Climate change litigation under tort law : a comparative approach

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Semestre d'automne 2023/2024

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Master thesis under the supervision of Prof. Thomas KADNER GRAZIANO

15.12.2023

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Foreword

Ich möchte Prof. KADNER GRAZIANO für die Möglichkeit danken, Klimaklagen im Rechtsvergleich zu behandeln: vielen Dank für sein Vertrauen, seine Verfügbarkeit und seine wertvollen Einblicke in dieses aktuelle Thema.

Dank gilt auch Frau Luisa REININGHAUS (Berlin, Genf) für ihre Beratung bei der Suche nach deutschen Rechtsquellen.

Zuletzt geht ein herzlicher Dank an Herrn Nick METTLER (Universität Bern) für seine kritische Meinung, seine unerschöpfliche juristische Neugier und für seine unerschütterliche Unterstützung.

List of abbreviations

AJDA	L'Actualité Juridique de Droit Administratif
AJP	Aktuelle Juristiche Praxis
BGB	Bürgerliches Gesetzbuch
BGE	Entscheidungen des Schweizerischen Bundesgerichts, amtliche Sammlung
BV	Bundesverfassung
BVerG	Bundesverfassungsgericht
BW	Burgerlijk Wetboek
CBAM	Carbon Border Adjustment Mechanism
CC	Civil code
CE	Conseil d'Etat
CPC	Code de procédure civile
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESG	Rechtszeitschrift für nachhaltige Unternehmensführung
EU	European Union
ETS	Emissions Trading System
GHG	Greenhouse Gas
GG	Grundgesetz
IPCC	International Panel on Climate Change
JA	Juristiche Arbeitsblätter
JuS	Zeitschrift für Studium und Referendariat
KlimR	Zeitschrift für das gesamte Klimarecht
KSG	Klimaschutzgesetz
NJW	Neue Juristiche Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
OHCHR	Office of the High Commissioner for Human Rights
RECIEL	Review of European, Comparative & International Environmental Law
REVDH	Revue des Droits de l'Homme
RFDA	Revue Française de Droit Administratif
TAP	Tribunal Administratif de Paris
UNFCCC	United Nations Framework Convention on Climate Change
UNGP	United Nations Guiding Principles
UNSDG	United Nations Sustainable Development Goals
Verfblog	Verfassungsblog
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZPO	Zivilprozessordung
ZUR	Zeitschrift für Umweltrecht

I. Introduction

Within the past decade, climate change litigation has become a worldwide key body of environmental law. Although the first cases emerged in the late 1980s[1], the number of climate claims radically increased after 2015, and nearly doubled between 2017 and 2020[2].

How did we get here? In 1972, the Stockholm conference raised the issue of climate change in the international community for the first time. Twenty years later, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted: it aimed at stabilizing "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"[3]. Meanwhile, despite these commitments, the earth temperature continued to rise, and climate change gradually became a collective awareness, leaving less and less room for climate skepticism.

This research focuses on climate claims aimed at ordering governments or companies to reduce their greenhouse gas (GHG) emissions in France, Germany, the Netherlands and Switzerland. The turning point for such claims lies in the Paris Agreement, which was adopted in 2015 by 196 States: this treaty binds governments to restrain the increase of the global average temperature below 2°, and to pursue efforts to limit this increase to 1,5°. Although this agreement has no direct effect on domestic law, signatories States are now under the obligation to implement new legislation in consistency with these international objectives.

However, in light of the climate crisis, domestic climate regulations are deemed insufficient by a number of citizens and associations: that is why several national courts recently held their State liable for the insufficiency of their climate regulations, creating landmark cases in the Netherlands (*Urgenda v. Dutch State*, Dutch Supreme Court, 2019)[4], in Germany (Judgment on *protection of future generations*, Constitutional Court, 2021)[5] or in France (*Grande-Synthe*, Administrative Supreme Court, 2020[6]; *Notre affaire à tous*, Administrative Court of Paris, 2021[7]). Several climate claims are currently debated before the European Court

[1] Joana SETZER/Catherine HIGHAM/Andrew JACKSON/Javier SOLANA, Climate-related litigation and central banks , *Frankfurt am Main: European Central Bank*, 2021, p. 3.

[2] Subodh MISHRA, The Rise of Climate Litigation, Harvard Law School Forum on corporate governance, 03.03.2022, available at: https://corpgov.law.harvard.edu/2022/03/03/the-rise-of-climate-litigation/.

[3] United Nations Framework Convention on Climate Change (UNFCCC), art. 2.

[4] First instance: Rechtbank Den Haag (*The Hague Court of first instance*), 24.06.2015, ECLI:NL:RBDHA:2015:7196 (english translation) (hereinafter: *Urgenda v. Dutch State*, first instance). Second instance: Gerechtsshof Den Haag (*The Hague Court of Appeal*), 09.10.2018, ECLI:NL:GHDHA:2018:2610 (English translation) (hereinafter: *Urgenda v. Dutch State*, Court of appeal). Supreme court: Hoge Raad (*Supreme Court of Justice*), 20.12.2019, ECLI:NL:HR:2019:2007 (english translation) (hereinafter: *Urgenda v. Dutch State*, Supreme court).

[5] Bundesverfassungsgericht, BVerG (*Constitutional Court*), 24.03.2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 (english translation) (hereinafter: BVerG 2021, or *judgment on protection of future generations*).

[6] Conseil d'Etat (*Administrative Supreme Court*), 19.11.2020, n°427301 (hereinafter: CE 19.11.2020, or the *Grande-Synthe* case, 2020). Subsequent decision after further instruction: Conseil d'Etat (*Administrative Supreme Court)*, 01.07.2021, n°427301 (hereinafter: CE 01.07.2021, or the *Grande-Synthe* case, 2021). Now pending before the ECHR as *Carême v. France*, n° 7189/21.

[7] Tribunal Administratif de Paris (*Administrative Court of Paris*), 03.02.2021, n°1904967 (hereinafter : TAP 03.02.2021, or the *Notre affaire à tous* case). Subsequent decision after further instruction: Tribunal Administratif de Paris (*Administrative Court of Paris*), 14.10.2021, n° 1904967 (hereinafter: TAP 14.10.2021).

of Human Rights, after being brought against Switzerland (*Klimaseniorinnen v. Switzerland*)[8] and France (*Carême v. France*)[9].

Meanwhile, other claimants consider that the liability of polluting companies under current legislation is insufficient as well. In their view, these companies should be held liable for the damage caused by global warming, which is due to their emissions. That is the reason why several companies emitting an important amount of greenhouse gas (GHG) are now directly sued under tort law. So far, the landmark tort decision remains the 2021 judgment ordering *Royal Dutch Shell* (hereinafter: *RDS*) to reduce its amount of GHG emissions by 45% by 2030 (*Urgenda v. Royal Dutch Shell*, the Hague Court of first instance, 2021, currently on appeal[10]).

Traditionally, tort law aims at obliging a tortfeasor to compensate a victim for the damage he or she has caused. In climate claims, however, the aim is not so much to compensate for past damage as to *prevent* this damage from worsening, by forcing polluters to reduce their present and future emissions. Moreover, the damage faced by victims is not so much climate change *per se* as the natural disasters (heat waves, drought, floods, hurricanes, disease, food crises, etc.) it causes. Furthermore, climate change is the result of the *worldwide* accumulation of GHG emissions over the past decades: the most polluting company alone would not be enough to cause climate change. Therefore, climate claims raise a number of issues under tort law, with regard to wrongfulness, damage and causation.

This overview of the main challenges of climate claims raises the following question: to what extent does climate change litigation affect the features of tort liability, and vice versa?

To answer this question, we will use a comparative approach. First, we will discuss how climate change litigation challenges the existing case law on environmental harm (II). Second, we will analyze the specific features and strengths of climate claims (III). Third, we will discuss the limits of these climate claims (IV). Finally, we will explore the alternative of granting rights to nature, and we will discuss whether this approach may remedy the weaknesses of climate claims (V).

II. From compensation of environmental harm to prevention of climate change: legal challenges brought by climate change litigation

Climate change judgments are indubitably innovative. However, when it comes to establishing such legal reasonings, there is no need to start from scratch nor to reinvent the wheel: on the one hand, claimants appeal to the courts on the basis of actions provided by their jurisdictions under constitutional law or tort law (A). On the other hand, courts start their reasoning by turning to the relevant existing case law (B).

A. The procedural frame of climate change claims

[8] Bundesgericht / Tribunal fédéral (*Federal Supreme Court of Justice*), 05.05.2020, BGE 146 I 145 (hereinafter: BGE 146 I 145, or the *Klimaseniorinnen* case), now pending before the ECtHR as *Klimaseniorinnen v. Switzerland*, n° 53600/20.

[9] CE 19.11.2020 or the *Grande-Synthe* case, 2020 (fn 6), now pending before the ECtHR as *Carême v. France,* n° 7189/21.

[10] Rechtbank Den Haag (*The Hague Court of first instance*), 26.05.2021, ECLI:NL:RBDHA:2021:5339 (english translation) (hereinafter: *Milieudefensie v. RDS*).

1. Claims against States through constitutional mechanisms

In several jurisdictions, Constitutional law guarantees the right for an individual to file a claim against the State when the latter fails to fulfill its duty properly.

In France, this right is embodied by the *ultra vires* action ("*recours pour excès de pouvoir*") since the *Dame Lamotte* precedent of 1950[11].This type of claim allows a claimant to challenge a refusal from the authorities to take "any useful measure" regarding an illegal situation. It usually comes together with a request for an injunction to take measures to put an end to this illegal situation[12]. The claimant's standing is traditionally broadly interpreted, due to the objective nature of this action[13]. In environmental law, the *Amis de la Terre* case[14] is the archetype of such a claim. In its decision, the French Administrative Supreme Court (*Conseil d'Etat*) ruled that the State had not taken sufficient regulations to comply with the limit amount of fine particles allowed in the air, and ordered it to take the necessary measures to respect the prescribed limits within eight months [15]. The *Grande-Synthe* case of 2020 is based on an *ultra vires* action[16].

In Germany, according to art. 93 Abs. 1 Nr. 4a GG, an individual whose fundamental rights are possibly infringed can sue the State by filling an individual constitutional claim *(Individualverfassungsbeschwerde*) before the Constitutional Court (*Bundesverfassungsgericht*). The claimant must prove that the State's behavior possibly infringes his or her own fundamental rights in a current and direct way[17]. The judgement of the German Constitutional Court on the *protection of future generations*[18] is based on this mechanism.

2. Tort claims against a State or a company

In all jurisdictions studied, any State or company that is held liable under tort law has the duty to compensate the victim for their damage. To obtain compensation, the claimant must prove the existence of a wrongful act of the defendant, for example the infringement of a duty of care or of an absolute right, as well as a damage, a causal link between the wrongful act and the damage, and a fault.

These conditions are set out in § 823 (1) BGB under German law, and in art. 41 al. 1 CO under Swiss law. Under French law, art. 1240 – 1241 CC provide the general conditions for tort liability, together with the *lex specialis* of art. 1246 CC regarding ecological damage. French tort law allows traditionally a broad interpretation of the claimant's standing because the legal interest for a victim to obtain compensation is presumed[19]. Moreover, art. 1246 CC explicitly provides compensation for the ecological damage, and art. 1248 CC allows associations to bring a claim, as long as they promote the conservation of nature or the

[11] Conseil d'Etat, *Ministre de l'Agriculture c. Dame Lamotte*, 17.02.1950, n° 86949.
[12] Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI, Le contentieux climatique devant le juge administratif, *RFDA* 4/2021, p. 747 – 770 (p. 766).
[13] Rémi RADIGUET, Responsabilité de l'Etat – climat, *Revue juridique de l'environnement*, 2021/2 (volume 46), p. 407 – 419 (p. 410).
[14] Conseil d'Etat, 12.07.2017, n°394254 (hereinafter : the *Amis de la Terre* case).
[15] Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 770.
[16] CE 19.11.2020 (fn 6).
[17] Thomas WÜRTENBERGER/Reinhold ZIPPELIUS, Deutsches Staatsrecht, 33. Auflage 2018, C.H Beck, München, Rn 87.
[18] BVerG 2021 (fn 5).
[19] Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 749.

environment, and as they are "certified or established no less than five years before the institution of proceedings"[20]. Under Dutch law, general conditions for tort liability can be found in art. 6:162 BW; here, the breach of an *unwritten* duty of care is explicitly qualified as a wrongful act. [21] Furthermore, art. 3:305a (1) BW allows associations to fill claims aimed at protecting environmental interests. Such claims are "public interest-related": in other words, "the interests at stake may concern many or potentially all members of society"[22].

Several landmark climate change judgments are based on tort liability. In France, The Administrative Court of Paris established liability of the State for ecological damage under art 1246 CC in the *Notre affaire à tous* case of 2021[23]. In the Netherlands, the Hague Court of first instance established liability of the State under art. 6:162 BW in 2015[24], and held Royal Dutch Shell liable under the exact same legal basis several years later, in 2021[25].

Having examined the procedural frames used by claimants, we now turn to the existing case law used by courts as the starting point of their reasonings.

B. The existing case law as the starting point of the courts' reasonings

1. Environmental harm is Human rights harm

The European Court of Human Rights has repeatedly held that environmental harm may constitute a violation of Human rights[26]. In several environmental harm cases, claimants invoked their right to life (art 2 ECHR), their right to respect for private and family life (art 8 ECHR), as well as their right to protection of property (art 1 Protocol 1 ECHR).

In *Öneryildiz v. Turkey*[27], claimants invoked art 2 ECHR in the context of a methane gas explosion that had killed a number of people. According to the ECtHR, protection of life under art. 2 ECHR entails a duty of the State to establish a legislative and administrative framework that ensures sufficient defense of life. *In casu*, it was established that the legislation implemented by the State was deficient in its application[28]. Thus, by not taking sufficient measures to address this risk, the State had infringed its duty to protect life. In *Budayeva v. Russia*[29], the Court held that protection of life includes protection against natural disasters if their imminence is clearly ascertainable in the specific case. The extent of the duty of the State depends on the cause of the threat as well as on the possibilities to mitigate it. *In casu*, the Russian authority had not taken sufficient measures against mudslides, although such incidents had occurred several times[30].

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[20] Translated in Thomas KADNER GRAZIANO, Comparative Tort Law – cases, materials, and exercises, 2018, Routledge, London and New York, p. 525.
[21] See Art. 6 :162 (2) BW.
[22] Berthy VAN DEN BROEK/Liesbeth ENNEKING, Public interest litigation in the Netherlands, Utrecht L.Rev. 2014, p. 77.
[23] TAP 03.02.2021 (fn 7).
[24] *Urgenda v. Dutch State*, first instance (fn 4).
[25] *Milieudefensie v. RDS* (fn 10).
[26] Maiko MEGURO, State of the Netherlands v. Urgenda Foundation, *The American journal of international law,* 2020, Vol.114 (4), p.729-735 (p. 732).
[27] ECHR, *Öneryildiz v. Turkey*, 30.01.2004.
[28] Thomas GROß, Die Ableitung von Klimaschutzmaßnahmen aus grundrechtlichen Schutzpflichten, *NVwZ* 2020, p. 337 – 342 (339 – 340).
[29] ECHR, *Budayeva v. Russia*, 20.03.2008.
[30] Thomas GROß (fn 28), p. 340.

In *Lopez Ostra v. Spain*[31], the Court established an infringement of art 8 ECHR in a situation of environmental harm, by stating that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health"[32]. Art 8 ECHR entails both negative and positive obligations for the State: not only must they refrain from interference with fundamental rights, but they must also protect individuals from interference by others.[33] Claimants who invoke art. 8 ECHR in the context of a threat of future violation must be able to prove in a sufficient way that this violation is likely to occur. However, the level of endangerment that must be met remains unclear. In *Calancea ua v. Moldavia*,[34] it was held that an electromagnetic field generated by high-voltage power was not dangerous enough to have a harmful effect on the claimant's private and family life[35].

Environmental harm can also infringe the property rights protected under art.1 Protocol 1 ECHR. However, the duty to protect property is not as extensive as the duty to protect life: whereas States are required to do everything in their power to protect life, the right to property requires only to take appropriate measures for the individual case. Thus, in *Budayeva v. Russia*, although the insufficient measures taken by the State to avoid mudslides constituted a violation of the duty to protect life, a violation of property rights was not recognized. [36]

From a procedural perspective, claimants can also invoke their right to an effective remedy (art. 13 CEDH) together with a material infringement of their fundamental rights (art 2 or 8 ECHR, art 1 Protocol 1 ECHR). This article, "in giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights"[37].

Finally, although the primary goal of fundamental rights is to limit the power of the States over individuals, it is undisputed in most legal orders today that such rights also have an impact on relationships between private parties[38]. In Europe, civil courts tend to interpret private law within the light of fundamental rights. They are thus demonstrating their readiness to grant effect to constitutional rights and international human rights instruments in private law disputes.[39] Therefore, fundamental rights matter in pure tort law cases as well.

2. The existing case law on the duty of care of the State

States have the power to decide how they ensure the protection of Human rights, yet they do not have an unlimited leeway on this matter: in *Jugheli et al. v. Georgia*, the ECtHR reminded that although "it is not its task to determine what exactly should have been done in the present situation (…), it is within the Court's jurisdiction to assess whether the Government

[31] ECHR, *Lopez Ostra v. Spain*, 9.12.1994.
[32] ECHR, *Lopez Ostra v. Spain*, 9.12.1994, at 51.
[33] Thomas GROß (fn 28), p. 338.
[34] ECHR, *Calancea ua v. Moldavia*, 06.02.2018.
[35] Thomas GROß (fn 28), p. 338.
[36] Thomas GROß (fn 28), p. 340.
[37] Guide on Article 13 of the European Convention on Human Rights, *Council of Europe/European Court of Human Rights*, 2022, p. 7.
[38] Matteo FORNASIER, The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect? *European Review of Private Law* 1/2015, p. 29 – 46 (p. 29).
[39] Olha CHEREDNYCHENKO, EU Fundamental Rights, EC Fundamental Freedoms and Private Law, *European Review of Private Law* 1/2006, p. 23 – 61 (p. 23).

approached the problem with due diligence and gave consideration to all the competing interests."[40]

According to the German Constitutional Court, the State has a duty of care to prevent infringements of fundamental rights through inferences by private parties. How this obligation is fulfilled is primarily a matter for the legislature to decide. Nevertheless, the State must take the necessary measures to ensure an effective protection of these rights[41], otherwise it violates the prohibition of insufficient measures (*Untermaßverbot*).[42] Before 2021[43], the Court had never concretized the principle of prohibition of insufficient measures in an environmental harm context. Nevertheless, it had exposed in its *Atomkraft case*[44] which factors were relevant for determining whether the State had failed to fulfill its duties: the content of the State's duties depends on the type, proximity, and extent of possible dangers, on the type and rank of the constitutionally protected legal interests, as well as on the regulations already in place[45].

In France, the *Amis de la Terre* judgment established the State's obligation of efficient action in a case of environmental pollution: the Administrative Supreme Court qualified the insufficient measures implemented to maintain the level of fine particles below the prescribed limits as a *wrongful* act that may give rise to State liability[46].

3. The existing case law on the environmental damage

In a number of legal systems, the ecological damage only became recoverable after a few changes in the conception of the damage.

In France for example, the *Erika* judgment gave for the first time an objective definition of the ecological damage. It could now be qualified independently of any patrimonial or extra patrimonial prejudice. In 2010, the Appeal Court of Paris defined the ecological damage as "any significant damage to the natural environment, including air, atmosphere, water, soil, land, landscapes, natural sites, biodiversity and the interaction between these elements, that has no repercussions on a particular human interest but affects a legitimate collective interest"[47]. The 2016 *Law on the Restoration of Biodiversity, Nature and the Countryside*[48] (*Loi pour la reconquête de la biodiversité, de la nature et des paysages*) codified this case law under art 1247 CC: "subject to the conditions stipulated by the present chapter, ecological damage is recoverable for any act which causes a considerable adverse effect on the structure or function of an ecosystem, or environmental benefits enjoyed by society as a whole"[49].

From an international perspective, the International Court of Justice (ICJ) recognizes since 2018 that environmental damage resulting from an internationally wrongful situation is itself recoverable.[50]

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[40] ECHR, *Jugheli et al. v. Georgia*, 13.07.2017, at 76.
[41] BVerG, 25.02.1975, *NJW* 1975, 573.
[42] Thomas GROß (fn 28), p. 338.
[43] BVerG 2021 (fn 5).
[44] BVerG, 08.08.1978, *NJW* 1979, 359.
[45] Thomas GROß (fn 28), p. 338.
[46] Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 762.
[47] Cour d'Appel de Paris (Appellate Court of Paris), 30.03.2010, n° 08/02278 (*Erika* case, appeal).
[48] Law n° 2016-1087 of 08.08.2016.
[49] Translated in Thomas KADNER GRAZIANO, Comparative Tort Law – cases, materials, and exercises, 2018, Routledge, London and New York, p. 525.
[50] ICJ, 02.02.2018, Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*), Compensation, Judgment, ICJ Reports 2018, p. 15. See also Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 757.

4. Intermediary conclusion on the existing case law

In a nutshell, courts facing a climate claim have at their disposal a solid body of case law, from the duty of the State to protect Human rights to the recognition of the environmental damage. However, the issues raised by climate claims go beyond this scope.

C. Limits of the existing case law with regard to the new challenges of climate change litigation

According to the IPCC Reports[51], if the rise of the global temperature does not stay below the 1,5 – 2° target, the whole world's population will be highly exposed to risks of natural disasters by 2040. From a legal perspective, this spatio-temporal framework raises several difficulties, in terms of admissibility of the claim, infringement of a duty of care, assessment of the damage and establishment of causation.

1. The admissibility of a climate claim

Although climate change already affects our daily lives, climate claims aim at preventing major natural disasters that are likely to occur in a *near future*. These damages will affect generations that have not been born yet. Nevertheless, current and future emissions of GHG need to be regulated now, so that there is a chance to protect future generations from major ecological damage. However, how can a Court consider rights of a generation that has not been born yet, and is therefore not eligible to fundamental rights?

Moreover, as it was outlined by the ECtHR, Human rights law primarily concerns the obligation of member States towards individuals within their own jurisdictions. The ECtHR itself has only considered environmental harm that does not cross borders[52]. However, climate change is global. Therefore, it can affect residents as well as non-residents of a jurisdiction: can non-residents qualify as claimants? In other words, are they protected under the duty of care imposed to States or companies?

Finally, "in private law, most jurisdictions traditionally require a person to be injured in his or her own legally protected interest to qualify for a claim"[53]. Some jurisdictions also require a sufficiently protected interest under public law. For example, under the *Swiss Federal Act of Administrative Procedure*, the claimant must prove that he or she is "more intensely concerned

[51] 1st report: IPCC, 2007: Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, PACHAURI, R.K and REISINGER, A. (eds.)]. *IPCC*, Geneva, Switzerland, p. 104ss. 2nd report: IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. PACHAURI and L.A. MEYER (eds.)]. *IPCC*, Geneva, Switzerland, p. 151ss. 3rd report: IPCC, 2018: 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.)]. *Cambridge University Press*, Cambridge, UK and New York, NY, USA, p. 616ss.

[52] Maiko MEGURO (fn 26), p. 732.

[53] Thomas KADNER GRAZIANO, Comparative Tort Law – cases, materials, and exercises, 2018, Routledge, London and New York, p. 502. See for example § 823 (1) BGB (German law) and art. 41 al. 1 CO (Swiss law).

that the rest of the population"[54] (see above Part II. A. 1). But how can one meet such a criterion when climate change potentially affects the *whole* world's population?

2. *The infringement of a duty of care*

States have the duty to protect fundamental rights through sufficient regulations. Regarding climate change, all the jurisdictions studied implemented domestic regulation to limit GHG emissions, such as the Federal Climate Change Act in Germany (*Bundes-Klimaschutzgesetz - KSG)*, or the Federal Act on the Reduction of CO2 emissions in Switzerland (*Bundesgesetz über die Reduktion der CO2 Emissionen*). Here, unlike in the *Öneryildiz v. Turkey* case, the question is not whether these legislations are *deficient* in their application, but whether they are *sufficient* with regard to climate change challenges. Can a court answer such question, or is it only a matter for the legislature? In other words, does an insufficient regulation constitute an infringement of the duty of the State?

The same issue arises when it comes to holding companies liable for their GHG emissions: companies such as *Shell*, *Total*, *BMW*, *Volkswagen*, or *Mercedes Benz* all comply with current environmental domestic laws. Therefore, how can a court qualify their behavior as unlawful? Are companies under a duty of care that forbids them to emit such an amount of GHG?

3. The damage issue

As it was outlined in the OHCHR Report of 2009[55], Human rights violations are normally established *after* the harm has occurred, while the threat of climate change largely concern a problem of risk or anticipated harm[56]. In a climate action, plaintiffs claim that there is a duty to prevent future infringements of their fundamental rights even though they have not suffered from any personal damage yet. However, although there is no scientific doubt that global warming will increase the likelihood of harmful events, it is not possible to predict who will be affected, nor when or where natural disasters will occur[57]. Under these circumstances, how can a claimant prove the existence of a damage?

4. The causation issue

When it comes to establishing causation before the ECtHR, claimants must prove that there is a *sufficient likelihood* that they are or will be affected by the act or omission of the State. Even if the court has often used the precautionary principle[58] to reduce the burden of proof, it has nevertheless only dealt with *identifiable* local sources of hazard that had affected a precisely identifiable group of people. However, although it is scientifically proven that global warming is caused by the amount of GHG emitted in the atmosphere, climate damages are not temporally nor spatially related to a specific polluter. On the contrary, climate change is the result of a global summation of emissions that cannot be attributed to specific sources[59]. Therefore, how

[54] Bundesgesetz über das Verwaltungsverfahren (*Swiss Federal Act of Administrative Procedure*), art. 48.
[55] Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Human Rights and Climate change, UN Doc. A/HRC/10/61 (15.01.2009).
[56] Maiko MEGURO (fn 26), p. 732.
[57] Thomas GROß (fn 28), p. 341.
[58] See ECHR, *Tatar v. Romania*, 27.01.2009.
[59] Thomas GROß (fn 28), p. 340 – 341.

can a court assess a sufficient causal link between a damage and the insufficient domestic law or the GHG emissions of a company?[60]

D. Intermediary conclusion on the challenges brought by climate change litigation

In the end, with the procedural frames and precedents exposed above, courts have at their disposal a set of essential tools for considering a climate claim. Yet they still must overcome new obstacles arising from the specific characteristics of climate change litigation.

Having set out the genesis of climate claims, we will now examine how courts indeed overcame these legal barriers.

E. Presentation of the judgments discussed

In this research, the following cases will be analyzed.

In *Urgenda v. Dutch State* (2015), *Urgenda*, a citizens' platform, asked The Hague Court of first instance to deliver an injunctive relief ordering the *Dutch State* to reduce its greenhouse gas (GHG) emissions by 40% by 2020 (compared to 1990), alternatively by 25%, in order to honor the commitments it had initially made before subsequently revising its position[61]. The court allowed the claim on the basis of Dutch tort law (art. 6:162 BW), and ordered the State to reduce its GHG emissions by 25% by 2020. The decision was confirmed by The Hague Court of appeal in 2018, and by the Dutch Supreme Court of justice in 2019[62].

In the *Grande-Synthe* case (2020), the *Grande-Synthe* community and its mayor *Damien Carême* asked the French Administrative Supreme Court to order the *French State* to comply with its climate obligations, and to take all appropriate measures to curb the curve of GHG emissions produced in France. The court allowed the claim on the basis of the French Energy Code (L 100-4) and delivered an injunctive relief in a subsequent decision in 2021, after further instruction[63]. However, the judges refused to ground their decision on the basis of art. 2 and art. 8 ECHR: for this reason, the case is now pending before the ECtHR as *Carême v. France*.

In the *Notre affaire à tous* case (2021), a number of associations such as *Notre affaire à tous*, *Greenpeace France* or *Oxfam France* asked the Administrative court of Paris to order the *French State* to take all necessary measures to achieve its goal for reducing GHG emissions, in order to prevent further ecological damage. The court allowed the claim on the basis of French tort law (art. 1246 CC), and delivered an injunctive relief in a subsequent decision in the same year, after further instruction[64].

In the *judgment on protection of future generations* (2021), a number of residents of Germany, as well as residents from Bangladesh and Nepal, asked the German Constitutional

[60] See Michael RODI, Michael KALIS, Klimaklagen als Instrument des Klimaschutzes, *KlimR* 2022, p. 5 – 10 (p. 7).
[61] Up to 2010, the Dutch State had set the target of reducing its emissions by 30% by 2020. However, after 2010, the government lowered this objective by setting a new goal of a 20% reduction: see *Urgenda v. Dutch State* (2015), first instance (fn 4), at 4.31.
[62] *Urgenda v. Dutch State*, first instance (fn 4), at 3.1 (Urgenda's conclusions) and 5.1 (court's ruling). Confirmed in *Urgenda v. Dutch State*, Court of appeal (fn 4) (section "decision"), and in *Urgenda v. Dutch State*, Supreme court (fn 4), at 9.
[63] CE 19.11.2020 (fn 6) at 1 (plaintiffs' conclusions) and art. 5 (court's decision). CE 01.07.2021 (fn 6), art. 2 (court's ruling).
[64] TAP 03.02.2021 (fn 7), at 2 (plaintiffs' conclusions) and art. 4 (court's ruling). TAP 14.10.2021 (fn 7), art 2 (court's ruling).

Court to review the constitutionality of the climate goals set in the Federal Climate Change Act (*Klimaschutzgesetz*). The court allowed the claim on the basis of the Basic Law (*Grundgesetz*), and ruled that the mitigation goals set in the Federal Climate Change Act were unconstitutional insofar as they infringed the claimants' right to protection of life and physical integrity, as well as their right to property. By stating so, the court obliged the State to set more ambitious climate goals in its domestic legislation[65].

In *Milieudefensie v. RDS* (2021), *Milieudefensie*, an environmental association, asked The Hague court of first instance to deliver an injunctive relief ordering *Royal Dutch Shell* (*RDS*) to reduce its GHG emissions by 45% by 2030 (compared to 2019). The court allowed the claim and delivered such injunction on the basis of Dutch tort law (art. 6:162 BW)[66]. The case is now on appeal.

In the *Klimaseniorinnen* case (2020), the *Klimaseniorinnen*, an association representing elderly women living in Switzerland, as well as a number of its members, asked the Swiss Federal Supreme Court of justice to order the *Swiss State* to take the necessary measures in order to comply with its international climate commitments, in particular by setting more ambitious targets for reducing GHG emissions. On the basis of art. 25a and art. 48 of the Federal Act of Administrative Procedure, the court refused to grant standing to the claimants, stating that their fundamental rights were not particularly infringed by climate change. For this reason, the case is now pending before the ECtHR as *Klimaseniorinnen v. Switzerland* [67].

In *Umwelthilfe v. Mercedes Benz* (2022), the environmental association *Umwelthilfe,* as well as a number of its members, asked the Regional Court of Stuttgart to order *Mercedes Benz,* car manufacturer*,* to refrain from the production of GHG-emitting combustion engines, on the basis of § 823 (1) cum 1004 BGB (*Unterlassungsanspruch*). The court dismissed the claim by denying any wrongful interference in the claimants' absolute rights[68]. Three subsequent cases present similar claimants (all environmental associations and a number of their members), similar defendants (all car manufacturers), similar conclusions and similar outcomes: *Umwelthilfe v. BMW* (2023) before the Regional Court of Munich I, *Greenpeace v. VW* (2023) before the Regional Court of Detmold, and *Umwelthilfe v. VW* (2023) before the Regional Court of Brunswick[69]. All these cases are now on appeal.

III. Analysis of the specific features of climate claims

In this section, we will analyze the main features of landmark climate cases (*Urgenda v. Dutch State*; *Milieudefensie v. RDS; Grande-Synthe* case; *Notre affaire à tous* case; *judgment of the protection of future generations*, BVerG 2021;). We will examine how courts indeed allowed such claims, and on what grounds they justified their decisions.

[65] BVerG 2021 (fn 5), Rn 38 – 40 and 78 – 79 (plaintiffs' conclusions); Rn 266 (court's ruling).
[66] *Milieudefensie v. RDS* (fn 10*)*, at 3.1 (plaintiffs' conclusions) and at 5.3 (court's ruling).
[67] BGE 146 I 145 (fn 8) at A. (plaintiffs' conclusions) and at 5.4 (court's ruling).
[68] Landgericht Stuttgart, LG Stuttgart (*Regional Court of Stuttgart*), 13.09.2022, NVwZ 2022, 1663 (1663 – 1664) (hereinafter: *Umwelthilfe v. Mercedes Benz*, 2022)
[69] Landgericht München I, LG München I (*Regional Court of Munich I*), 07.02.2023, ESG 2023, 117 (117 – 121) (hereinafter: *Umwelthilfe v. BMW*, 2023). Landgericht Braunschweig, LG Braunschweig (*Regional Court of Brunswick*), 14.02.2023, ESG 2023, 110 (110 – 116) (hereinafter: *Umwelthilfe v. VW*, 2023). Landgericht Detmold, LG Detmold (*Regional Court of Detmold*), 24.02.2023, ESG 2023, 116 (116 – 117) (hereinafter: *Greenpeace v. VW,* 2023).

A. Overcoming the barriers of admissibility

1. Jurisdiction and applicable law

Among all climate claims presently studied, only *Milieudefensie v. RDS* raises cross-borders issues. The competence of the Dutch court is not explicitly discussed in the decision. Nevertheless, since the *Royal Dutch Shell* headquarters are located in The Hague, jurisdiction follows from art. 4(1) and 63(1)(a) of the Brussels I (Recast) Regulation[70].

As for the applicable law, the Hague Court of first instance allows the application of Dutch law based on the choice of law made by claimants within the meaning of art. 7 Rome II Regulation. Indeed, the judge rejects the objection of RDS, according to which "its corporate policy is a preparatory act that falls outside the scope of this article (…)". Therefore, the court considers that "RDS's adoption of the corporate policy of the Shell group (…) constitutes an *independent* cause of the damage, which may contribute to environmental damage (…). Thus, "the conditional choice of law of *Milieudefensie* is in line with the concept of protection underlying art. 7 Rome II (…)."[71]

2. Standing of claimants

2.1 Standing of claimants in general

When analyzing the standing of claimants, all courts inevitably adopt a forward-looking perspective: although they deny any possibility of granting rights to a generation that remains unborn[72], they nevertheless acknowledge the need for protecting future generations by granting standing to the current claimants. Indeed, the Hague Court of first instance acknowledges that *Urgenda* defends the right of the current and future generations to a sustainable society[73]. The same court grants *Milieudefensie* standing as the association represents "the interests of current and future generations of Dutch residents"[74]. The French Administrative Supreme Court grands the *Grande-Synthe* community standing by taking forthcoming environmental disasters into account[75].The Administrative Court of Paris explicitly grants *Notre affaire à tous* standing as this association aims at protecting current and future generations[76].The German Constitutional Court recognizes a possible infringement of the claimants' rights by anticipating possible subsequent restrictions on freedoms of the future generations[77].

In accordance with their domestic case law[78],The Netherlands, France and Germany confirm their broad approach of the standing of claimants. In *Urgenda v. the Dutch State*, "is is not even in dispute that *Urgenda* has met the requirement of 3:305a BW". *In Milieudefensie v. RDS*, six associations are granted standing with no further development, as "the common interest of preventing dangerous climate change by reducing CO2 emissions can be protected

[70] Astrid STADLER, Can civil courts save the climate? Strategic climate-change litigation before civil courts, *Juridica International* 32/2023, p. 3 – 12 (p. 8).
[71] *Milieudefensie v. RDS* (fn 10), at 4.3.7.
[72] BVerG 2021 (fn 5), Rn 109.
[73] *Urgenda v. Dutch State*, first instance (fn 4), at 4.8.
[74] *Milieudefensie v. RDS* (fn 10), at 4.2.4.
[75] CE 19.11.2020 (fn 6), at 3.
[76] TAP 03.02.2021 (fn 7), at 13.
[77] BVerG 2021 (fn 5), Rn 116.
[78] See above, II. A. 2.

in a class action"[79]. In France, collective entities are easily granted standing as well: the French Administrative Supreme Court does not even distinguish between "certified environmental associations", whose standing is presumed under L 142-2 of the Environmental code (such as *Greenpeace*), and other associations (such as *Oxfam*, *Notre affaire à tous,* or the *Fondation Nicolas Hulot*)[80]. The Administrative Court of Paris even grants *Oxfam* standing, although its statutes are not directly related to environmental protection, as well as *Notre affaire à tous*, although this association does not meet the five years of experience criteria[81].

Before the German Constitutional Court, the analysis of claimants' standing is encompassed in a different procedural frame: due to the *individual* nature of the claim, only individual plaintiffs alleging an infringement of their *own* rights can be granted standing[82]. Therefore, environmental associations such as *Anwälte der Natur* do not qualify as claimants, as "the Basic Law and constitutional procedural law make no provision for this kind of standing to lodge constitutional complaint"[83]. Nevertheless, following the ECtHR case law on environmental harm as human rights harm[84], the German Constitutional Court grants individual claimants standing on the grounds that the *KSG* possibly infringes their right to protection of life and physical integrity (art. 2 (2) (1) GG), and their right to protection of property (art 14 (1) GG) as long as they remain owners of the land threatened by climate change. However, a protection that goes beyond property is not apparent, so that there is no possible infringement of economic freedom (art. 12 (1) GG) [85]. The Court also denies standing on the basis of a so-called "right to an ecological minimum standard of living" ("*Grundrecht auf ein ökologisches Existenzminimum*") nor a "right to a future constituent with human dignity" ("*Recht auf eine Menschenwürdige Zukunft*") [86] (art. 2 (1) cum art. 1 (1) GG). Art. 20a GG, that protects natural foundations of life and animals ("*natürliche Lebensgrundlagen und Tiere*"), cannot ground standing neither: this provision does not entail any subjective rights, it is rather a mere definition of a state objective[87].

2.2 Standing of nonresident claimants

In its judgment, the German Constitutional Court does not exclude that art 2 II 1 GG and art 14 I GG might also protect claimants who are residents from Bangladesh and Nepal[88]. Therefore, nonresidents of Germany are also granted standing.

On this matter, the French and Dutch approach differ. The French Administrative Supreme Court grants the *Grande-Synthe* municipality standing to the extent that this coastal city is very exposed to risks of climatic disasters, such as flooding and severe drought episodes. Paris and Grenoble are granted standing on a similar reasoning[89]. However, the Court denies standing to the single individual claimant, *Damien Carême* (mayor of *Grande-Synthe*), as there

[79] *Milieudefensie v. RDS* (fn 10), at 4.2.2.
[80] CE 19.11.2020 (fn 6), at 6. Rémi RADIGUET (fn 13), p. 410.
[81] TAP 03.02.2021 (fn 7), at 12 - 13; Rémi RADIGUET (fn 13), p. 413.
[82] Michael SACHS, Grundrechte: Klimawandel, *JuS* 2021, p. 708 – 711 (p. 709).
[83] BVerG 2021 (fn 5), Rn 136.
[84]Note: the 2021 *judgment on protection of future generations* explicitly mentions *Öneryildiz v. Turkey* and *Budayeva v. Russia* at Rn 99.
[85] BVerG 2021 (fn 5), Rn 99 – 100. Stefan MUCKEL, Pflicht des Gesetzgebers zu effektivem Klimaschutz, *JA* 2021, p. 610 – 613 (p. 611).
[86] BVerG 2021 (fn 5), Rn 113.
[87] BVerG 2021 (fn 5), Rn 112 ; Stefan MUCKEL (fn 85), p. 612.
[88] BVerG 2021 (fn 5), Rn 101.
[89] CE 19.11.2020 (fn 6), at 3 – 5.

is no certainty that he will still be a resident of *Grande-Synthe* when these damages occur[90]. In The Netherlands, the Hague Court of first instance excludes the rights of non-residents of the scope of its analysis in the *Urgenda* case[91], and denies *Action Aid* standing in *Milieudefensie v. RDS*, as this association "does not promote the interests of Dutch residents sufficiently for its collective claim to be allowable"[92]. Thus, unlike Germany, France and The Netherlands distinguish between residents and non-residents when granting claimants standing.

2.3 Intermediary conclusion on the standing of claimants

In the end, by granting standing to associations or broadly interpreting the standing of individual plaintiffs, courts rule that the fact that climate change potentially affects *everyone* is not an obstacle to admissibility[93].

B. Grounds for establishing liability of the State or company

1. Same climate science as a common basis

To begin with, all cases base their decisions on the same scientific knowledge of climate change: the IPCC Reports[94]. The conclusions of the IPCC Reports can be summed up with the following reasoning: due to anthropical GHG emissions, the temperature of the Earth is constantly rising. Every GHG emission currently contributes to this effect and increases it. By 2040, due to the global warming, the world's population will be more and more frequently exposed to natural disasters, such as water shortage, flooding, or heat waves: these phenomena will impact human health and livelihood. In order to mitigate this phenomenon as much as possible, and to avoid reaching a "tipping point"[95], the temperature of the Earth should not increase by more than 1,5° - 2° by 2100.

In all cases, this statement is not at all disputed by the parties[96]. Therefore, all courts quote the conclusions of the IPCC reports when assessing the damage. In *Urgenda v. Dutch State*, the Court relies on the conclusions of the IPCC when examining "the nature and extent of the damage ensuing from climate change, the knowledge and foreseeability of such damage and the chance that hazardous damage will occur"[97]. Furthermore, it emphasizes that "the negative consequences are currently being experienced in the Netherlands, such as heavy precipitation, and that adaptation measures are already being taken to make the Netherlands

[90] CE 19.11.2020 (fn 6) at 4. See also Rémi RADIGUET (fn 13), p. 411.
[91] Margaretha WEWERINKE-SINGH/Ashleigh MCCOACH, the State of the Netherlands v. Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation, *RECIEL* 2021/30, p. 275 – 283 (p. 281).
[92] *Milieudefensie v. RDS* (fn 10), at 4.2.5.
[93] On the *Grande-Synth*e case, see Hubert DELZANGLES, Le premier recours climatique en France : une affaire à suivre !, *AJDA* 4/2021, 01.02.2021, p. 217 – 226 (p. 222).
p. 222; Germany: BVerG 2021 (fn 5), Rn 110; see Michael SACHS (fn 82), p. 709.
[94] Germany: BVerG 2021 (fn 5), Rn 16ss ; Michael RODI, Michael KALIS (fn 60), p.7. France: CE 19.11.2020 (fn 6), at 5. TAP 03.02.2021 (fn 7), at 16. The Netherlands: *Milieudefensie v. RDS* (fn 10), at 2.3.5. *Urgenda v. Dutch State*, first instance (fn 4), at 2.8.
[95] Paul MOUGEOLLE, Notre affaire à tous et autres c. Total (2020), in : Christel Cournil (dir.), *Les grandes affaires climatiques*, DICE Editions, 2020, Aix-en-Provence, p. 547 – 560 (p. 552).
[96] See for example *Urgenda v. Dutch State*, first instance (fn 4), at 4.64.
[97] *Urgenda v. Dutch State*, first instance (fn 4), at 4.63.

"climate-proof""[98]. In *Milieudefensie v. RDS*, the Hague Court of first instance acknowledges that "it is not in dispute that these global CO2 emissions of the Shell group (…) contribute to global warming and climate change in the Netherlands and the Wadden region". Moreover, it underlines that "the global effects of climate change are apparent from the reports of the Intergovernmental Panel on Climate Change"[99]. Furthermore, it explicitly describes the risks for Dutch residents and the Wadden region in terms of health problems, increased mortality risk, flooding, accelerated sea level rise, and concludes that "climate change will equally have serious and irreversible consequences for the inhabitants of the Wadden region"[100].

On the same basis, the German Constitutional Court establishes that "there is a direct causal link between anthropogenic climate change and concentrations of human-induced GHG in the Earth's atmosphere (based on the current state of scientific knowledge (...))"[101], and reminds that "it is widely believed that average global warming above 1.5° would have significant consequences for the climate".[102] Even in the *Klimaseniorinnen* case, where claimants are denied standing (see above II.E), the judge does not question the scientific value of the IPCC reports. On the contrary, the Swiss Federal Supreme Court precisely recognizes on the basis of this scientific knowledge that "it is urgently required to protect life on Earth, even if the limit of "well below 2˚C" (…) will only occur in the medium to more distant future"[103].

Based on this worldwide consensus, courts do not consider the remaining uncertainties in climate change as an obstacle for establishing the damage: in *Milieudefensie v. RDS*, the Hague Court of first instance holds that "(the) uncertainty is inherent in prognoses and future scenarios but has no bearing on the prediction that climate change due to CO2 emissions will lead to serious and irreversible consequences for Dutch residents and inhabitants of the Wadden region"[104]. On a similar reasoning, the German Constitutional Court rules that "the possibility of violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore that do not amount to a violation of fundamental rights"[105]. Furthermore, if courts are not reluctant to acknowledge future hazardous climate change as a damage, although it entails some uncertainties, it is also because in all cases, claimants mainly ask for an injunctive relief[106]. On this matter, DE GRAAF and JANS point out that "since Urgenda was not claiming compensation of damages but a court order (on the basis of art 3:296 BW), the existence of present damage was not required. The threat of future damage was sufficient"[107]. Similarly regarding *Milieudefensie v. RDS*, RODI and KALIS underline that "uncertainties about the exact damage and adverse effects are not relevant in this case, as the association - as in previous climate lawsuits against nation states - is "only" demanding that Shell refrain from acting, but not compensation"[108].

Furthermore, when establishing an infringement of a duty of the State or of a company, all courts use the same international climate law as an essential component of their reasoning,

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[98] *Urgenda v. Dutch State*, first instance (fn 4), at 4.87. Confirmed in *Urgenda v. Dutch State*, Supreme court (fn 4), at 4.1 – 4.8.
[99] *Milieudefensie v. RDS* (fn 10), at 2.3.5.
[100] *Milieudefensie v. RDS* (fn 10), at 4.4.6.
[101] BVerG 2021 (fn 5), Rn 119.
[102] BVerG 2021 (fn 5), Rn 159.
[103] BGE 146 I 145 (fn 8), at 5.4.
[104] *Milieudefensie v. RDS* (fn 10), at 4.4.7.
[105] BVerG 2021 (fn 5), Rn. 108.
[106] See for example *Urgenda v. Dutch State*, first instance (fn 4), at 3.1.
[107] K.J DE GRAAF / J.H JANS, The Urgenda decision: Netherlands liable for role in causing dangerous global climate change, *Journal of Environmental Law*, 2015/27, p. 517 – 527 (p. 519).
[108] Michael RODI, Michael KALIS (fn 60), p. 7.

mainly the UNFCCC Principles and the Paris Agreement. That is the reason why they substantially base their decision on the same common principles (see below).

2. Principles of equity

2.1 The principle of equity between generations

First, Courts apply the principle of equity between generations (art. 3 (1) UNFCCC), namely the idea that future generations should not have to pay the price of todays' insufficient action on climate change.

The German Constitutional Court illustrates this notion through the following reasoning: under art. 2(2) first sentence GG, the State has a general duty to protect life and physical integrity; as this obligation is also oriented towards the future, it encompasses a duty to protect future generations ("*intergenerationelle Schutzverpflichtung"*)[109]; furthermore, under 20a GG, the legislator has an obligation to take climate action, in order to achieve a transition to climate neutrality[110]; however, quantities allowed by the KSG until 2030 irreversibly deplete the remaining budget for any future exercise of freedom involving GHG emissions, and therefore involves leaving subsequent generations with a drastic reduction burden.[111] Such a decision has an "advance interference-like effect" ("*eingriffsähnliche Vorwirkung"*) on the claimants' freedom[112]. This interference is constitutionally unjustifiable with regard to the principle of equity: in other words, "one generation must not be allowed to consume large portions of the GHG budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom (…)"[113].

In The Netherlands, in order to establish whether the State infringed an "unwritten duty of care" within the meaning of art. 6:162 (2) BW, the Hague Court of first instance interprets art. 21 of the Dutch Constitution in the light of the UNFCCC principles, insofar as "these obligations have a reflex effect in national law"[114]. Thus, it finds the principle of equity between generations "particularly relevant for establishing the scope for policymaking and duty of care" of the State[115]. More precisely, the Court rules that "the State, in choosing (mitigation) measures, also (has) to take account of the fact that the costs are to be distributed reasonably between the current and future generations"[116]. In its 2019 decision, the Dutch Supreme Court confirms that the principle of equity between current and future generation of humankind justifies the obligation for the Dutch State to mitigate its GHG emissions[117]. Regarding liability of *Royal Dutch Shell*, the Hague Court of first instance reminds that although neither the UNFCCC nor the Paris agreement are binding towards companies[118], international environmental law "welcomes the efforts of non-Party stakeholders to scale up their climate actions, (…) to address and respond to climate change, including those of (…) the private

[109] BVerG 2021 (fn 5), Rn 145 – 146.
[110] BVerG 2021 (fn 5), Rn 185.
[111] BVerG 2021 (fn 5), Rn 186;192.
[112] BVerG 2021 (fn 5), Rn 183.
[113] BVerG 2021 (fn 5), Rn 192; see also Stefan MUCKEL (fn 85), p. 613.
[114] *Urgenda v. Dutch State*, first instance (fn 4), at 4.43. Confirmed in *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.7.3.
[115] *Urgenda v. Dutch State*, first instance (fn 4), at 4.56.
[116] *Urgenda v. Dutch State*, first instance (fn 4), at 4.76.
[117] *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.7.3.
[118] Michael RODI, Michael KALIS (fn 60), p. 7.

sector"[119], and that "since 2012 there has been broad international consensus about the need for nonstate action (…)"[120]. Therefore, in order to determine the scope of the unwritten duty of care of art. 6:162 (2) BW, the Court applies the principle of equity between generations as well: particularly, it considers "that the CO2 emissions for which RDS can be held responsible (…) pose a very serious threat (…) for both current and future generations[121], and emphasizes that "each reduction means that there is more room in the carbon budget"[122].

The French Administrative Supreme Court interprets L 100-4 of the French Energy code in the light of the UNFCCC (art. 2 – 3) and the Paris Agreement (art. 2 – 4), to the extent that both international instruments are explicitly mentioned in this domestic law provision, although they are deprived of any direct effect[123]. Therefore, after explicitly quoting art. 3 (1) UNFCCC and the principle of equity[124], the Court qualifies the goal of this provision (a 40% reduction of GHG emissions between 1990 and 2030) as binding[125]. Furthermore, the Court points out that between 2015 and 2018, France has substantially exceeded its first carbon budget, and that the State is about to "postpone most efforts" after 2020, by stating new mitigation objectives for the 2019-2023 and 2024-2028 periods. However, such mitigation trajectories would require reaching an "unprecedented level of reduction of GHG emissions"[126]. In a subsequent decision of 2021[127], after further instruction on these mitigation objectives, the Court confirms that such decision from the government is not compatible with the State's domestic regulation. By ruling so, the Court acknowledges that it is not acceptable to compensate todays' emissions by imposing unbearable reductions of GHG emissions to future generations. The Administrative Court of Paris goes one step further, by establishing that in light with the principle of equity between generations[128], when the State exceeded its first carbon budget, it wrongfully infringed its obligations, and should therefore be held liable under art. 1246 CC[129].

2.2 The principle of equity between countries

Second, in accordance with art 3 (1) UNFCCC, courts apply the principle of equity between countries, also known as the principle of common but differentiated responsibilities, namely the idea that although all countries must address the climate change issue, a distinction must be made between what is expected from developed countries and from developing economies. Indeed, "from a historical perspective, the current industrialized countries are the main causers of the current GHG concentration in the atmosphere. As these countries benefited from the use of fossil fuels, they (now) have the most means available to take measures (…). Therefore, they have to take the lead in combating climate change."[130]

In the Netherlands, courts infer from this principle that the Dutch State as well as RDS bear a partial responsibility in climate change[131]. To do so, they rely on the Dutch case law on

[119] *Milieudefensie v. RDS* (fn 10), at 2.4.7.
[120] *Milieudefensie v. RDS* (fn 10), at 4.4.26.
[121] *Milieudefensie v. RDS* (fn 10), at 4.4.54.
[122] *Milieudefensie v. RDS* (fn 10), at 4.4.49.
[123] CE 19.11.2020 (fn 6) at 9. Hubert DELZANGLES (fn 93), p. 223.
[124] CE 19.11.2020 (fn 6), at 9.
[125] Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 752; Rémi RADIGUET (fn 13), p. 414.
[126] CE 19.11.2020 (fn 6), at 15.
[127] CE 01.07.2021 (fn 6).
[128] The principle of equity between generations is explicitly quoted in TAP 03.02.2021 (fn 7), at 18.
[129] TAP 03.02.2021 (fn 7), at 34.
[130] *Urgenda v. Dutch State*, first instance (fn 4), at 4. 57. Confirmed in *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.7.3.
[131] *Urgenda v. Dutch State*, first instance (fn 4), at 4.79. *Milieudefensie v. RDS* (fn 10), at 4.4.37; see also Maiko MEGURO (fn 26), p. 730.

joint liability: in the *Kalimijnen case*[132], several parties contributed to pollute the Rhine river by dumping chloride in France, Germany, Luxemburg and the Netherlands. Although only the *cumulative* effect of these acts made the water unusable, each defendant was nevertheless held liable in proportion to its share in causing the damage[133]. Therefore, following this reasoning, "the single circumstance that the Dutch emissions only constitute a minor contribution to global emissions does not alter the State's obligation to exercise care towards third parties"[134], and "the non-disputed circumstances that RDS is not the only party responsible for tackling dangerous climate change in the Netherlands and the Wadden region does not absolve RDS of its individual partial responsibility to contribute to the fight against dangerous climate change according to its ability"[135]. On this matter, The Hague Court of first instance emphasizes that "the total emissions of the Shell group (…) exceed the CO2 emissions of many states, including the Netherlands"[136], and reminds "the broad international consensus that each company must independently work towards achieving net zero emissions by 2050 (…)"[137].

The German Constitutional Court uses the same principle: the judge refers to the *Urgenda v. Dutch State* case, and rules that "the obligation to take climate action arising from art. 20a GG is not invalidated by the fact that the climate and global warming are worldwide phenomena, and that the problem of climate change cannot therefore be resolved by the mitigation efforts of any one state on its own."[138]

In France, the principle of common but differentiated responsibilities appears in the courts' reasoning, although it is not being extensively discussed: the French Administrative Supreme Court simply reminds that the French State committed itself to combat climate change by bringing an "equitable contribution (…) to the objective of GHG mitigation, (…) depending on (its) participation to GHG emissions (…) and (its) capacities and means to reduce them, in light of (its) economic and social development"[139]. The Administrative Court of Paris also mentions the principle of equity between countries when establishing liability of the State[140].

In a nutshell, through the principle of common but differentiated responsibilities, not only do Courts establish an infringement of the duty of the State or the company, but they also overcome the "drop in the ocean" argument[141], one of the most redundant objection in climate change, namely the opinion that the causes of climate change are too global to establish sufficient causation between climate change and the concrete acts of a State or a company.

3. The principle of precaution

Furthermore, Courts employ the principle of precaution (art. 3 (3) UNFCCC) in their reasonings, especially in view of the irreversible nature of global warming caused by anthropogenic GHG emissions[142] and the aggravation of climatic risks at a constant rise of the

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[132] Hoge Raad (*Supreme Court*), 23.09.1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen* case), 3.5.1.; see also fn 76 of *Milieudefensie v. RDS* (fn 10), and *Urgenda v. Dutch State*, first instance (fn 4), at 4.79.
[133] K.J DE GRAAF / J.H JANS (fn 107), p. 522.
[134] *Urgenda v. Dutch State*, first instance (fn 4), at 4.79. Confirmed in *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.7.1 – 5.7.7.
[135] *Milieudefensie v. RDS* (fn 10), at 4.4.37.
[136] *Milieudefensie v. RDS* (fn 10), at 4.4.5.
[137] *Milieudefensie v. RDS* (fn 10), at 4.4.34.
[138] BVerG 2021 (fn 5), Rn 199.
[139] CE 19.11.2020 (fn 6), at 12.
[140] TAP 03.02.2021 (fn 7), at 18.
[141] Margaretha WEWERINKE-SINGH/Ashleigh MCCOACH (fn 91), p. 277.
[142] BVerG 2021 (fn 5), Rn 108.

global temperature[143]. Although it is not always expressly mentioned in the judgments, this principle seems to be a key element in the reasoning of the Courts: not only does it allow judges to hold a State or a company liable for its failure to address climate change emergency, but it also helps courts to consider future hazardous climate change as a damage[144]. Furthermore, in consistency with the ECtHR case law[145], the principle of precaution facilitates the establishment of a sufficient causal link between the damage and infringement of the duty of care[146].

In France, the principle of precaution appears behind the analysis of the judges. According to the Administrative Supreme Court, in order to comply with its ultimate goal of a 40% mitigation by 2030, the State would have to achieve a level of 3% reduction per year between 2024 and 2028[147]. However, the court points out that the State already failed to reach its goal of a yearly 1,9% reduction level of between 2015 and 2018, and that in 2019, it could only achieve a 0,9% reduction of its GHG emissions[148]. Therefore, the judge orders the government to take any necessary measure able to mitigate the level of GHG emissions, and to ensure their compatibility with the binding reduction targets[149]. The Administrative Court of Paris relies on the same approach when it holds that failing to comply with the 2015-2018 carbon budget is a wrongful act. By ruling so, both the Administrative Supreme Court and the Administrative Court of Paris prevent the State from exonerating itself by simply relying on unrealistic future mitigation objectives[150]: such a perspective would enter into contradiction with the principle of precaution.

The German Constitutional Court also employs the principle of precaution when holding that "it would be neither responsible nor realistic to initially allow CO2-relevant behavior to continue unabated but then to suddenly demand climate neutrality once the remaining budget had been completely exhausted. (…) The smaller the remaining budget and the higher the emission levels, the less time will be left for the necessary developments"[151]. (Thus) "the legislator may be obliged to act in a forward-looking manner by taking precautionary measures in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights"[152].

The Dutch courts come to similar conclusions. The Hague Court of first instance quotes the words of *Urgenda* when it declares that "trying to slow down climate change is like trying to slow down an oil tanker that has to shut down its engines hundreds of kilometers off the coast not to hit the quay"[153]. In *Milieudefensie v. RDS*, "the court establishes that tackling dangerous climate change needs immediate attention. (…) The longer it takes to achieve the required emissions reductions, the higher the level of emitted greenhouse gases, and consequently, the sooner the remaining budget runs out"[154]. Therefore, in consistency with the principle of precaution, the Court states that although RDS' current emissions are lawful, there is "an imminent violation of (its) reduction obligation"[155].

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[143] CE 19.11.2020 (fn 6), at 15.
[144] See for example *Urgenda v. Dutch State*, first instance (fn 4), at 4.88.
[145] See above II. C. 4.
[146] Ibid.
[147] CE 01.07.2021 (fn 6), at 4.
[148] Ibid.
[149] CE 01.07.2021 (fn 6), art 1.
[150] Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 749.
[151] BVerG 2021 (fn 5), Rn 120; 186.
[152] BVerG 2021 (fn 5), Rn 194.
[153] *Urgenda v. Dutch State*, first instance (fn 4), at 4.65.
[154] *Milieudefensie v. RDS* (fn 10), at 4.4.28.
[155] *Milieudefensie v. RDS* (fn 10), at 4.5.3.

4. The principle of proportionality

In a more traditional way, courts apply the test of proportionality: although this principle is not always expressly mentioned in the cases studied[156], it nevertheless appears behind each court's reasoning. As exposed by Prof. Julian RIVERS, in continental Europe, the doctrine of proportionality is structured around a fourfold test: legitimacy (whether the act under review pursues a legitimate aim), suitability (whether the act is capable of achieving that aim), necessity (whether the act is the least intrusive mean of achieving the aim) and proportionality in a narrow sense, or fair balance of interests.[157]

4.1 Legitimacy

To begin with, in these climate claims, the test of legitimacy does not require any development, as the need for preventing climate claim is unanimously recognized.[158]

4.2 Suitability

Second, the criterion of suitability is reviewed by the German, French and Dutch courts. In Germany, the test of suitability is concretized by the principle of prohibition of insufficient measures (*Untermaßverbot)* exposed above[159]. It is an essential component of the Court's reasoning[160], particularly when the judge rules that the legislator does not benefit from an unlimited leeway in how it implements the obligation to take climate action under art. 20a GG,[161] and that "the (KSG) provisions are unconstitutional insofar as they give rise to a risk of serious impairment of fundamental rights in the future – a risk that is not *sufficiently*[162] contained at present"[163]. In France, although such principle is not expressly mentioned, the Court prohibits insufficient measures by obliging the government to take further action on climate law, after recalling that the French High Council on Climate pointed out the insufficiency of climate regulation with regard to the 40% mitigation objective[164], and that the Ministry of the Ecological Transition *itself* did not contest that this target could not be reached on the sole basis of the current legislation[165]. In the Netherlands, The Hague Court of first instance applies the test of suitability when it holds that "the State (…) has to take on a high level of care for establishing an *adequate* and *effective* statutory and instrumental framework to reduce the GHG emissions"[166].

[156] The principle of proportionality is expressly mentioned in the German and the Dutch decisions: see BVerG 2021 (fn 5), Rn 192; *Urgenda v. Dutch State*, first instance (fn 4), at 4.75, *Milieudefensie v. RDS* (fn 10), at 4.4.54. However, it is not explicitly quoted in the French decisions.
[157] Julian RIVERS, Proportionality and variable intensity of review, *Cambridge Law Journal* 2006/65(1), p. 174 – 207 (p. 180 – 181).
[158] See above II. B. 1.
[159] See above II. B. 2.
[160] Christian CALIESS, Das „Klimaurteil" des Bundesverfassungsgerichts: „Versubjektivierung" des art.20 a GG?, *ZUR* 2021, p. 355 – 358 (p. 357).
[161] BVerG 2021 (fn 5), Rn 211.
[162] Italics added by the author.
[163] BVerG 2021 (fn 5), Rn 195.
[164] CE 19.11.2020 (fn 6), at 14.
[165] CE 01.07.2021 (fn 6), at 5.
[166] *Urgenda v. Dutch State*, first instance (fn 4), at 4.66.

4.3 Necessity

Third, the test of necessity is applied by the German and the Dutch judges. In *Urgenda v. Dutch State*, the Court examines the cost-benefit ratio of alternatives technologies, such as GHG capture and storage, and declares that "as it is not plausible that techniques of this nature can be applied in the short term and therefore in time (…) it is the most efficient to mitigate and it is more cost-effective to take adequate action than to postpone measures in order to prevent hazardous climate change"[167]. Just as the Dutch judge, the German Constitutional Court does not consider GHG capture and storage technologies as serious alternatives to the obligation of reduction; in the words of the Court: "enlarging the remaining national budget by way of so-called negative emission technologies is also a possibility. However, to what extent negative emission technologies will be implemented on a large scale and not just in isolated applications is currently impossible to predict in view of ecological, technical, economic, political and social concerns."[168]

4.4 Proportionality in a narrow sense

Finally, the German and the Dutch courts balance the onerousness of precautionary measures with the anticipated cost of climate change.

On the one hand, the Hague Court of first instance declares that "it has neither been argued (…) that the State has insufficient means to realize higher reduction measures"[169]. On the other hand, it underlines that "if the current GHG emissions continue in the same manner, global warming will take such a form that the costs of adaptation will become disproportionately high. Adaptation measures will therefore not be sufficient to protect citizens against the aforementioned consequences in the long term. (…) (Thus) mitigation is vital for preventing dangerous climate change."[170]

In *Milieudefensie v. RDS*, on a similar reasoning, the Court balances the onerousness of the reduction obligation for RDS with the public interest of preventing climate change. It admits that such an obligation "could curb the potential growth of the Shell group's commercial interests". However, the Court recalls that "the means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size". In the present case, "the court is of the opinion that much may be expected of RDS, (…) (that) heads the Shell group, which consists of about 1,100 companies, and operates in 160 countries"[171]. Therefore, "due to the serious threats and risks to the human rights of Dutch residents and the Wadden region, private companies such as RDS may also be required to take drastic measures and make financial sacrifices to limit CO2 emissions (…)". Thus "the compelling common interest that is served by complying with the reduction obligation outweighs the negative consequences RDS might face (…)"[172]. The Court also denies any conflict between the reduction obligation and the UN Sustainable Development Goals (UNSDG), whose objective is to ensure access to affordable, reliable, sustainable, and modern energy for all. To do so, the Court relies on a teleological interpretation of the SDG 7, and underlines that "it is not the intention for SDG 7 (…) to detract from the Paris Agreement", quite the contrary: "the preamble under art 8 of the Paris Agreement (…) emphasizes the

[167] *Urgenda v. Dutch State*, first instance (fn 4), at 4.73.
[168] BVerG 2021 (fn 5), Rn. 227.
[169] *Urgenda v. Dutch State*, first instance (fn 4), at 4. 77.
[170] *Urgenda v. Dutch State*, first instance (fn 4), at 4.75.
[171] *Milieudefensie v. RDS* (fn 10), at 4.4.16.
[172] *Milieudefensie v. RDS* (fn 10), at 4.4.53 – 4.4.54.

intrinsic connection between the tackling of dangerous climate change and fair access to sustainable development and the eradication of poverty. The UNSDG sustainability goals can therefore not be a reason for RDS to not meet its reduction obligation".[173]

When balancing the interests at stake, the German Constitutional Court clarifies that "art. 20a GG does not (…) take absolute precedence over other interests. In cases of conflict, it must be balanced against other constitutional interests and principles. (…). However, given that climate change is almost entirely irreversible as things currently stand, any overshoot of the critical temperature for preventing climate change would only be justifiable under strict conditions – such as for the purpose of protecting fundamental rights. Within the balancing process the obligation to take climate action is accorded increasing weight as climate change intensifies"[174]. Therefore, after balancing the interests at stake, the Court concludes that insofar as "the efforts required under art. 20a GG to reduce GHG emissions after 2030 will be considerable", so that a "risk of serious burden (on fundamental rights) is significant", "the emission amounts specified until 2030 (in the KSG) (…) can ultimately only be reconciled with the potentially affected fundamental freedoms if precautionary measures are taken in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights"[175].

Thus, although court don't systematically apply all four tests, the principle of proportionality definitely shows through their reasonings. Ultimately, it allows judges to put some limits to the leeway of the State or to the freedom of action of a company.

5. Infringement of Fundamental rights

The approach of judges to Human rights considerably differs from one jurisdiction to another: whereas Human rights constitute a major ground for the courts' decisions in Germany and in The Netherlands, they are completely set aside by French Courts.

In *Urgenda v. Dutch State*, although the Hague Court of first instance only indirectly applies art 2 and 8 ECHR in order to interpret the duty of care of the State, the Court of Appeal[176] and the Supreme Court[177] reverse this precedent, and rule that art. 2 and 8 ECHR are *directly* applicable to a climate claim: in terms of standing, in consistency with the right to an effective remedy (art. 13 ECHR), *Urgenda*, which represents the interests of the residents of the Netherlands, must be able to invoke art. 2 and 8 ECHR[178]; in terms of duty of the State, in consistency with the ECtHR case law[179], and following the "common ground method", that allows the court to rely on international instruments in interpreting the ECHR[180], "no other conclusion can be drawn but that the State is required pursuant to art. 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change (…)"[181].

For the German Constitutional Court as well, rights to protection of life and physical integrity (art 2 (2) first sentence GG), as well as protection of property (art. 14 (1) GG), are the essential foundation of its judgment: not only do they ground the standing of claimants, but

[173] *Milieudefensie v. RDS* (fn 10), at 4.4.42.
[174] BVerG 2021 (fn 5), Rn. 198.
[175] BVerG 2021 (fn 5), Rn. 245.
[176] *Urgenda v. Dutch State*, first instance (fn 4), at 4.81. Confirmed in *Urgenda v. Dutch State*, Court of appeal (fn 4).
[177] *Urgenda v. Dutch State*, Supreme court (fn 4).
[178] *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.9.2.
[179] Note: the *Jugheli et al. v. Georgia* case is explicitly quoted in the judgment of the Supreme Court, at 5.3.3.
[180] *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.4.1 – 5.4.3. See also Maiko MEGURO (fn 26), p. 730.
[181] *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.6.2.

they are also the basis for establishing that the State infringed its duty by implementing insufficient climate regulation. In *Milieudefensie v. RDS*, the Court admits that art. 2 and 8 ECHR only apply indirectly towards companies; nevertheless, these provisions play a role in the interpretation of the unwritten standard of care of art 6:162 BW[182], together with the UN Guiding Principles (UNGP), insofar as "it is universally endorsed that companies must respect human rights", and that this "is not an optional responsibility for companies"[183].

In France, on the contrary, both the Administrative Supreme Court and the Administrative Court of Paris completely take fundamental rights out of their scope when ruling their decision, although plaintiffs did invoke art 2 and 8 ECHR[184].

Ultimately, the question whether art 2 and 8 ECHR directly apply in a climate claim is presently in the hands of the ECtHR, thanks to two currently pending cases: the *Klimaseniorinnen* case (*Klimaseniorinnen v. Switzerland*), and the *Grande-Synthe* case (now *Carême v. France*) [185]. In the *Klimaseniorinnen* case, although the Swiss Federal Supreme Court did examine the plaintiffs' rights to life (art. 10 (1) BV; art 2 ECHR) and to protection of privacy (art. 13 (1) BV; art. 8 ECHR), it nevertheless concludes that these rights were not infringed in the present case, as claimants aren't *more* concerned that the rest of the population, and as the feared consequences of climate change presented by IPCC reports should not occur before 2040[186]. Such reasoning is strongly criticized in the literature. For example, GROSZ argues that the requirement of a more intensive level of threat is not compatible with the principle of precaution[187]. If the ECtHR followed the approach of the Dutch Supreme Court, it could confirm that, at the opposite of what the Swiss Court ruled, "the fact that this risk will only be able to materialize a few decades from now and that it will not impact specific persons, or a specific group of persons, but large parts of the population does not mean (…) that art. 2 and 8 ECHR offer no protection from this threat"[188].

6. Causation

In addition to the principle of equity between countries and the principle of precaution, courts rely on various tools to establish causation between the insufficient legislation of a State, or the acts of a company, and the consequences of climate change.

On the one hand, several jurisdictions underline that the defendants *themselves* acknowledged not only the existence of global warming, but also their influence on this phenomenon. Indeed, the Administrative Court of Paris points out that "to the extent of the commitments it has made and the timetable it has set, the French government has recognized that it is in a position to take direct action on greenhouse gas emissions."[189] In *Urgenda v. Dutch State*, "the court also takes account of the fact that the State has known since 1992, and certainly since 2007, about global warming and the associated risks"[190]. Furthermore, it holds that "the excess greenhouse gas emission in the Netherlands (…) can be attributed to the State. After all, the State has the power to issue rules or other measures, including community information, to

[182] *Milieudefensie v. RDS* (fn 10), at 4.4.9.
[183] *Milieudefensie v. RDS* (fn 10), at 4.4.14 – 4.4.15.
[184] Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 752.
[185] ECtHR, *Klimaseniorinnen v. Switzerland*, n° 53600/20 (pending); ECtHR, *Carême v. France,* n° 7189/21 (pending).
[186] BGE 146 I 145 (fn 8), at 5.3 – 5.5.
[187] Mirina GROSZ, Grundrechte und Klimaschutz: National Perspektive, *AJP* 2021, p. 1361 – 1363 (p. 1362).
[188] *Urgenda v. Dutch State*, Supreme court (fn 4), at 5.6.2.
[189] TAP 03.02.2021 (fn 7), at 29.
[190] *Urgenda v. Dutch State*, first instance (fn 4), at 4.65.

promote transition to a sustainable society and to reduce greenhouse gas emission in the Netherlands"[191].Therefore, the Court concludes that "a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate"[192]. In *Milieudefensie v. RDS*, the Court underlines that "RDS determines the general policy of the Shell group"[193], and that "(it) has for a long time known of the dangerous consequences of CO2 emissions and the risks of climate change to Dutch residents and the inhabitants of the Wadden region"[194]. Finally, "it is also an established fact that RDS has set more stringent climate ambitions for the Shell group in 2019 and 2020"[195].

On the other hand, the Administrative Court of Paris is the only one to use the theory of adequate causation, in order to distinguish the main cause of the damage among several acts of the State[196]. On this matter, it concludes that although there is a lack of sufficient action regarding energy efficiency, development of sustainable energy, or regarding objectives able to limit global warming to 1,5°, such insufficiencies are not in a *direct* causal link with the prejudice. Therefore, among all the causes of damage discussed, it is the insufficiency of the actions of the State *on GHG mitigation* that generates liability.

C. Intermediary conclusion: review of the strengths of climate claims

In the end, succeeding climate claims are a combination of traditional and innovative principles encompassed in a groundbreaking legal approach.

When granting claimants *standing*, courts took account of the interests of the future generations through the rights of current claimants, although they mainly limited the scope of their analysis to the residents of their State. On this matter, legal mechanisms allowing associations to file a public interest-related claim showed their effectiveness: in France and in The Netherlands, such procedural provisions relieved the courts from having to examine whether individual claimants were personally infringed in their own legally protected interests, or whether they were more concerned than the rest of the population: in these jurisdictions, as opposed to the Swiss approach, environmental associations were granted standing precisely *because* they represented *any* potential victim of climate change.

By interpreting their domestic law in the light of the ECHR, the UNFCCC and the Paris Agreement, court applied the *principle of equity* between generations, the principle of equity between countries, and the *principle of precaution* for the benefit of climate change prevention. With such tools, judges ruled that with regard to global warming, implementing an insufficient regulation on GHG emissions consists in an *infringement of the duty of the State*, or that emitting such an amount of GHG emissions is indeed an infringement of the unwritten duty of care of a Dutch company. By doing so, courts overcame the objection that climate change regulation is only a matter for the legislature, and that a company which complies with the current GHG regulations cannot be held liable for climate change. From a broader perspective, courts did much more than simply acknowledging international principles of environmental law: they efficiently applied them towards States. Furthermore, they contributed to harden international soft law principles toward companies[197]. In addition, when judges recognized the

[191] *Urgenda v. Dutch State*, first instance (fn 4), at 4.87.
[192] *Urgenda v. Dutch State*, first instance (fn 4), at 4.90.
[193] *Milieudefensie v. RDS* (fn 10), at 4.4.4.
[194] *Milieudefensie v. RDS* (fn 10), at 4.4.20.
[195] *Milieudefensie v. RDS* (fn 10), at 4.5.2.
[196] See Agathe VAN LANG / Alix PERRIN /Meryem DEFFAIRI (fn 12), p. 762 – 763.
[197] Chiara MACCHI, Josephine VAN ZEBEN, Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell, *RECIEL* 2021, 30(3), p. 409-415 (p. 409).

relevance of Human rights in climate claims, they ensured the right for a victim to an effective remedy at the domestic level, within the meaning of art. 13 ECHR[198]. Finally, they established the liability of a parent company such as RDS with regard to climate change.[199]

Moreover, on the basis of the same scientific knowledge, courts considered the current and future consequences of global warming as a *damage*. By unanimously relying on the IPCC reports, they considerably lowered the burden of proof for the defendants: despite the intrinsic uncertainties of the phenomenon, the threat of future hazardous climate change was serious enough to justify an injunctive relief towards a State or a company.

Furthermore, courts convincingly established a sufficient *causal link* between infringements of the duty of care and the damage: by doing so, they confirmed that despite the fact that global warming is the result of worldwide *cumulated* GHG emissions, each actor, whether a State or company, bears an *individual* responsibility towards climate change. In other words, they brought together the need for international cooperation with the necessity of domestic commitments.

Having analyzed the main features and strengths of climate claims, we will now proceed to the critical review of their weaknesses.

IV. Limits of climate claims: legal weaknesses

A. Climate judgments: an encroachment on the principle of separation of powers?

1. Potential weaknesses

The first weakness pointed out in the literature is the inconsistency of climate judgments with the principle of separation of powers: when ruling their decisions, courts may exceed their competence in several areas.

Indeed, courts tend to overestimate the extent of the obligations falling to the States and companies under the UNFCCC principles and the Paris Agreement. Under international climate law, obligations of the State are to be determined on the basis of respective national circumstances. In particular, although the remaining amount of GHG that may still be emitted in the atmosphere is limited by the target of maintaining global warming below 1,5-2°c, the international community has not established a global residual budget yet, quite the contrary: due to intrinsic uncertainties, a large number of different residual CO2 budgets can be estimated. A fortiori, binding national residual GHG budgets cannot be inferred from international climate law[200]. Therefore, the obligations of the State are not to be understood as a "part measured against the whole"[201]. From this perspective, it seems problematic that the Dutch judge establishes "partial responsibility" of the State for climate change in the *Urgenda* decision, or that the German court acknowledges a "national share" in the remaining global GHG budget in the decision on *protection of future generations*[202].

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[198] Margaretha WEWERINKE-SINGH/Ashleigh MCCOACH (fn 91), p. 278.
[199] Chiara MACCHI, Josephine VAN ZEBEN (fn 197), p. 414.
[200] Patrick ABEL, Zukunftsgerichtete zivilrechtliche Klimaklagen und Grundgesetz, *NJW* 2023, p. 2305 – 2310 (p. 2307 - 2308).
[201] Maiko MEGURO (fn 26), p. 733 – 734.
[202] BVerG 2021 (fn 5), Rn. 225. Michael RODI, Michael KALIS (fn 60), p. 9.

The same reasoning applies to climate claims against companies. On this matter, the German Constitutional Court stated in 2022 that the climate targets for the federal government do not result in a legally defined or mathematically calculable CO2 budget for the federal states[203]. A fortiori, they do not result in individual budgets that could be prescribed toward companies[204]. That is the reason why the Regional Court of Munich (*Landgericht Munich I*) recently ruled in *Umwelthilfe v. BMW* (2023)[205] that it is not for a civil court to quantify the goal of 20a GG through emission quantities allowed for a company[206]. Regarding *Milieudefensie v. RDS*, the literature points out that the court may have overestimated the "worldwide consensus" on the obligations for companies to mitigate their GHG emissions, especially when it comes to scope 3 emissions [207]. Indeed, the court distinguishes between three scopes of emissions: scope 1 emissions are the "direct emissions from sources that are owned or controlled in full or in part by the organization"; scope 2 emissions are the "indirect emissions from third-party sources from which the organization has purchased or acquired electricity, steam or heating for its operations"; scope 3 emissions are "all other indirect emissions (…) occurring from greenhouse gas sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of third-party purchased crude oil and gas"[208]. Thus, when ruling that *RDS* is under the unwritten duty of care to reach a 45% mitigation of its GHG emissions, including scope 3 emissions, the court considers as mandatory under private law what neither the legislator nor the international community have regulated in a binding manner yet[209].

Moreover, in *Milieudefensie v. RDS*, the judge fails to explain why *RDS in particular* have to bear such an important share of the burden of mitigation, in comparison with other companies or other sectors: as RODI and KALIS emphasize, even if the court sees a burden of mitigation on all social actors, it can only rule on the merits of the case, and therefore only to the detriment of one company. According to these authors, by ruling so, the Hague Court of first instance seems to differentiate between "just" and "unjust" emissions without justification, as an "invisible hand" that would ensure a fair distribution to states, individuals and companies: such a task does not fall within the competence of the court[210]. On this matter, in Germany, the Regional Court of Munich recently recalled that the legislator retains some leeway in deciding how to achieve climate neutrality: even the German Constitutional Court did not rule that GHG mitigation should be specifically achieved in the transport sector[211].

The distribution of the burden of mitigation by courts may present several disadvantages for society. Indeed, climate change has a systemic dimension: it affects our society as a whole, from human health and livelihood to the bases of our market economy. Therefore, according to ABEL, a sustainable climate transition requires to consider the variety of tools at the State's disposal. In particular, the importance of market competition should not be underestimated: one the one hand, competition leads to innovations that could accelerate climate transition; on the other hand, due to the framework policy of the State encouraging GHG mitigation (e.g. new regulatory bans), companies maintaining high GHG emissions bear the risk of being disfavored on the market, a risk that could lead them to insolvency. Ultimately, competition could create

[203] Bundesverfassungsgericht (*Constitutional Court*), 18.01.2022, *NJW* 2022, 844.
[204] Patrick ABEL (fn 200), p. 2308.
[205] *Umwelthilfe v. BMW*, 2023 (fn 69).
[206] *Umwelthilfe v. BMW*, 2023 (fn 69), p. 121. Nils SCHMIDT-AHRENDTS, Klimaklagen: auf in die 2. Runde!, *ZUR* 2023, p. 416 – 420 (p. 417).
[207] Chiara MACCHI, Josephine VAN ZEBEN (fn 197), p. 413.
[208] *Milieudefensie v. RDS* (fn 10), at 2.5.4.
[209] Michael RODI, Michael KALIS (fn 60), p. 9.
[210] Michael RODI, Michael KALIS (fn 60), p. 5.
[211] Patrick ABEL (fn 200), p. 2306; *Umwelthilfe v. BMW*, 2023 (fn 69), p. 121.

incentives for a company to emit a low amount of GHG. According to the former governor of the Bank of England, Mark Carney, "companies that work to bring their emissions to zero will be rewarded handsomely; those that fail to adapt will cease to exist"[212]. Moreover, a drastic climate transition without measures of social compensation could lead several vulnerable actors to the risk of precariousness, in terms of employment or transportation for example. From this perspective, the possibility of accelerating climate protection before a civil court, whereas the legislator was planning to implement such measures towards companies at a later date for socio-political reasons, in order to achieve a gentle transition, may represent a "worst-case scenario"[213]. According to the same author, that is the reason why in 2022, the Regional Court of Stuttgart outlined *in Umwelthilfe v. Mercedes Benz*[214] that prevention of climate change requires the implementation of a "*Gesamtkonzept*" that affects all areas of economic and social life of the State. In line with the principle of materiality (*Wesentlichkeitsprinzip*)[215], such responsibility falls within the competence of the democratically elected legislature"[216], not of a civil court[217]. Besides, MAYER stresses that although the IPCC reports seek to define a least-cost way of achieving a certain mitigation outcome, the IPCC is precluded from making policy recommendations: therefore, IPCC scenarios do not "necessarily result in a justifiable allocation of the cost of mitigation action within society (…)"[218].

Moreover, the analysis of the unwritten standard of care in *Urgenda v. Dutch State* and *Milieudefensie v. RDS* presents some incoherence with regard to tort law principles. In establishing the scope of the standard of due care that the State owns to *Urgenda* and the persons it represents, the court makes use of the State's international obligations towards contracting parties. However, even though Dutch law allows the judge to take into account the "reflex effect" of obligations of international law, the fact that this standard of care is directly derived from IPCC scientific data and previous policy statements of the Netherlands is questionable[219]. The same reasoning applies toward companies: as MAYER points it out, even though "Human rights treaties can be interpreted as having such horizontal effects on corporations, they do not contain any specific standards that can help to determine the requisite level of mitigation action of any particular actor"[220].

Under tort law, the standard of care is usually interpreted by reference to an imaginary person that would adopt the ordinary level of diligence (traditionally referred to as the "*bonus pater familias*" or as the "*prudent man*" in France, or as "*the man on the Clapham omnibus*" in England)[221]. In the Netherlands, the duty of care of art. 6:162(2) BW is interpreted as the standard that "a reasonably acting person" would follow in the same situation. In other words, to interpret the standard of care under Dutch law, "it is necessary to compare the motorist with other motorists, the sportsman with other sportsmen, the doctor with other doctors, or the solicitor with other solicitors". Consequently, the Hague Court of first instance should have compared RDS's policy with the common practices of similar companies[222]. Therefore, according to MAYER, by exclusively relying on international environmental law to establish the

[212] Patrick ABEL (fn 200), p. 2305; Paul MOUGEOLLE, 2020 (fn 95), p. 547. See Mark Carney's quote in the following article: Stanley Reed, Climate Change Takes Center Stage in Davos, *The New York Times*, 2020.
[213] Patrick ABEL (fn 200), p. 2309.
[214] *Umwelthilfe v. Mercedes Benz*, 2022 (fn 68).
[215] Patrick ABEL (fn 200), p. 2308.
[216] *Umwelthilfe v. Mercedes Benz*, 2022 (fn 68), at 26.
[217] See similar grounds in *Umwelthilfe v. BMW*, 2023 (fn 69), at 2.a.
[218] Benoît MAYER, The Duty of care of fossil-fuel producers for climate change mitigation – Milieudefensie v. Royal Dutch Shell, *Transnational Environmental Law* 11:2, 2022, p. 407 – 418 (p. 418).
[219] K.J DE GRAAF / J.H JANS (fn 107), p. 525-526.
[220] Benoît MAYER (fn 218), p. 413.
[221] Benoît MAYER (fn 218), p. 416.
[222] Benoît MAYER (fn 218), p. 417.

scope of the duty of care, the court imposes its vision of the law as it should be (*lex ferenda*), rather than merely interpreting the law as it is, in the light of the standard of care generally accepted by society (*lex data*)[223].

In addition, the court provides no explanation[224] for differentiating the nature of RDS' obligation towards scope 1, scope 2 and scope 3 emissions: whereas the obligation to reduce scope 1 emissions ("direct emissions from sources that are owned or controlled in full or in part by the organization"[225]) is an *obligation of result*[226], mitigation of part of scope 2 ("indirect emissions from third-party sources from which the organization has purchased or acquired electricity, steam or heating for its operations")[227] and scope 3 emissions is only an *obligation of best efforts*[228].

2. Responses to this criticism

Nevertheless, climate judgments provide responses to such critics. In *Urgenda v. Dutch State*, the court recalls that "Dutch law does not have a full separation of state powers, in this case, between the executive and judiciary. The distribution of powers (…) is rather intended to establish a balance between these state powers. (…) Separate from any political agenda, the court has to limit itself to its own domain, which is the application of the law. The task of providing legal protection from government authorities, such as the State, pre-eminently belong to the domain of a judge. (…) (Thus) in a general sense, given the grounds put forward by *Urgenda*, the claim does not fall outside the scope of the court's domain. The claim essentially concerns legal protection and therefore requires a judicial review"[229]. The Dutch Supreme Court confirmed this assertion, by stating that "it is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound"[230]. Following the same reasoning, the judge states in *Milieudefensie v. RDS* that "the court does not follow RDS' argument that the claim (…) requires decisions which go beyond the lawmaking function of the court. (…) Assessing whether or not RDS has the alleged legal obligation and deciding on the claim based thereon is pre-eminently a task of the court". Indeed, it is precisely the task of the court to put some limits to the legislator's leeway, particularly when Fundamental rights may be infringed[231].

Furthermore, SCHMIDT-AHRENDS argues that a judgement ordering a company to mitigate its GHG emissions would only contradict the principle of separation of powers if legislators were to regulate the extent to which certain companies must reduce their greenhouse gas emissions. Of course, such a constitutionally coherent legislation, taking all interests into account, would bind the civil courts. However, as long as such statutory regulation *does not exist*, civil courts must decide themselves on climate claims. In Germany particularly, according to the Constitutional Court and the Federal Supreme Court (*Bundesgerichtshof*), when a statutory provision is insufficient with regard to a constitutional duty of protection, courts "must infer the correct decision on the merits from the general legal basis using the recognized method of finding the law" (*Methode der Rechtsfindung*)[232]. Such a reasoning can be applied to other

[223] Benoît MAYER (fn 218), p. 416.
[224] Chiara MACCHI, Josephine VAN ZEBEN (fn 197), p. 413.
[225] *Milieudefensie v. RDS* (fn 10), at 2.5.4.
[226] *Milieudefensie v. RDS* (fn 10), at 4.4.23.
[227] *Milieudefensie v. RDS* (fn 10), at 2.5.4.
[228] *Milieudefensie v. RDS* (fn 10), at 4.4.24.
[229] *Urgenda v. Dutch State*, first instance (fn 4), at 4.95 – 4.98.
[230] *Urgenda v. Dutch State*, Supreme court (fn 4), at 8.3.2.
[231] Thomas GROß (fn 28), p. 342.
[232] Nils SCHMIDT-AHRENDTS (fn 206), p. 417.

jurisdictions, such as France or the Netherlands, where there is also a lack such statutory law, and where judges also have the power to fill a regulatory gap[233]. Finally, in climate judgments, judges do not act as legislators of substitution by ordering what specific measures are to be taken to prevent climate change: they simply order an injunctive relief, in consistency with their domestic law interpreted within the light of the State's international obligations, and leave the choice of the appropriate measures to the State[234].

Regarding the Dutch way of interpreting the standard of care, MAYER admits himself that if the court had based itself on the common practice of similar companies regarding GHG mitigation, it would not have been able to define a "particularly clear-cut standard, let alone a very ambitious one"[235]. In addition, one could object that the court did compare RDS' behavior to other companies' when it ruled that "the means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size, (as well as) the extent to which it conducts business through a corporate group of individually", and that, having examined those circumstances, "much may be expected of RDS"[236]. Moreover, it is consistent to interpret RDS' standard of care within the light of the UNGP principles, since these soft law rules are directly inspired from the tort concept of due diligence[237].

Furthermore, MACCHI and VAN ZEBEN provide a coherent explanation for the distinction between RDS' obligation of results toward Scope 1 emissions and its obligation of best efforts toward part of its scope 2 and scope 3 emissions: "this distinction (…) resonates with the 'strict' responsibility of corporation under the UNGPs to avoid causing or contributing to' human rights arm versus their 'due diligence' responsibility to 'seek to prevent or mitigate adverse human rights impacts that that are directly linked to their operations, products or services by their business relationships'"[238]. Besides, as outlined by MOUGEOLLE, whereas RDS exercises a *total* control over its scope 1 and part of its scope 2 emissions, it only *partially* controls its scope 3 emissions, together with other actors, such as oil executive, car manufacturers or car users. Therefore, it seems logical that RDS bear an obligation of result towards scope 1 and part of its scope 2 emissions, and an obligation of best efforts regarding scope 3 emissions, which allows RDS to exonerate itself if the company proves with good faith that all reasonably conceivable efforts were made[239]. From such perspective, this distinction is consistent with tort law principles.

3. Intermediary conclusion on a possible encroachment on the separation of powers

In a nutshell, one can admit that in climate judgments, courts possibly create several legal incoherence when deciding on the burden of GHG mitigation that must be borne by States or companies. Nevertheless, in their legal reasonings, courts mainly interpret their domestic law in consistency with constitutional principles and international obligations in order to fill existing

[233] France: see art. 4 CC. Although the Dutch civil code does entail a similar provision, the Dutch case law demonstrates the power of the judge to fill gaps (see Bastiaan VAN DER VELDEN, Analogy in the strict liability rules in the Dutch Civil Code, in: Hendrik Kaptein and Bastiaan van der Velden (eds), *Analogy and Exemplary Reasoning in Legal Discourse*, Amsterdam University Press, 2018, p. 165 – 175 (p. 166); for an example, see Hoge Raad (*Supreme Court*), 27.04.2012, ECLI:NL:HR:2012:BV1301, 293.
[234] See Thomas GROß (fn 28) p. 342 on *Urgenda v. Dutch State*; see Patrick ABEL (fn 200) p. 2306 on BVerG 2021.
[235] Benoît MAYER (fn 218), p. 417.
[236] *Milieudefensie v. RDS* (fn 10), at 4.4.16.
[237] Paul MOUGEOLLE, "La responsabilité climatique de la société mère de Shell selon le Tribunal de la Haye et ses effets d'entraînement attendus en France", *REVDH* - Actualités Droits-Libertés, 2021, p. 148 – 159, n° 8.
[238] Chiara MACCHI, Josephine VAN ZEBEN (fn 197), p. 413.
[239] Paul MOUGEOLLE, 2021 (fn 237), n° 16.

gaps: such a task, far from representing an encroachment on the principle of separation of powers, is at the heart of their competence.

B. The difficulty of transposing the Dutch reasoning on liability of companies in other jurisdictions

To this day, *Milieudefensie v. RDS* remains the only case where a climate claim against a *company* was allowed. Following this judgment, claimants from other jurisdictions sued similar companies in their country, such as *Total* in France, or *BMW*, *Volkswagen* and *Mercedes Benz* in Germany[240], hoping that the progresses generated by the Dutch precedent would be expanded to their own legal system. However, all these claims were denied in first instance. Such results show how the Dutch conception of tort liability differs from that of other jurisdictions.

1. In Germany

1.1 The issue

In Germany, the Regional Court of Braunschweig explicitly analyzes the differences between the Dutch and German Tort law. Whereas art. 6:162 BW is a "general tort law clause"[241] that focuses on the analysis of the *defendant's behavior*[242] with regard to the "consensual standard of care of a company", § 823(1) BGB deals with "the constitutionally required protection in the interpretation of private law norms"[243], and focuses on the *result*, by requiring a wrongful infringement of the claimants' absolute rights. Therefore, a German civil court must examine whether the claimant is substantially "infringed in a legally protected interest which is personal to *him*" (*eigene Betroffenheit*[244]). Furthermore, where art. 6:162 BW regard a tortious act as a "a violation of someone else's right (…), an act or omission in violation of a duty imposed by law or (…) unwritten law (…)", § 823(1) BGB is conceived more narrowly: only a wrongful infringement of "life, body, freedom, property or other right" constitutes a tortious act, and the interpretation of "other right"(*songstiges Recht*) remains restrictive.

For all these reasons, even though the German Constitutional Court ruled that the amount of GHG emissions allowed today had an "advance interference-like effect" ("*eingriffsähnliche Vorwirkung"*) on fundamental rights[245], the four regional courts denied any wrongful interference in the absolute rights of claimants. In their similar reasonings, the Regional Court of Braunschweig and the Regional Court of Detmold argue that claimants are not personally infringed in their own rights of health and property by the activities of *Volkswagen*. Thus, claimants are under the obligation to tolerate (*Duldungspflicht*) such an insignificant interference (*unwesentliche Beeinträchtigung*)[246]. For the Regional Court of Stuttgart, there is only a possible *indirect* effect (*mittelbare Auswirkung*) on the claimants'

[240] France : Tribunal judiciaire de Paris, Ordonnance du juge de la mise en état, 06.07.2023, n°RG 22/03403 (hereinafter : the *Total* case). Germany: *Umwelthilfe v. BMW*, 2023 (fn 69); *Umwelthilfe v. VW*, 2023 (fn 69); *Greenpeace v. VW*, 2023 (fn 69); *Umwelthilfe v. Mercedes Benz*, 2022 (fn 68).
[241] *Umwelthilfe v. VW*, 2023 (fn 69), p. 115.
[242] Nils SCHMIDT-AHRENDTS (fn 206), p. 419.
[243] *Umwelthilfe v. VW*, 2023 (fn 69), p. 115.
[244] *Umwelthilfe v. VW*, 2023 (fn 69), p. 111.
[245] BverG 2021 (fn 5), Rn 183.
[246] *Umwelthilfe v. VW*, 2023 (fn 69), p. 115, *Greenpeace v. VW*, 2023 (fn 69), at 15.

personality rights; in addition, given that the consequences of the defendants' production on the claimants' rights are not *foreseeable*, it is not even possible to conduct a proper balance of interests[247]. The Regional Court of Munich I is the only one to admit that BMW might create an interference in the claimants' personality rights, but nevertheless states that such impairment remains lawful within the light of the balance of interests at stake[248]. Furthermore, the German civil courts confirm the legality of the defendants' activities, by stating that a so-called "right to GHG freedom" (*Recht auf treibhausgasbezogene Freiheit*) is not an "other right" within the meaning of §823 (1) BGB[249], and that since the legislator currently fulfills its constitutional duty through the new version of the *Climate Protection Act*, companies cannot be expected to take measures that go beyond what is provided by public climate legislation[250]. Another explanation of these verdict could lie in the difference of nature between RDS and companies such as *BMW*, *Volkswagen* or *Mercedes-Benz*: whereas *RDS* is the parent company of one of the most important actors in the worldwide oil industry, these three firms are car manufacturers which are only responsible for scope 3 emissions, together with their users. Such differences could explain why courts may have been reluctant to hold these companies liable for their role in the amount of GHG emitted in the atmosphere.

Thus, in comparison with Dutch law, the German conception of tort law is less likely to allow liability of a company for its GHG emissions. Due to the narrow scope of §823 (1) BGB, only an infringement of the absolute rights opens the door for tort liability, which excludes liability based on the infringement of a duty of care.

1.2. Solutions

Nevertheless, several authors suggest alternative arguments to overturn these judgments in the second instance. First, courts of appeal could establish that the risk of imminent interference reaches indeed a sufficient threshold: as pointed out by STADLER, "if the Earth is to be prevented from warming to above a certain level in the future, action must be taken now, so the threshold to demonstrate imminent impairment must not be too high. This is exactly what the German Constitutional Court held in its landmark decision of May 2021"[251]. Moreover, courts of appeal may remind the defendants that according to the prevailing opinion in German tort law, compliance with the public law regime does not automatically exempt a company from tort liability. In other words, "where European or national rules set only a minimum standard for the reduction of GHG emissions, individuals may argue (...) that only a stricter standard applied to an emitter may protect them from personal harm"[252].

Furthermore, KIENINGER argues that causation can be established through an alternative approach. According to her, causation between the defendant's GHG emission and the specific danger threatening the claimant is not about a strictly linear, individualized link, it is a matter of liability in proportion to the emissions of the individual defendant, each of which has certainly contributed to global warming[253]. In its intermediary decision on *Lliuya v. RWE*, the Higher Regional Court of Hamm [254] applied this reasoning when stating that "the defendant's

[247] *Umwelthilfe v. Mercedes Benz*, 2022 (fn 68), at 21.
[248] *Umwelthilfe v. BMW*, 2023 (fn 69), p. 119.
[249] *Greenpeace v. VW*, 2023 (fn 69), p.177.
[250] Nils SCHMIDT-AHRENDTS (fn 206), p. 418.
[251] Astrid STADLER (fn 70), p. 9.
[252] Astrid STADLER (fn 70), p. 11.
[253] Eva-Maria KIENINGER, Klimaklagen im internationalen und deutschen Privatrecht, *ZHR* 187 (2023), p. 348 – 391 (p. 367 – 369).
[254] Note: in *Lliuya v. RWE (*Oberlandesgericht Hamm, OLG Hamm (*Higher Regional Court of Hamm*), 30.11.2017, *ZUR* 2018, p. 118 – 119*)*, the defendant is accused of having contributed to the melting of a Glacier in Peru, which

contribution to the chain of causation is measurable and calculable (..), and amounts to 0.47% (of all historic GHG emissions) (…)[255]. Such a share of *contribution to causation* is therefore sufficient to serve as the basis for a claim of payment for protective measures[256]. In addition, KIENINGER points out that causation between GHG emissions and events of extreme weather is fulfilled when it is scientifically proven that the occurrence of such event would have been "practically impossible" without climate change. For example, this criterion would be met in the case of the heatwave that occurred in France and Belgium in July 2019: research shows that "without man-made climate change, this event would only have occurred approximately every 1,000 years or even less. Under current conditions, on the other hand, it will occur approximately every 50 years". This approach is consistent with the German laws of civil procedure since §286 ZPO considers that a "very high probability" is sufficient to establish causation[257]. Therefore, when asking for an injunctive relief in order to prevent further climate change, claimants could establish causation by stating that the risk of damaging extreme weather would never have been that high without climate change.

Finally, dangers created by the accumulation of GHG emission should indeed be considered as *foreseeable* for the defendant, since "it is now very well documented that the major emitters, above all the oil producers in the USA and Europe, have been well informed about the greenhouse effect, the resulting global warming and the dangers of climate change through their own research since the mid-1960s (…)". Besides, the condition of foreseeability does not require the defendant to be able to identify exactly "which glacier melt, flood or heatwave would occur in a particular place at a particular time, together with the resulting damage. (…) The case law only requires for the act of tortfeasor to be *generally* capable of causing damage of the kind that occurred"[258].

2. In Switzerland

In Switzerland, a climate claim against a company before a civil court would face an important number of obstacles as well.

First, claimants could already struggle at the stage of admissibility. Under Swiss law, there is no right to proceed to a collective action[259]. There is nevertheless a possibility of *voluntary joinder* (art. 71 CPC/ZPO), which allows "two or more persons whose rights and duties result from similar circumstances or legal grounds (to) jointly appear as plaintiffs (…)"[260]; however, "voluntary joinder is excluded if the individual cases are subject to different types of procedure"[261]. The most relevant provision for a civil climate claim may be art 89 (1) CPC/ZPO, which allows associations to bring an action in their own name as long as "they are authorized by their articles of association to protect the interests of a certain group of individuals"; however, associations can bring a claim for a violation of the *personality rights* of their members only[262]. Moreover, according to art. 59(2)(a) CPC/ZPO, the court would have to verify whether the claimant has a legitimate interest. In case of an action for injunctive relief, such interest only exists if there is an imminent threat of interference with an absolute subjective

caused important damage to the property and family life of a Peruvian Farmer. The claim was denied at first instance, and is on appeal before the OLG Hamm since 2017.

[255] *Lliuya v. RWE*, 2017 (fn 254), at d.

[256] Eva-Maria KIENINGER (fn 253), p. 369.

[257] Eva-Maria KIENINGER (fn 253), p. 370.

[258] Eva-Maria KIENINGER (fn 253), p. 375.

[259] Vito ROBERTO, Jürg FISCH, Zivilrechtliche Klima-Klagen, *AJP* 2021, p. 1225 – 1241 (p. 1231 – 1232).

[260] Art 71(1) CPC/ZPO.

[261] Art. 71(2) CPC/ZPO.

[262] See art 89(1) CPC/ZPO.

right. According to the literature, since "it is not currently possible to determine with sufficient certainty which legal interests and which rights holders will be affected by climate change", a Swiss judge could declare the claim inadmissible, by considering that "climate change does not cause any immediate threat of interference with absolute subjective rights"[263]. Such a result would be consistent with the Swiss judgment on the *Klimaseniorinnen* case[264].

Second, provided that the case would be declared admissible, claimants would have to select the most suitable legal basis for a civil climate claim. The right to an injunctive relief under neighbor law (art 679/684 CC) might be relevant; however, ROBERTO and FISCH argue that these provisions cannot be the right legal basis for a climate claim, for three reasons. First, the scope of this claim is very narrow: it only prevents immissions that have an excessive impact on a *neighboring property*. Second, emissions emanating from different properties must be assessed *separately*. However, "GHG emissions caused by an individual property owner are not - in themselves - capable of causing a dangerous greenhouse effect. (…) Even if all of a company's CO2 emissions were added together and considered to emanate from the property on which the company's headquarters are located, the necessary excessiveness could not be demonstrated, as the CO2 emissions of a single company are not in themselves capable of causing a dangerous greenhouse effect". Third, "an excessive impact on property would not be caused directly by CO2 emissions (…), but rather by climate change and damaging events (…)". For all these reasons, "climate change is (…) a global phenomenon that does not fit into the 'local grid' of neighborhood law"[265].

Claimants could also prevent an infringement of their absolute rights through the general right of injunctive relief (*allgemeiner Unterlassungsanspruch*)[266]. Two kinds of absolute subjective rights might be relevant: the protection of property (art. 641 CC), as well as the protection of personality, including physical integrity (art. 28 CC). For a "negative action for recovery of property" (art. 641(2) in fine CC, *action négatoire* / *negative Eigentumsklage*), as well as an action for an injunction against unlawful infringement of personality rights (art. 28a (1) ch. 1 CC), three conditions must be met: an interference in the absolute subjective right must be imminent, the defendant's behaviour must be unlawful, and there must be a causal link between the unlawful conduct and the imminent interference[267].

As exposed above, the first condition is to be examined at the admissibility stage, and might leave the court with no choice but to declare the claim inadmissible[268].

As for the second condition, an unlawfulness in the defendant's behavior can result "either from an infringement of an absolute right of the victim (…), or from the violation of a behavioural norm which is aimed at protecting the victim (…)"[269]. Such unlawful behaviour can either be the result of a breach of a *protective law* (*Schutznorm*) or a breach of the *general duty of care*[270]. However, protective norms protect only individual interests; norms that exclusively protect collective, supra-individual interests are not protective laws. Therefore, the *Swiss CO2 Act*, that exclusively aims at preventing climate change, without protecting any individual legal interest, is not a protective norm. As they only bind States, neither Human rights nor international environmental law (such as the Paris Agreement) qualify as protective

[263] Vito ROBERTO, Jürg FISCH (fn 259), p. 1232.
[264] See above III. B. 5.
[265] Vito ROBERTO, Jürg FISCH (fn 259), p. 1230.
[266] Vito ROBERTO, Jürg FISCH (fn 259), p. 1230.
[267] Vito ROBERTO, Jürg FISCH (fn 259), p. 1231.
[268] See above IV. B. 2.
[269] Franz WERRO, *La responsabilité civile*, 3e ed. 2017, Stämpfli, Bern, N 297.
[270] Vito ROBERTO, Jürg FISCH (fn 259), p. 1233.

norms[271]. Thus, wrongfulness should consist in the infringement of a general duty of care. On this matter, the court would have to determine whether the defendant is effectively under a duty of care vis à vis the claimant, as "the protection of individual freedom of development does not permit a duty to protect *everyone* from danger". In addition, in a civil climate action, claimants would have to argue that the defendant's GHG emissions contribute to climate change, which jeopardize their physical integrity or property. However, just as the four German Regional Courts, ROBERTO and FISCH argue that the extent to which the GHG emissions caused by a defendant will actually contribute to the alleged infringement of the claimants' rights to physical integrity and property is naturally *highly uncertain*, so that the danger created by the behavior of the defendant is not *recognizable*. Moreover, it would not be possible to qualify the sale of carbon-containing goods (fuel) to third parties as an unlawful act creating an *unacceptable risk*, since the trade as well as the use of such goods is usually not subject to any legal restrictions[272].Therefore, as "every human being is - by nature - an emitter of CO2, and (as) every human being is potentially affected by climate change", the court would have to conclude that there is no duty to protect against danger or unlawfulness with regard to CO2 emissions[273].

Finally, regarding causation, claimants would have to demonstrate that it is "more than probable" (*überwiegend warscheindlich*) that the defendant's behavior is a necessary (*sine qua non*) condition for the infringement of their rights[274]. However, ROBERTO and FISCH point out that since the greenhouse effect is caused by the *accumulation* of GHG emissions through time, the amount of GHG emitted by the defendant would only represent a "mini-cause" for the damage. In these circumstances, unlike Dutch judges, Swiss courts are very reluctant to establish partial liability: it would be *unacceptable* for the judge to establish joint liability of each actor who only made a *minimal* contribution to the damage. For these reasons, the prevailing view in Switzerland rejects liability based on a mini-cause.

In addition, ROBERTO and FISCH argue that even if claimants could establish the sine qua non condition of natural causation, the criteria of adequacy would not be met. On this matter, the authors quote the decision of a US Court, *Comer v. Murphy Oil USA, Inc*., (2012) according to which "the assertion that the defendants' emissions combined over a period of decades or centuries with other natural and man-made gases to cause or strengthen a hurricane and damage personal property is precisely the type of *remote*, *improbable*, and *extraordinary* occurrence that is excluded from liability"[275]. However, one could wonder whether this case is still relevant nowadays. Within the light of the IPCC Reports, hazardous climate change is far from being a remote, improbable, or extraordinary occurrence, quite the contrary: thus, such conception of global warming is rather outdated.

In a nutshell, the Swiss conception of tort law is unlikely to allow liability of a company in a climate claim. At the admissibility stage, the Swiss civil procedure does not have an equivalent legal basis to art. 3:305a (1) BW. Moreover, just as a German judge, a Swiss court would be reluctant to acknowledge an infringement of the claimants' absolute rights. Furthermore, since the Swiss relevant provisions do not contain any "unwritten duty of care", a wrongfulness in the defendant's behavior would be harshly demonstratable. Finally, as Switzerland does not share the Dutch view on partial responsibility, sufficient causation between the defendant's GHG emissions and the claimant's damage could not be established.

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[271] Vito ROBERTO, Jürg FISCH (fn 259), p. 1234 – 1235.
[272] Vito ROBERTO, Jürg FISCH (fn 259), p. 1233 – 1234.
[273] Vito ROBERTO, Jürg FISCH (fn 259), p. 1235 – 1236.
[274] Vito ROBERTO, Jürg FISCH (fn 259), p. 1237.
[275] *Ned Comer, et al., v. Murphy Oil USA*, Inc. et al., 839 F.Supp.2d 849, 868 (S.D.Miss 2012).

3. In France

From a comparative perspective, the French case involving the *Notre affaire à tous* association against *Total Energie SE*[276] appears to be the most similar to *Milieudefensie v. RDS*. Indeed, both jurisdictions allow an association to fill a claim on behalf on the claimants (art. 3:305a BW, art. 1248 CC). Both defendants are parent companies of multinational oil and gas entreprises[277]. In the *Total* case, claimants allege an infringement of the *Law on due diligence of corporations and main contractors*[278], whose concept of "reasonable due diligence" (*vigilance raisonnable*) is directly inferred from international soft law instruments related to the duty of companies towards Human rights, namely the UNGP principles[279]. This obligation also presents strong similarities with the general tort clause of art. 1241 CC, which is itself close to art. 6:162 BW. Therefore, just as in *Milieudefensie v. RDS*, the French court may hold Total liable by interpreting the duty of care of the company within the light of international environmental law and soft law instruments. In addition, judges could base their decision on the *Notre affaire à tous* precedent, which held the State liable under tort law, just as the judgement of *Milieudefensie v. RDS* was partially based on the *Urgenda* decision.

However, on the 6th of July 2023, the civil court of Paris dismissed the claim for procedural grounds of no relevance to our analysis[280]. The *Total* case is now on appeal. Nevertheless, the *Total* case differs from *Milieudefensie v. RDS* regarding Human rights: unlike the Dutch court, the French judge may refuse to interpret Total's standard of care in the light of art 2 and 8 ECHR since these grounds do not appear in any French climate claim, neither in the *Grande-Synthe* judgment nor in the *Notre affaire à tous* decision.

4. Intermediary conclusion on the difficulty of transposing the Dutch reasoning in other jurisdictions

In the end, this comparison of the Dutch, French, German and Swiss tort law shows that the Dutch conception of tort liability remains the most suitable one for a climate claim against a company: although France, Germany and Switzerland all share the same obligations of international environmental law as the Netherlands, the domestic specificities of their legal systems make the reasoning of *Milieudefensie v. RDS* hardly transposable in their jurisdiction.

C. The risk of forum shopping

1. Potential weaknesses

In the area of private international law, climate claims against companies may create a risk of forum shopping.

In terms of jurisdiction, the Dutch decision on *Milieudefensie v. RDS* may represent for the defendant an incentive to move its headquarters outside the Netherlands. As a matter of fact, the company announced shortly after the judgment that they planned to move their headquarters

[276] Tribunal judiciaire de Paris (*Civil Court of Paris*), 06.07.2023, n° 22/03403.
[277] Paul MOUGEOLLE, 2021 (fn 237), n° 17.
[278] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[279] Paul MOUGEOLLE, 2020 (fn 95), p. 548.
[280] Tribunal judiciaire de Paris (*Civil Court of Paris*), 06.07.2023, n° 22/03403.

to the UK, officially for tax purposes[281]. However, it is not enough for the defendant to move its headquarters to escape jurisdiction of a court: in any case, art. 7(2) of the Brussel I Regulation allows claimants to sue defendants in the place where the damage occurred or is likely to occur[282]. Therefore, had RDS moved its headquarters elsewhere, the Dutch judge would have nevertheless remained competent insofar as there was an imminent threat of damage in the Netherlands. In the end, due to the global effects of GHG emissions, the possibility of suing defendants in the place where the damage occurred opens the door to an almost *worldwide* forum shopping[283]: such a result could lead to *unpredictability*, which would enter into contradiction with the purpose of *legal certainty* of the Brussel I Regulation.

The same reasoning applies to applicable law. The Dutch way of broadly interpreting art. 7 Rome II Regulation is subject to criticism as well. In *Milieudefensie v. RDS*, the court admits that this broad interpretation "leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified"[284]. In other words, since more than one event could give rise to the same environmental damage, more than one law could be applicable to the case. [285] Such broad interpretation has the benefit to be consistent with the principle of favorability of the victim (*Günstigkeitsprinzip für den Geschädigten*). However, due to its inherent risk of forum shopping, it contradicts the purpose of predictability and legal certainty of the Rome II Regulation. [286]

2. Responses to this criticism

Nevertheless, this situation of forum shopping is not unanimously criticized: other authors argue, on the contrary, that such possibilities are precisely a *chance* for a climate claim. For KIENINGER, filling a claim where the damage occurred can have the advantage that the effects of climate change on the injured parties are more clearly visible to the court[287].

From a broader perspective, the possibility of bringing cross-border civil law actions and enforcing judgements across borders may even be the remedy for the so-called "tragedy of the commons problem"[288]. This theory describes "a situation in which individual users who have open access to a resource without being hampered by shared social structures or formal rules (such as fees or taxes) can act independently and, on the basis of their self-interest only, in a manner contrary to the common good of all users. The earth, being the commons, suffers globally through activities of individuals, companies, and governments"[289]. Therefore, this problem could be partially solved if, thanks to a choice of the claimant in terms of competence and applicable law, "not only Shell but also BP71 or RWE were obliged by a Dutch court to reduce emissions within a certain time frame"[290].

[281] Astrid STADLER (fn 70), p. 8.
[282] Astrid STADLER (fn 70), p. 9.
[283] Ibid.
[284] *Milieudefensie v. RDS* (fn 10), at 4.3.6.
[285] Benoît MAYER (fn 218), p. 410. See also Chiara MACCHI, Josephine VAN ZEBEN (fn 197), p. 411.
[286] Leopold KÖNIG, Sebastian TETZLAFF, "Forum shopping" unter Art. 7 Rom II-VO – neue Herausforderungen zur Bestimmung des anwendbaren Rechts bei "Klimaklagen", *Recht der Internationalen Wirtschaft*, 2022, p. 25-40 (p. 39).
[287] Eva-Maria KIENINGER (fn 253), p. 358.
[288] Eva-Maria KIENINGER (fn 253), p. 390.
[289] Astrid STADLER (fn 70), p. 6.
[290] Eva-Maria KIENINGER (fn 253), p. 359.

D. The risk of carbon leakage

Climate claims may also induce a risk of "carbon leakage", namely the relocation of GHG-intensive production to regions with less stringent climate regulations, which could lead to a general increase in global emissions[291]. In Europe, this phenomenon is well known since the implementation of the European Trading System (ETS), based on the market for the exchange of quotas: on this occasion, the European legislator recognized that in order to get around this system, companies could simply delocalize their activities in countries where climate regulations do not exist[292]. Such risk is explicitly discussed by the Dutch judges. In *Urgenda v. Dutch State*, the State argues that an injunctive relief will not lower the amount of GHG mission in the EU since "other European countries will neutralize reduced emissions in the Netherlands"[293]. In *Milieudefensie v. RDS*, *RDS* points out that the company could simply sell its oil and gas concessions to other competitors: from this perspective, "a reduction obligation (would) have no effect, or even be counterproductive, because the place of the Shell group (would) be taken by competitors". In both cases, courts quickly dismiss this argument, by stating that the available research shows no signs of carbon leakage[294], and that the Paris Agreement reduces the risk of carbon leakage as it binds each State to implement a sufficient climate policy[295].

However, according to MOUGEOLLE, the Dutch courts may have underestimated the risk of carbon leakage induced by succeeding climate claims, especially in case of disproportionately severe injunctive relief[296]. Besides, the Paris Agreement could really mitigate the risk of carbon leakage if all signatory States implemented the *same level* of climate regulation, so that companies would no longer have any interest in relocating their activities abroad: this is far from being the case for each of the 196 contracting States. Furthermore, STADLER emphasizes that the Dutch decision may effectively benefit Shell's competitors: "they may even be in a position to increase their emissions on account of Shell's reduction, because the ETS looks only at the *total* amount of emissions in a particular sector". From this perspective, "the climate protection effect of pro-active tort actions is therefore highly questionable"[297].

Nevertheless, the European legislator recently implemented a new mechanism to tackle the carbon leakage issue: the *Carbon Border Adjustment Mechanism* (CBAM) levies a fee on GHG emissions generated abroad during the production of certain imported goods. It aims at leveling the playing field between EU and non-EU manufacturers, and therefore prevents EU manufacturers from relocating their GHG-intensive production abroad[298].

E. The inefficiency of some climate claims: the French example

It is probably too early to consistently evaluate the efficiency of the Dutch, German and French succeeding climate claims on domestic climate policies from a legal approach.

[291] Gina RÜEGG/Sangeeta MOHANTY/Philipp WEBER-LORTSCH, Nachhaltiger Umbau des Welthandels?, *Zoll + MWST Revue* 3/2023, p. 139 – 147 (p. 140).
[292] Paul MOUGEOLLE, 2021 (fn 237), n°13.
[293] *Urgenda v. Dutch State*, Court of appeal (fn 4), at 57.
[294] *Urgenda v. Dutch State*, first instance (fn 4), at 4.81; confirmed in *Urgenda v. Dutch State*, Court of appeal (fn 4), at 57. See also K.J DE GRAAF / J.H JANS (fn 107), p. 522.
[295] *Milieudefensie v. RDS* (fn 10), at 4.4.50 ; Paul MOUGEOLLE, 2021 (fn 237), n°14.
[296] Paul MOUGEOLLE, 2021 (fn 237), n°14.
[297] Astrid STADLER (fn 70), p. 8.
[298] Gina RÜEGG/Sangeeta MOHANTY/Philipp WEBER-LORTSCH (fn 291), p. 140.

However, in France, a brief overview of the concrete impact of climate judgements already reveals a serious lack of effect. For the record, in its decision of July 2021 on the *Grande-Synthe* case, after further instruction, the French Administrative Supreme Court ordered the State to implement sufficient climate policy before the 31st of March 2022[299]. On the 10th of May 2023, noting that this decision had still not been implemented, the same court renewed its injunction, and ordered the State to comply before the 30th of June 2024[300]. In the *Notre affaire à tous* judgment, the Administrative Court of Paris issued a similar injunctive relief and ordered the State to comply with its environmental legislation before the 31st of December 2022[301]. On the 14th of June 2023, claimants asked the Court to decide on the non-compliance of this decision[302]. This judgement has not been delivered yet.

The reason why these climatic judgements remain a dead letter is that they do not include any *astreinte*, despite the repeated requests of the claimants[303]. For the literature, this choice is a timid one ("*timoré*")[304], especially with regard to the *Amis de la Terre* precedent: in August 2021, noting that its first decision had only been partially implemented, the Administrative Supreme Court issued a new ruling together with an *astreinte* of 10 million euros for each six-month delay[305]. In its third decision of October 2022, the court finally ordered the State to pay an *astreinte* of 20 million euros (*liquidation de l'astreinte*)[306]. By dividing this sum between several organizations fighting air pollution, the court avoided unjust enrichment of the claimant, as well as the "ridiculous situation where the State required to pay an *astreinte* would simply transfer it to its own budget"[307]. It must be admitted, however, that the use of *astreinte* was more easily justifiable in the *Amis de la Terre* case, since a European directive had imposed a clear obligation of result on the State, unlike the French environmental regulation on GHG emissions[308].

Nevertheless, this example shows that succeeding climate claims against a State do not automatically lead to the emergence of efficient climate policies. In the worst case, these progressive decisions may even end up being no more than a declaratory and symbolic judgment.

F. Intermediary conclusion on the limits of climate claims

In the end, several weaknesses appear behind the concept of climate judgments ordering States or companies to mitigate their GHG emissions.

Beyond a few legal inconsistencies here and there, the literature questions the democratic legitimacy of legal injunctions ordering States to mitigate their GHG emissions, insofar as it is primarily up to the legislator to decide on such matter. However, courts do have

[299] CE 01.07.2021 (fn 6), art. 2.
[300] Conseil d'Etat (*Administrative Supreme Court*), 10.05.2023, n° 467982.
[301] Tribunal Administratif de Paris (*Administrative Court of Paris*), 14.10.2021, n° 1904967.
[302] See official website of the claimant association, available at: https://laffairedusiecle.net/laffaire-du-siecle-demande-une-astreinte-dun-milliard-deuros-pour-obliger-letat-a-agir/ .
[303] In their conclusions from the 14th of June 2023, the claimant association now asks the court to impose an *astreinte* of 1.1 billion euros for nine semesters of delay (see weblink above).
[304] Mathilde GRANDJEAN, « Nos maisons brûlent et le Gouvernement regarde toujours ailleurs » : éléments pour un bilan à propos de l'efficacité de la justice administrative en matière climatique, *Revue juridique de l'environnement*, 2023/1 (volume 48), p. 87 – 103 (p. 98).
[305] Conseil d'Etat (*Administrative Supreme Court*), 04.08.2021, n°428409.
[306] Conseil d'Etat (*Administrative Supreme Court*), 17.10.2022, n°428409.
[307] Mathilde GRANDJEAN (fn 304), p. 93.
[308] Ibid.

the power to fill the gaps left by the legislator, in particular when domestic climate legislation does not comply with international law.

Moreover, a comparative analysis shows that there is no equivalent to the Dutch tort provision and its *unwritten* duty of care in France, Germany or Switzerland. Under Swiss law, it seems that there is no relevant provision for establishing the duty of care of a company towards climate. In France, the *lex specialis* on the due diligence of companies appears less efficient that the general tort provision of the civil code. In Germany, the tort general provision exclusively requires an infringement of the absolute rights: by focusing on the result for the claimant rather than on the defendant's behavior, German tort law narrows the chances of success of climate claims against companies. Due to the global nature of climate change, establishing sufficient causation between the GHG emissions of the defendant and the damage remains a challenge for civils courts. However, in jurisdictions that are opened to the concept of liability *in proportion* to the contribution to the damage, such as Germany, causation could be proven through scientific studies demonstrating the impact of big polluting companies on climate change.

Furthermore, the inherent cross-border nature of climate claims presents a risk of forum shopping: on the one hand, this issue possibly undermines the purpose of predictability and legal certainty of Private international law regulations; one the other hand, the variety of potential jurisdictions and applicable laws fulfill the purpose of the protection of victims, by offering them an access to climate justice somewhere in the world.

Nevertheless, the risk of carbon leakage should not be underestimated by the courts. The European legislator is well aware of this reality: that is the reason why it has set up a new mechanism to tackle this risk, in order to remedy the shortcomings of the ETS system.

Finally, in some jurisdictions, succeeding climate claims against the State remain essentially symbolic: that is the case in France, where climate judgments are inefficient when they don't impose any *astreinte*.

Having identified the main limits of climate claims, we will finally explore the alternative approach of granting rights to nature. In particular, we will discuss whether such approach can remedy the weaknesses of climate change litigation.

V. Overview of a remedy for the limits of climate claims: granting rights to nature

A. Advantages of this approach

The concept of rights of nature comes from States of Latin America: by granting rights to nature, States such as Ecuador, Bolivia or Colombia protect the rights of their indigenous communities, who live in symbiosis with nature. These rights can be granted in various forms, such as constitutional norms granting rights to nature in general or ruling of supreme courts narrowed down to specific areas. In 2008, Ecuador was the first State to grant rights to "Mother nature" through constitutional law. In 2016, the Supreme Court of Colombia granted legal rights to the Amazon region and the Atrato River[309].

For some years now, European countries have been considering granting rights to nature as well. In 2021, a group of citizens launched an initiative to hold a referendum on proposed

[309] Laura SCHIMMÖLLER, Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador, *Transnational Environmental Law*, 9:3 (2020), p. 569 – 592 (p. 574).

amendments to Bavaria's constitution recognizing rights of nature[310]. In 2022, the Spanish Senate approved the Mar Menor Act which granted legal personality to the Mar Menor lagoon and its basin[311].

In the literature, granting rights to nature is seen as a promising way to tackle the climate crisis[312]. Since this approach acknowledges that human beings and their environment are interconnected, SCHIMMÖLLER argues that granting rights to nature could strengthen both environmental human rights and environmental protection[313]. From this perspective, granting rights to nature could mean granting rights to our climate itself, since it naturally regulates our whole environment.

Applying this approach to climate change litigation offers a number of advantages. First, claimants would be relieved of the need of asserting a violation of their own Human rights. In particular, rights of nature could exempt claimants from having to prove an infringement of their absolute rights under German law, or from having to be "particularly concerned" under Swiss law. Thus, "the possibilities for legal action against environmental damage (would) (…) be expanded regardless of whether humans are affected"[314].

Moreover, causation would not be an issue anymore, since there would be no need for establishing a causal link between GHG emissions and a *Human* prejudice; therefore, only the causal link between GHG emissions of a company and climate change would have to be proven: this is already scientifically done in the IPCC Reports, and almost unanimously acknowledged by the international community.

Furthermore, granting rights to nature could remedy "the asymmetry of having legal personhood for corporations – which may exploit nature for economic gain – while having no such status for the ecosystems (…) which (are) threatened by this exploitation"[315]: such legal paradox appears to be more and more disconnected from the current climate crisis.

B. Limits of this approach

However, this approach is not without its limits. Unsurprisingly, the question of who would have standing remains difficult to answer. In the Constitution of Ecuador, *any person* may demand public authorities to apply these rights. A claimant may be "any collective, natural or legal person, and may invoke the rights directly through a constitutional lawsuit (…)"[316]. In New Zealand, a separate body is regulated by guidelines specifying a *guardian* role and receive financial support of the State[317]. In the Bavarian project, the question remains open; EWERING and GUTMANN argue that it would be conceivable to extend existing rights of action for associations or to create a *trustee* action for nature[318]. The fact is that the issue of standing is easier to solve for States with indigenous communities: in that case, whoever has standing to enforce rights protecting these communities may also have standing to enforce rights of nature

[310] Elena Sofia EWERING, Andreas GUTMANN, Gibt Bayern der Natur Rechte? *VerfBlog*, 2021/9/10, available at: https://verfassungsblog.de/gibt-bayern-der-natur-rechte/ p. 1.
[311] Marie-Christine FUCHS, Rights of Nature reach Europe: The Mar Menor Case in Spain in the Light of Latin American Precedents, *VerfBlog*, 2023/2/24, available at: https://verfassungsblog.de/rights-of-nature-reach-europe/ p. 1.
[312] Elena Sofia EWERING, Andreas GUTMANN (fn 310), p. 1; Laura SCHIMMÖLLER (fn 309), p. 569.
[313] Laura SCHIMMÖLLER (fn 309), p. 570.
[314] Elena Sofia EWERING, Andreas GUTMANN (fn 310), p. 1.
[315] Laura SCHIMMÖLLER (fn 309), p. 590.
[316] Laura SCHIMMÖLLER (fn 309), p. 579.
[317] Laura SCHIMMÖLLER (fn 309), p. 589.
[318] Elena Sofia EWERING, Andreas GUTMANN (fn 310), p. 2.

before courts. However, in Europe, in the absence of indigenous communities, there might be an important risk of abuse from claimants: for example, people or associations who are better resourced could claim nature's rights in order to stop construction and developments in their living areas, so that these developments may be moved in poorer neighborhoods whose inhabitant don't have the resources to invoke a claim of rights of nature[319].

Furthermore, enforcement of rights of nature would lead to inevitable conflicts of interests, in particular with the protection of property and the economic freedom. Such conflicts are no news for a court, but in that case, the judge would not be simply required to do a balance between conflicting Human rights, but rather a balance between *human* interests and the interests of nature *itself*. In Ecuador, the Constitutional Court partially solved this conflict by stating that nature can be both a legal entity and an object of property[320]. Nevertheless, outside the context of indigenous communities, in jurisdictions which remain deeply anthropocentric, such kind of balance of interests would be rarely tip in favor of nature.

Finally, some authors argue that "the transformations required for an effective realization are not worth the effort, as the end result may not be significantly different from the existing public interest litigation framework."[321] In Ecuador, granting rights to nature in 2008 did not stop the government from allowing non-renewable resource extraction in protected areas in 2009, by delaying the creation of the institutional framework necessary to effectively implement rights of nature[322]. In Spain, in light of significant legal inconsistencies, the concept of granting legal personality of the *Mar Menor* was even qualified as "legal utopia": the *Mar Menor Act* refers to the Spanish Constitution, whereas the latter does not recognize the legal subjectivity of nature[323]; in addition, the text refers to the intrinsic connection between nature and the culture of the inhabitants of the *Mar Menor* region without explaining why this justifies the legal personality of the *Mar* itself[324].

C. Intermediary conclusion on this alternative approach

In the end, granting rights to nature indeed remedy the main weaknesses of tort climate claims, by suppressing the requirement of an independent human prejudice: damage caused to nature itself by the GHG emissions of a company would be sufficient. Such approach would especially benefit climate claims under German and Swiss tort law; however, it would not really represent a shift of perspective in jurisdictions such as France or the Netherlands: French tort law already recognizes the ecological damage as independent from any human prejudice, and Dutch tort law overcomes almost every obstacle that a tort climate claim may have to face.

VI. Conclusion

To answer our research question, climate change litigation indubitably affects the main features of tort law: not only do these actions shed new light on tort liability, but they also tend to reshape certain aspects of it, such as wrongfulness, damage or causation.

[319] Laura SCHIMMÖLLER (fn 309), p. 583.
[320] Elena Sofia EWERING, Andreas GUTMANN (fn 310), p. 3.
[321] Laura SCHIMMÖLLER (fn 309), p. 590
[322] Laura SCHIMMÖLLER (fn 309), p. 580.
[323] Marie-Christine FUCHS (fn 311), p.2.
[324] Marie-Christine FUCHS (fn 311), p. 4.

The results of this comparative research shows that among all jurisdictions studied, the admissibility of a climate claim mainly depends on the possibilities of standing for claimants: in jurisdictions where environmental associations have standing to represent the interests of the plaintiffs, such as France, the Netherlands, it is likely that the claim will be admissible, whereas in jurisdictions such as Switzerland, where claimants must still prove that they are more particularly concerned than the rest of the population, climate claims will already be denied at the admissibility stage, since climate change potentially affects anyone. By granting standing to the current claimants, judges take into account the interests of the future generations. However, almost all courts exclude the interests of non-residents, even though the latter are just as concerned by climate change as residents are.

The cross-border nature of climate change potentially requires the application of the Brussels I and Rome II Regulations when determining the jurisdiction of the court and the applicable law. Although there is not yet much case law on the matter, the *Milieudefensie v. RDS* precedent shows that a number of courts may be competent for several climate claims against the same company, and that several laws may be applicable to these cases, since *any* polluting company in the world is potentially responsible for climate change, and since climate change can cause damage *anywhere* in the world. Such result protects victims by offering them a choice in terms of competence and applicable law, but it also challenges the legal certainty offered by international private law regulations.

Regarding wrongfulness, a climate claim is more likely to succeed in jurisdictions where the infringement of a duty of care qualifies as a tortious act, such as France or the Netherlands. In particular, a tort clause that explicitly provides liability for the infringement of an *unwritten* duty of care is the most suitable for holding a company liable for its GHG emissions: among all jurisdictions studied, only Dutch law offers this possibility. Nevertheless, the Dutch and French courts take an innovative look at the duty of care, by interpreting this standard in the light of international principles of environmental law, such as the principle of equity between countries, the principle of equity between generations, the principle of precaution or the soft law principles on Business and Human rights (UNGP). Despite a few inconsistencies with the traditional interpretation of the standard of care under tort law, such approach seems to meet the challenges of climate change and contributes to strengthening the responsibility of companies with regard to their polluting emissions.

On the contrary, in jurisdictions where only the infringement of an absolute right qualifies as a tortious act, a company is less likely to be held liable: in Germany, despite the judgement of the Constitutional Court on the *protection of future generations*, which explicitly acknowledges the effect of climate change on fundamental rights, civil courts refuse for now to recognize that the GHG emissions of a company create a wrongful interference with the absolute rights of claimants.

In order to establish the damage, courts combine the traditional case law on environmental harm with the use of the most recent scientific data on climate change: by confirming that environmental harm is human rights harm, and by relying on the IPCC reports, judges establish that the threat of hazardous climate change is sufficient to qualify as a damage, especially in the context of an injunctive relief. By adopting such a forward-looking perspective, courts acknowledge the urgent need to act *now* in order to have the chance to prevent further damage in the future.

As for causation, establishment of a sufficient causal link between the GHG emissions of a company and the damage depends on how judges analyze this criterion. Climate claims are more likely to succeed when causation between GHG emissions, climate change and damage is based on scientific data from IPCC reports: this is the case in France or in the Netherlands

for example. On the contrary, causation is less likely to be established in jurisdictions such as Germany or Switzerland, which require a strictly individualized, linear causal link between the defendant's GHG emissions and the specific danger threatening the claimant. However, in these jurisdictions, a slight change of perspective could remedy this situation. First, causation should be a matter of liability of the defendant in proportion to its *contribution* to climate change; some jurisdictions, such as Germany or the Netherlands, are indeed familiar with the concept of partial responsibility, which is the most suitable way of tackling the responsibility of a company towards climate change; others, such as Switzerland, are extremely reluctant to establish liability on such basis. In addition, causation should be easily established when it is scientifically proven that the risk of damaging extreme weather would never have been that high in the absence of climate change. Besides, the danger of climate change *in general* should be considered as foreseeable for the defendant, since the international community has known about the impact of global warming for decades.

Finally, the alternative approach of granting rights to nature provides the advantage of suppressing the main barrier to success of climate claims: it relieves claimants from bringing the proof of the concrete, current impact of climate change on Human rights. However, this remedy is not without weaknesses, in terms of legal consistency, standing of claimants or conflict of interests.

This research is based on the current state of climate case law in France, Germany, the Netherlands and Switzerland until December 2023: in the coming year, the ECtHR should rule for the first time on climate claims against France and Switzerland, the Dutch court of appeal may confirm or overrule the *Milieudefensie v. RDS* precedent, higher regional courts of Germany may reverse the first instance decisions and hold car manufacturers liable for the GHG emissions they create, and Total could be held liable on appeal in France. In the end, climate claims are shaped by evolving domestic specificities of tort law, just as tort law evolves through climate change litigation.

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Annexes

1. Tribunal Administratif de Paris (*Administrative Court of Paris*), 03.02.2021, n°1904967:

10. Aux termes de l'article 1246 du code civil : "Toute personne responsable d'un préjudice écologique est tenue de le réparer.". En vertu de l'article 1247 du même code, le préjudice écologique consiste en une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement. L'article 1248 de ce code dispose que : "L'action en réparation du préjudice écologique est ouverte à toute personne ayant qualité et intérêt à agir, telle que l'Etat, l'Office français de la biodiversité, les collectivités territoriales et leurs groupements dont le territoire est concerné, ainsi que les établissements publics et les associations agréées ou créées depuis au moins cinq ans à la date d'introduction de l'instance qui ont pour objet la protection de la nature et la défense de l'environnement.". Enfin, aux termes de l'article L. 142-1 du code de l'environnement : "Toute association ayant pour objet la protection de la nature et de l'environnement peut engager des instances devant les juridictions administratives pour tout grief se rapportant à celle-ci. (...)".

11. Il résulte de l'ensemble de ces dispositions que les associations, agréées ou non, qui ont pour objet statutaire la protection de la nature et la défense de l'environnement ont qualité pour introduire devant la juridiction administrative un recours tendant à la réparation du préjudice écologique. (…)

En ce qui concerne l'existence d'un préjudice écologique :

16. Il résulte de l'instruction, et notamment des derniers rapports spéciaux publiés par le Groupe d'experts intergouvernemental sur l'évolution du climat (GIEC), auxquels la France participe activement, dont elle contribue au financement à hauteur de 15 %, et aux conclusions desquels elle adhère, que l'augmentation constante de la température globale moyenne de la Terre, qui a atteint aujourd'hui 1°C par rapport à l'époque préindustrielle, est due principalement aux émissions de gaz à effet de serre d'origine anthropique. (…) Au regard de l'ensemble de ces éléments, le préjudice écologique invoqué par les associations requérantes doit être regardé comme établi.

En ce qui concerne les carences fautives et le lien de causalité : (…)

18. D'une part, l'article 2 de la convention-cadre des Nations Unies sur les changements climatiques (CCNUCC) du 9 mai 1992 stipule que: "L'objectif ultime de la présente Convention et de tous instruments juridiques connexes que la Conférence des Parties pourrait adopter est de stabiliser, conformément aux dispositions pertinentes de la Convention, les concentrations de gaz à effet de serre dans l'atmosphère à un niveau qui empêche toute perturbation anthropique dangereuse du système climatique (...).". À cet égard, le paragraphe 1 de l'article 3 de la convention prévoit notamment que : "Il incombe aux Parties de préserver le système climatique dans l'intérêt des générations présentes et futures, sur la base de l'équité et en fonction de leurs responsabilités communes mais différenciées et de leurs capacités respectives. Il appartient, en conséquence, aux pays développés parties d'être à l'avant-garde de la lutte contre les changements climatiques et leurs effets néfastes." (…)

21. Il résulte de ces stipulations et dispositions que l'Etat français, qui a reconnu l'existence d'une "urgence" à lutter contre le dérèglement climatique en cours, a également reconnu sa capacité à agir effectivement sur ce phénomène pour en limiter les causes et en atténuer les conséquences néfastes. À cet effet, il a choisi de souscrire à des engagements internationaux et, à l'échelle nationale, d'exercer son pouvoir de réglementation, notamment en menant une politique publique de réduction des émissions de gaz à effet de serre émis depuis le territoire national, par laquelle il s'est engagé à atteindre, à des échéances précises et successives, un certain nombre d'objectifs dans ce domaine.

Concernant l'objectif de réduction des émissions de gaz à effet de serre :

29. En ce domaine, d'une part, l'annexe II de la décision n° 406/2009/CE du 23 avril 2009 relative à l'effort à fournir par les États membres pour réduire leurs émissions de gaz à effet de serre afin de respecter les engagements de la Communauté en matière de réduction de ces émissions jusqu'en 2020, a fixé à la France, pour 2020, une limite d'émission de gaz à effet de serre de - 14 % par rapport aux niveaux d'émission de 2005. (…). D'autre part, les dispositions de l'article L. 100-4 du code de l'énergie, dans leur rédaction issue de la loi du 8 novembre 2019 relative à l'énergie et au climat, précisent que : "I. - Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : / 1° De réduire les émissions de gaz à effet de serre de 40 % entre 1990 et 2030 et d'atteindre la neutralité carbone à l'horizon 2050 en divisant les émissions de gaz à effet de serre par un facteur supérieur à six entre 1990 et 2050. La trajectoire est précisée dans les budgets carbone mentionnés à l'article L. 222-1 A du code de l'environnement. Pour l'application du présent 1 , la neutralité carbone est entendue comme un équilibre, sur le territoire national, entre les émissions anthropiques par les sources et les absorptions anthropiques par les puits de gaz à effet de serre, tel que mentionné à l'article 4 de l'accord de Paris ratifié le 5 octobre 2016. (…) En vue d'atteindre cet objectif de réduction des émissions de gaz à effet de serre, l'article L. 222-1 A du code de l'environnement prévoit que : "Pour la période 2015-2018, puis pour chaque période consécutive de cinq ans, un plafond national des émissions de gaz à effet de serre dénommé " budget carbone " est fixé par décret." (…). L'Etat, les collectivités territoriales et leurs établissements publics respectifs prennent en compte la stratégie bascarbone dans leurs documents de planification et de programmation qui ont des incidences significatives sur les émissions de gaz à effet de serre. /Dans le cadre de la stratégie bas-carbone, le niveau de soutien financier des projets publics intègre, systématiquement et parmi d'autres critères, le critère de contribution à la réduction des émissions de gaz à effet de serre. Les principes et modalités de calcul des émissions de gaz à effet de serre des projets publics sont définis par décret." (…) Il résulte de l'ensemble de ce qui précède qu'à hauteur des engagements qu'il s'est fixés et du calendrier qu'il a arrêté, l'État a reconnu qu'il était en mesure d'agir directement sur les émissions de gaz à effet de serre.

30. (…) Par suite, l'État doit être regardé comme ayant méconnu le premier budget carbone et n'a pas ainsi réalisé les actions qu'il avait lui-même reconnues comme étant susceptibles de réduire les émissions de gaz à effet de serre.

31. En outre, la circonstance que l'Etat pourrait atteindre les objectifs de réduction des émissions de gaz à effet de serre de 40 % en 2030 par rapport à leur niveau de 1990 et de neutralité carbone à l'horizon 2050 n'est pas de nature à l'exonérer de sa responsabilité

dès lors que le non-respect de la trajectoire qu'il s'est fixée pour atteindre ces objectifs engendre des émissions supplémentaires de gaz à effet de serre, qui se cumuleront avec les précédentes et produiront des effets pendant toute la durée de vie de ces gaz dans l'atmosphère, soit environ 100 ans, aggravant ainsi le préjudice écologique invoqué. (…)

34. Il résulte de tout ce qui précède que les associations requérantes sont fondées à soutenir qu'à hauteur des engagements qu'il avait pris et qu'il n'a pas respectés dans le cadre du premier budget carbone, l'État doit être regardé comme responsable, au sens des dispositions précitées de l'article 1246 du code civil, d'une partie du préjudice écologique constaté au point 16. (…)

2. Conseil d'Etat (*Administrative Supreme Court*), 19.11.2020, n°427301:

3. Il ressort des pièces du dossier, et en particulier des données publiées par l'Observatoire national sur les effets du réchauffement climatique, que le secteur du dunkerquois est identifié comme relevant d'un indice d'exposition aux risques climatiques qualifié de très fort. A cet égard, la commune de Grande-Synthe fait valoir sans être sérieusement contestée sur ce point qu'en raison de sa proximité immédiate avec le littoral et des caractéristiques physiques de son territoire, elle est exposée à moyenne échéance à des risques accrus et élevés d'inondations, à une amplification des épisodes de fortes sécheresses avec pour incidence non seulement une diminution et une dégradation de la ressource en eau douce mais aussi des dégâts significatifs sur les espaces bâtis compte tenu des caractéristiques géologiques du sol. Si ces conséquences concrètes du changement climatique ne sont susceptibles de déployer tous leurs effets sur le territoire de la commune qu'à l'horizon 2030 ou 2040, leur caractère inéluctable, en l'absence de mesures efficaces prises rapidement pour en prévenir les causes et eu égard à l'horizon d'action des politiques publiques en la matière, est de nature à justifier la nécessité d'agir sans délai à cette fin. Par suite, la commune de Grande-Synthe (…) justifie d'un intérêt lui donnant qualité pour demander l'annulation des décisions implicites attaquées, la circonstance, invoquée par la ministre à l'appui de sa fin de non-recevoir, que ces effets du changement climatique sont susceptibles d'affecter les intérêts d'un nombre important de communes n'étant pas de nature à remettre en cause cet intérêt.

4. En revanche, M. A... qui se borne, d'une part, à soutenir que sa résidence actuelle se trouve dans une zone susceptible d'être soumise à des inondations à l'horizon de 2040, d'autre part, à se prévaloir de sa qualité de citoyen, ne justifie pas d'un tel intérêt. (…)

6. En second lieu, les associations Oxfam France, Greenpeace France et Notre Affaire A Tous, et la Fondation pour la Nature et l'Homme, qui ont notamment pour objet de lutter contre les atteintes anthropiques à l'environnement dont l'une des manifestations réside dans la contribution au phénomène du changement climatique, justifient également d'un intérêt suffisant à intervenir au soutien de la demande d'annulation des décisions attaquées. (…).

9. D'une part, au niveau mondial, l'article 2 de la convention-cadre des Nations Unies sur les changements climatiques (CCNUCC) du 9 mai 1992 stipule que : " L'objectif ultime de la présente Convention et de tous instruments juridiques connexes que la Conférence des Parties pourrait adopter est de stabiliser, conformément aux dispositions pertinentes de la Convention, les concentrations de gaz à effet de serre dans l'atmosphère à un niveau qui empêche toute perturbation anthropique dangereuse du système climatique. (...). ". A cet égard, le paragraphe 1 de l'article 3 de la convention prévoit notamment que : " Il

incombe aux Parties de préserver le système climatique dans l'intérêt des générations présentes et futures, sur la base de l'équité et en fonction de leurs responsabilités communes mais différenciées et de leurs capacités respectives. Il appartient, en conséquence, aux pays développés parties d'être à l'avant-garde de la lutte contre les changements climatiques et leurs effets néfastes. " (…)

10. D'autre part, au niveau européen, par la décision 94/69/CE du 15 décembre 1993 concernant la conclusion de la CCNUCC, le Conseil a approuvé la convention au nom de la Communauté européenne, devenue l'Union européenne. Notamment aux fins de mise en oeuvre des stipulations précitées, l'Union européenne a adopté un premier « Paquet Energie Climat 2020 » (…)

11. Enfin, au niveau national, les dispositions de l'article L. 100-4 du code de l'énergie, dans leur rédaction issue de la loi du 8 novembre 2019 relative à l'énergie et au climat, précisent que : " I. - Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : / 1° De réduire les émissions de gaz à effet de serre de 40 % entre 1990 et 2030 et d'atteindre la neutralité carbone à l'horizon 2050 en divisant les émissions de gaz à effet de serre par un facteur supérieur à six entre 1990 et 2050. La trajectoire est précisée dans les budgets carbone mentionnés à l'article L. 222-1 A du code de l'environnement (…).

12. Il résulte de ces stipulations et dispositions que l'Union européenne et la France, signataires de la CCNUCC et de l'accord de Paris, se sont engagées à lutter contre les effets nocifs du changement climatique induit notamment par l'augmentation, au cours de l'ère industrielle, des émissions de gaz à effet de serre imputables aux activités humaines, en menant des politiques visant à réduire, par étapes successives, le niveau de ces émissions, afin d'assumer, suivant le principe d'une contribution équitable de l'ensemble des Etats parties à l'objectif de réduction des émissions de gaz à effet de serre, leurs responsabilités communes mais différenciées en fonction de leur participation aux émissions acquises et de leurs capacités et moyens à les réduire à l'avenir au regard de leur niveau de développement économique et social. Si les stipulations de la CCNUCC et de l'accord de Paris citées au point 9 requièrent l'intervention d'actes complémentaires pour produire des effets à l'égard des particuliers et sont, par suite, dépourvues d'effet direct, elles doivent néanmoins être prises en considération dans l'interprétation des dispositions de droit national, notamment celles citées au point 11, qui, se référant aux objectifs qu'elles fixent, ont précisément pour objet de les mettre en œuvre.

14. Il ressort des pièces du dossier, notamment des données communément admises en matière d'émissions de gaz à effet de serre, que, au terme de la période 2015-2018, la France a substantiellement dépassé le premier budget carbone qu'elle s'était assignée, (...). A cet égard, dans ses deux premiers rapports annuels publiés en juin 2019 et juillet 2020, le Haut conseil pour le climat (…) a souligné les insuffisances des politiques menées pour atteindre les objectifs fixés. (…)

3. Bundesverfassungsgericht, BVerG (*Constitutional Court*), 24.03.2021 (*judgment on protection of future generations*):

99 aa) (1) The complainants' fundamental right to protection arising from Art. 2(2) first sentence GG might have been violated. The protection of life and physical integrity under Art. 2(2) first sentence GG extends to protection against impairments caused by environmental pollution ((…) on Art. 2 of the European Convention on Human Rights (ECHR), see also European Court of Human Rights (ECtHR), Öneryildiz v. Turkey, Judgment of 30 November 2004, no. 48939/99, para. 89 ff.; ECtHR, Budayeva and Others v. Russia, Judgment of 20 March 2008, no. 15339/02 inter alia, para. 128 ff (…)). It also includes protection against risks to human life and health caused by climate change. The legislator might have violated its duty of protection by affording insufficient protection against health impairments and risks to life caused by climate change. It is true that climate change is a genuinely global phenomenon and could obviously not be stopped by the German state on its own. However, this does not render it impossible or superfluous for Germany to make its own contribution towards protecting the climate (see para. 199 ff. below for more details).

100 Insofar as the complainants are the owners of properties they describe as being jeopardised by climate change, a violation of the legislator's duty to protect property arising from Art. 14(1) GG is also a possibility (…). However, insofar as the complainants in proceedings 1 BvR 288/20 claim a violation of Art. 12(1) GG because climate change prevents them from continuing to run a family farm or hotel, the possibility of a violation of a duty of protection that goes beyond the protection of tangible property is not apparent.

101 (2) The complainants in proceedings 1 BvR 78/20 who live in Bangladesh and in Nepal also have standing. The Federal Constitutional Court has yet to clarify whether the Basic Law's fundamental rights oblige the German state to contribute towards protecting people abroad against impairments caused by the effects of global climate change and under what circumstances such a duty of protection could potentially be violated. The validity of German fundamental rights vis-à-vis these complainants does not appear to be ruled out from the outset. (…)

108 b) aa) The complainants are presently affected in their own fundamental rights by the provisions governing the amount of greenhouse gas emissions allowed until 2030 in § 3(1) second sentence 2 and § 4(1) second sentence KSG in conjunction with Annex 2. As things currently stand, global warming caused by anthropogenic greenhouse gas emissions is largely irreversible (see para. 32 above). It cannot be ruled out from the outset that the complainants will see climate change advancing to such a degree in their own lifetimes that their rights protected under Art. 2(2) first sentence GG and Art. 14(1) GG will be impaired ([...]). The possibility of a violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore does not amount to a violation of fundamental rights. Even provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law (cf. BVerfGE 49, 89 <141>). This is certainly the case where a course of events, once embarked upon, can no longer be corrected (see also BVerfGE 140, 42 <58 para. 59> with further references).

109 The complainants are not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights (…). Rather, the complainants are invoking their own fundamental rights.

110 Nor are the constitutional complaints an inadmissible *actio popularis* . The mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights (…). In constitutional complaint proceedings, it is not generally required that complainants are especially affected – beyond simply being individually affected – in some particular manner that differentiates them from all other persons (…).

112 2. Art. 20a GG cannot be directly relied upon to establish standing to lodge a constitutional complaint. It is true that the protection mandate laid down in Art. 20a GG encompasses climate action (see para. 198 below). It is also a justiciable provision (see para. 205 ff. below). However, Art. 20a GG does not entail any subjective rights (…) Proposals for including a subjective fundamental right to environmental protection in the Constitution have been repeatedly discussed (…), but with the constitutional reforms of 1994, the legislator decided against making any such amendment. This is why Art. 20a GG is located outside the fundamental rights part of the Constitution. Furthermore, Art. 20a GG is not mentioned in Art. 93(1) no. 4a GG, which lists the rights that may be asserted by way of a constitutional complaint when they are violated. Accordingly, the Federal Constitutional Court has repeatedly described the provision as being a fundamental national objective (*Staatszielbestimmung*) (…).

113 3. Neither the "fundamental right to an ecological minimum standard of living" asserted by the complainants in proceedings 1 BvR 2656/18, nor the similar "right to a future consistent with human dignity" claimed in proceedings 1 BvR 288/20 can be invoked here to establish standing to lodge a constitutional complaint (…).

117 a) aa) (1) The fundamental freedoms of the complainants might have been violated on the grounds that the Federal Climate Change Act offloads significant portions of the greenhouse gas reduction burdens required under Art. 20a GG onto the post-2030 period. Further mitigation efforts might then be necessary at extremely short notice, placing the complainants under enormous (additional) strain and comprehensively jeopardising their freedom protected by fundamental rights. Practically all forms of freedom are potentially affected because virtually all aspects of human life involve the emission of greenhouse gases (see para. 37 above) and are thus potentially threatened by drastic restrictions after 2030. Freedom is comprehensively protected by the Basic Law through special fundamental rights, and in any case through the general freedom of action enshrined in Art. 2(1) GG as the elementary fundamental right to freedom (cf. BVerfGE 6, 32 <36 f.>; established case-law). Freedom might be jeopardised in an unconstitutional manner by § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 if these provisions were to allow overly generous amounts of CO2 to be emitted in the near term, thereby offloading the necessary reduction burdens onto the future at the expense of future freedom. It is true that no reduction burdens deemed constitutionally unreasonable may be imposed on the complainants even in the future; their fundamental rights will continue to protect them against unreasonable

impairments of freedom. However, the definition of reasonable (*zumutbar*) will to some extent be determined in light of the constitutional obligation to take climate action (Art. 20a GG). This, reinforced by similar protection obligations arising from fundamental rights, will demand greater reductions in greenhouse gas emissions than is presently the case and will therefore justify more severe restrictions on freedom if the risk posed by climate change does indeed increase. (..)

118 (2) The amounts of greenhouse gas emissions that are allowed until 2030 under § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 have an impact on the reduction efforts that will be required thereafter. Even now, these amounts already play a role in determining future restrictions on fundamental rights – not just in factual terms, but with advance legal effects. This is partly due to the largely irreversible impact of CO2 emissions on the Earth's temperature, and partly to the fact that the Basic Law does not allow the state to remain inactive while climate change progresses ad infinitum . One key factor influencing the extent of the potential loss of freedom is the amount of time left for making the social and economic transition to climate neutrality – something that will at some point be required under constitutional law in order to tackle climate change.

119 (a) There is a direct causal link between anthropogenic climate change and concentrations of human-induced greenhouse gases in the Earth's atmosphere (…). CO2 emissions are particularly significant in this regard. Once they have entered the Earth's atmosphere, they are virtually impossible to remove as things currently stand. This means that anthropogenic global warming and climate change resulting from earlier periods cannot be reversed at some later date. At the same time, with every amount of CO2 emitted over and above a small climate-neutral quantity, the Earth's temperature rises further along its irreversible trajectory and climate change also undergoes an irreversible progression. If global warming is to be halted at a specific temperature limit, nothing more than the amount of CO2 corresponding to this limit may be emitted. The world has a so-called remaining CO2 budget. If emissions go beyond this remaining budget, the temperature limit will be exceeded.

120 (b) However, unmitigated aggravation of global warming and climate change would not be in accordance with the Basic Law. Apart from being at odds with the duties of protection arising from fundamental rights, it would primarily conflict with the obligation under Art. 20a GG to take climate action, which the legislator has specified by formulating the target – now the relevant standard under constitutional law – of limiting global warming to well below 2°C and preferably to 1.5°C above pre-industrial levels (see para. 208 ff. below for more details). This temperature limit correlates with an – albeit not precisely quantifiable – remaining national CO2 budget that is derived from the remaining global budget (see para. 216 ff. below). Once this national CO2 budget has been used up, any further CO2 emissions may only be allowed if the interest in doing so takes constitutional precedence over, in particular, the obligation to take climate action arising from Art. 20a GG (see para. 198 below). Behaviour directly or indirectly involving CO2 emissions would then be constitutionally acceptable only if the fundamental freedoms supporting such behaviour were capable of prevailing within the necessary balancing process, whereby the relative weight accorded to any climate-

harmful exercise of freedom will steadily decrease as climate change intensifies. In terms of the legal framework governing CO2-relevant behaviour, Art. 20a GG is accorded increasing normative weight even before the constitutionally relevant budget is entirely used up because, regardless of any concerns from the constitutional law perspective, it would be neither responsible nor realistic to initially allow CO2-relevant behaviour to continue unabated but then to suddenly demand climate neutrality once the remaining budget had been completely exhausted. As ever more of the CO2 budget is consumed, the requirements arising from constitutional law to take climate action become ever more urgent and the potential impairments of fundamental rights that would be permissible under constitutional law become ever more extreme ([...]). The restrictions on freedom that will be necessary in the future are thus already built into the generosity of the current climate change legislation. Climate action measures that are presently being avoided out of respect for current freedom will have to be taken in future – under possibly even more unfavourable conditions – and would then curtail the exact same needs and freedoms but with far greater severity. (…)

145 aa) Art. 2(2) first sentence GG imposes on the state a general duty of protection of life and physical integrity. Apart from providing the individual with a defensive right against state interference, this fundamental right also encompasses the state's duty to protect and promote the legal interests of life and physical integrity and to safeguard these interests against unlawful interference by others (…). The duties of protection derived from the objective dimension of this fundamental right are, in principle, part of the subjective enjoyment of this fundamental right. (…).

146 The state's duty of protection arising from Art. 2(2) first sentence GG does not take effect only after violations have already occurred. It is also oriented towards the future (…). The duty to afford protection against risks to life and health can also establish a duty to protect future generations (…). This is all the more applicable where irreversible processes are at stake. However, this duty to afford intergenerational protection has a solely objective dimension because future generations – either as a whole or as the sum of individuals not yet born – do not yet carry any fundamental rights in the present (see para. 109 above; [...]).

147 bb) The protection of life and physical integrity under Art. 2(2) first sentence GG encompasses protection against impairments and degradation of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause (…). According to the case-law of the European Court of Human Rights, the European Convention on Human Rights also imposes positive obligations on the state to protect life and health against risks posed by environmental pollution (…). However, as far as is apparent, this does not lead to protection of greater scope than that afforded under Art. 2(2) first sentence GG.

148 The state's duty of protection arising from Art. 2(2) first sentence GG also includes the duty to protect life and health against the risks posed by climate change (…). In view of the considerable risks that increasingly severe climate change may also entail for the legal interests protected under Art. 2(2) first sentence GG – for example through heat waves, floods or hurricanes (see para. 22 ff. above) – the state is obliged to afford this

protection to the current population and also, in light of objective legal requirements, to future generations.

149 On the one hand, Art. 2(2) first sentence GG obliges the state to afford protection by taking measures that help to limit anthropogenic global warming and the associated climate change (cf. also Art. 2(1)(a) PA). The fact that the German state is incapable of halting climate change on its own and is reliant upon international involvement because of climate change's global impact and the global nature of its causes does not, in principle, rule out the possibility of a duty of protection arising from fundamental rights ([...]). The global dimension is nonetheless significant for determining the content of the duty of climate-change-related protection arising from Art. 2(2) first sentence GG. For example, the state must involve the international level in seeking to resolve the climate problem. Insofar as the duty of protection arising from Art. 2(2) first sentence GG is directed at the risks posed by climate change, it compels the state to engage in internationally oriented activities to tackle climate change at the global level and requires it to promote climate action within the international framework (for example through negotiations, via treaties or in organisations). National measures embedded within this framework then make a contribution towards halting climate change (see para. 200 f. below for more details with regard to Art. 20a GG). (…)

182 However, the legislator has violated fundamental rights by failing to take sufficient precautionary measures to manage the obligations to reduce emissions in ways that respect fundamental rights – obligations that could be substantial in later periods due to the emissions allowed by law until 2030. (…)

183 The legislator's decision to allow the amounts of CO2 specified in § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 to be emitted until the year 2030 has an advance interference-like effect (*eingriffsähnliche Vorwirkung*) on the freedom of the complainants – freedom that is comprehensively protected under the Basic Law. As such, the decision requires constitutional justification (1). It is true that this risk to fundamental freedoms is not unconstitutional on the grounds of any violation of objective constitutional law. No violation of Art. 20a GG can ultimately be ascertained (2 a). However, § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 are unconstitutional to the extent that they create disproportionate risks that freedom protected by fundamental rights will be impaired in the future. Since the two provisions specify emission amounts until 2030 which – in fulfilling the obligation arising from constitutional law to take climate action – significantly narrow the emission possibilities available after 2030, the legislator must take sufficient precautionary measures to ensure that freedom is respected when making a transition to climate neutrality. Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded onto the future (see para. 117 ff. above). In this respect, there is a lack of a legal framework specifying minimum reduction requirements after 2030 that would be suitable for providing orientation and incentives in time for the necessary development of climate-neutral technologies and practices (2 b).

184 1. a) The legislator's decision to allow the CO2 amounts specified (…) to be emitted until 2030 has an advance interference-like effect on the freedom of the complainants – freedom that is comprehensively protected under the Basic Law. The Basic Law protects all human exercise of freedom through special fundamental rights to freedom, as well as through the general freedom of action enshrined in Art. 2(1) GG as the elementary fundamental right to freedom (…). Currently, the numerous forms of private, professional and economic activity (…) that still directly or indirectly cause CO2 to be released into the Earth's atmosphere are also protected.

185 However, any such exercise of freedom is subject to limits that the legislator must impose in order to take climate action in accordance with Art. 20a GG and to fulfil duties of protection arising from fundamental rights. The possibilities for exercising freedom protected by fundamental rights in ways that directly or indirectly involve CO2 emissions come up against constitutional limits because, as things currently stand, CO2 emissions make an essentially irreversible contribution towards global warming and, under constitutional law, the legislator may not allow climate change to progress *ad infinitum* without taking action. In this respect, the relevant aspect in terms of constitutional law is the obligation to take climate action enshrined in Art. 20a GG (…) – an obligation which the legislator has specified by formulating the target of limiting global warming to well below 2°C and preferably to 1.5°C above pre-industrial levels (see para. 208 ff. below for more details). If the CO2 budget correlating with this temperature runs out, activities directly or indirectly involving CO2 emissions can then only be allowed where the relevant fundamental rights are able to prevail within the balancing process over climate action requirements. As climate change intensifies, such exercise of freedom will be accorded ever less weight within the balancing process due to its ever greater impact on the environment.

186 Against this backdrop, provisions that allow CO2 emissions in the present pose an irreversible legal risk to future freedom because every amount of CO2 that is allowed today irreversibly depletes the remaining budget that was predetermined in accordance with constitutional law, and any exercise of freedom involving CO2 emissions will be subject to more stringent restrictions that will be necessary under constitutional law (…). It is true that any exercise of freedom involving CO2 emissions would essentially have to be prohibited at some point anyway because global warming can only be prevented if anthropogenic concentrations of CO2 in the Earth's atmosphere do not rise any further. However, if the CO2 budget were to have already been largely depleted by 2030, there would be a heightened risk of serious losses of freedom because there would then be a shorter timeframe for the technological and social developments needed to enable today's still heavily CO2-oriented lifestyle to make the transition to climate-neutral behaviour in a way that respects freedom (…). The smaller the remaining budget and the higher the emission levels, the less time will be left for the necessary developments. Yet the less that such developments are readily accessible, the more profoundly will holders of fundamental rights be affected by restrictions on CO2-relevant behaviour – restrictions that will become increasingly urgent under constitutional law as the CO2 budget disappears. (…)

192 bb) Further requirements for justification under constitutional law arise from the principle of proportionality. Fundamental rights oblige the legislator to manage the CO2 emission reductions that are constitutionally required under Art. 20a GG in a forward-looking way to the point of climate neutrality such that the associated losses of freedom

continue to be reasonable despite the ever-increasing climate action requirements, and the reduction burdens are not unevenly distributed over time and between generations to the detriment of the future (…) It follows from the principle of proportionality that one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom – something the complainants describe as an "emergency stop". It is true that even severe losses of freedom may, at some point in the future, be deemed proportionate and justified in order to prevent climate change. This is precisely what gives rise to the risk of having to accept considerable losses of freedom (…). However, since the current provisions on allowed emission amounts have now already established a path to future burdens on freedom, the impacts on future freedom must be proportionate from the standpoint of today – while it is still possible to change course. (…)

194 It is thus imperative to prevent an overly short-sighted and thus one-sided distribution of freedom and reduction burdens to the detriment of the future. This demands that the limited remaining CO2 budget be consumed in a sufficiently prudent manner, thereby helping to gain the critical time needed to initiate the transformations that (…) are necessary to alleviate the losses of freedom arising from the reduction of CO2 emissions and the restrictions on any CO2-relevant exercise of freedom. The challenged provisions would be unconstitutional if they allowed so much of the remaining budget to be consumed that future losses of freedom would inevitably assume unreasonable proportions from today's perspective on account of there being insufficient time for developments and transformations that might bring alleviation. (…) In any case, the principle of proportionality does not start affording protection only after an absolute level of unreasonableness has been reached, but rather demands that freedom protected by fundamental rights also be treated with respect prior to this. Accordingly, the legislator may be obliged to act in a forward-looking manner by taking precautionary measures in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights (…).

195 2. In view of the considerable risk to freedom that it poses in later reduction phases, the legal framework in § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 specifying the emission amounts allowed until 2030 is not constitutional without further precautionary measures being taken. The advance effects that these provisions specifying emission amounts have on fundamental rights is not fully justifiable under constitutional law. (…) The provisions are unconstitutional insofar as they give rise to a risk of serious impairments of fundamental rights in the future – a risk that is not sufficiently contained at present. Since the emission amounts specified until 2030 in the two provisions significantly narrow the emission possibilities that will be available in accordance with Art. 20a GG thereafter, the legislator must take sufficient precautionary measures to ensure that a transition to climate neutrality is made in a way that respects freedom, in order to alleviate the reduction burdens faced by the complainants from 2031 onwards and to contain the associated risks to fundamental rights. (…)

198 (1) Art. 20a GG obliges the state to take climate action (…). One key indicator for the overall state of the Earth system is the global average temperature. Accordingly, the obligation to take climate action primarily manifests itself in efforts to ensure that

human-induced global warming does not exceed a certain temperature limit. The global warming that is currently observable results from anthropogenic greenhouse gas emissions being released into the Earth's atmosphere. In order to prevent global warming from exceeding the temperature limit that is relevant under constitutional law (…), it is necessary to stop further greenhouse gas concentrations from accumulating in the Earth's atmosphere. This is because, as things currently stand, greenhouse gas concentrations and the resultant global warming that leads to climate change are largely irreversible. (…) Once the constitutionally relevant limits of global warming have been reached, the constitutional obligation to take climate action will make it mandatory to restrict greenhouse gas emissions to levels that have a net zero impact on greenhouse gas concentrations in the Earth's atmosphere (…). In this respect, Art. 20a GG is also aimed at achieving climate neutrality. Art. 20a GG does not however take absolute precedence over other interests. In cases of conflict, it must be balanced against other constitutional interests and principles (…). The same applies to the obligation contained in Art. 20a GG to take climate action. However, given that climate change is almost entirely irreversible as things currently stand, any overshoot of the critical temperature for preventing climate change would only be justifiable under strict conditions – such as for the purpose of protecting fundamental rights. Within the balancing process, the obligation to take climate action is accorded increasing weight as climate change intensifies.

199 (2) The obligation to take climate action arising from Art. 20a GG is not invalidated by the fact that the climate and global warming are worldwide phenomena and that the problems of climate change cannot therefore be resolved by the mitigation efforts of any one state on its own. The climate action mandate enshrined in Art. 20a GG possesses – like global warming itself – a special international dimension from the outset. Art. 20a GG obliges the state to involve the supranational level in seeking to resolve the climate problem (a). Embedded within an international framework, national climate action measures are capable of having the impact required by Art. 20a GG. Even if such measures would be incapable of resolving the climate problem on their own, they must be taken in order to fulfil the climate action mandate under constitutional law (b). (…)

227 Enlarging the remaining national budget by way of so-called negative emission technologies is also a possibility (see for example the Carbon Dioxide Storage Act (*Kohlendioxid-Speicherungsgesetz* – KSpG) (…)). However, to what extent negative emission technologies will be implemented on a large scale and not just in isolated applications is currently impossible to predict in view of ecological, technical, economic, political and social concerns – notwithstanding the constitutional law issues that could be raised (…).

245 (1) The efforts required under Art. 20a GG to reduce greenhouse gas emissions after 2030 will be considerable. Whether they will be so drastic as to inevitably entail unacceptable impairments of fundamental rights from today's perspective (a) is impossible to determine. Nevertheless, the risk of serious burdens is significant. Due to the obligation to contain the risks of significant impairments of fundamental rights, as well as the general obligation to respect fundamental rights, the emission amounts specified until 2030 in (the) (…) KSG in conjunction with Annex 2 can ultimately only be reconciled with the potentially affected fundamental freedoms if precautionary measures are taken in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights (b).

4. Rechtbank Den Haag (*The Hague Court of first instance*), *Urgenda v. Dutch State*, 24.05.2015:

4.1 This case is essentially about the question whether the State has a legal obligation towards Urgenda to place further limits on greenhouse gas emissions – particularly CO2 emissions –in addition to those arising from the plans of the Dutch government, acting on behalf of the State. (…)

4.4 Under Book 3, Section 303 of the Dutch Civil Code, an individual or legal person is only entitled to bring an action to the civil court if he has sufficient own, personal interest in the claim. Under Book 3, Section 303*a* of the Dutch Civil Code, a foundation or association with full legal capacity may also bring an action to the court pertaining to the protection of general interests or the collective interests of other persons, in so far as the foundation or association represents these general or collective interests based on the objectives formulated in its by-laws. (…).

4.6 The court finds as follows. Urgenda's claims against the State indeed belong to the group of claims the Dutch legislature finds allowable and has wanted to make possible with Book 3, Section 303*a* of the Dutch Civil Code (…)

4.7. (…) Article 2 of Urgenda's by-laws stipulate that it strives for a more sustainable society, "beginning in the Netherlands". This demonstrates prioritisation – as it rightly argues – and not a limitation to Dutch territory. (…) Therefore, Urgenda can partially base its claims on the fact that the Dutch emissions also have consequences for persons outside the Dutch national borders, since these claims are directed at such emissions.

4.9 Seeing as it is not in dispute that Urgenda has met the requirement of Book 3, Section 305a of the Dutch Civil Code that it has made sufficient efforts to attain its claim by entering into consultations with the State, the court concludes that Urgenda's claims, in so far as it acts on its own behalf, are allowable to the fullest extent. (…)

4.43. (…) When applying and interpreting national-law open standards and concepts, including social proprietary, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a "reflex effect" in national law. (…)

4.56 The objectives and principles of the international climate policy have been formulated in Articles 2 and 3 of the UN Climate Change Convention (…). The court finds the principles under (i), (ii), (iii) and (iv) particularly relevant for establishing the scope for policymaking and the duty of care. These read as follows, in brief: (i) protection of the climate system, for the benefit of current and future generations, based on fairness; (iii) the precautionary principle; (iv) the sustainability principle.

4. 57 The principle of fairness (i) means that the policy should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change. The principle of fairness also

expresses that industrialised countries have to take the lead in combating climate change and its negative impact. The justification for this, and this is also noted in literature, lies first and foremost in the fact that from a historical perspective the current industrialised countries are the main causers of the current high greenhouse gas concentration in the atmosphere and that these countries also benefited from the use of fossil fuels, in the form of economic growth and prosperity. Their prosperity also means that these countries have the most means available to take measures to combat climate change. (…)

4. 63 The objectives and principles stated here do not have a direct effect due to their international and private-law nature, as has been considered above. However, they do determine to a great extent the framework for and the manner in which the State exercises its powers (…). With due regard for all the above, the answer to the question whether or not the State is exercising due care with its current climate policy depends on whether according to objective standards the reduction measures taken by the State to prevent hazardous climate change for man and the environment are sufficient, also in view of the State's discretionary power. In determining the scope of the duty of care of the State, the court will therefore take account of: (i) the nature and extent of the damage ensuing from climate change; (ii) the knowledge and foreseeability of this damage;(iii) the chance that hazardous climate change will occur; (iv) the nature of the acts (or omissions) of the State; (v) the onerousness of taking precautionary measures; (vi) the discretion of the State to execute its public duties – with due regard for the public-law principles, all this in light of: the latest scientific knowledge; the available (technical) option to take security measures, and the cost-benefit ratio of the security measures to be taken.

4.64 As has been stated before, the Parties agree that due to the current climate change and the threat of further change with irreversible and serious consequences for man and the environment, the State should take precautionary measures for its citizens. (…)

4.65. Since it is an established fact that the current global emissions and reduction targets of the signatories to the UN Climate Change Convention are insufficient to realise the 2° target and therefore the chances of dangerous climate change should be considered as very high – and this with serious consequences for man and the environment, both in the Netherlands and abroad – the State is obliged to take measures in its own territory to prevent dangerous climate change (mitigation measures). Since it is also an established fact that without far reaching reduction measures, the global greenhouse gas emissions will have reached a level in several years, around 2030, that realising the 2° target will have become impossible, these mitigation measures should be taken expeditiously. After all, the faster the reduction of emissions can be initiated, the bigger the chance that the danger will subside. In the words of Urgenda: trying to slow down climate change is like trying to slow down an oil tanker that has to shut down its engines hundreds of kilometres off the coast not to hit the quay. If you shut down the engines when the quay is in sight, it is inevitable that the oil tanker will sooner or later hit the quay. The court also takes account of the fact that the State has known since 1992, and certainly since 2007, about global warming and the associated risks. These factors lead the court to the opinion that, given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent it.

4. 66 The State has argued that it cannot be seen as one of the *causers* of an imminent climate change, as it does not emit greenhouse gases. However, it is an established fact that the State has the power to control the collective Dutch emission level (and that it indeed controls it). Since the State's acts or omissions are connected to the Dutch emissions a high level of meticulousness should be required of it in view of the security interests of third parties (citizens), including Urgenda. Apart from that, when it became a signatory to the UN Climate Change Convention and the Kyoto Protocol, the State expressly accepted its responsibility for the national emission level and in this context accepted the obligation to reduce this emission level as much as needed to prevent dangerous climate change. Moreover, citizens and businesses are dependent on the availability of non-fossil energy sources to make the transition to a sustainable society. (…) The State therefore plays a crucial role in the transition to a sustainable society and therefore has to take on a high level of care for establishing an adequate and effective statutory and instrumental framework to reduce the greenhouse gas emissions in the Netherlands.

4. 71 The court also considers that in climate science and the international climate policy there is consensus that the most serious consequences of climate change have to be prevented. It is known that the risks and damage of climate change increase as the mean temperature rises. Taking immediate action, as argued by Urgenda, is more cost-effective, is also supported by the IPCC and UNEP (see 2.19 and 2.30). The reports concerned also prove that mitigation of greenhouse gas emissions in the short and long term is the only effective way to avert the danger of climate change. Although adaptation measures can reduce the effects of climate change, they do not eliminate the danger of climate change. Mitigation therefore is the only really effective tool.

4. 72 The court has deduced from the various reports submitted by the Parties that mitigation can be realised in various ways. This could include the limitation of the use of fossil fuels by means of, among other things, emissions trading or tax measures, the introduction of renewable energy sources, the reduction of energy consumption and reforestation and combating deforestation. The State has also referred to new technologies such as CO2 capture and storage. The court deems the State's viewpoint that a high level of CO2 reduction can be expected to be achieved in the future through CO2 capture and storage insufficiently supported. Such an expectation would be relevant if it has been established that the use of these techniques would enable such a reduction that the emission between now and 2050, as depicted in the first graph above, could be compensated. Without sufficient objection from the State, Urgenda has argued that in so far as these techniques are sufficiently available (CO2 capture and storage are still in the experimental phase) it is not plausible that techniques of this nature can be applied in the short term and therefore in time (…).

4.73. Based on its considerations here, the court concludes that in view of the latest scientific and technical knowledge it is the most efficient to mitigate and it is more cost-effective to take adequate action than to postpone measures in order to prevent hazardous climate change. The court is therefore of the opinion that the State has a duty of care to mitigate as quickly and as much as possible.

4. 75 The court emphasises that this first and foremost should concern mitigation measures, as adaptation measures will only allow the State to protect its citizens from the consequences of climate change to a limited level. If the current greenhouse gas emissions continue in the same manner, global warming will take such a form that the

costs of adaptation will become disproportionately high. Adaptation measures will therefore not be sufficient to protect citizens against the aforementioned consequences in the long term. The only effective remedy against hazardous climate change is to reduce the emission of greenhouse gases. Therefore, the court arrives at the opinion that from the viewpoint of efficient measures available the State has limited options: mitigation is vital for preventing dangerous climate change.

4. 76 (…). Due to this principle of fairness, the State, in choosing measures, will also have to take account of the fact that the costs are to be distributed reasonably between the current and future generations. If according to the current insights it turns out to be cheaper on balance to act now, the State has a serious obligation, arising from due care, towards future generations to act accordingly. Moreover, the State cannot postpone taking precautionary measures based on the sole reason that there is no scientific certainty yet about the precise effect of the measures. However, a cost-benefit ratio is allowed here. Finally, the State will have to base its actions on the principle of "prevention is better than cure".

4. 77 (…) The State should not be expected to do the impossible nor may a disproportionately high burden be placed on it. However, as has been considered above, it has neither been argued, nor has it become evident that the State has insufficient financial means to realise higher reduction measures. (…)

4. 79 It is an established fact that climate change is a global problem and therefore requires global accountability. (…) This means that more reduction measures have to be taken on an international level. It compels all countries, including the Netherlands, to implement the reduction measures to the fullest extent as possible. The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State's obligation to exercise care. After all, it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO2 levels in the atmosphere and therefore to hazardous climate change. Emission reduction therefore concerns both a joint and individual responsibility of the signatories to the UN Climate Change Convention. In view of the fact that the Dutch emission reduction is determined by the State, it may not reject possible liability by stating that its contribution is minor (…).Therefore, the court arrives at the opinion that the single circumstance that the Dutch emissions only constitute a minor contribution to global emissions does not alter the State's obligation to exercise care towards third parties. Here too, the court takes into account that in view of a fair distribution the Netherlands, like the other Annex I countries, has taken the lead in taking mitigation measures and has therefore committed to a more than proportionte contribution to reduction. Moreover, it is beyond dispute that the Dutch per capita emissions are one of the highest in the world. (…)

4. 81 The court also does not follow the State's argument that other European countries will neutralise reduced emissions in the Netherlands, and that greenhouse gas emission in the EU as a whole will therefore not decrease. The phenomenon the State refers to and which could occur at various levels (between countries, but also between provinces, regions or on a global scale) and which could have various causes, is also known as the "waterbed effect" or "carbon leakage". The accompanying document to the announcement of the European Commission of 22 January 2014 ("summary of the effect assessment") referred to in 2.66 states that "so far there have been no signs" of carbon

leakage. In view of this, it cannot be maintained that extra reduction efforts of the State would be without substantial influence. (…)

4. 83 Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstance that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this. (…)

4. 87 From the aforementioned considerations regarding the nature of the act (which includes the omission) of the government it ensues that the excess greenhouse gas emission in the Netherlands that will occur between the present time and 2020 without further measures, can be attributed to the State. After all, the State has the power to issue rules or other measures, including community information, to promote the transition to a sustainable society and to reduce greenhouse gas emission in the Netherlands. (…)

4. 89 It is an established fact that climate change is occurring partly due to the Dutch greenhouse gas emissions. It is also an established fact that the negative consequences are currently being experienced in the Netherlands, such as heavy precipitation, and that adaptation measures are already being taken to make the Netherlands "climate-proof". Moreover, it is established that if the global emissions, partly caused by the Netherlands, do not decrease substantially, hazardous climate change will probably occur. In the opinion of the court, the possibility of damages for those whose interests Urgenda represents, including current and future generations of Dutch nationals, is so great and concrete that given its duty of care, the State must make an adequate contribution, greater than its current contribution, to prevent hazardous climate change.

4. 90 From the above considerations, particularly in 4.79, it follows that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate. The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that these emissions contribute to climate change. The court has taken into consideration in this respect as well that the Dutch greenhouse emissions have contributed to climate change and by their nature will also continue to contribute to climate change. (…)

4. 93 Based on the foregoing, the court concludes that the State – apart from the defence to be discussed below – has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990.

4. 95 The court states first and foremost that Dutch law does not have a full separation of state powers, in this case, between the executive and judiciary. The distribution of powers between these powers (and the legislature) is rather intended to establish a balance between these state powers. (…) Separate from any political agenda, the court has to limit itself to *its own* domain, which is the application of law. (…)

4. 98 In a general sense, given the grounds put forward by Urgenda, the claim does not fall outside the scope of the court's domain. The claim essentially concerns legal protection and therefore requires a "judicial review". (…)

5. Hoge Raad (*Dutch Supreme Court*,) *Urgenda v. Dutch State,* 20.12.2019:

5.6.2 Pursuant to the findings above in paras. 5.2.1-5.3.4, no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem. Given the findings above in paras. 4.2-4.7, after all, this constitutes a 'real and immediate risk' as referred to above in para. 5.2.2 and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised. The same applies to, *inter alia*, the possible sharp rise in the sea level, which could render part of the Netherlands uninhabitable. The fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean – contrary to the State's assertions – that Articles 2 and 8 ECHR offer no protection from this threat (see above in para. 5.3.1 and the conclusion of paras. 5.2.2 and 5.2.3). This is consistent with the precautionary principle (see para. 5.3.2, above). The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken.

5.7.1 The answer to the question referred to in 5.6.3 above is in the opinion of the Supreme Court, that, under Articles 2 and 8 ECHR, the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem. This is based on the following grounds. (…)

5.9.2 Urgenda, which in this case, on the basis of Article 3:305a DCC, represents the interests of the residents of the Netherlands with respect to whom the obligation referred to in 5.9.1 above applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit.38 Especially in cases involving environmental interests, such as the present case, legal protection through the pooling of interests is highly efficient and effective.39 This is also in line with Article 9(3) in conjunction with Article 2(5) of the Aarhus Convention,40 which guarantees interest groups access to justice in order to challenge violations of environmental law, and in line with Article 13 ECHR (see 5.5.1-5.5.3 above).

5.9.3 As the Court of Appeal rightly held in para. 35, the fact that Urgenda does not have a right to complain to the ECtHR on the basis of Article 34 ECHR, because it is not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, does not detract from Urgenda's right to institute proceedings. After all, this does not deprive Urgenda of the power to institute a claim under Dutch law in accordance with Article 3:305a DCC on behalf of residents who are in fact such victims.

8.3.2 As considered in 6.3 above, in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.

6. Rechtbank Den Haag *(The Hague Court of first instance*), *Milieudefensie v. RDS*, 26.05.2021*:*

4.4.1 (…) This case revolves around the question whether or not RDS has the obligation to reduce at end 2030 and relative to 2019 levels across all emission Scopes (1 through to 3) the CO2 emissions of the Shell group's entire energy portfolio through the corporate policy of the Shell group. (…)

4.1.3 The court does not follow RDS' argument that the claims of Milieudefensie et al. require decisions which go beyond the lawmaking function of the court. The court must decide on the claims of Milieudefensie et al.30 Assessing whether or not RDS has the alleged legal obligation and deciding on the claims based thereon is pre-eminently a task of the court. In the following assessment, the court interprets the unwritten standard of care from the applicable Book 6 Section 162 Dutch Civil Code on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.

4.1.4. The assessment culminates in the conclusion that RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030 relative to 2019 through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3). It is up to RDS to design the reduction obligation, taking account of its current obligations and other relevant circumstances. The reduction obligation is an obligation of result for the activities of the Shell group, with respect to which RDS may be expected to ensure that the CO2 emissions of the Shell group are reduced to this level. This is a significant best-efforts obligation with respect to the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by the business relations, and to use its influence to limit any lasting consequences as much as possible. This obligations is also designated hereinafter as 'RDS' reduction obligation'.

4.1.5. The court explains below how it has arrived at this opinion. The following themes are dealt with in the following order: under 4.2 the admissibility, under 4.3 the applicable law, under 4.4 RDS' reduction obligation, under 4.5 the policy, the policy intentions and the ambitions of RDS and the allowability of the claims, and under 4.6, the conclusion and costs of the proceedings. (…)

4.2.1. Access to the Dutch courts is governed by Dutch law. The class actions of Milieudefensie et al. are governed by Book 3 Section 305a Dutch Civil Code, pursuant to which a foundation or association with full legal capacity may institute legal proceedings for the protection of similar interests of other persons. (…)

4.2.2. The class actions of Milieudefensie et al. are public interest actions. Such actions seek to protect public interests, which cannot be individualized because they accrue to a much larger group of persons, which is undefined and unspecified. (…) The dispute on the admissibility of class actions revolves around the question whether or not they comply with the requirement 'similar interest' in the sense of Book 3 Section 305a Dutch Civil Code. (…)

4.2.4. (…) (T)he interests of current and future generations of Dutch residents and (with respect to the Waddenvereniging) of the inhabitants of the Wadden Sea area, a part of which is located in the Netherlands, as served in the alternative with the class actions, are suitable for bundling, even though in the Netherlands and in the Wadden region there are differences in time, extent and intensity to which the inhabitants will be affected by climate change caused by CO2 emissions. However, these differences are much smaller and of a different nature than the mutual differences when it concerns the entire global population and do not stand in the way of bundling in a class action. (…)

4.2.5 The interest served with the class action must align with the objects stated in the articles of association and must also actually be promoted. Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends and Jongeren Milieu Actief meet this requirement. ActionAid does not meet this requirement, as it does not promote the interests of Dutch residents sufficiently for its collective claim to be allowable. ActionAid's object is broadly formulated in its articles of association, which pertains to the world with a special focus on Africa. ActionAid mainly operates in developing countries. Its operations in the Netherlands are geared towards developing countries, not Dutch residents. Its collective claim must therefore be declared not allowable. (…)

4.3.1 Milieudefensie et al. principally make a choice of law within the meaning of Article 7 Rome II35, which according to Milieudefensie et al. leads to the applicability of Dutch law. (…)

4.3.2. Article 7 Rome II determines that the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to the general rule of Article 4 paragraph 1 Rome II, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred. The parties were right to take as a starting point that climate change, whether dangerous or otherwise, due to CO2 emissions constitutes environmental damage in the sense of Article 7 Rome II. They are divided on the question what should be seen as an 'event giving rise to the damage' in the sense of this provision. Milieudefensie et al. allege that this is the corporate policy as determined for the Shell group by RDS in the Netherlands, whereby her choice of law leads to the applicability of Dutch law. (…)

4.3.5 An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase. It is not in dispute that the CO2 emissions for which Milieudefensie et al. hold RDS liable occur all over the world and contribute to climate change in the Netherlands and the Wadden region (…) These CO2 emissions only cause environmental damage and imminent environmental damage in conjunction with other emissions of CO2 and other greenhouse gases for Dutch residents and the inhabitants of the Wadden region. Not only are CO2 emitters held personally responsible for environmental damage in legal proceedings conducted all over the world, but also other parties that could influence CO2 emissions. The underlying thought is that every contribution towards a reduction of CO2 emissions may be of importance. The court is of the opinion that these distinctive aspects of responsibility for environmental damage and imminent environmental damage must be

included in the answer to the question what in this case should be understood as 'event giving rise to the damage' in the sense of Article 7 Rome II. (…)

4.3.6 Although Article 7 Rome II refers to an 'event giving rise to the damage', i.e. singular, it leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage. When applying Article 7 Rome II, RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region.

4.3.7 Superfluously, the court considers that the conditional choice of law of Milieudefensie et al. is in line with the concept of protection underlying Article 7 Rome II, and that the general rule of Article 4 paragraph 1 Rome II, upheld in Article 7 Rome II, insofar as the class actions seek to protect the interests of the Dutch residents, also leads to the applicability of Dutch law. (…)

4.4.4 From the facts as presented under 2.5.1 through to 2.5.7 it follows that RDS determines the general policy of the Shell group. (…)

4.4.5 If all Scopes (1 through to 3) are included, the Shell group is responsible for significant CO2 emissions all over the world. The total CO2 emissions of the Shell group (Scope 1 through to 3) exceeds the CO2 emissions of many states, including the Netherlands. It is not in dispute that these global CO2 emissions of the Shell group (Scope 1 through to 3) contribute to global warming and climate change in the Netherlands and the Wadden region.

4.4.6 (…) The climate change caused by CO2 emissions will have serious and irreversible consequences for the Netherlands and the Wadden region (…). The risks associated with climate change for Dutch residents and the inhabitants of the Wadden region concern health risks and deaths due to climate change-induced hot spells as well as health problems and an increased mortality risk due to increasing infectious diseases, deterioration of air quality, increase of UV exposure, and an increase of water-related and foodborne diseases. They also concern water-related health risks, which the Netherlands and the Wadden region will face, including flooding along the coast and rivers, excess water, water shortage, deterioration of water quality, salinization, raised water levels and drought (…).

4.4.7 (…) (The) observations of RDS show that there is some uncertainty about the precise manner in which dangerous climate change will manifest in the Netherlands and Wadden region. This uncertainty is inherent in prognoses and future scenarios but has no bearing on the prediction that climate change due to CO2 emissions will lead to serious and irreversible consequences for Dutch residents and the inhabitants of the Wadden region. (…)

4.4.10 From the Urgenda ruling it can be deduced that Articles 2 and 8 ECHR offer protection against the consequences of dangerous climate change due to Co2 emissions induced global warming. (…)

4.4.14 It can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR as well as other 'internationally recognized human rights (…).

4.4.15 Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. 52 Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts. It is a global standard of expected conduct for all businesses wherever they operate. As has been stated above, this responsibility of businesses exists independently of states' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.53 It is not an optional responsibility for companies. (…)

4.4.16 (…) The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. (…) The court is of the opinion that much may be expected of RDS. RDS heads the Shell group, which consists of about 1,100 companies, and operates in 160 countries all over the world.(…)

4.4.23 Due to the policy-setting influence RDS has over the companies in the Shell group, it bears the same responsibility for these business relations as for its own activities. The far-reaching control and influence of RDS over the Shell group means that RDS' RDS' reduction obligation must be an obligation of result for emissions connected to own activities of the Shell group. This concerns RDS' Scope 1 emissions and the part of RDS' Scope 2 emissions which can be ascribed to the Shell companies. From the perspective of the Shell group as a whole, this constitutes the Scope 1 emissions of the Shell group.

4.4.24. As regards the business relations of the Shell group, including the end-users, RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible (see under 4.4.20). This is a significant best-efforts obligation, which is not removed or reduced by the individual responsibility of the business relations, including the end-users, for their own CO2 emissions. (…)

4.4.26 The agreement is non-binding on the signatories and is non-binding for RDS. However, the signatories have sought out the help of non-state stakeholders (see 2.4.7). Whether or not RDS or the Shell group can be designated as the 'non-Party stakeholders' referred to in COP 25 can remain undiscussed. The signatories have emphasized that the reduction of CO2 emissions and global warming cannot be achieved by states alone. Other parties must also contribute. Since 2012 there has been broad international consensus about the need for non-state action, because states cannot tackle the climate issue on their own.

4.4.28 The court establishes that tackling dangerous climate change needs immediate attention. Given the current concentration of greenhouse gases in the atmosphere (401 ppm in 2018), the remaining carbon budget is limited. (…). The longer it takes to achieve the required emissions reductions, the higher the level of emitted greenhouse gases, and consequently, the sooner the remaining carbon budget runs out. (…) The sooner reductions are started, the more time is available before the remaining carbon budget runs out. (…)

4.4.29 There is a widely endorsed consensus that in order to limit global warming to 1.5°C, reduction pathways that reduce CO2 emissions by net 45% in 2030, relative to 2010 levels, and by net 100% in 2050, should be chosen. The court includes this broad consensus in its interpretation of the unwritten standard of care. (…)

4.4.37 In answering the question what can be expected of RDS, the court considers that an important characteristic of the imminent environmental damage in the Netherlands and the Wadden region at issue here is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase. It is an established fact that – apart from its own limited CO2 emissions – RDS does not actually causes the Scope 1 through to 3 emissions of the Shell group by itself. However, this circumstance and the not-disputed circumstance that RDS is not the only party responsible for tackling dangerous climate change in the Netherlands and the Wadden region does not absolve RDS of its individual partial responsibility to contribute to the fight against dangerous climate change according to its ability.76 As has been considered above (in legal ground 4.4.16), much may be expected of RDS in this regard, considering it is the policy-setting head of the Shell group, a major player on the fossil fuel market and responsible for significant CO2 emissions, which incidentally exceed the emissions of many states and which contributes to global warming and climate change in the Netherlands and the Wadden region, with serious and irreversible consequences and risks for the human rights of Dutch residents and the inhabitants of the Wadden region. On RDS rests an obligation of results as regards the Scope 1 emissions of the Shell group as well as a significant best-efforts obligation as regards the business relations of the Shell group, including the end-users, whereby RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible (see under 4.4.24). (…)

4.4.38 In the foregoing, the court has considered that in its interpretation of the unwritten standard of care (see legal ground 4.4.29) it has included the consensus that in order to limit global warming to 1.5°C, reduction pathways that reduce CO2 emissions by net 45% in 2030, relative to 2010 levels, and by net 100% in 2050, should be chosen. (…)

4.4.41 The UN Sustainable Development Goals (UNSDG)77 have the object, inter alia, to ensure access to affordable, reliable, sustainable and modern energy for all. The court includes the UNSDG in its interpretation of the unwritten standard of care, as this UN Resolution represents a widely endorsed international consensus. (…)

4.4.42 From this it follows that there is a connection between the UNSDG and the climate goals of the Paris Agreement and other agreements made for the implementation of the UN Climate Convention. It is not the intention for SDG 7 (*"Ensure access to affordable, reliable, sustainable and modern energy for all"*), as cited by RDS, to detract from the Paris Agreement or to interfere with these goals. This also follows from SDG 13 (…) and the preamble under 8 of the Paris Agreement, which emphasizes the intrinsic connection between the tackling of dangerous climate and fair access to sustainable development and the eradication of poverty. The UNSDG sustainability goals can therefore not be a reason for RDS to not meet its reduction obligation. (…)

4.4.49 RDS argues that the reduction obligation will have no effect, or even be counterproductive, because the place of the Shell group will be taken by competitors. Even if this were true, it will not benefit RDS. Due to the compelling interests which are served with the reduction obligation, this argument cannot justify assuming beforehand there is no need for RDS to not meet this obligation. It is also important here that each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change. After all, each reduction means that there is more room in the carbon budget. The court acknowledges that RDS cannot solve this global problem on its own. However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence.82

4.4.50. The question also is whether this argument of RDS is actually valid. What this argument assumes is perfect substitution, whereby the place of the Shell group will be taken over one-on-one by other parties. However, it remains to be seen whether this circumstance will transpire. This cannot necessarily be deduced from the examples given by RDS or from the Mulder report submitted by RDS (…). The examples date from before the Paris Agreement. Therefore, it cannot automatically be assumed that it will be the same, now or in the future. (…)

4.4.53 RDS argues that imposing a reduction obligation on it will lead to unfair competition and a disruption of the 'level playing field' on the oil and gas market. RDS has failed to specify this argument. (…). Although the court made enquiries about it, RDS has failed to further specify the onerousness of the reduction obligation. (…)

4.4.55 The court concludes that RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3). It is up to RDS to design the reduction obligation, taking account of its current obligations. The reduction obligation is an obligation of result for the activities of the Shell group. This is a significant best-efforts obligation with respect to the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible. (…)

4.5.3 From legal ground 4.5.2 follows that the policy, policy intentions and ambitions of RDS for the Shell group are incompatible with RDS' reduction obligation. This implies an imminent violation of RDS' reduction obligation. It means that the court must allow the claimed order for compliance with this legal obligation.

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Genève, le 15.12.2023

Carlotta PESSIS-CORDIN