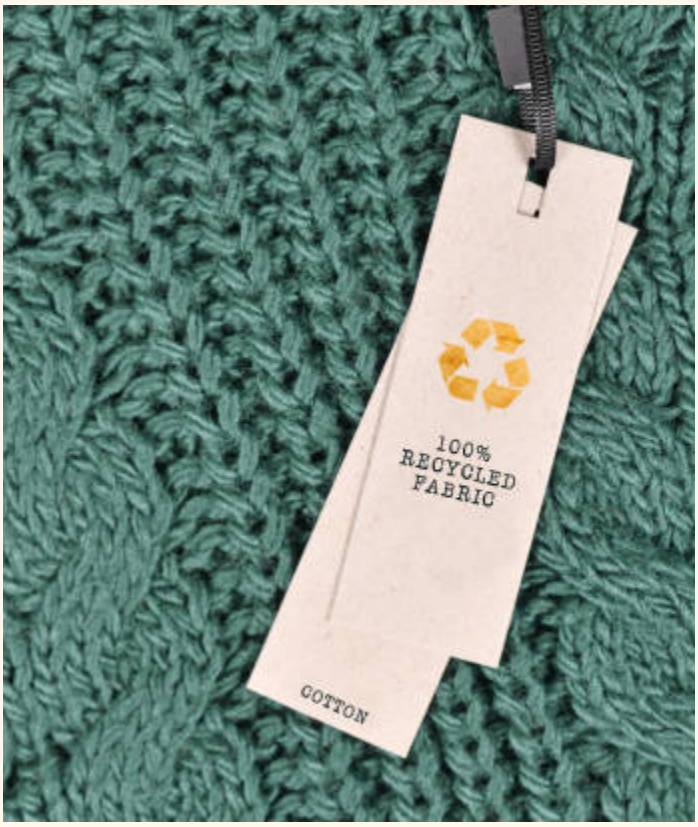
LOSS AND DAMAGE

The most celebrated outcome of COP27 in Sharm El Sheikh was the establishment of the Loss and Damage Fund. For decades, the developed countries resisted continuous pleas for financial help from nations most severely affected by the irreversible effects of climate change where adaptation can no longer be applied. The L&D Fund is a historic step in the right direction, but it will need a clear operational framework to be effective.



SECOND CHANCE FOR THE AMAZON

For the past few years, the whole world looked with increasing horror at the deforestation of the Amazon. The newly elected Brazilian President Lula pledged to save the 'lungs of the planet'. He already revived the Amazon Fund, a 1,2 billion mechanism whose purpose is to promote and support conservation and anti-deforestation efforts. Alongside ambitious greenhouse gas emission reduction targets, Lula vowed to reach 0% deforestation by 2030.



NO TO GREENWASHING

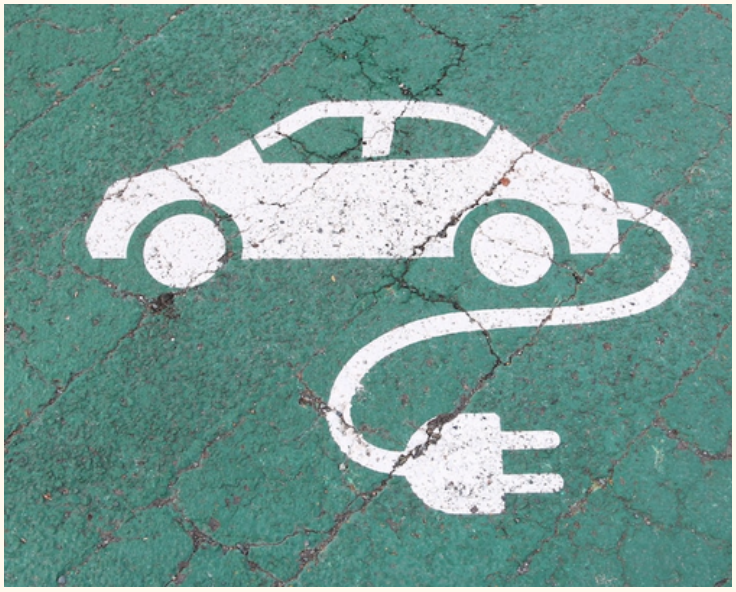
A newly drafted EU law intends to finally put a stop to greenwashing – a morally dubious advertising technique of branding products as sustainable in order to attract climate-conscious customers. The new rules would require companies to back their claims with scientific data and disclose information on the product's effects which harm the environment. This much-needed development came as a result of the EU Commission's study which revealed that over half of surveyed companies used misleading slogans.

DRESS RESPONSIBLY!

Ethical shopping has been gaining popularity, especially among younger generations. Now, it may finally receive legal backing. Last year, the European Commission launched a Strategy for Circular and Sustainable Textiles. It expressed its plans for several cutting-edge efforts aimed at increasing sustainability in one of the most polluting (and human rights-breaking) industry. For instance, it intends to introduce an electronic label which would inform the buyers on everything they wish to know about the production process, but also the possibility to recycle.

CLEAN TRANSPORT

Even non-drivers couldn't fail to notice that low-carbon transport is [in vogue], with electric cars and buses slowly beginning to dominate the roads. This trend is about to gain speed this year. After announcing the ambitious plans to ban sales of all CO2-emitting cars, the EU states are doubling down on their efforts to promote electric vehicles through various subsidy schemes and investing in accessible charging stations.



HIGH HOPES FOR COP28

After a rather fruitful meeting in Sharm El Sheikh, COP28 in Dubai will seek to retain the momentum. Firstly, it will need to strengthen the loss and damage framework and fill the gaps left in Egypt. Practical questions about the Fund's operation remain unanswered. A transitional committee launched at COP27 is set to help by issuing recommendations.

Another decision from COP27 bound to reappear at the next conference is the Global Stocktake – an instrument to measure the progress in meeting the Paris Agreement goals. The first stocktake will be concluded this year. World leaders will be faced with responding to the findings and finding a way to ensure the timely meeting of climate targets.

Given the current energy crisis, the issue can be expected to find its place in the Conference's agenda. The discussions on accelerating renewable energy development will be of particular relevance to finding the right balance between safeguarding green transition and maintaining energy security.

Finally, COP28 will have to tackle the long-avoided elephant in the room – climate finance. As current adaptation funding remains insufficient, sitting below the promised $100 billion, this year the COP28 parties are expected to double down their efforts and suggest a reform of the World Bank aimed to advance the matter.