Justitia, the People’s Power and Mother Earth

Democratic legitimacy of judicial law-making in European private law cases on climate change

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III.
NATIONAL BOUNDARIES: PEOPLE ABROAD

'Borders? I have never seen one. But I have heard they exist in the minds of some people.'
Thor Heyerdahl

A. INTRODUCTION. TRANSNATIONAL UNFAIRNESS AND ATTRIBUTION PROBLEMS

The previous chapter identified a fundamental deficit of decision-making on environmental problems in a national deliberative democracy. That is, for at least three severely impacted groups – people in other nations, future generations and non-human entities – a model of deliberative democracy in a nation state cannot be assumed to deliver normatively legitimate nor politically effective results, because these groups are excluded from the decision-making process.\textsuperscript{236}

Boundaries of democratically legitimate judicial law-making are set in nation-states by currently living, human citizens. Therefore, calls have been made for an inclusive ‘climate justice’\textsuperscript{237} or ‘planetary justice’.\textsuperscript{238}

\textsuperscript{236} See section F of the former Chapter II, for an analysis of these two concepts introduced by Fraser and Nash (n 191).
\textsuperscript{237} Davis and others (n 217). See section F of Chaper II.
\textsuperscript{238} John S Dryzek and Jonathan Pickering, The Politics of the Anthropocene (Oxford University Press 2018) 68.
This book puts forward that we are currently witnessing an ongoing, transnational environmentalisation of (constitutional) law that increasingly surpasses nation-focused, now-oriented and anthropocentric boundaries to democratically legitimate judicial law-making. The climate cases are both a signal of this ongoing dynamic and a factor pushing the boundaries further. The current chapter aims to demonstrate this for the first of the three identified groups: people abroad, who are affected because environmental problems do not stop at national borders.

This introductory section shortly sketches the climate change related injustice done to people abroad within our current legal-political scheme, the existing international and European law aiming to address the problem, and the difficulties to establish responsibility because it is not directly clear what would be a fair methodology for attributing transboundary emissions to particular actors. Section II of the chapter serves to provide the ‘data’, demonstrating how the climate cases in European private law seek to emancipate people abroad before the courts, and showing how the courts applying European private law affirm the ongoing environmentalisation of law and the constitutionalisation of the environment, at times inclusively towards people from other nations.

1. Transboundary environmental problems and international law

Environmental problems are transboundary in at least two ways. Firstly, the place where they are caused often does not coincide with the place where their effects are felt. In 2018, for example, certain areas in the Netherlands and Belgium suffered from polluted air because of German Easter bonfires.\textsuperscript{239} One can also think of European greenhouse gas emissions leading to global warming, threatening the livelihood of a Peruvian community situated close to a glacier now likely to melt.\textsuperscript{240} Secondly, one nation alone cannot solve a global issue such as climate change: \textit{Global problems need global solutions}.\textsuperscript{241} Measures to combat environmental problems come with financial costs, which makes it unattractive,

\textsuperscript{240} Cf the facts of the German lawsuit \textit{Saúl Lliuya v RWE} further discussed below in section 3.
\textsuperscript{241} As the UN Human Rights Council recognized in its resolution 7/23 of 28 March 2008: ‘...climate change is a global problem (...) it requires a global solution’.
regarding a nation’s economic competitiveness, to take such measures outside an international cooperative scheme.242

The global nature of climate change, combined with a division of the world in nation-states leads to prominent distributive asymmetries. A 2018 IPCC special report has signalled the following four problems,243 Firstly, the nations that contributed the most to the problem have benefitted the most with polluting industries. Secondly, the least responsible will be adversely impacted the most.244 Thirdly, the worst-affected are often the least financially capable of joining the international discussions on how to address the problem. Fourthly and finally, certain nations will be economically left behind because they are not able to join the others in a transition towards a low-carbon economy. Such asymmetries inspired climate activists to call for ‘Climate Justice’, a term that was initially focussed especially on poor and vulnerable people,245 more so than on future generations and non-human beings, who became noticed later.246

Law is not ignorant to transboundary problems. States have put in place international law to address issues that extend beyond the borders of their territories.247 Since the beginning of the 20th century, international treaties have been adopted to regulate interstate relationships with regard to environmental matters.248 International environmental law has proliferated especially since the first intergovernmental conference to address environmental issues, held in Stockholm in 1972 and resulting in the Stockholm Declaration on the Human Environment. Both the event and the Declaration aimed to reconcile the two goals of environmental action on the one hand and economic development of

242 Cf the law and economics guided reasoning by David Weisbach in Gardiner and Weisbach (n 220).
244 This is true for nations as well as generations, the latter of which will be dealt with in Chapter IV.
245 See for instance Robinson (n 218)., or the 2002 Bali Principles of Climate Justice adopted by a coalition of groups during the Earth Summit taking place in Johannesburg. This document mentions ‘Mother Earth’ and ‘Future Generations’ but clearly focusses at ‘putting a human face at climate change’.
246 As also discussed in section F of Chapter II: see Davis and others (n 217) 219.
mainly those countries having profited less from industrialisation on the other; the first goal should not detriment the second. Thus, the Declaration puts forward an awareness of affectedness beyond national boundaries, and also recognises the need for international cooperation, as have many international environmental legal initiatives that have followed.

In this spirit, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) acknowledges that ‘the Earth’s climate and its adverse effects are a common concern of humankind,’ and that ‘the global nature of climate change calls for the widest possible cooperation by all countries (...) in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.’

Likewise, the EU has installed an ‘Effort Sharing’ Regulation to implement the UNFCCC and its ensuing 2015 Paris Agreement, thereby also recognising the need to internationally cooperate to combat the problem of climate change. It reiterates the common but differentiated responsibilities, stating that ‘the European Council supported a Union objective, in the context of necessary reductions according to the Intergovernmental Panel on Climate Change (IPCC) by developed countries as a group, to reduce greenhouse gas emissions by 80-95 % by 2050 compared to 1990 levels’.249

2. Establishing responsibility through attributing emissions
‘The polluter pays’ is one of the most well-known environmental legal principles. It forms a guideline for establishing who should be held responsible for damage to the environment. Nevertheless, pinpointing the polluter remains a difficult issue when it comes to climate change; a whole body of literature exists on how to attribute greenhouse gasses to particular actors.250

The IPCC has developed reporting guidelines, following which countries have to report the emissions resulting from the production on their territories rather

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250 For a useful historical overview of this debate, see Manfred Lenzen and others, ‘Shared Producer and Consumer Responsibility — Theory and Practice’ (2007) 61 Ecological Economics 27.
than those resulting from the consumption on their territories.\textsuperscript{251} It forms the basis for calculating the emissions relevant for the legal scheme of the UNFCCC. Yet this system reinforces the asymmetrical tendencies described above. The countries of largest consumption are usually the ones that historically produced and thus emitted the most. Parallel to a growing awareness with regard to the adverse impacts of industrial pollution, a lot of production was moved to other, poorer countries. Responsibility thus shifted to the nations benefitting less in terms of consumption.\textsuperscript{252} For example, when one would calculate the emissions of the Western city of Portland on the basis of what its people consume, the figure is twice as high as the figure for the emissions on the basis of its production.\textsuperscript{253}

Perhaps counter-intuitively, this is not to say that environmentalists striving for climate justice only look to consumption, and thus want to hold the consumer responsible. On the contrary, as will be shown in detail in this chapter, some cases are launched against oil companies, or against States owning such companies, on the basis of the effects of their production; the emissions that occur when consumers combust the fuels provided.

At present, such emissions are usually not included. The most widely used method to calculate a corporate actor’s greenhouse gas emissions is laid down in the \textit{Greenhouse Gas Protocol}, developed by the World Resources Institute and the World Business Council for Sustainable Development.\textsuperscript{254} The initiative distinguishes between three types of emissions. ‘Scope 1 emissions’ that encompass all the greenhouse gasses that are emitted on the site of a certain company. ‘Scope 2 emissions’ encompass the greenhouse gasses emitted as a consequence of the use of energy by a certain company; these emissions physically occur at the place where the electricity is generated. ‘Scope 3 emissions’ designate all other emissions taking place as a result of activities within the territory or site, such as ‘extraction and production of purchased


\textsuperscript{252} This is unfortunately true for not only industrial pollution, but also for deplorable labour conditions: think of Bangladeshi sweatshops providing the West with fashionable, cheap clothing at the expense of local labourers. For a more elaborate legal-theoretical research on how contract law could account for this, see Lyn KL Tjon Soei Len, \textit{Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer Contracts} (Bloomsbury Publishing 2017).


\textsuperscript{254} Cf http://ghgprotocol.org/.
materials; transportation of purchased fuels; and use of sold products and services’. Normally, only Scope 1 and 2 are deemed relevant for calculating companies’ emissions; reporting on Scope 3 emissions is optional.

A ground-breaking 2013 study by Richard Heede showed that, when adding up the historical emissions resulting from the use of oil and gas (i.e. scope 3 emissions, in terms of the Greenhouse Gas Protocol), about two thirds of global emissions can be attributed to only 90 large companies, being either State or investor-owned. Heede’s work later became known as the Carbon Majors study and has been updated regularly. It has stimulated litigation against big oil companies worldwide, among which some of the cases in European private law (see in particular paragraphs 3, 4, 5, 7, 10 and 11 of section II below).

Surely, litigation against 90 companies could be more effective than litigation against uncountable consumers, or than strategies to influence all these consumers’ behavioural patterns. Yet to my knowledge, there has been little debate amongst lawyers on the issue whether companies indeed should be held responsible for scope 3 emissions. It almost seems as if the legally educated take Heede’s study for granted, since it is produced in an academic exact science journal, without questioning the underlying methodology that actually presupposes an attribution that would merit legal attention. It is a legal or moral rather than an empirical question, whether companies can be held responsible for the emissions resulting from consumers using their products. In the only case where a similar question is explicitly addressed – the Norwegian Artic Oil case – the District Court and the Court of Appeal expressed different views, as will be shown in paragraphs 5 and 10 of Section II. It is likely that this discussion will become big in the coming decennium, when the cases against oil business will be adjudicated.

Arguments in favour of holding companies responsible for scope 3 emissions include that they are the best placed to change their production processes, that they have profited the most from selling unsustainable products, and that big oil


\[257\] See http://climateaccountability.org
has often engaged in lobbies against climate related regulation and even bribed scientific experts to publicly downsize or deny the problem of anthropogenic climate change. Arguments against this inclusion centre on the fact that it should be the government that should take public responsibility by imposing CO2-taxes and thus discouraging consumers using unsustainable products, as private parties should be able to maximise their profits.

It would in any event also be good to reflect on how this issue relates to the fairness problems resulting from the existing methodology to calculate emissions caused by States: do we indeed need to shift responsibility of States from production towards consumption, making them responsible what is consumed at their own territory, whereas responsibility of oil companies should include consumers behaviour far beyond their production sites? In other words, do we want responsibility of States and of business to be consistent and do we mind if we hold more than one actor responsible for the same emission?

In summary, it is at least debatable what would be the best attribution methodology. Should energy producers be held responsible for emissions that have occurred abroad due to consumers using their products, the so-called scope 3 emissions? Should States be held responsible for consumption patterns within their borders? Should the current legal-political scheme of the UNFCCC remain in force, and only attribute to States scope 1 and 2 emissions resulting from production? Is there at all reason to hold companies rather than States responsible, let alone liable? These questions have not yet been sufficiently addressed neither by courts, nor in legal literature, but we will see they are relevant for the climate cases studied in this chapter.

3. Climate lawsuits in European private law
It will be shown in this chapter that the climate lawsuits all invoke international and European environmental law. As these legal sources as such reflect the transboundary nature of environmental problems, their invocation amounts to an implicit request to take on board the interests of people abroad. After all, their

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application amounts to an enforcement of the international cooperative scheme that was put in place specifically to face transboundary challenges – even if such a scheme is as of this moment imperfect. Moreover, most climate claims appeal explicitly to the importance of people beyond national boundaries, often pointing towards international human rights law. Foreign persons are either among the claimants, or litigating nationals point to dangers climate change poses on those outside territorial borders.

Still, the national judicial bodies confronted with these claims have a mandate that is limited by the will of a citizenry within national boundaries.\(^259\) This poses a boundary to the role of the judiciary in European private law, labelled in the last chapter as the legal boundary. Mother Earth encompasses people worldwide, whereas the People’s Power that delimited Justitia’s discretion is centred in a nation state. The limitations to this discretion actualise in the requirements of the civil (procedural) laws that regulate the lawsuits, putting also a factual boundary to the role of the judiciary in European private law: she may use for her reasoning only those facts that were brought forward by the parties, (though it is up to her to select the legally relevant facts) and must accept as true the facts on which the parties agree.

Whereas the legal boundary places the suitability of deliberative democracy to lead to legitimate results under pressure (as those affected who live abroad were not included in the decision-making process), the factual boundary challenges the potential of private law to create the correct solutions for public problems. After all, when a court bases itself on facts brought forward by private parties, it is not evident it considers everything relevant to solve a public issue. The purpose of civil procedure might be seen as the enforcement of private rights and entitlements,\(^260\) not as the way to find answers to public questions.

The following sections explore how the climate change lawsuits contest the boundaries of democratically legitimate judicial law-making in European private law. We will see how they, each in their own way, appeal to the interests of people abroad. Thereby, they challenge the courts to reconcile private law and environmental constitutionalism and to consider a concept of justice beyond the nation-state while remaining within the legal and factual boundaries to their role.

\(^{259}\) As for the People’s Climate Case, this claims asks the CJEU to consider global interests whereas its mandate is regionally determined. See further below section 7.

\(^{260}\) Cf e.g. Gerard Lewin, *Het burgerlijkprocesrecht is de pathologie van het recht* (Kluwer 2013).
I will illustrate this now with regard to each of the cases, presenting them chronologically so as to demonstrate the ongoing development towards environmental constitutionalism (Section II.1-11). In subsections, I will present in some detail how people from other nations are considered by the claims, the counterclaims made and the decisions rendered (if any). It is important to include the claims and counterclaims, because – as elaborated on in the former chapter – they form contributions to the public sphere in and of themselves. In the long run, they influence the intersubjective debates on the right interpretation of the law, and as such, they may be affirmed by the courts. Also, it is interesting to see to which parts of the claims the European private law courts have agreed at the moment of writing this thesis. The claims, counterclaims and judicial decisions in the climate cases are all contained in lengthy documents, sometimes over 200 pages. The subsequent sections do not offer mere summaries of these documents, but offer an analysis of how they address people abroad. For each case, a last subsection stresses its significance in light of the democratic legitimacy of judicial law-making on climate change and people abroad. Section III concludes this chapter with some final reflections, where the findings of this chapter are connected to the theory introduced in the former chapter.

B. NATIONAL BOUNDARIES IN EUROPEAN PRIVATE LAW CLIMATE CASES

1. Climate change enters the scene of European private law: The Dutch Urgenda case on first instance

Litigation on climate change is a global phenomenon that occurred since the 1980s and became rather important in the early years of our century. In European private law, the first climate case was that of the environmental Foundation Urgenda winning against the Dutch State on 24 June 2015.261 The reasoning of the District Court of The Hague is highly remarkable – Urgenda is widely considered as a landmark case. As this and the next chapter illustrate, it has inspired numerous other climate cases. The Court carefully motivated its decision in almost 70 pages, elaborately discussing climate science, international climate politics and explicitly addressing the governmental separation of powers

261 In the same year, a Pakistani farmer won a similar claim against his government before the Court of Lahore. This is but one of many more climate cases; see the databases of the LSE and the Sabin Center of Columbia University, also referred to in the introduction to this book.
at a national level, defending it stayed within the boundaries of democratically legitimate judicial law-making.

In 2007, the government of the Netherlands decided that it wanted to reduce Dutch greenhouse gas emissions with 30% by 2020, compared to the year 1990. In 2011, however, the government came with a new reduction goal, amounting to 14-17% of total reduction in greenhouse gases. Foundation Urgenda argued that this new goal amounts to a tort under the Dutch Civil Code, for the reduction goal should be at least in between 25 and 40%. Therefore, it initiated a case against the Dutch State in December 2013. In June 2015, the District Court of the Hague rendered its judgment and approved the most important part of the claim: it ordered the Dutch State to reduce at least 25% of its greenhouse gasses emissions by the end of 2020, compared to 1990 levels. The State thereupon appealed (see section 8 below). The Urgenda case is fascinating for a number of reasons, one of them being how it addresses people outside the Netherlands.

1.1 People abroad in Urgenda’s claim
The central provision in the Urgenda case is Article 162, Book 6, Dutch Civil Code, the provision on tortious acts. The second section of this Article distinguishes between three types of tortious acts: 1) violations of someone else’s right/entitlement; 2) an act or omission breaching a duty imposed by law; and 3) an act or omission in violation of what according to unwritten law is deemed fit in societal interrelations. Foundation Urgenda argued the State’s lowered greenhouse gasses reduction goal can be characterised as a tort of any of these three types.262 Firstly, Urgenda argued that insufficient climate policy leads to human rights violations. Secondly, it argued that international law imposes a duty on the State to reduce more emissions. Thirdly, case-law interpreting the phrase ‘what is deemed fit in societal interrelations’ has led to the doctrines of hazardous negligence and nuisance, which are also violated in the present case, according to Urgenda’s claim.

In choosing to argue along all these three lines, Urgenda points to people abroad both implicitly and explicitly. Very explicit is the first type of tort: Foundation Urgenda stresses that globally, human rights violations occur resulting from climate change, particularly the right to life and the right to private life enshrined in Articles 2 and 8 of the ECHR (and also the right to health of Article 168 TFEU and the right to environmental protection of Article 191 TFEU).263 In reasoning

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262 Cf. Urgenda claim, §312.
why it should have standing, Urgenda also explicitly says it acts on behalf of people in other countries, since its statutory goal reads to stimulate transitional processes towards a sustainable society ‘beginning in the Netherlands’. This means the interests it defends are ‘primarily but not exclusively Dutch interests’, since ‘climate change and a sustainable society are per definition transboundary themes’.

Perhaps subtler, Urgenda also underscores how mutually interdependent States are in today’s globalised world. ‘Certainly there are parts of the world where the consequences of the climate are (…) more severe than in the Netherlands,’ the claim states, ‘but nonetheless the Netherlands experiences severe consequences of an ever stronger warming now and in the coming decennia’. It is a fact, the claim unfolds, that some regions will be impacted more than others, but all regions globally will undergo more negative than positive consequences due to a dangerous climate change occurring when global warming exceeds 2°C. It was, therefore, in the opinion of the claimants that the United Nations took up the topic, extensively describing the international cooperation done on the theme of climate change, including the establishment of the IPCC.

In discussing the Dutch State’s duty under international law, the claim points to the international no harm principle, the UNFCCC and to how these two sources oblige States not to cause damage to other States. Furthermore, it discusses the common but differentiated responsibilities principle of the UNFCCC, holding that developed nations should take the lead in combatting climate change. The claim enumerates all outcomes of the yearly Conference of the Parties (COP) to the UNFCCC. Already in 2007 at COP13, the Parties determined that the industrialised nations (the so-called ‘Annex I – countries’ including the Netherlands) should reduce between 25 and 40% in 2020. Another COP led to the 2010 Cancun Agreement, which codified the acknowledgment that global

264 *Idem*, §51.
265 *Idem*, §61.
266 *Idem*, §40.
267 *Idem*, §37.
268 *Idem*, §78.
269 The UNFCCC distinguishes between countries taken up in its Annex I, which are the more economically developed nations, and the countries not taken up in Annex I, which are the developing nations. Annex I countries should take the lead in combatting climate change according to the common but differentiated responsibilities principle. Among the Non-Annex I countries are 49 parties who are classified as least developed nations (LDN) for their limited capacity to fight and adapt to climate change.
270 *Idem*, §201.
warming will impact human rights when it exceeds 2°C. In short, there exists an international obligation for industrialised nations such as the Netherlands to reduce 25-40% by the year 2020 to prevent significant harm to other nations and humanity at large.

When discussing the national private law doctrines of hazardous negligence and nuisance, the claim draws a parallel between nuisance exceeding the borders of a parcel of land and transnational nuisance. The Dutch fundamental principle, that one is not allowed to bring nuisance from their own territory to the surrounding grounds, ‘in essence is the national version of the international legal no harm doctrine that is also the underlying rationale of the UNFCCC,’ stipulates the claim. The Dutch doctrine of nuisance indeed has transnational application, as was determined by the Dutch Supreme Court in the *Kalimijnen* (“Potash Mines”) case, where Dutch gardeners successfully claimed compensation from up-stream French mines that had dumped salt into the river Rhine, the water of which the Dutch used for their plants. This case also illustrates that when damage is the cumulative consequence of the behaviour of several actors, each of them has a *pro rata* liability, meaning they are each responsible for their contribution, even if this contribution on its own was not enough to cause the damage. Such *pro rata* liability should also apply in the case of CO2 emissions leading to dangerous global warming.

The claim also touches upon the *Kelderluik* (“Cellar Hatch”) case, in which the Dutch Supreme Court developed criteria to establish liability for hazardous negligence, i.e. for failing to take preventive measures for a certain danger created (in the Cellar Hatch case: using a form of warming sign to prevent people from falling into an opened cellar). Several elements should be considered: the extent to which the danger was known, the likelihood danger will materialise, the severity of the damage and the possibilities or inconvenience of taking preventive measures. It is this doctrine that the District Court used, ruling in favour of Foundation Urgenda.

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271 Idem, §§210-212.
272 Idem.
273 Idem, §262.
274 Dutch Supreme Court (Hoge Raad) 23 September 1988 *Mines de Potasses v Bier ao* (*Kalimijnen*) ECLI:NL:PHR:1988:AD5713
275 Idem, §270-279.
276 Dutch Supreme Court (Hoge Raad) 5 November 1965 *Coca cola v Duchateau* (*Kelderluik*) ECLI:NL:HR:1965:AB7079
1.2. People abroad in the decision of the District Court

Importantly in the context of this chapter, the District Court of the Hague accepts Urgenda’s standing to defend the climate-related interests of people abroad. The considerations of the Court merit full citation:

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. The interests Urgenda wants to defend appear to be – from its objective formulated in its by-laws – primarily but not solely Dutch interests. Moreover, the term “sustainable society” has an inherent international (and global) dimension. As based on its by-laws Urgenda is defending the interest of a “sustainable society”, it actually protects an interest that by its nature crosses national borders. 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.\(^{277}\)

It is good to note that the District Court renders this decision in June 2015 – 8 months before the Paris Agreement was adopted,\(^{278}\) in which States agreed to strive to keep global warming at 1.5\(^{\circ}\)C. Indeed, the Court observes that, considering all the climate summits organised under the umbrella of the UNFCCC so far, States worldwide have assumed 2\(^{\circ}\)C of warming as the maximum. Still, the Court notes that the parties to the UNFCCC already decided in 2010, in Cancun, that countries should aim for 1.5\(^{\circ}\)C, because countries in the Pacific, such as Tuvalu and Fiji, risk to vanish below sea-level when global warming exceeds 1.5\(^{\circ}\)C.\(^{279}\) And, the Court notes, the parties agree that dangerous climate change has severe consequences at a global and local level.\(^{280}\) Therefore, it accepts this as a fact (in line with the factual boundary to its role laid down in the Dutch Code of Civil Procedure).\(^{281}\) Furthermore, as a factual matter, the Court concludes that to prevent dangerous climate change, anthropogenic emissions of greenhouse gasses must be reduced dramatically.\(^{282}\)

\(^{277}\) Urgenda decision, §4.7.
\(^{278}\) The Paris Agreement is the outcome of the COP to the UNFCCC held in December 2015 in Paris.
\(^{279}\) Urgenda decision §4.14.
\(^{280}\) Idem, §4.16.
\(^{281}\) Cf. Article 149 Dutch Civil Procedure (‘Wetboek van Burgerlijke Rechtsvordering’).
\(^{282}\) Urgenda decision, §4.15.
The Court furthermore concludes, basing itself on climate science approved by international climate politics, that industrialised nations, including the Netherlands and the EU as a whole, should reduce 25-40% in 2020 and 85-90% by 2050.283 This means that the Netherlands’ current reduction goal is lower than what international climate science and policy deem necessary.284 The question is whether this amounts to a tortious act (i.e. whether it is ‘wrongful’ in the sense of the Dutch Civil Code), because even if the State agrees that greenhouse gasses should be reduced, it argues that this can also be done after the year 2020. In other words, the debate in the Urgenda case concerns the question how much and how fast the Dutch State should reduce emissions.285

The Court considers the second tortious act first, namely whether the State breached a duty imposed by law. Article 21 of the Dutch Constitution, as well as all the legal instruments developed with the insight that climate change is ‘an extraterritorial, global problem’286 (i.e. the United Nations Convention on Climate Change and its Kyoto Protocol, the international customary ‘no harm principle’, as well as EU law based on Article 191 TFEU), all entail environmental obligations for the Dutch State, but only towards other States, not towards the Urgenda Foundation. Therefore, the Court reasons, Urgenda has no standing with respect to these provisions.287

Yet the Court remarks that a State is nonetheless supposed ‘to want to meet its international obligations, which means that open norms of national law ought to be interpreted in line with international law.288 The Court calls this a ‘reflex effect’ of international law in national law, but in international law literature such judicial practices are generally known as the doctrine of consistent interpretation: national law is interpreted such that it is consistent with international law.289

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283 Idem, §4.29.
284 Idem, §4.31 (vi).
286 Idem, §4.37.
287 Idem §4.42. The court refers to Article 93 of the Dutch Constitution, which regulates the matter of standing with regard to international (including EU) law.
288 Idem §4.43 [emphasis LB].
289 Cf. André Nollkaemper, National Courts and the International Rule of Law / André Nollkaemper (Oxford Universty Press 2011) 139 ff. Nota bene: The Dutch ‘reflex effect’ doctrine encompasses more than interpretation consistent with international law, for not only international but also national legal norms can have a reflex effect on open norms of private law. Cf. e.g. Jaap author Spier, Verbintenissen uit de wet en schadevergoeding / prof. mr. J. Spier [and four others]. (7th ed., Wolters Kluwer 2015) 162,232,268.
The Court goes on to consider the first tortious act,\textsuperscript{290} that is, whether the State violated a subjective right, in particular Articles 2 (right to life) and 8 (right to private life) of the European Convention on Human Rights.\textsuperscript{291} Since these rights are meant to protect natural human beings, they can as such not be invoked by the legal person such as Foundation Urgenda. Therefore, Urgenda also lacks standing in this respect states the Court.\textsuperscript{292} The Court does, however, consider the positive obligations following from these human rights because they, too, can be of guidance when interpreting open norms of private law (in other words, when interpreting national law consistently with international law). In providing an example of such an open norm, the court explicitly mentions the duty of care norm laid down in Article 162(2), Book 6, Dutch Civil Code.\textsuperscript{293}

This duty of care, under the doctrine of hazardous negligence, is what the Court considers thirdly and lastly, in light of tortious act type number 3.\textsuperscript{294} It signals that this is the first time that a Dutch legal procedure hinges on the question whether the State has breached its duty of care by taking insufficient measures to prevent dangerous climate change.\textsuperscript{295} Stating that ‘the doctrine of hazardous negligence, as explained in the literature, bears a resemblance to the theme of hazardous climate change’, the Hague Court finds that similar criteria can be used to assess the tortious character of the Dutch State’s conduct.\textsuperscript{296} That the doctrine of hazardous negligence also encompasses omitting to investigate and to act upon scientific available information, was decided in case-law concerning the use of asbestos.\textsuperscript{297} That it also applies when the contribution of the State to the danger is only minor was determined in the Dutch Supreme Court’s Potash Mines ruling.\textsuperscript{298}

The Court observes that the Dutch Constitution grants the State a wide discretion to regulate the environment. Yet, because of the global nature of the dangers of climate change, the Court found that international and European law determine the extent to which the Dutch State has a duty of care towards the environment,

\begin{itemize}
\item[290] See section 1.1 for an enumeration of all three types.
\item[291] Cf Urgenda decision §4.45 ff.
\item[292] Idem §4.45.
\item[293] Idem §4.46.
\item[294] Idem §4.53 ff.
\item[295] Idem §4.53.
\item[296] Idem §4.54. The Court says the argumentation on the doctrine of nuisance has no independent significance for the case in §4.5.
\item[297] Case-law on asbestos was brought forward by the claimants but not referred to by the Court in its decision.
\item[298] Cf. Urgenda decision §4.79.
\end{itemize}
including the UNFCC’s equity principle dictating *inter alia* that developed nations should take the lead in combatting climate change – i.e. the common but differentiated responsibilities principle invoked by Urgenda.\(^{299}\) The Court explicitly recognises that these goals and principles do not have direct effect because of their international public law nature.\(^{300}\) This means they cannot as such be applied and enforced by a national private law court.\(^{301}\) Nevertheless, such goals and principles do ‘determine to a great extent the framework for and the manner in which the State exercises its powers’ in the Court’s opinion.\(^{302}\) Therefore, the Court considers them relevant to assess whether the State neglected its duty of care and thus committed a tort *towards* Urgenda.\(^{303}\) The Court thereupon translated the hazardous negligence doctrine into six criteria of relevance here:

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\begin{align*}
(\text{i}) & \quad \text{the nature and extent of the damage ensuing from climate change;} \\
(\text{ii}) & \quad \text{the knowledge and foreseeability of this damage;} \\
(\text{iii}) & \quad \text{the chance that hazardous climate change will occur;} \\
(\text{iv}) & \quad \text{the nature of the acts (or omissions) of the State;} \\
(\text{v}) & \quad \text{the onerousness of taking precautionary measures;} \\
(\text{vi}) & \quad \text{the discretion of the State to execute its public duties – with due regard for the public-law principles, all this in light of:}
\end{align*}
\]

- the latest scientific knowledge;
- the available (technical) option to take security measures;
and
- the cost-benefit ratio of the security measures to be taken.\(^{304}\)

The Court thus develops the doctrine of hazardous negligence to also include acting hazardously negligent on the global climate problem. It goes on to consider each of its renewed criteria, extensively motivating why they are all met in the present case.\(^{305}\) Thus, the Court concluded that the State acted in a tortious manner.\(^{306}\)

\(^{299}\) *Idem* §4.55.
\(^{301}\) Cf. Nollkaemper (N 289) 117.
\(^{302}\) *Urgenda* decision § 4.63.
\(^{303}\) *Idem* §4.63.
\(^{304}\) *Idem* §4.63.
\(^{305}\) *Idem*, §§4.64-4.93.
\(^{306}\) *Urgenda* decision §4.86.
Interesting, in this regard, is the argument of the State that the Dutch proportion in global emissions is negligible, so Dutch reductions are not effective for a global scale.\textsuperscript{307} ‘This argument fails,’ the Court notes, ‘[as] it is certain that climate change is a global problem and requires global responsibility’.\textsuperscript{308} Throughout the judgment, the Court continually stresses that industrialised nations such as the Netherlands have agreed to ‘take the lead’ in combatting climate change, thereby coming close to the notion of climate justice: ‘Moreover, it is undisputed that the Dutch \textit{per capita} emissions belong to the highest in the world.’\textsuperscript{309}

At the end of its lengthy considerations, the Court orders the State to make sure to decrease Dutch greenhouse gas emissions to at least 25\% in 2020 with respect to the year 1990, and to pay for Foundation Urgenda’s costs of the proceedings.\textsuperscript{310}

\textbf{1.3 Emancipation of people abroad through the Urgenda case on first instance}

Numerous commentaries have been written on the \textit{Urgenda} case, proving it provides food for thought for many legal disciplines. It is certainly also significant for the subject of this chapter, i.e. the constitutionalisation of the environmental interests of people abroad, which legitimises judicial interference in European private law, although the judgment of the District Court is not as clear in this respect as the decision of the Court of Appeal, to be discussed below in section 8.

Even without the judgment of the District Court of The Hague, the claim is interesting for both explicitly and implicitly relying on the interests of people outside the Netherlands. Relying on international environmental law, international human rights law and national law, Foundation Urgenda asserts that the interests of people abroad are highly relevant for the duty of care regarding climate change on part of the Dutch State.

A definite key in the success of Foundation Urgenda is precisely the private law dimension of the case. That is, the lion’s share of the District Court’s judgment is based on facts – facts that the Court \textit{had to} assume, because in Dutch private law judges must base themselves on facts agreed upon by the parties, or on facts that are posited by one party and not (sufficiently) disputed by the other – the factual boundary to the role of the judiciary in European private law. Given all the years that the Dutch State was involved in international climate politics and given all the international declarations it signed at the COPs, the State could not deny that

\begin{itemize}
\item \textsuperscript{307} \textit{Idem}, §4.78.
\item \textsuperscript{308} \textit{Idem}, §4.79.
\item \textsuperscript{309} \textit{Idem}.
\item \textsuperscript{310} \textit{Idem} §§5.1-5.3.
\end{itemize}
climate change will be a great danger to not only the Netherlands but certainly also to other nations. The Court’s observation, that global responsibility for the problem is required, therefore has more factual than legal relevance in the judgment.311

According to the Court, Urgenda could not rely directly on the international climate law and international human rights law, but the Court deemed the State to intend to live up to its international obligations. It thereby mostly stressed the interests of people abroad implicitly, in the need for international cooperation and the responsibility of the Netherlands to contribute to the solution for the global problem of climate change. In weighing the relevant damage, it furthermore relied on inter alia the possible violations of human rights globally, thus contributing to an ongoing constitutionalisation of the climate in which rights of people across borders are at least factually relevant.

The Court acceptance of Urgenda’s standing on behalf of people abroad would appear to be more explicit. At the same time it is necessary to note that the Court itself evaded the question, whether it also granted its remedy for people outside the Netherlands, as ‘unlawfulness of the State towards the (...) population of the Netherlands is already sufficient’.312 This carefulness of the Court demonstrates how national boundaries still constrain the discretion of a national judicial body: if unnecessary, the Court will not explicitly provide a remedy on behalf of people abroad, even if it is clearly prepared to accept that national climate policy should be shaped by transnational obligations and that the interests of people abroad cannot be discarded in this context.

Indeed, the District Court is clearly aware that ordering the State to adopt a certain goal in the reduction of greenhouse gasses may come across as falling outside the democratically legitimate boundaries of its discretion. For this reason, it hastens to add a special section on the system of the separation of powers,313 This is remarkable, since the Court had already considered the State’s discretion to set out policies in its fifth criterion to establish hazardous negligence. The Court stresses the private law character of its role in this case, saying that it should be conscious of its role in a legal conflict between two parties,

311 In an informal conversation, the lawyer of the case Roger Cox also told me that he attributed the success of the case to his unusually extensive descriptions of the facts.

312 Idem, §4.92

313 Idem §4.94 ff. Although in strands of legal literature on constitutionalism, the term ‘trias politica’ may seem somewhat old-fashioned, it is commonly used in Dutch debate about national law to designate the separation of powers between legislature, executive and judiciary.
whereas the State must act in a general interest.\textsuperscript{314} The Court openly recognises the limits to democratically legitimate judicial law-making posed by the \textit{factual} boundary to its role as court applying private law: it says it should be hesitant to render judgements with large consequences for other parties than the two before it in the legal dispute.\textsuperscript{315}

The Court adds that judges’ democratic legitimacy lies in the fact that they apply democratically enacted national or international law.\textsuperscript{316} It thus situates its democratic legitimacy also in \textit{international} law, that already implicitly took on board the interests of people in other nations; after all, international law is made together with other nation states. The Court thus makes use of the instruments available for meeting at least some of the \textit{normative legitimacy} concerns that come with excluding people abroad from a decision-making process that heavily impacts them: at least the law that is (supposedly) made also in their name should be enforced.

Furthermore, the Court considers it is a key task of the judiciary to provide legal protection against the State.\textsuperscript{317} It remarks that in essence, Foundation Urgenda’s claim calls for legal protection and to test against the law.\textsuperscript{318} Since the Court does not dictate the State \textit{how} to meet its duty of care, it has – in its own judgment – not surpassed the boundaries of its role within the constitutional separation of powers.\textsuperscript{319}

In short, the \textit{Urgenda} case on first instance is highly significant for the national boundaries of democratically legitimate judicial law-making European private law climate cases. Firstly, the claim by Urgenda, that insufficient climate policy could be a matter of Dutch tort law, was affirmed by the Court. Important in this regard is the role played by the factual boundaries to the role of the judiciary in these private law proceedings. This private law dimension of the case helped to establish that there is so much factual agreement on the dangers of climate change and the responsibility of States that the Court had to assume a duty of care on part of the Dutch government. The dangers to people in other nations proved relevant as a factual matter.

\textsuperscript{314} Idem §4.95.  
\textsuperscript{315} Idem §4.96.  
\textsuperscript{316} Idem §4.97.  
\textsuperscript{317} Idem §4.97.  
\textsuperscript{318} Idem §4.98.  
\textsuperscript{319} Idem §4.101-102.
Secondly, these dangers were considered in the light of constitutional and human rights law, thus operationalising a constitutionalised climate in private law proceedings in the interest of people abroad. Thirdly, the Court legitimised its contra-majoritarian order, reasoning its own democratic legitimacy lies in enforcing national and international law. In other words, decisive were the legal boundaries to its role as set by the Netherlands’ international cooperative obligations to solve the transnational problem of climate change.

2. Language as a boundary for the Belgian ‘Klimaatzaak’

The Belgian Klimaatzaak so far represents the least spectacular of the climate cases in European private law.320 The claimants – the NGO Klimaatzaak and some 8,000 individuals – were represented by, among others, Roger Cox, one of Urgenda’s lawyers and masterminds.321 Unsurprisingly therefore, the Klimaatzaak largely follows the same line of reasoning as Urgenda: based on national (in this case Belgian) tort law, the Belgian federal government, as well as three regional governments, are asked to reduce Belgian greenhouse gasses emissions with 25-40% by the end of 2020, compared to 1990 levels.322 Furthermore, the claimants rely directly on their fundamental rights enshrined in Articles 2 and 8 ECHR,323 on the principle of prevention324 and the principle of precaution.325

Why then, is this case so little spectacular, at least until now? It was launched in April 2015, so even before the District Court of The Hague rendered its decision in the Urgenda case. Yet where other climate cases since then led to a range of eye-catching judgments, the Belgians were stuck in a Babylonian debate on whether the proceedings should be held in French or in Dutch. A series of proceedings followed. Only the 20th April 2018, with a ruling of the Cour de Cassation, the government had exhausted all its remedies to contest the usage of French.326 This means that substantive consideration by a court will only the fall of 2020, which is late keeping in mind the claim covers a reduction target for that

320 ‘Klimaatzaak’ is Dutch for climate case.
321 On appeal, it was not Roger Cox but Koos van den Bergh who worked on the Urgenda case. They were helped by many others, including legal counsel Dennis van Berkel.
323 Idem, §§52-69.
324 Idem, §§70-75.
325 Idem, §§76-83
326 For a full chronology of all judicial decisions in the Klimaatzaak, see <https://www.klimaatzaak.eu/nl/the-case> accessed 15 December 2018.
very same year, 2020.327 The Minister of the Environment nevertheless felt it to be legitimate to use all possible procedural tools, she commented in an interview – if she would have been allowed to plead in Dutch, there already could have been a decision, she said.328

2.1 People abroad in the ‘Klimaatzaak’ claim
The Klimaatzaak claim does barely rely on the interests of people abroad. On the contrary, it points elaborately to effects of climate change for Belgian territory and Belgian public health.329 That climate change has global effects, serves as an argument for the existence of climate damage to the Belgian claimants.330 Also the observation, that other parts of the world will be impacted more severely, is made to show the risks for Belgium when it comes to trade, food security, conflicts and migration flows.331 In relation to the reference to Article 8 ECHR, the claimants point out they cannot escape the dangers of climate change by moving elsewhere.332 Only when referencing to Klimaatzaak’s by-laws, the NGO makes clear that it aims to protect ‘humankind’ against climate change and loss of biodiversity,333 and to take action inside and outside Belgium.334

The claim elaborately discusses the need for international cooperation as reflected in international climate change law and its implementation in Belgian law. Yet the emphasis on climate change as a global problem serves mostly to illustrate its grimness. The claim as such seems less concerned with the interests of people abroad than many of the other climate claims. This makes the Klimaatzaak proceedings so far somewhat less interesting for the purposes of this chapter; the claim is more relevant for future generations, as will be shown

329 Klimaatzaak claim, §§20-33.
330 Idem, §102.
331 Idem, §107.
in the next chapter, and it is the most relevant for non-humans, who will be addressed in the epilogue to this book.

2.2 Emancipation of people abroad through the Belgian ‘Klimaatzaak’
Significant, however, is that the Klimaatzaak puts climate change forward as an issue of law rather than politics: to act upon climate change is not only a private, legal duty of the Belgian authorities given their own engagement in international climate debates, it is also a constitutional matter – a matter of fundamental rights as enshrined in Articles 2 and 8 ECHR. It will be highly interesting to see how the Belgian courts respond to these statements. An interpretation of Articles 2 and 8 ECHR affirming the claim may have persuasive influence on other judges within the jurisdiction of the ECHR.

Thus, although the claim heavily leans on the global nature of the climate problem and on the need to cooperation with other States, the invocation of interests of people abroad remains implicit, if not absent. In this sense, the Klimaatzaak is an outlier, since the other climate cases in European private law are explicit about the interests of foreigners, as this chapter illustrates. The Klimaatzaak thus also demonstrates that it is not necessary to invoke interests outside national boundaries, as domestic interests might suffice to instigate a climate case. It remains to be seen, however, whether such a case is successful under Belgian tort law.

3. Climate responsibility for private parties: The German case of Lliuya v. RWE
The German climate case of Lliuya v. RWE points very obviously to the interests of people abroad, as it is the claimant who lives abroad, namely in Peru. Mister Saúl Luciano Lliuya works as a farmer and mountain guide in the city of Huaraz, located at the foot of the Peruvian Andes. He fears for his property because global warming may lead to a flood of the glacial lake Palcacocha situated near his house, caused by the heightened melting of the overlying glacier. Protection measures are costly, so Lliuya asked one of the largest contributors to the climate problem – the German energy company RWE – to contribute a proportionate sum to pay for these measures.335 NGO Germanwatch assisted his claim. His

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claim was unsuccessful at the District Court of Essen but an appeal led the Higher Regional Court of Hamm to allow for evidentiary proceedings. The substantive outcome of the case is still expected.

3.1 People abroad in the claim of Lliuya v RWE
The legal basis of Mr Lliuya’s claim is §1004 of the German Civil Code, which states that when ownership is interfered with, the owner may require the disturber to remove this interference, except where the owner is obliged to tolerate the interference. Mr Lliuya and his wife own a house that would be severely affected should Lake Palcacocha overflow. He argues that such an event would be the result of climate change allegedly caused by *inter alia* the business practices of RWE, a German energy company founded in 1898 as Rheinisch-Westfälisches Elektrizitätswerk AG. RWE is reportedly ‘Europe’s largest single emitter of CO2’. The claim points out that Richard Heede’s study on the carbon majors shows that RWE’s share of historic global emissions in 2010 was 0.47%.

With reports of the IPCC and other scientific bodies, the claim demonstrates a link between climate change and accelerated melting of glaciers, the responsibility of the parent company RWE for its subsidiaries’ contributions to climate change, and the need for protective measures. Furthermore, it is stated that the Court has jurisdiction according to the private international law rules laid down in Brussels I-bis regulation and the German Code of Civil Procedure. Also RWE has standing to be sued when applying the German Code of Civil Procedure. Moreover German law is applicable to this conflict, in accordance with Article 7 Rome II Regulation. Although according to the sophisticated German Civil Code, §1004 falls in another category than a classical

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336 District Court of Essen (Zivilkammer des Landsgerichts Essen) 15 December 2016, Lliuya v RWE AG
337 Higher Regional Court of Hamm (Oberlandesgericht Hamm) 30 November 2017, Lliuya v RWE AG
338 *Lliuya v RWE* claim, §A.8.2.
339 *Lliuya v RWE* claim, §§A.3-7.4.
342 Private international law covers the field of law that regulates, in transboundary conflicts, what court has jurisdiction, what law should be applied, and what foreign judgments should be legally recognized and/or enforced.
tort, a claim based on this provision should still be classified as tort within the framework of the Rome II Regulation.

The claim then analyses all the constitutive elements of liability under §1004 of the German Civil Code. Mr Lliuya’s house is his property, which is impaired in the sense of §1004, RWE can be classified as a disturber, and there is a causal link between the contributions to climate change and the increased threat of Lake Palcacocha overflowing. Moreover, the interference is unlawful, but not because the activities of RWE are forbidden, as they are legally authorised; the unlawfulness is rather to be found in Lliuya’s property being impaired. Lastly, Mr Lliuya has no obligation to tolerate the interference.

The argumentation on causality is as follows. The normal standard of causation is the \textit{conditio-sine-qua-non} formula: one is only liable if the harm would not have occurred without the behaviour under dispute. This formula cannot be applied to the present case, as climate change would still threaten Mr Lliuya without RWE’s practices, after all, many other emitters contribute to global warming. The case at hand is, however, one of cumulative causation so that ‘the sine-qua-non formula can only be applied in the sense that a contribution to the causation was made, and that the sum of all contributions indirectly leads to the impairment of property’. The impairment of Mr Lliuya’s property would not have occurred without the amounts of emitted greenhouse gasses from all emitters, since without anthropogenic climate change, the lake Palcacocha would not have been overfilled like it is now. Thereby, ‘the causal connection between action and outcome is fundamentally given,’ according to Lliuya.

The claim refers four times to the \textit{Urgenda} judgment of June 2015: (a) to substantiate that climate change is caused by humans, and as such is recognised by the District Court of The Hague; (b) in stating that the latter court’s practice shows it is possible to establish a causal relationship in climate change cases (here

\footnotesize

346 \textit{Idem}, §B.II.
348 \textit{Idem}, §B.II.2.
349 \textit{Idem}, §B.II.3.
351 \textit{Idem}, §B.II.5.
352 \textit{Idem}, §B.II.36.
353 \textit{Idem}, §B.II.4.2.1.
354 \textit{Idem}, §B.II.4.2.2.
the claim also points to an American climate case *Massachusetts v EPA*;\(^{356}\) (c) that this remains the case even if IPCC reports note that linear causations do not exist in climate science, as the District Court in The Hague recognised;\(^{357}\) and (d) that the defendant must be long aware of the risk of climate change as scientists realised its damaging effects prior to 1990, as the District Court in the Hague held said in *Urgenda*.\(^{358}\)

Thus, Lliuya argues his ownership is impeded by the threat of climate-change related floods and that RWE is one of the disturbers. The most effective risk-reducing measure for Mr Lliuya would be to reduce the volume of water in the lake and regulate the outflow of water.\(^{359}\) Therefore, he requests that RWE either pays 0.47% of the costs, or, alternatively, that it takes such measures itself.\(^{360}\) Alternatively, he requests a sum of €17,000 to be paid to the local authorities called Waraq. If those authorities would be able to take protective measures, RWE would be released from its obligation towards Mr Lliuya.\(^{361}\)

### 3.2 People abroad in the decisions of the District Court and the Higher Regional Court

Unlike in the *Urgenda* case, where the Dutch State agreed with Urgenda on the facts, RWE has attacked the factual basis of the claim. RWE strongly opposes the possibility to establish, as a matter of fact, the causal link between particular greenhouse gasses emissions and glacial retreat.\(^{362}\) There would be no linear link between emissions and global temperature increase,\(^{363}\) and RWE points to numerous other factors than greenhouse gas emissions that drive climate change, such as solar radiation, aerosols and volcano eruptions.\(^{364}\) RWE also argues Heede’s study on the carbon majors is unusable, contesting its uncertainty factor, and pointing out that it is unclear whether the study, which concerns historical emissions, considered the fact that the companies associated with RWE were acquired or decommissioned only a few years ago.\(^{365}\)

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\(^{356}\) *Idem*, §B.II.4.

\(^{357}\) *Idem*.

\(^{358}\) *Idem*.

\(^{359}\) *Idem*, §A.9.

\(^{360}\) Cf Rechtsanwalte Günther, additional written submission of Lliuya against RWE AG, 11 June 2016, §I.1.

\(^{361}\) *Idem*, §I.2.


\(^{363}\) *Idem*, §B.III.1

\(^{364}\) *Idem*, §B.III.1.a-k.

\(^{365}\) *Idem*, §B.III.1.k.
a) The District Court of Essen  
On the 15th December 2016, the District Court of Essen declares that Mr Lliuya’s claim was partially inadmissible and partially unfounded. The inadmissibility is due to technicalities of the German Civil Code. The claim had referred to a section of the Civil Code’s chapter on damages to calculate RWE’s contribution to the damage, whereas this Section, according to the Court, is not applicable to the present case. ‘This norm (…) is not applicable to the determination of grounds for liability to a claim, but is to facilitate ascertaining the specific extent of damages’.366 Also, the Court notes that no association of local authorities Waraq exists – this is apparently a merely informal translation. ‘The actual name and legal personality of this institution are not discernible,’ making it impossible for the defendant to fulfill its obligation should the Court so order, which renders the title as a whole unenforceable.367

Otherwise, the Court finds the claim unfounded. It agrees with RWE on the issue of causality. ‘Only co-causation exists,’ the Court says, because ‘if the hypothetical omission of merely one of the causes would already undo the damage’. RWE is, therefore, not a disturber in this sense, because:

...[e]ven (…) as a a major greenhouse gas emitter, [its emissions] are not so significant in the light of the millions and billions of emitters worldwide that anthropogenic climate change and therefore the supposed flood risk of the glacial lake would not occur if the defendant’s particular emission were not to exist.

(…)

When innumerable major and minor emitters release greenhouse gases, which merge indistinguishably with each other, alter each other, and finally, through highly complex natural processes, induce a change in the climate, it is impossible to identify anything resembling a linear chain of causation from once particular source of emission to one particular damage.368

Also, the construction measure asked for by Mr Lliuya would not suffice to withstand a flood wave due to an outbreak of the glacial lake. For all of these reasons, the District Court of Essen dismissed the claim and ordered Mr Lliuya to bear the costs of the proceedings.

366 Distrcit Court of Essen, Lliuya v RWE, §I.
367 Idem.
368 Idem, §II.
b) Discussions on appeal
Since the District Court dismissed the claim for a lack of causality, it is not surprising that the discussions on appeal revolve around this issue. Lliuya’s appeal extensively argues there is a causal link, saying that though in the absence of RWE’s behaviour there still would be a risk, such a risk would not exist to the same extent, as any greenhouse gas emissions further contributes to cumulative emissions in the air.\textsuperscript{369}

Oppositely, RWE defends in stating climate change cannot be attributed to individuals; that pro rata liability would also not be the appropriate construction to achieve Mr Lliuya’s goal as he will never be able to file lawsuits against all emitters; and that climate change cannot be addressed through individual civil liability as it should be dealt with by States at an intergovernmental level.\textsuperscript{370} In making the latter point, RWE relies on a USA climate case \textit{Kivalina v ExxonMobil Corporation}, which was dismissed based on the political question doctrine, and on the \textit{Urgenda} case, stressing this case was directed against the State so it cannot serve as blueprint for a case against a business entity like RWE.

RWE also again challenges the carbon major report, which forms the basis for the 0.47\% percentage and is essential for the matter of causation. RWE says this number reflects ‘inessential’ emissions; the plaintiff should rather address RWE’s customers.\textsuperscript{371} RWE argues that the \textit{Carbon Majors} study is unusable, because it uses scope 2 and 3 emissions for calculating RWE’s share in global emissions, whereas only scope 1 emissions should be used.\textsuperscript{372} In other words, whilst Lliuya, using the \textit{Carbon Majors} study, says consumers’ emissions should be attributed to big oil, RWE only wants to take responsibility for on-site emissions resulting directly from its production. RWE adds that it ‘did not cause the emissions as an end in itself, but rather to supply power in the public interest’.\textsuperscript{373}

\textsuperscript{370} Cf. summaries of defendant’s statements available at <https://germanwatch.org/de/14198> accessed 20 December 2018.
\textsuperscript{372} See ‘Summary of the defendant’s submission’ 30 October 2017 available at https://germanwatch.org/de/14198 accessed 18 October 2019, §C.II.
\textsuperscript{373} See ‘Summary of the respondent’s response to the appeal’ 10 July 2017, available at https://germanwatch.org/de/14198 accessed 18 October 2019, §1.2.
c) The Higher Regional Court of Hamm
The Higher Regional Court of Hamm seems to be more on Lliuya’s side, although, as said, it has not yet rendered a substantive decision with its order from the 30th November 2017. It states that the German private law system utilises the principle that even a party who acts lawfully must be liable for property damage caused by him, and that this principle also applies to §1004 German Civil Code.374 Furthermore, the alleged threat of Mr Lliuya’s property is attributable to RWE’s active operation of power plants.375

Therefore, the Court has ordered Mr Lliuya to provide evidence on a series of his allegations: that the flood would seriously threaten this house, that the RWE’s CO2 emissions lead to a higher concentration of greenhouse gases in the atmosphere, that this leads to higher temperatures, that such leads to heightened melting of the relevant glacier, and that RWE’s contribution to this chain of causation is measurable and attributable for 0.47% (and if this number is not right, what is the correct proportion).376 The Court asks the parties to designate appropriate, preferably German-speaking experts to respond to these questions.377 Substantive adjudication of the case will occur later, when the requested evidence can be taken into account.378

3.3 Emancipation of people abroad and the case of Lliuya v RWE
The case is fascinating for various reasons. Firstly, of all the climate cases, Lliuya v RWE is the most typical private law case. Not only is the claimant a private individual,379 whereas the climate cases are mostly launched by an NGO and a group of individuals, it is also the first European climate case with a private entity as a defendant.380 In the USA, there have been more climate cases against

374 Higher Regional Court of Hamm, Lliuya v RWE, §I.2.
375 Idem, §I.3.
376 Idem, §II.
377 Idem, §V. As the parties could not agree on the appropriate experts, the Court in the end appointed them itself: Higher Regional Court of Hamm (Oberlandesgericht Hamm) 21 July 2018, Lliuya v RWE AG.
378 On the 14th of December, RWE challenged this decision, but the 1st of February 2018 the Regional Court of Hamm determined in an order that RWE’s complaints failed.
379 Assisted by an NGO, Germanwatch.
business, many of them initiated by local governments. In Europe, the environmental NGO Milieudefensie with a group of individual claimants later launched another case against a company, Shell.\textsuperscript{381} And the French NGO Notre Affaire à Tous is preparing a case against Total.\textsuperscript{382}

Moreover, perhaps because of this more typical private law relationship, Lliuya not only relies on some kind of horizontal effect of fundamental rights. The claim is based on the German Civil Code’s provisions on neighbouring law. This is made possible through private international law, which as such provides for people abroad to defend their viewpoints in national courts. Noteworthy here is that the defendant RWE never contested the applicability of the private international law rules that gave Mr Lliuya standing.

In contrast to the Urgenda case, standing for a foreign interest was thus well-accepted in Lliuya v RWE. Instead, the core of the debate moved to the issue of causality, which the District Court found impossible to establish: ‘Every person is, to some extent, an emitter’.\textsuperscript{383} This relates directly to RWE’s viewpoint that private law is not suitable for the climate problem, especially when used against a private party rather than a governmental authority: climate change is to be dealt with by international politics.

Indeed, Mr Lliuya’s aim may be regarded public rather than private in essence, as he wants to put in place a water drainage system which would not only protect him, but all the people in his city. On the other hand, he does not aim to ‘protect humankind’, like the Klimaatzaak association, for instance. The goal of his procedure \textit{stricto sensu} is to protect his property – his private autonomy - and not to prevent climate change. As a matter of fact, Lliuya has so little trust in intergovernmental climate negotiations that he sees private law as the only effective venue; he ‘will not and cannot wait longer for protective measures to be decided at the political level’.\textsuperscript{384} This objection can be translated in that Lliuya puts forward the lack of political efficacy of the legal system that we signalled in the last chapter.\textsuperscript{385} He appeals to the judiciary to make up for the normative

\textsuperscript{381} See below section 6.
\textsuperscript{382} See https://notreaffaireatous.org/multinationales/ accessed 17 October 2019.
\textsuperscript{383} Disctrict Court of Essen, Lliuya v RWE, §II.
\textsuperscript{384} Lliuya v RWE claim, §A.10.
\textsuperscript{385} See the discussion of Nancy Fraser’s work in Chapter II, §F.
legitimacy\textsuperscript{386} of the system when he adds that he ‘is in any case not prohibited from taking legal action’.\textsuperscript{387}

The Regional Court of Hamm agreed on the latter point. It declared the claim admissible and showed itself willing to reconsider the causality in light of the evidence provided. In its concise judgment, it does not bother about the question whether private law is suitable to deal with climate change. Implicitly, it seemed to have accepted this as a given.

Vital in this regard is how the Regional Court reiterates the private law principle that harm should be compensated even if the harmful conduct is not forbidden.\textsuperscript{388} Vital because this principle is especially relevant for those harmed who did not have a voice in the legislative process that determines what is to be forbidden and what is allowed: as Mr Lliuya is a Peruvian and not German, he lacked the public autonomy to participate in the deliberative democratic process that ultimately led RWE to obtain the authorisations for its business. For him, German authorisations lack normative legitimacy. Therefore, it would be especially unfair if such authorisations would free disturbers such as RWE from responsibility towards him when his private autonomy is endangered.

In sum, \textit{Lliuya v RWE} – at least thus far – has a manifold significance in light of the consideration of people abroad through European private law climate litigation. Firstly, the case demonstrates how private international law facilitates access to national justice for foreigners. For those nonnationals who can afford the time, money and intellectual capacity to begin a lawsuit, therefore, private international law as such forms an important step in the direction of repairing the injustice of systems that exclude affected people abroad from the decision-making process. Through a lawsuit, they can voice their interests in the legal system of another nation. Factors such as time, money and creative headspace of course are far from evident for the vast majority of the people affected most severely by climate change, which exhibits how litigation can never be ‘the’ solution to this global problem – the conditions for litigation only reproduce the distributive asymmetries mentioned in the introduction to this chapter.\textsuperscript{389} Yet

\begin{flushright}
\textsuperscript{386} Cf the discussion of Nancy Fraser’s work in Chapter II, §F.
\textsuperscript{387} \textit{Lliuya v RWE} claim, §A.10.
\textsuperscript{388} Indeed, this point is also made in the influential contribution Hinteregger, Monika, ‘Civil Liability and the Challenges of Climate Change: A Functional Analysis’ [2017] Journal of European Tort Law.
\textsuperscript{389} Supra §A.1.
\end{flushright}
private law protects certain private interests and does in principle not discriminate based on nationality.

Secondly, the case shows that this is only a first step, once standing has been accepted, there are many more hurdles to overcome in private law proceedings. The issue of causality has proven to incite controversy, but as it looks now, it may be possible to prove. Not so much fleshed out in the legal literature on this case (at least to my knowledge) is the issue of whether indeed scope 3 emissions should be attributed to big oil – that is, whether the emissions resulting from consumers using fossil fuels can be attributed to a large oil company like RWE.\textsuperscript{390} If not, then RWE’s contribution to the global climate problem might be considered to be smaller than 0.47%, and \textit{pro rata} liability might lead to an amount of damages much lower than the €17,000 that Mr Lliuya has requested. However, the Regional Court of Hamm said that Lliuya’s action would also be admissible if it turned out he could only demand €0.33.\textsuperscript{391}

Therefore, the current state of German law is not only that climate change can be a matter of law rather than politics, but also that climate claims can be instigated against private entities. This last step brings us to another point of importance, namely the added value of private law as opposed to public law proceedings for climate change. Where in public law, what is not illegal automatically falls within the sphere of what is to be deemed legal, in private law additional private legal duties exist not to cause harm to others. The Regional Court explained ‘the \textit{condition} that conflicts with the ownership of the object must be unlawful, not the \textit{action leading to it}.’\textsuperscript{392}

Thus, like in the first instance judgment in \textit{Urgenda}, the case of \textit{Lliuya v RWE} shows that where public authorities fail to introduce efficient anti-climate change


\textsuperscript{391} Order of the Regional Court of Hamm \textit{Lliuya v RWE AG} 1 February 2018, §3.

\textsuperscript{392} Order of the Regional Court of Hamm \textit{Lliuya v RWE AG} 1 February 2018, §5 (emphasis added).
measures, private law may offer operational space for the judiciary to provide remedies. To a small extent, the judiciary in European private law may repair the *normative legitimacy* and *political efficacy* of the legal system that is under pressure due to the exclusion of people abroad in the decision-making process on climate change. Private parties may be held liable for climate change as a legal matter, provided that sufficient factual evidence will be presented.

**4. Climate change falls in the scope of the ECHR: The Swedish Magnolia case**

So far, the climate change lawsuits in European private law led to only two final decisions, one of which in the Swedish *Magnolia* case. It was launched against the Swedish State by 176 individuals and two youth organisations – Push Sverige (Push Sweden) and Fältbiologerna (Nature and Youth Sweden). The case is called *Magnolia* because the environmentalist youngsters came together regularly in a café named Magnolia, ‘and the name sounded good’. They contended that Sweden should not have sold coal-plants to an unsustainable operator.

The District Court of Stockholm denied the claim, as did the Stockholm Court of Appeal. Due to the courts’ assessments and because of lacking financial resources, the claimants then decided not to go to the Supreme Court. In the first two instances, they had relied on crowd funding to pay for legal representation, court fees and communication costs.

The claim being denied does not make *Magnolia* a less interesting case. On the contrary, it underlines the exclusion problems of deliberative democracies as signalled in Chapter II. That is, *Magnolia* makes a highly relevant appeal to the interests of *future generations* and therefore will also be dealt with in Chapter IV. Additionally, the interests of *people abroad* are present in the claim, since it

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393 The other in Urgenda, see section 9 below.
394 So I was told by one of the people behind the lawsuit through Facebook Messenger.
395 Stockholm District Court (Stockholms Tingsrätt) 30 June 2017 Push Sverige, Fältbiologerna et al v Staten, *Magnolia*.

4.1. People abroad in the Magnolia claim

Sweden is one of the ‘greenest’ industrialised nations in the world. In 2018, for example, it already reached its renewable energy target set for the year 2030.\footnote{‘Sweden to Reach Its 2030 Renewable Energy Target This Year’ (World Economic Forum) <https://www.weforum.org/agenda/2018/07/sweden-to-reach-its-2030-renewable-energy-target-this-year/> accessed 15 October 2018.} Yet the Magnolia claim revolves around the question how such a target should be reached. That is, the claim concerns the wholly State-owned energy company Vattenfall.\footnote{Interestingly, this is the same Vattenfall that started arbitration proceedings about its alleged damages caused by Germany’s decision to phase out nuclears. On its website, Vattenfall says these proceedings do not question the democratic decision of Germany as such, but only seek compensation. Cf Vattenfall, ‘Questions and Answers - Vattenfall – ICSID’ (Vattenfall) <http://corporate.vattenfall.com/about-vattenfall/vattenfall-brief/vattenfall-icsid/questions-and-answers-about-vattenfall-icsid/> accessed 21 November 2018. Yet proceedings such as these prove how difficult it is for States to engage in the energy transition.} It had started in 2001 to purchase German coal companies, but in want of a greener energy record, the company announced in April 2016 to get rid of these lignite assets in Germany, by selling them to the Czech company Energeticky A Prumyslovy Holding and its financial partner PPF Investment.\footnote{Cf Stockholm District Court Magnolia.}

The government authorised this sale in June the same year and the transfer was completed in October.\footnote{Idem.}

According to the plaintiffs, this sale is unlawful. Explicitly inspired by the complex argument made in the Urgenda case,\footnote{Cf §114 Magnolia claim.} they invoke a wide range of legal sources to substantiate the unlawfulness: national and international tort law; the UNFCCC and its protocols and declarations; Articles 2 and 8 of the ECHR; and Swedish climate policy showing the Swedish State acknowledges the dangers of
climate change as well as its exemplary role for other nations in tackling the climate problem. Furthermore, they mention the Oslo Principles.\textsuperscript{404}

The invoked Swedish policy includes, notably a target set in 1999 intended to be reached in 2020, which aimed at solving the major environmental problems ‘without causing increasing environmental and health problems \textit{outside Sweden’s borders}’.\textsuperscript{405} Furthermore the claim points to a 2009 governmental directive which stipulates that given the integration of energy markets, ‘it is difficult to determine what exactly is “Swedish” energy (...);’ that ‘the Swedish State should be a responsible owner of the group Vattenfall’ and that ‘Thus all geographical boundaries should be deleted from the Articles of Association [of Vattenfall]’\textsuperscript{406}

Under the State’s ownership, the UN Global compact was signed, a (legally non-binding) corporate social responsibility document that orders companies to encourage the development of environmentally friendly technologies, among other things.\textsuperscript{407} At the same time, the claim notes, the State ‘has in a remarkable way consistently avoided discussing its responsibility for Vattenfall’s lignite operations, despite the fact that this is the Swedish operation with by far the greatest climate impact’.\textsuperscript{408} Vattenfall’s emissions abroad are larger than all combined Swedish territorial emissions, the claimants allege.\textsuperscript{409} They do not make explicit whether they base this statement on Heede’s \textit{Carbon Majors} report.

The claim continues to reason that if Sweden is to take its role as a model for other countries seriously, it only had two options regarding the lignite operations in Germany. These operations should either have been dismantled combined with a transition to climate-friendly energy, or they should have been sold to an owner equally responsible to Sweden.\textsuperscript{410} However, the Czech company that

\begin{footnotesize}
\textsuperscript{404} Expert Group On Global Climate Obligations (n 204).
\textsuperscript{406} Cf § 44 \textit{Magnolia} claim.
\textsuperscript{407} Cf § 66 \textit{Magnolia} claim.
\textsuperscript{408} \textit{Magnolia} claim §36 and ‘The Ten Principles | UN Global Compact’ <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 17 October 2018.
\textsuperscript{409} \textit{Magnolia} claim §38.
\textsuperscript{410} \textit{Magnolia} claim §§55-57, 106.
\end{footnotesize}
bought Vattenfall’s coal plants does not live up to this standard.\textsuperscript{411} Since this company has not communicated any ambition regarding sustainability, it is likely to even expand the coal operations.\textsuperscript{412} In short, although Vattenfall defends the transfer pointing to its ambitions to reduce greenhouse gasses, the end-result will probably the opposite, i.e. increased emissions in the EU.\textsuperscript{413}

The claimants want the Court to declare the sale illegal and hold that the State has failed in its duty of care regarding the environment. Moreover, the claimants request disclosure of documents regarding the sale.\textsuperscript{414} Furthermore, they ask for damages at the symbolic amount of one Swedish crown per person, because of this allegedly unlawful decision of the Swedish Government.

\textbf{4.2. People abroad in the decisions of the District Court and the Appellate Court}

The Stockholm District Court’s judgment is only 6 pages – small compared to the 70 pages first instance decision in \textit{Urgenda}. The Court largely ignores the reasoning of the youngster litigants and focuses on the requested damages. It notes that the alleged consequences of the sale are based on hypothetical reasoning, whereas a fundamental principle of the law of damages reads that liability can only be established when there is actual damage.\textsuperscript{415} A mere risk due to a certain act or negligence cannot be regarded as damaging.\textsuperscript{416} Thus, the Court holds it impossible to find any economic damage for the claimants.\textsuperscript{417}

The Stockholm District Court notes that it has not been established that the sale leads to a real threat of the right to life enshrined in Article 2 ECHR.\textsuperscript{418} As for Article 8 ECHR, the Court observes that violations of this provision have only been found when environmental disturbances have already occurred.\textsuperscript{419} Accordingly, the Court finds that neither of these ECHR provisions have been violated\textsuperscript{420} and that the case is clearly unfounded.\textsuperscript{421} Therefore, the Court finds it

\textsuperscript{411} \textit{Magnolia} claim §§74-75.
\textsuperscript{412} \textit{Magnolia} claim §§71-73.
\textsuperscript{413} \textit{Magnolia} claim §§76, 104.
\textsuperscript{414} \textit{Magnolia} claim § 125.
\textsuperscript{415} Stockholm Distrcict Court \textit{Magnolia} 4.
\textsuperscript{416} \textit{Idem}.
\textsuperscript{417} \textit{Idem}.
\textsuperscript{418} Stockholm Distrcict Court \textit{Magnolia} 5.
\textsuperscript{419} \textit{Idem}.
\textsuperscript{420} \textit{Idem}.
\textsuperscript{421} Stockholm Distrcict Court \textit{Magnolia} 6.
unnecessary to order disclosure of documents that could further carve out the factual allegations of the claimants.\textsuperscript{422}

The Appellate Court deals with the case even more briefly, in only two pages. It agrees with the District Court and, although it seems to provide an opening regarding the possibility of immaterial damage, it adds that the claimants have not substantiated how their lives would have been put at risk.\textsuperscript{423} It sees no reasonable grounds for granting damages.\textsuperscript{424}

It is important to note that both courts confine themselves to denying the claimants a remedy under the ECHR, for these have not convincingly argued how their ECHR rights would have been violated. The courts do not deny the convention could come at play in climate change related situations. On the contrary, the District Court’s relatively elaborate discussion of Strasbourg case law suggests it interprets the scope of Articles 2 and 8 to possibly encompass violations due to climate change. The addition of the Appellate Court also suggests that the claimants could have relied on Article 2 if they would have substantiated how their lives would be risked.

Moreover, the Courts did not rely on some form of doctrine of the separation of powers to dismiss the request to declare illegal the parliamentary decision to sell Vattenfall’s lignite assets. As a matter of fact, they choose not to address this request at all. It is a pity this choice is not explained in the judgments, but I presume the courts did not feel the need because of the ‘clear unfoundedness’ of the claim.

In short, the Magnolia claim seems to have been declined due to a mismatch between its target – prevent extra emissions in the future, for the benefit of all – and the remedy requested – damages, typically used for grievance caused in the past, to be paid to specific individuals.

Environmental civil liability claims often fail in Sweden because of difficulties to prove actual injury to individuals caused by an act or omission of the State.\textsuperscript{425} In regard of Magnolia it has been noted that the legal argument of the claim was

\textsuperscript{422} Idem.
\textsuperscript{423} Stockholm Court of Appeal Magnolia 2.
\textsuperscript{424} Idem.
underdeveloped, sometimes even to a ‘puzzling’ extent.\textsuperscript{426} The claim does not render explicit how the various legal sources relate to each other. Unlike the claim in the \textit{Urgenda} case, on which its lawyers worked for years, the \textit{Magnolia} claim gives the impression to have been produced rather hastily. Be that as it may, it has pushed the boundaries of democratically legitimate judicial law-making in European private law, as I illustrate in the next subsection.

\subsection*{4.3. Emancipation of people abroad through the \textit{Magnolia} case}

\textit{Magnolia} breathes uneasiness about cleaning the national slate by laying emissions at the door of another State, instead of actually reducing greenhouse gas emissions. National borders might be legally relevant for Justitia but they are immaterial to Mother Earth. As the young environmentalists put in their claim: ‘The fact that greenhouse gasses from Vattenfall’s lignite operations take place in another country is irrelevant because they will also impact Swedish territory and Swedish nationals’.\textsuperscript{427}

In the other climate cases in European private law, national emissions are questioned for the sake of people abroad (I mean ‘national’ from the perspective of the court). The \textit{Magnolia} case presents the mirror image: it complains on behalf of national citizens about emissions that used to count as national, but now count as foreign.\textsuperscript{428} Like the other cases, however, \textit{Magnolia} questions the legitimacy of a democratic decision-making procedure that excludes people abroad.\textsuperscript{429} That is, the claimants are not citizens of the Czech Republic, so through the sale they lost their public autonomy regarding the use of the lignite assets in question. Moreover, without national boundaries, artificial slate cleaning would not have been an option, as can be illustrated by the thought experiment of a borderless world. There, it would be impossible to sell polluting coal plants to another jurisdiction; thus, such a sale evidently is not one of the ‘global solutions’ sought for. To put it yet differently, when keeping in mind the goal of international politics to have global warming not exceed 2°C, the sale of the lignite assets is not \textit{politically effective} to reduce emissions, nor \textit{normatively legitimate} for the claimants who want to stay in control of the operation of these assets to realise necessary reductions.

\footnote{\textsuperscript{426} Cf de Vílchez Moragues (n 398) 16.}

\footnote{\textsuperscript{427} \textit{Magnolia} claim §107.}

\footnote{\textsuperscript{428} To pursue a claim under private law, the claimants were more or less forced to invoke their own interest, as a merely public interest would not suffice for standing, cf ‘European E-Justice Portal - Access to Justice in Environmental Matters: Sweden’ (n 425) VI.
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\footnote{\textsuperscript{429} And future generations, as will be elaborated on in the next chapter.}
Consequently, the *Magnolia* case has a threefold importance when seen as a contribution to the debate on climate change in European private law. Firstly, the Swedish claimants felt encouraged by the success of the Dutch *Urgenda* decision at first instance, and therefore regarded the sale of Vattenfall’s lignite assets as a matter of law rather than politics. Hence a lawsuit was in their eyes the apt means to address the matter.

Secondly, the claim addresses – still as a matter of law rather than politics – the injustice of a legal system in which national boundaries allow States to pass the buck to others when it comes to climate change, whereas this clearly does not offer a solution to this pressing, inherently transboundary issue. Annika Hagberg, one of the actors behind *Magnolia*, commented in an interview that the case proves ‘the legal system is not adapted to climate change,’ thereby, to put it in Fraser’s terms, delivering critique to the political effectiveness and normative legitimacy of the current legal-political system. In Habermasian vocabulary: the claimants addressed the loss of their public autonomy concerning the lignite assets through a private lawsuit, because they fear for their private autonomy, i.e. a life in Sweden untouched by dangerous climate change.

Thirdly, even though neither of the courts established a violation of the ECHR, they apparently held the Convention to be plausibly relevant for a climate lawsuit. They were aware of a constitutionalised environment to the extent that, had they been able to establish climate change damages to the claimants, they would have been willing to use tort law to remedy these. Thus – while one should not read too much in the Courts’ silence on the separation of powers – the judgments give the impression that both Swedish courts left open the possibility that well-argued claims regarding climate change could be dealt with by the judiciary rather than the political branches of government. Would the claimants have *factually* substantiated the violation of their fundamental rights under the ECHR, then the Courts might have seen the *legal* space to grant them a remedy whilst respecting legal and factual boundaries to their role.

5. National boundaries as an obstacle to operationalise a constitutionalised environment: The Norwegian case on Arctic Oil

So far, one other climate case has arisen in Scandinavia, namely the Norwegian case. It shows how national boundaries can still limit courts’ power to rule in

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favour of the environment, even where it is constitutionalised. The case is known as *The People v. Arctic Oil*, (hereinafter: *Arctic Oil*).\(^{431}\) It shares some characteristics with the *Magnolia* case. It was similarly launched by youngsters, namely united in the NGO Natur og Undom (Nature and Youth), assisted by the organisations Greenpeace Nordic and Besteferldrenes klimaaksjon (Grandparents climate action). Moreover, *Arctic Oil* also targets the State for a particular governmental decision, this time one to grant licences to drill for oil in the Arctic sea. Other climate cases directed against governments, such as *Urgenda* and the Belgian *Klimaatzaak*, instead challenge general policy. Thirdly, the claimants also lost, but so far only on first instance.\(^{432}\) They directly appealed to the Supreme Court of Norway (*Høyesterett*),\(^{433}\) but this Court refused to hear the case so it went first to the Court of Appeal (*Lagmannsretten*).\(^{434}\) This appeal is to be discussed below in Section 10.

The main basis of the claimants’ legal argument is section 112 of the Norwegian Constitution (the environmental provision). Therefore, *Arctic oil* can be classified as a case concerning constitutional review of an administrative decision. However, the Norwegian legal system does not draw a distinction between administrative and civil courts,\(^{435}\) and Norwegian administrative and civil law are greatly interrelated.\(^{436}\) The review of administrative decisions is regulated by the 2005 Act Relating to Mediation and Procedure in Civil Disputes.\(^{437}\) In other words, the dispute is guided by civil procedure, which becomes apparent, for example, in the claimants and the defendant having prepared a joint agreed presentation of the facts for the Court.\(^{438}\) Hence I deem this case to fall within the scope of European private law.


\(^{432}\) Oslo District Court (Oslo Tingrett) 4 January 2018 Natur og Ungdom & Greenpeace v Staten, *Arctic Oil*, case number 16-166674TVI-OTIR/06.

\(^{433}\) Cf Wahl-Larsen Advokatfirma *Direct Appeal to the Supreme Court of Norway*, 5 February 2018.

\(^{434}\) Norwegian Supreme Court (Norges Nøyesterett) 12 April 2018 Natur og Ungdom & Greenpeace v Staten, case number 18-043328SIV-HRET, *Artic Oil*.


\(^{436}\) Cf WH van Boom, Meinhard Lukas and Bjarte Askeland, *Tort and Regulatory Law / Willem H. van Boom, Meinhard Lukas, Christa Kissling (Eds.) ; with Contrib. by Bjarte Askeland ... [et Al.]* (Springer 2007) 205.


\(^{438}\) Cf §2.1 District Court *Arctic Oil*. 

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5.1 People abroad in the Arctic Oil claim

The Arctic Oil claim is directed against a governmental decision to award ten licences to thirteen companies to search for and produce petroleum (oil and gas) within the geographic area of the license. This ‘Licensing Decision’ was the result of a lengthy process: after impact-assessments conducted by the Ministry of Petroleum and Energy, the Norwegian Parliament (the Storting) agreed to open up the Barents Sea South and the Barents Sea East for petroleum activities in respectively 1989 and 2013. Subsequently, the Norwegian government held several licencing rounds; the licences complained about in the Arctic Oil case are the result of the 23rd round held in 2016.

The plaintiffs challenge the Licensing Decision based on two alternative lines of reasoning. Primarily, they maintain that the decision is contrary to section 112 Norwegian Constitution. Alternatively, they argue that the environmental impacts of the Licensing Decision were not assessed to an adequate degree.

As for the primary line of reasoning, the claimants point to a constitutional revision in 2014 – only two years before they launched their case – which reformulated section 112 in stronger terms. Whereas its predecessor stipulated that the State Authorities ‘issue further provisions’ for its implementation, today’s version says the State Authorities ‘shall take measures’. The full text of the section now reads:

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles.

According to the plaintiffs, this means individuals now have rights under section 112; that it imposes obligations on the legislature, and that the judiciary

439 In the judgment also referred to as the Norwegian Royal Decree of 10 June 2016.
440 Cf People v Arctic Oil claim 18 October 2016.
441 Idem, §9.2.1.
accordingly may probably review legislation against this provision, and certainly administrative decisions like the Licensing Decision at issue.\textsuperscript{442}

To determine at what stage an environmental encroachment amounts to a violation of section 112, the plaintiffs put forward the ‘presumption principle’; section 112 is to be interpreted in accordance with international legal rules and fundamental principles of international law.\textsuperscript{443} Thus, they ask the Court to use international law to shape the rather open norm of section 112 in a similar fashion to the way in which the District Court of The Hague shaped the open private law norm of hazardous negligence.

For this interpretative purpose, the Norwegian claimants point to international climate change law, the UNFCCC and, importantly, the ensuing Paris Agreement; Norway was the first developed country in the world to ratify this ambitious document and it was even a Norwegian representative who pushed for the high-level of ambition in it,\textsuperscript{444} whereas ten days after Norway’s ratification, the government issued the licenses. Furthermore, they rely on the international human rights enshrined in Articles 2 and 8 ECHR, and Article 13 ICESCR, mentioning the fact that the Human Rights Committee and the UN Committee on the Rights of the Child both emphasised that States have affirmative obligations to mitigate climate change.\textsuperscript{445} Also, they invoke the Norwegian and international environmental precautionary principle, meaning firstly, that the lack of preventive measures cannot be justified by a lack of scientific knowledge on risk. Secondly, that the State should prove the Licensing Decision does not have negative impact rather than that the claimants should prove these impacts will arise.\textsuperscript{446}

Perhaps the most interesting for the purposes of this chapter, however, is that the claimants maintain that section 112 of the Norwegian Constitution also protects interests outside Norway’s boundaries:

\begin{quote}
Several of the negative environmental impacts of the Licensing Decision encroach entirely upon or partially affect the environment outside Norwegian territory. It is therefore necessary to understand clearly that Section 112 of the Constitution also sets limitations for
\end{quote}

\textsuperscript{442} Idem.
\textsuperscript{443} Idem, §9.2.2.
\textsuperscript{444} Cf Idem, §6.4.4.
\textsuperscript{445} Idem, §9.2.5.
\textsuperscript{446} Idem, §9.2.3.
decisions where the negative environmental impacts of the decision entirely or partially come to bear outside Norway.447

To underpin this position, the plaintiffs use the non-discrimination principle codified in the Norwegian Pollution Act, which states that pollution shall be counteracted ‘irrespective of whether the damage or nuisance arises within or outside Norway’. They also elaborate on the international no harm principle, as developed by the International Court of Justice in the Pulp Mills case,448 and maintain it imposes stringent requirements on Norway to avoid harm to other countries. Both the non-discrimination principle and the no harm principle would be embedded in section 112.

The plaintiffs apply the thus understood section 112 to the facts of the case, and conclude: ‘The planet’s natural resources, including its climate, are protected by Section 112, first paragraph of the Constitution. No territorial limitations apply here.’449 The only argument in favour of the Licensing Decision – economic yet uncertain450 gain – cannot justify it; the climate threat can hardly be denied and calculations of the carbon budget show there is no space for more petroleum.

After shortly explaining that their observations also support their second line of reasoning – that the lack of a discussion on adverse environmental effects of the Decision leads to a procedural, administrative error451 – the plaintiffs lay out their claim. They want the Licensing Decision to be declared invalid and the Government of Norway to pay for their legal costs.452

5.2 People abroad in the decision of the District Court

Although the claim was disputed by the Norwegian Government for a number of reasons, the Oslo District Court agrees with the plaintiffs on one point, namely that section 112 Norwegian Constitution is a provision that entails individual rights.453 The Court says this is clear from the preparatory works and scholarly literature; actually, the section was already a ‘rights provision’ before the constitutional revision of 2014.

447 Idem, §9.2.4.
449 People v Arctic Oil claim, §9.2.6.
450 Idem, §§9.2.6-7.
451 Idem, §9.3
452 Idem, §10.
453 District Court Arctic Oil, §5.2.1.
The Court continues to note that the parties agree that (traditional) environmental harm and climate deterioration are covered by the provision.\textsuperscript{454} The parties also agree that section 112 cannot be invoked against any environmental encroachment, as a certain threshold needs to be met. They, however, disagree on that threshold – more specifically on the question, whether section 112 covers CO\textsubscript{2} emissions occurring after combustion of Norwegian oil and gas abroad.\textsuperscript{455}

The Court provides its own view on the latter point of discussion based on a rather restricted interpretation of section 112 of the Norwegian Constitution:

\begin{quote}
\textit{\ldots fulfilment of the duty to take measures under the third paragraph of Section 112 will mean that a decision which is otherwise prohibited becomes lawful. How Norwegian authorities would be able to fulfil their duty to take measures for exported oil and gas has not been clarified for the Court.} \\
\textit{(...) According to what the Court understands, such measures will not be available to Norwegian authorities for emissions from activities abroad. The relationship between the first and third paragraphs of section 112 therefore argues against – as the Court sees it – considering emissions abroad as covered by Section 112.}\textsuperscript{456}
\end{quote}

Apparently, the Court understands the word ‘measures’ in the third paragraph of the section as covering only active measures to be taken after the licenses at issue are made operational. It does not consider ‘measures’ to possibly include not \textit{doing} something, in this case, not taking the Licensing Decision to avoid extra emissions abroad \textit{beforehand}.\textsuperscript{457} Seemingly, such a possibility was not ‘clarified’ by the claimants.

The Court noted that neither international climate change law nor Norwegian law includes the obligation to account for emissions resulting from exported oil and gas that are burnt abroad. Norway is only responsible for environmental harm abroad resulting from CO\textsubscript{2} emissions occurring within its national boundaries.\textsuperscript{458} Consequently, the Court only takes into account the extra emissions that occur within Norwegian territory as a result of the Decision (i.e. ‘scope 1’ emissions, in the terminology of the \textit{Greenhouse Gas Protocol}), and calculates that the harm

\textsuperscript{454} \textit{Idem,} \textsection{5.2.2.}
\textsuperscript{455} \textit{Idem.}
\textsuperscript{456} \textit{Idem.}
\textsuperscript{457} Cf. Also Marius Gulbranson Nordby, ‘Hvordan Ikke Spreng Jotunheimen’ [forthcoming].
\textsuperscript{458} District Court \textit{Arctic Oil,} \textsection{5.2.2.}
caused will be marginal to the total load of emissions caused by petroleum activities.459

The District Court also emphasises the separation of powers related arguments. Considering whether the Decision violated section 112, it says, weight should be attached to the political discretion of the ‘Storting’, i.e. the Norwegian Parliament.460 Although the Storting did not deliberate on the constitutionality of the Decision, it did take a position on the Decision’s predicate, namely when opening the Barents Sea South-east for petroleum activities in 2013.461 Furthermore, several debates in the Storting showed that there was no political support to refrain from issuing the licenses, since questions related to the 23rd licencing round have been up for a vote three times.462 Firstly, in 2014, a member of parliament proposed to halt the licensing round in light of the then latest IPCC report – this proposal was however not adopted. Secondly, in 2015, another two proposals failed, these two asking to refrain from petroleum activities close to the polar region. And thirdly, in 2016, still five proposals more tried to delay and/or prevent the petroleum activities, but also none of these were adopted by the parliament.

The Court summarises that all this ‘cannot easily be understood other than as the majority in the Storting has regarded the risk for environmental harm and climate deterioration due to the Decision’ as acceptable.463 Although the Court finds the Storting’s involvement in itself enough to conclude that the duty to take measures has been fulfilled, it also otherwise reaches that conclusion in light of the safety measures put in place by the Government.464

On the basis of the separation of powers, the Court also dismisses all the claimant’s arguments in which the Licensing Decision is put in the broader context of necessary action against climate change, for it finds none of these arguments relevant in assessing the constitutionality of the decision: ‘In part it is talk of possible impacts from the Decision that are too remote in relation to the risk that is relevant to assess, and in part the issues involve overall assessments

459 District Court Arctic Oil, §5.2.3.
460 Idem, §5.2.2.
461 Idem, §5.2.2.
462 Idem, §5.2.4.
463 Idem.
464 Idem.
that are better assessed through political processes that the courts are not suited to reviewing.\textsuperscript{465}

The plaintiffs focussed on section 112 and its interpretation consistent with international law. Interestingly, they did not rely directly on Norwegian obligations under international (human rights) law – which is why these could not be considered by the Court as a procedural matter,\textsuperscript{466} even though these obligations were mentioned in amicus curiae briefs written by three\textsuperscript{467} organisations.\textsuperscript{468} The Court had to respect the factual boundary to its role.

Since the Court does not agree on the plaintiffs’ constitutional complaints, it continues to consider their alternative line of reasoning concerning administrative errors.\textsuperscript{469} It goes through the applicable administrative requirements,\textsuperscript{470} without finding any violation.\textsuperscript{471} That is, climate effects have sufficiently been assessed, for the licensed explorations only impact the climate marginally and the Storting considers Norwegian climate policy more generally in other contexts.\textsuperscript{472} Also concerns for the polar region have been sufficiently considered, both by the administration and by the Storting.\textsuperscript{473} The Court held that if commercially exploitable discoveries are made, more environmental impact assessments will need to be carried out – at that time a new management plan might be made, taking into account new knowledge.\textsuperscript{474}

Secondly, the Courts sees no errors relating to the economic assessment of the Licensing Decision. The claimants relied on a report referring to global climate costs, but the Court repeats what has already been put forward in relation to the constitutional complaint: ‘The Court cannot see that the duty to assess impacts includes climate consequences of CO\textsubscript{2} emissions from oil and gas exported

\textsuperscript{465} Idem.
\textsuperscript{466} Cf. section 18-5 of the Dispute Act, stipulating ‘...The court can reject the submission by interlocutory order if the submission due to its form, scope or content is ill suited to throw light on the public interests in the case...’
\textsuperscript{467} Namely the Environmental Law Alliance Worldwide, the Allard. K. Lowenstein International Human Rights Clinic and the Center for International Environmental Law.
\textsuperscript{468} District Court \textit{Arctic Oil}, §5.2.5.
\textsuperscript{469} Idem, §5.3.1.
\textsuperscript{470} Idem, §5.3.2.
\textsuperscript{471} Idem, §§5.3.3–5.3.7.
\textsuperscript{472} Idem, §5.3.3.
\textsuperscript{473} Idem, §5.3.4.
\textsuperscript{474} Idem.
abroad or therefore the costs of such emissions." And it adds: ‘For this to have been the case, it would have to have been stated clearly in the rules. It is not.’ As has been shown in the introduction to this chapter, this is actually true; in the current legal/political system, neither companies nor States are deemed responsible for those emissions that fall in ‘scope 3’ according to the Greenhouse Gas Protocol.

Lastly, the Court finds the Licensing Decision sufficiently justified, especially since the plaintiffs have not elaborated on the ‘stringent requirements’ section 112 of the Constitution would impose, according to them. The Court concludes by stating it is issuing a judgment in favour of the government, and that the latter’s procedural costs are to be paid by the environmental organisations. There is no violation of the law and this climate case is lost by Natur og Ungdom, Greenpeace and the Norwegian Grandparents.

This outcome appears to be the result of firstly, the Court’s narrow interpretation of the word ‘measures’ in section 112. By excluding the possibility that these measures could cover the negative action not to grant licenses, the Court’s weighing of measures that are taken becomes almost superfluous in light of the claim made in Arctic Oil. Secondly, the claimants relied only indirectly on Norway’s international obligations, namely in giving meaning to the rather open norm of section 112. Inter alia due to the Court’s narrow reading, this strategy was unsuccessful. A direct appeal to international obligations might have been more successful, although it must immediately be added that, as has been shown in the introduction to this chapter, the IPCC Reporting Guidelines imply the country of combustion being responsible for emissions, not the country in which elsewhere burnt petroleum originates.

Thirdly, the doctrine of the separation of powers plays a major role in this case’s outcome: the parliament had so elaborately discussed the licenses in various debates, that the Court did not dare to jump in, even though it found that section 112 of the Constitution could be a basis for judicial review. Although the Court, thus, was willing to assess the validity of the Decision, it felt unable to do that against the background of overall Norwegian climate policy, as such would rather belong to the political realm.

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475 Idem, §5.3.5.
476 Idem.
477 Idem, §5.4.
478 Idem, §5.5.
5.3 Emancipation of people abroad through the Arctic Oil case

The Arctic Oil claim essentially asks Norway to take responsibility for climate change beyond its borders. Norway is a small state population-wise, but it is among the biggest oil exporters in the world.\textsuperscript{479} It is not Norway that burns its own oil and gas, but exporting it means they will be burnt at some point and thus lead to emissions deteriorating the global climate. The claim breathes the same uneasiness as the Magnolia claim; passing the buck to other States does not solve the climate problem. To hide behind national boundaries is an artificial, legal solution, which is neither politically effective nor normatively legitimate, when the climate threat is real.

At the same time, the District Court’s decision in the Arctic Oil case plainly illustrates how the boundaries of democratically legitimate judicial law-making limit the judiciary in delivering environmentalist remedies. The boundaries to the role of the Court prohibited it from stating that current international law imposes on Norway the obligation to revoke the licences. Due to the \textit{factual} boundaries laid down in civil procedure, the Court did not consider Norway’s direct obligations under international law, but only section 112 Norwegian Constitution through which the invoked international legal sources were supposed to have indirect effect. It could have come to another conclusion in interpreting section 112 less narrowly, but to do so would have required courage, as the Court then would have to go against the outcomes of a series of parliamentary debates. This is related to the \textit{legal} boundaries to its role, which led it to conclude that the government is not responsible for Norwegian petroleum combusted abroad.

Section 112 begins with the words ‘Every \textit{person} has the right to...’, so arguably, this right could encompass more people than Norwegian citizens only.\textsuperscript{480} It is, however, nowhere made explicit whether the interests invoked by the Arctic Oil claim centre around those of nationals, like in the Magnolia claim, or also encompass people in other nations, such as in the Urgenda case. The claim puts across a certain cosmopolitism by relying on the Constitution’s text and simply referring to ‘every person’. Attention is put less on who is mostly affected; as climate change will have global effects the more pressing question is who are, or who regard themselves as mostly responsible.

\textsuperscript{479} Cf. ‘The World Factbook — Central Intelligence Agency’


\textsuperscript{480} ‘\textit{Enhver har rett til}...’
Norway has a green self-image, illustrated by its active engagement in international climate change politics and its swift ratification of the Paris Agreement. At the same time, its almost unequalled national wealth heavily depends on its petroleum revenues. Before the discovery of oil in the 1970s, it was a rather poor nation of mostly fishermen. The issue ‘to drill, or not to drill’ therefore is existential to the Norwegian identity.\textsuperscript{481} Unsurprisingly, the case has led to societal debates.\textsuperscript{482} Hence the District Court felt uncertain in developing an interpretation of section 112 that would prohibit further oil explorations.

In short, this climate case has a threefold significance in terms of pushing the boundaries of democratically legitimate judicial law-making in European private law. Firstly, the \textit{Arctic Oil} claimants formulated the invalidity of the Licensing Decision as a legal rather than a political matter. They felt encouraged by the Urgenda case, referring to it in their claim.\textsuperscript{483} The need to tackle climate change is so big, the claimants felt, that it can invalidate governmental decisions as a constitutional matter. It should not be overlooked that, secondly, the Court actually agreed with the claimants on this matter. The case provides an example of a constitutionalised environment. Even the Norwegian State agreed with the claimants that climate change falls under the scope of section 112. The Court furthermore determined this is a ‘rights provision’ that may be used to set aside governmental decisions. Thus, the climate as such can indeed be a matter of law in the Norwegian system, even though the Licensing Decision was upheld in this case.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{483} \textit{People v Arctic Oil} claim, §1.
\end{itemize}
\end{footnotesize}
Lastly and perhaps most importantly, *Arctic Oil* labelled the hypocrisy of a nation profiting hugely from petroleum activities, but not willing to take the responsibility for resulting emissions – scope 3 emissions, in the *Greenhouse Gas Protocol*’s terms. This goes to the heart of the problem of a world where Justitia restricted by the People’s Power is confronted with a danger to Mother Earth as a whole, leading to politically ineffective and normatively illegitimate results.

6. The ECHR contains positive State obligations to prevent climate change: The Dutch Urgenda case on appeal

As also expanded upon in the former chapter, the *Urgenda* decision on first instance received heavy critique, especially but not exclusively in the national legal journals. The Dutch State appealed on almost every possible point, emphasising in the media mostly that it was not up to the Court to determine the Dutch greenhouse gases reduction target, as this is a political question that falls within the discretion of politics. Urgenda appealed as well, be it only at one point, namely that the District Court had said that Urgenda could not rely directly on Articles 2 and 8 ECHR.

Living in the Netherlands, I went to The Hague on the 9th October 2018 to hear the Court of Appeal read its decision aloud. The atmosphere in the room was tense; it was overly full with Urgenda supporters and journalists. Euphoria, laughter and applause was the public’s reaction to the verdict that turned out to be favourable to Urgenda rather than the State.

6.1 People abroad in the decision of The Hague Court of Appeal

The Hague Court of Appeal observed that the parties do not dispute the facts as they were determined by the Court of First Instance – although they disagree on how these facts should be weighed. Sketching the context, the Court recalls the international character of the problem and its solutions, saying that within climate scientists and the ‘world community’ there is, for a considerable time now, a consensus that global warming should be kept below 2°C. Also the Dutch State recognises that CO2 emissions should be strongly reduced and eventually need to be ended. Urgenda however, finds that the reduction efforts

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484 For instance, also in Germany critique was voiced, cf Bernhard W Wegener, ‘Urgenda – Weltrettung per Gerichtsbeschluss? Klimaklagen Testen Die Grenzen Des Rechtsschutzes’ [2019] Zeitschrift für Umweltsrecht (ZUR) 3.
486 *Idem*, §3.5
487 *Idem*, §3.7.
of the State do not go far enough and pled at first instance to order the State to reduce its emissions with 25-40% by 2020, compared to 1990 levels; the Court of First instance ordered 25%. As Urgenda did not appeal this number, the Court of Appeal cannot order more than 25%, as anything above this number is no longer disputed by the parties.488 (I am unsure whether Urgenda had realised this implication of the factual boundary to the Court’s discretion.)

The Court goes on to emphasise the unfairness of the global climate problem as well as the international cooperative scheme developed to tackle it: it extensively discusses the UNFCCC, noting this document’s goal to protect of ‘humanity’;489 that the parties aim to protect the climate system, each according to their responsibilities and potential, considering the developing countries that are especially vulnerable for climate change;490 and stressing that developed nations listed in Annex I, ‘considering their per-capita emissions, their prosperity and the long history of emissions, should internationally take the lead in combatting climate change and its disadvantageous effects.491 The Court summarises in one page the outcomes of UNFCCC COPs since 1997, noting that ever since 2007, States have endorsed the scientific model saying that Annex I countries must reduce between 25 and 40 % of greenhouse gas emissions by 2020, compared to 1990 levels.492

The Court also refers to the United Nations Environmental Protection Agency’s (UNEP’s) yearly reports on the so-called ‘emissions gap’ – the difference between the desired reductions to prevent dangerous climate change and what countries promised to reduce.493 UNEP has noted that when the emissions gap will not filled by 2030, it is highly unlikely that the goal of 2°C of global warming can still be realised.494 In 2015, the Paris Agreement was concluded, which calls upon countries individual responsibilities – it no longer aspires to global agreements on emission reduction.495 The target of 2°C warming as a maximum is upheld in this document, in which the parties agree to strive to even keep it at 1,5°C.

488 Idem, §3.9.
489 Idem, §5.
490 Idem, §8.
491 Idem, §9.
492 Idem, §11.
494 Idem, §14.
495 Idem, §15.
The Court also discusses the European ETS Directive and the *Effort Sharing Decision*,\textsuperscript{496} and the national Dutch context.\textsuperscript{497} ‘Until 2011 the Netherlands (being an Annex I country) used a reduction target in 2020 of 30\% compared to 1990,’ notes the Court.\textsuperscript{498} It adds:

\begin{quote}
*The Netherlands has relatively high CO2 emissions per capita compared to other industrialised nations. The Netherlands’ emissions are now at place 34 of 208 countries. Of the 33 countries with higher emissions, there are only nine with higher emissions per capita, none of which being an EU Member State. (…) CO2 emissions in the Netherlands have barely declined since 1990, and in recent years they have even increased. (…)\textsuperscript{499}*
\end{quote}

It is only after this factual context that the Court moves to consider the actual dispute and the law. Contrary to the judgment at first instance, the Court of Appeal found that Urgenda *does* have standing to directly invoke Articles 2 and 8 of the ECHR. It reasons that even if Article 34 of the *European Convention of Human Rights* does not allow societal organisation like Urgenda to argue claims before the ECHR, this is a European rule that cannot determine who has standing in *Dutch* courts.\textsuperscript{500} The State opposed standing as far as Urgenda is representing future generations and people abroad, but the Court did not deem it necessary to address this point as it was undisputed that Urgenda *has* standing, namely representing the current generations of Dutch people.\textsuperscript{501}

Undisputed by the parties was that climate change will be very dangerous, leading to ‘hundreds of thousands of deaths in Western-Europe alone in the second half of this century’.\textsuperscript{502} Therefore, the Court observes, there is a severe risk that the current generation of Dutch residents will be confronted with a loss of life and/or disturbance of family life as protected in the Articles 2 and 8 ECHR respectively.\textsuperscript{503} The State has a positive obligation to protect the rights enshrined in these Articles. This obligation is concretised in the reduction of greenhouse gasses with at least 25\% in 2020, a target that the IPCC made known in 2007 and that was endorsed by virtually all COPs since. ‘Whereas this does not amount to a legal norm with direct effect, it does in the opinion of the Court confirm the *fact*

\begin{footnotes}
\footnotetext[496]{*Idem, §§16-18.*}
\footnotetext[497]{*Idem, §§19-26.*}
\footnotetext[498]{*Idem, §19.*}
\footnotetext[499]{*Idem, §26.*}
\footnotetext[500]{*Idem, §35.*}
\footnotetext[501]{*Idem, §37.*}
\footnotetext[502]{*Idem, §44.*}
\footnotetext[503]{*Idem, §45.*}
\end{footnotes}
that a reduction of 25-40% by 2020 is the minimum necessary to prevent dangerous climate change'.  

The Court of Appeal already agreed with the outcome of the judgment at first instance, but it proceeded to reject all the arguments made by the State. The State had pointed to transnational mechanisms in order to deny its own responsibility. It had argued that it could not use a reduction target higher than the EU’s target of 20% for 2020. The Court disagrees, pointing to the fact that the EU’s measures do not prevent the Member States from issuing higher protection measures. The State also argued that to do more would lead to a ‘waterbed effect’, i.e. that lower emissions in the Netherlands would only create room for more emissions elsewhere in the EU. The Court responded that this argument mistakenly assumes that other EU Member States would fully use the available room for emissions under the ETS-system, whereas this is not the case, as illustrated by countries such as Germany, UK, Denmark, Sweden and France, that have already reduced more than the Netherlands.

The Court of Appeal also found that the State did not substantiate its allegations on the risk of ‘carbon leakage’, i.e. that companies would replace their businesses outside the Netherlands, nor did the State substantiate its argument that the level playing field for Dutch business would diminish – and besides, the Court notes that it does not see how not upholding this level playing field would violate any rule of law. The Court finally remarked that the current policy of the Netherlands aims at 49% for 2030, which is higher than the EU’s goal, but that ‘apparently, these considerations were not of overriding importance’.

The State had argued that it could take to adaptation rather than mitigation measures, but the Court noted that adaptation measures cannot adequately prevent the disastrous consequences the earth warming up too much. The State also argued that 25% was a goal for Annex I countries as a whole, which would not mean that an individual Annex-I country should realise this reduction. The Court notes that the State, however, had failed to substantiate why a lower

504 Idem, §51 (emphasis added).
505 Idem, §54.
506 Idem, §55.
507 Idem, §56.
508 Idem, §57.
509 Idem.
510 Idem, §58.
511 Idem, §59.
number percentage would be applicable to the Netherlands. Since the Dutch gross domestic product is above average in the EU, and this has led to a relatively high reduction goal within the European Effort Sharing Decision, it may be assumed that at least the goal for Annex I countries as a whole is applicable to the Netherlands as well.

The State also argued that in absolute numbers, the Dutch emissions are relatively low compared to the global whole. The Court replied:

> the Court recognises that at issue is a problem of a global scale and that the State cannot solve this problem alone, but this does not release the State from its obligation to, from its territory and within its capabilities, take measures that, together with measures taken by other States, offer protection against dangerous climate change.\textsuperscript{512}

Neither does the Court follow the State’s argument that causality would be problematic. Not only is causality less strict as a requirement when an injunctive order is requested rather than damages, moreover, if the State’s argumentation were to be followed, an effective remedy against a worldwide problem such as the one at hand would be absent.\textsuperscript{513}

The Court emphasised that the Dutch State has known about the problem of climate change for a long time, and until 2011 used a reduction target of 30% - therefore the State’s argument that 2020 would result in a deadline being imposed that was too soon was dismissed.\textsuperscript{514} The Court also rejected the State’s arguments on the separation of powers, for ‘the Court of Appeal is obliged to apply provisions with direct effect of treaties to which the Netherlands are party, such as Articles 2 and 8 ECHR.\textsuperscript{515}

The Court of Appeal upheld the reduction order of at least 25% by 2020 compared to 1990 levels, and the State has to pay for Urgenda’s procedural costs.

6.2 Emancipation of people abroad through the Urgenda case on appeal

The *Urgenda* decision by the Court of Appeal is significant in the context of this chapter and this thesis for many reasons, including one that may easily escape a reader’s attention: virtually nowhere in the decision it is explicitly said that the District Court was wrong (except for when addressing Urgenda’s standing to rely

\textsuperscript{512} Idem, §62.
\textsuperscript{513} Idem, §64.
\textsuperscript{514} Idem, §66
\textsuperscript{515} Idem, §69.
directly on Articles 2 and 8 ECHR). This means that the current state of Dutch law is that claims concerning climate change can still be based on the doctrine of hazardous negligence read into Article 162, Book 6, Dutch Civil Code. This doctrine is also invoked in the Dutch climate case against Royal Dutch Shell, as we will below in section 7.

Another point where the Court of Appeal did not explicitly say the District Court was wrong regards Urgenda’s standing on behalf of people abroad. The Court of First Instance had held that Urgenda can partially base its claims on the fact that the Dutch emissions also have consequences for persons outside the Dutch national borders.516 The Court of Appeal, however, saw no need to address the State’s complaints in this regard and simply said that it was undisputed that Urgenda had standing, namely as far as representing people inside the Netherlands.

Especially relevant in the context of this chapter is how much emphasis the Court of Appeal puts on the need for international cooperation to combat climate change, reiterating all the international legal efforts made so far, and how much the Court emphasises the Dutch obligation to contribute its share to these international efforts. Its considerations echo the notion of climate justice: ‘...the Netherlands, as highly developed country, has long profited of fossil fuels and it still belongs to the countries with very high per capita emissions, and inter alia for these reasons it should take up on its responsibilities.’517 This awareness is also very present in the court’s decision as it rejects all the State’s arguments saying that the Netherlands should not go beyond the EU-wide established minimum.

Its reasoning here, referring to courts’ obligation to provide effective remedies against rights violations,518 is guided by a motive that one could label as ‘political effectiveness’. If the nation states can escape responsibility by pointing to international cooperation as the sole solution for the climate problem, ultimately that solution will be undermined. The Court enforced this realisation against the Dutch State, and thereby granted at least some political effectiveness to international law that has been enacted to address the global problem of climate change. Thus, it helps to fulfil one of the critical conditions formulated by Nancy Fraser on the way to creating a transnational public sphere out of the international law that does exist.

516 Although it did not explicitly grant the remedy of the order for people from other nations, cf section 1 above.
517 Idem, §66.
518 An obligation codified in inter alia Articles 6 and 13 ECHR and Article 47 CFREU.
The Court received criticism regarding the way in which it constructed the figure of 25%. It was said that the Court illegitimately pulled together into its legally binding injunction (i.e. the 25% order) descriptive climate science, legally unbinding declarations of the COPS, non-justiciable norms from the UNFCCC and unwritten duties of care read into either in the civil code or in international human rights law.\textsuperscript{519} In other words, the Court was said not to respect the legal boundaries of its role, as it did not use (legal) sources in the way it was intended by the legislature; it had magically transformed non-binding sources into binding obligations.

Elsewhere, I have argued that this critique misses the private law dimension of the case; precisely because of the \textit{factual} boundary imposed on judges in private law proceedings, the court has to accept those facts as true that are not (convincingly) disputed by the parties.\textsuperscript{520} The legal norms applied by the Court of Appeal are Articles 2 and 8 ECHR – the rights to life and a family life. The Dutch State recognises that global warming exceeding 2°C is very dangerous. To prevent this, international politics subscribed to a division of efforts in which developed nations must reduce emissions by 25 and 40% by 2020. The State did argue that it could reduce less now, relying on so-called ‘negative emissions’, i.e. techniques to filter greenhouse gasses out of the air. Urgenda objected that such techniques have not yet been invented, which the State had to admit was correct. The Court thereupon concluded that scenarios in which less reduction now is compensated with negative emissions in the future are not realistic. That 25% reduction is the minimum, is thus a factual rather than a legal remark, as also apparent from the Court’s formulation, ‘the fact that a reduction of 25-40% by 2020 is the minimum necessary to prevent dangerous climate change’.\textsuperscript{521} The Advocate General made a similar analysis later when advising the Dutch Supreme Court in the case.\textsuperscript{522}

The Court of Appeal of the Hague established in this decision for the first time that Articles 2 and 8 ECHR impose positive obligations on the State regarding climate change. In the first instance decision in the Urgenda case, the Court had of course already deemed Articles 2 and 8 of the ECHR \textit{relevant} for determining that there was a legal minimum requirement for climate action resting upon the State, as it allowed the Articles to have ‘reflex effect’ in the open norm of

\begin{itemize}
  \item \textsuperscript{519} E.g. Besselink (n 73); Besselink (n 71); Wegener (n 484).
  \item \textsuperscript{520} Burgers and Staal (n 73); Burgers, ‘Critici van Het Urgenda-Vonnis Zien de Privaatrechtelijke Dimensie over Het Hoofd’ (n 138).
  \item \textsuperscript{521} See n. 263 above.
\end{itemize}
hazardous negligence. The courts in Magnolia appeared to deem climate change
to at least fall within the scope of said Articles. However, the Urgenda case on
appeal presents us an instance of a completed constitutionalisation of climate
change in European private law.

Applying the ECHR made the issue of the separation of powers less pressing (as
has also been argued in Chapter II of this thesis). Although the District Court of
The Hague needed to elaborately explain why its decision did not violate the
separation of powers, the Court of Appeal dealt with this in only three sentences.

The ECHR is an international, trans-European source. Its application in this case
may thus have transboundary relevance. Articles 2 and 8 ECHR were invoked in
the Belgian and Norwegian cases, as well as in the Dutch case against Shell.
Outside the domain of private law, the Swiss Klimaseniorinnen case also relies
on these Articles, for example.

In summary, the decision in Urgenda is significant for the purposes of this
chapter for at least three reasons. Firstly, the Court felt that the State’s obligation
to reduce 25% of greenhouse gas emissions by 2020 was a matter of law rather
than politics. Secondly, the court based this obligation on the fundamental rights
enshrined in the ECHR, thus affirming the transnational movement of
environmental constitutionalism, and actualising this movement through
European private law proceedings. Thirdly, whilst the Court of Appeal did not,
unlike the District Court, explicitly grant Urgenda standing on behalf of people
abroad, it did extensively emphasise the need for international cooperation on
the matter of climate change and the obligation that followed therefrom for an
individual State like the Netherlands. For global solutions, the contributions of
all are needed. Thus, the Court successfully reconciled the legal and factual
boundaries imposed on its role in European private law with environmental
constitutionalism, providing at least some political effectiveness to international
law that supposedly was enacted together with people from other nations.

7. The unlawfulness of big oils’ business case: The Dutch case of
Milieudefensie v Royal Dutch Shell

On 4th April 2018, the Dutch environmental NGO Milieudefensie (Friends of the
Earth Netherlands) sent a letter to the oil giant Royal Dutch Shell in which it
threatened to initiate a lawsuit if Shell would not, within eight weeks, alter its
business strategy to align with the goals of the Paris Agreement. Shell immediately responded in the media: ‘We believe that climate change is a complex societal challenge that should not be addressed by courts’. Shell maintained this position in its official response that followed the 28th May in the same year.

As a result, Milieudefensie pursued the lawsuit. On 5th April 2019, seven NGO’s led by Milieudefensie and 17,379 individual co-plaintiffs delivered the summons in their climate lawsuit against Shell. Importantly in the light of the present chapter, the claim addressed *inter alia* the interests of people from other nations. So far, there is no substantive judgment in the case. Shell has not yet delivered any legal documents, but it has consistently communicated climate business strategy is not something for the court to determine.

### 7.1 People abroad in the claim of Milieudefensie v Shell

Milieudefensie and its co-plaintiffs argue that Shell should adopt another business strategy, reducing its net emissions with 45% in 2030, as compared to 2010, and by 100% in 2050. The claimants rely on two distinct legal bases. Firstly, the doctrine of hazardous negligence, on the basis of Article 162, Book 6, Dutch Civil Code and applicable to climate change following the interpretation of the District Court in the *Urgenda* case (see above section 1); and secondly, fundamental rights, echoing the reasoning of the Court of Appeal in *Urgenda* (see above section 6).

The consideration of people abroad begins early in the 235 pages of the claim, namely when arguing that the case falls under the jurisdiction of the District Court in The Hague: ‘The Dutch court in The Hague has (international) jurisdiction,’ following the rules of private international law laid down in the Brussel I-bis Regulation. Moreover, Dutch law should be applied following the rules of private international law laid down in the Rome II Regulation, as Shell’s headquarters are situated in The Hague and as all

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526 *Milieudefensie v Shell* claim, §§75-76 [Translation LB].
claimants are based in the Netherlands: the claim is based on a tort committed in the Netherlands resulting in damage taking place in *inter alia* the Netherlands.

Furthermore, various claimants explicitly refer to the protection of people abroad in their statutory goals, reiterated in the summons in order to prove the interest required for standing. Milieudefensie itself aims to protect the environment and nature ‘home and abroad’;\(^{527}\) Greenpeace aims at a green, peaceful *planet*;\(^{528}\) the Both ENDS Foundation aims at the responsible management of nature the and environment *globally*,\(^{529}\) and is concerned specifically and primarily with those affected the most, namely ‘the poorest and most vulnerable groups in countries of the global south’;\(^{530}\) and Foundation Action Aid aims to combat poverty and injustice in the world, specifically focussing on Africa\(^{531}\) – it wants people in developing countries to profit from their resources and not to be disproportionately disadvantaged by its extraction,\(^{532}\) hence this foundation supports globally the growing movement making a case for ‘climate justice’.\(^{533}\)

The claim elaborately discusses international climate policy and the UNFCCC, stressing how the latter posits climate change as a ‘common concern for mankind’.\(^{534}\) Sketching the relevant facts, it recalls how the IPCC has stressed that climate impacts will be unequally distributed,\(^{535}\) and that the IPCC and WHO have warned for the global health risks.\(^{536}\) The claim also discusses the indirect effects of international climate change for the Netherlands and Europe as a whole, such as diminished food and energy security, as well as global instability and more refugees.\(^{537}\)

> It is evident that the Netherlands is no island able to seclude itself of the international consequences of climate change. Hence, the consequences of climate change abroad must be included when determining the severity (...) of the dangers of climate change for the Netherlands and its residents...

> This is precisely what the American Federal (...) Environmental

\(^{527}\) *Idem*, §130.

\(^{528}\) *Idem*, §156.

\(^{529}\) *Idem*, §234.

\(^{530}\) *Idem*, §242.

\(^{531}\) *Idem*, §263.

\(^{532}\) *Idem*, §274.

\(^{533}\) *Idem*, §278.

\(^{534}\) *Idem*, §373.

\(^{535}\) *Idem*, §433.

\(^{536}\) *Idem*, §449.

\(^{537}\) *Idem*, §§464-472.
Protection Agency (EPA) did regarding the risk analysis for USA citizens...538

Discussing more direct effects for the Netherlands and Europe, such as deaths due to heat, the claim also points to the poorest strata of the population will be the most vulnerable to climate change.539

The claim also argues that Shell violates its duty of care regarding the prevention of dangerous climate change, based on hazardous negligence and fundamental rights. As for the doctrine of hazardous negligence, the claim carefully ticks all the boxes of the criteria that should be met according to the District Court in Urgenda:

(i) the nature and scope of the damage caused by climate change
(ii) the knowledge about and foreseeability of this damage
(iii) the likelihood that dangerous climate change will materialise
(iv) the nature of the acts (or the omissions) of the State and
(v) the inconvenience of taking precautionary measures.540

The claim devotes pages and pages to climate science to show the likelihood of significant damage caused by climate change (i and iii). It furthermore demonstrates that Shell knew about this damage for decennia (ii).541 Richard Heede’s study on the carbon majors is cited to substantiate how large Shell’s contributions are.542 Shell also knew that it was one of the greatest polluters and that it had to take precautionary measures itself.543 However, it is actively investing in fossil fuels, spreading misinformation about the dangers of climate change and lobbying against regulation of an energy transition.544 The claim argues that Shell thus ‘uses her power and influence as one of the world’s largest companies to enrich herself at the expense of society (...).’545 This behaviour is ‘extraordinarily uncareful’.546

The consequence is that the activities of Shell have become a great danger for humanity, human rights, future generations and the environment. Shell therefore now needs to, in the interest of

538 Idem, §§473-4 [translation LB].
539 Idem, §§477-493.
540 Recited in Milieudefensie v Shell claim, §512 [Translation LB]
541 Idem, §534.
542 Idem, §525.
543 Idem, §562.
544 Idem, §§575-602.
545 Idem, §602 [translation LB].
546 Idem, §606.
mankind, the environment and future generations, fully recognise her societal responsibility and duty of care.\textsuperscript{547}

Shell’s activities form a significant contribution to the climate problem (iv) and the inconvenience of a transition (v) cannot serve as an excuse, the claim argues:

*Why would society (…) year after year have to undergo increasingly dangerous transformations because it would be inconvenient for Shell to change? To pose this question is to answer it. Every sense of justice is tempted if the outcome would be that a company like Shell could just continue, in The Hague, the destruction of the global living environment, a destruction of which scientists already in the eighties announced it would be of a scale that only a global atom war would lead to greater damage.*\textsuperscript{548}

When discussing the second legal basis, i.e. fundamental rights enshrined in constitutional law and international human rights law, the claim stresses once again that the severest violations will occur abroad to the most vulnerable groups.\textsuperscript{549} It relies on *inter alia* resolutions by the UN Human Rights Council\textsuperscript{550} and the case-law of both the CJEU\textsuperscript{551} and the ECtHR\textsuperscript{552} and the considerations of the Court of Appeal in *Urgenda*.\textsuperscript{553} The claimants thus point to people abroad very explicitly.

More implicit, but nevertheless very interesting, are the arguments of the claimants regarding the positive human rights obligation to combat climate change on part of the business entity Shell – in other words, a private party – rather than the public authority of the State. The claim invokes the UN Guiding Principles on Business and Human Rights, explaining how these came into being because States acknowledged that they had insufficient grip on transnational corporations like Shell, so that self-regulation was put forward as a solution.\textsuperscript{554} Shell committed itself to these principles, on a voluntary basis.\textsuperscript{555} The background of the UN Guiding Principles, the claimants argue, explain that:

\textsuperscript{547} *Idem*, §607 [translation LB, emphasis added].
\textsuperscript{548} *Idem*, §§621-622 [translation LB].
\textsuperscript{549} *Idem*, §655.
\textsuperscript{550} Cf *idem* §§653-4.
\textsuperscript{551} Cf *idem* §657.
\textsuperscript{552} *Idem*, §§672-90.
\textsuperscript{553} *Idem*, §§663-65.
\textsuperscript{554} *Idem*, §§691-702.
\textsuperscript{555} *Idem*, §702.
...a company with the status, the power and the possibilities of Shell should not violate human rights, even not if she (in relation to the emissions of her activities and products) cannot be sufficiently regulated at the moment... This lack of regulation notwithstanding, she has an obligation of her own to prevent human rights violations.556

So, instead of pointing to international cooperation as an obligation for a State, as many of the other climate cases discussed in this chapter, the summons of Milieudefensie points to the failure (in other words the lack of political effectiveness) of international State regulation to argue Shell has a legal obligation itself. It does so not only with regard to human rights, but also relating to international climate change law. That is, since the birth of the 1992 UNFCCC, the claimants assert, States have proven themselves incapable of reaching a fair distribution of necessary reductions – they found themselves trapped in an ‘unsolvable deadlock’.557 The Paris Agreement, therefore, shifted the responsibility back to the nation States, requiring them to articulate their own so-called nationally determined contributions. ‘The Paris Agreement shows that a collective tackling of nations can no longer be awaited and that it is now down to the individual responsibility of States as well as other important parties.’558 The claimants cite the Paris Agreement, stipulating it ‘welcomes the efforts of all non-Party stakeholders to address (...) climate change, including (...) the private sector’ and that these stakeholders are ‘invited to scale up their efforts’.559

The claimants also cite from the UN Guiding Principles: ‘Business enterprises should respect human rights,’ and: ‘The responsibility to respect human rights requires that business enterprises (...) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur’.560 The claimants argue that this is in line with the application of the criteria of hazardous negligence to Shell’s behaviour, and also to apply Articles 2 and 8 ECHR indirectly – after all, the ECHR also uses soft law norms (such as the UN Guiding Principles) to interpret ECHR obligations.561

In this context, the claim also points to the UN Global Compact, another soft law initiative endorsed by Shell, through which enterprises commit themselves to

556 Idem [translation LB].
557 Idem, §§704-5.
558 Idem, §708.
559 Idem.
560 Idem, §711.
respect human rights and take responsibility and initiatives for the environment, including the development of environmentally friendly techniques.\textsuperscript{562} Moreover, Shell committed itself to the OECD guidelines, again calling for businesses to respect human rights.\textsuperscript{563} The claimants conclude that Shell has to live up to the same duty of care that rests on the Dutch Government resulting from international human rights law, as was determined on appeal in the \textit{Urgenda} case.\textsuperscript{564} ‘The need for protection against the powerful position of Shell is comparable with the need for protection against the power of the State.’\textsuperscript{565}

After explaining what Shell should do to prevent dangerous climate change (these arguments return in the next chapter on future generations), the claimants ask the Court to order Shell to reduce its net greenhouse gasses much faster than it aiming to do now: 100\% reduction of emissions should be reached 2050, 72\% in 2040, compared to 2010 levels, and 45\% in 2030. Furthermore, they ask the Court to have Shell pay for their legal costs.

7.2 Emancipation of people abroad through \textit{Milieudefensie v Royal Dutch Shell}

It is not only environmental problems that transcend national boundaries, so too do the activities of a multinational such as Shell. Transnational private entities such as Shell have proven difficult to regulate. Operations usually take place in developing nations that lack the infrastructure to enforce national laws – whereas the often-Western nations where these enterprises have their headquarters have little interests in holding them to account. As a result, already back in the seventies, coalitions of developed nations in the UN called for an international, binding treaty with human rights obligations for transnational corporations. A \textit{Commission on Transnational Corporations} was formed that discussed over two decennia the form of the treaty to be.\textsuperscript{566} This resulted ultimately in the \textit{non-binding} OECD Guidelines, also invoked by Milieudefensie in the present claim. The claim relies as well on the UN Global Compact and the UN Guiding Principles on Business and Human Rights. All these documents are soft law: as of yet, there is no international treaty codifying \textit{binding} human rights obligations for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{562} \textit{Idem}, §716–719.
\item \textsuperscript{563} \textit{Idem}, §720–722.
\item \textsuperscript{564} \textit{Idem}, §723.
\item \textsuperscript{565} \textit{Idem}, §724.
\item \textsuperscript{566} ‘United Nations Centre on Transnational Corporations | UIA Yearbook Profile | Union of International Associations’ \textless https://uia.org/s/or/en/1100024712\textgreater accessed 24 October 2019.
\end{itemize}
\end{footnotesize}
enterprises - although renewed attempts are made at the UN level since June 2014.567

Holding multinationals accountable for human rights violations abroad in court, through so-called ‘foreign direct liability claims’ is a strategy with varying success.568 In the USA, claims based on the so-called Alien Tort Statute seemed successful for a while, but the tide has turned again.569 In the absence of binding public (international) human rights obligations on the part of transnational enterprises, the plausibly significant added value of foreign direct liability claims often lie in their private law dimension, as is also true for the claim of Milieudefensie against Shell. After all, even if the Court would be unwilling to accept the direct horizontal effect of human rights, it could still rely on the indirect effect of human rights through the private law criteria of tort, more specifically, those of hazardous negligence.

In this light, it is interesting how the claim highlights another instance of international law failing to come up with binding obligations, this time for States regarding climate change. The claim uses this political inefficacy as an argument for responsibility on part of private entities, that typically should be enforced through private rather than public legal proceedings.

Should the District Court of The Hague decide in favour of Milieudefensie, this could be a great step forward in foreign direct liability claims, not least for people abroad; they would acquire a forum to voice their discomfort with the business activities of a company whose operations occur worldwide. In this regard, it is important how the claimants expressly aim to represent people from other

nations, as well as how they point more holistically to all nations being inter-dependent.

Issues similar to those debated in the German case of Lliuya v RWE are likely to arise here too. Shell has consistently pointed to the legal boundaries to the role of the judiciary, saying climate change is to be dealt with by politicians rather than by judges. The claim underlines that Shell is responsible for 1.2–1.7% of global emissions – almost three times the portion of emissions that the Netherlands was held liable for in the Urgenda case. These percentages stem from the Carbon Majors study counting in ‘scope 3’ emissions – and Shell is contesting its responsibility for those, attributing them rather to end users. Shell’s CEO Ben van Beurden commented in an interview: ‘Despite what a lot of activists say, it is entirely legitimate to invest in oil and gas because the world demands it’.

For the purposes of this chapter, most significant is how the claim frames climate change entirely as a human rights issue heavily affecting people across national boundaries. Thus, it not only puts climate action forward as an obligation enforceable on private entities through private law proceedings, it furthermore explicitly presents this obligation as part of a constitutionalised environment, whether working directly through the mere application of international human rights law, or indirectly through the doctrine of hazardous negligence coloured by the very same fundamental rights.

8. Climate liability of the EU? The People’s Climate Case

In May 2018, an action called the People’s Climate Case was brought to the Court of Justice of the European Union (CJEU). It was accepted by the CJEU’s bench three months later. The applicants argue that the EU’s climate goal for

570 Idem, 552-3.
574 The Court of Justice of the EU is divided into two courts, the Court of Justice and the General Court, the latter of which deals with the People’s Climate Case pursuant to Article 256 TFEU. I simply use the term CJEU (the abbreviation for Court of Justice of the European Union).
2030 – laid down in two regulations and a directive – is contrary to higher-ranking subjective rights and objective legal principles. The defendants (the European Parliament and the Council) have objected and stated that the case should be declared inadmissible. The General Court agreed in its Order of 8 May 2019. The Claimants thereupon appealed; if the Court of Justice agrees with the General Court's findings, that will be the end of the case, but if it quashes the order, it can either itself decide on the merits, or send the case back to the General Court to do so.

Although the case is pursued at the European rather than the national level, it shows parallels with the other cases discussed in this chapter. Like these other cases, the People’s Climate Case uses non-contractual liability as one of the legal bases for the claim, which is why I deem this case to fall within the sphere of European private law. The claimants are a Sami youth organisation from Sweden and ten families that comprise of 36 individual claimants. Similar to the case of Lliuya v RWE, the appeal to the interests of people abroad is obvious, as two of these families reside outside the borders of the European Union, namely in Fiji and Kenya. Similar to the Urgenda case, general policy is challenged, but no damages are claimed. Instead, the claimants of the People’s Climate Case ask the CJEU for an injunction to force the EU to enact better climate legislation for the EU.

8.1 People abroad in the claim of the People’s Climate Case

The in excess of 100 pages claim of the People’s Climate Case is largely founded on two legal bases, respectively Articles 263 and 340 of the TFEU. The former provides the basis for an action of annulment of the greenhouse gasses reduction target laid down in three pieces of legislation: the Emissions Trading Scheme Directive (ETS Directive), the Effort Sharing Regulation and the Land Use, Land Use Change and Forestry Regulation (LULUCF Regulation). Such an action of annulment may be regarded as an EU equivalent of a national administrative legal action; the CJEU is requested to annul these pieces of legislation in so far as their greenhouse gasses reduction goal is concerned.

577 Cf Article 61 Statute of the Court of Justice of the European Union.
578 Except for the Arctic Oil case, which is a constitutional case that was however litigated through civil procedure, see section 5 above.
The second legal basis is, however, equivalent to a national private legal action, namely Article 340 TFEU *inter alia* stipulating that in case of non-contractual liability, ‘the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions’. The applicants allege that they suffer harm and will continue to suffer harm due to the insufficient climate targets of the EU. Accordingly, the EU should be held liable under Article 340. As a remedy, they request an injunction to set greater emission reduction targets. Since this book has European private law as its topic, I focus on the second legal basis of the claim, but will refer to the line of reasoning based on Article 263 where necessary.

The list of applicants is colourful, to say the least. It illustrates the diverse and widespread impacts of climate change. The applicants each fear climate change for different reasons, and most of them already suffered climate change-related damage. The claim presents them in alphabetical order:580

The Carvalho family from Portugal has a forestry business that was completely destroyed by climate change induced wildfires in 2017.

The Conceicao family from Portugal keeps bees for a living and saw their honey harvest halved due to heatwaves and droughts intensified by climate change.

Alfredo Sendin and the Caixeiro family, also from Portugal, depend on farms in southern Portugal that have become less productive since their crops die sooner and they have to spend more on irrigation and livestock rearing.

The Feschet family from Southern France who own a lavender farm that suffers from less rainfall and higher temperatures; lavender plants have to be uprooted earlier (after 4 years instead of after 23, like in the 1970s) or they die, meaning the Feschets can make less effective use of their lands.

The Guyo family from northern Kenya depends on cattle and goat herding – the survival of these animals is directly threatened by higher temperatures, less rainfall and increased droughts. Moreover, the children in this family are unable to go to school or work during the day when heatwaves occur, causing heat rash and dizzy spells.

The farming Vlad family from Romania have been witness to decreased incomes due to climate change, for example, their cows produce less milk when heatwaves occur.

The Italian Elter family runs a bed and breakfast in the Italian Alps and they also produce preserves, marmalades and liqueurs from fruits and herbs they

580 People’s Climate Case claim, §D.43-86.
grow; however, when the ice in the mountains melts, tourists have fewer reasons to visit, making it more difficult for them to make a living.

The German Recktenwald family, who run a hotel on Langeoog, an island in the North Sea that might be washed away due to sea level rise and storms.

Lastly, the Qaloibau family from Fiji who survive on income from fishing and eco-tourism and fear for their existence due to coral-bleaching, which leads to a depletion of fish stocks and a decline of tourism incomes. Cyclones have already destroyed the canteen and the fishing boat this family once owned. Furthermore, according to the claim ‘most alarmingly,’ the village of these people is designated for potential relocation as it might flood due to sea level rises.

Apart from all these families, an organization called Sáminuorra is amongst the applicants. It is an association of young Sami, the indigenous peoples living in the northern parts of Sweden, Finland, Norway and Russia. The members are between 6 and 30 years old and they fear they will no longer be able to exercise reindeer herding – an activity essential to their culture and economy – because winters will become so mild that they will be unable to feed their reindeers with food that typically is found under snow.

The claim sketches results of climate science to prove how the applicants will incur (further) damage, because climate change leads to increased temperatures in general, resulting in heat waves, flooding, droughts and desertification, and the retreat of snow and ice. It also pays attention to the causal link between anthropogenic greenhouse gasses emissions and climate change, and to the contributions of the EU.

Because of ‘higher rank norms’, the EU should prevent the damages the applicants have incurred and will incur. These norms include, the claim maintains, subjective rights enshrined in the European Charter of Fundamental Rights (CFREU / ‘the Charter’) and objective principles laid down in the TFEU, international customary law and international treaties such as the UNFCCC, the Kyoto Protocol, the Paris agreement, the UN Convention to Combat Desertification, the Alpine Convention, the Convention on Biodiversity, and the UNESCO World Heritage Convention. For example, the customary no-harm

581 Idem, §C.13-42.
582 Idem, §C.14-20.
583 Idem, §C.21-34.
584 Idem, §C.35-38
585 Idem, §C.39-42.
586 Idem, §G.154.
rule recognised by the International Court of Justice in the *Pulp Mills* case obliges the EU to prevent harm to other States,\(^\text{588}\) where the Paris Agreement sets a specific temperature goal (global warming should remain well below 2°C, preferably at 1.5°C) allowing to calculate an available budget for the EU which is exceeded when one would enforce the present legislative instruments.\(^\text{589}\)

The claim invokes the following fundamental rights enshrined in the CFREU: the right to life, the right to physical integrity, the rights of children, the right to engage in work and to pursue a freely chosen or accepted occupation, the right to conduct a business, the right to property and the right to equal treatment.\(^\text{590}\)

These rights imply positive obligations for the EU, explains the claim, both by analogy to case-law of the ECtHR\(^\text{591}\) and since the EU is member to the UNFCCC\(^\text{592}\) and already accepted legislative responsibility through enacting the directive and regulations targeted by the claim.\(^\text{593}\)

Most interesting for the purposes of this chapter is the discussion of the right to equal treatment, Article 21 of the Charter, where the claim argues for an interpretation that is inclusive towards people abroad:

> ... equality applicable here is equality between persons in the developed States of the EU, and persons living in less developed countries. It is submitted that the right to equal treatment is not limited by nationality and hence is enjoyed by non-EU citizens. It must be understood to extend to all persons adversely affected by EU law, including by the allocation and allowed use of emission rights. This allocation must not discriminate against persons living in foreign countries in favour of EU nationals.\(^\text{594}\)

The claim thus puts forward that the right to equal treatment has a ‘geographical dimension’ that implies sharing a carbon budget ‘between States on an equal per capita basis’,\(^\text{595}\) in other words, that fundamental rights require every human to have an equal share in the global carbon budget.

\(^\text{588}\) *Idem*, §H2.b.206-207.
\(^\text{590}\) *Idem*, §H1.161-201.
\(^\text{591}\) *Idem*, §H1.165-167, 173.
\(^\text{592}\) *Idem*, §H1.168.
\(^\text{593}\) *Idem*, §H.1.169
\(^\text{594}\) *Idem*, §H.1.e.193.
\(^\text{595}\) *Idem*, §H.1.e.197.
The claim proceeds to state that the invoked EU fundamental rights are in principle also granted to non-EU citizens and people living outside the EU and that EU environmental laws are also formulated in a geographically neutral manner.\textsuperscript{596} To substantiate this rather far-going submission, the claim draws a parallel with EU competition law. Foreign companies affected by cartels within the EU are entitled to notify the EU commission thereof. Apparently, people outside the EU have a right to fair competition. The plaintiffs residing in Kenya and Fiji are in a comparable situation, submits the claim, because whilst acknowledging the right to competition is different to the fundamental rights to health, occupation and property:

\ldots there is no reason why large companies that suffer from restrictions to free international trade and competition should be better treated than actors in the small and medium scale farming and tourism business who suffer from the destruction of the natural conditions of their livelihoods.\textsuperscript{597}

All the invoked fundamental rights are violated according to the applicants:\textsuperscript{598} those related to their physical well-being, occupation, property, the rights of the children and notably the right to equality, as climate change ‘tends to affect persons in less developed countries more severely than in developed countries’.\textsuperscript{599}

Interestingly, the claim puts forward that that the invoked ‘higher-rank law’ can be violated through the effects of climate change \textit{separately} from exceeding the temperature goal enshrined in the Paris Agreement.\textsuperscript{600} This contrasts with the judgment of the Court of Appeal in \textit{Urgenda}, that established a violation of the international human rights to life and private life in the ECHR, using the temperature goals laid down in \textit{inter alia} the Paris Agreement to determine the level of discretion for the Dutch government. The Hague Court of Appeal there felt unable to establish a reduction obligation that would go further than what international climate politics has established as necessary. The \textit{People’s Climate Case} claims that the EU’s climate obligations should go further, in the event global warming in line with the international climate goals still results in the violation of, for example, the no harm rule.\textsuperscript{601}

\textsuperscript{596} Idem, §H.1.f.198-199.
\textsuperscript{597} Idem, §H.1.f.201.
\textsuperscript{598} Idem, §J1.240-255.
\textsuperscript{599} Idem, §J1.252.
\textsuperscript{600} Idem, §J2.256.
\textsuperscript{601} Idem, §H2.211, J2.256.
Yet even when looking at the higher-rank norm of the Paris Agreement alone, the EU’s legislative measures are insufficient, the claim posits. That is, based on the Paris Agreement’s goal of 1.5°C as the maximum temperature rise, one can calculate a ‘budget’ of greenhouse gas emissions still available on the globe before we meet this point. This budget has to be shared among states on a per capita basis, the claimants say, and their calculations to this effect lead to the ‘dramatic conclusion’ that no budget remains available to the EU – it has already consumed its share in the global carbon budget.602

This argumentation, that the EU’s climate laws violate higher-rank norms, serves a dual purpose: as a reason to annul these laws based on Article 263 TFEU,603 and to establish an unlawful act of the EU that leads to its non-contractual liability based on Article 340 TFEU.604

As for the second line of reasoning, the claim says that the EU is in breach of its obligations at least since it signed the UNFCCC in 1992,605 while this ‘unlawful conduct continues today and its gravity is compounded by the ever-strengthening legal obligations, the immense scientific literature on the subject, and the emerging factual evidence of climate change already occurring.’606 This breach is sufficiently serious, because the EU has disregarded the limits of its political discretion, which, according to the claim, does not exist in so far as the depth of required reductions are concerned.607

Furthermore, the claimants also identify the required causal link, as the EU acknowledges the dangers of climate change and recognises its responsibility and capacity to reduce greenhouse gas emissions.608 Reduction of greenhouse gases can best be achieved in a cooperative scheme, making a large entity such as the EU more suitable for action than isolate actors. Non-contractual liability may also be established in case of future losses,609 the likelihood of which is established by climate science.610 The claimants already incur damages, and they

602 Idem, §1.2.b-c.
603 To further substantiate this line of thought, the claim also extensively argues there is no justification for EU’s current laws in §J3-4 of the claim.
604 People’s Climate Case claim, §K1.389-395.
605 Idem, §K1.391
606 Idem, §K1.395.
607 Idem, §K2.397.
609 Idem, §K3.400.
610 Idem, §K3.408.
will continue to suffer.\footnote{Idem, §K3.410-412.} The injunction they ask for would require the EU to reduce emissions of at least 50%-60% by 2030, or another level deemed appropriate by the Court.\footnote{Idem, §K4.413-416.}

### 8.2 People abroad in the Order of the General Court
The Council and the Parliament have successfully opposed the admissibility of the claim in the *People’s Climate Case*. They deem it impossible that the legislation in question does directly and individually affect the claimants. Firstly, these pieces of legislation are instances of minimum harmonisation so that they cannot be said to affect an individual’s fundamental rights; it is up to the Member States of the EU to take more stringent measures.\footnote{Cf Order of the General Court (Second Chamber) Carvalho a.o. v European Parliament and Council of the European Union ‘The People’s Climate Case’ 8 May 2019, Case T-330/18, §25, 27.} Moreover, since anyone’s human rights can be affected by climate change, the claimants cannot be individually concerned.\footnote{Idem, §26.} The Council and Parliament argue that the requirement for standing would lose meaning if each and every person around the world should be considered individually concerned by the legislative package,\footnote{Idem, §27.} The request for an injunction under the header of non-contractual liability of the Union is simply an attempt to circumvent these standing requirements, they add.\footnote{Idem, §59.} Moreover, there is no causal link between the Union’s legislative actions and the damages that the plaintiffs claim to suffer.\footnote{Idem, §60.}

The General Court starts to set out the admissibility requirements for an action of annulment enshrined in Article 263 TFEU. For legislative acts like the ones under attack in the case, it is required that plaintiffs are individually and directly concerned.\footnote{Idem, §41.} Since these are cumulative conditions, if the applicants are not individually concerned, it is not necessary to enquire whether the legislative package is of direct concern to them, adds the Court.\footnote{Idem, §44.} The requirement of being individually concerned implies that a plaintiff’s situation can be differentiated from all other persons.\footnote{Idem, §45.} The Court is not convinced by the plaintiffs’ argument that they were individually concerned because, although all persons in principle...
may enjoy the same rights, climate change leads to infringements of fundamental rights that are different for each individual.  

The Court acknowledges that ‘it is true that every individual is likely to be affected one way or another by climate change’ and it adds that this is the very reason for the EU and its Member States to have committed to reducing emissions.  

It does not at all react to the claimants’ arguments on the rights to equality enshrined in Article 21 CFREU. As for the applicants’ argument regarding the right to an effective remedy, the Court says:

…it should be pointed out that the protection conferred to Article 47 of the Charter of Fundamental Rights does not require that an individual should have an unconditional entitlement to bring an action for annulment of such a legislative act of the Union directly before the Courts of the European Union.  

The Court says that Articles 263 and 277 of the TFEU provide for a ‘complete system of remedies’ and that where natural and legal persons lack admissibility to challenge acts of the European Union, they can do so indirectly, asking for the act to be declared non-applicable under Article 277 by the Courts of the EU, or to ask national courts to ask a prejudicial question to the CJEU concerning an act’s validity.  

As for the injunction sought under the non-contractual liability of the Union, the Court agrees with the defendants that ‘the claim seeking annulment of the legislative package and the injunction requested in connection with the action for damages are almost identical and concern the same alleged unlawfulness’.  

It follows that ‘the action for compensation (…) must also be declared inadmissible’. The claimants have to pay their own costs made in these proceedings.

8.3 Emancipation of people abroad through the People’s Climate Case

The European Parliament and the Council have challenged the admissibility of the claim, saying that climate change is so pervasive and common to all persons,

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621 *Idem*, §46-47.  
623 *Idem*, §52.  
624 *Idem*, §53.  
625 *Idem*, §67.  
626 *Idem*, §70.  
627 *Idem*, §75.
and caused by such a wide range of activities, that a legal response by the CJEU should be unavailable. The applicants, however, are of the opinion that they ‘ask for no more than the faithful application of law’. In thus emphasising the legal nature of the obligation to address climate change, the claim bears significance as such.

More specifically, the claims’ argumentation reframes the public problem of climate change into an issue of private autonomy. That is, the colourful list of applicants, as well as media coverage of the case, stresses how each applicant is affected in their rights, each applicant in his or her own way. Mr Feschet’s lavender fields are drying out, the hotel of the Recktenwalds will go bankrupt when their idyllic North Sea island will be flooded, the small Guyo children cannot go to school due to the heat. The claim *individualises* the climate problem and is therefore less classifiable as so-called ‘public interest litigation’ compared to the *Urgenda* case, the *Klimaatzaak, Magnolia, Arctic Oil* and even the case of Milieudefensie against Shell. Instead, like the case of *Lliuya* against RWE, the *People’s Climate Case* is concerned with private interests.

In this regard, it is also interesting which rights the applicants invoke. That is, they do not stop at the rights to life and private life, also invoked in the other cases. Relying on the CFREU rather than the ECHR, they additionally invoke the right to an occupation and to engage in work (Article 15 CFREU) and the right to property (Article 17 CFREU) – rights that are rather ‘economic’ in nature and essential to private legal relationships.

Moreover, the claim connects this reframing to an unequivocal appeal to the (private) interests of people abroad. More plainly than for instance the *Arctic Oil* case, the *People’s Climate Case* specifies that Article 21 of the Charter – the provision stipulating ‘Everyone is equal before the law’ – must be interpreted so as to regard people abroad, i.e. non-EU-citizens, as beneficiaries of EU fundamental rights when it comes to climate change. Otherwise the normative legitimacy of fundamental rights as a project would be undermined.

The failure of the claim so far is due to the strict requirements of admissibility before the Court of Justice of the European Union. In the literature on the *People’s Climate Case*, these requirements are criticised for not aligning with the requirements for procedural environmental justice laid down in the Aarhus
Convention,\textsuperscript{629} and for leading to the Kafkaesque paradox that the larger the damage is, the less access the EU provides to legal remedies.\textsuperscript{630} The admissibility requirements date back to the CJEU’s case law from 1963, \textsuperscript{631} a time when the (human rights) impact of climate change was hardly known, and well before the entry into force of the EU’s Fundamental Rights Charter. Perhaps such considerations will make the Court of Justice of the EU reconsider the standing requirements on appeal.

In any event, the claim of the \textit{People’s Climate Case} is strongly pushing the boundaries of democratically legitimate judicial law-making in European private law: it presents the effects of climate change as a private problem and maintains that the constitutionalisation of the environment has not only gone so far to now imply positive obligations to prevent climate change, but also to do this for the benefit of those who live outside the territorial boundaries of the EU.

\textbf{9. The Dutch Urgenda Case before the Supreme Court}

After having lost on appeal, the Dutch State took the \textit{Urgenda} case in cassation to the highest judicial instance in the Netherlands: the Dutch Supreme Court (\textit{Hoge Raad}). Before the Supreme Court, one cannot present new facts; this court only decides on questions of law, which concern uniform application and development of law.\textsuperscript{632}

The Supreme Court is advised by the Advocate-General, who issued an opinion on 13 September 2019. Normally only one Advocate-General advises, but this case was so complex that the Procurator-General and one of the Advocate-Generals wrote a joint opinion. In 141 pages, with many references to scholarly literature, they explained why the Supreme Court should not accept the State’s complaints.\textsuperscript{633} On 20 December 2019, the Supreme Court followed this advice and ruled that the Court of Appeal’s judgment was correct.\textsuperscript{634} Whilst the explicit

\textsuperscript{629} Fanny Vesterberg, ‘EU Climate Change Litigations: Dream or Reality? Individuals’ Possibilities to Challenge the Legality Of EU Climate Actions within the System of Legal Remedies in EU Law’ (Lund University 2018).
\textsuperscript{630} Charald Aal, ‘De People’s Climate Case’ (2019) 94 Nederlands Juristenblad 2297.
\textsuperscript{632} Cf Article 118(2) Dutch Constitution (\textit{Grondwet}) and Articles 78-81 Dutch Law on the Judicial Organisation (\textit{Wet op de rechterlijke organisatie}).
recognition of people abroad seems to be less strong than at first instance and on appeal, the implicit recognition only grew in strength in the Court’s reasoning, as will be explained below.

9.1 People Abroad in the Urgenda case before the Supreme Court

a) The State’s complaints

Many of the State’s arguments against the ruling of the Court of Appeal in the Urgenda case can be linked to its main objection, that climate change is a political matter not to be adjudicated by courts. That is, firstly, it complained inter alia that the State is, legally speaking, not bound by 25% reduction of greenhouse gases by 2020, as this number is not laid down in a legally binding norm. Secondly, the State said that the goal of 25% reduction is anyway meant for developed countries as a whole rather than for an individual State such as the Netherlands. Thirdly, the injunction of the Court of Appeal would amount to a judicial order to legislate, which is forbidden under the case law of the Dutch Supreme Court. Finally, the State had argued explicitly that the judiciary’s task is not to make political considerations necessary for decision-making about the reduction of greenhouse gases.

Apart from these complaints, the State also raised objections that did not directly relate to the law versus politics debate. That is, it said that the Court of Appeal wrongly interpreted Articles 2 and 8 ECHR, because it discarded the wide margin of discretion on part of the State. Also, it complained that Articles 2 and 8 ECHR are not suitable for a collective action in the sense of Article 303a, Book 3, Dutch Civil Code. It also said that factually, a reduction of 25% is neither necessary nor effective for the realisation of the goal of 2°C of global warming.

b) Facts and the core of the conflict

In its decision, the Supreme Court observes that the State did not dispute the facts central to the proceedings: global warming above 2°C is very dangerous, as internationally recognised in inter alia the UNFCCC.635 The reduction of greenhouse gases is necessary, and every emission leads to a higher concentration of greenhouse gases in the atmosphere, contributing to hitting the critical boundaries for safe emissions known as the carbon budget.636 The State did not oppose the Court of Appeal’s observations that there is a realistic chance of dangerous climate change leading to the severe risk that the current generation of people in the Netherlands will be confronted with a loss of life and or a

635 Supreme Court Urgenda, §§4.1-5.
636 Idem, §4.6.
disruption of their family life; and that it is without doubt that the current
generation of Dutch people will face during their lives the adverse effects of
climate change if global emission of greenhouse gasses is not adequately
reduced.\footnote{Idem, §4.8.}

The Supreme Court notes that the State \textit{does} oppose that Article 2 and 8 ECHR
would oblige to reduce greenhouse gas emissions by 25\% by 2020, as compared
to 1990 levels.\footnote{Idem.} In other words, the discussion truly centres around the
question, to what extent the climate is constitutionalised in the ECHR rights to
life and to private and family life. The Court starts to consider the question,
whether Article 2 and 8 ECHR oblige the State to take climate measures
generally. Whether such measures should add up to a certain percentage of
emission reduction is discussed later on in the judgment.

c) Jurisdiction as territory

The State had also raised complaints about the Court of Appeal considering the
interests of people abroad. That is, it had argued that since Article 1 ECHR
stipulates that States shall secure the ECHR rights and freedom to \textit{everyone in
their jurisdiction} and that such would mean that only the effects of climate
change within the Netherlands should be considered.\footnote{Cf the summary of those complaints in the Opinion of the Advocate-General and the
Procurator-General, §§3.4-5.}

The Advocate-General and the Procurator-General opined that this complaint of
the State was not a point of discussion before the Court of Appeal, so that it does
not need any treatment in cassation. They note that they will address it
‘superfluously’,\footnote{Idm, §3.10.} and remark sharply that the danger climate change is
characterised by it threatening the (family) life of individuals globally in a way
that one cannot beforehand specify who will become a victim, but that ‘in
particular residents of lower lying areas, including large parts of the Netherlands’
are extra vulnerable.\footnote{Idem, §3.12.} The Dutch Supreme Court does not engage in superfluous
remarks about the question, whether transboundary effects of climate change
play a role in establishing a violation of Article 2 and 8 ECHR.

The Advocate-General and the Procurator-General did, however, observe that the
Court of Appeal correctly applied the territoriality principle, as it confined itself
to Dutch residents.\textsuperscript{642} In this vein, the Supreme Court notes that Article 1 ECHR should be understood as the ECHR protecting people within the territory of States:

\begin{quote}
If it comes to the Netherlands, this regards primarily, and as far as of interest for this case, the residents of the Netherlands.\textsuperscript{643}
\end{quote}

In other words, the Supreme Court finds it unnecessary, in this case to afford protection from the Dutch State under the ECHR to people who are not Dutch residents – i.e. people abroad.

d) Article 2 and 8 contain positive environmental obligations

The Court goes on to derive from the ECtHR’s case-law that the right to life and the right to private and family life each may be at stake in environmental situations, and that they may contain positive obligations on the part of States even when risks will only materialise on the long term.\textsuperscript{644} The protection of these provisions is not limited to specific individuals, yet stretches out over society as a whole.\textsuperscript{645} The judiciary may examine whether measures taken by a State are reasonable and suitable.\textsuperscript{646} This should not lead to an unreasonable burden upon States; the obligations following from these rights encompass measures to be taken but not to guarantee achieving a desired result.\textsuperscript{647}

e) The common ground method

Following the recommendations of the Procurator-General and Advocate-General, the Dutch Supreme Court relies on the so-called common ground method to interpret the ECHR.\textsuperscript{648} It says that this method is in line with Article 31 of the Vienna Convention on the Law of Treaties. The method involves interpreting the ECHR in line with views that are broadly shared in the Member States and in an international context.\textsuperscript{649} The common ground method is used by the ECtHR, as is clear from the case \textit{Demir and Baykara v Turkey}.\textsuperscript{650}

\begin{flushright}
\textsuperscript{642} \textit{Idem}, §3.16. \\
\textsuperscript{643} Dutch Supreme Court \textit{Urgenda}, §5.2.1. \\
\textsuperscript{644} \textit{Idem}, §§5.2.2-3. \\
\textsuperscript{645} \textit{Idem}, §5.3.1. \\
\textsuperscript{646} \textit{Idem}, §5.3.3. \\
\textsuperscript{647} \textit{Idem}, §5.3.4. \\
\textsuperscript{648} \textit{Idem}, §§5.4.1-2 \\
\textsuperscript{649} Procurator-General and Advocate General \textit{Urgenda}, §2.70. \\
\textsuperscript{650} Grand Chamber of the European Court of Human Rights 12 November 2008 \textit{Demir and Baykara v Turkey}, application number 34503/97.
\end{flushright}
Procurator-General, the Advocate-General and the Dutch Supreme Court all cite the same considerations of the ECtHR in this case:

...The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. (…) In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (…)\textsuperscript{651}

\textbf{f) ECHR obligations to act against dangerous climate change: do your fair share}

The Supreme Court notes that Article 13 ECHR is also of relevance – it contains the right to an effective remedy for violated ECHR rights. This means that national courts need to offer effective protection against the violation of ECHR rights pursuant to the case-law of the ECtHR.\textsuperscript{652} As the ECtHR has not yet ruled on climate related matters, the Supreme Court notes that ‘the question is whether the global character of the consequences of emissions implies that no protection can be sought under Articles 2 and 8,’.\textsuperscript{653} Immediately after, the Court provides the answer, establishing that the Netherlands has a partial responsibility to contribute its share:

\textit{The answer [to this question] reads in the opinion of the Supreme Court that the Netherlands, based on Articles 2 and 8 ECHR, is obliged to do its part to prevent dangerous climate change…}\textsuperscript{654}

The Court goes on to detail why such is the case, using sources relevant pursuant to the common ground method. Firstly, the UNFCCC ‘is built upon the thought that climate change is a global problem that needs to be solved globally,’ and ‘measures need to be taken by all nations’.\textsuperscript{655} This is clear from the treaty’s preamble, reiterating the no-harm principle, and from Article 4, prescribing that

\textsuperscript{651} Idem, §§85-6, cited by the Procurator-General and the Advocate-General in §2.71 of their opinion, and by the Dutch Supreme Court in §5.4.2 of its ruling.

\textsuperscript{652} Supreme Court, Urgenda, §5.5.2.

\textsuperscript{653} Idem, §5.6.3.

\textsuperscript{654} Idem, §5.7.1.

\textsuperscript{655} Idem, §7.7.2.
all parties take measures and develop policy.\textsuperscript{656} Also, all the COPs are held in the spirit of the idea that all States do that which is necessary, as confirmed by Article 3 Paris Agreement.\textsuperscript{657} Lastly, States can individually be called to account based on the international customary ‘no harm’ principle (prohibiting States to harm each other): ‘This approach justifies partial responsibility,’ the Court says, ‘every State is responsible for its share and can be held accountable for that.’\textsuperscript{658}

According to the Court, such partial responsibility aligns with the Draft Articles on State Responsibility of States for Internationally Wrongful Acts, as proposed by the International Law Commission and accepted by the General Assembly of the UN.\textsuperscript{659} Many States employ corresponding rules in liability and tort law. Based hereon, the Court dismisses two lines of the States’ defence in a paragraph that merits full citation:

\begin{quote}
Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a State does not have to take responsibility because other States do not comply with their partial responsibility, cannot be accepted.

Nor can the assertion that a State’s own share in global greenhouse gas emissions is very small and that reducing emissions from one’s own territory makes little difference on a global scale, be accepted as a defence.

Indeed, acceptance of these defences would mean that a State could easily evade its partial responsibility by pointing out other States or its own small share. If, on the other hand, this defence is ruled out, each State can effectively be called to account for its share of emissions and the chance of all States actually delivering their contribution will be the greatest, in accordance with the principles laid down in the preamble to the UNFCCC cited above in 5.7.2.\textsuperscript{660}
\end{quote}

Thus, based on the principle of effective judicial protection, the Court firstly determines that insufficient State action against climate change cannot be justified by pointing to the fact that other States also do not take enough action; and it secondly dismisses the defence that Dutch emissions are only a small portion of the global whole.

\textsuperscript{656} Idem, §§7.7.2-3.
\textsuperscript{657} Idem, §7.7.4.
\textsuperscript{658} Idem, §5.7.5.
\textsuperscript{659} Idem, §5.7.6.
\textsuperscript{660} Idem, §5.7.7.
It goes on to observe that in view of the facts, every reduction of emissions has a positive effect on countering dangerous climate change, since every reduction means that there is more space left in the global carbon budget. It sharply concludes that ‘no reduction is negligible,’\(^{661}\) and that the facts show that ‘climate change threatens human rights,’\(^{662}\) meaning that Articles 2 and 8 ECHR oblige Member States to contribute their share against dangerous climate change.\(^{663}\)

g) Concrete climate obligations flowing from Articles 2 and 8 ECHR

The next question is what climate action is required concretely by Articles 2 and 8 ECHR.\(^{664}\) Here the Dutch Supreme Court shows that it is conscious of the delicate balance between law and politics, noting that the answer to this question is to be found in principle in the political domain.\(^{665}\) Yet it is up to the judiciary to assess whether the State has taken fewer measures than that which is ‘evidently the minimum’ of its share in the measures that have to be taken globally.\(^{666}\)

The Court subsequently engages in this assessment: following the common ground method, it observes that there is an internationally shared view that developed countries should reduce at least 25-40% of their emissions by 2020.\(^{667}\) This percentage was introduced in the 4\(^{th}\) IPCC assessment report (‘AR4’) in 2007 and referred to in practically every COP outcome document since.\(^{668}\) The State had pointed to the fact that the IPCC’s next report, AR5, did not repeat the percentage, but the Court deemed this irrelevant because the latter report is not concerned with 2020, but with 2030.\(^{669}\) Also the EU uses AR4 as a benchmark for its policy.\(^{670}\)

The Court reasons that whilst this percentage of 25-40% is ascribed to developed countries as a group, it also applies to the Netherlands as an individual State.\(^{671}\) After all, the UNFCCC and the Paris Agreement start from the idea of responsibility of individual States.\(^{672}\) The Court of Appeal was right in

\(^{661}\) *Idem*, §5.7.8.

\(^{662}\) *Idem*, §5.7.9.

\(^{663}\) *Idem*, §5.8.

\(^{664}\) *Idem*, §6.1.

\(^{665}\) *Idem*, §6.2.

\(^{666}\) *Idem*, §6.3.

\(^{667}\) *Idem*, §7.2.11.

\(^{668}\) *Idem*, §§7.2.1-3.

\(^{669}\) *Idem*, §7.2.4.

\(^{670}\) *Idem*, §7.2.6.

\(^{671}\) *Idem*, §7.3.6.

\(^{672}\) *Idem*, §7.3.2.
considering that it would not lie in the line of expectations that for the Netherlands a lower reduction percentage would apply than for developed nations as a whole, given its relatively high per capita emissions and also since in EU-context, it agreed on relatively large reductions.673

In short, there is a large consensus in international science and politics that developed nations, including the Netherlands, should reduce at the very least 25% of their greenhouse gas emissions by 2020 as compared to 1990 levels. In light of the principle of proper judicial protection, the Supreme Court finds that this consensus must be invoked whilst making concrete the positive obligations that rest upon the State pursuant to Articles 2 and 8 ECHR.674 It thus decides not to quash the judgment of the Court of Appeal. Foundation Urgenda therefore also won also before this highest judicial instance in the Netherlands.

h) Law versus politics
The Court finishes by elaborately addressing the State’s complaints that explicitly address the role of the judiciary, arguing that the Court of Appeal would have given an order to legislate, which is forbidden; and that climate change belonged to the political domain generally.

The Supreme Court analyses its own case law prohibiting the judiciary to issue an order to legislate.675 In principle, the judiciary may order the State to exercise its legal obligations, just like anyone else, under Article 296, Book 3, Dutch Civil Code. The prohibition to issue a judicial order to legislate is an exception, introduced for two reasons: (a) the judiciary should generally not step onto the political domain and (b) courts in private law may only bind the parties before them and not society at large.676 Yet these two reasons are at play only with a judicial order to promulgate legislation with a specific substance. They do not prohibit that the judiciary declares a lack of legislation unlawful. The order of the Court of Appeal to reduce emissions with 25% does not equal to an order to legislate over a determined substance, the Supreme Court stated. Hence it does not fall under the exceptional doctrine of prohibited judicial orders.677

As for the more general argument on climate change falling within the political domain, the Court notes that the reduction of greenhouse gasses is indeed for

673 Idem, §7.3.4.
674 Idem, §7.5.1.
675 Idem, §§8 et seq.
676 Idem, §8.2.4-5.
677 Idem, §8.2.7.
politics to determine, but it is for the judiciary to check whether politics have remained within the boundaries of the law.\textsuperscript{678} These boundaries include those flowing from the ECHR that must be applied pursuant to Article 93 and 94 Dutch Constitution. It adds: ‘The protection of human rights that is thus offered forms an essential component of the democratic constitutional State.’\textsuperscript{679} This means that the Court of Appeal did nothing wrong in judging that the State is at least obligated to a 25% reduction by 2020.\textsuperscript{680}

9.2 Emancipation of people abroad through the Supreme Court’s decision in Urgenda

The ruling by the Supreme Court in Urgenda is significant, because it once more, just like the District Court, the Court of Appeal the Procurator-General and the Advocate-General, affirmed that climate change is a matter of law rather than politics. To be sure, courts should not order which exact climate measures should be taken, but a reduction of at least 25% by 2020 is now the most authoritative interpretation of State obligations under Articles 2 and 8 ECHR operationalised in European private law. Within the Urgenda case, this reduction target to tackle climate change has thus been constitutionalised in fundamental rights and operationalised in a private law injunction on part of the State.

The State had argued that legally speaking, 25% reduction by 2020 was not laid down in any binding norm. Hereby, it directly appealed to what I identified as the ‘legal boundary’ to the role of the judiciary in constitutional States; courts may only apply democratically enacted law.\textsuperscript{681} Yet none of the judicial authorities agreed – i.e. the District Court, the Court of Appeal, the Procurator-General the Advocate-General, nor the Supreme Court. Following the common ground method (to which I will return later), they established that the facts can lead to no other conclusion than 25% being the bare minimum.

The State had also factually challenged that 25% of Dutch emission reduction would make any difference for the prevention of dangerous climate change. This challenge was factually unconvincing, the Supreme Court found. Since the State did adhere to the notion of the ‘carbon budget’, the Supreme Court concluded: ‘no reduction is negligible.’\textsuperscript{682} That the Netherlands contributed only a small part of global emissions, therefore could not serve as an excuse for small reduction

\begin{footnotes}
\item[678] Idem, §8.3.2.
\item[679] Idem, §8.3.3.
\item[680] Idem, §§8.3.5.
\item[681] See above, §A.3 of this Chapter, and §B of Chapter II.
\item[682] Supra note 424.
\end{footnotes}
efforts. The Supreme Court’s interpretation that all States should contribute their share, responds to the observation that only international cooperation can solve an issue like climate change. Interesting here is also how the Supreme Court’s interpretation was guided by the principle of effective judicial protection, as this (constitutional) principle further guides how we are to understand the role of the judiciary in the debate about whether climate change belongs to the political or the legal domain.

As for people abroad, the Supreme Court did refuse to consider their interests explicitly under the regime of the ECHR, as it understood Article 1 ECHR to limit the obligations of Member States to their own territory (at least ‘primarily and as far as of interest for this case’). I find this an interesting limitation, for indeed, the interpretation of Article 1 is guided by a territoriality principle, but the ECtHR has exceptionally established extra-territorial jurisdiction. This happened for instance where military officers acted outside national boundaries but exercised ‘effective control’ abroad; and perhaps more importantly, in cases where action within national boundaries had extraterritorial effects, including one in which the extradition of a criminal to the USA would lead to him facing the death penalty, whereas such violates the right to be free of inhuman treatment under the ECHR. Of course, these fact patterns are quite far away from national emissions contributing to global climate change, but they at least illustrate that jurisdiction need not always equal territory under the case-law of the ECtHR. Scholarly literature supports the idea that transboundary environmental harm should trigger jurisdiction, in the sense that victims from other territories can claim protection from the polluting State under human rights regimes. In November 2017, the Inter-American Court of Human Rights did rule that States can violate the right to the environment extraterritorially. Thus, it would not have been that far-fetched for the Dutch Supreme Court to reason more along the lines of the District Court (that, after all, had allowed Urgenda standing on behalf of people abroad) and to also consider explicitly the impact of Dutch emissions

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684 Cf eg ECHR 30 June 2009 Al-Saadoon and Mufdhi against the United Kingdom, application number 61498/08.

685 ECHR 7 July 1989 Soering v United Kingdom application number 14038/88.


on people abroad. That being said, the Supreme Court did not exclude extraterritorial application of the ECHR, but it simply deemed the interests of Dutch residents enough to trigger the Dutch State’s obligation to reduce at least 25% of its emissions by the end of 2020.

In contrast, the *implicit* consideration of people abroad was only strengthened in the ruling of the Supreme Court in its elaborations on the common ground method. Surely this method was also applied by the Court of Appeal; and a doctrine with a similar rationale is the ‘reflex effect’, applied by the District Court to international sources into the private law duty of care. Yet the Supreme Court rendered explicit that it borrowed this method from the ECtHR (evidently helped by the Procurator-General and the Advocate-General, who had elaborated on the method in their opinion).

The method amounts to implicitly considering people abroad, as it designates that for the interpretation of the ECHR, it is important to look at a certain consensus across member states, which can be found in international legal sources that were not even ratified by the State under scrutiny, in this case the Netherlands. The explanations on the method thus make clearer the importance of applying fundamental rights stemming from an instrument with *transnational* application for the emancipation of people abroad in the matter of climate change. After all, a certain majority view amongst States is important; in other words, the views and insights of people outside national boundaries are relevant in formulating the constraints on political action laid down in fundamental rights that can be held against a State by national courts applying European private law.

This means that transnational deliberations in certain ‘public sphere’ here *have* constrained the ‘centre’ of decision-making in the Netherlands. Following Nancy Fraser’s elaborations on the public sphere (see Chapter II, section E) this may well be considered a first step in the direction of creating a transnational public sphere. Obviously, the ‘public sphere’ resorted to by the Supreme Court is highly elitist, as it comprises of experts working of the IPCC and national representatives coming together at international political conferences; this means it cannot be wholly normatively legitimate as it in fact excludes the voices of many. At the same time, it is certain that the legal-political system is made more normatively legitimate from the perspective of people abroad, who through the common ground method have influenced how the minimum reduction in emissions in the Dutch State, even though the State itself claims it never intended to adopt 25% as a legally binding norm. The ‘transnational public sphere’ – to the
extent that this exists – has thus gained at least some political effectiveness through the decision of the Supreme Court in the Urgenda case.

10. Responsibility for emissions abroad: The Norwegian Arctic Oil case on appeal

The environmentalist claimants in the Arctic Oil case – Greenpeace Norway, the environmental youth organisation Natur og Ungdom and the environmental grandparent organisation Bestefolderenes Klimaaksjon – did not give up after having lost on first instance, and they filed an appeal. They argued again the unlawfulness of the governmental Licensing Decision that allowed for gasoline exploration in newly opened maritime areas.

On 23rd January 2020, the Oslo Court of Appeal rendered its decision. Whilst the State prevailed, the decision contains important considerations through which the constitutionalisation of the environment is furthered, and, most importantly, according to which Norway bears responsibility for emissions that occur abroad as a result of its oil and gas production. At the same time, the judgment is legalistic and conservative, demonstrating once more the constraints felt by the judiciary asked to mingle in the issue of climate change.

10.1 People abroad in the Arctic Oil case before the Court of Appeal

One of the contentious issues on appeal was again, whether the right to the environment enshrined in section 112 of the Norwegian Constitution is a so-called ‘rights provision’, i.e. a provision on which judicial review could be based – in this case of the Licensing Decision. The claimants and the District Court had said yes, but the Norwegian State disagreed. Moreover, the State had argued that the last paragraph of this provision, speaking of ‘measures’ to be taken to implement the right to the environment, is to be understood only as ‘active’ measures, so it cannot entail an abstention of a certain action (e.g. awarding licenses to drill for oil and gas).

a) The right to a healthy environment is suitable for judicial review

The Court of Appeal carefully consider the text of Section 112, its preparatory works and relevant literature. Moreover, it shows its awareness of the tension between law and politics that judicial review in accordance this Article may incite; it observes that environmental decision-making often involves political balancing that is best done by popularly elected bodies. Yet it goes on to stress the role of

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688 Oslo Court of Appeal (Borgarting Lagmannsrett) 23 January 2020, Natur og Ungdom & Greenpeace Norge v Staten, case number 18-060499ASD-BORG/03, ‘Artic Oil’.
courts in protecting the rule of law and in limiting the political majority where ‘constitutionally established values’ are at stake. It notes about the right to the environment:

_The environment is fundamental in the broadest sense for humans’ living conditions, and when compared with other rights the courts have been assigned to protect, it does not seem unnatural to understand section 112 to mean that in this area as well, the courts must be able to set a limit on the Government’s actions._

689

In conclusion, the Court of Appeal says that the Article must be understood as rights provision that can be reviewed before the Norwegian courts. 690

**b) Norway responsible for petroleum burnt abroad, but not for harmful effects abroad**

Moving to the substance of Section 112, the Court says that the key is ‘whether the measures are sufficient in light of the severity of the environmental harm’. 691

It notes that the authorities have a high degree of discretion in choosing sufficient measures, where they have to balance the societal costs of harming the environment and those of the measures – elements that the Court also will consider in its review.

The Court finds that section 112 is applicable to the emission of greenhouse gasses. 692 It then takes two steps interpreting Section 112, the first of which is very progressive, the second rather the opposite. That is, it firstly considers that in the assessment of the Licensing Decision against Section 112, also to be taken in are those emissions that are the result of burning Norway’s petroleum _abroad_. Interestingly, it bases this interpretation on the reference to future generations in section 112 (I will come back to this in the next Chapter IV, on future generations). The Court notes that emissions resulting from the exploration, also after export out of Norway, will have a climatic effect that might also harm (future) Norwegians. Though the Court agrees with the point made by the State (and the Court of First Instance), that _international_ climate agreements do not oblige hereto, it finds that these sources cannot justify a restrictive interpretation of the _Norwegian_ constitution. 693 In other words, the Court says it wants to consider the so-called scope 3 emissions under section 112 and thus grants the

689 Idem, §2.2.
690 Idem.
691 Idem, §2.3.
692 Idem, §2.4.
693 Idem.
Norwegian Constitution a wider application than international environmental law.

The second step of interpretation is however a lot less progressive. That is, it finds that relevant for the assessment under section 112 are only climate change effects in Norway, so not the effects abroad. The Court says that while the wording of section 112 (‘every person has the rights to an environment...’) is entirely general in nature, it is at the same time ‘obvious that the Norwegian Constitution does not grant global rights but instead has a limited scope of application’. According to the Court, such is not changed by the international environmental ‘no harm’ principle, prohibiting States to harm each other. It reasons that this principle ‘had been developed with the intention of assigning responsibility for harmful actions, whereas section 112 of the Norwegian Constitution involves an individual right to the environment’. The Court further justifies this interpretation by pointing out that, in contrast with the principle of solidarity between future generations, solidarity between nations is nowhere to be read in the Norwegian Constitution. The Court says that, whilst the solidarity principle across nations might be significant for fighting dangerous climate change morally speaking, ‘the effects arising in Norway are key’ for an assessment under Section 112.694

The Court immediately relativized this slightly, adding that actions within Norway contributing to environmental harm outside Norwegian borders can be to some degree ‘relevant’ for assessing whether the threshold of section 112 has been met; a violation of international agreements such as Paris can also be ‘important elements’ to clarify the exact acceptable limits and appropriate measures.695

c) The constitutional right to a healthy environment is not violated

The Court does make note of a few interesting facts, including that the parties to the Paris Agreement (including Norway) have pledged to keep global temperatures well below 1.5°C, but that the combined nationally determined contributions of the parties are ‘clearly too low’ to achieve this goal; that negative emission techniques are currently not available on a large scale; and that Norway’s per capita emissions are twice as high as the global average and also above the European average.696

694 Idem.
695 Idem.
696 Idem, §3.1.
Yet, the Court then makes a move that is at odds with the line developed by the Dutch courts in *Urgenda* and the German Higher Regional Court in the *Lliuya* case. That is, whereas the latter courts deemed percentages of respectively 0.5\% and 0.47\% legally relevant, the Oslo Court of Appeal notes that Norway’s emissions are only ‘marginal’ compared to the global whole.\(^{697}\) According to the Court, this is true for the emissions resulting directly from the production in Norway,\(^ {698}\) as well as for the emissions of greenhouse gasses from combustion abroad, which add up to 1\% of global emissions.\(^ {699}\)

The Court observes that the emissions resulting from the production in Norway are estimated at 4.5 to 22 million tonnes of CO\(_2\), and it says this is a ‘minor contribution’ to Norway’s national annual emissions of 50-60 million tonnes.\(^ {700}\) It also says these emissions have to be weighed against measures taken, and notes that Norway is participating in the EU’s emissions allowance trading system. ‘Assuming a well-functioning emissions allowance trading system, this means that increased emissions from the Norwegian Continental Shelf will not affect the total emissions within sectors required to surrender allowances in the EU.’\(^ {701}\) The Court of Appeal says it indeed assumes that participation in the ETS is a ‘significant’ measure in the sense of the third paragraph of Section 112, as is the Norwegian imposition of a national carbon tax.\(^ {702}\)

Moreover, it reasons that other Norwegian emissions are not ‘fixed’ – the government can decide to lower those in order to comply with the Paris Agreement. ‘Which national emissions are appropriate to prioritise is beyond the power of the courts to review under Section 112.’\(^ {703}\) This is also the reason the Court dismisses the claimants’ idea to apply the *Urgenda* case; it says that this case was about general policy and that the Dutch courts did not take position in the prioritisation of certain emissions.

As for the emissions resulting from combustion abroad of Norwegian petroleum, the Court notes that measures to combat global emissions are more difficult, from a legal perspective.\(^ {704}\) Yet, it does regard Norway’s active role in international

\(^{697}\) *Idem*, §3.2-3.
\(^{698}\) *Idem*, §3.2.
\(^{699}\) *Idem*, §3-3.
\(^{700}\) *Idem*, §3.2.
\(^{701}\) *Idem*.
\(^{702}\) *Idem*.
\(^{703}\) *Idem*.
\(^{704}\) *Idem*, §3.3.
climate politics a ‘measure’ in the sense of the third paragraph of section 112 of the Norwegian Constitution, as well as Norway’s International Climate and Forest Initiative and its support for adaptation for developing countries. ‘Compared with such measures, shutting down or reducing Norwegian petroleum activities may prove less cost-effective,’ it says.\textsuperscript{705}

The alternative to gradually phase out Norwegian exports of oil and gas is not necessarily effective, the Court observes. After all, cuts in Norwegian production ‘might quickly be replaced by oil supplied from other countries’.\textsuperscript{706} It goes on to observe that even if climate change effects are dramatic, relevant are the (serious) effects in Norway, for which a number of measures have already been put in place. Once again, the Court defers to the political institutions, noting that the Norwegian Parliament (the ‘Storting’) had voted against the gradual phasing out of Norwegian petroleum production on several occasions.

d) The ECHR not violated
On appeal, the claimants had independently invoked Articles 2 and 8 of the ECHR to challenge the Licensing Decision. However, the Court of Appeal deems these rights not to be violated. It noted that the ‘consequences of climate change globally are beyond the Norwegian State’s obligation under the ECHR,’ in view of Article 1 ECHR which obliges States to secure the Convention rights of everyone within their jurisdiction.\textsuperscript{707} The Court reasoned that, though global warming might cause a loss of human life in Norway, the emissions resulting from the Licensing Decision are only marginal in comparison to global emissions, which means that the requirement for a ‘real and immediate risk’ under Article 2 is not fulfilled. As for Article 8, the Court finds that there is ‘clearly’ no direct and immediate link between the emissions resulting from the Licensing Decision and the rights under Article 8 of Norwegian residents.\textsuperscript{708} Moreover, even if a real and immediate risk or a direct and immediate link could be found, then the State would still have its margin of appreciation. There is ‘nothing to indicate that such an assessment will be different under ECHR Articles 2 and 8 than under Section 112 of the Norwegian Constitution.’\textsuperscript{709}

\textsuperscript{705} Idem.
\textsuperscript{706} Idem.
\textsuperscript{707} Idem, §4.2.
\textsuperscript{708} Idem.
\textsuperscript{709} Idem.
e) The State wins, but parties bear their own legal costs
After establishing that the local environmental harm is also only marginal, and that the government made no procedural errors in reaching the Licensing Decision, the Court of Appeal unanimously rules in favour of the Norwegian State. It does not, however, award any legal costs, as issues related the interpretation of Section 112 have not been reviewed before by the courts, meaning that the decision has significance beyond this particular case, and is of importance for the State as well.\textsuperscript{710}

10.2 The emancipation of people abroad in the Court of Appeal’s Arctic Oil decision
The ruling of the Court of Appeal in the Arctic Oil case operationalises the constitutionalisation of the environment in a civil procedure, by establishing that climate change falls within the scope of Section 112 of the Norwegian Constitution and that this provision forms a justiciable basis to challenge governmental decision-making. The Court thus affirms that the climate is matter of law, not politics – even a matter of constitutional law legitimising judicial interference.

Also, the Court made an important step in determining that the rationale of Section 112 supports Norway also being responsible for the combustion of exported petroleum. The so-called ‘scope 3 emissions’ are thus considered legally relevant for Norway’s climate responsibility. This finding will certainly be invoked in numerous climate cases against business entities. Important in the context of this chapter is that the reasoning behind this finding is based on the observation that climate change knows no national boundaries, so that emissions will affect Norwegians regardless of their origin. This is, to my knowledge, the first court rendering such an opinion about the attribution problem discussed in the introduction to this chapter\textsuperscript{711} and it is certainly the first court in a European private law ruling to do so.

Lastly, the Court of Appeal interprets Section 112 to possibly also containing an obligation to abstain from certain actions – unlike the District Court that had understood the word ‘measures’ in the provision to only entail \textit{active} measures. That being said, just like the District Court, the Court of Appeal deems the Licensing Decision constitutional.

\textsuperscript{710} \textit{Idem}, §6.

\textsuperscript{711} See above section A.2.
Moreover, in its decision, the Court also explicitly excludes people abroad from any protection under the Norwegian Constitution and under the ECHR. In this regard, it neither adds to the normative legitimacy nor to the political effectiveness of the public sphere for those who live abroad. This exclusion is remarkable. After all, that only effects within Norwegian boundaries are relevant is at the very least difficult to reconcile with the universal aspiration of human rights – and we have seen above in section 9.2 that the ECtHR has occasionally ruled that action within national boundaries, but with an extraterritorial effect can violate rights under the Convention.

The Norwegian Court of Appeal supports its narrow reading by reference to inter alia the Emission Trading Scheme of the EU. Now of course, this mechanism, put in place to combat climate change does reflect the acknowledgment of climate change being a global problem in need of international cooperative solutions. Thus, one could say that this instrument, and the Court considering it, amount to an implicit recognition of people abroad. Yet it is also surprising that the Court of Appeal deems participation in this very scheme an apt ‘measure’ in the sense of the Norwegian Constitution to take care of the environment. After all, the ETS is notoriously ineffective, as the prices of emission allowances are too low, inter alia because the EU has given out many allowances for free when the system was first introduced. The ETS is part of the EU legislative package that is being challenged for its insufficient effectiveness in the so-called People’s Climate Case against the EU.

Not less surprising is the Court’s reasoning around the Norwegian contribution to global emissions being ‘marginal’. It is difficult to see how Norway’s emissions are ‘marginal’ in any understanding of this term; it is a nation with merely 5 million citizens and its per capita emissions are twice as high as the world’s average.

One can of course only guess why the Norwegian Court would engage in such precarious reasoning, but the seemingly most important reason is – as


713 See section 8 above.
emphasised by the Court itself; the Norwegian Parliament, and thus Norwegian politicians, have clearly decided in favour of more oil production by Norway. The Court thus felt constrained by the legal boundaries to its role that it also read the facts quite differently from the Dutch courts in the Urgenda case; a case in which a contribution of 0.5% to global emissions was deemed legally relevant, whereas the Norwegian Court said 1% was ‘marginal’. This difference can of course also be explained by the fact that the Arctic Oil case concerns a specific decision, which is not evidently violating international environmental law, whereas the Urgenda case concerned the enforcement of an internationally agreed minimum goal for general policy. Yet even bearing these contrasts in mind, the qualification of 1% of global emissions as ‘marginal’ is remarkable.

In summary, the Norwegian Court of Appeal’s ruling is at times legalistic and very conservative from the perspective of people abroad. At the same time, the Court operationalises a constitutionalised environment more so than the District Court and most importantly, it assigns responsibility to Norway for emissions taking place abroad as a result of the usage of Norwegian petroleum. Thereby, not only it clearly affirms how the climate is a legal, not only a political matter, but it also strongly recognises the global nature of climate change.

11. Enforcing the international climate obligations of a private party: French municipalities against Total

In 2017, the Duty of Vigilance Act entered into force in France. It was designed in reaction to the horrible Rana Plaza incident that occurred in Bangladesh in 2013, when a clothing factory collapsed, resulting in the death of approximately 1,200 people and in at least 2,500 wounded people. Many Western companies had their apparel produced in the factory, including Prada, Gucci, Benetton and Mango, and French companies such as Carrefour, Auchan and Camaieu. Yet, in the legal system at the time, none of these large companies could be held accountable. Sub-contractors of sub-contractors fell outside the scope of multinationals’ legal responsibility – no matter how much the multinationals had profited from the low financial costs of the Bangladeshi labour in poor conditions. In discussing the significance of Milieudefensie’s climate case against Shell, the problem of multinational corporations falling outside the scope of binding international law also needs to be dealt with.


715 Section 7.2 above.
Indeed, at the time of the Rhana Plaza incident, only legally non-binding, voluntarily adopted standards applied to the value chains of multinationals. The Duty of Vigilance Act is revolutionary, in imposing legally binding obligations on multinationals that apply transnationally – throughout their global value chain.\textsuperscript{716} It adds provisions to the French Commercial Code (\textit{Code de Commerce}) that require large corporations to adopt a so-called plan of vigilance.\textsuperscript{717} In this plan, these corporations are required to map the dangers posed by their global value chains to human rights and fundamental freedoms, security, health and the environment, and they need to explain which reasonable measures they will take to address such risks. If they fail to meet these obligations, and continue to fail to meet these obligations three months after the first notice, anyone can hold them liable in court.\textsuperscript{718}

The Act is widely regarded as a step forward in the problems surrounding the topic of business and human rights. Many aspects of the Act are, however, unclear. For instance, what are ‘reasonable measures’? Such questions will depend on judicial interpretation.\textsuperscript{719} Final judicial decisions applying the act have not yet been rendered.

Therefore, a pioneering case is the French climate case against the oil giant Total, which is based on the articles that the Act of Vigilance introduced in the French Commercial Code. The plaintiffs are the mayors of thirteen French cities, including Grenoble and Nanterre, and four NGO’s called \textit{Les Eco Maires} (The Eco Mayors), \textit{Notre Affaire à Tous} (Our case for all), \textit{Sherpa} and \textit{Zéa}. In October 2018, they first sent a letter to Total pointing out that the climate is not even mentioned in Total’s plan of vigilance, whereas Total is among the carbon majors identified by Heede’s study and is responsible for almost 1\% of global greenhouse

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\textsuperscript{717} Art. L. 225-102-4.-I stipulates that the obligation to adopt a plan of vigilance applies to corporations which at least 5000 direct and indirect employees in France, or with at least 100,000 direct and indirect employees in France and abroad.
\textsuperscript{718} Cf Art. L. 225-102-4.-II “Lorsqu'une société mise en demeure de respecter les obligations prévues au I n'y satisfait pas dans un délai de trois mois à compter de la mise en demeure, la juridiction compétente peut, à la demande de toute personne justifiant d'un intérêt à agir, lui enjoindre, le cas échéant sous astreinte, de les respecter.”
\textsuperscript{719} Cf Mavoungou (n 716) 58.
gas emissions.\textsuperscript{720} When this case will be fought in court, it is therefore likely that Total will contest its responsibility for so-called ‘scope 3’ emissions.

Total published a renewed plan in March 2019, but two months later, Notre Affaire à Tous published a report analysing how Total’s plan is extremely insufficient.\textsuperscript{721} In June, the plaintiffs sent another warning letter to Total. In the absence of Total’s willingness to adopt a serious plan respecting the Paris Agreement, the plaintiffs launched their official claim on 28th January 2020 before the Nanterre court of first instance (\textit{tribunal judiciare de Nanterre}).\textsuperscript{722} Total publicly said that it ‘regretted’ the lawsuit, since the problem of climate change is rather something to deal with by society at large.\textsuperscript{723}

\textbf{11.1 People Abroad in the claim against Total}

The claim against Total is the only one in European private law that explicitly refers to the Greenhouse Gas Protocol and uses its terminology ‘scope 1/2/3 emissions’.\textsuperscript{724} In a set of definitions, the claim explains what is meant by this demarcation.\textsuperscript{725} The claim argues fiercely that scope 3 emissions should be considered to count for the legally relevant number of Total’s emissions – thus calculated, Richard Heede’s \textit{Carbon Majors} report shows that Total causes about 0.9\% of global emissions.\textsuperscript{726} Total thus is the largest French emitter.\textsuperscript{727} Total’s scope 1, 2 and 3 emissions add up to a number that is higher than France’s territorial emissions.\textsuperscript{728} The claimants argue that Total’s emissions endanger human rights and thus should be addressed in the company’s plan of vigilance pursuant to the French Commercial Code as amended by the Act of Vigilance.

\begin{flushright}
\textsuperscript{724} See also the introduction of this chapter, §A.2.
\textsuperscript{725} Claim against Total, §1.1.
\textsuperscript{726} \textit{Idem}, §1.3.2.
\textsuperscript{727} \textit{Idem}.
\textsuperscript{728} \textit{Idem}.
\end{flushright}
To support that Total indeed should take responsibility for all its emissions, the claimants invoke a general duty of care to preserve and ameliorate the environment, which rests on ‘every person’ according to Article 2 French Environmental Charter (*Charte de l’environnement*).\(^{729}\) This law entered into force in 2005 and is considered as constitutional in nature. Moreover, the claim elaborately discusses literature and international policy documents showing that climate change will endanger human rights, and they invoke the Dutch *Urgenda* case that found climate related violations of Articles 2 and 8 ECHR.\(^{730}\)

The claimants argue that the current plan of vigilance of Total does ‘not conform’ to the Commercial Code, with the aid of a number of arguments. For one, the law asks for a ‘cartography,’ this word refers to the science of drawing maps, whereas the plan only contains a list of risks. ‘This is not at all about a cartography,’ the claimants say, whereas ‘the activities of Total as well as the companies she controls are perfectly localisable geographically.’\(^{731}\) Since Total also can easily afford such financially, it has an obligation to carefully map how all its activities contribute to climate change.\(^{732}\)

The claimants note that Total’s latest plan of vigilance mentions climate change, in the following way: ‘Climate change is a global risk for the planet resulting from diverse human activities like the production and consumption of energy.’\(^{733}\) However, the claimants find this statement ‘eminently incomplete’, in particular because Total does not specify its own major contribution to global emissions.

In its plan of vigilance, it does refer to two reduction scenarios that respectively lead to 2.7°C and 3.3°C of warming. These are, therefore, not in alignment with the UNFCCC, that aims for a maximum of 2°C, and the Paris Agreement, aiming at 1.5°C. Also clearly not in line with the latter two documents are the measures that Total announces in its plan of vigilance, such as amelioration of energy efficiency (this can never lead to the necessary decrease in energy usage); a heavier reliance on natural gas (though cleaner than coal, still very polluting); and negative emissions (not yet invented, as also underlined by the courts in the *Urgenda* case).\(^{734}\) Total is also aware of this as its CEO, mister Pouyanné, himself

\(^{729}\) *Idem*, §2.2.
\(^{730}\) *Idem*, §2.3.2.3.
\(^{731}\) *Idem*, §2.3.3.1.
\(^{732}\) *Idem*.
\(^{733}\) *Idem*.
\(^{734}\) *Idem*.
publicly stated that ‘the urge to say that we’ll be climate neutral by 2050 is sympathetic, but no one of us will be here in 2050.’

 Likewise, the claimants criticise the goals unfolded by Total in its plan of vigilance, *inter alia* because these only address Total’s scope 1 and 2 emissions, but not its scope 3 emissions.

 Based on the French Commercial Code, the claimants thus ask for a judicial injunction, ordering Total to come up with a new plan of vigilance, which includes: a clear identification of the risks related to a global warming above 1,5°C, referring to the most recent works of the IPCC, specifically risks to the enjoyment of human rights; her own contribution to global emissions; and a complete and exhaustive cartography of risks resulting from its activities for each of its sectors and projects.

 In the alternative, the claimants ask for another injunction based on the obligation to prevent ecological damage under Article 1252 of the French civil code – I will treat this in more detail in the next chapter, on future generations.

**11.2 Emancipation of people abroad in the claim against Total**

The claim against Total is another attempt to operationalise a constitutionalised environment through private law, thereby again making the point that climate change is a matter of (constitutional) law rather than politics. France is rather unique in not only having adopted a right to an environment in its Constitution through the Environmental Charter, but to also have included environmental duties therein. The claimants combine that with another rather progressive piece of regulation: the Vigilance Act, put in place precisely to hold multinationals accountable for their entire value chains, even if these are spread across multiple States. As such, this claim thus is an interesting move to address the transboundary effect of climate change through constitutional law to be operationalised in private law proceedings.

 In a way, the claim against Total is focussed on the local detriments of climate change rather than those taking place in other nations – after all, most claimants are mayors precisely concerned with their own communities. Effects in other nations are not mentioned, nor do the claimants assert that they represent people

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735 Idem.
736 Idem.
737 Idem, §2.3.4.
738 Cf Chapter IV, section II.11.
from other nations – in this sense, not much normative legitimacy is added to the public sphere from the perspective of people abroad. At the same time, by arguing so fiercely for the legal relevance of so-called scope 3 emissions, the claim truly attempts to address through private law proceedings the transboundary nature of climate change, thereby at least contributing to an increased political effectiveness of the public sphere, in so far as it makes national boundaries irrelevant for calculating a multinational’s emissions.

Perhaps unfortunately for the claimants, only two days after they launched their claim, the Nanterre court of first instance said it was incompetent to hear another pioneering claim based on the Act of Vigilance, which happened to be directed against Total as well.\(^{739}\) The Court here rendered the first judgment on this Act, referring the case to the commercial court instead. This other case against Total was launched by inter alia Friends of the Earth and regarded Total’s plan of vigilance that allegedly did not address thoroughly enough the risks of its oil projects in Uganda. The claimants in the latter case announced that they were ‘extremely disappointed’ with the decision of the Nanterre Court, clarifying: ‘The Commercial Court is a court created to enable commercial entities (as lay judges) to render justice in disputes between corporations. The Total case involves serious human rights and environmental violations. It is therefore unrealistic to imagine that the Commercial Court is the appropriate jurisdiction for compelling Total to take the necessary measures to put an end to these abuses.’\(^{740}\) Given that the eco-mayors did launch their claim before the exact same court as Friends of the Earth, it is not unlikely that they might stumble upon the same jurisdictional obstacle.

**C. CONCLUDING REFLECTIONS ON PEOPLE ABROAD**

The past sections have singled out all the climate change cases that came up in European private law so far. This served the purpose to provide the ‘data’ to substantiate theoretical submissions made in chapter II. First, the cases exemplify the ongoing environmentalisation of law and the constitutionalisation of the environment. Second, and more specifically, the chapter looked at the cases from the perspective of ‘people abroad’ so as to reconstruct how the cases deal

\(^{739}\) Court of First Instance of Nanterre (*Tribunal Judiciaire de Nanterre*) 30 January 2020,

with the legitimacy critique articulated by Nancy Fraser and others to legal-political systems that take decisions with large transboundary effects without hearing the voice of those people who live beyond national boundaries. These concluding reflections provide an overview of these two aspects.

1. Law, not politics; environmental constitutionalism

1.1 Law rather than politics
The last chapter submitted that the climate cases, qua contributions to the public sphere that are primarily directed to the legal rather than the political domain, put forward that the environment has constitutionalised and that action on climate change is a matter of law rather than politics, which can be enforced through private legal procedures in Europe.

Evidently, by engaging in litigation, each of the claimants put climate change forward as a matter of law, in other words, something that can be adjudicated upon without the judiciary violating the legal boundaries of its role as determined by the people’s power.

Not all claimants were successful so far. It is for the courts to provide the most authoritative articulation of the right interpretation of the law. Also in the Court decisions, there is evidence that climate change can be a matter of law rather than politics, albeit to different degrees.

The judges in the Urgenda case agreed that the Dutch State has a legally enforceable obligation to do the internationally agreed minimum against climate change. By allowing the Lliuya case to the evidentiary phase, also the German Higher Regional Court seems to be willing to consider climate change as a matter of law. Furthermore, the Swedish courts in Magnolia appeared not to exclude this possibility either, in saying that they only missed factual evidence of legal violations rather than missing a legal basis. Also, both courts in Arctic Oil were willing to consider climate change related complaints, as they deemed the environmental Section 112 of the Norwegian constitution a ‘rights provision’. And, lastly, whereas the General Court of the EU declared The People’s Climate Case inadmissible, it did so pointing out the availability of remedies at the national level, thereby not excluding that climate change could belong to the legal domain, be it before national rather than European courts.
1.2 Environmental constitutionalism

The climate cases all oppose majority decisions in one way or the other. This is evident where the cases are launched against governments: the Urgenda case, the Belgian Klimaatzaak, the Swedish Magnolia case, the Norwegian case of Arctic Oil, and the People’s Climate Case against the EU. In the cases against the companies RWE, Shell and Total this is less evident, but it can still be read in these companies’ defences articulating their acts never were illegal; they rely on the legality of their operations that they situate in democratic majority decisions. Now, following Habermas’ co-originality thesis, the judiciary can only legitimately oppose democratic majority decisions when basing itself on a fundamental right. It was argued in Chapter II that in light of this theory, the increasing success of litigating environmentalists can only be understood together with the ongoing constitutionalisation of the environment. This chapter presented the climate cases in chronological order so as to show how they push the ongoing movement of environmental constitutionalism for it to be actualised in European private law:

In 2015, in the Urgenda case, the District Court still felt unable to agree with the claimants that climate change may lead to direct violations of Articles 2 and 8 of the ECHR. It did find these rights however relevant for determining what climate obligations rest on the Dutch State, by weighing them indirectly through the application of the private law doctrine of hazardous negligence. The Belgian Klimaatzaak claimants have also claimed that fundamental rights can be relied upon directly; the outcome of the Belgian case is not yet known at the moment of writing this thesis. Interestingly, in June 2017 and January 2018, the Swedish courts in Magnolia seemed to open a door, since they assumed climate change could fall within the scope of Articles 2 and 8, even if they did not find any violations. Importantly, the Oslo District Court in January 2018 acknowledged that climate change could a priori violate fundamental rights, specifically Section 112 of the Norwegian constitution – although its narrow reading of this provision contributed to the outcome, that the environmentalists lost this case.

A true breakthrough came then with the appellate decision in the Urgenda case in October 2018, which established a violation of Articles 2 and 8 ECHR caused by insufficient climate policy, measured against what States have articulated as necessary in international negotiations under the header of the UNFCCC. In other words, climate change was reframed as a matter of fundamental rights in European private law here. This finding was subsequently used by the case against the oil companies Shell and Total, in respectively the Netherlands and France, as well against the Norwegian State in the Arctic Oil case on appeal.
The claim in the *People’s Climate Case* – invoking both *Urgenda* and the success obtained in the case against RWE – goes even further, putting forward that fundamental rights and the international no harm principle may be violated autonomously. That is, even when governmental policies are in line with international climate change law under the UNFCCC, human rights violations due to climate change may be attributed to governmental bodies like the EU’s Parliament and Council. In 2020, the *Arctic Oil* case on appeal was again lost by the environmentalists, but the Court of Appeal confirmed the justiciability of the right to the environment enshrined in Section 112 of the Norwegian Constitution, and it significantly widened the scope of this provision, as we will also discuss in the next section.

The chapter also disclosed how clearly the claims build upon each other to sustain this development from the political into the legal and into the constitutional domain. All claims invoke the Urgenda case of first instance, and as soon as the judgment by the Dutch Court of Appeal was delivered, the environmentalists used this as well. The environmentalist even hired the same lawyers: Roger Cox was involved in *Urgenda* as well as the Belgian *Klimaatzaak* and the case against Shell, and Roda Verheyen represents Mr Lliuya as well as the families who brought their case against the EU. To this it may also be added that the environmentalists connect through platforms such as Climate Action Network, where insights and strategies are shared.

2. Inclusion of people abroad implicitly and explicitly

According to Habermas’ theory unfolded in the former chapter, law draws its legitimacy from intersubjective deliberations taking place in the political institutions and in the public sphere. The former chapter also introduced Nancy Fraser shedding light on public spheres in deliberative democracies in a transnational context. She emphasised that the concept of the public sphere is not a descriptive notion, but an element of (Habermas’) *critical* theory. This theory conceives the public sphere as a space for the communicative generation of public opinion that has the function to alert to important political issues and to control the centre of political decision-making from the periphery. Two characteristics of the public sphere are crucial within this theory: namely its *political effectiveness*, i.e. its ability to actually influence the centre of political decision-making; and its *normative legitimacy*.

741 And she is on another, administrative case against the German government.
Nancy Fraser underscored that for this normative legitimacy not only the *participatory parity* of the public sphere matters, i.e. that the participants are contributing under equal conditions, but also that the public sphere is *inclusive*, i.e. that all those who were affected have a chance to participate in the informal processes of opinion formation to which the official decision-makers are accountable.\(^{742}\) This inclusiveness condition can no longer be deemed to be satisfied when the relevant public sphere consists of a national citizenry, she observes, because ‘under current conditions, one’s conditions of living do not depend wholly on the internal constitution of the political community of which one is a citizen’.\(^{743}\)

The latter statement is certainly true when it comes to climate change, which is characterised by the transboundary dispersion of its causes and effects. Climate change affects people globally, so that when speaking of democratically legitimate decision-making on this matter, ‘affectedness’ as a criterion for inclusiveness would ideally result in a global public sphere that could hold some kind of global government accountable. This thought experiment does not match our daily reality, in which we have constructed boundaries between nation states (and far from all of them have a functioning *national* public sphere).

### 2.1 Implicit inclusion of people abroad through enforcing international law

Surely, we put in place *some* mechanisms to address the transboundary problem of climate change that seem to meet the global ambition warranted for, namely through international law, as elaborated upon in the introduction to this chapter. All the climate cases we have seen in this chapter have relied on international law to substantiate their claims, and thereby implicitly try to do justice to people from other nations, as the affectedness of these people is thought to have played a role in the articulation of an instrument like the UNFCCC.

The most successful instance, in this regard, is the case of Mr Lliuya against the German oil company RWE. Even if he loses this case, *private international law* allowed him the access to a judicial forum in another nation, thereby granting him the possibility to make a contribution to the public sphere that is especially strong given it is not directed at the political but at the legal institutions (i.e. not claiming that the law needs to change, but rather that the law has already changed.

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\(^{742}\) Fraser and Nash (n 191) 28–9.
\(^{743}\) ibid 29–30.
and that the court merely needs to confirm this). Yet we have to acknowledge that, even though this mechanism of private international law might add some normative legitimacy to European private law, it cannot be said to be politically effective. After all, those who find the time and financial resources to engage in litigation are exceptions, certainly when keeping in mind that those people most affected by climate change are the poor and vulnerable, mostly living in developing nations, in other words, those people who precisely lack means to engage in litigation. Even the most benevolent NGO’s will not be able to help all of them.

Indeed, the international legal system to a certain extent reinforces the pronounced injustices we are facing relating to climate change, as underlined by the introduction to this chapter. Globally, those peoples and nations who profited the least from industrialisation leading to greenhouse gas emissions causing climate change, are suffering the most from its effects and are the least capable to adapt. A State such as Norway, in the Arctic Oil case, refuses to take responsibility for the transboundary effects of authorisations for oil drilling that will profit those inside its national territory – and it is allowed to do so by the system that deems only ‘scope 1’ and ‘scope 2’ emissions relevant. Thus – even where significantly the Court of Appeal did also consider ‘scope 3’ emissions – the international legal system did not prevent it from reasoning quite boldly that Norway’s share in global emissions is only ‘marginal’. The system likewise permits Sweden to authorise its fully State-owned oil company Vattenfall to sell lignite assets to an actor of a different nationality instead of actually reducing emissions. In line with this, we have also seen that there is barely any international law binding corporate actors – although attempts have been made to make international law binding upon them in the case against Shell, and in France through the enforcement of the Duty of Vigilance Act in the case against Total.

Relatedly, it is poignant that recognition for the need for international cooperation to combat climate change invariably serves as an argument of the defendant parties in the cases, to show that responsibility is not with them but rather by a global collective. Meanwhile, the failure of the international legal system to adequately prevent climate change was the reason for the claimants to engage into litigation in the first place. The Klimaatzaak claim points to the Belgian role in international cooperation time and again. The case of Mr Lliuya case uses a lack of effective international solutions as a motivation to litigate.

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744 Cf section D of Chapter II.
against a private actor RWE. And in the *Urgenda* case, it is the need for cooperation that renders futile the Dutch State’s argument that its emissions are only a drop in the ocean.

### 2.2 Explicit inclusion of people abroad by making them subject of rights

Apart from implicitly taking people abroad on board through the application of international law, the cases also try to make the voices of these people heard in the public sphere more explicitly, namely where defending their rights:

Association Urgenda says to also stand for people abroad, as do the claimants in the case against Shell, whereas the Peruvian Mr Lliuya defends his own rights in a German court (it should be noted that he is the only one not invoking fundamental rights, but rights stemming from the German Civil Code). The *Arctic Oil* claimants maintain that the Norwegian constitutional provision on the environment, Section 112, should also set limitations for decisions leading to negative environmental impacts outside Norway; no territorial limitations apply to this provision’s protection of the planet’s natural resources, including the climate.

*Magnolia* presents a mirror image of most of the cases; the claimants feel they are the people abroad excluded from a decision-making process. They invoke their own rights, including those enshrined in Articles 2 and 8 ECHR. A similar rationale can be read in the Oslo Court of Appeal’s finding, that emissions abroad resulting from Norwegian oil combustion are relevant because they can harm people in Norway. Of all climate cases discussed, the claim in the *People’s Climate Case* is the most categorical in explicitly stating that people outside Europe are also holders of the rights enshrined in the CFREU.

A claim to these rights leads to a tension that is not easy to overcome for the courts. After all, they are asked to deliver eventually counter-majoritarian judgments that would be legitimised by rights of people who do not form part of the polis in the first place. Yet the formulation of this renewed interpretation emanates from actors that are coming mainly from the territory the courts operate in. In *Urgenda*, for example, the courts were asked to adjudicate that the government’s reduction goal was wrongful, and Urgenda is claiming that such a decision could be legitimised by applying the rights of people abroad. Yet it is the Dutch organisation Urgenda putting forward this interpretation of environmental rights. In itself, this dynamic is not strange to inclusion processes – men were ultimately the ones who had to vote for women’ – but it leads to a struggle that is visible in the cases:
The District Court of The Hague allowed standing for Urgenda representing people abroad, even if only indirectly applying Articles 2 and 8 ECHR (and Article 21 of the Dutch Constitution) so as to shape a private legal duty of care not to create unnecessarily dangerous situations. Yet it did not specify whether the remedy in this case was also granted on behalf of people from other nations – the Court noted that the unlawfulness towards the population of the Netherlands was already sufficient. Similarly, the Court of Appeal of The Hague in Urgenda circumvented the question of standing on behalf of people abroad, stating that the interests of nationals were sufficient to render its judgment. At the same time, it did not explicitly overturn the District Court’s decision in this respect, which had allowed Association Urgenda to represent people abroad. This possibility thus still stands as a matter of Dutch law. Moreover, both the District Court and the Court of Appeal deemed damages occurring abroad relevant when weighing the facts of this case.

The Oslo District Court in the case of Arctic Oil was simply unwilling to read Norwegian responsibility for the combustion of its oil abroad into Section 112, thus hampering recognition of people abroad in the ongoing movement of environmental constitutionalism. The Court of Appeal on the contrary held that emissions abroad resulting from the combustion of Norwegian petroleum are relevant for the lawfulness of the Licensing Decision. This is a step that is important in the transnational development of climate law as it is invoked against big corporate actors. Yet the Oslo Court of Appeal also rendered explicit that the ‘scope 3 emissions’ are only relevant because they may affect the climate in Norway – it refused to consider the detrimental effects abroad. Furthermore, it remains to be seen if and how the CJEU will respond to the philosophically strong, but legal-politically far-reaching position of the claimants regarding the rights of people outside the EU.

It must also be noted that apart from legal boundaries, the factual boundaries remain hurdles for those wanting to take climate change to court. It remains to be seen whether Mr Lliuya can factually establish the causal link necessary for his legal victory, the Magnolia youngsters failed to provide the courts with the facts they needed to win their case. Thus, procedural autonomy in private law can be arsenal too heavy to bear for the litigating parties. At the same time, the success of Association Urgenda (as well as the provisional success in the case of Mr Lliuya) demonstrates how the factual boundaries to the role of the judiciary in European private law can work as an empowering tool for private parties, to leave Justitia no choice but to rule in favour of Mother Earth.
3. Conclusion of this chapter
Having underlined how the various climate cases discussed reaffirm and push for a constitutionalisation of the environment which includes the interests of people abroad, it must be acknowledged that the more traditional, nation-centred perspective to boundaries of democratically legitimate judicial law-making still largely seems to prevail. The claims are most often not successful in court, so far. Also, to include people abroad makes judicial decisions vulnerable for legitimacy critique. This is vividly illustrated by all the societal critique to the Urgenda decisions and the debates surrounding the Norwegian climate case. Also, the available case-law has not yet solved the question what actor should be responsible for which emissions.

The varying success of the litigating environmentalists can be explained by the particularities of each legal system and each particular claim. Much of Urgenda’s success can be ascribed to the facts that were dealt with at great length in the claim, and were mostly acknowledged by the State.

In short, national borders that problematically determine the legal boundaries to the role of the judiciary in European private law form an issue that has not yet been overcome, even if they are sometimes relocated because the factual boundary leaves the judiciary with no other choice. When seen as contributions to the public sphere, it also cannot be expected that the climate cases would immediately solve such problems. They rather alert to the illegitimate exclusion of people abroad, something which will hopefully lead to renewed debates about the inclusion of the (international) legal order. A similar dynamic, this time relating to future generations, is to be discussed in the next chapter.

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