CLIMATE CHANGE LITIGATION

Enforceability of action through legal claims and the role of judges in Europe

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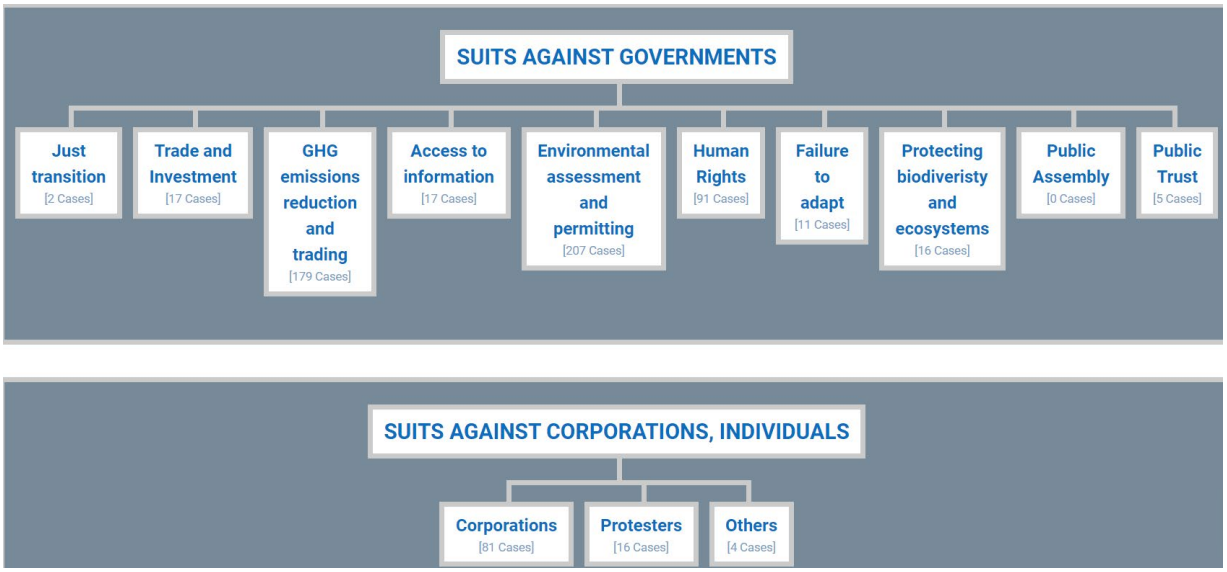
1. Introduction

It is commonly accepted that the next decade is critical for tackling climate change and significantly reducing damages for future generations. The latest report of the Intergovernmental Panel on Climate Change (IPCC) shows that the world is not on track to meet the global rise in temperature to 1.5 degrees Celsius and outlines what needs to be done to limit climate change.[1] Secretary-General of the United Nations António Guterres has launched a video message on the launch of this report in which he states: 'The jury has reached a verdict. And it is damning. This report of the Intergovernmental Panel on Climate Change is a litany of broken climate promises. It is a file of shame, cataloguing the empty pledges that put us firmly on track towards an unlivable world. We are on a fast track to climate disaster'.[2]

From an international perspective, the Paris Agreement adopted in 2015 was a key milestone towards setting more ambitious targets and taking a long-term perspective to escape irreversible damage. However, in practice it appears hard for governments and private sector companies around the globe to take the necessary actions to reach those goals. This has led to an increase of court cases in which claimants call on the individual responsibility of states and private sector companies to intensify efforts towards the collective pursuit of a more sustainable tomorrow. According to the Global Climate Change Litigation Database these are the numbers of climate change related court cases – not including cases in the United States:[3]



[1] H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.), *IPCC, 2022: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.*

[2] https://www.un.org/sg/en/content/sg/statement/2022-04-04/secretary-generals-video-message-the-launch-of-the-third-ipcc-report-scroll-down-for-languages.

[3] http://climatecasechart.com/climate-change-litigation/non-us-climate-change-litigation/.

More and more, national courts are allowing such claims. For example, in the Dutch landmark *Urgenda* case, the Supreme Court ruled that the Netherlands had to reduce its greenhouse gas (GHG) emissions by at least 25% by the end of 2020 compared to 1990.[4] In a recent ruling the District Court of the Hague ruled that a similar obligation lies on Royal Dutch Shell (Shell); a private company.[5] Also, the German Constitutional Court recently ruled in the *Neubauer* case that the German Federal Climate Law (*Klimaschutzgesetz*) violates the constitutional freedoms of future generations, enshrined in the Basic Law of Germany.[6]

These examples are not (yet) followed by all courts around Europe, including the European Court of Justice (ECJ), and while praised by some, these rulings have also been highly criticized. Are these judges protecting the rule of law or is this judicial activism which goes beyond the boundaries of the powers of the judiciary?

The case law in climate litigation cases – and the literature discussing it – touches upon some fundamental issues regarding e.g. the role of the judiciary in a democratic state under the rule of law (*trias politica*), the cross-border aspect of climate change and the question whose rights and obligations are involved. We will zoom in to these issues: how they have been dealt with so far and how, in our opinion, judges should deal with climate litigation cases in the future.

To that end, we will first briefly set out the legal framework (§ 2) and address the different concepts in climate litigation (§ 3), before discussing some of the most noteworthy national (§ 4) and European case law (§ 5) into more detail and setting out the main issues in climate litigation (§ 6).[7] Finally, we will summarize our observations and appreciations (§ 7).

2. Legal framework

A. The United Nations Climate Convention

A UN conference on 'Human Environment' was held in Stockholm in 1972. The conference brought forth the Stockholm Declaration, in which the principles of international environmental policy and environmental law were laid down. The United Nations Environment Program (UNEP) was established as a result of the conference.

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[4] Hoge Raad (Supreme Court of the Netherlands), 20 December 2019, *the State of the Netherlands v. Foundation Urgenda,* ECLI:NL:HR:2019:2006. We refer to § 4.A for a further discussion of this judgement.
[5] Rechtbank Den Haag (District Court of the Hague), 26 December 2021, *Friends of the Earth Netherlands et al vs Shell plc*, ECLI:NL:RBDHA:2021:5337. We refer to § 4.B for a further discussion of this judgement.
[6] Bundesverfassungsgericht (German Federal Constitutional Court) 24 March 2021, BvR 2656/18/1 BvR 78/20/1 BvR 96/20/1 BvR 288/20, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, *Neubauer and others v. Germany*. This judgement is discussed in § 4.C.
[7] For examples of cases that have been filed worldwide, we refer to: https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/.

In 1992 the United Nations Framework Convention on Climate Change (UNFCCC) was concluded. The UNFCCC is the main international treaty on fighting climate change and seeks to protect the planet's ecosystems and mankind and strives for sustainable development for the protection of current and future generations. The ultimate objective of the convention is to achieve stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. According to Article 4(2) of the convention, the countries listed in Annex I must take the lead, in an international context, in counteracting climate change and its negative consequences. They have committed themselves to reducing GHG emissions. They must periodically report on the measures they have taken. The objective is to return the level of emissions to the level in 1990. The EU and all its member states are among the 197 parties to the Convention.

Article 7 has established the Conference of the Parties (COP), which usually convenes every year (the so-called climate change conferences). The COP is the highest decision-making entity under the convention, although COP decisions are not legally binding. Numerous COPs have since been held, including the COP 21 in 2015 in Paris (the Paris Climate Conference), culminating in the Paris Agreement.

B. The Paris Agreement

The Paris Agreement, which was signed on 22 April 2016, entered into effect on 4 November 2016. The Paris Agreement is the first-ever universal, legally binding global climate change agreement. The EU and its member states are among the close to 190 parties to the Paris Agreement. Each party to the agreement is called to account regarding its individual responsibility (bottom-up approach). The Paris Agreement stipulates that global warming must be kept 'well below 2°C' as compared to the average pre-industrial levels, while striving to limit the temperature increase to 1.5°C. The parties must prepare ambitious national climate plans and the level of ambition must increase with each new plan. The use of fossil fuels must quickly be brought to an end, as this is a major cause of excessive CO2 emissions.

C. EU climate policy

Article 191 of the Treaty on the Functioning of the European Union (TFEU) contains the EU's environmental goals. For the implementation of its environmental policy, the EU has worked out a large number of directives, including the so-called ETS directive (Directive 2003/87/EC), which was subsequently amended. ETS stands for 'Emissions Trading System'. This system entails that companies in the ETS sector may only emit (GHG) in exchange for the surrender of emissions rights. These emissions rights may be bought, sold or retained. Companies in the

EU that fall under the ETS system, which are energy-intensive companies such as those in the energy sector, may only emit GHG in exchange for surrendering emission allowances. The system currently provides for an emissions reduction of 43% by 2030 relative to 2005 (Directive (EU) 2018/410).

In addition, on 29 July 2021 the European Climate Law (Regulation (EU) 2021/1119) entered into force. It writes into law the goal set out in the European Green Deal for Europe's economy and society to become climate neutral by 2050. The law also increases the ambition for 2030 by setting a more ambitious interim target: the GHG reduction target for 2030 becomes 55% compared to 1990, instead of the previously applicable target of 40%. The EU institutions and the Member States are bound to take the necessary measures at EU and national level to meet these targets. The Climate Law includes measures to keep track of progress and adjust actions accordingly. Progress will be reviewed every five years. The Climate Law also addresses the necessary steps to get to the 2050 target.

D. The European Convention on Human Rights

Article 1 of the European Convention on Human Rights (ECHR) provides that the contracting parties must secure the rights and freedoms defined in Section I of the ECHR to everyone within their jurisdiction. [8] In other words, ECHR protection is afforded to the persons who fall within the states' jurisdiction. In relation to climate change, primarily the right to life (Article 2) and the right to private life (Article 8) are important. Such articles are relied on frequently in climate cases. Furthermore, Article 13 is relevant for the interpretation of Articles 2 and 8 since it provides the right to an effective remedy before a national authority if the rights and freedoms under the ECHR are violated. The remedy must be both practically and legally effective.[9]

E. The EU Charter of Fundamental Rights

While the ECHR is more frequently invoked in the context of climate litigation in the European Union than the EU Charter of Fundamental Rights (the Charter) and many of the rights in the Charter overlap with those in the ECHR, the EU's – and the ECJ's – ambitions for the Charter are to provide a stronger and more ambitious protection than the ECHR. This is possible due to the nature of EU law and the remedies that the ECJ and national Courts are able to offer for violations of EU law. Especially Article 47 of the Charter is an important provision with respect

[8] https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[9] ECtHR, *Kudla v. Poland*, Appl. no. 30210/96, Judgement of 26 October 2000 at § 157, ECtHR, *Neshkov et al. v. Bulgaria*, Appl. no. 36925/10 , Judgement of 27 January 2015 at § 180 and 181, and ECtHR, *Ulemek v. Croatia*, Appl. no. 21613/16, Judgement of 31 October 2019 at § 71. All ECtHR decisions are available at http://hudoc.echr.coe.int/

to climate litigation, as it establishes the right to an effective remedy and to a fair trial. In three German climate litigation cases Article 47 of the Charter is used to deal with problems of standing (of environmental associations).[10]

F. The International Covenant on Civil and Political Rights

Furthermore, the International Covenant on Civil and Political Rights (ICCPR) is of relevance since all ECHR contracting states have ratified it. Article 6 protects the right to life. According to the Human Rights Committee environmental degradation, climate change and unsustainable development are some of the most pressing and serious threats to the ability of present and future generations to the enjoyment of the right to life and the state obligations under international environmental law should thus inform the contents of Article 6 and the obligation of states parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.[11] So the interpretation of the Human Rights Committee emphasizes that climate change raises an issue under Article 6.

G. The legal framework applicable to companies and private market parties

The aforementioned conventions, laws and regulations address the obligations of states in relation to (the consequences of) climate change. The liability and responsibility of private companies and financial market parties (asset owners) with regard to sustainability and climate change are affected both by legal provisions and by soft law instruments. [12] E.g. there are legal provisions to identify and report on the ecological (climate), social (social and physical living environment) and governance (management, supervision, accountability and control) factors (ESG factors) of their investments and financings and soft law rules on the corporate social responsibility (CSR rules) for private companies and financial market parties with regard to their activities.

Examples of legal provisions to identify and report on ESG factors can be found in various EU sources such as the Sustainable Finance Disclosure Regulation, the Taxonomy Regulation and the Directive on disclosure of non-financial and diversity information by certain large undertakings and groups (to be amended by the proposed Corporate Sustainability Reporting

[10] *Neubauer*, *supra* note 6, Verwaltungsgericht Berlin (Administrative Court Berlin), 22 November 2018, *Friends of the Earth Germany and others v. Germany*, Verwaltungsgericht Berlin (Administrative Court Berlin) 25 October 2018, *Family Farmers and Greenpeace Germany v. Germany,* ECLI:DE:VGBE:2019:1031.VG10K412.18.00.
[11] Human Rights Committee, General Comment No. 36, Article 6 (Right to Life), CCPR/C/GC/36, 3 September 2019, at para. 62.
[12] Asset owner are e.g. pension funds, asset managers and investment managers.

Directive (COM(2021) 189 final, 2021/0104).[13] Non-compliance with these legal obligations may result in liability of the non-compliant party vis-à-vis the party relying on those rules (provided that they have direct effect or have been implemented into the national legislation).

Examples of CSR rules can be found in the UN Guiding Principles on business and human rights, OESO Guidelines for Multinational Enterprises, the UN Global Compact Principles and the ISO 26000 Social Responsibility Guidance Standard. In addition, several sectors-specific CSR frameworks have been developed.[14] CSR rules require companies and financial market parties to respect human rights and refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights.[15] The responsibility to respect human rights requires that business enterprises: (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[16] In addition, companies should support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies.[17]

These soft laws instruments are in principle not binding on companies. However, CSR standards as expressed in such soft law instruments can give substance to the explanation and interpretation of civil law relationships and the (unwritten) standard of due care of companies and private market parties and may become *de facto* binding on companies. In addition to these CSR rules, a group of legal experts has – in light of the Paris Agreement – developed the principles on Climate Obligations of Enterprises which should provide guidance to governments, companies, investors, accountants, regulators, judges, lawyers, academia and NGOs on the obligations of all stakeholders in achieving the goals of the Paris Agreement.[18]

[13] Council Regulation 2019/2088/EU, OJ 2019 L 317/1, Council Regulation 2020/852/EU, OJ 2020 L 198/13, Commission Directive 2014/95/EU, OJ 2014 L 330/1.
[14] Such as the Equator Principles and the IFC Environmental and Social Performance Standards (financial markets) and the Voluntary Principles on Security and Human Rights (oil and gas industry).
[15] United Nations, Guiding principles on business and human rights: implementing the United Nations Protect, Respect and Remedy framework (2011), Principle 12.
[16] Ibid. Principle 13.
[17] United Nations, UN Global Compact Principles (https://www.unglobalcompact.org/what-is-gc/mission/principles) Principle 7
[18] These principles contain different types of obligations: limiting emissions, obligations regarding products, services, choice of suppliers, disclosure of certain data and how financial institutions and investors should deal with the threat of climate change. According to the authors, the legal basis for these principles can be found in sources of international law, human rights, international treaties, environmental law, tort law, case law (of national and international courts), all kinds of rules of 'soft law', authoritative reports and views in doctrine.

As these principles have no legal status, the application thereof is dependant on whether judges are willing to apply these principles in the interpretation of the unwritten standard of due care of companies and private market parties.

3. Concepts in climate litigation

In environmental action in general two different concepts are apparent: adaptation and mitigation. Such concepts are related to the way in which the harms are presented. In climate litigation trends this distinction is also visible.[19] The figure of adaptation is often associated with direct harm which has already occurred as a result of climate change. In such cases, the opposing party claims for specific money or funds. Since most ecological harm is related to direct activities of companies, the defendant is usually a company. Mitigation is used to achieve restriction of present and future GHG emission reduction. Mitigation litigation aims to push governments towards more political action and corporations towards better policies, for instance in the *Urgenda* case (§ 4.A).

The rise in climate specific cases shows that the legal position of climate change is becoming significantly more robust.[20] Literature on this subject identifies that the legal techniques and strategies used in climate litigation show similarities between mitigation and adaptation, but that the grounds of climate litigation have been gradually shifting towards newer obligations and values, focusing on the more imminent and extensive harms of climate change, for example in the *Urgenda* case.[21]

4. Examples of national case law

A. Urgenda case

In the introduction of this article we already touched upon the *Urgenda* case. With its ruling in this case, the Dutch Supreme Court finalized the first case in which a national court issued a specific order to a government to reduce GHG emissions on the basis of human rights. Urgenda, a Dutch non-profit sustainability foundation, successfully called upon the right to life and the right to private and family life (Articles 2 and 8 ECHR) to justify the positive obligation of the state to take measures that reduce risks that could jeopardize the welfare of Dutch residents,

[19] Hoek, Van Uhm and Zaitch, 'Climate Change Litigation: learning from the Urgenda case', 1 *Tijdschrift over Cultuur & Criminaliteit* (2021) 14.
[20] Burgers and Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v the Netherlands', in J.E. Nijman and W.G. Werner (eds), *Netherlands Yearbook of International Law* (2018) 223. See for examples of cases that have been filed worldwide: https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/ Furthermore, we refer to the Global Climate Change Litigation Database for an more extensive overview of climate change caselaw: http://climatecasechart.com/non-us-climate-change-litigation/
[21] Hoek, Van Uhm and Zaitch, *supra* note 19 at 14.

even if such impacts would only materialize a few decades from now. The Supreme Court ruled that the State must comply with the target, considered necessary by the international community, of a reduction by at least 25% in 2020 compared to 1990 levels. If legislative measures are required to achieve such compliance, it is up to the state to determine which specific legislation is desirable and necessary.

B. Shell case

In this matter before the District Court of The Hague in the Netherlands, the association 'Friends of the Earth Netherlands' together with several individuals asked the court to rule that Shell and its subsidiaries should reduce their CO2 emissions by 45% in 2030 as compared to the levels of 2019. Friends of the Earth Netherlands based its claim on an unwritten duty of care under Article 6:162 of the Dutch Civil Code. Although Friends of the Earth Netherlands was unable to directly invoke human rights, the District Court still recognized the importance of human rights in the assessment of the claim. Therefore, the District Court used these, among other things, for the interpretation of the duty of care. The District Court, moreover, stated that from the *Urgenda* judgment it could be deduced that Articles 2 and 8 ECHR offer protection against the consequences of climate change. The District Court therefore decided in favour of the claimants and ordered Shell to reduce its CO2 emissions by the requested 45%. Meanwhile, Shell has lodged an appeal against the judgement of the District Court with the Court of Appeal in the Hague, which to date is still pending. In its appeal Shell argues, amongst other things, that, given the decision by the Supreme Court of the Netherlands in the *Urgenda* case, decision-making on the reduction of GHG emissions is a power of government and parliament and that courts must observe restraint in the assessment of the measures taken by the state as the government has a large freedom when making such political assessments. Therefore, there is – according to Shell – no room for a new rule of unwritten law such as the reduction obligation of a private company as recognized by the District Court. Furthermore, the District Court has used ECHR and UN General Principles to construct a legal obligation, whereas both the ECHR and UN General principles do not constitute binding obligations for Shell. Therefore, Shell argues that the court wrongfully created the reduction obligation based on these principles. As the appeal is still pending, it is unclear how the Court of Appeal will assess these arguments of Shell.

C. Neubauer case

Another landmark decision is the *Neubauer* case of the German Federal Constitutional Court.[22] In this case a group of young people argued that Germany's climate law, which set a reduction target of 55% by 2030 compared to 1990 levels, was insufficient to protect against dangerous climate change and therefore violated their fundamental rights, including their right to life, right to health and right to a decent future. The court recognized that climate change represents a 'catastrophic or even apocalyptic' threat to society and that under Article 2(2) of the German Constitution, the state has a constitutional duty to protect against dangerous climate change. This duty requires taking mitigation measures towards achieving climate neutrality and engaging in 'internationally oriented activities to tackle climate change at the global level'.[23] In its ruling, the court concluded that due to the insufficient reduction target of 55% by 2030, almost the entirety of the German emissions budget would be exhausted by 2030. This would create an impossible reduction task for the generations after 2030. The court found that creating this near-impossible task would infringe the plaintiffs' fundamental freedoms. The court considered that Germany's climate protection law violates the fundamental rights of young people and future generations and it must therefore be improved. The court explicitly stated that the state obligations are directed towards the future and can entail a duty towards future generations.[24]

However, different from the *Urgenda* judgement, the court did not provide specific instructions as to which action the government is to undertake. Nevertheless, the decision has had a significant impact on German climate policy. Shortly after the decision of the court, the German government increased its reduction target from 55% to 65% by 2030, compared to 1990 levels. Similarly to the *Urgenda* case, this case supports the argument that the right to life generally provides protection against climate change.

D. Klimaatzaak case

The final national case we will shine a light on is the biggest climate case worldwide so far. In its judgement in this case, the Brussels Court of First Instance established for the first time the negligence of the Belgian public authorities.[25] Filed in 2015 by the association *Klimaatzaak*, which was founded by 11 Belgians, the case was joined by more than 58,000 co-plaintiffs

[22] *Neubauer*, *supra* note 6.
[23] Ibid. Para. 149.
[24] Ibid. Para. 146.
[25] Tribunal de première instance francophone de Bruxelles, Section Civile (Brussels Court of First Instance), 17 June 2021, *VZW Klimaatzaak v. de Belgische Staat en anderen*, 2015/4585/A.

during the proceedings. The applicants relied on similar arguments as those in the *Urgenda* case and also referred to it. The claim was based on (inter alia) Articles 2 and 8 ECHR and the applicants argued that Belgium's current climate policies are in violation of the rights enshrined in these articles.

In its judgment, the court recognized that the NGO *Klimaatzaak*, as well as the over 58,000 co-plaintiffs, are directly, personally and realistically at risk of harm because of the ongoing climate crisis. The court concluded that the federal state of Belgium and three regional governments are jointly and individually responsible for protecting their citizens from the negative impacts of the climate crisis. Referring to their failure to take adequate climate measures to date, the court found both the national and regional authorities in breach of their duty of care towards their citizens and had violated fundamental rights in general and Articles 2 and 8 ECHR specifically by not taking sufficient climate action. In its ruling, the court did not impose any concrete reduction targets.[26] The court did not specify what the Belgian government has to undertake to mend the violation, because the court found that the separation of powers does not allow it to make that decision.[27]

5. European case law

A. The European Court of Human Rights (ECtHR)

Although Articles 2 and 8 ECHR play a big role in climate litigation, the ECtHR has not yet dealt with a case that directly relates to the problem of climate change so far. However, currently four climate change cases are pending before the ECtHR.[28] In the *Duarte Agostinho and Others v. Portugal* case, the applicants complain that the 33 respondent states have failed to comply with their positive obligations under Articles 2 and 8 (as well as Article 14, prohibition of discrimination), read in the view of the commitments made within the context of the Paris

[26] For this reason, Klimaatzaak filed an appeal on 16 November 2021. The Brussels Court of Appeal decided to give priority to the handling of the Klimaatzaak, which will take place from 14 September until 23 October 2022, see: https://twitter.com/Klimaatzaak.

[27] In its judgement the Court considered at para. 2.3.2: 'However, this request for an injunction cannot be granted without infringing the principle of the separation of powers. Indeed, the judge cannot determine the content of the obligations of a public authority and thus deprive it of its discretionary power. In other words, if the judiciary is competent to establish the fault committed by the public authority, even in the exercise of its discretionary power, it cannot, on this occasion, deprive the latter of its political freedom nor substitute itself for it. 231 The judiciary cannot assess the appropriateness of the action of the public authority when the latter is exercising its competence nor exercise itself the discretionary power which belongs to this public authority. It is therefore necessary to check whether the injunction requested does not tend to lead the tribunal to substitute itself for the legislative or administrative authority in the exercise of its discretionary competence. …
In other words, while it is within the remit of the tribunal to note a failure on the part of the federal state and the three regions, this does not authorise it, by virtue of the principle of separation of powers, to itself set targets for reducing Belgium's GHG emissions.'

[28] *Duarte Agostinho and Others v. Portugal and 32 Other States*, Appl. no. 39371/20, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. no. 53600/20, *Greenpeace Nordic and Others v. Norway*, Appl. no. 34068/21 and *Mex M. v. Austria*, filed 25 March 2021, see:
https://climaterightsdatabase.com/database/?_deciding_body=european-court-of-human-rights, (accessed 14 may 2022).

Agreement.[29] Note that in this case the applicants have not exhausted domestic remedies and are attempting to rely on an exception to the rule to exhaust domestic remedies first.[30] The applicants argue that such a rule should not apply due to the absence of an adequate domestic remedy. The decision of the court on these arguments will determine if the case will be heard on the merits.

However, from case law pertaining to environmental dangers can be indirectly derived which obligations states have regarding climate change.[31] The right to life (Article 2) is about the positive obligation of the state to take all necessary measures to protect the lives of persons under its jurisdiction,[32] or the negative obligation of the state not to inflict death, except in cases of death resulting directly from the acts of state agents. In terms of the positive obligation, the state must take preventive measures in the event of dangerous activities or disasters.[33]

The ECtHR made the link between environmental damage and damage to private life protected by Article 8 in the *Lopez Ostra* case.[34] However, the ECtHR considered that in striking a fair balance between individual interests and those of the community, the state has a margin of appreciation. In the *Tàtar* case, the ECtHR stated that the existence of a serious and substantial risk to the applicants' health and well-being placed a positive obligation on the state to adopt reasonable and adequate measures capable of protecting the rights of the persons concerned to

[29] In this case the issue is raised that, on the one hand, the ECHR focusses on the individual state as a respondent and that state's obligations to 'secure to everyone within its jurisdiction' the rights under the Convention, whilst on the other hand, climate change is a global problem that needs to be solved globally. Furthermore, is noted that when the ECtHR communicated the case, it asked the parties to comment not only on the alleged violations of Art. 2, 8 and 14 ECHR, but instead it also invoked Art. 3 ECHR, the prohibition of torture and inhuman and degrading treatment, as well as the right to property in Art. 1 of Protocol No. 1 to the Convention.

[30] Since the applicants are lodging their case against 33 states, making use of domestic remedies in each of these states would have taken several years.

[31] We refer to ECtHR, factsheet Environment and the European Convention on Human Rights, May 2022, at 1, which states: 'Even though the European Convention on Human Rights does not enshrine any right to a healthy environment as such, the European Court of Human Rights has been called upon to develop its case-law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks.' See also Dikkers, 'Towards European consensus on climate change as a human rights problem', 2 *Ars Aequi* (AA) 2022, 89 in which relevant ECtHR environmental jurisprudence is discussed.

[32] ECtHR, *Kiliç v. Turkey*, Appl. no. 22492/93, Judgement of 28 March 2000, at para 62 and ECtHR, *Valentin Câmpeanu v. Romania*, Appl. no. 47848/08, Judgement of 17 July 2014, at para. 130.

[33] ECtHR, *Öneryildiz v. Turkey*, Appl. no. 48939/99, Judgement of 30 November 2004 at para. 90; ECtHR 2008, *Budayeva and Others v. Russia*, Appl. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 Judgement of 20 March 2008 at para. 130. In the *Öneryildiz* case, the ECtHR explained that in the context of dangerous activities, the state has a primary duty to put in place a legislative and administrative framework to provide effective deterrence against threats to the right to life (para. 89). Moreover, special emphasis must be placed on regulations geared to the special features of the activity in question, which means that a state has obligations such as the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (para. 90).

[34] ECtHR, *López Ostra v. Spain*, Appl. no. Judgement of 9 December 1994. In this case a malfunction in a waste treatment plant caused health issues for the inhabitants living nearby. At para 51 the Court considered that 'it is self-evident that serious environmental damage may affect the well-being of a person and deprive him of the enjoyment of his home in such a way as to adversely affect his private and family life, without however seriously endangering his health'.

respect for their private life and home and, more generally, to the enjoyment of a healthy and protected environment.[35]

With regard to environmental protection, Articles 2 and 8 may overlap in certain circumstances. Therefore, the ECtHR has explained that the principles developed under Article 8 can also be relied upon in respect of Article 2.[36]

In order to determine whether a state meets its positive obligations under Articles 2 and 8, the victim must be able to invoke a direct, clearly identifiable and locally specific interference.[37] For instance in the *Cordella* case, the ECtHR considered that 19 out of 180 applicants did not have victim status, since they did not live in one of the towns classified as being at high environmental risk and they had not shown that they were personally affected. For the other applicants, the ECtHR held that here had been a breach of Article 8. Furthermore, the ECtHR recalled that the ECHR does not contain a general right to environmental protection and that popular actions are prohibited.[38]

Lastly, we remark that the ECtHR has made it clear that the choice of appropriate measures is within the broad discretion of the State.[39] Under its existing case law, especially in cases regarding broader policy choices, the margin of appreciation left to states in the sphere of environmental protection has generally been held to be wide, leaving the ECtHR to consider only whether there has been a 'manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere.

[35] ECtHR, *Tàtar v. Romania*, Appl. no. 67021/01, Judgement of 27 January 2009, at para. 107.
[36] See *Budayeva and Others v. Russia*, *supra* note 33 at para 133 and *Öneryildiz v. Turkey*, *supra* note 33 at paras. 90 and 160.
[37] See for example ECtHR, *Ivan Atanasov v. Bulgaria*, Appl. no. 12853/03, Judgement of 2 December 2010 at para 66. In earlier case law, for instance in ECtHR, *Fadeyeva v. Russia*, Appl. No 55723/00, Judgement of 9 June 2005, at para 68, the ECtHR explained that, since protection in that case is derived from Art. 8, an individual's home, family life or private life has to be directly affected in order for human rights to be engaged. This requirement makes for a seemingly high threshold for a violation under Art. 8.
[38] ECtHR, *Cordella and Others v. Italy*, Appl.nos. 54414/13 and 54264/15, Judgement of 24 January 2019, at paras. 100-101.
[39] ECtHR, Guide on Article 2 of the European Convention on Human Rights Right to life, 31 December 2021, 12: 'There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres'. In this regard we also refer to *Budayeva and Others v Russia*, *supra* note 33 at paras. 134-135; ECtHR, *Vilnes and Others v. Norway*, Appl. nos. 52806/09 and 22703/10, Judgement of 5 December 2013, at para. 220 and ECtHR, *Brincat and Others v. Malta*, Appl. nos. 60908/11, 62110/11 and 62129/11, Judgement of 24 July 2014, at para. 101.

However, the complexity of the issues involved with regard to environmental protection renders the Court's role primarily as a subsidiary one'.[40]

B. ECJ and the General Court: People's Climate case

The *Carvalho* case, also known as the *People's Climate* case, was brought by 36 individuals from families from various member states of the European Union (Germany, France, Italy, Portugal and Romania), as well as from Kenya and Fiji, and an association governed by Swedish law, the *Sáminuorra*, which represents young indigenous Samis. All of them were active in agriculture and tourism in climate-sensitive areas in and outside of Europe. Already suffering from consequences of climate change such as sea-level rising, flooding or droughts, the applicants complained about the EU's 2018 legislative package regulating GHG emissions for the years 2021 to 2030. They claimed this legislation was an infringement of their fundamental rights and they relied on e.g. the Paris Agreement. The applicants filed an action for annulment and a claim for damages pursuant to Article 340(2) TFEU, not aimed at pecuniary damages but an order directed at the Council and the Parliament to adopt stricter GHG emission targets of 50% to 60%.

In 2019, just like the ECJ now, the General Court did not touch on the question whether the EU should be obliged to set stricter GHG emission targets (which it did now set with the Climate Law), but declared the actions inadmissible. Relying on the *Plaumann* decision, in which the ECJ has set the barriers for individual concern for natural or legal persons, the General Court decided that the applicants were not individually concerned and therefore did not have standing.[41] Furthermore, it held that the *Sáminuorra* did not fulfil the conditions under which case law allows associations to bring an action for annulment. The General Court also dismisses the damages claim, as it aims to obtain the same result as the action for annulment.

6. Main issues in climate change litigation

The case law discussed in paragraphs 4 and 5 above – and academic literature discussing this case law – show that some of the most controversial points in climate litigation are (i) the

[40] *Fadeyeva v. Russia*, *supra* note 37, at para. 105 regarding Art. 8. With regard to Art. 2, see for instance *López Ostra v. Spain*, *supra* note 34, at para. 51 and *Öneryildiz v. Turkey, supra* note 33 at para. 107. Since cases involving environmental issues are likely to give rise to difficult social and technical issues, the ECtHR often refers to the need to give the state a wide margin of appreciation in assessing the best policy.

[41] ECJ 15 July 1963, case 25/62 (*Plaumann v. Commission*), in which the ECJ ruled that, in order for individuals to have standing in such cases the contested act must affect them 'by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the addressee'.

separation of powers (*trias politica*, § 6.A), (ii) the question whether or not individuals and NGOs have standing (§ 6.B) and (iii) the liability of asset owners (§ 6.C).

A. Separation of powers (trias politica)

The constitutional structure of the governments of most nations in Europe has been based on the doctrine of separation of powers, or the *trias politica*. According to Montesquieu, the need for the separation of powers was to protect citizens from an arbitrary government.[42] By the division of the government into separate powers, each with a personal, well-defined task, the risk of arbitrariness would be the smallest. The separation of powers is structured as follows: the legislator makes the law, the executive administers the law, and the judiciary applies the law. The boundaries between these different functions may not be sharp in all events and powers may overlap.

As for the role of the judiciary in some climate cases, the question arises whether the judges are protecting the rule of law or if their rulings are best described as judicial activism which exceeds the boundaries of the judiciary in the *trias politica* doctrine. For example in the *Urgenda* case, the Supreme Court dictated climate policy to the government without a basis in law other than the open, civil law standards of 'social responsibility' and 'duty of care'. This, whilst in a case in 2003 the Supreme Court adopted a more restrained tone and decided that the judiciary is not empowered to order the legislature to enact legislation.[43] In light thereof, a more restrained attitude and less activist judgement would be conceivable.

One of the critical remarks on the *Urgenda* case is that the judges in this case undermined the separation of powers.[44] In other words, the Supreme Court's decision qualifies as judicial activism which upsets the balance of powers. On the other hand, it is argued that such judicial decisions confirm a working system of separation of powers.[45] One point of view in this regard is that the legislator and (Supreme) court(s) are 'partners in law business', which partnership is not the same for each country.[46] For instance in the Netherlands, the principle of judicial

[42] C. de Montesquieu, *De l'esprit des loix* (1748).
[43] Hoge Raad (Supreme Court of the Netherlands) 21 maart 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt* case).
[44] E.g. Bergkamp and Hanekamp, 'Climate Change Litigation against States: The Perils of Court-Made Climate Policies', 5 *European Energy and Environmental Law Review* (2015) at 105 and 106, Besselink, 'Rechter en Politiek: Machtenscheiding in de Urgenda-zaak', 8 *Tijdschrift voor constitutioneel recht* (2020) at 130. In the Netherlands, judges were accused by of being 'dikastocrats': politician Baudet wrote that this 'dikastocracy' (rule by judges) is the 'Achilles heel' of the liberal state. See https://twitter.com/thierrybaudet/status/1194613924462772224.
[45] E.g. Eckes, *Separation of Powers in Climate Cases: Comparing cases in Germany and the Netherlands*, 10 May 2021, available at https://verfassungsblog.de/separation-of-powers-in-climate-cases/. The author states that such cases strengthen the processes of deliberation and reason-giving and create conditions for greater legitimacy of the exercise of public power.
[46] J.B.M. Vranken, 'Toeval of beleid? Over rechtsvorming door hoogste rechters' 75 *NJB* (2000), at 1.

restraint applies and is reflected in assessment prohibitions and restrictions.[47] Also, it can be argued that judges do not think within terms of power, but seek solutions for concrete legal questions in individual cases within the limits of law.[48] As long as democratic majorities fail to enact effective climate laws, fundamental rights – essential for the protection of the democracy as such – may create legitimate operational space for the judiciary to provide remedies against climate change.[49]

B. Standing of claimants in climate litigation

One of the most fundamental aspects of the rule of law is standing, or *locus standi*: the capacity of a party to bring a suit before a court, and the corresponding requirements a claimant must meet to demonstrate they have the right to sue. Standing can be a significant obstacle in climate litigation, as climate change harms are diffuse and difficult to attribute with a clear causal chain.

For example, as set out in paragraph 5.B, the ECJ ruled in the *People's Climate* case that the claimants do not have standing because they had not established that the contested provisions of the acts at issue distinguished them individually from all other natural or legal persons concerned by those provisions.[50] The standards set by the ECJ for direct access to the EU courts are high and academics have argued that they are too high, at least in climate actions.[51] They argue that, because climate change affects everyone in current and future generations, it is almost impossible to establish an individual concern. It seems paradoxical that climate cases are therefore dismissed by the ECJ, as the fact that climate change affects everyone means the damage is serious, which should be reason to allow legal action rather than dismiss it on formal grounds. However, the *People's Climate* case shows that standing in climate actions against EU legislative acts will – at least for now – remain a difficult hurdle to overcome.

This also applies to NGOs, and especially to NGOs who do not represent a specific group of individuals but idealistic interests such as fighting climate change. For comparable reasons, and for reasons related to *trias politica* discussed above, it is controversial in academic circles

[47] For example, pursuant to Art. 120 of the Dutch Constitution the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts. The Netherlands do not have a constitutional court. However, judges are able to refer to equivalents of the same constitutional rights in European and international law, which allows for judicial fundamental rights reviews via Arts. 93 and 94 of the Dutch Constitution.
[48] See for instance De Werd, 'Dikastofobie', *NJB blog*, 4 February 2020 available at https://www.njb.nl/blogs/dikastofobie/
[49] Cf. Burgers, 'Should Judges Make Climate Change Law' 9 *Transnational Environmental Law* (2020), at 70. The author states at p. 71 that the different decisions in climate cases indicate that we are facing a legal transition: 'Climate change clearly was a political subject but that understanding is shifting, as not only the body of the law on the environment is growing but also as the environment is *constitutionalizing'* at 70.
[50] ECJ 25 March 2021, ECLI:EU:C:2021:252.
[51] See e.g. Kucko, , 'The Status of Natural or Legal Persons According to the Annulment Procedure. Post-Lisbon', *LSE Law Review*, (2017) 2, at 101-119 and https://europeanlawblog.eu/2021/04/06/the-cjeu-dismissed-the-peoples-climate-case-as-inadmissible-the-limit-of-plaumann-is-plaumann/.

whether NGOs should have standing in climate litigation cases.[52] Critics, e.g., fear that supra-individual cases against governments will lead activist judges to infringe the prerogative of the democratically elected legislature. However, especially NGOs are capable of representing those mostly affected by climate change since a substantial part are not (yet) legal persons with rights that they can invoke themselves, e.g. future generations, non-human entities and the earth itself.

In the *Urgenda* case (§ 4.A) the courts did grant Urgenda – an NGO – standing. However, while the district court of The Hague (the District Court) ruled that Urgenda *itself* had standing, because it defends the collective interests of present and future generations related to sustainability, the Supreme Court held that Urgenda had standing *only* in so far as it filed a class action on behalf of the residents of the Netherlands. The Supreme Court found that those citizens – and not Urgenda itself – can invoke the state's obligation (following from Articles 2 and 8 ECHR) to take appropriate measures against the threat of dangerous climate change, because (only) those citizens are potential victims of the (threatened) violation of that obligation by the Dutch state. It further found that the interests of the residents of the Netherlands are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit.

In the *Shell* case (§ 4.B) the District Court held that this does not apply to the interests of current and future generations of the world's population; those interests are not suitable for bundling. The court ruled that, although the entire world population is served by curbing dangerous climate change, there are huge differences in the time and manner in which the global population at various locations will be affected by global warming caused by CO2 emissions. Therefore, this principal interest does not meet the requirement of 'similar interest'. However, in line with its earlier judgment in the *Urgenda* case in which the court explicitly accepted the principle of intergenerational equity (which – in short – means that each generation has a responsibility to the next, especially when it comes to the use of natural resources), the District Court did find that the interests of current – and future – generations of Dutch residents are suitable for bundling.[53] According to the District Court, the differences in time, extent and intensity to which these inhabitants will be affected by climate change caused by CO2 emissions

[52] Stolk, 'De legitimiteit van strategisch procederende belangenorganisaties', *Preadviezen Jonge VAR* (2018).
[53] This principle has been accepted before (e.g. in the *Minors Oposa* case in the Philippines in which the Supreme Court of the Philippines ruled that the right to a clean environment, to exist from the land, and to provide for future generations are fundamental and that there is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations) and claims and court decisions often mention future generations. Also, the German Federal Constitutional Court stated in the *Neubauer* case that the German state's obligations are directed towards the future and can entail a duty towards future generations (see § 4.C).

do not stand in the way of bundling in a class action. In its appeal Shell has challenged this decision and it may, in our opinion, very well be successful.[54] The fundamental issue with granting future generations standing is that they simply do not exist. Because of their non-existence, it is impossible to establish what their interests will be. Future generations cannot be considered as part of one single community. While it is already hard to divide existing generations into distinct groups with the same interests, this is even more the case for future humans. Not only because of intergenerational differences, but also because distant humans may have different needs and interests than those who will be born in the next ten years. However, the District Court's approach does do justice to the fact that climate change – and the action taken to fight it now – will especially affect those future generations; it should be possible to enforce their (future) rights.

Similarly, in many jurisdictions the idea of giving standing (and other legal rights) to the environment has been raised. Recently Spain's Congress of Deputies voted in favour of giving legal personhood to the Mar Menor, a severely polluted natural lagoon in Spain's southwest Murcia region.[55] Providing ecosystems with legal personhood will solve standing issues in some climate litigation cases and (thus) provide new opportunities for climate litigation.

C. Liability of (directors of) companies and asset owners

As we have seen above, climate change and environmental issues are more and more seen in the human rights context, primarily the right to life and the right to private life are important in relation to climate change (Articles 2 and 8 ECHR). States, as addressees of these human rights obligations, are held to have certain obligations in respect of climate change.[56] However, recent case law shows that claimants have also a cause of action in cases on environmental matters against private parties, especially those companies that are large scale CO2 emitters.[57] The claimants in these cases cannot directly invoke human rights against these private parties. Claims in these matters are based on the interpretation of national rules on fault based liability, liability without fault or strict liability, as most national laws are lacking direct enforceable environmental provisions for companies. In order to assess these claims, courts rely on CSR

[54] https://www.shell.nl/media/nieuwsberichten/2022/waarom-shell-in-hoger-beroep-gaat/_jcr_content/par/textimage_1538868955.stream/1647937612380/09807a0bc888002fec77cc718dbd364e28a19820/20220322StatementofAppeal(ENG).pdf (para. 10.8).
[55] https://spanishnewstoday.com/spanish_mps_vote_to_give_mar_menor_lagoon_personhood_and_rights_1759340-a.html.
[56] See e.g. the case of *Urgenda* in the Netherlands, *supra* note 4, *Neubauer and others v. Germany*, *supra* note 6 and *VZW Klimaatzaak v. de Belgische Staat*, *supra* note 25.
[57] See e.g. *Friends of the Earth Netherlands and others v. Shell plc*, *supra* note 5, Tribunal Judicidaire de Nanterre (Nanterre Judicial Court), 30 January 2020 *Les Amis de la Terre v. SA Total* N°R.G. : 19/02833 - N° Portalis DB3R-W-B7D-VIPX and Landgericht Essen (Regional Court Essen), 15 December 2016, *Luciano Lliuya v. RWE AG*, ECLI:DE:LGE:2016:1215.2O285.15.00.

rules in the interpretation whether there is a liability, making CSR rules de facto binding on companies.

To date, the *Shell* judgement is one of the patent examples where the claimants have been successful and it has a certain knock-on effect for other companies: immediately following the *Shell* judgment, the main claimant, Friends of the Earth Netherlands, announced that it would consider commencing similar proceedings against other large-scale CO2 emitters based in the Netherlands.[58]

Meanwhile, in the United Kingdom, a shareholder of Shell (ClientEarth) has brought a derivative litigation action against Shell's 13 directors to hold each of them personally and legally responsible for failing to adopt a strategy to prepare the company for net zero emissions (and to bring the climate policy of Shell in accordance with the Paris Agreement), which according to ClientEarth is a breach of their duties under the UK Companies Act. Furthermore, Friends of the Earth Netherlands is also threatening to bring action against the directors of Shell in the Netherlands for their non-compliance with the judgement of the District Court of the Hague.[59] We note that also in these cases the claims are based on general (corporate) law rather than specific rules aimed at the protection of the environment/climate, and that it will be a matter of interpretation for the courts to see if any liability in respect of failures to comply with climate goals can be based on the general (corporate) liability rules for directors.

7. (Further) comments and observations

Climate change is an eminently cross-border issue, which requires a cross-border approach. International law in the area of climate change as is at present seems not really suitable for that at first glance, since it is primarily interstate and territorial oriented. Climate cases demonstrate that judges may contribute to the solutions for urgent environmental problems with legal instruments.

We observe different approaches from the judiciary: from restrained judgements to more radical judgements holding the government and private companies accountable for their climate inaction and even issuing specific orders. While many argue that – in light of the *trias politica* – this goes beyond the scope of the powers of the judiciary, in our opinion, the (in)capability of judges to examine the science, facts and interests necessary to reach a reasoned conclusion on

[58] These include companies such as Tata Steel, Chemelot, electricity producers such as Engie, RWE, Eneco and Vattenfall, DOW Benelux, the fertilizer producer Yara, the BP refinery in Rotterdam, and Air Liquide. See: Te Winkel and Van Heesch, 'The Shell judgment – a bombShell in private international law?', *NIPR* (2021) 3, at 532-542.
[59] https://milieudefensie.nl/actueel/brief-aan-de-bestuurders-van-shell/@@download/file/2022-04-25%20Letter%20to%20Shell's%20directors.pdf.

climate issues is also a concern. In general, the judiciary lacks the required research capacity and specific scientific knowledge.[60] Judges are trying to find new ways of getting hold of the facts and science relevant to climate change, for example via *amicus curiae*, scientific committees or comparative law study. Nevertheless, the legislator is better suited than the judge to take into account all legitimate interests and alternatives and to make the choices needed in order to meet the objectives of the energy transition.

Therefore, it is first and foremost up to international and national legislators to make those choices and provide for clear rules which make sure the internationally set targets can and will be achieved and which can be enforced. If legislators take their responsibility, judges in general will no longer be inclined to seek the boundaries of their powers and upset the *trias politica*. As long as those rules are not there, we expect the struggle of the judiciary, which the national and European case law discussed in this article shows, will continue. Judges are dependant on the claims and arguments of parties. Another – less politically sensitive – way for the judiciary to deal with climate litigation cases like *Urgenda*, *Shell*, *Neubauer* and *Klimaatzaak* would be to summon the government to provide for sufficient (legislative) measures within a set timeframe and/or establish a (international) monitoring committee which reports on compliance with those measures and progress on climate targets.

With regard to enforcement, one would expect an important role for European courts because of the cross-border nature of climate change and the relevant legislation. However, both the ECtHR and the ECJ did not provide clarity on the main issues raised in climate cases up to date.

From ECtHR case law with regard to environmental dangers can be derived that the threshold for a violation under Article 8 ECHR is quite high. If the judiciary aims to protect human rights effectively with regard to climate change, it should be willing to assume a violation before an individual's home, family life or private life is directly affected. Furthermore, the individual aspect required in this regard is not in line with the more collective nature of climate change. A possible alternative to an individual proceeding (including the requirement to exhaust domestic

[60] With regard to the latter, we point out that in practice this lack of information might be partially overcome by having the judge gathering information from for example (third) parties and experts. In this regard, we refer for instance to a federal lawsuit in San Francisco, United States in which for five hours, opposing sides in a climate change case offered the judge their accounts of the history and current state of climate science (https://www.science.org/content/article/san-francisco-court-room-climate-science-gets-its-day-docket). The judge has invited the counsels to conduct a two-part tutorial on the subject of global warming and climate change, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180227_docket-317-cv-06011_notice.pdf

remedies) would be a request for an advisory opinion from the ECtHR.[61] Although non-binding, in this way the ECtHR may provide clarity on how the ECHR applies in climate cases.

The ECJ did not make any attempt to answer the question whether the rights of citizens are infringed by insufficient EU climate legislation. In light of the right to legal remedies set out in Article 47 of the Charter and because of the collective, cross-border nature and the impact of climate change, it would make sense in our opinion for the ECJ to apply a less strict interpretation of the criteria for standing, so it can give guidance to national courts and governments. Also, we are of the opinion that standing should not be limited to individuals with legal personhood. Because the consequences of climate change will be felt especially by future generations, it should be possible to enforce the relevant laws on behalf of those future generations.

With regard to climate litigation against private companies, it is noted that the human rights approach which is used in court cases vis-à-vis states, cannot be used against private companies. Although certain courts use CSR rules and human rights in the interpretation of the duty of care of private companies or in the assessment of a liability claim against such private company, we note that in general there is no specific legal framework on the basis of which the courts may render their decision in climate litigation against private companies. Moreover, it is very difficult to convert general global or regional climate goals into specific legal obligations of a private company. This is even more pressing in a judicial determination by a court, as a judgement rendered against a private company cannot fully account for the broader social and economic trade-offs and technical challenges involved in addressing climate change and such judicial determination will be static in nature (captures a certain moment in time, not taking into account any changes in policies, techniques etc.). Imposing an obligation on an individual company also cuts across existing policy frameworks of governments, including the legislative framework. Furthermore, if any obligations would exist or be created for private companies with regard to climate change it needs to be created in countries around the world (or at least a certain region) in order to create an impact on the global climate targets and we do not expect that to be the case in the near future. It is therefore upon legislature/governments to act and propose a suitable legal framework, rather than the judiciary rendering judgements against individual companies.

[61] Pursuant to Protocol No. 16, entered into force in 2018 for the states that ratified it, the ECtHR can issue advisory opinions on questions concerning the application and interpretation of the ECHR. Such opinions can only be requested by the highest courts and tribunals of a state. Advisory opinions are not binding, but they may provide clarity on how the ECHR applies in climate change cases.