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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IV. TEMPORAL BOUNDARIES: FUTURE GENERATIONS

‘The future depends on what you do today.’
Mohandas Karamchand Gandhi

A. REPRESENTATION OF FUTURE GENERATIONS IN DISCOURSE THEORY

Financial Times columnist Simon Kuper’s advice to those who want to spur others to take climate action includes the statement: ‘Don’t talk about saving grandchildren; talk about people today’.745 This chapter does focus on future generations, but not to spur others to take green action. Instead, it reconstructs how the climate cases under study push the temporal boundaries of a deliberative democracy in which only people today have a voice. The cases signal and contribute to a movement increasingly reading the interests of future generations into constitutionalised, environmental norms, which they operationalise through European private law.

Before delving into the details of the cases in section B, this introductory and theoretical section lays the foundations of the problematic aspect of excluding future generations – ‘grandchildren’ – from our deliberations on how to address

745 Simon Kuper, ‘How to Sell Climate Change and Save the Planet’ (Financial Times, 5 December 2018) <https://www.ft.com/content/0dce55f8-1e8-af46-2022a0b02a6c> accessed 23 January 2019.
climate change (§1), it addresses how future generations are (§2) and could be (§3) accounted for in our legal-political system. Moreover, it explains that such does not necessarily match a Habermasian account of deliberative democracy (§4) and asks whether this can be fixed by means of a theory of representation (§5). The theoretical problems concerning the representation of future generations are reflected in the cases (§6), as will be shown in more detail in the rest of the chapter, in sections B.1-9. The chapter ends with some concluding remarks.

1. A devastated future... for whom exactly?

Exactly the limited rhetorical impact of the effects of climate change on the world of our grandchildren is problematic. After all, we know for a fact that there will be future generations,746 since activities connected to procreation – falling in love, dating, intimacy, marriage, parenthood, passing on knowledge and values – belong to what many deem essential for a happy human life. Future humans, while no legal persons yet, will be bearers of human dignity and fundamental rights that might be heavily impaired if the planetary boundaries are crossed.747 These impairments occurring in a distant future does not make them less devastating.

My own hypothetical great-grandchildren, for example, might inherit a house in Amsterdam, but may find their property inundated with water, leaving it valueless.748 Such emotional and financial damage is futile compared to how others will be affected. Coastal communities in Indonesia will face life-threatening dangers from waves and storms, as traditional defences such as coral reefs will have died out due to ocean warming and acidification. Massive heatwaves will kill numerous inhabitants of Asian megacities. In Africa, people will starve because of failed harvests due to the droughts. These are just a few of the IPCC’s predictions, all of them being highly likely to contribute to political destabilisation with its ensuing risks.749

746 Save for unlikely scenarios such as humanity being entirely destroyed by a nuclear war, a vigilant robot take-over or an aggressive invasion of outer space aliens.
747 Cf I. Introduction for an account of planetary boundaries.
749 O. Hoegh-Guldberg and others, ‘Chapter 3. Impacts of 1.5°C Global Warming on Natural and Human Systems’, Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change,
But who are those generations with these forecasted devastated futures? Generations overlap. When speaking of ‘future generations’ we often refer not only to the unborn, but also to persons already alive: our children and youngsters. In the winter of 2018-2019, thousands of children thus claimed this identity when they went on ‘school strike’ for the planet, all over the world, following the example of the Swedish girl Greta Thunberg. Indeed, they constitute a future generation of people who may vote and be elected. Whereas children lack these political powers today, they are already citizens. In their climate school strikes, they contributed to the political deliberations, urging politicians to act on climate change. Furthermore, children and youngsters can exercise their right to initiate judicial proceedings, as we will see in more detail later in this chapter.

As a side note: thanks to the ever-improving medical sciences, the lives of today’s adults might be extended beyond expectation. A sense of après nous le déluge might therefore be less accurate; the generations suffering from climate change in the (near and far) future may well include adult people alive today. That being said, in the remainder of this chapter, I define ‘future generations’ as the unborn as a group, and when analysing the cases, I will also pay attention to how these cases address the future of minors who are currently alive.

2. Future generations are legally relevant
Certainly, there are legal sources which reflect that we attach importance to the generations after us. Not coincidentally, the UN Convention on the Rights of the Child is amongst the few international human rights treaties to explicitly mention environmental concerns, in its Article 24 on the rights to health, water and nutrition. Importantly, to protect future generations is one of the aims of the UN Framework Convention on Climate Change (UNFCCC). This is echoed by inter alia the Paris Agreement calling for ‘intergenerational equity’. Correspondingly, an increasing number of national constitutions refers to some kind of sustainable development, and efforts to eradicate poverty (2018) 298–281 <https://www.ipcc.ch/sr15/chapter/chapter-3/> accessed 26 February 2019.

Surely popular scientific media have the tendency to exaggerate the research results, using the word ‘immortality’. Still research does show life spans are indeed expanding, see e.g. Denham Harman, ‘Free Radical Theory of Aging: An Update’ (2006) 1067 Annals of the New York Academy of Sciences 10.

intergenerational justice.\textsuperscript{752} We will see a vibrant example when we discuss the Norwegian climate case Arctic Oil below in section B.5 and B.10.

Future generations emerge in the most important international environmental political documents of the 20th century. The 1972 Stockholm Declaration mentions future generations three times, underscoring the ‘solemn responsibility’ of man to ‘protect and improve the environment for present and future generations’.\textsuperscript{753} Under auspices of the UN, in 1987 a report entitled Our Common Future was published, written by a commission presided by Gro Brundtland. This report coined the notion of ‘sustainable development’,\textsuperscript{754} which became leading in international environmental law and politics. Sustainable development was defined as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.\textsuperscript{755} This emphasis on future generations came back in Principle 2 of the 1992 Rio Declaration: ‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’ The United Nations still operate the well-known Sustainable Development Goals, an agenda that serves as ‘a shared blueprint for peace and prosperity for people and the planet, now and into the future’.\textsuperscript{756}

The TEU in turn refers to this notion, stipulating that the EU shall contribute to “the sustainable development of the Earth”, in Article 3, and reiterating the importance of sustainable development in Article 21(2)(f). In the TFEU, the notion is again reiterated, with Article 11 stipulating: ‘Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.’ Implicitly, the needs of future generations can thus be read into the constitutive treaties of the EU as well. After all, the definition of sustainable development includes a reference to the needs of future generations. The Fundamental Rights Charter of the EU even explicitly states in its preamble: ‘Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.’

\textsuperscript{753} Cf principle 1 Stockholm Declaration.
\textsuperscript{754} Cf also I. Introduction, section C for an explanation why I do not use this concept centrally in this PhD Thesis.
\textsuperscript{755} World Commission on Environment and Development (n 25) s 3.27.
Likewise, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in its preamble and Article 1 refers to a right to the environment that is supposed to be protected for the benefit of future generations. This Convention has been ratified by all EU Member States, as well as by the EU itself (and some Asian States).

Also, the international environmental principle of prevention is clearly future-oriented; States have a duty to prevent transboundary pollution and environmental harm resulting from activities within their jurisdiction or control.\textsuperscript{757} This duty is not absolute; it only comes into play with a considerable amount of pollution or harm that may be qualified in different ways. The preventive principle is included in so many international agreements that it is considered a principle of customary international law.\textsuperscript{758} It is laid down in the laws of the European Union and in many national legal systems as well.\textsuperscript{759}

The preventive principle is applicable when risks are relatively certain, whereas the related precautionary principle dictates that the absence of certainty on risks should not lead to postponing precautionary measures.\textsuperscript{760} The latter principle appears in various ways, such that no-one agreed definition exists.\textsuperscript{761} It is laid down in \textit{inter alia} Principle 15 of the Rio Declaration and Article 191(2) of the TFEU. The precautionary principle is thought to have a procedural dimension; the environment is said to be given ‘the benefit of the doubt’, lowering the standard of proof for environmental harm in cases where decisions ought to be made on what measures to take;\textsuperscript{762} absence of risk rather than the existence of the risk has to be proven.

\textsuperscript{757} Patricia W Birnie, Alan E Boyle and Catherine Redgwell, \textit{International Law and the Environment} (Oxford University Press 2009) 137.
\textsuperscript{759} ibid 68–72.
\textsuperscript{760} ibid 75.
\textsuperscript{762} Cf. Birnie, Boyle and Redgwell (n 757) 156–7.
At the basis of the precautionary principle lays the precautionary ethics developed by the thinker Hans Jonas in his book *Das Prinzip Verantwortung*,\(^\text{763}\) translated as *The Imperative of Responsibility*.\(^\text{764}\) In this book, Jonas calls for an ‘heuristic of fear’: one must consider the worst-case scenarios when determining what action is due in response to unknown risks.\(^\text{765}\) Essential, in his theory, is that the principle addresses unknown dangerous side effects of the technologies employed by humans. This emphasis on the absence of knowledge can also be traced back, for example, in the Rio Declaration: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”\(^\text{766}\)

### 3. Accounting for future generations fails; should we make them speak?

Yet despite all these sources recognising that we attach importance to the future, in politics, we mostly reason based on present-day cost-benefit analyses. And therefore, it looks unattractive to actually implement measures to prevent climate change - a carbon tax, for example. After all, while such a tax would now burden people dependant on the fossil fuel economy, the benefits will only arise in a future for which our present politicians are not accountable and in which today’s people might no longer be there.

Our economic models, including those made by Nobel-prize winner William Nordhaus, thus shift climate burdens to future generations in a way deemed unethical by critics.\(^\text{767}\) This problem is mostly caused not by the economic models as such, but by the number chosen as so-called ‘discount factor’, i.e. a function representing inflation and expected growth of the economy, both resulting in the assumption that costs are higher for present generations than they will be for future people. Choosing a different number might result in a fairer sharing of climate burdens. It is said that in shifting the burdens to future people, climate scepticism is replaced with ‘climate cynicism’, or that ‘climate delayers are as bad

\(^\text{763}\) Hans Jonas, *Das Prinzip Verantwortung: Versuch einer Ethik für die technologische Zivilisation* (5th edn, Frankfurt Main Suhrkamp 1987).


\(^\text{765}\) For an excellent Dutch summary, see Jong (n 761) ch 4.

\(^\text{766}\) Principle 15 [emphasis added].

as climate deniers’. The American Trump administration, for example, acknowledges the dangers of anthropogenic global warming, but regards mitigation measures cost ineffective.

A question thus arising is whether our democracy unjustifiably excludes future generations from the law-making process. In other words, whether an inclusive understanding of democracy would require to give a voice to future generations in our political debates taking place today. After all, if they could participate, deliberations leading to legislation might look very different. Our public sphere cannot function in a *normatively legitimate* manner, because not all affected by climate change are included: future generations are painfully excluded. The public sphere functions neither *politically effective*: because future generations cannot object, governments are free to postpone measures against climate change, only worsening its effects in the long run.

Several thinkers have called for such an inclusion by means of representing future generations, for instance through instituting ‘guardians of the future’ in an extra chamber of parliament, who could discuss and veto future-impairing legislation; or by reserving seats in the existing parliament for representatives of future generations. In this regard, it is important to distinguish between

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770 Cf. discussion of Nancy Fraser in Chapter II, section F.

771 Ibid.


773 An insightful oversight of proposals of this kind made by Dobson and Ekeli is Danielle Zwarthoed, ‘Political Representation of Future Generations’ in Marcus Düwell, Gerhard Bos and Naomi van Steenbergen (eds), *Towards the ethics of a green future. The theory and practice of human rights for future people* (1st edn, Routlegde 2018) 90–93.
children and the unborn; rights of children are not the same as rights of future adults, and therefore the mandates of existing ombudsmen for children, for instance, do not suffice. Moreover, existing children’s rights are individual rights, whereas the rights of ‘the unborn’ are per definition group rights.

Apart from theoretical proposals, the interests of future generations have been institutionalised in the practice of several states, even beyond being mentioned in the constitution. Hungary, for example, installed an ombudsman for future generations in 2008, who may advise the public authorities, interfere in environmental legal proceedings and bring pieces of legislation to the attention of the constitutional court. Likewise Wales has instituted a Future Generations Commissioner, to whom the legislative institutions have to justify that their new legislative proposals are future-proof. Germany, Finland, and Malta have parliamentary commissions who check every legislative proposal on its future dimensions, and outside Europe similar institutions exist in Canada, for example. In the UK, an initiative exists under the name All Party-Parliamentary Group on Future Generations, which aims to bring future generation’s interests more to the fore in the UK parliament.

4. Discourse theory and future generations

It is not evident that institutions representing future generations would be required by the underlying ratio of Habermas’ deliberative democracy theory. To understand this, one needs to revert to the very basis of his line of thought. Habermas builds on discourse theory. He starts from the premise that in our pluralistic societies it is impossible to objectively determine an absolute truth or morality. What we can determine, however, is that people adopt rules for their communication; to nod means one understands, saying ‘I don’t know...’ designates the opposite. These rules differ over time and place, but it is a given

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774 As remarked by a Dutch proposal to institute an ombudsperson for future generations: Jan Venis, van de and Stefanie Pijnenburg, ‘Een Ombudspersoon voor Toekomstige Generaties in Nederland. Institutionalisering van de behoeften, belangen en rechten van toekomstige generaties’.
775 When speaking of individual rights of the unborn, one will soon enter the debate about abortion, which falls out of the scope of what I intend to discuss in this book.
777 See https://futuregenerations.wales/ (last visited 11 December 2019).
779 See https://www.appgfuturegenerations.com/ (last visited 2 December 2019).
that they exist - not subjectively nor objectively but intersubjectively. They exist between people, who mutually agree on them. Habermas captures this in his discourse principle: ‘Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.’\textsuperscript{780} In a hypothetical conversation, if I would draw a circle in the air to indicate that I disagree, such would only become a rule of communication when the others in the discussion accept ‘drawing circles in the air’ as a means to put across disagreement.

Habermas proceeds to ‘translate’ the discourse principle into two variants. One is a morality principle, which requires that the interests of all those possibly involved are considered equally - only then can one come to a moral norm.\textsuperscript{781} The other is the democracy principle, saying that ‘only those statutes may claim legitimacy that can meet the assent of all citizens in a discursive process of legislation that in turn must be legally constituted’.\textsuperscript{782} In other words, as also explained in Chapter II, the legitimacy of law-making is not situated in majority decisions within the political institutions, but rather in the public sphere, where the debates amongst individuals and the organisation forming civil society (the periphery) may influence and correct decisions taken by the political institutions (the centre). Substantively, there might be no agreement on political questions, but there is an agreement of the ways in which to deliberate on desired answers. A great advantage of this approach is that while being theoretical, it is situated in actual discourses and thus exceeds the metaphysical.

The former chapter on people abroad aimed to demonstrate that, although there currently exists no cosmopolitan international public sphere, the climate cases push against the national constraints of the deliberative democracies in European private law – they push against the limiting category of ‘citizens’ determining access to the public sphere. Now, a public sphere including all living people on the planet is imaginable, certainly with our high-tech communication channels (though one should not expect too much from communication technology for democratisation)\textsuperscript{783}. Yet it is impossible to truly communicate with unborn future generations. No matter how noble their mind, a politician standing

\begin{footnotes}
\item\textsuperscript{780} Habermas, \textit{Between Facts and Norms} (n 51) 107.
\item\textsuperscript{781} ibid 108.
\item\textsuperscript{782} ibid 110.
\end{footnotes}
for future generations would lack accountability to her ‘electorate’ - there are no real-life deliberations in which to situate her legitimacy. Such deliberations will only arise once the future generations become currently living citizens. Then, future generations will obtain voice and vote in our deliberative democracy, contrary to people currently living abroad, who will never do so in our current system.

This presents us with a seemingly insurmountable problem. There is clearly a normative legitimacy and a political efficacy problem at play for future generations when we look at decision-making about climate change in our current constitutional democracies. Qua reconstruction of our current legal-political system, Habermas’ theory also provides little space for future generations. In other words, if we want to fix the problems of normative legitimacy problem and political efficacy at play from the perspective of future generations, we need to delve deeper into theory on their representation.

5. The representation of future generations

Following up on theoretical proposals for enfranchising future generations in our democratic systems, a debate has emerged on the question of whether it is at all possible to represent future generations – very much aligning with the a priori unease within Habermas’ theory expressed above. Several objections have been raised. One is the so-called ‘plurality problem’, indicating that future generations will consist of a plurality of individuals that might each have different wants and needs, so that it is not evident for representatives today what they should actually stand for.784 Related to the plurality problem, the literature raises the ‘non-identity problem’, reasoning today’s policies are determining the future, so that absent our policies, particular future people will simply not be there in the same way as otherwise.785

To the latter two problems it may be replied that ‘most advocates of future generations would call for representation of whoever will live (regardless of their identities) and not representation of all possible people’.786 That is, at least in the context of climate change, the forecasted effects of global warming are so disastrous that we may assume that future generations would want to live in a

785 ibid.
world with a stable climate—no matter their exact identity. Therefore, they are likely to be in favour of preventive and precautionary measures against climate change today.

Also the indeterminacy of the exact implications of climate change (when, where and how?) are raised as problematic in the context of representation of future generations.\(^{787}\) It would go beyond the scope of this book to extensively delve into this argument, so let it suffice for now to suppose that any kind of policy is always based on some kind of indeterminate future (one knows that raise the maximum speed leads to more deaths, but one does not know who will die when, where nor how).

It is also said that since future generations cannot authorise their representative today, the latter person can merely *advocate for their interests*, but not represent them. In this vein, one author states: ‘I can talk *about* future generations, even though I cannot speak *for* them because I cannot act with their authorization.’\(^{788}\) Similarly, it has been remarked that precisely because it is impossible to determine which particular individuals the future generations will be composed, representing them is ‘a matter of promoting a view on what is best for the future’, and that we can at best *consider the interests* of future generations, but not ‘genuinely’ represent them, i.e. give them a political voice today as subjects rather than consider their interests as objects.\(^{789}\) Analogously, it is argued that affectedness as the trigger for democratic inclusion should merely be understood in a legal sense – to be subjected\(^{790}\) – meaning that future generations do not need to be included in our democratic deliberations of today.\(^{791}\) They are not

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\(^{787}\) Lukas Meyer and others, ‘Risk and Rights: How to Deal with Risks from a Rights-Based Perspective’ in Marcus Düwell, Gerhard Bos and Naomi van Steenbergen (eds), *Towards the ethics of a green future. The theory and Practice of Human Rights for Future People* (Routlegde 2018).


\(^{789}\) Jensen (n 786) 538, 548.


The same author argues elsewhere that if future generations are truly represented in our legal system, this means part of the responsibility for present laws and policies shift from people today to future generations, cf Ludvig Beckman, ‘Political Representation of Future Generations
subjected to our laws, as they have the democratic liberty to change the law regulating their lives.

In part responding to such objections, alternative models of representation were developed within the framework of deliberative democracy. Instead of conceptualising representation as a three-tiered model of a representative being authorised by a constituency, Michael Saward rather presents representation as ‘claim-making’.\textsuperscript{792} This involves five elements: a maker of representations (M) put forward a subject (S) which stands for an object (O) that is related to a referent (R) and is offered to an audience (A). A bit oversimplifying this model, one can say that it places legitimacy of representation not in the authorisation by the constituency, but rather in the acceptability of the representative claim with the audience. Andrew Rehfeld even proposed a theory of political representation that is not concerned with legitimacy, but simply with ‘explaining’ representation ‘by reference of a relevant audience accepting a person as such’.\textsuperscript{793}

Saward’s model encompasses representation in general – it is motivated precisely by the goal to go beyond mere representation by elected representatives in parliament. As it is a model developed to fit within deliberative democracy theory, we can well use it within this book to reconstruct what is going on in the climate cases under study. That is, translated to the climate cases, Saward’s deliberative democracy model would look something like this: the claim-maker (M) is the lawyer, who puts forward the subject (S), being an environmental NGO; which stands for an object (O), namely the needs of future generations; related to the referent (R) future humans; and offered to the audience (A), which primarily consists of the judges on the court and secondarily of other people in the courtroom and those who follow the case. In Rehfeld’s conception as well, it is likely the court who forms the relevant audience.\textsuperscript{794} If the representative claim is accepted by the audience, it may continue to deliberate with the represented through the representative.

\textsuperscript{792} Michael Saward, \textit{The Representative Claim} (1st edn, Oxford University Press 2010).
\textsuperscript{794} As also suggested by Gonzalez-Ricoy and Rey (n 784) 4–5.
Building on work of Saward and Rehfeld, Ana Karnein has proposed ‘surrogate representation’ of future generations. That is, whilst acknowledging the problems of authorisation, accountability and plurality, she reasons that there are principles on the basis of which representatives of future generations may make decisions: ‘future generations could not possibly agree to be treated with less regards for their well-being than we display for our own’. Such principled reasoning should be combined, she proposes, with robust institutions in which people take place with expertise on matters such as climate change and future narratives.

In short, when delving deeper into the debate about representation of future generations, not all objections are convincing. More importantly, there are authors who submit that deliberative democracy theory does allow for future generations to be legitimately represented – a stance that will be further researched below when discussing the climate cases in European private law.

6. Future generations in European private law climate change cases

When turning to the climate lawsuits in European private law, it is the courts that are forced to judge upon the legitimacy of the representation of future generations by the environmentalist claimants. The latter use relevant legal sources to substantiate that future generations are to be considered in the context of climate change. What I identified in chapter II as the ‘legal’ and the ‘factual’ boundaries to the role of the judiciary in European private law, thus imposes upon the courts to reflect on future generations: they must apply the law applicable to the facts as presented to them by the parties. Now interestingly, in line with the theoretical debates sketched above, also the courts struggle to determine whether this reflection upon future generations amounts to true representation – including the protection of future generations’ rights – or only to a consideration of their interests.

The legal language surrounding future generations is at times slightly ambiguous, but most of the provisions cited above in section A.2 seems to convey an ethical conscience of people today in their behaviour towards the future. That is, they reflect that, for purposes of self-realisation, we want to leave behind an earth that is at least as alive at the one we inherited from our parents, and that we possibly

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796 ibid 94.
should ameliorate it.\textsuperscript{797} We do this primarily \textit{for us}. Only at times, we see explicit references to \textit{rights} of future generations, acknowledging a more \textit{moral} obligation to take them on board of the legal-political system. We would do it \textit{for them}.

Although the last word is not said on the issue of whether we can and should represent future generations, there is an increasing constitutional awareness about future generations. It seems that in a collective self-understanding, future generations are taken up in the constitutionalisation of the environment.\textsuperscript{798} This means that the fate of future generations is not left to the mere preferences of today’s politics: their interests are laid down in law, notably constitutional law.

In the remainder of this chapter, all the European private law climate cases will again be analysed, in a way similar to how it was done in the former chapter, but this time for future generations. Thus, the following sections B.1 until B.11 do not provide mere summaries of the cases, but instead highlight how they push for future generations’ inclusion in the law-making process on climate change. Every section will address the question whether the case at hand does ‘genuinely’ represent future generations and defends their rights, or whether it is rather an instance of advocacy where future generations’ interests are considered because people today feel this is their ethical obligation. Thus, highlighting the role of future generations – whether children or unborn – this chapter showcases how their interests are read into a constitutionalised environment and serve as an argument to use the private law proceedings at hand in a future-oriented manner. The chapter ends with some concluding remarks, in which this analysis is again reconnected with the theoretical framework introduced in Chapter II of this book.

\textsuperscript{797} Patrick Kaczmarek and Simon Beard make an interesting argument about intergenerational obligations, namely that we owe it to our forefathers and foremothers to not let humanity go extinct: Patrick Kaczmarek and Simon Beard, ‘Human Extinction and Our Obligations to the Past’ [2019] Utilitas 1.

\textsuperscript{798} Constitutional awareness of future generations extends beyond environmental issues – also sustainability of pension funds, for example, can a matter of concern for future generations.
B. TEMPORAL BOUNDARIES IN EUROPEAN PRIVATE LAW CLIMATE CASES

1. Standing for future generations: The Urgenda case on first instance
The *Urgenda* case was launched in 2013 and is now world famous. The judgment rendered at first instance in 2015 received international attention *inter alia* for the role of future generations in the case.799 After all, future generations were debated between the parties: Foundation Urgenda (plaintiff) against the State of the Netherlands (defendant). Key question: is the State of the Netherlands obliged to reduce at least 25-40% of greenhouse gas emissions by 2020, compared to 1990 levels, and is this obligation also due towards future generations?

1.1 Future generations in Urgenda’s claim
The unusually long claim of Foundation Urgenda (over 100 pages) starts with an introduction entitled ‘necessary basic knowledge’. Here, it explains how anthropogenic climate change works; it highlights some international initiatives to combat dangerous climate change including the UNFCCC containing the precautionary principle. Furthermore, it underlines that a consensus has emerged that climate change will negatively affect the enjoyment of human rights across the world. Of particular relevance for future generations is that there is a delay between the emission of greenhouse gasses and the climatic effects:

“That is, it takes 30 to 50 years before emitted greenhouse gasses fully reach their warming effect in the atmosphere and on land. The full consequences of today’s emissions for global warming of the atmosphere and land will thus become visible only after 2050. This delay of 30 to 50 years also means that on earth we can only now perceive the full warming and its ensuing harmful effects of those CO2 emissions that took place until about 1980.”800

The claim goes on to stress that this means that even if humanity would stop all emissions immediately, the emissions of the past decennia will in any event


800 Urgenda claim, §13.
further warm the globe. The negative effects of this warming are already substantial, which led the American Environmental Protection Agency to recognise CO2 as an air pollutant in 2012 – climate science shows that climate change caused by greenhouse gasses will harm the health of present and future generations.

The claim continues to reason that society must prepare through adaptation measures for the substantial consequences of those climatic changes that can no longer be prevented, and that further warming of the globe should be avoided as much as possible. The dangerous effects of climate change for the Netherlands include heat stress – leading to health problems and more deaths of especially vulnerable people, but also water problems including inundations in coastal areas and water shortages, biodiversity loss, and an increase of water related diseases. And, since the Netherlands is in great part located below sea level, ‘these proceedings ultimately also address whether great parts of the Dutch territory will still be fit for human life and habitation in the future.’

The claim underlines that the importance of the protection of ‘our children, grandchildren and the Dutch generations after them’ is often mentioned in the context of sustainable development, figuring in international treaties including the CFREU as an interest, which requires legal protection.

It seems to take on a moral perspective when explaining: ‘A world in which the boundary of dangerous climate change is crossed, will harm the rights of the youth and future generations even heavier than ours.’ Yet it immediately adds, in a more ethical sense:

‘Their world is dictated by what we do or fail to do. If we fail, a considerably more unpredictable world will await them: (...). No one should look forward to such a heritage.’

The claim’s introduction on necessary basic knowledge concludes with the observation: ‘This case concerns us and (our heritage to) our children and the future generations of the Dutch people.’ The brackets used around the words

801 Idem, §14.
802 Idem, §17.
803 Idem, §19.
804 Idem, §41.
805 Idem, §42.
806 Idem.
807 Idem, §43.
‘our heritage to’ show that the Foundation stands for both the moral concern as to how to account for future generations in the courtroom, as well as for the ethical concern on who we – the present generation – want to be and what heritage we want to leave to the future.

a) Standing
The claim argues that Foundation Urgenda has standing under Dutch civil (procedural) law. The claim states that Foundation Urgenda is, as evident from its by-laws, standing up for the collective legal interests of current and surely also of future generations.  

It states that Urgenda’s goal is to develop a vision for a sustainable Netherlands in the year 2050, and to draft an action plan for this year to be executed with partners in society. Urgenda’s by-laws mention the word ‘sustainable’ time and again, which refers to the notion of sustainable development of the Brundtland report, containing the needs of future generations. Therefore, Urgenda argued the interest which she may call ‘its interest’ (and which determines whether it has enough interest to bring an admissible claim to the court) is not only idealistic, but it also concerns the collective interests of the current and future generations to whom she gives a voice. In short, Foundation Urgenda clearly makes a ‘genuine’ ‘representative claim’, explicitly arguing that she gives a voice to future generations.

The claim also explains how this intergenerational aspect of sustainability is present in various relevant legal sources, including the CFREU and the Aarhus Convention. And it invokes an earlier decision by the Hague Court of First Instance, in which standing on behalf of future generations was accepted.

b) Facts
The claim continues to elaborately unfold the relevant and alarming facts in more detail, as they emerge from IPCC reports, various Dutch scientific agencies, from

808 Idem, §48.
809 Idem, §53.
810 Idem, §54.
811 Idem, §56.
812 Idem, §57.
813 Idem, §58 [emphasis added].
814 Idem, §59.
815 Idem, §60. This concerns a case in which Greenpeace Netherlands and an environmental youth organisation sued the Dutch State, alleging that the Dutch gas policy was not in line with the sustainability principle. Though the applicants were allowed standing (and also on behalf of future generations), the case was lost on the merits. Cf Court of First Instance The Hague (Rechtbank Den Haag) 2 May 2001, ECLI:NL:RBSGR:2001:AB1369.
American and European sources and from the World Bank and the International Energy Agency. The claim positions that these facts make abundantly clear that far-going reductions are required before the year 2020. ‘With its current climate policy, the world is moving towards a (highly) dangerous climate change of 4°C or more in the year 2100 and thereafter. Urgenda c.s. aim to prevent this (...)’

c) The ECHR and the principle of prevention

Subsequently, the claim argues the applicable legal regime to the current case; Articles 2 and 8 ECHR, general principles of international law including the no harm principle, the UNFCCC which refers to future generations and the principles of prevention and precaution, as well as the outcome documents of COP’s to the UNFCCC including the Kyoto Protocol.

The claim then zooms into Article 1 ECHR, which stipulates that parties to the ECHR shall secure to everyone within their jurisdiction the Convention’s rights and freedoms. It makes an interesting argument here, connecting the environmental legal principle of prevention with this treaty containing fundamental rights. That is, it argues that Article 1 contains an obligation of result, meaning that violations have to be prevented. The ECHR is thus based on the prevention principle, the claim asserts.

To illustrate the applicability of the ECHR, the claim discusses various cases before the ECtHR involving Articles 2 and 8 ECHR, and it argues that the case of Taskin v Turkey (in which people complained about pollution of a local gold mine) shows that Article 8 can be invoked with success when the foreseeable risk at stake will materialise only in a few decennia. It also points to the principle of precaution as an autonomous principle of EU law, and argues that the Dutch State violates these social human rights and the precautionary principle enshrined in it.

d) Tort law

The claim proceeds to argue that also according to national law, the Dutch State is acting contrary to its legal obligations, resulting in torts under the doctrines of

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816 Urgenda claim, §147.
817 Idem, §222.
818 Idem, §223.
819 Idem, §253. ECtHR 10 November 2004, Taksin v Turkey.
820 Idem, §256.
821 Idem, §257.
nuisance and hazardous negligence.\textsuperscript{822} The Dutch State has the power to reduce Dutch emissions,\textsuperscript{823} and the Netherlands is substantially contributing to global emissions, considering both its absolute and its per capita emissions.\textsuperscript{824} It explains that the legal obligations from the Netherlands flow from Article 21 of the Dutch Constitution, the ECHR and various other international sources, and it explains how these obligations are violated, resulting in tort under Dutch law.

e) Injunctive relief: order to reduce 25-40%  
The claim then moves on the specific reduction target of 25-40%. Here, it inter alia invokes a report of the International Energy Agency, which explains that if an EU-wide target of 40% reduction is not met, societal costs will only increase.\textsuperscript{825} Basing itself on another study also used by the IPCC, the claim argues:

\begin{quote}
Failing to execute the necessary reduction measures now, means passing on a considerable burden to the future and to today’s and tomorrow’s youth. Our negligence leads us to enlarging the climate problem so that the climate damage and adaptation costs will be way higher in the future (...).
\end{quote}

\begin{quote}
If climate change proceeds faster than we now assume, the goal of 2\textdegree C will become unreachable, and thus we will deprive ourselves and the future generations to innovate at a manageable pace. There will simply be no space for any scientific, technical or societal adversity if we do not do before 2020 what has to be done. Every adversity after 2020 would then mean the end of the goal of 2\textdegree C.\textsuperscript{826}
\end{quote}

Bearing in mind the science, even a reduction target of 25-30% in 2020 would not be sufficient, meaning that the EU’s target of 20%, and the Dutch target that is derived from that, of 16%, is too small.\textsuperscript{827} It elaborately illustrates this position with the aid of various scientific sources. Also, it dismisses the State’s reaction that it will act more ambitiously on the condition that other countries contribute, adding the following observation about the State’s obligations towards future generations:

\begin{flushright}
822 Idem, §258 et seq. See Chapter III, section 1 of this book for a more elaborate explanation of this argumentation.
823 Idem, §293 et seq.
824 Idem, §334 et seq.
825 Idem, §371, citing the IEA report \textit{Greenhouse gas emission reduction targets for 2030. Conditions for a EU target of 40%}.
826 Idem, §373.
827 Idem, 374.
\end{flushright}
Postponing emission reductions benefits only the current generation but means that future generations will pay four times as much. Urgenda c.s. are of the opinion that the State — and particularly Urgenda is of the opinion that the notion ‘sustainability’ compels to solidarity between generations — should not only serve the interest of the current generation of the Dutch, but also the interest of the future generations.828

The question is, so the claim reasons, what the State will do if international negotiations fail.829 Such a failure is not unlikely. After all, the entry into force of the Kyoto Protocol was a laborious exercise.830 ‘Increasingly less, one hears the year 2020 being mentioned and increasingly often 2030 as the year in which substantial reductions should be realised; the problems are again procrastinated, even though everyone knows that the problems will have become greater and more expensive by then.’831

f) The claim’s emotional concluding remarks

In the first 139 pages, the claim’s style is formal and to the point. Yet it shows emotion in the concluding remarks.832 There, the claimants admit that they feel almost tempted to scream to convince the court. After all, though the interests at play are unprecedentedly large and serious, the problem to be to foremost overcome is that the consequences of dangerous climate change are ‘so big, so grave, still so far away and – mostly – so far outside our imaginative powers’, that it becomes meaningless in people’s daily lives: ‘If there are other, concrete and more every day, and well understood, interests at play (budget deficits, crisis, unemployment, economic growth) we quickly let the latter weigh heavier than the IPCC’s perspective of the future that exceeds our imagination and with which we cannot identify ourselves.’833

It goes on to note that the IPCC’s reports must be neutral, scientific and value-free, and therefore are formulated in that way, but that one cannot but become ‘worried to death’ when letting the message truly sink in, and looking at the changes that are slowly already taking place and when putting them in the right perspective. ‘In so far as it not deadly worrying for one’s own future, then it is for the future of one’s own children; 2050 is no longer far away, and for our children

828 Idem, §398.
829 Idem, §400.
830 Idem, §401.
831 Idem.
832 Idem, §422 et seq.
833 Idem, §424.
the year 2100 is a horizon they will experience.’834 In one of the last paragraphs, the claim reiterates: ‘Urgenda c.s. ask legal protection and legal enforcement of the future of their children...’.835

1.2 Future generations in the judgement of the Hague District Court

The Dutch State presented several arguments against Urgenda’s claim.836 Interestingly, at first instance, it did not challenge Foundation Urgenda’s standing on behalf of future generations as such; it only challenged the standing on behalf of future generations from other nations. This position changed on appeal, as will be shown in section 6 below. The State also argued that its efforts are indeed aimed at preventing dangerous climate change and that there is neither a national nor an international legal obligation that can be enforced against the State in the form of an order to take additional measures. It denied having violated Articles 2 and 8 ECHR, and argued that a judicial order regarding its climate policy would run against the doctrine of the separation of powers.

a) Standing

Responding to the unusually long claim by Foundation Urgenda, the District Court of The Hague renders an unusually long judgment.837 Considering Urgenda’s standing, the Court applies Article 305a, Book 3, Dutch Civil Code, a provision that provides standing to organisations to defend public interests, insofar as they are protecting these interests pursuant to their by-laws. The Court notes that Urgenda’s by-laws state that the Foundation strives for a sustainable society,838 and that the notion ‘sustainable society’ has an intergenerational dimension, as illustrated by the definition of sustainable development stemming from the Brundtland report.839 The Court rules that Urgenda also has standing on behalf of future generations:

When Urgenda asserts the right to availability of natural resources and a safe and healthy living climate of (not only present, but also) future generations, she therefore equally strives for a sustainable society.840

834 Idem, §425.
835 Idem, §430.
836 Cf eg §3.3 Court of First Instance The Hague (Rechtbank Den Haag) 24 June 2015 Stichting Urgenda/Staat der Nederlanden ECLI:NL:RBDHA:2015:7145
837 The judgement consists of 69 pages.
838 Idem, §4.7.
839 Idem, §4.8.
840 Idem.
b) Facts
The judgment devotes lengthy attention to the facts, derived from the reports of various scientific institutions, such as the IPCC and the Royal Dutch Meteorological Institute (‘KNMI’).\textsuperscript{841} Also as a factual matter, the Court describes how a legal and policy framework surrounding climate change has been built over the years,\textsuperscript{842} inter alia noting that the UNFCCC speaks of preserving the climate system for future generations, and of the principles of prevention and precaution,\textsuperscript{843} and the court notes that these same principles figure in the TFEU.\textsuperscript{844}

The State and Urgenda both agree, notes the Court, that a temperature rise of over 2°C as compared to pre-industrial levels will create a very dangerous situation for humans and the environment. ‘Hence the concentration of greenhouse gasses in the air need to be stabilised. Thus, a reduction is required of the current anthropogenic greenhouse gas emissions.’\textsuperscript{845} Equally undisputed is that international politics have determined a reduction scenario in which developed countries, among which the Netherlands and the EU as a whole, will need to reduce between 25-40% by 2020. The State, however, disputes that the Netherlands individually should already reduce 25% by 2020.\textsuperscript{846}

c) Hazardous negligence
The Court analyses whether the State has committed a tort by setting a reduction goal lower than 25%.\textsuperscript{847} Noting that the doctrine of nuisance does not have independent significance,\textsuperscript{848} the Court moves on to a type of tort that results from ‘an act or omission in violation of what according to unwritten law is deemed fit in societal interrelations’ (Article 162(2), Book 6, Dutch Civil Code). More specifically, it applies the doctrine of hazardous negligence, which implies a duty of care to not unnecessarily create dangerous situations.

The Court considers various factors that are relevant for this duty of care. It pays particular attention to the principles unfolded in Article 3 UNFCCC, namely (i) the protection of the climate system, for current and future generations, on the

\textsuperscript{841} Idem, §2.
\textsuperscript{842} Idem, §2.34 et seq.
\textsuperscript{843} Idem, §2.36-8.
\textsuperscript{844} Idem, §2.53.
\textsuperscript{845} Idem, §4.18.
\textsuperscript{846} Idem, §4.32.
\textsuperscript{847} As also unfolded in section B.1 of chapter III of this book.
\textsuperscript{848} Court of First Instance, Urgenda, §4.51.
basis of equity; (ii) the precautionary principle; and (iii) the sustainability principle.\textsuperscript{849} It notes that the equity principle means \textit{inter alia} that policy should not be directed solely to what is advantageous to current generations, but also to the implications for future generations, so that they do not need to solely carry the consequences of climate change.\textsuperscript{850} The precautionary principle means that measures should not be postponed until the moment that full scientific certainty exists.\textsuperscript{851} Moreover, the sustainability principle expresses the promotion of sustainable development.\textsuperscript{852} The Court also notes that another relevant factor is that the TFEU contains the precautionary principle and the principle of prevention\textsuperscript{853} (the latter of which means that prevention is better than cure).

Further, as mentioned in Chapter III, section B.1.2, the Court defines the criteria to test whether the State’s reduction goal amounts to tortious hazardous negligence: (i) the nature and scope of the damage resulting from dangerous climate change, (ii) the foreseeability of this damage, (iii) the chance that dangerous climate change will realise, (iv) the nature of the conduct or negligence of the State, (v) the inconvenience of taking precautionary measures, and (vi) the discretion of the State to determine policy.\textsuperscript{854}

Discussing criteria (i) to (iii), the Court observes again that the State and Urgenda agree that climate change may lead to irreversible and serious consequences for humankind and the environment, and that they agree that the State should take precautionary measures.\textsuperscript{855} After all, it is undisputed that the current global emissions and the current reduction targets of parties to the UNFCCC are insufficient to realise the 2°C goal, so that the chance to dangerous climate change is very large.\textsuperscript{856} Moreover, mitigation measures need to be adopted speedily. ‘After all, the faster a reduction of emissions is put in place, the larger the chance that the danger is avoided.’\textsuperscript{857} In short, the Court takes a very precautionary approach here.

Similarly, when discussing criterion (v), regarding the convenience or inconvenience to take precautionary measures, the Court observes that ‘within

\textsuperscript{849} Idem, §4.56.  
\textsuperscript{850} Idem, §4.57.  
\textsuperscript{851} Idem, §4.58.  
\textsuperscript{852} Idem, §4.59.  
\textsuperscript{853} Idem, §§4.60-1.  
\textsuperscript{854} Idem, 4.63.  
\textsuperscript{855} Idem, 4.64.  
\textsuperscript{856} Idem, 4.65.  
\textsuperscript{857} Idem.
climate change and international climate policy, the consensus exists that the most severe consequences of climate change have to be prevented,’ and that international reports support Urgenda’s position that action now rather than later is more cost effective.858

Finally, when considering criterion (vi), on the discretion and political freedom of the State, the Court notes that the State indeed has a wide discretion, but that this discretion is not unlimited.859 ‘The only effective remedy against dangerous climate change is the reduction of greenhouse gasses,’ so from an effectiveness perspective, mitigation is essential for preventing dangerous climate change, the Court says.860 The discretion of the State is further diminished by public law principles applicable to the State, among which the intergenerational equity principle. The Court states that since current insights indicate that it is on balance cheaper to act now, a heavier duty rests upon the State to act accordingly for the benefit of future generations.861

d) Damage and relativity
Concluding that the duty of care of the State is weighty, the Court examines the other elements necessary to constitute a tort. One of them is the presence of damage. Yet, Urgenda does not request damages as a remedy, but instead injunctive relief in the form of a judicial order to the State under Article 296, Book 3, Dutch Civil Code. This means it does not need to show an exact amount of damage. The State, however, argued that Urgenda’s interests were not affected in a sufficiently concrete manner to obtain a judicial order.862 The Court disagreed:

In the opinion of the Court, the possibility of damage for those of whom Urgenda defends the interests, among whom the current and future generation of Dutch people, is so large and concrete that the State, given its duty of care, must make an adequate contribution to prevent dangerous climate change.863

Another constitutive element of a tort is the requirement of ‘relativity’, i.e. that the violated norm is meant to protect the interests that Urgenda defends. The Court states that this requirement has been met. It adds that it is not necessary

858 Idem, 4.71 (emphasis added).
859 Idem, 4.74.
860 Idem, 4.75.
861 Idem, 4.76. Note the contrast with economic models concluding the opposite, cf section A.3. above.
862 Cf Court of First Instance, Urgenda, §4.88.
863 Idem, §4.89.
to consider whether Urgenda could also be successful in so far as representing current and future generations from other nations. ‘After all, unlawfulness of the State towards the current and future population of the Netherlands suffices,’ the Court notes.\textsuperscript{864}

e) Separation of powers no obstacle to injunctive relief
Hereafter, the Court continues to address whether its judgment would run against the doctrine of the separation of governmental powers; the most significant objection of the State against Urgenda’s claim. However, the Court says that this objection is unfounded, as the case is ‘in essence about legal protection’.\textsuperscript{865} It orders the Dutch State to reduce its greenhouse gasses with at least 25% by 2020, as compared to 1990 levels.\textsuperscript{866}

1.3 Future generations’ emancipation through the Dutch Urgenda case on first instance
The Urgenda case is highly significant for the representation of future generations in the courtroom. After all, the Court allowed standing to future generations, through the ‘voice’ given to them by Foundation Urgenda. The State, at first instance, did not even object to standing for Dutch future generations: “The State refers to the judgment of the Court of First Instance regarding the question whether Urgenda is admissible in so far as she fights for the interests of future generations of Dutch people (and that into infinity)”.\textsuperscript{867} Urgenda’s standing is an instance of ‘genuine’ representation, where rights of future generations are invoked. The Court even explicitly conveys that the State owes obligations towards future generations, and that these obligations may limit the State’s discretion in drafting certain climate policies. The judgment, thereby, clearly adds to the normative legitimacy and the political efficacy of the legal-political system, for it is inclusive towards future generations.

Interestingly, the Court did deny Urgenda’s claim insofar as it directly relied on the ECHR, because a legal person such as Urgenda (contrary to \textit{natural} persons, i.e. humans) could not rely on infringements to its physical integrity of its private life and in any event would now be allowed standing before the ECtHR.\textsuperscript{868} It thus

\textsuperscript{864} \textit{Idem}, §4.92.
\textsuperscript{865} \textit{Idem}, §4.98.
\textsuperscript{866} \textit{Idem}, §5.
\textsuperscript{867} \textit{Idem}, §4.5.
\textsuperscript{868} \textit{Idem}, §4.45.
did not address Urgenda’s position on the ECHR being based on a principle of prevention, whereas the Court of Appeal would, as will be illustrated in section 6.

The Court did, however, deem Articles 2 and 8 ECHR relevant for determining the State’s duty of care under the doctrine of hazardous negligence. The importance of standing for future generations also returned in the application of this doctrine. That is, under the doctrine of hazardous negligence, various factors are weighed against each other: The easier the precautionary measures, the more likely a legal obligation exists to take them; and the larger the threatening damage, the heavier the legal obligation becomes to take precautionary measures. Since future generations were allowed standing, also damage caused to them was calculated in this balance. The damage thus become so large, that the balance could do little more than tilt towards a legal obligation on part of the State to take precautionary measures against climate change.

Since international climate science and policy agrees that such damage will materialise once the Earth becomes an average of 2°C hotter, and that, to achieve the goal of a maximum warming of 2°C, developed nations should reduce emissions between 25 and 40% by 2020 compared to 1990 levels, the Court was able to conclude that the State acted unlawfully under tort law insofar as it reduced less than 25%. This is a clear example of a legal decision inclusive towards future generations; their rights are taken up in the balance to determine the climate related obligations of the Dutch State.

2. An ethical obligation towards the future: The Belgian ‘Klimaatzaak’

In the Belgian case *Klimaatzaak,* no substantive judgments have yet been issued. The claimants maintain that several Belgian governmental agencies have committed a tort and a fundamental rights violation in having adopted a climate target for the year 2020 that is lower than 40% reduction of greenhouse gasses compared to the year 1990. Future generations are present throughout the claim.

2.1 Future generations in the ‘Klimaatzaak’ claim

*Klimaatzaak,* which translates as ‘climate case’, is also the name of the NGO that filed this case with the court. In line with the Aarhus Convention, Belgian case-law has established that legal persons aiming for environmental protection have sufficient interest necessary to get standing for a legal action concerning the

869 See also section B.1 of the former chapter.
violation of environmental law. The non-profit organisation Klimaatzaak argues it meets this criterion, as its by-laws stipulate its goal to be the protection of current and future generations against anthropogenic climate change and biodiversity loss.

In adopting the protection of future generations as one of its main goals, Klimaatzaak puts future generations at the centre of the discussion. However, the claim also considers the future more indirectly, ethically in the sense of who do we want to be, when it describes all the dangerous consequences of climate change and adds: ‘No one should look forward to such a heritage.’

The claimants believe that there is only one protection left against the dangers of climate change: the legal obligations to precaution, and to prevent dangerous situations as well human rights violations. They invoke three legal grounds separately and autonomously: (a) human rights, (b) the principles of precaution and prevention, and (c) tort law obligation not to create unnecessary dangerous situations (hazardous negligence).

a) Human rights
The claimants invoke the human rights to health and to a clean environment enshrined in Article 23 Belgian Constitution, and the rights to life and private life enshrined in Articles 2 and 8 ECHR, as well as the right to an effective remedy ensured by Article 13 ECHR. The claimants state that Belgian constitutional rights should be read as covering substantively the same as Article 8 ECHR, namely the protection of health and a healthy living environment. The case-law of the ECtHR shows that positive obligations follow from these rights already when there is a heightened risk to their violation, and the national highest Administrative Court confirmed the principle of prevention is part of the constitutional right to a healthy environment.

Thus, the claim underlines how these rights not only work reactively, but have importance for the future. Although there might be little damage as of yet, the

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870 Klimaatzaak claim, §4.
871 Recited in ibid, §6 [emphasis added].
872 Ibid, §15. It is not coincidental that this is an exact copy of a phrase from the Urgenda claim: the same lawyer, Roger Cox, worked on drafting both claims.
873 Ibid.
875 Ibid, §§61, 68.
876 Ibid, §61.
claimants maintain that their rights are violated – especially their right to family life, given the impact of climate change which will be felt by their children within decennia.877

b) Principles of prevention and precaution
The claimants put forward that it is without question that the principle of prevention is applicable to climate change, since there is no scientific doubt about its anthropogenic nature.878 As an autonomous legal source, this amounts to the obligation of the defendant Belgian authorities to prevent Belgian emissions to cause significant harm to the environment in which the claimants reside, work and live.879 Furthermore, the principle may serve to colour the private legal duty not to be hazardously negligent.880

The precautionary principle works in a similar fashion. It is invoked autonomously, but also makes it easier to establish hazardous negligence, the claimants say.881 This principle is part of international human rights law in the reading of the ECtHR882 and it is widely used as a standard by Belgian national courts.883 It is of relevance for climate change not because anthropogenic climate change is uncertain as such, but because its consequences cannot be estimated with a similar level of certainty.884 In the current proceedings, it would also mean that the defendants should prove their postponing of measures does not lead to damage or severe risks, rather than the claimants having to prove it does.885

c) Hazardous negligence
When discussing the private legal obligation laid down in Article 1382 Belgian Civil Code, the provision on tort, the claimants argue that it allows the judge to order preventive measures, even without there being made a mistake now or damage having occurred already, as (the threat of) future damage suffices.886 The claim subsequently discusses the three constitutive elements of a tort: fault, damage and causality.

877 Ibid, §69.
878 Ibid, §§70-71.
879 Ibid, §74.
880 Ibid, §75.
881 Ibid, §81.
882 Ibid, §77.
883 Ibid, §78.
884 Ibid, §79.
885 Ibid, §80.
With respect to fault, Article 1382 Belgian Civil Code includes the duty of care not to act hazardously negligent. The Belgian Government allegedly acts in a hazardously negligent manner in adopting climate policy aiming at less than 25% reduction in greenhouse gasses in 2020 compared to 1990 levels, as this is the minimum percentage to meet the goal not to have global warming exceed by 2°C. After all, there is an international consensus that 2°C warming is the maximum necessary to avoid dangerous situations.\footnote{Ibid, §86-90.} This was confirmed in communications and even decrees of various local authorities.\footnote{Ibid, §88.} As said, the claimants argue that the preventive and precautionary principles are relevant to the duty of care following from the Civil Code, leading to an obligation on part of the government to take preventive measures.\footnote{Ibid, §93.} National scientific reports show that it is possible to reduce greenhouse gasses in Belgium with 80-95%, so the government cannot argue such would be impossible.\footnote{Ibid, §95.}

When discussing the requirement of damage, the claim unfolds that climate change is \textit{already} causing damage, mostly damaging people’s health, but also in the form of moral damage attributable to uncertainties and fears about future damage.\footnote{Ibid, §§97-102.} Moreover, it will cause \textit{future} damage. Now the remedy the claimants ask is not financial compensation but a judicial injunction, and they maintain that this does not affect the duty on part of the government to recover damage.\footnote{Ibid, §104-105.} ‘The longer far-reaching reduction measures are postponed, the bigger the economic and social costs will be for current and future generations,’ the claim states.\footnote{Ibid, §107.}

Also, the last condition for a tort – causality – is met, the claimants argue. They maintain that even though Belgium’s contribution to global emissions is small, it is a necessary condition for the current state of affairs, as global climate change is characterised by the sum of many small contributions.\footnote{Ibid, §112.}

d) Special civil code provision
Additionally, the claimants rely on Article 714 Belgian Civil Code devoted to affairs for general use, which may be infringed when users of non-appropriated
environmental parts diminish the user rights of other legal subjects and when the regenerative abilities of those parts are affected. The claimants find their user rights of a ‘stable climate’, on rich biodiversity and good air quality is infringed in this way: ‘Claimants and their children’ are directly dependant on the well-functioning of these ecosystems.

2.2 Future generations’ emancipation through the Belgian ‘Klimaatzaak’
Even without a substantive judgment in the case, the Klimaatzaak is highly interesting, as it strongly conveys that Belgium has an ethical obligation towards the future. After all, it targets the ethical self-understanding of Belgium in referring to a climate-damaged heritage for future generations that no-one should want others to inherit. Also, Foundation Klimaatzaak’s by-laws stipulate that it is among its goals to protect future generations, and the claim extensively discusses future damage. Thus, tying in with the debates on representation discussed in the introduction of this chapter, the Foundation does not per se present itself as the voice of the unborn; it does not ‘talk for’ but ‘talk about’ unborn future generations. It does, however, rely heavily on the rights of children.

In so doing, the claim of the Klimaatzaak foundation clearly puts climate-related concerns for the future forward as a matter of law rather than politics. It invokes the principles of prevention and precaution through no less than three legal avenues: as autonomous sources of obligations on part of the Belgian authorities, as relevant elements when considering the Belgian authorities’ duties in light of the Civil Code, and as relevant for their duties related to (international) human rights.

The latter of these avenues most clearly communicates that the interests of future generations – under threat due to climate change – pertain to the area of fundamental rights. Although only the interests and not per se the rights of the unborn are invoked, the claimants do direct attention to their children to underline the gravity of the climate problem. The rights of these children will be violated in the future. Thereby, the urgency for the Belgian authorities to take preventive and precautionary measures is presented as a constitutional matter, which would legitimise judicial interference. Furthermore the future-oriented private legal remedy of a judicial injunction to incite the Belgian authorities to adopt a greenhouse gasses reduction goal necessary to prevent the rights of future generations to be infringed.

895 Ibid, §115.
In short, the *Klimaatzaak* claim cannot be said to repair the *normative legitimacy* issue at play in constitutional democracies with regard to unborn future generations; the claim does not aim to ‘genuinely’ represent future generations. By invoking children’s (future) rights, however, the claim does advance some *political effectiveness*, because although minors cannot vote, they are forcefully able to contribute to the public sphere through the court by means of the message that the future should be weighed more heavily than thus far has been the case in determining the appropriate greenhouse gas reduction goals.

3. Risk for adults who live now: The German case of *Lliuya v RWE*

The case of Mr Lliuya against the German Energy Giant RWE AG is the only case in European private law that does not, one way or the other, address the interests of future generations *per se*. Mr Lliuya litigates primarily on behalf of himself, as he is concerned with a heightened risk of a flood plausibly destroying his property. He is amongst the adults alive today already confronted with the adverse effects of climate change. He wants to build a dam that could protect him and asks RWE to pay for 0.47% of the costs. After all, RWE’s share in global greenhouse gasses emissions is 0.47%, greenhouse gasses lead to global warming and global warming leads to the melting of a glacier near the house of Mr Lliuya and his wife.

The District Court of Essen not only considered the causality in this case unfounded, it also deemed the impairment of Mr Lliuya’s property by a flood hazard a ‘moot’ question that ‘must not be determined’.896 ‘The question is not if, but *when*,’ reads Mr Lliuya’s claim on appeal, thus directing attention at his own future.897 The Regional Court of Hamm opined that this risk for the future is relevant, as apparent from its invitation to Mr Lliuya to prove causality on a number of points. In short, the case is most significant not for temporal boundaries, but for the national boundaries of democratically legitimate judicial law-making in European private law, as discussed in the former chapter.898

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896 District Court of Essen (Zivilkammer des Landsgerichts Essen) 15 December 2016, Lliuya v RWE AG


898 For an elaborate description an analysis, see section 3 of the former Chapter.
4. Article 2 ECHR encompasses the future: The Swedish Magnolia case

The Swedish case of Magnolia is launched by people who self-identify as future generations, united in two youth organisations. Firstly, Push Sverige (Push Sweden), which states to believe that climate change is ‘among the foremost threats to the future of mankind’;⑧⁹⁹ and secondly, Fältbiologerna (Nature and Youth Sweden), an organisation that has ‘shaped new generations of environmentally-smart and nature-interested citizens’ since 1947.⑩⁰⁰ In addition, there are 178 individual co-plaintiffs, who, according to the claim, ‘all want to work for a sustainable future, strong measures to reduce (…) greenhouse gas emissions and thereby prevent a climate catastrophe’.⑩⁰¹ Throughout the claim, the plaintiffs stress how future generations are implicated.

4.1 Future generations in the Magnolia claim

The plaintiffs argue that the Swedish Government committed a tort by allowing the wholly-State owned energy company Vattenfall to sell lignite assets in Germany to a Czech operator that is allegedly not operating as sustainably as Vattenfall. Would the State have lived up to its duty of care, then it would either have had Vattenfall dismantle the lignite assets, or have them sold to an operator equally sustainable and as involved in corporate social responsibility as Vattenfall. After all, a less sustainable operator is likely to expand the lignite assets, resulting in more greenhouse gas emissions, leading to dangerous climate change. The claim points out that impacts will definitely also be felt within Sweden: more weather disasters, reduced air quality and ensuing health problems, increased heat stress.⑩⁰² It adds: ‘For no group in society is the climate issue more important than for the young’. It also explains that the two NGO’s represent mainly children and young people, who would otherwise have no autonomous standing in court.⑩⁰³

The claim invokes a number of legal sources relating to future generations. Firstly, the Swedish parliament adopted the so-called Generational Goal in 1999, holding that within one generation the major environmental problems should be solved, without causing increased environmental problems outside Sweden’s borders.⑩⁰⁴ A governmental bill from 2000 determined this goal should be met.

⑧⁹⁹ Cf Magnolia claim §1.
⑩⁰⁰ Magnolia claim §2.
⑩⁰¹ Magnolia claim, §3.
⑩⁰² Idem, §9.
⑩⁰³ Idem, §119.
⑩⁰⁴ Cf. idem, §28.
by 2020. Furthermore, it invokes the international environmental legal principles of prevention and precaution and Article 1:2 Swedish Constitution, which stipulates *inter alia* ‘The public institutions shall promote sustainable development leading to a good environment for present and future generations.’ This provision is one of many setting out policy objectives for the Swedish State. The claimants also rely on Article 2 and 8 ECHR, even if these two do not explicitly deal with the climate (nor with future generations).

How these different legal sources relate to each other or to the remedy requested is not rendered very clear in the (as mentioned: slightly underdeveloped) claim. The litigating youngsters ask the judge to declare that the Swedish state failed in its duty of care towards them, by allowing the sale of Vattenfall’s lignite operations to the Czech company; declare that this sale was actually illegal; that certain documents regarding the sale are made public; and that all claimants receive a symbolic amount of damages of 1 Swedish Crown per person.

**4.2 Future generations in the decisions of the District Court and the Appellate Court**

Both the District Court and the Court of Appeal in Stockholm dismissed the claim in few words. Unfortunately, neither of them explicitly mentions future generations, nor do they address the Generational Goal invoked by the claimants. The District Court says that the ‘hypothetical reasoning’ regarding the future business operations of the lignite assets in Germany cannot serve as a basis for liability, as a fundamental principle of the law of damages reads that liability can only be established when there is actual damage. A risk of injury alone cannot be the basis for granting damages and the claimants failed to make concrete what economic damage they were suffering. The Court of Appeal agrees.

The District Court separately considers the complaint under the Articles 2 and 8 ECHR. It remarks that, in the context of the right to life (Article 2) State liability may already be established when somebody is unreasonably exposed to a life-

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905 Cf. *idem*, §30.
906 *Idem*, §96.
908 See section 4.2 of the former chapter.
threatening situation. Case-law in the context of the right to private life (Article 8), in contrast concerns infringements that have already occurred at the time of the complaint. In any event, the claimants did not substantiate that their lives were threatened. Their action is rather built on a risk analysis based on a hypothetical reasoning, the Court reiterates. Similarly, the appellate court stresses the claimants have not substantiated the damage they would have incurred.

4.3 Future generations’ emancipation through the Magnolia case
Not only are the claimants of the Magnolia case youngsters, they also explicitly refer to the rights of the unborn:

‘By allowing Vattenfall to complete the sale, the State has acted in a way that does not meet the requirements that can reasonably be attributed to its duty of care to Sweden’s inhabitants and to the rights of future generations regarding environment, health and property.’

In also underscoring that the NGO’s represent young people who would otherwise not have the possibility to go to court in the Swedish legal system, the Magnolia case clearly brought a ‘representative claim’ on behalf of future generations. The claim forms an attempt to ‘genuinely’ represent future generations and to enforce their rights through the Swedish courts. Thereby, it forms an attempt to truly engage future generations in the public sphere, and forms an answer to the normative legitimacy and political effectiveness issues at play with constitutional democracies in which decisions regarding climate change are made without engaging future people and with disproportionately discounting them.

Among the sources invoked by the claimants is the Swedish Constitution, which in Article 1:2 stipulates a governmental duty to ‘promote sustainable development leading to a good environment for present and future generations’. Nevertheless, the courts unfortunately do not engage with the plaintiffs’ representative claim on behalf of the unborn. As noted in the previous chapter, 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 at specific individuals.

911 Magnolia claim, §108 [emphasis added].
Yet as also noted in the previous chapter, the Courts do seem to find Articles 2 and 8 ECHR relevant for a legal complaint touching upon climate change. What is more, the District Court affirms that Article 2 can be applied in the context of severe risk for existential damage in the future, even if it asserts that Article 8 has only be applied to damage that have already occurred.912 Thus, not only does the Magnolia case show that the remedy of injunctive relief might be more apt than damages in climate change cases, but it also contributes to a constitutionalisation of the environment that could be directed to the future. It is due to the factual boundaries of their role that the Courts had to decide that the claimants did not substantiate they would face existential risks, but the Courts did hint at such an existential risk having the potential to form the factual basis for applying Article 2 ECHR in a climate case.

5. Future generations’ constitutional rights not enforced: Norwegian Arctic Oil

Similar to the Magnolia case, and importantly in the light of this chapter, the Norwegian case Arctic Oil is instigated not only by Greenpeace Nordic, but also by the youth organisation Natur og Ungdom (Nature and Youth) and by Besteforeldrenes klimaaksjon (Grandparents’ Climate Campaign). Norwegian youngsters can become a member of Natur og Ungdom until they turn 25. The organisation, established in 1967 clearly identifies its members as part of the future generation, enthusiastically joining Greta Thunberg’s school strikes, stating ‘We are the young people who have to take the bill for the politicians’ failure to take climate policy measures.’913

Besteforeldrenes klimaaksjon was established in 2006 by people who self-identify as grandparents and thus are concerned about precisely those with whom this chapter opened: grandchildren. As the guiding principle for climate action, the grandparents adopted what is codified in Section 112 Norwegian Constitution: ‘Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations.

912 An assertion that does not seem entirely correct, given case-law such as ECtHR Third Section 30 April 2005 Taşkin v Turkey, application number 46117/99.
as well’.\textsuperscript{914} As already touched upon in the former chapter on people abroad, this provision is central in the Arctic Oil case.\textsuperscript{915}

\textit{5.1 Future generations in the claim of the Arctic Oil case}

As clear by now, the Norwegian Constitution contains a right to the environment for future generations that is invoked in the Arctic Oil claim. It is safe to presume that the claimants invoke it on behalf of themselves – children and youngsters – and on behalf of their grandchildren – again, living children. Furthermore, they are concerned with the unborn, as their opening summary suggests:

\begin{quote}
This case relates to the constitutional and procedural validity of the Licensing Decision. It concerns the integrity of Norway’s commitments to the international community and its duty of care to our children, our grandchildren and generations to come.\textsuperscript{916}
\end{quote}

Natur og Ungdom’s Statutory Articles even state that the organisation works on the premise that ‘the future of the human race is dependent on the preservation of the natural environment’, as the claim reiterates to stress the admissibility of the NGO.\textsuperscript{917}

Norway pled under the Paris Agreement to take measures to ensure global warming is restricted to 2°C and preferably even 1.5°C. Yet in 2016, the Norwegian Government took the Licensing Decision, allowing thirteen companies to search for and produce oil and gas (petroleum) in parts of the Barents Sea. The Licensing Decision is incompatible with the need to take measures, the claimants argue; it ‘has the opposite effect: it facilitates petroleum production that will contribute extremely high CO2 emissions where petroleum is used, far into the future.’\textsuperscript{918} That is, the claimants point out, the life of Norwegian oil and gas fields varies between 50 to 70 years. Therefore, depending on the size of the discoveries, the Decision ‘lays the groundwork for future petroleum production’ that ‘must be expected to last for up to 50 years or more’.\textsuperscript{919}

\begin{footnotes}
\item \textsuperscript{914} Cf. Matthijs Wolferen, van, ‘To Justifie the Wayes of God to Men; Limits to the Court’s Power of Interpretation’ (Groningen University 2018) 299.
\item \textsuperscript{915} In this chapter, I leave out most arguments on procedural errors of the Licensing Decision, as these are less relevant for the topic of this chapter: future generations.
\item \textsuperscript{916} Arctic Oil claim, 18 October 2016, opening summary.
\item \textsuperscript{917} Idem, §3.2.
\item \textsuperscript{918} Idem, §6.1.
\item \textsuperscript{919} Idem, §6.4.3.
\end{footnotes}
According to the claimants, this results in the Licensing Decision violating ‘the fundamental constitutional right of every person, including future generations, to a healthy environment (including a liveable climate)’. Apart from being invalid for substantively violating Section 112 Norwegian Constitution, it is argued in the alternative that the Licensing Decision is also invalid due to procedural errors including the fact that the relevance of Section 112 was not even considered.

Large climate change related damage will materialise once global warming exceeds 2°C or even 1.5°C, as was laid down in the Paris Agreement – in this respect, the Paris Agreement represents not only a legal but also factual basis for the case, the claimants stress. Now the IPCC has calculated the amount of emissions resulting in 2°C of warming. This amount, the so-called ‘carbon budget’, suggests that a large part of fossil fuels available in the world cannot be burnt, including, the claimants argue, fossil fuels available in the Arctic. ‘Planning for petroleum production far into the future is not consistent with the reduction in CO2 emissions required to avoid damaging climate change,’ they state. As a matter of fact, Norway is currently not living up to its own climate targets.

Under the header ‘socio-economic considerations’, the claimants argue that as a result of the Norwegian tax regime, the Norwegian Government incurs major expenditures in the initial exploration phase. ‘This only makes sense if it leads to sufficient actual production to at least cover the expenditures’, the claimants explain, whereas the government failed to consider that the carbon budget leaves no room for actual production. In contrast, several large oil companies chose not to participate in the licensing round leading to the Decision. In other words, even from an economic point of view the Licensing Decision is not future proof.

The national and international environmental precautionary principle must be regarded as embedded in Section 112 Norwegian Constitution, the claimants put forward. They argue that the provision poses an absolute limit to risks that the

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920 Idem, §1.
921 Idem, §6.4.4.
922 Idem.
923 Idem, §6.4.6.3.
924 Idem, §7.
925 Idem, §9.2.3.
natural environment can be exposed to, which includes a right for the unborn to be protected against dangerous climate change:\textsuperscript{926}

\begin{quote}
Section 112 of the Constitution grants Norwegian citizens a right to demand that the state do its absolute best to contribute to limiting the warming of the planet as much as possible, in order to protect the natural environment not only for those who are alive today, but also for their descendants.
\end{quote}

In summary, the claimants wish the Decision to be declared invalid and the Norwegian State to pay for their procedural costs.

5.2. Future generations in the decision of the District Court

As also discussed in the previous chapter, the Norwegian Government challenged that Section 112 Constitution would be a ‘rights provision’, in other words, a provision that can be invoked against the Government. The Oslo District Court, however, in its Decision of 4 January 2018, opens with a textual interpretation, reasoning that the word right (‘rett’) is used, indicating the provision actually is a rights provision. Moreover, this word is reiterated when the provision stipulates that the right is also to be safeguarded for future generations— again indicating the provision must be a rights provision.\textsuperscript{927} Thereafter, it considers a range of sources, including the recent preparatory works (the Article was redrafted in 2014) to conclude that indeed, Section 112 is a ‘rights provision’ that can be invoked against the Norwegian State.

Whereas so far, future generations might have drawn courage from the judgment, hereafter this tide turns, namely when the Court goes on to ask what the right entails. As discussed in the previous chapter on people abroad, the Court considers emissions resulting from combusting Norwegian petroleum \textit{abroad} to fall out of the scope of Norway’s obligations. Therefore, these emissions are not assessed in light of Section 112, leaving only those emissions implicated with the exploration and extraction itself for consideration.

Furthermore, the Court agrees that the precautionary principle plays a central role in the interpretation of the Article, but it interprets this principle in an unusual way. Bear mind that the widely accepted version of the precautionary principle reads that uncertainty regarding the risk of a certain action may not be a reason to abstain from precautionary measures. In contrast, the Court

\textsuperscript{926} \textit{Idem}, \S\textsuperscript{9.2.6}.

\textsuperscript{927} Oslo District Court (Oslo Tingrett) 4 January 2018 Natur og Ungdom & Greenpeace v Staten, \textit{Arctic Oil}, case number 16-166674TVI-OTIR/06. \S\textsuperscript{5.2.1}.
concludes, after stating that both parties agree that the relevant criterion here is ‘risk’, that the principle is that ‘there may be an acceptable risk even though the undesirable impact is great, when the probability that it will occur is sufficiently small’. The Court, in light of this version of the precautionary principle, goes on to consider the risk associated with the Licensing Decision. Making an estimate of the emissions implicated with the extraction of newly found petroleum, the Court deems them a drop in the ocean:

Norwegian CO2 emissions constitute in total 0.15 percent of the emissions in the world. Twenty-eight percent of the Norwegian emissions stem from the petroleum sector. An isolated increase of national emissions (...) means only an extremely marginal increase of total Norwegian emissions and for the petroleum’s share.

The third paragraph of Section 112 of the Norwegian Constitution stipulates that the authorities of the State shall take measures to implement its principles. Given that this obligation does not cover CO2 emissions abroad, the Court only considers the national CO2 emissions and the more traditional environmental harm resulting from the Decision, that both can be considered minimal. The Court does not see it as its task to test whether Norway is doing enough against climate change in a more general sense and to consider the Decision in that light, because the impacts lie to far in the future (and can better be assessed by politicians than by judges):

It is in part talk of possible impacts that are too remote in relation to the risk that is relevant to assess and in part the issues involve overall assessments that are better assessed through political processes that the courts are not suited to reviewing.

Socio-economic considerations are irrelevant when assessing Section 112 Constitution, the Court. When, further on in the judgment, discussing the environmental impact assessment, the Court is also not convinced of the socio-economic argument by the claimants that unopened fields will entail a cost for the Government because of the taxation scheme: ‘The Court understands that the effect of tax rules is continuously assessed in connection with tax policy,’ it remarks, adding that the financial disadvantage also seems ‘marginal’.

928 Idem, §5.2.2.
929 Idem, §5.2.3.
930 Idem, §5.2.4.
931 Idem, §
932 Idem, §5.3.6.
The District Court of Oslo concludes that the government, in taking the Licensing Decision, did not violate Section 112, nor did it violate provisions of the national Petroleum Act interpreted in light of the Constitution; the impact assessments were carried out as they should have been and the government sufficiently justified its decision. The plaintiffs have to bear the legal costs.933

5.3 Future generations’ emancipation through the Arctic Oil case
The claim of Greenpeace Nordig, Natur og Ungdom and Bestefolerenes Klimaaksjon is significant because it is brought to court by youngsters and on behalf of the unborn and because it revolves around a constitutional provision containing rights for future generations. Accordingly, it aims to operationalise constitutionalised environmental rights of future generations through a private law proceeding934 – thus pushing the temporal boundaries of democratically legitimate judicial law-making in European private law. The claim attempts to politically empower future generations by invoking their rights against a governmental decision, thus contributing to fix the normative legitimacy and political effectiveness problems at play in democratic decision-making on climate change in constitutional democracies where future generations do normally not have a voice.

Not only from an environmental, but certainly also from a theoretical perspective it is a pity that the Oslo District Court did not consider these future generations more elaborately. Given that the Norwegian Constitution does contain this provision, what are the consequences? What future generations does the provision cover? How to determine, legally speaking, at what stage we deem the right to the environment managed in such a way that it is protected for future generations as well? How far in the future does the protection of Section 112 reach? The Court only seemed to slightly engage with the latter question, noting that the complaint concerns impact that is ‘too remote’ to be relevant to assess when considering the Licensing Decision. For the rest, and similar to the Courts in the Magnolia case, the Oslo District Court did not engage with the representative claim on behalf of future generations made by the plaintiffs.

In Chapter III, on people abroad, the two most important reasons why the Court did not address such questions have been discussed. Firstly, it deemed emissions abroad resulting from burnt Norwegian petroleum to fall outside the legal

933 Idem, §5.4.
934 See section 5 of the former Chapter for an account of why I deem the Arctic Oil case to fall within the field of European private law.
conflict at hand, thus diminishing the factual matter of the case to only little emissions. Secondly, the Court did not want to consider the Licensing Decision in light of overall climate policy because it deemed this something for the political branches of government.

At the same time, it should not be forgotten that the youngsters and grandparents that started the *Arctic Oil* case did obtain a small success; the District Court acknowledged Section 112 is a rights provision that may be invoked against the government in a civil procedure and furthermore, that climate change is covered by this provision. Highly significantly, this means that the Court agreed that future generations’ interests related to the climate are matter of constitutional law. The Court even stated that this provision can be invoked against the government (in principle, yet not in the present case). This line was further strengthened by the Oslo Court of Appeal, as will be illustrated in section 10.

6. Future generations became current generations in the *Urgenda* case on appeal

The Dutch State appealed the judgment in the *Urgenda* case on every possible point. In various aspects, it challenged the role of future generations in the case. Foundation Urgenda, on the other hand, also appealed the judgement of the District Court: it complained that it should have been allowed to rely directly on the ECHR. It was Urgenda’s position that prevailed.

6.1 Future generations in the *Urgenda* case on appeal

At first sight, future generations play a smaller role in the decision of the Court of Appeal than at first instance. However, as will be explained below, this only means that the judgment grew in legitimacy.

a) Standing

Whereas at first instance, the Dutch State had not objected to standing for Foundation Urgenda on behalf of Dutch future generations, on appeal, it did object on this ground.\(^{935}\) That is, the State argued that the interests of Dutch (and foreign) future generations into infinity do not amount to an interest that is sufficiently concrete to be allowed standing under the Articles 303 and 305a, Book 3, Dutch Civil Code.\(^{936}\) However, the Court of Appeal deemed it unnecessary to delve into this issue, noting that it was undisputed that Urgenda had standing, in so far as it acts on behalf of the current generation of Dutch people. Therefore,

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\(^{935}\) Cf Appeal by the State (‘Memorie van Grieven’) §11.

\(^{936}\) *Idem.*
the State had no interest in its complaint about standing; Urgenda had standing.937

So, in contrast to the Court of First Instance, which had allowed standing to Urgenda on behalf of future generations, the Court of Appeal did not explicitly allow standing on behalf of future generations. On the other hand, the Court of Appeal neither said that such would not be possible.

The Court of Appeal did explicitly reject another of the State’s argument concerning standing, namely that Urgenda was representing an interest so large that it encompasses people who do not at all want to be represented by Urgenda.938 This is an interesting objection by the State, because it echoes the theoretical objections made against representation of future generations, as unfolded in the introductory section to this chapter; there is no authorisation to legitimise representation, and there is a ‘plurality problem’ at play (i.e. future generations will be so diverse that their representative cannot determine what they each would want).939 Yet the Court of Appeal was not convinced by this concern, and based itself on the Parliamentary Proceedings concerning Article 305a, Book 3, Dutch Civil Code. The Court cites these minutes:

> Regarding the idealistic interests it does not matter whether every member in society attaches as much importance to these interests. It is even possible that the interests defended collide with ideas and opinions of other groups in society. This in itself should not obstruct a collective action. (...) Possibly, it can be about the interests of an indeterminable, very large group of persons.940

In other words, according to Dutch civil (procedural) law, a representative claim made in a Foundation’s by-laws suffices to be accepted as a ‘genuine’ representative by the court.

b) Human rights and the prevention principle
The largest contrast between the judgment at first instance with that on appeal is that the Court of Appeal agrees with Urgenda that the ECHR could be directly invoked in this case.941 Therefore, the Court extensively addresses how the ECHR

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938 Appeal by the State (‘Memorie van Grieven’) §11.3.
939 See section A.5. above.
940 Court of Appeal, Urgenda §38.
941 See also section 6.1 of Chapter III above.
is indeed aimed at the prevention of violations, as Foundation Urgenda had argued at first instance, though the Court left Article 1 ECHR out of the discussion. It observes that States have positive obligations under Article 2 and 8 ECHR to prevent future infringements of the interests protected by these provisions. Such positive obligations should not imply an impossible or disproportionate burden. Yet when the government knows that real and immediate threatening dangers exist, it must take preventive measures to avoid infringement as much as possible. ‘It is in light hereof that the Court will assess the (threatening) climate dangers posited.’

The Court continues to observe that the dangers of climate change are real (something on which the parties agree) and that they create a serious risk that the current generation of Dutch people will be confronted with a loss of life or a disturbance of their family life. Based on international climate science and international policy documents the Dutch State itself signed, the Court subsequently found that a developed country such as the Netherlands is not living up to its positive obligations under Articles 2 and 8 ECHR when taking measures in such a way that less than 25% of greenhouse gas emissions will be reduced by 2020.

c) Precautionary principle
The Court finally addresses the numerous complaints made by the State against the judgment at first instance. One of them was that there is a level of uncertainty in climate science as to when, where and how dangerous climate change will materialise. The Court of Appeal rejects this argumentation based on the precautionary principle, pointing to the fact that the uncertainties in climate science may also imply that the situation will be worse than expected. ‘Hence the circumstance, that there is a lack of full scientific certainty about the effectiveness of the reduction scenario ordered, does not mean that the State can justifiably refrain from taking further measures. Sufficient is the thorough plausibility, as described hereabove’.

942 See section 1.1.c of this chapter above.
943 Court of Appeal, Urgenda §40 et seq.
944 Idem, §41.
945 Idem, §43.
946 Idem.
947 Idem, §45.
948 Idem, §46-53.
949 Appeal by the State (‘Memorie van Grieven’) §§12.41-3.
950 Court of Appeal Urgenda §63.
6.2 Future generations’ emancipation through the Urgenda case on appeal
In their initial claim dating from 2013, the claimants in the Urgenda case still declared that they felt tempted to scream before the court, because the interests of future generations are so important, but so unheard and unseen. The Court of Appeal in the Urgenda case decided 5 years later, in 2018. It would appear that the generations who were deemed ‘future’ in 2015 when the District Court issued its decision, became present generations before the Court of Appeal when the court delivered its judgement in 2018, three years after the court at first instance. That is, the Court no longer deems it necessary to justify its order to the State pointing to the interests of future generations and weighing in their damage, as the interests of the current generation suffices.

It was October when the Court of Appeal rendered its judgment – it must therefore have been written during that outrageously warm summer of 2018, larded with sleepless nights and full of alarming news about wildfires up to the North Pole. Perhaps the decision should be read in this light; although future generations do not play an explicit role as at first instance, the Court fully accepts Urgenda’s message that the climate crisis is of utmost urgency. It does not even confine its decision to the interests of the young: ‘After all, it is absolutely plausible that already the current generation of Dutch people, mostly but not exclusively the younger ones among them, will face during their lives the adverse effects of climate change if the global greenhouse gas emissions are not adequately reduced’.

Does this therefore mean that the Court of Appeal contributes less to the empowerment of future generations in European private law than the District Court, in terms of rendering the public sphere more normatively legitimate and politically effective for them? Formally speaking, perhaps. Yet what really happened in this case is what will always happen with temporal boundaries to legal-political systems: at a certain point, these boundaries move towards you, as you grow older in time, and before you know it you are at the other side of that boundary. The Court therefore needed not to grapple with the complicated theoretical complications of representing future generations. The environment is

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951 Cf section 1.1.f above.
953 Court of Appeal Urgenda §37 (emphasis added).
constitutionalised through the Urgenda case to such an extent that it falls within the scope of currently alive people’s rights to life and to family life.

7. Future generations stand up against big oil: The claim against Royal Dutch Shell

On 5th April 2019, seven NGO’s led by Milieudefensie (Friends of the Earth Netherlands) and 17,379 individual co-plaintiffs deliver the summons in their climate lawsuit against energy giant Royal Dutch Shell. Shell reacted with a PR campaign, using the hashtag ‘#lieveringesprek’ (‘a conversation would be better’), stressing that yes, climate change is important, but this is a matter to be solved by society at large rather than in a courtroom. In other words, Shell maintains that climate change falls outside the boundaries of legitimate judicial law-making. In its claim of 236 pages, Milieudefensie of course argues the opposite, extensively discussing future generations and substantiating that both private law and (international) fundamental rights form legal bases for a judicial injunction to incite Shell to abandon its fossil industry and reach net zero greenhouse gas emissions in the year 2050.

7.1 Future generations in Milieudefensie’s claim against Shell

The claim explicitly argues that the NGO’s can defend the interest of future generations:

Because this case also concerns the severe consequences of Shell’s current activities for the human environment in the second half of this century (and after), the claiming NGO’s want to stress they strive not only on behalf of current generations against climate change, for the environment, human rights, ecologic and natural-historic values (...) but that they do such also on behalf of future generations.954

In Dutch law, the standing of NGOs litigating in a certain general interest requires that the NGO must pursue activities in this particular interest. Two of the seven NGO’s pursuing the claim against Shell explicitly mention future generations in their by-laws. NGO Milieudefensie’s aim is ‘to protect environment and nature, on behalf of current and future generations’,955 and the statutory goal of NGO Fossielvrij NL (‘fossil free Netherlands’) is ‘to achieve social, environmental and economic justice and health for current and future...

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954 Milieudefensie v Shell claim, §287.
955 Idem, §§129-130.
generations’.956 A third NGO is a youth organisation called Jongeren Milieu Actief (‘Youngsters Environment Active’) with members who are minors. The claim also stresses that the activities of a fourth NGO, Greenpeace, show that it is concerned to secure a green and peaceful future,957 and that there are young people and children among the 17,379 individual co-plaintiffs, who will increasingly suffer from climate change.958

In fact, all plaintiffs aim to protect future generations, the claim reasons, as their activities show they all strive for a sustainable society, a goal that inherently includes the interests of future generations, following the accepted definition of ‘sustainable development’ from the UNEP report Our Common Future: ‘sustainable development is development that meets the needs of the present without comprising the ability of future generations to meet their own needs.’959 This intergenerational aspect of sustainability is recognised in various legal sources, including the CFREU, the Aarhus Convention, the UNFCCC and the decision of the District Court in the Dutch Urgenda case.960

In sketching the facts, the claim explicitly deals with injustice between generations, discussing the consequences of climate change for the younger individual co-plaintiffs. ‘This concerns the people who did not contribute the most in causing climate change. (...) The contrariety thus coming to the fore is that the pleasures are for the older generations and the troubles for the younger generations.’961 The claim adds: ‘This again underlines the importance of climate action and shows that waiting is no option’.962

The claimants proceed to accuse Shell of the infringement its duty of care following from two sources. Firstly, the doctrine of hazardous negligence read into the provision on tort of the Dutch Civil Code; the norm that the Dutch State was said to violate in the Urgenda case by the Court at first instance. Secondly, fundamental rights enshrined in various legal documents, i.e. norms that the

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956 Idem, §191. Fossielvrij NL’s goal more completely read: ‘to achieve social, environmental and economic justice and health for current and future generations through taking away societal legitimacy of coal- oil- and gas companies (...) to fasten the transition to a sustainable economy based on renewable energy’ [translation LB].
957 Milieudefensie v Shell claim, §§166, 185.
958 Idem, §501.
959 This report, also known as the Brundtland report, is cited in Milieudefensie v Shell claim, §288.
960 Milieudefensie v Shell claim, §§290-295.
961 Idem, §501-502 [Translation LB].
962 Milieudefensie v Shell claim, §502 [Translation LB].
Dutch State was said to violate by the Court of Appeal in the *Urgenda* case. As also expanded upon in the previous chapter, in arguing Shell’s current business strategy amounts to a tort of hazardous negligence, the claim discusses all 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.963

Discussing the criterion (ii), the claim states that Shell has been well aware of these risks for decennia. Shell had been warned in 1959 that without an energy transition, an accumulation of greenhouse gasses might lead to the polar ice caps melting and New York City drowning.964 Various (internal) reports and conferences in which Shell participated called upon the company to make a transition and take preventive measures.965 It did heighten its own oil platforms in the sea.966 Shell also knew that it was one of the greatest polluters and that it had to take precautionary measures itself.967

Yet instead of acting upon this knowledge, the claim states that Shell is actively investing in fossil fuels, spreading misinformation about the dangers of climate change and lobbying against regulation of an energy transition.968 The claim states that Shell thus ‘uses her power and influence as one of the world’s largest companies to enrich herself at the expense of society and at the expense of future generations.’969 This behaviour is ‘extraordinarily uncareful’.970

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 people, environment and future generations, fully recognise her societal responsibility and duty of care.971

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963 Recited in *Idem*, §512 [Translation LB]  
964 *Milieudefensie v Shell* claim, §534.  
966 *Idem*, §546.  
967 *Idem*, §562.  
969 *Idem*, §602 [translation LB].  
970 *Idem*, §606.  
971 *Idem*, §607 [translation LB, emphasis added].
After having discussed all the Urgenda case criteria for a climate change related tort of hazardous negligence, the claim continues to argue that the activities of Shell violate fundamental rights. In this regard, it points to the Court of Appeal in the Urgenda case, which noted how the precautionary principle is read into the ECHR rights to life and private life in ECHR case-law. The duty of care following from these rights also applies to Shell due to the doctrine of indirect horizontal effect; Shell subscribed to various declarations of corporate social responsibility saying it respects human rights. These include the UN Global Compact that also mentions the precautionary principle in relation to environmental problems. Shell thus, like the Dutch State, has a duty to prevent future violations of the interests protected by Article 2 and 8 ECHR. This prevention duty already comes into play with a heightened risk of damage, even before damage has occurred, the ECtHR established in the Di Sarno v Italy case.

The final, more factual section of the claim is intended to substantiate the remedy requested, i.e. that Shell adapts its business strategy so that it linearly reduces its greenhouse gas emissions reaching net zero emissions in the year 2050. This section explains why climate change should be prevented, rather than solved later with future so-called ‘negative emission’ techniques meant to take greenhouse gasses out of the air. The claim explains that even a short period of the earth being ‘too hot’ will result in irreversible damage. A linear reduction path is important, because non-linear paths lead to more cumulative emissions in the air. Science shows negative emissions techniques – if ever invented – are likely to help little.

The claim finishes by requesting the same remedy as provided in the Urgenda case, a judicial injunction, this time to incite Shell to reduce its emissions by 45% in 2030 compared to 2010, 72% in the year 2040 and 100% in the year 2050. Moreover, the claimants request a legal declaration that Shell behaves unlawfully in the event that it does not meet these targets. If the court would not want to

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972 See Chapter III, section 7.1 for more details.
973 Milieudefensie v Shell claim, §665.
974 Idem, §719.
975 Idem, §670.
976 Idem, §671.
977 Idem, §751.
978 Idem, §754.
979 Idem, §762.
engage that far in the future, the claimants alternatively restrict their request for an injunction and a legal declaration for the goals of 2030.

7.2 Future generations’ emancipation through Milieudefensie v Royal Dutch Shell

Significantly, the claim of Milieudefensie against Shell truly attempts to represent future generations in the courtroom. Firstly, it underlines that some of the plaintiffs are youngsters. Secondly, it argues explicitly that NGO’s do and can act as representatives for the unborn. The claim thereby implicates that the interests of future generations are not only a political matter, but a matter of law with legal standing of its own. It even explicitly discusses intergenerational injustice, presenting it as a legal problem to which the judges can offer a partial solution in these tort law proceedings. Thus, it forms an attempt to fix the normative legitimacy and political effectiveness problems at play with constitutional democracies for future generations.

It is furthermore interesting to see how heavily the claim relies on the judgments in the Urgenda case. The Court of Appeal found a tort on the part of the State basing itself directly on Articles 2 and 8 ECHR, however, without rejecting the reasoning of the District Court that had found this tort on the basis of the doctrine of hazardous negligence. Therefore, the climate related criteria for hazardous negligence developed by the District Court are still valid under current Dutch law. Arguably, the doctrine of hazardous negligence is more likely to fit a lawsuit against a company, as the addressees of the ECHR in principle are States rather than private parties.

Whatever the chances of success, both legal bases (i.e. the doctrine of hazardous negligence and the ECHR provisions) very similarly rely on damage allegedly brought to future generations. After all, that climate change would ultimately endanger the rights enshrined in Article 2 and 8 ECHR is relevant for assessing the nature and scope of the damage, one of the criteria of hazardous negligence. The larger this damage, the earlier an obligation to prevent it comes into play under the hazardous negligence doctrine. Taking up future generations into the calculation, as the District Court in Urgenda did, is likely to enlarge the damage for which Shell is allegedly liable, which makes its obligation to prevent it more severe. The reasoning about the direct invocation of said provisions, therefore, is also of relevance for their indirect reliance through the open norm of hazardous negligence, including the paragraphs in which the claim showcases how the principles of prevention and precaution are read into these fundamental rights.
In light of Milieudefensie’s crystal clear endeavour to thus show the legal relevance of future generations, it is striking that it accounts for the short-termism of the law in its request for remedies that target the year 2050, but alternatively ‘in case the district court would be of the opinion that the claim partly sees to situations that are too far away in the future’, restricts requested remedies to the year 2030.980

In short, the claim of Milieudefensie and others against Shell is highly significant for presenting future generations, both children and the unborn, as fundamental rights-holders who are able to hold a private party accountable for its climate change related responsibilities through private law proceedings ideally resulting in a future-oriented injunction.

8. Children and their parents: The People’s Climate Case against the EU

‘This case is brought by children and their parents...’ are the opening words of the claim that goes under the name ‘The People’s Climate Case’ against the EU.981 Thus, it puts children central – the adult plaintiffs are primarily referred to as ‘their parents’. The General Court declared the claim inadmissible in May 2018 after which the claimants appealed.

However, they have also achieved a more material success in the meantime. That is, on 11 December 2019, the European Commission presented its ‘Green New Deal’, which aims to reduce the EU’s greenhouse gas emissions by 2030 with 55%.982 This is a number that aligns with the injunctive relieve requested by the claimants, that the EU should set its reduction target at least between 50 and 60%. It is not unlikely that the lawsuit has contributed to create this level of ambition within the European Commission, and perhaps it was the strong emphasis on children in the claim of People’s Climate Case that was the most convincing.

8.1 Future generations in the claim of the People’s Climate Case

Introducing the plaintiffs, the claim in The People’s Climate Case emphasises that they include ‘younger people and children’.983 All the nine families have children,

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980 Idem, §233.
983 People’s Climate Case claim, §B.9.

the names of whom are mentioned: Diago, Beatriz, Vera, Gabriel, Sado, Issa, Jibril, Adanoor, Mohammed, Soulail, Alice Rosa, Maria, Luke, Katarina, Petero and Elisabeta. The applicants are joined by the youth association Sáminuorra, the members are between 6 and 30 years old and belong to the indigenous people Sami, from the north of Scandinavia and Russia.

a) Facts
In outlining the facts of the case, the claim carefully underlines that a climate change induced raise in heatwaves is ‘particularly serious for children’, citing a UNICEF document explaining how ‘extreme heat is a real threat to children’s well-being (...) not only directly, but also (...) through a variety of heat-related illnesses’.984 This is especially relevant for the Kenyan Guyo family, and their children Sadi, Issa, Jibril, Adanoor, and Mohammed:

When temperatures rise above 33/34°C, the children are unable to walk to or attend school, or work during the day. High temperatures continue at night, preventing the children to sleep. The higher temperatures also cause heat rashes and dizzy spells among the children. The children are thus already affected in their right to education.985

Children generally are also likely to suffer especially from flooding, through inter alia ‘higher risks of injuries and death by drowning’.986 Moreover, children are particularly vulnerable for droughts, which can lead to nutritional deprivation, ‘with immediate and lifelong impacts’.987

Also, the retreat of snow and ice as a result of global warming will result in the starving of reindeer:988 ‘Reindeer depend on foods such as lichen, occurring under the winter snow. However, milder winters (or periods of milder temperatures followed by freezing) cause the melting and then re-refreezing of snow, trapping the lichen under ice...’.989 This is especially harmful to the Sami youth who are reindeer herders. The claim explains that reindeer herding is important culturally, socially and economically for them.990

985 Idem, §D.66.
986 Idem, §C2.b.27.
987 Idem, §C2.c.31.
988 Idem, §C.2.d.33.
989 Idem, §D.85.
990 Idem, §D.83.
b) Admissibility
In arguing for admissibility of the claim, the applicants posit they are both directly and individually concerned in the sense of Article 263(4) TFEU.\(^{991}\) The available EU legislation on climate change results in a violation of their fundamental rights. Here, the claimants make an interesting argument based on the relationship between the European Court of Human Rights (ECtHR) and the CJEU.\(^{992}\)

> If the CJEU is to be the sole arbiter of the reconciliation of EU measures and fundamental rights, it must follow that an individual whose fundamental rights are at stake necessarily has a right of access to the EU judicature. In consequence, it should be held that a person is ‘individually concerned’ where the person is ‘affected in a fundamental right’.\(^{993}\)

As also explained in the previous chapter, the claim in *The People’s Climate Case* is based on two TFEU articles; Article 263 providing an action for annulment, and Article 340 on the non-contractual liability of the Union. As for the latter legal basis, the claimants make a different argument on standing; they posit that it suffices that they show that the EU action at stake causes damage to them.\(^{994}\)

c) Fundamental rights infringements
The claimants substantiate that a range of their fundamental rights are violated by the EU’s small reduction target. Most relevant for the purposes of this chapter are the submissions regarding Article 21 and Article 24 CFREU. The latter provision codifies the rights of children. The claimants postulate that this entails that the EU has positive duties to ensure that sufficient steps are taken to protect children from climate change related threats, and that it has duties to take into account children’s best interests as a primary consideration when deciding on the level of emissions reductions.\(^{995}\)

In the context of Article 21 CREU, on the right to equality, the claim reasons that since this provision prohibits any discrimination based on age, the principle of equal treatment should be applicable in respect of ‘equality between children and

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\(^{991}\) *Idem*, §F.
\(^{992}\) Most likely superfluously: the European Court on Human Rights does not form part of the EU, which has 27 Member States, but it belongs to another regional organization in Europe, the Council of Europe, which has 47 Member States.
\(^{993}\) *The People’s Climate Case* claim, §F.b.140.
\(^{994}\) *Idem*, §F2.a.152.
\(^{995}\) *Idem*, §H.1.b.
young people, and older people, and requires broader intergenerational justice'.\textsuperscript{996} It adds that the ‘present adult generation consumes environmental resources at the expense of the life chances of today’s and tomorrow’s younger generations’.\textsuperscript{997} Moreover, in this context, it draws attention to the importance attached to future generations in the TEU, the TFEU and the CFREU, resulting in the following conclusion:

\begin{quote}
It can be concluded from this growing concern for future generations that a common proposition to that effect has emerged as a fundamental principle of EU primary law.\textsuperscript{998}
\end{quote}

The claim additionally invokes Article 3(1) UNFCCC, which stipulates that the parties should protect the climate system for the benefit of present and future generations.\textsuperscript{999} By not adequately reducing the EU’s greenhouse gasses, both Articles 21 and 24 are violated, the claim submits.\textsuperscript{1000}

d) The principles of prevention and precaution

Apart from subjective (fundamental) rights, the claim also invokes objective law containing obligations on part of the EU, among which the international no-harm rule and the Paris Agreement, which are binding upon the EU.\textsuperscript{1001} EU primary law is also invoked, more particularly the principle that damage should be prevented and the precautionary principle, both stemming from Article 191 TFEU.\textsuperscript{1002} Explaining the precautionary principle, the claim submits that the IPCC’s scenarios should be regarded as an absolute minimum:

\begin{quote}
... the IPCC’s suggestions for emission reduction have been based on a 66% likelihood of staying within the limits of 2°C increase, and on a 50% likelihood of staying within the limits of 1.5°C. This very low level of certainty should not be regarded as sufficiently precautionary because it implies that there is 34% or 50%, respectively, likelihood of overshooting the 2°C and 1.5°C limits.\textsuperscript{1003}
\end{quote}

The claim also points to a UNEP report to support the position that ‘the later action is taken, the more costly it will become’.\textsuperscript{1004}

\textsuperscript{996} Idem, §H.1.e.191.
\textsuperscript{997} Idem, §H.1.e.192.
\textsuperscript{998} Idem, §H.1.e.193.
\textsuperscript{999} Idem, §H.1.e.194.
\textsuperscript{1000} Idem, §§J.1.250-1.
\textsuperscript{1001} Idem, §H.2.
\textsuperscript{1002} Idem, §H2.d, H.3.
\textsuperscript{1003} Idem, §H.3.218.
\textsuperscript{1004} Idem, §I3.233.

e) Injunctive relief
Moving to the substantiation of the injunction requested, the claim compares various reduction paths. It argues that this path should be at least linear, adding that also more ambitious paths are a good option: ‘more preventive measures adopted earlier in time are more likely to avoid damage and are more consistent with principles of intergenerational equity’. It would be inappropriate to adopt a regressive pathway, in which emissions are reduced to a lower extent now and a greater extent in the future. ‘In legal terms the deferral of stringent measures would violate the prevention principle (Article 191(2)(2) TFEU) and discriminate against younger generations in favour of older generations.’

The claim finally discusses the three requirements to establish the EU’s non-contractual liability under 340 TFEU: an unlawful act, entailing a sufficiently serious breach of rights conferred to individuals, which causes damage. As for the latter criterion, the causation of harm, the claim argues that it should be applied in light of the principle by which an applicant may seek relief in respect of future losses. By any means, the applicants say they already incur climate change related damage, and they put forward that they will suffer further damage, and that the negative consequences of climate change will only worsen if the EU does not take adequate measures.

The applicants emphasise that they do not seek damages, but instead a future-oriented injunction requiring the EU to adopt emission reduction targets, through its existing legal framework, of at least 50-60% by 2030, ‘or such other level as the Court finds appropriate’.

8.2 Future generations in the order of the General Court
Literature supports the idea that fundamental rights infringements should lead to admissibility under Article 263 TFEU. Yet the General Court decided otherwise. On 8 May 2019, it declared the claim was inadmissible. The Court thereby agreed with the position of the defendants – the European Parliament

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1006 Idem, §J2.d.276.
1007 Idem, §K3.400.
1009 Idem, §§K4.413-16.
1011 CJEU General Court (Second Chamber) 8 May 2019 Carvalho and others v European Parliament and the Council of the European Union (‘The People’s Climate Case’), Case T-330/18.
and the Council of the EU – that the applicants did not meet the so-called ‘Plaumann-test’ for admissibility, stipulating that they have to be directly and individually concerned.

According to the Court, the infringement of fundamental rights need not be understood as being unique to and different for each individual (as the claimants had argued). “The fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application.” This is also true for the youth association Sáminuorra, which according to the court had not shown that it was individually concerned. Such would only be the case if the association would have been a trade organisation with special procedural rights, or if it would have collected individual interests that each would lead to the entitlement to bring proceedings, or if the association itself would be affected – quod non all three.

The standing requirements of being ‘directly and individually concerned’ are formulated for an action for annulment. As for the applicants’ action for damages under the non-contractual liability of the EU, the Court notes that it should also be declared inadmissible, since ‘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 adds later on that it is clear that the action does not seek damages, but rather amendment of the legislative package. The Court rules that it follows that the action for compensation should also be declared inadmissible.

In short, the Court is unconvinced that the ‘children and their parents’ are affected more than others, or in any justiciable way. It does not engage with the intergenerational dimension of the right to equality that was alleged by the claimants, nor does it respond to the extensive arguments on cost effectiveness in light of the principles of prevention and precaution.

1012 This test was developed in the Plaumann case, CJEU 15 July 1963 Plaumann & Co. v Commission of the European Economic Community, Case 25-62.
1013 CJEU General Court The People’s Climate Case, §§46-7.
1014 Idem, §50.
1015 Idem, §51.
1016 Idem.
1017 Idem, §67.
1018 Idem, §68.
1019 Idem, §70.
8.3 Future generations’ emancipation through the People’s Climate Case

The claim of the People’s Climate Case is concerned mostly with children rather than the unborn. It refers to ‘generations to come’ in the context of the alleged intergenerational element of the right to equality enshrined in Article 21 CFREU, but also here it concludes with reference to merely children, when summarising that the intergenerational element is ‘warning against the postponement of measures to later years, when today’s children will be adults and dangerous climate change (avoidable by earlier action) will already have occurred’.

This choice for children rather than the unborn makes sense when considering the strict admissibility requirements before the CJEU, known as the Plaumann test, upon which the claim also stranded at this instance (the claimants have appealed). After all, these requirements – to be directly and individually concerned – can impossibly be met by future generations in the sense of ‘the unborn’, for we can speak of them per definition only as a group and not as particular individuals who could be concerned in a way distinguishable from other (unborn) individuals. This means that the unborn future generations would never stand a chance before the CJEU – for a reason that neatly echoes the theoretical problem of plurality discussed in §5 of the introductory section A of the present chapter: we cannot know the individual preferences of future humans.

In and of itself, the admissibility requirements before the CJEU do reflect the delicate balance between law and politics. That is, these requirements suggest that EU legislation is in principle thought to be brought about in a democratically legitimate manner – meaning it is not for the legal institution of the court to reconsider whether European politics have done a good job, at the exception where certain individuals are directly affected by a piece of legislation. In other words, it is the task of the Court to refrain from the political domain, and exceptionally to protect individual rights against a democratic majority.

Yet the problem with the people who are affected most by climate change – in particular future generations, including children – is that they are not a minority. On the contrary, they consist of a very large group, and the claim in the People’s Climate Case precisely questions the (normative) legitimacy of the EU’s climate targets laid down in its legislative package. In other words, the claim argues that the rights of children and of unborn future generations have not

1020 The People’s Climate Case claim, §H1.e197 (emphasis added).
1021 Cf also the analysis by Matthijs Wolferen, van, ‘To Justifie the Wayes of God to Men; Limits to the Court’s Power of Interpretation’ (Groningen University 2018) 299.
sufficiently been considered in the political process resulting in this legislation; their interests are overruled by the democratic majority as if they were a minority. The claim aims to repair this lack of political efficacy of the public sphere by advancing the rights of children before the Court. This attempt fails, because the Court applies the Plaumann test, which is premised on the legitimacy of EU legislation and thereby makes it impossible to launch a collective environmental action before the CJEU.

Unsurprisingly, the Plaumann test has been heavily criticised in academic literature on collective (environmental) actions, not least for going against the Aarhus Convention on environmental procedural rights. It is, therefore, exciting to await the judgment on appeal in this case and to see whether the CJEU will reconsider its admissibility requirements.

Nonetheless, even if the Court remains attached to the requirements of direct and individual concern in the case on appeal, it remains to be seen whether the outcome will remain the same. That is, one may question whether it is truly the case that, in the words of the General Court ‘every individual is likely to be affected one way or another by climate change’ in such a way that they are all equally concerned. After all, a millionaire living in a mountain house with a view of a Norwegian fjord will not experience the same as, for instance the family Recktenwald with their family business on the island Langeoog that is slowly being washed away, nor will this hypothetical Norwegian millionaire experience the same as the Sami youth who are bereaved of their traditional way of life herding reindeer.

In conclusion, the claim in the so-called People’s Climate Case aims to advance in particular the political efficacy of the current legal-political system and to address its lack of normative legitimacy, by means of placing children in a central position in the legislative process on climate change. Yet the CJEU has applied an admissibility test, which reproduces the same problems that the claimants tried to raise, and thereby beautifully demonstrates once more the tension between law and politics generated by the climate cases, and the theoretical problems coming with the representation of future generations.
9. People now matter in the Dutch Urgenda case before the Supreme Court

The Dutch State had filed appeal to the Supreme Court in the *Urgenda* case immediately after the Court of Appeal rendered its decision.\(^{1022}\) On 20th December 2019, the Dutch Supreme Court decided *not* to quash the Court of Appeal’s judgment,\(^{1023}\) in line with the Opinion issued by the Advocate-General and Procurator General on 13th September 2019.\(^{1024}\) In respect of future generations, the ruling of the Dutch Supreme Court did not add much to the decision of the Court of Appeal. As analysed above, it would appear that future generations have become current generations as time elapsed.\(^{1025}\)

9.1 Future generations in the Urgenda ruling of the Supreme Court

In noting the facts upon which parties agree, the Dutch Supreme Court approvingly cites the Court of Appeal’s observation that there is ‘a real threat of dangerous climate change, resulting in the serious risk that the current generation of inhabitants will be confronted with loss of life and/or a disruption of family life.’\(^{1026}\) The Dutch Supreme Court also endorses the Court of Appeal establishing that ‘it is absolutely plausible that already the current generation of Dutch people, *mostly but not exclusively* the younger ones among them, will face during their lives the adverse effects of climate change if the global greenhouse gas emissions are not adequately reduced’\(^{1027}\). It thus keeps the focus on those who are alive now, rather than on those who still have to be born, and it does not limit its observations to children but even includes adults.

In affirming the applicability of the ECHR to the case, the Dutch Supreme Court observes for both Articles 2 and 8 ECHR that their scope encompasses events that may occur in the future. That is, it notes that States have a positive obligation to take measures in order to protect the right to life enshrined in Article 2 ECHR when an environmental problem poses a ‘real and immediate risk’ and when the State is aware of this risk.\(^{1028}\) It adds that this word ‘immediate’ is not to be

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\(^{1022}\) See section 6 above.


\(^{1025}\) Cf. section 6.2 above.

\(^{1026}\) Supreme Court, *Urgenda* §4.7 citing the Court of Appeal *Urgenda* §45 (emphasis added).

\(^{1027}\) Supreme Court *Urgenda* §4.7 citing the Court of Appeal *Urgenda* §37 (emphasis added).

\(^{1028}\) Supreme Court *Urgenda* §5.2.2.
understood temporally, but as ‘a danger that directly affects the persons involved’.\textsuperscript{1029} Thus, the protection of Article 2 ‘also encompasses dangers that can materialise only in the long term.’\textsuperscript{1030} Also from Article 8 flow positive State obligations to take reasonable and appropriate measures if there is a risk of severe environmental pollution that ‘may affect individuals well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely’.\textsuperscript{1031} The Court adds: ‘This risk need not exist in the short term.’\textsuperscript{1032}

The Court continues to observe that the obligation to take appropriate measures under Articles 2 and 8 ECHR means that States have to – in line with the precautionary principle – take preventive measures even where it is not entirely certain that the risk will materialise.\textsuperscript{1033} Importantly, when there \textit{is} a real and immediate risk, States do \textit{not} have a margin of appreciation in their obligation to take appropriate measures.\textsuperscript{1034} They may choose \textit{what} measures they take, but these measures must effectively reasonable and appropriate.\textsuperscript{1035}

In this vein, it dismisses the complaint of the State, that Articles 2 and 8 would not be specific enough to amount to an obligation to take action against climate change: ‘The circumstance that the risk will only realise in a couple of decennia and will not concern a specific (group of) persons but large sections of the population, does not mean that – other than the State argues – Articles 2 and 8 would not protect against this threat. This is in line with the precautionary principle.’\textsuperscript{1036}

As elaborately discussed in the former Chapter,\textsuperscript{1037} the Supreme Court used the so-called ‘common ground method’ to interpret the ECHR. That is, it relied on an international consensus as emerging from various international sources. In reasoning that the need to cooperate internationally also can be translated to obligations for individual States, it \textit{inter alia} relies on Article 3 UNFCCC, which stresses that the parties should protect the climate system for the benefit of present \textit{and future generations} of humankind, on the basis of equity and in

\begin{itemize}
  \item \textsuperscript{1029} \textit{Idem}.
  \item \textsuperscript{1030} \textit{Idem}.
  \item \textsuperscript{1031} This phrase the Supreme Court borrows from the ECtHR, §5.2.3.
  \item \textsuperscript{1032} Supreme Court \textit{Urgenda} §5.2.3.
  \item \textsuperscript{1033} \textit{Idem}, §5.3.2.
  \item \textsuperscript{1034} \textit{Idem}.
  \item \textsuperscript{1035} \textit{Idem}.
  \item \textsuperscript{1036} \textit{Idem}, §5.6.2.
  \item \textsuperscript{1037} See Chapter III, section 9.
\end{itemize}
accordance with their common but differentiated responsibilities and respective capabilities.\textsuperscript{1038}

A last point where the Court demonstrates its future-awareness is where it dismisses the reasoning of the State that it can reduce less now and resort to so-called ‘negative emissions’ later on, i.e. techniques to filter greenhouse gasses out of the air. Here the Court again invokes the precautionary principle, pointing to the facts that, as of this moment, there are no negative emission techniques that can be used on a large scale; and that negative emissions have so far not been a basis for decisions at international climate conferences.\textsuperscript{1039}

The Court is clear that the ideal reduction path should be the exact opposite: now is the time to reduce more. Pointing to a UNEP report from 2013, the Court observes that every emission leads to less space being left within the carbon budget, meaning that any delay in reduction amounts to larger necessary reductions in the future:\textsuperscript{1040}

\begin{quote}
This means that, for each delay in emissions reductions, the reduction measures to be taken later will have to be increasingly drastic and costly to achieve the intended result, and they will also be riskier.\textsuperscript{1041}
\end{quote}

The Dutch Supreme Court, therefore, agrees with the injunction issued by the Court of Appeal, ordering the Dutch State to reduce at least 25\% of its emissions by the end of 2020, compared to 1990 levels.

9.2 Future generations’ emancipation through the Supreme Court’s Urgenda ruling
Whereas at first instance in the Urgenda case, future generations were still granted standing, explicit references to them have almost disappeared in the ruling of the Dutch Supreme Court. Note that the latter court rendered its decision in December 2019 – i.e. very close to the ‘deadline’ of the judicial order under discussion, to reduce at least 25\% of emission by (the end of) 2020. The effects of climate change are increasingly addressed in the news, as does societal turbulence concerning measures that have to be taken now and only become more drastic, the more they are delayed.

\begin{flushright}
\textsuperscript{1038} Supreme Court Urgenda §5.7.3 (emphasis added).
\textsuperscript{1039} Idem, §7.2.5.
\textsuperscript{1040} Idem, §7.4.3.
\textsuperscript{1041} Idem.
\end{flushright}
No intricate reflections on the representation of future generations, nor even of children, were needed. Before the Dutch Supreme Court, Urgenda could represent the damage being the result of the Dutch Government not having considered ‘future generations’ in the past. The Dutch Supreme Court is concerned with people now. Its whole decision is characterised by an emphasis on the principle of precaution; the Court uses this principle to interpret Articles 2 and 8 such that they cover not entirely certain, future risks, and it also uses this principle to dismiss the State’s arguments on negative emission techniques.

Thus, whilst the Dutch Supreme Court neither explicitly addresses the normative legitimacy nor the political effectiveness of the problems at play with constitutional democracies for future generations, it does confirm a precautionary interpretation of a constitutionalised environment and affirmed its operationalisation through the private legal remedy of an injunction against the State.

10. Connecting future generations with people abroad: The Arctic Oil Case on appeal

Greenpeace Norway, the youth organisation Natur og Ungdom and the organisation of grandparents Bestefolderenes Klimaaksjon did not give up after having lost at first instance. They launched an appeal to question anew the lawfulness of the Licensing Decision, through which the Norwegian State had allowed for petroleum exploration in newly opened maritime areas. As elaborately discussed in the previous chapter, the environmentalist lost again on appeal. However, the Norwegian constitutional provision codifying a fundamental right to the environment gained in strength, particularly for future generations.

10.1 Future generations in the judgment of the Court of Appeal

Most importantly for the purposes of this chapter, the Oslo Court of Appeal explicitly recognised the normative legitimacy issue at play with future generations in constitutional democracies, and used this to give extra strength to Section 112 Norwegian Constitution, which codifies a right to an environment for future generations as well. That is, after having emphasised that the environment is ‘fundamental in the broadest sense for peoples’ living conditions’ and therefore

\[1042\] See Chapter III, section II.10.

\[1043\] Oslo Court of Appeal (Borgarting Lagmannsrett) 23 January 2020, Natur og Ungdom & Greenpeace Norge v Staten, case number 18-060499ASD-BORG/03, ‘Artic Oil’.
need to be understood as a justiciable right that can be invoked against the State, the Court points out:

...the second sentence of the first paragraph of Section 112 stipulates that natural resources are to be managed in a way ‘that will safeguard this right for future generations as well’. The fact that the right is to be safeguarded across generations has an aspect of the concern for democracy, in that future generations cannot influence today’s political process.1044

In line herewith, the Court finds – for the sake of future generations – that Norway is responsible for the combustion of exported petroleum under Section 112. The Court remarks quite to the point that ‘for the effect on the climate, including the climate in Norway, it does not matter whether the emissions occur during the production or the combustion, nor whether the petroleum is burned in Norway or abroad’.1045 That these future generations concern only Norwegians and not foreign future generations becomes clear further in the judgment, where the Court underlines that the Constitution codifies a solidarity principle across generations, but not a solidarity principle across nations.1046

In outlining the facts, the Court emphasises that there is a broad agreement that global warming is ‘one of the greatest challenges that humanity is facing’, for ‘emissions today will remain in the atmosphere for a long period and the matter therefore involves changes that can have an effect several hundred years into the future’.1047 However, as will also be analysed in the last chapter,1048 the Court finds that the Licensing Decision violate neither Section 112 Norwegian Constitution, nor Articles 2 and 8 ECHR, because the emissions under scrutiny are only ‘marginal’ in comparison with the global whole.1049

The claimants also argued that it is unlikely that the Licensing Decision would in the end lead to net socio-economic benefits, but the Court dismisses this line of reasoning. It notes that ‘the matter involves uncertain and future emissions, and the measures under the third paragraph of Section 112 that could provide room for the emissions can best be assessed at the time that the emissions are imminent.’1050

1044 Idem, §2.2.
1045 Idem, §2.4.
1046 Idem.
1047 Idem, §3.1.
1048 See Chapter III, section II.10.
1049 Court of Appeal Arctic Oil, §3.3.
1050 Idem, §3.5.
no legal obligations to calculate the socio-economic costs of CO2-emissions, and that the State made no other procedural errors in issuing the Licensing Decision.

The State thus won this case, but it had to bear its own legal costs as the questions of the case, according to the Court of Appeal, involved ‘key values relating to the environment and citizens’ future living conditions’ in which the State too had an interest.

10.2 Future generations’ emancipation through the Arctic Oil case

The considerations of the Oslo Court of Appeal mean a huge step forward in terms of the normative legitimacy of the legal-political system, from the perspective of future generations. That is, it explicitly recognises that it should enforce their right to the environment because they do not have a voice in today’s politics. The Court moreover uses this standpoint quite creatively, by saying that the Norwegian State is responsible for the combustion of its exported petroleum – something that is not required under international law. Thus, the Court seems to accept the possibility of genuinely representing future generations, strengthening their rights in the Norwegian constitutional democracy of today.

By the same token, political effectiveness is not significantly increased, since the Court rules that Norwegian emissions are only marginal compared to the global whole – even when calculating those resulting from exported petroleum. According to the Court, these emissions thus do not matter much for future Norwegians.

The latter finding reconnects the problems at play with future generations with the problems discussed in the last chapter, i.e. people abroad. For indeed, it may be the case that future Norwegian citizens will be relatively well off, even if global emissions reach the most dangerous tipping points. In his beautiful youth novel, *The World According to Anna*, the Norwegian writer Jostein Gaarder describes a girl living in future Norway. Whilst she is very sad about all the species that have gone extinct, she and her family live in very decent conditions – in contrast to the climate refugees from other places who roam the streets outside her house.

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1051 *Idem*, §5.2.
1052 *Idem*, §5.
1054 Cf Chapter III, section I.B.
Now of course, this book of Gaarder’s is fiction, but it vividly tells what IPCC reports tell us dryly in graphs and numbers, namely that people from the poorest nations will suffer the most from climate change, not only today, but mostly in the future.

11. Preventive measures for the environment: French municipalities against Total

On the 28th January 2020, the mayors of thirteen French cities, and four French NGO’s launched their claim against the largest French oil company, Total.1056 They relied on the new Act of Vigilance, which added provisions to the French Commercial Code (Code de Commerce) forcing large corporations to adopt a ‘plan of vigilance’ in which they must identify how their global value chains pose risks to human rights and fundamental freedoms, security, health and the environment. Moreover, the claim is based on other relatively new provisions, stemming from the French Civil Code (Code Civil) and rendering liable actors who commit considerable harm to the environment. Whereas future generations are not mentioned as such, the claim is characterised by an emphasis on the need for prevention.

11.1 Future generations in the claim of the French municipalities against Total

The claim commences with a short overview of the relevant facts and the legal context, including the Paris Agreement, which stipulates the principle of sustainable development. Thereafter, the claimants argue that they have enough interest in the claim to obtain standing, pointing inter alia to the fact that urban populations are exposed to an increased mortality rate due to heat waves – which will hit in particular vulnerable people such as the elderly and very young children.1057 As for inundations, these are occurring already, with many tragic effects, they say. The mayors are particularly concerned because they are legally responsible for the public tranquillity and public health.1058

a) The Act of Vigilance

The claims’ primary legal basis is the Act of Vigilance in the French Commercial Code. To strengthen the position that Total has a duty to protect the environment,

1057 Claim against Total, §2.1.2.
1058 Idem.
the claimants invoke the Environmental Charter (Charte de l’environnement) which has constitutional value. This charter codifies a duty for ‘every person’ – including legal persons such as companies – to preserve and ameliorate the environment. The claimants cite doctrine saying that a duty of vigilance follows from the Charter, not only when damage to the environment is already done, ‘but also in case of a risk to damage’. In view of the relevant legislative texts, case-law and general sources of public international law, the claimants assert, the notion of vigilance ‘implies a duty of prevention and attenuation if a risk to damage is known or reasonably foreseeable’.1059

Further, the Act of Vigilance itself calls for prevention of dangers for human rights and fundamental freedoms, health and security of persons, as well as for the environment. The whole idea of the Act is prevention rather than reparation, the claimants stress. They submit that Total’s plan of vigilance is greatly insufficient. In so doing, they refer serval times to the Urgenda case, including pointing out that climate change leads to the violation of human rights, and where arguing against negative emission techniques. That is, like the Dutch State, Total includes negative emission techniques in its reduction plans. The Dutch courts rejected this argument in the Urgenda case, because these techniques are not yet available on a large scale. Hence, the claim against Total argues that also Total should not rely on these techniques in its predictions of future emissions and alter its plan of vigilance in this respect. In short, the claim advocates a more precautionary approach.

The claimants also find Total’s plan of vigilance not sufficiently future-oriented. ‘The temporal perimeter of the “goals” is way too limited,’ they assert, as Total’s goals only go so far as 2030, whereas according to the plaintiffs, Total’s goals should include paths so as to reach climate neutrality by the year 2050.

Hence, they ask for an injunction, requiring Total to draft a better plan of vigilance, which should, inter alia: address the risks related to a global warming of over 1.5°C; recognise the incompatibility of a trajectory with 1.5°C warming at maximum with the exploration of new hydrocarbon sources destined to be used; include measures to massively and quickly reduce greenhouse gas emissions

1059 Idem, §2.2.
1060 Idem.
1061 Idem, §2.3.1.
1062 Idem, §2.3.2.3.
1063 Idem, §2.3.3.2.
1064 Idem.
(scope 1, 2, and 3) so as to meet significant reductions by 2030 and eventually meet carbon neutrality by 2050.\textsuperscript{1065}

b) Ecological tort in the civil code
Moreover, as a supplementary argument and as a self-standing legal basis,\textsuperscript{1066} the claim relies on Article 1252 French Civil Code, which stipulates that a civil judge can order reasonable measures to prevent or stop considerable damage done to the environment.\textsuperscript{1067} This is a highly interesting piece of legislation, because it decouples a damaged natural or legal person from an actionable tort – also when there is ‘pure’ ecological loss, meaning no damage to any person but to the environment only, a polluter can be ordered by the judge to remedy this loss. This point will be dealt with again in the Epilogue of this book.\textsuperscript{1068}

Interesting for the purposes of the current chapter is how the claimants emphasise the preventive dimension of the provisions on ecological damage (‘préjudice écologique’). That is, they compare the ambitions of Total with a trajectory that would lead to a global warming of 1.5°C at maximum and conclude that the two clearly do not align. They illustrate this assertion with a graph including four lines; one line represents a trajectory towards 1.5°C, which decreases over time in terms of emitted tons of greenhouse gasses, ending at zero in 2050; and the other three represent different ambitions of Total, of respectively 1%, 2% and 3% annual growth of the company, that each increase in terms of emitted tons of greenhouse gasses and end somewhere in 2040, for the company has not expressed what it will do after that year.\textsuperscript{1069} ‘The inadequacy of Total’s ‘ambition’ with the trajectories in line with the Paris Agreement are thus evident,’ the claimants say.\textsuperscript{1070}

Thus, also based on Article 1252 French Civil Code, the claimants petition the court for an injunction forcing Total to align all its emissions (scope 1, 2 and 3) with the Paris Agreement, and in the alternative, forcing Total to include in its plan of vigilance a goal of 1.5°C of global warming at maximum, and to cover in this plan all emissions, i.e. scope 1, 2 and 3.\textsuperscript{1071}

\textsuperscript{1065} Idem, §2.3.4.
\textsuperscript{1066} In French, this is called ‘à titre supplémentaire’.
\textsuperscript{1067} Claim against Total, §2.4.
\textsuperscript{1068} See VI. Epilogue below.
\textsuperscript{1069} Claim against Total, §2.4.3.
\textsuperscript{1070} Idem.
\textsuperscript{1071} Idem, §2.4.4.
Based on the Act of Vigilance implemented in the French Commercial Code, the claimants moreover ask the Court to make Total pay €50,000,- every day that it is late in implementing the injunctions requested. They submit that this sum is justified in view of Total’s large revenues and in view of the urgency of the climate problem.1072

11.2 Future generations’ emancipation through the claim of the French municipalities
Unlike most of the other climate claims in European private law, the claim against Total does not explicitly refer to future generations. The claimants do not put forward that they represent future generations or even children. The mayors do say they are very much concerned about vulnerable people in their communities, including young children, but against Total they act on behalf of themselves rather than on behalf of these people. From the perspective of future generations, this claim do not contribute to the normative legitimacy to the public sphere.

As for political effectiveness, this claim is in any event very much characterised by its emphasis on the need for prevention. The plan of vigilance of Total should be more forward-looking, the claimants submit, and they do so by invoking inter alia a constitutional duty. Based on two pillars of private law – the Act of Vigilance and ecological tort – they moreover ask for a future-oriented injunction rather than for backward-looking reparation. Thus, the claim without doubt contributes to an ongoing constitutionalisation of the environment operationalised in private law that is looking forward, into the future.

1072 Idem, §2.5.
C. CONCLUDING REMARKS ON FUTURE GENERATIONS

In section A above, this chapter commenced with the observation, that those who will live in the future are especially vulnerable for dangerous climate change, and that this is to a certain level recognised in national, European and international law. The section went on to apply two characteristics of the Habermasian public sphere, as identified by Nancy Fraser, to the situation of future generations. Thus, it made use of Habermas’ theory qua critical theory; it showed that the public spheres in our constitutional democracies are neither politically effective nor normatively legitimate from the perspective of future generations. In so doing, the temporal boundaries of our current legal-political system, also as reconstructed by Habermas, were criticised.

Section A went on to analyse that, whereas this critique can easily be understood in a Habermasian framework of deliberative democracy, the same framework does not evidently allow for enfranchising future generations. After all, future generations, in the sense of the unborn, are not yet here so they cannot deliberate. Therefore, an expedition into further theory was necessary, namely theory that specifically addressed the representation of future generations in today’s legal-political system.

The evaluated literature on the representation of future generations identified multiple problems, the most important of which were: the non-identity problem (the people who exist in the future will be there merely because of our actual choices and cannot serve to weigh counterfactual scenarios, as the latter will lead to different individuals being born in the future); the plurality problem (future people will have a diverse range of views so that we cannot maintain that they would take one particular political position on the now); and the authorisation problem (future people are not here to authorise their representative to represent them). The literature also presented opposing views, according to which it does not matter who the specific people of the future will be, we can represent whoever will live then – putting aside the non-identity problem. Future people can be expected not to want a climate disrupted world and are likely to want us to consider their interest equally importantly to our own – addressing the plurality problem. The legitimacy of representation in deliberative democracies does not necessarily need to be placed in the authorisation by the represented, but is more realistically situated in the acceptability of representative claims among a relevant audience, consisting of members who do live now.
Section B of this chapter evaluated the climate cases in European private law brought about so far, to demonstrate how the climate lawsuits address the political effectiveness and normative legitimacy problems for future generations, and how they aim to overcome these problems by operationalising through European private law a future oriented constitutionalisation of the environment. This, in turn, allowed an examination of how the relevant audience – primarily consisting of the courts in European private law\(^{1073}\) – responded to these claims, which led to the observation that the difficulties pinpointed in the theoretical debates surrounding the representation of future generations return in the practice of climate cases in European private law. These concluding reflections provide an overview of these aspects.

1. **Future-oriented environmental constitutionalism through European private law**

In Chapter II of this thesis, two boundaries to the role of the judiciary in European private law were identified: a legal boundary, relevant the role of the judiciary generally, dictating that courts may only apply laws enacted through the people’s power, and a factual boundary, specific to courts applying private law, dictating that the courts must assume the facts on which the parties agree.\(^{1074}\)

The *factual* boundary is key to the environmentalist successes obtained so far in the *Urgenda* case. After all, the dangers of climate change are uncontested between the parties. Actually, in all the climate cases so far, the facts are not disputed, as the scientific consensus on climate change is so significant that no one contests it in court. This is also true for the damage that is likely to be caused to future generations, due to climate change. The various conflicts rather centre instead on how to legally weigh the facts.

Indeed, as also elaborated upon in section A.2 of this chapter, the fact that future generations are vulnerable to negative environmental impacts is so widely recognised that a wide range of international and European legal sources call for their protection. The climate lawsuits resort to these legal sources to underline that their requests from the courts fit within the *legal* boundaries of the role of the judiciary. Likewise, the climate lawsuits are characterised by requests for forward-looking remedies that find their basis in private law.

\(^{1073}\) Courts are the audience of the representative claim, which forms one of the submission in the deliberations taking place before and with the court.

\(^{1074}\) See section B.2 of Chapter II.
1.1 Environmental law and fundamental rights for the future
The Urgenda claim, the Magnolia claim, the claim against the EU and the claim against Shell explicitly reiterate how the UNFCCC aspires to protect future generations. Likewise, the principle of sustainable development, encapsulating future generations’ interests, is invoked in the Urgenda claim, the Magnolia claim, the Milieudefensie claim and the claim against Total. Perhaps most importantly, all claims apart from one rely heavily on the principles of prevention and precaution, namely the Urgenda claim, the claim in the Belgian Klimaatzaak, the Magnolia claim, the Norwegian claim on Arctic Oil, and the claims against Shell, the EU and Total. Only Lliuya in his case against RWE does not invoke these principles as such (though he is motivated to prevent large damage to his community if the nearby glacier lake overflows).

These sources are often invoked autonomously, but also to guide interpretation of relevant fundamental rights, thus advancing a future-oriented constitutionalisation of the environment. That is, in the Urgenda case, the claimants submitted that Articles 2 and 8 ECHR are applicable not only retroactively, but also when there is a risk of future damage, as the two provisions need to be read in light of the principles of prevention and precaution. The Court of Appeal of The Hague and the Dutch Supreme Court agreed in this respect. This contrasts with the courts in the Swedish Magnolia case, where the District Court – although the claimants had made an argument regarding Articles 2 and 8 ECHR similar to Urgenda – maintained that Article 8 ECHR can only be invoked when an infringement has occurred already. The Belgian Klimaatzaak claim again puts forward that Articles 2 and 8 ECHR should be interpreted in line with the principles of prevention and precaution, and similar arguments were made in the cases against Shell and Total and against the Norwegian State.

The Norwegian courts did not truly engage with the submissions regarding the ECHR provisions, but they did – importantly – consider the fundamental right to the environment that the Norwegian Constitution grants to future generations. Both courts attached justiciable value to Section 112 Norwegian Constitution and the Court of Appeal even deemed Norway responsible for certain emissions abroad because these will affect future Norwegian citizens regardless of where they take place. Likewise, in the case before the CJEU, the claimants invoke other fundamental rights provisions than Article 2 and 8 ECHR – they focus instead on a series of fundamental rights enshrined in the CFREU, including the rights of the child and the right to (intergenerational) equality.
This future-oriented environmental constitutionalism was not only advanced by pointing to the unborn, but also by invoking the rights of children and adults who are already alive. This is likely to happen more often as time passes, because the people to whom one refers to as ‘future generations’ in the past will one day become those living in the present. As time goes by, global warming advances, and where an abstract term such as ‘future generations’ was needed in the seventies to highlight who is the most affected, we can now easily point to current children with a destroyed future, or even to children already suffering. The rights of children are invoked in the Urgenda case, the Klimaatzaak, the Magnolia case, the Norwegian case of Arctic Oil, the cases against Shell and very forcefully in the case against the EU – where the claimants maintain that the EU should be guided by a general principle of intergenerational equity. In the Urgenda case on first instance, it was undisputed that Urgenda had standing to represent future generations, but on appeal the courts deemed that the interests of currently living Dutch residents suffice for Urgenda’s standing – and that the relevant residents are not exclusively the younger ones. Correspondingly, the French mayors in Total mainly point to the interests of the people who live in their communities today – both children and adults. And Mr. Lliuya as well is concerned with his family and the other people living in his community now.

1.2 Future-oriented private law remedies
Whereas international and European environmental principles and fundamental rights are used to substantiate unlawfulness and liability, the remedies requested in the cases all find their basis in ‘pure’ private law. Private law remedies, certainly in tort law, are traditionally aimed at restoring harm retroactively. Interestingly, however, all claims but one request forward-looking remedies. That is, only the Swedish claimants of Magnolia requested (symbolic) damages of one Swedish crown per person to remedy the alleged governmental tort. However, this remedy does not align so well with the future-oriented goal of the case (namely to prevent future emissions leading to harmful climate change), which was one of the reasons why the environmentalists lost this case two times in a row. Lliuya also asks for damages from RWE, based on German neighbour law, but not to cover costs that he had already incurred: he rather wanted to finance a dam to prevent him and his community members to incur future damage.

The rest of the climate lawsuits all request injunctions. In the Urgenda case, an order to the government is requested to have Dutch national emissions reduced with at least 25% by the end of 2020 (this was quite far in the future when the case was launched in 2013), based on Article 296, Book 3, Dutch Civil Code. The
Belgian Klimaatzaak asks for the same, based on Article 1382 Belgian Civil Code. The Norwegian case seeks to have the Licensing Decision declared invalid by the judge along the line of Norwegian civil procedure, so as to prevent exploration for more petroleum and its ensuing effects on the climate. And the claim against the EU invokes inter alia the Urgenda case to substantiate that an injunction to remedy the Union’s non-contractual liability is ‘in accordance with the general principles common to the laws of the Member States’ according to Article 340 TFEU.

Highly interesting when considering their democratic legitimacy are the future-oriented remedies requested against the companies Shell and Total based on their alleged due diligence obligations. Remember, after all, that climate lawsuits against corporate actors are said to be problematic since these companies have (in principle) always acted with authorisations given out by governmental authorities. Shell stated that the climate is something for politics rather than for the courts, and Total similarly declared to ‘regret’ the lawsuit – these standpoints are based on an alleged lack of legality of the climate claims, asserting this legality should originate in democratic majority decisions. Yet this lack of legality is way less pressing in cases where future-oriented injunctions rather than retroactive damages are requested. After all, the goal is not to ‘punish’ for business strategies of the past, but to altering future business ‘strategy’, which at the very least is less concerning for the legal certainty of the sued corporate actors.

2. The cases reflect theoretical problems around future generations’ representation

Paying attention to the problems of non-identity, plurality and authorisation, section B of this chapter analysed for each of the cases whether they were, on the one hand, instances of ‘genuine representation’, enforcing rights of future generations and considering such to be moral duty, or on the other rather examples of ‘advocacy’, advancing a view that does consider future generations’ interests but rather because of an ethical duty. Genuine representation provides future generations with a ‘voice’ in today’s legal-political system and has the potential to add not only to the public sphere’s political efficacy, but also to its normative legitimacy for future generations. Advocacy, however, only has the potential to add political efficacy, but not normative legitimacy.

2.1 Children

Like the unborn, children cannot vote in elections, and they have little political power as they are generally taken less seriously than adults. Moreover, children will be more heavily impacted by climate change than most adults, simply
because their lives will last longer on average. To this extent, therefore, the public sphere suffers from normative legitimacy and political efficacy issues from their perspective in a way very similar to that of the unborn. Yet unlike the unborn, children do have a natural voice in our present-day public sphere, a voice that they can use through, for instance, school strikes. ‘We children do this to wake the adults up,’ Greta Thunberg explained to the British Parliament.\textsuperscript{1075} Through their climate action, children build up pressure in the periphery of the public sphere so as to constrain the centre of decision-making, with a certain political efficacy. Additionally, in claiming this position, they take up deliberative space in the public sphere so that it has also (some) normative legitimacy for them.

Children can moreover file claims with the courts and have their rights enforced. Thunberg and fifteen other children launched a complaint to the Committee of the UN Convention on the Rights of the Child against five of its signatory States, in September 2019.\textsuperscript{1076} In the cases studied in this chapter, young children are among the co-plaintiffs in the Urgenda case, the Magnolia case, the Norwegian case on Arctic Oil, and in the cases against Shell and the EU. This has clear advantages. The non-identity problem, the plurality problem, nor the authorisation problem are at play with children’s legal representation in court; the claimants are specific children with a clearly articulated view that they certainly want to see transmitted by their legal representatives. Children’s rights are individual rights; individual children can be seen as a minority worthy of judicial protection against majority decisions.

\subsection{2.2 The unborn}

The representation of the unborn is, however, more difficult. The unborn form a group per definition, and they are not a minority.\textsuperscript{1077} This makes it virtually impossible, as we saw in section B.8.3, to meet the CJEU’s admissibility criterion to be ‘individually concerned’ by climate legislation. Group rights generally quickly amount to a public interest not evidently enforceable in a private law procedure. In this vein, the Dutch State objected to Urgenda’s standing at first instance on behalf of future generations abroad,\textsuperscript{1078} and to standing on behalf of

\begin{itemize}
\item \textsuperscript{1075} Greta Thunberg, \textit{No One Is Too Small to Make a Difference} (Penguin UK 2019) 68.  
\item \textsuperscript{1077} Even in the darkest IPCC scenarios, the unborn are luckily not in a lesser number than us.  
\item \textsuperscript{1078} See section B.1.
\end{itemize}
future generations ‘into infinity’ on appeal.\textsuperscript{1079} On appeal, the State also advanced an argument very similar to the theoretical authorisation and plurality problems, saying that Urgenda could easily be claiming to represent people who do not at all want to be represented by Urgenda.

Indeed, Urgenda had made a claim of ‘genuine representation’, saying it was there to ‘give a voice’ to future generations. Other claims of genuine representation were made by the plaintiffs in the Belgian \textit{Klimaatzaak}, the \textit{Magnolia} case, the Norwegian case, and in the case against Shell. In the \textit{Klimaatzaak} and also in the \textit{Urgenda} case, there was also a strong line of advocacy, where the claims spoke of a ‘heritage’ that no one should want to leave — a strategy of both claims to provide the relevant courts with a way to evade representational difficulties. In a way, all cases aimed at the prevention of dangerous climate change can be said to advocate \textit{inter alia} future generations’ interest.

Interestingly, the District Court in the \textit{Urgenda} case did accept standing for future generations. This judgment thus added to the normative legitimacy \textit{and} the political efficacy of the public sphere for future generations. On appeal, the courts in this case, however, deemed the interest of currently living people significant enough to grant Urgenda standing. Both the Court of Appeal of The Hague and the Dutch Supreme Court were therefore able to avoid engaging with the Dutch State’s arguments regarding the difficult representation of the unborn. The Court of Appeal did, however, reject the State’s arguments echoing the authorisation and plurality problems, referring to the minutes of the Dutch parliament, in which this point was discarded for public interest claims.

From a theoretical perspective, it is a pity that the courts in the Swedish \textit{Magnolia} case did not engage with the claim in so far as it said to address future generations’ interests. At the same time, it is only usual for courts to evade difficult questions if not totally necessary to address them — the Swedish courts could already dismiss the claim because of the Swedish law of damages. Similarly, the Norwegian District Court denied the claim in the \textit{Arctic Oil} case without truly engaging with what the constitutional provision on future generations entails. Noting that the claim addressed a ‘too remote’ risk, the Court showed it felt constrained by temporal boundaries.

\textsuperscript{1079} See sections B.6 and B.9.
This stands in sharp contrast with the Norwegian Court of Appeal, which truly enlarged the public sphere’s normative legitimacy for future generations, by fully accepting the genuine representative claim of the plaintiffs and by acknowledging that Section 112 Norwegian Constitution is precisely there to bring back to balance the political system in which the unborn do not have voice. It used this notion to interpret Norway’s legal responsibility to encompass emissions taking place from exported petroleum, thus going beyond of what is strictly required under current international climate law.\textsuperscript{1080} In the end, however, its judgement did not result in much added political effectiveness, as it still deemed the Licensing Decision constitutional, not least because it was so heavily debated in parliament. The Oslo Court of Appeal thus deferred to the People’s Power – whereas Justitia had crossed temporal boundaries, the old legal boundary still constrained her.

3. Conclusion of this chapter

Four conclusions can be drawn from discussing how the climate cases reaffirm and push for a constitutionalisation of the environment that is inclusive towards future generations. Firstly, theoretical problems regarding the representation of future generations return in the practice of the cases, and where possible, the courts will evade these problems.

Secondly, where the courts do need to engage with these problems, they can overcome them to the extent they see operational space within legal and factual boundaries. For example, the Dutch Court of Appeal dismissed the State’s arguments regarding plurality and authorisation, based on Parliamentary Proceedings. Likewise, the Norwegian Court of Appeal used regular legal sources in interpreting Section 112 Norwegian Constitution as addressing future generations’ need for normative legitimacy, but the court felt unable to provide this provision politically effective teeth precisely because the Licensing Decision under dispute was so lengthily debated in parliament.

Thirdly, whilst intellectually more challenging, inclusion of future generations seems, at times, more easily acceptable within the framework of a constitutional state than inclusion of people abroad, as long as we speak of future generations of nationals; the Dutch State at first only challenged Urgenda’s standing for future generations abroad, and the Norwegian Court of Appeal constrained the application of section 112 Norwegian Constitution to future Norwegian nationals.

\textsuperscript{1080} See section B.10 of this chapter, as well as section A of Chapter III.
Fourthly, and perhaps depressingly, if political inaction on climate change lasts long enough, one day, the people who we today refer to as ‘future generations’, will become the people of the now. The present people of the future will have no other choice than to put all their financial means into adaptation to the disrupted climate, as mitigation will no longer be an option - both because what already happened can no longer be prevented and because adaptation will be more urgent than further prevention.

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