The first climate cases of the European Court: What implications for the sea?*

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Abstract

This article reviews the first climate-related rulings of the European Court of Human Rights and their potential implications for the sea. Through the *KlimaSeniorinnen, Duarte Agostinho*, and *Carême* cases, the Court defined strict thresholds for jurisdiction and victim status, contrasting with more flexible interpretations by UN and Inter-American bodies. While none of the cases directly addressed marine issues, they raise important questions about the legal protection of rights threatened by sea-level rise. The Swiss case established a positive obligation to prevent serious climate harms. The article highlights the structural challenges of accessing climate justice in Europe and suggests that these rulings might influence future maritime climate litigation.

Keywords: ECtHR, climate justice, sea-level rise, positive obligations, climate victim status.

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1. Introduction

On 9 April 2024, the Grand Chamber of the European Court of Human Rights (ECtHR) issued its first decisions on climate issues, in the context of three cases: *Duarte Agostinho and al. v. Portugal and 32 other States*,[1] *Carême v. France*,[2] and *Verein KlimaSeniorinnen Schweiz and al v. Switzerland*.[3]

The *Duarte Agostinho* case concerned the greenhouse gas emissions from 33 Member States which, in the view of the applicants – Portuguese nationals aged between 10 and 23 – contribute to global warming, resulting in, among other effects, heatwaves that adversely affected the applicants' living conditions and health.

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1. ECtHR, [GC] *Durarte Agostinho v. Portugal and 32 other States (the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Swiss Confederation, the Republic of Cyprus, the Czech Republic, the Federal Republic of Germany, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Estonia, the Republic of Finland, the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Hellenic Republic , the Republic of Croatia, Hungary, Ireland, the Italian Republic, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Latvia, the Republic of Malta, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, Romania, the Russian Federation, the Slovak Republic, the Republic of Slovenia, the Kingdom of Sweden, the Republic of Türkiye and Ukraine)*, 9 April 2024, Application no. 39371/20.

2. ECtHR, [GC] *Carême v. France*, 9 April 2024, Application no. 7189/21.

3. ECtHR, [GC] *Verein KlimaSeniorinnen Schweiz and al v. Switzerland*, 9 April 2024, Application no. 53600/20. For a commentary, see Andre Den Exter, 'Bringing Climate Change to Strasbourg. The Convention and Healthy Environment Claims' (2024) European Journal of Health Law, Vol. 31, Issue 2, 153-170; Angela Hefti et al., 'A Health-Centric Intersectional Approach to Climate Litigation at the European Court of Human Rights' (2024) Harvard Human Rights Journal, vol. 37, no. Special Edition, 351-378; Jacques Hartmann, 'Protecting Rights through Climate Change Litigation before European Courts' (2022) Journal of Human Rights and the Environment, Vol. 13, Issue 1, 90-113; Verena Kahl, 'A Human Right to Climate Protection - Necessary Protection or Human Rights Proliferation?' (2022) Netherlands Quarterly of Human Rights, Vol. 40, Issue 2 158-179; Ane Sydnes Egeland, 'The Convention, the Court and the Climate: The Future in the Balance' (24 September 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/the-convention-the-court-and-the-climate-the-future-in-the-balance/>>; Başak Çali and Chhaya Bhardwaj, 'Watch this

The applicants relied on the positive obligations under Articles 2 (right to life) and 8 (right to respect for private and family life) of the Convention, read in light of the States' commitments under the 2015 Paris Agreement on climate change (COP 21). They also alleged a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 2 and/or Article 8 of the Convention, arguing that global warming affects their generation particularly and that, given their age, the interference with their rights is greater than in the case of older generations. The

space: Executing Article 8 Compliant Climate Mitigation Legislation in Verein KlimaSeniorinnen v. Switzerland' (15 July 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/watch-this-space-executing-article-8-compliant-climate-mitigation-legislation-in-verein-klimaseniorinnen-v-switzerland/>>; Chris Hilson and Oliver Geden, 'Climate or carbon neutrality? Which one must states aim for under Article 8 ECHR?' (29 April 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/climate-or-carbon-neutrality-which-one-must-states-aim-for-under-article-8-echr/>>; Aoife Nolan, 'Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights' Klimaseniorinnen Decision' (15 April 2024) EJIL Talks!, available <<https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/>>; Stephen Humphreys, 'A Swiss human rights budget?' (12 April 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/a-swiss-human-rights-budget/>>; Ole W. Pedersen, 'Climate Change and the ECHR: The Results Are In' (11 April 2024) EJIL Talks!, available <<https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/>>; Marko Milanovic, 'A Quick Take on the European Court's Climate Change Judgments' (9 April 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/>>; Joël Andriantsimbazovina, 'L'obligation positive des États adhérents à la Convention européenne des droits de l'Homme de lutter contre les effets néfastes graves du changement climatique' (2024) La Gazette du Palais, 05-11-2024, n°36; Marta Torre-Schaub, 'La Cour européenne des droits de l'Homme: une jurisprudence originale sur le changement climatique' (2024) Revue internationale de droit comparé, n°4, 80-95; Monica Feria-Tinta, 'Le droit international est-il en train de changer? Observations après Duarte Agostinho, Klimaseniorinnen et l'avis consultatif du TIDM sur le changement climatique' (2024) Revue internationale de droit comparé, n°4, 157-178; Marta Torre-Schaub, 'La CEDH et le changement climatique, une "approche sur mesure"' (2024) Actualité Juridique Droit Administratif (AJDA), n°31, 1720-1724; Marta Torre-Schaub, 'Le changement climatique dans la jurisprudence de la Cour européenne des droits de l'homme: entre continuité et innovation' (2024) La Semaine juridique - Administrations et collectivités territoriales (JCPA), n°23, 36-40; Sara Brimo, 'Le changement climatique entre dans le prétoire de la Cour européenne des droits de l'Homme' (2024) La Gazette du Palais, n°19, 16-19.

Grand Chamber unanimously declared the application inadmissible for two reasons. First, the Court refused to establish the extraterritorial jurisdiction of the respondent States other than Portugal. Indeed, the Court found that there were no grounds in the Convention for the extension, by way of judicial interpretation, of their extraterritorial jurisdiction in the manner requested by the applicants. It followed that territorial jurisdiction was established in respect of Portugal, whereas no jurisdiction could be established as regards the other respondent States. Second, since the applicants had not pursued any legal remedy in Portugal, the applicants' complaint against Portugal was also inadmissible for non-exhaustion of domestic remedies.

The *Carême v. France* case concerned a complaint by a resident and former mayor of the city of Grande-Synthe, who submitted that France has taken insufficient steps to prevent climate change and that this failure entails a violation of the right to life and the right to respect for private and family life. The Grand Chamber unanimously declared the application inadmissible because of the lack of victim status: the applicant had no relevant links with Grande-Synthe anymore since at the time of his application he did not live in Grande-Synthe anymore, nor in France but in Brussels.

The *Verein KlimaSeniorinnen* case was brought to the Court by four women and a Swiss association (Verein KlimaSeniorinnen Schweiz) whose members are all older women concerned about the consequences of global warming on their living conditions and health.

They considered that the Swiss authorities were not taking sufficient action to mitigate the effects of climate change. They argued that the respondent State had failed to fulfil its positive obligations to protect life effectively and to ensure respect for their private and family life, including their home. They further complained that they had not had access to a court and argued that no effective domestic remedy had been available to them for the purpose of submitting their complaints relating to the right

to life and to the right to respect for private and family life. The Grand Chamber held that there had been a violation of Article 8 (right to respect for private and family life) and 6 § 1 (right to a fair trial / access to court) of the Convention in what concerns the association. Therefore, the Court found that Switzerland had failed to comply with its duties ("positive obligations") under the Convention concerning climate change. The Swiss authorities had not acted in time and in an appropriate way to devise, develop and implement relevant legislation and measures in this case. In particular, the Court found that Article 8 of the Convention encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life. However, it held that the four individual applicants did not fulfil the victim-status criteria under Article 34 (individual applications) of the Convention and declared their complaints inadmissible.

These three cases are not *maritime cases.* The only one indirectly linked to sea issues is the *Carême v. France* case, in which the applicant complained about the erosion of the coastline, the risk of flooding and the sea-level rise. He submitted that his residence in Grande-Synthe was at a future risk of flooding and that according to some predictions the part of the city where he lived would be underwater by 2040 due to the effects of climate change. According to the applicant, this situation prevented him from envisaging himself serenely in his home.[4] Neither the applicant nor the Court mobilise the law of the sea in the *Carême* case. The only mention is a reference to the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice advisory proceedings on obligations of States in the context of climate change in the part "relevant international materials" common to all three cases. They were both still pending at the time the decisions of the European Court were taken.[5]

4. ECtHR, [GC] Carême v. France, 9 April 2024, Application no. 7189/21, §67, 77 and 82.
5. ECtHR, *Verein KlimaSeniorinnen,* prec., §§187 and 188.

However, these judgments raise issues that could be useful to address situations where the effect of climate change on the ocean have consequences on the enjoyment of human rights due to sea-level rise and inhabitability of coastal areas. In particular, these cases provide information on the justiciability of the human rights threatened by the maritime effects of climate change and on the conditions for accessing human rights bodies to defend them (Section 2). In addition, the Swiss case also provides information on the content of human rights in the face of climate change, which could be applicable in a maritime or coastal context (Section 3).

2. Access to an International Human rights body to address the maritime effects of climate change

The access to the ECtHR, as well as other human rights bodies is delicate in climate matters because of the global nature of the issue. First, it is extremely difficult (if not impossible) to identify the individual State responsible for the pollution since all States contribute at different levels to climate change. Second, it is also very difficult to identify who can be granted the victim status since everyone is affected by climate change.

These issues were addressed by Human rights Bodies before the European Court, especially the UN Committees (mainly the Human Rights Committee – HRC, and the Committee on the Rights of the Child – CRC) and the Inter-American Court on Human Rights (IACtHR). The HRC addressed these issues in the *Teitiota*[6] and *Torres Strait*

6. HRC, *Teitiota v. New Zealand*, Communication No. 2728/2016, 23 September 2019. No violation of the right to life (article 6).

Islander[7] cases, the CRC in the *Chiara Sacchi*[8] case, and the Inter-American Court in its 2017 *Advisory Opinion on the Environment*.[9] This *corpus* of cases factually very similar to the ECtHR cases is mostly coherent and adopts a concurring and flexible position on issues of jurisdiction and victim status. In all these cases, the human rights bodies considered the two conditions to be met.

The ECtHR adopts a diametrically opposed position since it refused to adapt the notion of jurisdiction to the climate context (Section 2.1) and creates new and specific criteria for climate cases in relations to the victim status requesting an *especially high threshold* (Section 2.2).

2.1 The notion of Jurisdiction

The IACtHR in its 2017 Advisory opinion and the CRC in the *Chiara Sacchi* case used the same test for the establishment of the jurisdiction when a transboundary harm occurred. The *Chiara Sacchi* case was brought to the Committee by a group of fifteen children who alleged that the climate inaction of France, Germany, Brazil, Turkey and Argentina caused the violation of their rights even though they did not live in the territory of the defendant States.[10] According to this test, the individuals are under the jurisdiction of the State on whose territory the emissions originated if three conditions are met: (i) if there is a causal link between

7. HRC, *Daniel Billy et al. v. Australia* (Torres Strait Islanders case), Communication No. 3624/2019, 21 July 2022. No violation of the right to life (article 6) but violation to the right to private and family life (article 17) and the minority rights (article 27).

8. CRC, *Sacchi and Others v. Argentina* (CRC/C/88/D/104/2019, 22 September 2021). Inadmissible (non-exhaustion of domestic remedies).

9. IACtHR, Advisory Opinion OC-23/17 *on the Environment and Human Rights*, 15 November 2017.

10. They alleged the violation of articles 3 (best interests of the child); 6 (right to life); 24 (right to health) and 30 (minority rights) of the Convention on the Right of the Child.

the acts or omissions of the State in question and the negative impact on the rights of individuals located outside its territory; (ii) if the State of origin exercises effective control over the sources of the emissions in question; and (iii) if the alleged harm suffered by the victims was reasonably foreseeable to the State.[11] Therefore, the CRC considered that the children were under the jurisdiction of the defendant States, opening the access to human rights bodies to the all the victims of the adverse effects of climate change even the ones that are not located in the territory of the defendant State.

The ECtHR refused to use this test in the *Duarte Agostinho* case which was very similar to the *Chiara Sacchi* case. The Court did acknowledge that States have ultimate control over public and private activities based on their territories that produce greenhouse gas (GHG) emissions that there is a certain causal relationship between public and private activities based on a State's territories that produce GHG emissions and the adverse impact on the rights and well-being of people residing outside its borders; and that the issue of climate change is of a truly existential nature for humankind, in a way that sets it apart from other cause-and-effect situations. However, according to the Court, "these considerations cannot in themselves serve as a basis for creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction or as justification for expanding on the existing ones."[12]

The judges considered that there was no ground for jurisdiction in the existing case law that the Court could use since the defendant States exercised no control over the territory or the individuals. Besides, there was no "special features" which may lead the Court to extend its case law. Therefore, the Portuguese children were under the jurisdiction of Portugal only, and could not be considered to be under the jurisdiction

11. See IACtHR, OC-23/17, préc., §§101-104 and CRC, *Chiara Sacchi*, préc., §10.7.
12. ECtHR, *Verein KlimaSeniorinnen,* préc., §195.

of the other 32 States. In doing so, the ECtHR limited the access in the framework of climate issues and refused to adapt its competence and admissibility criteria to the specificities of the climate litigation. This position stems primarily from a structural concern: the European system is already burdened by a very high volume of applications, which threatens to overwhelm the Court. The ECtHR would not be able to absorb the flow of applications that could arrive if it opened its jurisdiction to all climate victims. The risk does not exist for the UN Committees and the IACtHR.

2.2 The Victim Status

The UN Committees have adapted their interpretation of victim status to address the specificities of climate change. In particular, the Committees have applied two criteria: (i) the risk of impairment of the rights being "more than a theoretical possibility"[13] and (ii) the vulnerability of the applicant.

First, the HRC reiterates its jurisprudence according to which a person may claim victim status if they are actually affected, either by an act or omission of the State party that has already impaired the exercise of a right, or if such impairment has not yet occurred but the risk of being affected is *more than a theoretical possibility*. Both in the *Torres Strait Islander* case and in the *Teitiota* case, the HRC considered that the risk of impairment of the author's rights was "more than a theoretical possibility", considering the serious adverse impacts that have already occurred, are ongoing and reasonably foreseeable.

Second, the specific vulnerability of certain groups to the adverse effects of climate change was put forward by the HRC and the CRC to grant victim status to the authors of the communications. In the *Chiara*

13. HRC, *Torres Strait's Islander*, préc., §7.10; HRC, *Teitiota v. New Zealand*, préc., §8.4.

Sacchi case, the authors are children. The Committee recognised that, "as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken."[14] In the *Torres Strait Islander* case, the HRC considered that the authors are "among those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts."[15]

The ECtHR did recognise the particular vulnerability of children in the *Duarte Agostinho* case and of older people in the *Verein Seniorinnen* case, but did not use this vulnerability to lower the threshold of the victim-status criteria.[16] On the contrary, the European Court adapted its criteria to the context of climate change to adopt an *especially high threshold*.[17] According to the Court, the victim status in relation to future risk is only exceptionally admitted in order not to slip into *actio popularis*. Besides, anyone could be concerned by the actual and future risks posed by climate change and could be affected:

> Given the nature of climate change and its various adverse effects and future risks, the number of persons affected, in different ways and to varying degrees, is indefinite. […] The need, in this context, for a special approach to victim status, and its delimitation, therefore arises from the fact that complaints may concern acts or omissions in respect of various types of general measures, the consequences of which are not limited to

14. *Chiara Sacchi*, préc., §10.13.

15. HRC, *Torres Strait's Islander*, préc., §7.10.

16. ECtHR, *Verein KlimaSeniorinnen*: "The Court notes that there is cogent scientific evidence demonstrating that climate change has already contributed to an increase in morbidity and mortality, especially among certain more vulnerable groups, that it actually creates such effects and that, in the absence of resolute action by States, it risks progressing to the point of being irreversible and disastrous", préc., §478.

17. Ibid., §488.

> certain identifiable individuals or groups but affect the population more widely.[18]

Therefore, the Court requires the existence of a real risk of a "direct impact" on the applicant's rights.[19] Besides, the risk must be of a particular level and severity. If the applicant invokes the rights to life, he/she has to demonstrate that the risk is "real and imminent";[20] if the allegations concern the enjoyment of the right to privacy or family life, the Court requires the proof of an "actual interference" with the applicant's rights.[21]

As a result, the four individual applicants in the *Verein KlimaSeniorinnen* case did not meet the *especially high threshold.* Once again, UN Committees are not facing the same risks as the European Court is in terms of clogging under the number of applications. However, the Court did grant the victim status to the Swiss association. This is the only issue where the Court will allow some flexibility in the interpretation of the admissibility criteria. According to the Court, the "the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing" justify the recognition of the standing of associations before the Court in climate-change cases:[22]

> The Court therefore considers it appropriate in this specific context to acknowledge the importance of making allowance for recourse to legal action by associations for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change, instead of exclusively relying on proceedings brought by each individual on his or her own behalf.[23]

18. Ibid., §479.

19. Ibid., §483.

20. Ibid., §§511 et s.

21. Ibid., §§514 et s.

22. Ibid., §499.

23. Ibid.

Thus, the conditions for an association to be granted the victim status are the following: the association must be (i) lawfully established in the State party; (ii) pursuing (in accordance with its statute) the defence of the human rights of its members (within the jurisdiction concerned) against the threats arising from climate change; and (ii) qualified and representative to act on behalf of its members or other affected individuals.[24]

3. Content of the obligations regarding the maritime effects of climate change

The most interesting part of the ECtHR judgments is, of course, the recognition of a positive obligation "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change"[25] (Section 3.1). However, the Court also recognised the existence of a wide margin of appreciation in the implementation of the positive obligation (Section 3.2).

3.1 The Recognition of Positive Obligations

In the *Torres Strait Islander* case, Australia argued that the positive obligation under Article 17 of the Covenant (private and family life) does not "create an obligation to protect generally against the future effects of climate change, which, as a matter of international law, extend well beyond the scope of a single State party's jurisdiction and control".[26] The defendant State further argued that the allocation of State's resources to

24. Ibid., §502.

25. Ibid., §545.

26. HRC, *Torres Strait Islander*, préc., §6.8.

the fight against climate change is a democratic matter including difficult policy decisions from democratically elected national institutions. A similar position has been taken by the Swiss authorities in the *KlimaSeniorinnen* case.[27]

However, both the HRC and the ECtHR applied the positive obligations under the right to private and family life to climate change measures. The HRC recalls that States parties must "prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious,"[28] including when the threat comes from environmental damage.[29] Likewise, the ECtHR concluded that the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the European Convention on Human Rights.

The ECtHR also recognised procedural positive obligations as regards the State's decision-making process in the context of climate change. First, the obligation to inform the public, in particular the persons who may be affected by the regulations and measures decided by the public authorities or the absence thereof, allowing them to assess the risk to which they are exposed. Second, the obligation to allow public participation in the decision-making process, in particular the interests of those affected or at risk.[30]

27. ECtHR, *Verein KlimaSeniorinnen*, préc., §337.

28. HRC, *Torres Strait Islander*, préc., § 8.9. See also General comment No. 16 (1988), paras 1 and 9.

29. Ibid., préc., §8.9.

30. ECtHR, *Verein KlimaSeniorinnen*, préc., §554.

3.2 The margin of appreciation

If human rights bodies affirm the existence of a positive obligation under the right to privacy and family life to adopt measures capable of mitigating the existing and potentially irreversible future effects of climate change, they also let to the State parties a certain margin of appreciation.

The ECtRH explained, in the *KlimaSeniorinnen* case, that States Parties have a reduced margin of appreciation on their commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect. However, on the choice of means designed to achieve those objectives, State parties can benefit from a wide margin of appreciation. Of course, the ECtHR will control that the competent domestic authorities have not exceeded their margin of appreciation. To do so, the Court verifies that they

(i) adopted general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
(ii) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
(iii) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction target […];
(iv) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
(v) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[31]

31. ECtHR, *Verein KlimaSeniorinnen*, §550.

The existence of a wide margin of appreciation could disappoint on the robustness of the obligations, especially in comparison to other international courts or tribunals who adopted a more ambitious interpretation of States' obligations in the context of climate change.[32] However, the ECtHR judges made a clear reference to the due diligence obligation[33] contained both in international environmental law and in the law of the sea.[34] Therefore, the ECtHR opened the door for a dynamic interpretation of the Convention in light of the law of the sea obligations, especially in light of ITLOS's interpretation of the due diligence obligation in the context of climate change. As a matter of fact, ITLOS considers that the standard of due diligence that States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be *stringent*.[35]

In conclusion, the ECtHR adopted a rather restrictive view of its competence and of the admissibility of the application preventing non-European coastal communities from accessing the Court, for instance on sea-level rise issues. However, it did recognise the existence of a positive obligation under Article 8 of the European Convention on Human Rights to mitigate existing and potential effects of climate change and extend the *locus standi* of associations in climate matters, opening the door to potential maritime or coastal cases.

32. See for instance: ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, N°31.

33. See ECtHR, *Verein KlimaSeniorinnen*, §§538 and 550.

34. The due diligence principle is stemming from the prevention principle (which requires States to act diligently to prevent environmental harm). In the climate change context, the principle is contained in Article 4§3 Of the Paris agreement, 2015.

35. ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, N°31, §241.