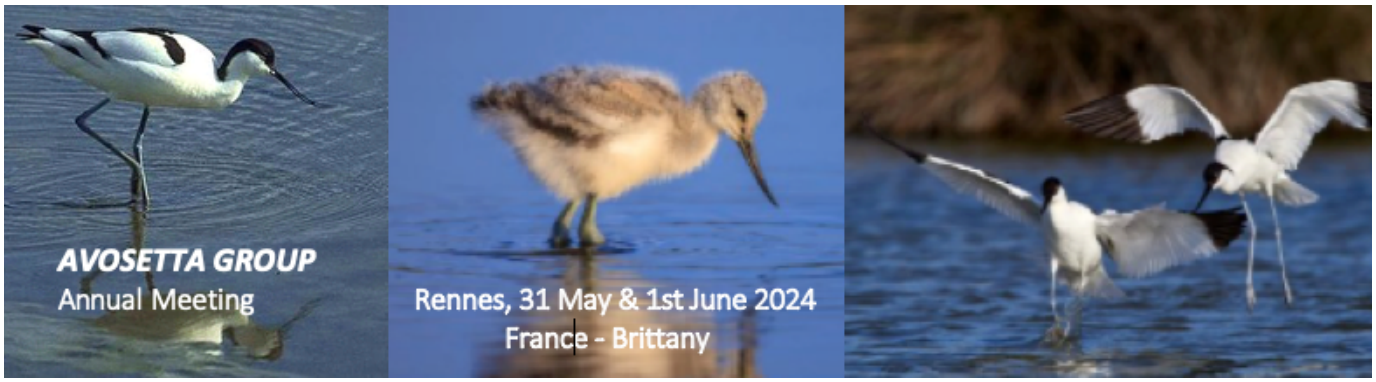

WATER LAW & SUSTAINABLE TRAJECTORIES

CLIMATE LITIGATION

National Reports

Austria

"Children and Youth's Climate Case"

In February 2023, twelve minors aged five to 16, represented by their parents, filed a case with the Austrian Constitutional Court.[1] The extensive application challenges the Austrian Climate Act. The claimants argue that due to serious legal deficiencies, the Austrian Climate Act – which has not been updated for the post-2020 period – does not lead to a decrease in greenhouse gas emissions and does not sufficiently protect them from the consequences of global warming. Against the background of the Austrian Constitutional Act on Sustainability,[2] the applicants claim that the Constitution stipulates that legislation ought to protect the well-being of children – also in terms of intergenerational justice. The claimants invoke children's rights, protected by Austrian constitutional law,[3] and refer to comparable rights in the Charter of
Fundamental Rights of the European Union.[4] They conclude that a law which lacks reduction targets for greenhouse gases, fails to assign clear responsibilities and does not provide for an accountability mechanism clearly infringes constitutional rights.

In considering the admissibility of an application, the Austrian Constitutional Court applies a relatively strict standard with respect to the scope of the application. It does not accept applications that cover wide parts of a law without specifying the concerns that speak against the constitutionality of the law. Thus in the case at hand, the request lodged by the applicants was held to be too narrow. The Court argued that repealing the Climate Act to the extent desired by the applicants would have the consequence, among other things, of making the Federal Government responsible not only for conducting negotiations on climate protection measures, but also for taking measures. As is evident in the present case, the Constitutional Court exercises restraint when the requested repeal of parts of the law would not merely open a gap, but would also amend the content of the provision, thus putting the Court in the position of a positive legislator. In sum, therefore, the Court dismissed the action on formal grounds without going on to address the question of the applicants' standing.

Intertemporal protection of freedom rights

In a similar vein, a complaint which – following the German Climate Order[5]– argued that the Austrian Climate Act impairs the claimant's future enjoyment of fundamental freedoms was rejected as inadmissible because the applicant had failed to specify in a more detailed manner which civil liberties were endangered and in what way.[6]

Ban on the sale of fossil fuels and heating oil

[1] VfGH 27 June 2023, G 123/2023.
[2] Federal Constitutional Act on Sustainability, BGBl I
111/2013 last amended by BGBl I 82/2019.
[3] Federal Constitutional Act on Children's Rights, BGBl I 4/2011.
[4] Art 24 CFREU regarding children's rights and Article 37 CFREU on environmental protection.
[5] Cf. BVerfG, 1 BvR 2656/18 et al.
[6] VfGH 27 June 2023, G 139/2021. A general freedom of action is not expressly enshrined in the Constitution, nor is it firmly anchored in the case-law of the Austrian Constitutional Court.

Several individuals and an environmental NGO had demanded – to no avail – that the minister of economy issue a ban on the sale of fossil fuels and heating oil by decree. The Administrative Court of Vienna assumed that the minister had rightly rejected the application – as individuals have no such right – and dismissed the appeal. The Austrian Constitutional Court held the complaint to be admissible as the claimants have a right to review whether a decision on the merits was wrongfully denied by the Administrative Court. The court also highlighted the duties to protect that arise from Art 8 of the ECHR in environmental matters. However, the Constitutional Court decided[7] that the Administrative Court of Vienna had rightly assumed that individuals are not entitled to have the competent minister issue a ban on the sale of fossil fuels and heating oil by decree,rather, it is the task of the legislator to choose the appropriate measures in order to fulfil its duties to protect.

Follow up: "Kerosene Cases"

As reported previously, under the leadership of Greenpeace Austria, over 8,000 individuals filed what they labelled as the first climate lawsuit in Austria in 2020.[8] Under the lead of the environmental NGO Greenpeace Austria, the claimants sought to repeal laws that offered tax privileges for air traffic but not for rail transportation. The claim was dismissed by the Constitutional Court due to a lack of standing.

In 2021 a citizen who does make use of rail and air services filed an application with the Austrian Constitutional Court and sought to repeal the tax benefits for aviation in various tax laws[9] as unconstitutional.[10] The applicant suffers from a syndrome that worsens in the heat and claims that the consequences of global warming are affecting her health and physical integrity specifically. Again, the Austrian Constitutional Court rejected the application as inadmissible. The Court held that the provisions affected the applicant as a consumer (i.e. financially at most) and that such affectedness is not sufficient to consider consumers as addressees of the respective laws.

[7] VfGH 27 June 2023, E 1517/2022.
[8] VfGH 30 September 2020, G 144/2020.
[9] The claimant challenged provisions of the Value Added Tax Act, BGBl 663/1994 as amended by BGBl 104/2019, as well as of the Mineral Oil Tax Act, BGBl 630/1994 as amended by BGBl I 227/2021.
[10] VfGH 27 June 2023, G 106/2022, G 107/2022, V 140/2022.

Belgium

L. Lavrysen

The Belgian Climate case

In its judgment of 30 November 2023, the Court of Appeal of Brussels[11] held that, with regard to the current Belgian climate policy, and in view of its commitments on emissions reductions for 2020 and 2030, the Belgian State, the Flemish Region and the Brussels-Capital Region have violated articles 2 and 8 of the ECHR and committed faults, within the meaning of articles 1382 and 1383 of the Civil Code.

As compensation for the harmful consequences of the breaches observed, part of which has already occurred, as well as to prevent the occurrence of future and certain damage, and to ensure the effectiveness of the protection of Articles 2 and 8 of the ECHR, the Court issued an injunction to the Belgian State, the Flemish Region and the Brussels-Capital Region to take, after consultation with the Walloon Region, the appropriate measures to do their part in the reduction in the overall volume of annual GHG emissions from the Belgian territory of at least 55% in 2030 compared to 1990 (according EU law Belgium has to reduce in 2030 its emissions in the non-ETS sectors with 47 % compared with 2005 emissions). The Court held that it was up to those authorities to determine, in consultation with the Walloon Region, what portion must be supported by each of them.

The Court deferred its ruling on the request for penalty payments intended to guarantee the execution of the injunction pending communication, by the most diligent party, of official figures of GHG emissions from Belgium for the years 2022 to 2024. The Court also invited the most diligent party to have the case at that time re-established before the court, with a view to rule on the request for penalty payments and on the request for production, under penalty of a fine, of the GHG emissions report of the year 2030.

In the judgment there are plenty references to future generations. In the first place, in the part in which the Court describes the facts and the context and in the part of the judgment concerning the appeal request. But the Court refers also to future generations while giving reasons for its decision. So the Court explains that the 55 % reduction is imposed to avoid exposing future generations to the risk of major climate change that would make part of the territory uninhabitable with serious consequences on the economy, health and access to basic resources and to avoid imposing a very strong reduction in GHG emissions in the future, on a 20-year interval between 2030 and 2050.

Furthermore the Court refers to the protection of future generations in relation to the establishment of personal harm and the causal link between the fault and the harm.

Please note that one of the defending parties, the Flemish Region, has indicated that it will challenge the appeal judgment before the Cour de cassation. So the case is not closed and one has to see if the judgment will be confirmed or not.

Nicolas de Sadeleer

Belgian public authorities liable for flawed climate policy: Klimaatzaak case

Abstract The judgment handed down in the *Klimaatzaak* case by the French-speaking Court of First Instance of Brussels on 17 June 2021 was largely confirmed by the 160-page, well-reasoned judgment of the Brussels Court of Appeal of 30 November 2023. This judgment raises fundamental

[11] https://prismic-io.s3.amazonaws.com/affaireclimat/aff2e124-f79d-4d5a-916a-e7919342f880_SP520199231130123 20+en.pdf

issues relating to judicial review of public authorities' inaction to mitigate greenhouse gas (GHG) emissions. In reviewing the Belgian climate change policies in light of the fundamental rights to life and privacy and the general duty of care inherent in fault-based civil liability, the Court of Appeal narrowed the gap between Belgian GHG emission reduction targets and public mitigation measures. It follows that political rhetoric must be fleshed out into legal instruments well-tailored to ward-off climate change impacts on life and privacy.

Introduction

The *Klimaatzaak* case we are analysing here has already given rise to considerable doctrinal controversy in Belgium. It is anything but an easy case to understand. The aim of this casenote is to systematically describe the reasoning of the Court of Appeal of Brussels for foreign lawyers, insofar as the civil courts of other States party to the ECHR could apply the same reasoning in cases initiated against State authorities for climate inaction.

1. Jurisdictional powers

The Brussels Court of Appeal considered whether it could hear the appeal brought by the appellants, namely the Belgian NGO Klimaatzaak and 58,000 natural persons. It held that it had jurisdiction to rule on disputes relating to the subjective rights they were invoking, irrespective of the room for manoeuvre left to the Belgian (§113) and the lack of direct effect of various rights enshrined in the European Convention of Human Rights (ECHR) (§§ 108 to 115). This reasoning needs to be explained more systematically.

A claim relating to future damage may be deemed admissible (§111).

In accordance with Articles 144-145 of the Belgian Constitution, the Brussels Court of Appeal recalls firstly that disputes concerning 'civil and political rights' fall within the remit of the judiciary.

The power of jurisdiction is determined by the 'real and direct object of the claim. When the object of the claim relates to an administrative act, it is necessary for the Court 'to verify whether a subjective right is at stake' (§113).[12] Traditionally, the subjective right can only exist when the authority is bound by a legal obligation arising from a rule of objective (public) law which leaves the authorities no room for manoeuvre in deciding how to apply it to the specific case authorities (concept of "*competence liée*") (§113). The Court of Appeal refused to endorse a restrictive interpretation of subjective rights suggested by the public authorities. It held that the judiciary has 'the power both to prevent and to remedy any infringement unlawfully made of subjective rights by authorities in the exercise of their discretion'[13] and that subjective rights in the case at hand are enshrined in the ECHR.

Consequently, disputes relating to the rights guaranteed by the ECHR fall within the jurisdiction of the Belgian courts. Furthermore, regarding civil liability every individual has a subjective right to compensation where an authority has failed to act with ordinary care and diligence.

[12] Cass., 24 septembre 2010, Pas., I, p. 2375, concl. of the General Advocate Vandewal ; Cass., 8 mars 2013 Pas., I, p. 601 and concl. of the General Advocate Werquin.
[13] Cass., 3 January 2008, Pas., I, n°4; Cass., 24 November 2006, Pas., I, n°599; Cass., 26 Decembre 2014, Pas., I, p. 3037.

2. Admissibility of claims

Climate litigation differs from other types of litigation in that claimants aim at an injunction from the courts to prevent the occurrence of a swathe of ecological disasters which are likely to occur on the long term. Their aim is therefore not to seek damages.

Given the prohibition of *actio popularis* in Belgian judicial law (§119), the respondents – the Belgian authorities - challenged on appeal the admissibility of the appeal brought by the NGO Klimaatzaak, which should have confined itself to claiming compensation for non-material damage.

The Court of Appeal held that the admissibility of the appeals brought both by the NGO and by natural persons must be assessed in light of Article 9(3) of the Aarhus Convention, which requires States parties to guarantee 'broad access to justice' (§ 123). Thus, the Belgian courts must take account of the objectives of the Convention when it is called upon to rule on the admissibility of an environmental NGO (§ 123-124). It follows that a restrictive interpretation of these treaty criteria would deny environmental associations' standing (§ 123). In this respect, it is irrelevant that the NGO's objective have no material or geographical limits, or that they are not pursued in a lasting and effective manner (§ 124).

Accordingly, the reference to 'national environmental law' in Article 9(3) cannot be understood in a restrictive way. These terms encompass rules of international law as well as Article 1382 of the Civil Code that establishes a fault-based liability. It follows that the appellant NGO may bring proceedings within the meaning of Articles 17 and 18 of the Belgian Code of Judicial Procedure, in so far as it alleges breach of Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code (§ 125).

Nevertheless, the Court of Appeal stressed that the appeal brought by the NGO was also deemed admissible insofar as its statutory aim of combating climate change could not be confused with the avoidance of 'pure ecological damage' ("*prejudice écologique pur*") which is not recognized in Belgian civil law. The Court of Appeal took the view that the NGO statutory aim encompasses of a series of "individual ecological damages ", some of which had already occurred (§ 126). 'Individual ecological damage' covers damage resulting from nuisance and pollution caused by climate change (deterioration of the appellant's health, reduced quality of life, etc.) or to their property (destruction, deterioration, loss of value, etc.).[14]

Lastly, the appellant NGO is also able to claim non-material damage in the event of damage to the environment (§ 127). In accordance with the case law of the Belgian Constitutional Court, 'a legal person that has been established with the specific objective of protecting the environment may (...) actually suffer non-material damage and bring such an action'.[15]

Consequently, an environmental NGO has standing to protect the purpose for which it was established, based on the Aarhus Convention, and without the need for a Belgian legislative provision to enshrine such a right.

[14] N. DE SADELEER, « De la réparation du dommage environnemental individuel à celle du dommage collectif. Quelques réflexions sur des arrêts récents », Responsabilité, risques et progrès, in C. Delforge (dir.) (Brussels, Larcier, 2021) 8.
[15] Case n°7/2016, 21 January 2016.

As for the admissibility of the natural persons' claims, the respondents – the Belgian public authorities - argued that the 'interests' of the NGO and the natural persons were not personal, direct, certain, born and present, as required by the Belgian Code of Judicial Procedure. The Court of Appeal held that these criteria were fulfilled on the ground that a 'dangerous threshold' had been crossed given the accumulation of GHG in the atmosphere, a phenomenon that was the subject of a 'scientific consensus' (§ 128 and 134). The Court held that '[t]he potential impact of global warming on the life and private and family life of every individual on the planet is sufficiently demonstrated' (§ 131). As to the admissibility of the natural persons' claim, the Court of Appeal referred to the findings of the Court of First Instance on the effects of global warming already observed in Belgium and projections for 2100 (§131).

With respect to the standing of the thousand individuals appealing the judgment of the Court of 1st of instance, the Court of Appeal reasoned by analogy in relation to the Klimaatzaak NGO' standing. The Court also dismissed the respondents' argument according to which the natural persons were seeking the compensation of 'pure ecological damage', which is unlike French civil law[16] not recognized in Belgian civil law. The damages claimed by the plaintiffs are 'individual' and not diffuse as they related to food and water supplies, damage to their property, impacts on their physical and mental health, etc. (§132). The Court referred in this connection to the ECtHR *Cordella v. Italy* case, according to which 'it is often impossible to quantify the effects of significant industrial pollution in each individual situation and to distinguish the influence of other factors, such as, for example, age and occupation. The same applies to the deterioration in quality of life resulting from industrial pollution. Quality of life is a highly subjective concept that does not lend itself to a precise definition'.[17]

In addition, the Court of Appeal held that the natural persons did not have to demonstrate the specific impact of global warming on their individual situation, because 'the extent of the already existing consequences of global warming and the scale of the risks that it entails make it possible, …., to consider, with sufficient judicial certainty, that each of the natural persons who are party to the proceedings has an interest of their own' (§133).

Moreover, the fact that this 'dangerous threshold' was not expected to be crossed for several decades did not deprive the appellants of their standing ('interest') in bringing proceedings (§ 134).

3. Merits of the case

The Court of Appeal went on to examine in detail both the scientific data and the international and EU obligations incumbent on the Belgian authorities. After a systematic and comprehensive presentation of the relevant scientific reports of the Intergovernmental Panel on Climate Change (IPCC) and the array of international standards to which the European Union (EU) and Belgium are party, the Court of Appeal proceeded to examine the two grounds of appeal in turn, namely the

[16] In virtue of Article 1247 of the French Civil Code, 'Ecological damage consisting of non-negligible harm to the components or functions of ecosystems or to the collective benefits derived by man from the environment may be compensated …'.
[17] Cordella and Others v. Italy, 24 January 2019, §160.

breach of articles 2 and 8 of the ECHR, and then the breach of Articles 1382-83 of the Civil Code that establish fault-based liability.

3.1. First plea in law relating to respect for the rights to life and to privacy

As regards the first ground of appeal, the Court of Appeal focused on respect for the right to life enshrined in Article 2 ECHR, insofar as the case law relating to that provision can be transposed, *mutatis mutandis,* to Article 8 ECHR (§ 214). Article 2 of the ECHR imposes two types of obligation: firstly, a negative obligation on each State to 'refrain from causing death intentionally and unlawfully' and, secondly, a positive obligation to 'take such measures as are necessary to protect the lives of persons under its jurisdiction'[18] (§139). The right to life necessarily implies the adoption of preventive measures (§139).

The Court of Appeal highlighted the essential features of Articles 2 and 8 of the ECHR in environmental matters, as developed by the European Court of Human Rights (ECtHR), namely that they require States to 'regulate preventively' environmental risks. The Court began by pointing out that although '[t]he ECHR does not as such enshrine a right to a healthy environment' (§138), it has nevertheless developed a significant body of case-law relating to rights that may be violated 'by ricochet' as a result of damage to the environment.[19] Indeed, the ECHR amounts to 'a living instrument' (§138).

In this respect, the Court stated that 'Articles 2 and 8 of the ECHR do not explicitly provide for a 'sanction' in the event of a breach of the obligations enshrined therein. Such a 'sanction' may be inferred from the right to an effective remedy enshrined in Article 13 of the ECHR, which must make it possible not only to obtain compensation for the damage caused by the violation of the other rights enshrined in the Convention but also to put an end to that violation, and ideally to prevent it' (§146).

3.1.1. Subsidiarity and scope of judicial review

In accordance with the principle of subsidiarity, the national authorities are endowed with a broad margin of appreciation given the complexity of climate change issues. Whether it is the right to life (an obligation of means and not of result) or the right to privacy, the State must strike a fair balance between the competing interests of the claimant and society (§141). In addition, the State's means of guaranteeing the effectiveness of these two fundamental rights must not be subject to impossible or disproportionate burdens. The Court of Appeal therefore had to decide on the scope of its review of the Belgian authorities' failure to act to prevent adequately climate change. Should it confine itself to a minimal review in censuring the manifest error of appraisal? In other words, to show judicial restrain. Or could it review, in depth, the appropriateness of the Belgian mitigation measures (§147) to the objective of complying with the Paris Agreement? The objective of this agreement is to avoid global warming of 1.5°C.

[18] Kurt v. Austria, 15 juin 2021, §157.

[19] N de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' 81 (2012) Nordic Journal of International Law 39–74.

Although the principle of subsidiarity[20] has the effect of increasing the margin of appreciation left to the national authorities, the fact remains that this room for manoeuvre, understood within the meaning of the ECHR, 'is not binding on the judiciary when the latter reviews the action of the legislative and executive powers' (§ 148).

That being said, in reviewing whether the State's inaction breached Article 2, the Court had to bear in mind that in accordance with the constitutional principle of the separation of powers, the judiciary is not entitled to substitute the decision for that of the lawmaker on which the Constitution confers the sole responsibility for that duty (§ 149).

3.1.2. Direct effect of fundamental rights

Judicial review of the inaction of the public authorities was all the trickier as the Court of Appeal had to rule on the direct effect of the two ECHR fundamental rights (§ 150 et seq.). The appellants could only contend with the positive measures taken by the Belgian State authorities provided Articles 2 and 8 have direct effect. In principle, it is settled case law in Belgium that the direct effect of an act of international law can be inferred from the sufficiently precise and unconditional nature of the norm whose purpose is to give rise to rights for individuals.[21] The Belgian Court of Cassation has previously ruled that Article 8 ECHR, insofar as it provides for positive obligations on the State, was not sufficiently precise and complete to give rise to subjective rights and that it therefore lacked direct effect.[22]

In *Klimaatzaak*, the Brussels Court of first instance had departed from these traditional criteria, considering that account had to be taken of the margin of appreciation that the provisions of the ECHR confer to the court in charge for applying the provision of treaty law. Adopting 'a contextualised and gradual approach to direct effect' (§152), the Court of Appeal agreed with the findings of the Court of first instance. The ECHR is a 'living instrument' that must be interpreted in the light of 'current conditions, including soft law'.[23] In assessing the scope of Articles 2 and 8 ECHR in climate matters, it is therefore possible to take into account the constitutional objective of sustainable development (Article 7a of the Belgian Constitution), the precautionary principle (Article 3(1) of the 1992 UN Framework Convention on Climate Change (UNFCCC)) and the protection of future generations (preamble to the 1998 Aarhus Convention), as well as factual elements such as scientific studies on which there is unanimous agreement, or even 'political consensus' at international, European or national level (§152). Indeed, it was essential for the Belgian public authorities, in assessing the risk and determining preventive measures, to 'refer to experts' knowledge in the field' of climate change (§ 153).

Stressing the importance of an assessment *in concreto* of Articles 2 and 8 and the context in which these provisions are applied (§152), the Court of Appeal departed from the classic doctrine, which considers that direct effect is conditional on the precision and completeness of the international

[20] See Protocol No. 15 to the ECHR.
[21] Cass. (1st Ch.), 9 February 2017, J.T. 2019, p. 33.
[22] Cass., 6 March 1986, Pas. 1986, 1I, p. 433.
[23] 12 November 2008, Demir & Baykara v Turkey, § 76.

provision invoked. This openness both to non-binding provisions (international soft law) and to an array of scientific data does not, in any event, have the effect of transforming the judiciary into a government of judges. The courts are not replacing the lawmaker as the 'facts' are merely taken into account to 'inform the law, without, however, ... creating or abolishing it' (§ 152).

The question arose as to whether a court could request the State to adopt global warming mitigation measures without interfering with politics. Some Belgian legal scholars are taking the view that determining the appropriate level of GHG emission reductions is a political issue that requires a democratic decision taken by federal and regional parliamentary assemblies.[24] The Court's answer was straightforward. As the protector of the rule of law, judicial power does not slide into the political realm of democracy, so long as it confines itself to reviewing the appropriateness and reasonableness of State measures intended to guarantee the effective application of the rights enshrined in Articles 2 and 8 ECHR in the light of 'the soundest scientific knowledge of the time' (§ 156).

3.1.3. Right to life

The impacts of climate change are undeniably distant in time and space.[25] As the climate gradually warms, to what extent the risks it entails 'real and immediate' for potential victims? An affirmative answer to this question would oblige the public authorities to intervene to counter such a risk by adopting preventive measures (§ 160). The Court of Appeal held that the fact that the feared impacts are remote in time does not preclude the application of the ECHR (§ 142).[26] Moreover, the 'real and immediate' nature of the risk was not disputed (§164).

As climate change is a global phenomenon, the Belgian authorities argued that the efforts they should make in order to carry out an optimal mitigation policy would have only a minimal influence on this phenomenon. In the Court of Appeal's view, the international dimension of global warming and the limited contribution of Belgian emissions to the overall volume of emissions did not, however, obliterate the 'responsibility' of the various Belgian State authorities, which was called upon to "do their part" (§ 159). The Court of Appeal thus adopted a line of reasoning similar to that of the German Constitutional Court[27] and the Dutch Supreme Court.[28]

Following an exhaustive explanation of the relationship between ECHR and constitutional principles, the Court of Appeal applied these principles to the case at hand. It drew a distinction between the measures taken during the 2013-2020 commitment period and those adopted for the 2021-2030 period.

a)) With respect to the first commitment period, it became clear as early as 2015 that the threshold for reducing GHG emissions by 25% was contrary the Belgian State's international obligations given

[24] B. Dubuisson, 'Responsabilité civile et changement climatique. Libres propos sur le jugement rendu dans l'affaire «Klimaatzaak », in Penser, écrire et interpreter le droit. Liber Amicorum Xavier Thunis, (Brussels, Larcier, 2023) 259.
[25] N. de Sadeleer, Environment Principles, 2nd. ed. (Oxford: OUP, 2020) 260-264.
[26] See Taskin and others v. Turkey, 46117/99.
[27] Neubauer, § 203.
[28] Urgenda, §§5.7.1.-5.8

that such an objective was insufficient to keep global warming below 2°C (§§176, 182). In finding this threshold insufficient, the Court of Appeal could not rely on a binding regulatory threshold insofar as international law does not provide for binding reduction targets in GHG emissions. To assess the breach of the right to life due to a pusillanimous policy, the Court had to rely on the declarations of the various COPs to the 1992 UNFCCC (§169) as well as on the IPCC reports (§175). The Court highlighted that these reports called for the pursuit of a reduction target of -25% to 40% to be achieved by 2020, far more ambitious than the 25% Belgian objective.

The Court of Appeal therefore considered that a 30% reduction in GHG emissions by 2022 could be regarded as the minimum to be achieved by the Belgian authorities in the light of the obligations stemming from Article 2 ECHR (§176). Moreover, it considered that the Belgian public authorities had not demonstrated that pursuing the -30% target would have been amounting to 'an excessive burden'. The Court also concluded that the authorities had not taken 'reasonable appropriate measures to ensure that the Belgian State did its part to prevent the crossing of a threshold considered dangerous by the scientific community' (§ 183).

The fact that, at the time, the EU provided for a lower threshold than -25% to -40% did not, moreover, obviate the violation of Article 2 ECHR (§§161, 171, 183). As a matter of principle, EU environment secondary law imposes minimum obligations,[29] whereas the requirements arising from the ECHR required the pursuit of a higher level of reduction in GHG emissions.

On the other hand, the Walloon Region did not infringe Article 2 and, therefore, Article 8 on the account that it pursued more ambitious targets at the time and succeeded in achieving its emission GHG reductions targets (-38.5% for the forestry sector) (§177).

The judgment of the Court of First Instance was therefore upheld, except as regards the Walloon Region.

b)) Regarding the second commitment period 2021-2030, the appellants argued that the Belgian public authorities should have pursued a much more substantial reduction in GHG emissions, namely -81%, or at least a minimum of -61% by 2030 compared to 1990 (§184 to 189). These thresholds were set by Professor Joeri Rogelj based in his study regarding Belgium's remaining carbon budget from 2021 (§187). His study was based on the global residual carbon budget established by the IPCC's 6th Assessment Report, giving a two-in-three chance of reaching the threshold of dangerous global warming of 1.5°C, i.e. 400 GtCO2.[30]

The Court of Appeal had to ascertain whether Belgium should not exceed these thresholds for the period in question, having regard to the protection afforded by Article 2 ECHR. Despite the recognition of 'a scientific and political consensus' since 2018 on the need to limit global warming to 1.5°C rather than 2°C (§191), the Court considered that the pursuit of the optimal scenario -61% /-81% for reducing GHG emissions was a 'political decision involving the consideration of many factors' and therefore fell outside the scope of Article 2 ECHR (§195). Accordingly, no

[29] See Article 173 TFEU. N de Sadeleer, EU Environment Law and the Internal Market (Oxford: OUP, 2014) 350-358.
[30] J. Groejl, Belgium's emissions pathway in the context of global remaining budget (Grantham Institute Science Brief, Imperial College London, 2023).

violation of Article 2 ECHR can be inferred from the fact that the public authorities did not undertake to achieve a level of emissions reduction below the 81% or 61% thresholds by 2030 (§ 196).

Nonetheless, the Court of Appeal had to ascertain whether, in the light of Article 2 ECHR, Belgium's climate policy was sufficiently adequate to achieve the target of -55% compared to 1990.

Since when was the target of less than 55% to be achieved by 2030 as a minimum to put an end to the violation of Article 2 of the ECHR? Reckoning on various administrative reports, the Court noted that from 2019 onwards, the objective of -55% was considered. This target therefore anticipates the entry into force of the European Climate Act[31] on 29 July 2021 (§ 203).

In this respect, the Court considered that this threshold was 'minimal' and that, consequently, Belgium in order 'to comply with Article 2' could not go beyond (§ 202). After highlighting the inadequacies of federal and regional climate policies, except for that of the Walloon Region, the Court found that Article 2 had been infringed by the respondents. The judgment of the Court of First Instance was therefore upheld, except as regards the Walloon Region (see § 211).

3.1.4. Right to privacy

Finally, the Court of Appeal applied, *mutatis mutandis*, its reasoning in relation to the right to life (Article 2 ECHR) to the right to privacy (Article 8 ECHR) for the period 2013-2020, even though it might have been possible to envisage a lower threshold for reducing GHG emissions than that required to guarantee the right to life (§ 213-214). On the other hand, it found that the respondents had not breached Article 8 for the period 2021-2030 (§ 215).

4. Second plea in law relating to breach of articles 1382 and 1383 of the former Civil Code

Insofar as the Court of Appeal only partially upheld the appellants' claim in relation to Articles 2 and 8 ECHR, it then examined whether it was possible to uphold the claim in its entirety on the basis of Articles 1382 and 1383 of the Belgian Civil Code. As the appellants were unable to rely on a breach of a supranational or even a national binding standard in climate matters (§ 229), they relied on a breach of the general standard of care in challenging the non-contractual civil liability of the Belgian State and the three regions.

4.1. Principles applicable to civil liability in Belgium

After recalling the principles applicable to civil liability (§§ 219 to 228), the Court of Appeal reviewed its triptych:

- the faults committed by the public authorities,
- the damage claimed by the appellants,
- and the causal link between that damage and the faults.

[31] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2018] OJ L 243/1.

This requires a few words of explanation. As in other countries belonging to the civil family, fault is defined with regard to duty of care. Normal and reasonable care is required. Measures taken under normal circumstances are sufficient to avoid incurring liability. In other words, the fact for the authorities of having acted as a *bonus pater familias* is sufficient to exonerate them from liability. Oriented towards the past, civil liability is in principle limited to guaranteeing the reparation of damage that has already occurred. Under Belgian law, the damage cannot be hypothetical; it must be certain in terms of its existence, even if the precise amount has not yet been established. Hypothetical harm cannot constitute grounds for compensation. To require that damage be certain is to demand that there be no lingering doubt whatsoever as to its existence or how it will develop in future, although in practice both its character and its scope will constantly be the subject of scientific uncertainty. Yet this limits the effectiveness of civil liability law as a remedy against environmental degradation. In addition to both fault and damage, causation must—like the other basic conditions of liability—be certain. Proof of a causal connection between the tortious act and the ensuing damage is the main stumbling block for victims of pollution.

Recalling that the design of climate policy is the prerogative of the legislature, which has a broad discretion (§227), the Court of Appeal set out the principles applicable to the aquilian liability of the legislature, which must behave like 'an ordinarily prudent and diligent legislature in the same circumstances' (§226).

In this respect, the constitutional principle of the separation of powers does not prevent the Court of Appeal from imposing on the authorities a precise percentage reduction in GHG emissions to be achieved as a remedy. However, it can only oblige the authorities to pursue the 'minimum contribution' in accordance with the scientific consensus (i.e. the IPCC reports) and the political consensus on the international scene as reflected in the COPs (§ 227). Accordingly, the Court must confine itself to review the compliance with the minimum requirements imposed by directly applicable norms of international law or, in the absence of such norms, on the basis of 'data which are the subject of a scientific and political consensus', which define the contours of the duty of care incumbent on public authorities facing a 'serious threat' (§ 228). Moreover, it must refrain from specifying the concrete regulatory measures that should be implemented by the different Belgian governments to achieve this objective.

The authorities can go further, but this is not within the jurisdiction of the court, who is only empowered to set a minimum threshold.

Because of these limits on the court's power and in the absence of scientific consensus, the Court of Appeal dismissed the request to pursue a higher target of at least 61%, contemplated in the study of Professor Joeri Rogelj. Conversely, the Court held that compliance with the 55% reduction threshold is a non-negotiable objective. Below this threshold, there is, in the Court's words, 'no longer any room for trade-offs with other interests such as, for example, the preservation of social cohesion or economic growth' (§240).

4.2.The alleged faults

Insofar as no rule of international law imposes a specific conduct on the Belgian public authorities

regarding the reduction of GHG emissions, the Court of Appeal had to ascertain whether the latter complied with a standard of *bonus pater familias* conduct (§ 229). From the point of view of the equivalence of conditions, the slightest fault is in principle sufficient to activate Articles 1382-1383 C.civ. (§ 233). Once again, the Court distinguished between the 2013-2020 period and the ongoing 2021-2030 period.

Regarding the first period (2013-2020), the Court of Appeal found the conduct of the Belgian authorities, with the exception of the sole Walloon Region, to be at fault, given that the means employed had been 'clearly insufficient in the light of the climate science of the time' (§ 237). While the Court accepted that a reduction threshold of -40% for 2020 was not binding on Belgium, a reduction threshold of -30% constituted nevertheless 'a minimum imposed by the general duty of care' (§§ 238 and 240). Moreover, the Belgian authorities were not exonerated from their liability by the fact that they were complying at the time with the standards laid down by the EU or by international law (§ 239).

Then, regarding the period 2021-2030, the Court of Appeal reached the conclusion that the conduct of the public authorities was also at fault, with the exception of that of the Walloon Region, given that the federal and regional measures currently in force pursue insufficient reduction targets.

Although, in principle, Belgian civil courts can only marginally review the actions of the public authorities, insofar as they cannot replace the legislator, the wrongfulness of their actions can be reviewed in the light of the degree of knowledge of the risks.

The lack of cooperation between the federal State and the federated entities (the regions), which has been highlighted on several occasions, is testament to a wrongful conduct. Both the reports of the Belgian Climate Commission and the European institutions (§248) have confirmed this failure, which constitutes *fault* within the meaning of Article 1382. In the same way, scientific reports make it possible to chisel out the conduct expected of a 'normally reasonable and prudent authority' (§ 244).

Because of the combination of poor results achieved in reducing GHG emissions, chaotic climate governance and repeated warnings from the EU institutions (§ 244), the Belgian authorities did not act with the prudence and diligence expected of a *bonus pater familias* within the meaning of Article 1382 Cc. It is not, therefore, the breach of Articles 2 and 8 ECHR that constitutes the civil fault that gives rise to liability on the part of the Belgian authorities but the departure of prudence and diligence. This wrongful conduct does not require the annulment of legislation by the Constitutional Court or for the EU measures that had not been applied by the Belgian authorities to have direct effect.

4.3. Damage and causal link

While the Court of first instance had not examined these two conditions in detail, the Court of appeal held, first, that the damage claimed was 'actual and both present and future', insofar as natural persons were personally affected, regardless of their geographical location (§ 257).

Moreover, the appellant NGO could rely on non-material damage insofar as it was harmed by the risk of global warming more than 1.5°C (§ 258). Secondly, the Court of Appeal considered that, as regards the harmful effects of GHG emissions from 1980 to the present day, the causal link 'lies' in the breaches observed from 2013 onwards. Indeed, the lack of ambition in the past continues to produce its effects today (§ 266). It also accepted that there is a causal link between the faults committed by the public authorities and future damage that will occur in around 40 years, the occurrence of which it is still possible to prevent or even limit (§ 267 and 268).

5. Injunctions

The appellants requested that the Court of Appeal issue an injunction against the defaulting public authorities to require them to take the necessary measures to reduce GHG emissions. This was one of the bone of contention given that this request had been refused by the Court of First Instance.

At the risk of deviating from the traditional functions of civil liability, the Court of Appeal considered that an injunction was 'the best, if not the only, remedy for a breach of Articles 2 and 8 ECHR, particularly in environmental litigation' (§ 277).

The Belgian State insisted on the need to distinguish between

a) compensation in nature (*en nature*) for damage, which is the only remedy that can take the form of an injunction, but which implies that the damage has already occurred (which was not the case here), and

b) injunctions, the sole purpose of which is to prevent damage that has not yet occurred (that are prohibited under Belgian law).

The Belgian State concluded that Article 1382 in force does not allow the civil courts to grant injunctions on the grounds that the climate change damages have not yet occurred. Moreover, Article 1382 is due to be amended by the new article 6.42 of the law relating to book 6 on 'extra-contractual liability' (§ 279) which provides for such an injunction.

The Court of Appeal rejected this argument, adhering to French and Belgian doctrine. It held that the court could order an injunction 'to put an end to an unlawful situation that has caused damage that has already occurred or is in the process of occurring'. Such an injunction does not relate to requests for purely preventive measures (§ 281). In the case at hand, the Court rules that the appellants' action to prevent future climate damage is admissible since, firstly, the fault has already been committed and, secondly, the damage is sufficiently certain (§ 281).

The injunction was thus founded on breach of the general rule of prudence.

Since the injunction issued by the Court of Appeal is limited to an objective of reducing GHG emissions, it does not infringe the principle of the separation of powers (§286).

The Court considered that an injunction against all public authorities is conceivable. However, an order *in solidum* cannot be envisaged from a constitutional point of view. Indeed, the principle of apportionment of jurisdiction requires that those authorities be left free to determine the manner

in which the burden should be apportioned. The order can therefore only consist of a single result to be achieved collectively by the federal State and the Flemish and Brussels regions (§ 286), each of them having to 'do their part' within the limits of their respective competences. Accordingly, the different authorities will then have to negotiate and determine themselves, within the limits of their competence, the share that each would have to invest to achieve the overall objective.

Finally, the Court of Appeal rejected the request that the injunction be accompanied by a penalty payment (§ 296).

6. Conclusion

Several lessons can be drawn from the *Klimaatzaak* case. Firstly, although this is the first case of this kind in Belgian law, the reasoning set out above is not isolated. A wave of collective claims against pusillanimous state policies have been favourably adjudicated by several foreign courts (Conseil d'État de France of 19 November 2020 (Grande-Synthe), Tribunal administratif de Paris of 3 February 2021 (*affaire du siècle*)).

In ruling that the public authorities are infringing the right to life and the right to respect for private and family life (Articles 2 and 8 of the ECHR), the Court of Appeal is adopting the same reasoning as the Dutch Supreme Court, which on 20 December 2019 condemned the Netherlands for violating these two fundamental rights.[32]

Framed by scientific imperatives and international obligations, the discretionary power of legislators and governments is no longer absolute. The political agenda cannot obliterate the scientific findings. The international law that needs to be taken into account goes beyond treaty law (Kyoto Protocol) insofar as it encompasses the 'political consensus' that the States have reached at the Conferences of the Parties to the 1992 UNFCCC. Finally, scientific reports and soft law instruments determine the level of the general standard of care (§ 240 and 244).

[32] N de Sadeleer, 'The Hoge Raad judgment of 20 December 2019 in the Urgenda case: an overcautious policy for reducing GHG emissions breaches Articles 2 and 8 of the European Convention on Human Rights', Elni Law Review (2020) 7-11.

Croatia

Czechia

Jiri Vodicka

At the recent Avosetta meeting, it was reported that the Supreme Administrative Court (SAC) annulled a Municipal Court in Prague decision related to the first climate action in Czechia and remanded the case for review. Following the SAC's reasoning, the Municipal Court dismissed the action based on several key points:[33]:

- The right to a favourable environment under Article 35 of the Charter of Fundamental Rights and Freedoms (Constitutional Act No. 2/1993 Coll.) does not impose an obligation on the state to reduce GHG emissions by 55% by 2030 compared to 1990. Moreover, international human rights obligations do not include a specific right to a favourable environment, climate stability, maintaining specific GHG emission levels, or freedom from adverse climate change effects.[34]
- Courts cannot impose obligations on states that exceed the EU's nationally determined contributions (one of the claims).
- The claimants failed to sufficiently demonstrate how their public subjective rights were violated due to inadequate implementation of sectoral EU legislation.

The claimants have filed a cassation complaint with the Supreme Administrative Court, with a decision expected in 2024. Despite the European Court of Human Rights' decision in Klimaseniorinnen, it's likely that the SAC will uphold the dismissal. The claimants are prepared to defend their rights before the Constitutional Court.

Czechia currently lacks a dedicated climate act, though the Pirate Party has initiated public discussions on this issue and proposed a potential draft. Nevertheless, the current government does not consider it a priority, meaning the climate framework remains largely reliant on EU legislation.

[33] Decision of Municipal Court in Prague of 25.10. 2023, case no. 14 A 101/2021.
[34] The Municipal Court issued its decision before the case Klimasenniorinen was decided.

Denmark

France

Nathalie Hervé-Fournereau & Simon Jolivet

CLIMATE & AIR LITIGATION 2023

♣ ACTIONS AGAINST THE PUBLIC AUTHORITIES

○ CLIMATE

⇨ COUNCIL OF STATE: COMMUNE DE GRANDE SYNTHE

Background

- 19/11/2020, n° 427301

The Court considered that the action of this coastal municipality which is particularly exposed to the effects of climate change is admissible. In November, the Court ordered the government to send it within three months all the elements likely to justify that the greenhouse gas reduction objective resulting from the Paris agreement (-40/ by 2030) could be met. In the light of all these elements, the Court will judge whether the State's refusal to take additional measures as request by the applicants is compatible with the compliance with the trajectory set to achieve the 2030 objective or if this refusal is deemed illegal, to order that new measures be taken by the government.

- 1/07/2021, n° 427301

In the light of the data communicated by the public authorities, the Council of State concludes that ***the reduction in greenhouse gas emissions for 2020 cannot (...) be considered sufficient to establish a trend in emissions that respects the trajectory set to achieve the 2030 objectives***. Based on the reports of the environmental authority (General Council for the Environment and Sustainable Development), the Economic, Social and Environmental Council and the High Council for the Climate, the judge considers that *the new trajectory for reducing GES implies the adoption of additional short-term measures to accelerate the reduction of GES 2023*. The Court underlines that the Minister for Ecological Transition did not dispute the fact that ***the GES reduction targets set for 2030 could not be achieved on the basis of the measures currently in force***. The judge concludes that *in the absence of the additional measures to curb the curve of GES produced on national territory, the refusal of the regulatory authority to take such additional measures was incompatible with the trajectory of reduction of these emissions set by the decree of 21/4/2020 in order to achieve the reduction objectives set by Article L 100-4 of the Energy Code and in the annex to Regulation 2018/842/EU*. **The implicit refusal to take all useful measures to curb the curve of GES produced on the national territory is annulled**. The Council of State **orders the adoption of all useful measures to curb the curve of GES produced on the national territory (...) before 31 March 2022.**

- 10/5/2023, n° 467982

The Commune de Grande-Synthe, party to the judgment of 1 July 2021, the City of Paris and the associations Notre Affaire à Tous (NAAT), Oxfam France, Fondation pour la Nature et l'Homme and Greenpeace France, interveners in the case, brought the matter before the Conseil d'Etat. The applicants consider that the measures taken by the Government do not ensure full compliance with the Conseil d'Etat's judgment of 1 July 2002. In the light of the data on the reduction of greenhouse gas emissions, the judge considered that there were still uncertainties as to whether the measures taken by the government would achieve a rate of reduction of greenhouse gas emissions in France compatible with the reduction targets for 2030 set by French legislation and European Union law. In

this case, the judge found that the emission reduction results presented by the government were "difficult to interpret" because of two exogenous circumstances affecting greenhouse gas emissions: one related to the swine flu pandemic and the war in Ukraine, and the other related to temporary government measures likely to run counter to greenhouse gas emission reduction targets (energy prices and the temporary use of coal and gas-fired power stations to guarantee electricity supply). The judge also pointed out that the 3rd and 4th carbon budgets (decree of April 2020) impose a rate of reduction of greenhouse gas emissions higher than the average annual rate of -1.9% observed for the years 2019/2021, but without taking into account the increase in the European emission reduction target. In addition, the judge noted that the government's prospective assessment "is based on modelling assumptions that have not been verified at this stage and do not allow the results presented to be considered sufficiently reliable".
. The judge also pointed out that the conclusions of this assessment "appear to contradict the sectoral target analysis of the National Low Carbon Strategy carried out by the High Council for Climate".
Consequently, the judge concluded that his decision of July 2021 could not be considered fully implemented. He therefore ordered the Prime Minister to take all the additional measures necessary to ensure that the rate of reduction of greenhouse gas emissions is compatible with the trajectory for the reduction of these emissions established by Decree No. 2020-457 of 21 April 2020, with a view to achieving the reduction targets by 30 June 2024, and to provide, by 31 December 2023 and then by 30 June 2024, all the information justifying the adoption of these measures and making it possible to assess their impact on the targets for the reduction of greenhouse gas emissions. However, the judge rejected the plaintiffs' request for a penalty payment because he considered that the various measures taken by the government "demonstrate the government's determination to achieve the emission reduction targets set for 2030 and to implement the 2021 decision". The judge insisted on this "will" in view of the "diligence" already shown by the government and the measures likely to be taken in the future".
The judge's decision has been challenged by the associations and the Grande Synthe commune, which see it as an unwelcome caution on the part of the judge with regard to the government's actions, and have lodged an appeal.

- ♣ European Court of Human Rights : 9/4/2024 Case of Carême Damien v. France, n°718921

The Court concluded that the scope of the present case should be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3. The court pointed out that Damien Carême, in his capacity as mayor and on behalf of the Commune, had filed an appeal with the Conseil d'Etat against the French State for failure to act on climate change (see Grande Synthe'case). The court proceeded to analyse the arguments put forward by Carême as a victim and subsequently rejected them one by one: Damien Carême argues that it would therefore affect his property and his day-to-day environment. He precised that his house located less than four kilometres from the coastline which would be flooded by 2040 according some predictions. However, the Court states that Damien Carême after becoming a member of the European Parliament in May 2019 lived in Brussels and the "*only concrete link*" with the municipality of Grande Synthe is now "*that his brother lives there*". However, according to the Court's well-established case law, it is necessary to demonstrate additional elements of dependence to enable adult siblings to rely on the family -life aspect of Article 8. the Court does not consider that Carême Damien can claim to be a victim and thus invoke Article 8 in respect of the alleged risks linked to climate change threatening that commune, irrespective of whether he is a citizen or former resident of that commune- In addition, the Court emphasised that Damien Carême "*had no right to apply to the Court or to lodge a complaint with it on behalf of the municipality of Grande Synthe*" (he is also

no longer mayor), recalling its case-law to the effect that decentralised authorities *"are considered as "governmental organisations" and do not have standing to make an application to the Court under Article 34 of the Convention"*.

⇨ ADMINISTRATIVE TRIBUNAL PARIS : CASE NOTRE AFFAIRE A TOUS & AL/FRANCE STATE

Background

- 3/2/2021 : n°1904967, 1904968, 1904972, 1904976/4-1, Association Oxfam France, association notre affaire à tous, Fondation pour la nature et l'homme, Association Greenpeace France/ France State

The plaintiffs asked to the judge to recognize the State's failure to act and to order to the State to take all the measures to reduce the greenhouse gases emissions compatible with keeping global warming below 1.5 C. The application for an injunction is attached to the main request for the main claim for compensation of one euro for ecological damage due to the State liability. They also invoked the recognition of a general obligation to fight against the climate change and the recognition of the right to live in a sustainable climate system

The judge **recognized the ecological damage linked to climate change** and held the French State liable for failing to fully meet its goals in reducing greenhouse gases. It **recognized the fault of the State and the ecological damage resulting by the non-respect of the climate commitment by the State**; it also recognized the moral prejudice of the four applicants (one symbolic euro). Before ruling on the conclusions of the four applicants, the tribunal ordered an additional instruction to submit the unnotified observations of the competent ministers to all the parties within two months from the date of the notification of this judgment

- 14/10/2021 n°1904967, 1904968, 1904972, 1904976/4-1

The Tribunal enjoins the French government "*to take all necessary measures to **repair the ecological damage and prevent the aggravation of the damage up to the uncompensated share of greenhouse gas emissions under the first carbon budget, i.e. 15 million tons of CO2 equivalent***" as of the date of the judgment" (...). The tribunal states that it "*appears reasonable that this remedy be effective by **December 31, 2022 at the latest***" and that the measures be adopted "*within a sufficiently short period of time to prevent the aggravation of these damages*". However, the Tribunal considers that there is no reason to attach a penalty to this injunction. Similarly, the judge specifies that it is not for the tribunal to assess the sufficiency of the measures taken to reach the objective of reducing greenhouse gases by 40% in 2030 compared to 1990 level, considering that this issue was already assessed by the Council of State in the case Commune de Grande-Synthe of July 1, 2021.

- 22/12/2023, n°1904967, 1904968, 1904972, 1904976/4-1

In June 2023, the associations applied to the Paris Administrative Court to enforce the October 2021 ruling. They argue that the reductions in greenhouse gas emissions are not exclusively attributable to the government's action. In this case, they insist on the role of exogenous factors (Covid pandemic, war in Ukraine, meteorological conditions) in the observed drop in emissions. Consequently, the associations request the Paris Court to order the government to comply fully with the October 2021 ruling and to impose a penalty of €1.1 billion, corresponding to the social cost of carbon for the period 2019 to the first half of 2023.

In light of the res judicata effect of the Paris administrative Tribunal's October 2021 judgment, the Tribunal, in its capacity as the enforcing judge, has considered that it is not within its competence to modify the quantum of the loss to be compensated (i.e., 15 million tonnes of CO2 equivalent). The judge considers that exogenous factors (such as the impact of the pandemic, the war in Ukraine, and meteorological conditions) influenced the decline in missions on French territory. In his opinion, this created a context conducive to the enforcement of the October 2021 judgment. The judge therefore concludes that these factors cannot be ruled out when assessing the implementation of the October ruling. Furthermore, the judge stated that the government took decisions in response to these exogenous events that had an effect on the reduction in emissions, even if these decisions did not constitute specific climate actions. He concluded that it is important to take these effects into account insofar as they contribute to repairing the ecological damage observed (in its judgment 2021) and preventing the resulting damage to nature.
The judge also evaluated the other measures implemented by the government in 2022, including the ban on oil-fired boilers from July 2022, the ecological bonus for vehicle purchases and other initiatives to promote renewable energies. From this, the judge estimated that the State was taking proactive steps to enhance energy efficiency, which could be linked to the observed decline in CO2 emissions. However, the judge acknowledged that a number of government measures would not take effect until after 31/12/2022 and could not all be taken into account by the enforcement judge. As a result, the judge concluded that compensation for ecological damage was not complete and that there were still 3 to 5 million tonnes of CO2 equivalent to be offset.
However, the judge rejected the associations' request for additional enforcement measures, as he estimated that the current data showed a reduction in emissions of 5 million tonnes of CO2 in the first quarter of 2023. He also rejected the associations' request for a penalty payment.
In addition, the judge ruled that it was not within his competence as an enforcement judge to monitor compliance with France's climate targets up to 2030. In accordance with his competence in this case, his jurisdiction was limited to verifying that the compensation for ecological damage (15 million tonnes of carbon equivalent) in the light of the first carbon budget for 2015-2018 was duly met by 31 December 2022 in accordance with the October 2021 judgment.

- AIR POLLUTION : Council of State : Les Amis de la terre/France State- case n°428409

Background

- 12/7/2017, n°394254

The government is instructed to take the necessary steps to draw up and implement an air quality plan for the urban areas in question in accordance with Directive 2008/50/CE (nitrogen dioxide and fine particles PM10 thresholds) and to submit it to the European Commission by 31/3/2018.

- 10/7/2020, n°428409

The Council ordered the State to pay a penalty payment if it did not justify, within six months of the notification of this decision, having executed the decision of 12 July 2017, for each of the areas listed in point 11 of its new decision, and fixed the amount of this penalty payment at 10 million euros per six-month period until the date of this execution.

- 4/8/2021, n°428409

The Council of State proceeded to the provisional liquidation of the penalty imposed for the period from 11 January to 11 July 2021 and ordered the State to pay the sum of 10 million euros, to be distributed as follows: 100,000 euros to the Friends of the Earth France association, 3.3 million euros to the French Environment and Energy Management Agency (ADEME), 2.5 million euros to the Centre for Studies and Expertise on Risks, the Environment, Mobility and Development (CEREMA), 2 million euros to the French National Health Security Agency, 1 million euros to the National Institute for the

Industrial Environment and Risks (INERIS), 350,000 euros each to the approved air quality monitoring associations Air Parif and Atmo Auvergne Rhône-Alpes, and 200,000 euros each to Atmo Occitanie and Atmo Sud

- 17/10/22, n°428409

In view of the delays in complying with the decisions and the situation of exceeding air pollution standards in several areas (NO2: Toulouse, Lyon, Paris, Aix-Marseille) the judge decides to order the State to pay the sum of 20 million euros, as a provisional liquidation of the fine imposed by the decision of 10 July 2020, for the period from 11 July 2021 to 11 July 2022. The judge distributed this sum between the association and agencies : 50 000 euros association Amis de la terre.

- 24/11/23 n°428409

The decision of the Council of State (July 2017) is enforced as regards exceedances of the limit values for fine particulate matter PM 10 and, as regards nitrogen dioxide, for all the zones listed in the decision of 10 July 2020 with the exception of Lyon and Paris- The State is ordered to pay the sum of 10 million euros, as provisional liquidation of the fine imposed by the decision of 10 July 2020, for the period from 12 July 2022 to 12 July 2023, to be distributed between the association and public agencies : 10 000 euros (association Amis de la terre); 3,3 million DEME, 2,5 million CEREMA, 2 millions ANSES, 1 million Ineris, 450 000 euros each Air Paris et Atmo Auvergne Rhône Alpes, 145 000 euros each Atmo Occidanie et Atmo Sud.

♣ ACTIONS AGAINST COMPANIES: one the TotalEnergie' cases[35]

At the beginning of 2024, the Paris Court of Appeal created a new chamber to deal with environmental disputes arising from the law 2017 on the Duty of Vigilance.

Among the cases to be examined by this new chamber of the Paris Court of Appeal is the TotalEnergies case, which was brought before the courts by a group of associations and local authorities. The case concerns the company's climate commitments under the Law 2017 on the Duty of Vigilance. In 2018, a group of associations asked Total to take climate issues into account in its 2017 Due Diligence Act plan. Although Total's 2019 plan includes climate commitments, the group believes this is not enough. In January 2020, the collective has referred the matter to the Tribunal de Nanterre, which has said it can hear the case (February 2021). The Nanterre Court also rejected TotalEnergie's argument that the Commercial Court had jurisdiction. The Versailles Court of Appeal will confirm the jurisdiction of the courts for all legal actions in this area. From now on, the Paris court has jurisdiction over disputes relating to the 2017 law on duty of care. The TotalEnergie case has therefore been referred to the Paris court. The collective includes French associations and local authorities as well as the City of New York[36].

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⇨ Judicial Tribunal of Paris

- 6/7/2023 : Order (ordonnance) of the pre-trial Judge (juge de la mise en état)

The collective group requests the judge to order Total Energie to publish, within three months of the judgment, a due diligence plan including, in the "identification of risks" chapter. it also requests the judge to order TOTAL to publish, within six months of the decision, a new due diligence plan containing the following measures as "appropriate actions to mitigate risks or prevent serious harm",

[35] https://reporterre.net/Les-dix-affaires-en-justice-qui-veulent-stopper-Total

[36] Sherpa, Notre Affaire à Tous, France Nature Environnement Amnesty International France, ZEA, les Eco Maires et les villes de Paris, New York, Arcueil, Bayonne, Bègles, Bize-Minervois, Centre Val de Loire, Champneuville, Correns, Est-Ensemble Grand Paris, Grenoble, La Possession, Mouans-Sartoux, Nanterre, Sevran et Vitry-le-François.

which it will undertake to publish and implement. As a complementary request, they ask the judge to order TOTAL ENERGIES, as part of its obligation to prevent damage resulting from its activities, to publish and implement appropriate measures to reduce its direct or indirect emissions, in accordance with the Paris Agreement, in order to limit global warming to "well below 2°C".

However, the judge ruled the collective's action against TotalEnergie inadmissible. The judge ruled that TotalEnergie had not been properly informed by the collective. The demands in the summons were different from those in the formal notice sent to the company in June 2019. Or the Law 2017 on the Duty of Vigilance does contain such obligation to be a condition for access to the Courts. The judge also ruled that the local authorities had no interest in taking action because the effects of climate change are global ! contrary to the judgement of the Council of State (Commune Grande Synthe).
The collective appealed the court's decision to the Paris Court of Appeal. It also said the court was not impartial because the judge had family ties to a senior executive of TotalEnergie. The judgement of the Appeal Court of Paris is expected before summer 2024.

Germany

Gerd Winter

I first summarily recall Bernhard's **observations in the 2023 report**:

After the sensational climate protection decision of the Federal Constitutional Court of 21.03.2021 climate litigation has largely been unsuccessful. Thus, the BVerfG (15.12.2022 - 1 BvR 2146/22 - Speed Limit) dismissed as inadmissible a constitutional complaint directed at the introduction of a speed limit on German motorways. The constitutional complaints with which the complainants wanted to force the legislators of the federal states to make more concrete climate protection plans were also unsuccessful (BVerfG, 18.01.2022 - 1 BvR 1565/21, et al. - Landesklimaschutzplanung).

Attempts, analogous to the Dutch "Shell" decision (Rechtbank Den Haag, 26.5.2021, C/09/571932 / HA ZA 19-379 - Milieudefensie u.a./Royal Dutch Shell), to compel German car manufacturers to undertake more extensive climate protection efforts through the courts have also consistently failed so far. For example, the Regional Court of Munich rejected a lawsuit that sought to force BMW to abandon the production of passenger cars with internal combustion engines from 2030 (judgement of 07.02.2023, ref. 3 O 12581/21). Parallel lawsuits against Mercedes (Stuttgart Regional Court, judgement of 13.09.2022, ref. 17 O 789/21) and VW (Detmold Regional Court, 24.02.2023 - 01 O 199/21; Braunschweig Regional Court, 14.02.2023 - 6 O 3931/21) were also dismissed at first instance.

All attempts to have the further expansion of motorways stopped by the courts with reference to the climate protection decision of the Federal Constitutional Court and the legal obligation to take climate protection targets into account have also failed so far (BVerwG, 9 A 7.21 - judgement of 04 May 2022 - A 14; BVerwG, 9 A 1.21 - judgement of 07 July 2022 - A 20).

The constitutional mandate to protect the climate developed by the Federal Constitutional Court has so far only become effective in interpretative decisions on the applicable law. For example, the Federal Constitutional Court has rejected as unconstitutional a Land law provision banning wind turbines in forests without exception, also citing the importance of climate protection (BVerfG, 27.09.2022 - 1 BvR 2661/21 - Windkraft im Wald). However, the main argument here was the division of competences between the federal government and the Länder. Conversely, the BVerfG, referring to the climate protection goal, declared the obligation under Land law for residents to participate financially in the income from wind turbines to be constitutionally permissible despite the associated encroachment on the right to freedom of occupation (BVerfG, Beschl. v. 23.03.2022, Az. 1 BvR 1187/17 - Bürgerwindparks MV).

Referring to the constitutional climate protection goal, the VGH Baden-Württemberg (13.07.2022 - 2 S 808/22 - Parkgebühren) declared parking fees of the city of Freiburg increased by a factor of 16 and the climate policy incentive effect pursued with this increase to be lawful.

New developments:

On appeal the Federal Administrative Court (BVerwG - 9 CN 2.22) quashed the decision. Apart from formal issues (whether the fees were to be regulated by regulation or local by-law for being a matter of state rather than communal competence) the court decided that parking fees were administrative fees that traditionally reflect covering the costs of administration and value of the

service for users. They cannot be used for climate protection purposes. I believe this ignores the climate protection obligation established by Art. 20a Grundgesetz as interpreted by the BVerfG.

Two more recent judgments may indicate a new more proactive turn of the judiciary. By judgment of 30.11.2023, 11 A 1/23 ECLI:DE:OVGBEBB:2023:1130.11A1.23.00 the Higher Administrative Court (Oberverwaltungsgericht – OVG) Berlin/Brandenburg decided upon application of an NGO that the German government is obliged to establish an action programme for the sectors buildings and transportation that ensures compliance with the emission budgets the Climate Protection Law (KSG) had laid out for these sectors. The decision was based on the opinion of an official expert commission established by the KSG in which failure of compliance of these sectors had been determined. By the way a question of standing of the NGO was implied. NGOs have standing only concerning plans and programmes subject to a strategic environmental impact assessment. The action programme was not counted as such in the list of relevant plans and programmes. But the court referred to Art.9 (3) Aarhus and ECJ C-240/09 (Brown Bear), C-664/15 (Protect) for an extensive interpretation.

A like judgment was rendered by the same court a week ago. The reasons are not yet available.

Another constitutional complaint is under elaboration that will challenge the recent (not yet finally adopted) amendment of the KSG which will reduce the binding character of the sector budgets allowing offsets between sectors.

Concerning Jan's question about the influence on national litigation of the ECtHR judgments in the KlimaSeniorinnen and Agostinho cases my preliminary observations are as follows:

- On jurisdiction: the court refused to accept extraterritorial jurisdiction for transborder effects of national emissions (also called scope 1 emissions) and, by implication, also transborder emissions under control of a state (so called scope 3 emissions, such as from exported coal or gasoline or automobiles). This will have an impact on the national interpretation of human rights by national courts but it should be clear that national human rights systems are not required by the ECHR to confine external reach of their national human rights to the jurisdiction of the state. They can go further, like the BVerfG did in *Neubauer.*
- The Court accepted responsibility of a state for transborder effects of emissions including "embedded" emissions caused externally by the production of imported products. But this can only be raised as a human rights issue by inhabitants of the relevant state, including associations. The precise implications of the distinction between responsibility and jurisdiction will still have to elaborated.
- On standing of associations: The court interpreted Art. 34 ECHR as providing an association action. There is still some doubt whether only members can be represented or also non-members. It is also unclear to what extent the requirement of victim status (interpreted as personal and severe concern) is also to be applied to the persons the interests of which the association may represent.
- While these questions are related to standing before the ECtHR the Court also ruled on standing before national courts according to Art. 6 (1) ECHR. The judgement remains narrow with regard to individuals confirming that a link between a court decision and the violation of a right must be established and may not just be "tenuous" (the "Schaffroth criteria"). Concerning an association action the Court in a way sympathised with this but did not in effect mandate national systems to introduce it but only required national courts to seriously reflect on the issue.

- This does not mean that there must be a chance for association action challenging legislation where a related constitutional complaint is not provided. This is different concerning legal systems that provide for a constitutional complaint. The BVerfG, for example, will need to reconsider its standing opinion to reject an association action in relation to human rights (such as to human health) who have a personal bearing.
- The ECtHR's first approach is to somewhat applaud to the emissions budget approach requiring states to derive their own budget from the global one applying reasonable criteria of allocation. This will influence litigation at national levels.
- However, I believe this is rather futile to do because there is simply no free budget anymore. We are in situation of already existing damage and thus interference with human rights. The only way out is not to go top down but bottom up requiring every individual state to reduce emissions to a level that is absolutely "necessary" (see Art. 8 II ECHR). This is I believe the ECtHR's second approach with its list of measures a state must take reaching from target setting to regulation and implementation. I recommend that future litigation should concentrate on what any individual state is technically and economically capable of doing, going through all sectors and considering all possible instruments, rather than deriving budgets from 1.5°C or whatever temperature limit.

Hungary

Iceland

Aðalheiður Jóhannsdóttir

Climate litigation in Iceland

As of today, now climate cases have been brought before Icelandic Courts.

The European Court of Human Rights´ ruling in the KlimaSeniorinnen Case

While the case has been briefly explained by scholars, if and how the new approach of the ECtHR could influence the Icelandic legal environment has not really been theorised yet. It is not unreasonable to presume that the new approach relating to Article 6 of the European Convention on Human Rights could even been more influential in Iceland than the fact that cases related to climate change are now being accepted to fall under the Article 8 guarantee. The reason for this conclusion relates, inter alia, to the strict standing rules that the Icelandic Courts apply, which have barred ENGOs from the possibility of seeking Court review of, e.g., permitting decisions thought to contravene national law relating to the environment.

Ireland

Áine Ryall

The July 2020 judgment of the Supreme Court in *Friends of the Irish Environment v Government of Ireland* ('Climate Case Ireland') [2020] IESC 49, remains the most significant development in this area to date.

At the time of writing, there are three ongoing cases brought by the NGO Friends of the Irish Environment currently before the High Court: a challenge to the Climate Action Plan 2023; a case relating to the absence of a long-term climate strategy; and another case relating to theadoption of sectoral emissions ceilings.

The Government approved the Climate Action Plan 2024 on 21 May 2024.

As regards some recently decided cases, *An Taisce – the National Trust for Ireland v An Bord Pleanála* [2022] IESC 8 (16 February 2022) is an important Supreme Court decision.[37] By way of a general summary, the Supreme Court determined that the upstream consequences (specifically, increased demand for milk) of the proposed development (a cheese manufacturing plant) were not indirect significant effects liable to be assessed under the EIA Directive or the Habitats Directive. The challenge under the Water Framework Directive was also dismissed. The Supreme Court declined to make a reference to the CJEU on the interpretation of Article 3(1) of the EIA Directive on the basis that, in its view, the case involvedthe application of established principles rather than any novel point of interpretation.

Note that the Supreme Court referred in its judgment to *R (Finch) v Surrey Co Co* [2020] EWHC3566 (Admin). The day after the Supreme Court delivered its judgment in *An Taisce*, the Courtof Appeal delivered its judgment in *Finch* [2022] EWCA Civ 187. Subsequently, on 9 August 2022, the UK Supreme Court granted leave to appeal. Judgment is currently pending from theUK Supreme Court and is awaited with interest in Ireland.[38]

Coyne and Coyne v An Bord Pleanála, Ireland and the Attorney General [2023] IEHC 412 was an unsuccessful challenge to the planning permission for development of a data centre / associated works and the approval of a substation and underground transmission cables by An Bord Pleanála on a site adjacent to the applicants' residence. The Coynes relied on a rangeof grounds including *inter alia*: alleged breach of the 'have regard to' obligation in section 15of the Climate Action and Low Carbon Development Act 2015;[39] alleged failure to assess the environmental impacts of CO_2 emissions as required by the EIA Directive; and alleged breachof their rights to life and bodily integrity and to a healthy environment consistent with humandignity as guaranteed by Article 40.3 of the Constitution and / or An Bord Pleanála's obligations pursuant to section 3 of the European Convention on Human Rights Act 2003 andArticles 2 and 8 ECHR. The High Court rejected all grounds

[37] Summary of judgment here.

[38] The UK Supreme Court delivered judgment in *Finch* on 20 June 2024 – [2024] UKSC 20.

[39] Note section 15 was amended by the Climate Action and Low Carbon Development (Amendment)Act 2021. The original section 15 was at issue in *Coyne*.

on which judicial review was sought.

A pending action before the General Court of the EU is also notable: Case T-120/24 *Global Legal Action Network and CAN-Europe v Commission* (pending) concerning Implementing Decision (EU) 2023/1319 on revision of Member States' annual emission allocations for the period 2023-2030. For the background to this action see this blog.

Latest EPA projections

The Environmental Protection Agency published its latest greenhouse gas emissions projections for the period 2023-2050 on 28 May 2024: *Ireland's Greenhouse Gas Emissions Projections 2023-2050*. The stark headline findings are as follows:

- Ireland is projected to achieve a reduction of up to 29 per cent in total greenhouse gas emissions by 2030, compared to a target of 51 per cent, when the impact of the majority of actions outlined in Climate Action Plan 2024 is included.
- To achieve a reduction of 29 per cent would require full implementation of a wide range of policies and plans across all sectors and for these to deliver the anticipated carbon savings.
- Almost all sectors are on a trajectory to exceed their national sectoral emissions ceilings for 2025 and 2030, including Agriculture, Electricity and Transport.
- The first two carbon budgets (2021-2030) will not be met, and by a significant marginof between 17 and 27 per cent.
- Ireland will not meet its EU Effort Sharing Regulation target of 42 per cent reduction by 2030.

Given these projections, there is no doubt that individuals and NGOs will continue to turn tothe courts in an effort to hold the State accountable for its ongoing failure to meet climate obligations. It is also interesting to note that the publication of the latest EPA projections attracted significant media attention. There is increasing public awareness of, and concern over, how far off-target Ireland is as regards its climate obligations.

Impact of *KlimaSeniorinnen* on climate litigation in Ireland?

The impact of the judgment of the European Court of Human rights in *KlimaSeniorinnen*[40] in the Irish context remains to be seen. One area where we may see interesting future developments is NGO standing, in the specific context of NGOs seeking to invoke personal constitutional / human

[40] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (application no. 53600/20). See further the material available on the website of the European Court of Human Rights: Grand Chamber Rulings inClimate Change Cases.

rights under the Constitution and the European Convention on HumanRights (via obligations arising under the European Convention on Human Rights Act 2003), inparticular the right to life and the right to bodily integrity, in climate litigation.

In *Friends of the Irish Environment v Government of Ireland* ('Climate Case Ireland') [2020] IESC 49, the Supreme Court determined that the NGO Friends of the Irish Environment CLG, as a corporate entity, did not have standing to invoke the personal rights put forward in the proceedings. In its challenge to the legality of Ireland's National Mitigation Plan, the NGO hadasserted *inter alia* that the State had failed to vindicate rights guaranteed under the Constitution (specifically the right to life, the right to bodily integrity and an asserted unenumerated 'right to an environment consistent with human dignity' / right to a healthy environment) and under the European Convention on Human Rights (specifically the rights guaranteed by Article 2 and Article 8). The European Convention on Human Rights Act 2003 places a positive obligation on all organs of the State (with the exception of the courts) to perform their functions in a manner compatible with the State's obligations under the Convention. On that basis it was alleged that decisions of the Government in relation to the National Mitigation Plan could be assessed to determine whether, in reaching any such decisions, the Government had met its obligations under the 2003 Act to properly act in a waywhich protects Convention rights.

While the Supreme Court ruled that the NGO did not have standing to assert the personal rights at issue here, the standing of Friends of the Irish Environment to challenge the legalityof the National Mitigation Plan was not otherwise in dispute and it succeeded in having the Plan quashed on the basis that it fell 'a long way short' of what the Climate Action and Low Carbon Development Act 2015 demanded in terms of specificity.

As regards the asserted constitutional right to a healthy environment, the Supreme Court wasnot prepared to accept that such a right could be derived from the Constitution which made no express provision for such a right. Clarke CJ concluded that 'a cogent case' had not been made out to support the recognition of a derived constitutional right to a healthy environment. The asserted right was either 'superfluous' (if it did not extend beyond the right to life and the right to bodily integrity) or it was 'excessively vague and ill-defined' (if it did extend beyond those rights). Such a right could not, therefore, be derived from the Constitution.

The Strasbourg Court's approach to NGO standing in *KlimaSeniorinnen* – which draws heavilyon the Aarhus Convention[41] – may lead to arguments being made in future climate cases thatthe Supreme Court's approach in Climate Case Ireland should be revisited – and in particularin the context of claims based on obligations arising under the European Convention on Human Rights Act 2003. There has already been some academic commentary on the standing point following the *KlimaSeniorinnen* judgment: see Orla Kelleher and Andrew Jackson, 'Whatdoes the latest European climate judgment mean for Ireland?' *RTÉ Brainstorm* 12 April 2014.See also Orla Kelleher's earlier contribution 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2022) 34 *Journal of EnvironmentalLaw* 107 (open access).

It is also reasonable to expect that the substantive findings of the Strasbourg Court in

[41] United Nations Economic Commission for Europe (UN ECE) *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 447.

KlimaSeniorinnen in respect of Article 8 ECHR will be relied on in support of future climate litigation in Ireland. While there are pending challenges before the High Court (see above theongoing cases brought by Friends of the Irish Environment), these cases pre-date the judgment in *KlimaSeniorinnen* and are not premised on a breach of the State's obligations under the ECHR. Accordingly, the impact and potential added value of the judgment in *KlimaSeniorinnen* at the domestic level in Ireland remains to be seen.

Italy

Massimiliano Montini and Emanuela Orlando

(2023-2024)

Climate Litigation: the Italian case "Giudizio Universale"

On climate litigation, the most remarkable development over the past year has been the ruling by the First instance Tribunal (for civil cases) in the case "Giudizio Universale". In this lawsuit, brought by several environmental associations against the Italian State, the claimants invoke the responsibility, and extracontractual liability ex article 2043 of the Italian Civil Code, of the Italian State for the damage caused by climate change. The claimants asked the court to condemn the Italian State, on the basis of article 2058 of the Italian civil code, to adopt alla the necessary initiatives and actions to reduce by 2030 the 92% of CO_2 emissions compared to 1990 levels; and subordinately, to assert the liability of the Italian state, and of the Prime Minister, for climate change damage on the basis of article 2051 of the Italian civil code.

The text of the decision and other relevant documents can be found here: https://giudiziouniversale.eu/la-causa-legale/

Background to the claim:

Conceptually and methodologically the claim rested on two main grounds. The first is the assertion of a "science-based limitation" ["riserva di scienza"] to the political discretion of government and legislature. Building on previous decisions of the Italian Constitutional Court, the claimants assert that scientific data and findings of scientific institutions represent limits to the political discretion of decision-makers and to private autonomy… and that therefore the climate emergency, as expressed and recognized by world scientists and declared by the European Parliament, limits state discretion in law and policy making.

The second point relates to the assertion of an individual subjective right to a safe and stable climate, which also extends to future generations, and which constitutes the fundamental premise for the enjoyment of all human rights. The claimants argue that such a right corresponds to an obligation of the State to remove the situation of climate emergency. The realization of such a right is to be achieved through the norms that define the contents of the State's climate obligations in terms of: 1) specific mitigation measures; 2) objectives (e.g. limit temperature increase to 1,5 degrees Celsius); 3) timeline (obligations by 2030 and by 2050 for climate neutrality). In supporting this claim, the plaintiffs refer to article 2 of the Italian Constitution, in article 6 TEU, in article 52 of the European Charter of Fundamental rights and articles 2, 8 14 of the European Convention of Human Rights.

On such a basis, the claimants have framed the responsibility of the State in terms of extra-contractual liability under article 2043 of the Italian Civil Code, for not having adopted the necessary initiatives and appropriate measures to achieve climate stability in accordance with scientific findings. The inertia of the Italian Government thus amounts to a tortious act under article 2043 of the Civil Code. However, remarkably, the plaintiffs seek to invoke article 2043 not so much to claim compensation for the damage occurred, but rather in a preventive perspective – i.e. to avoid that the continuation of the inadequate measures and the omissions by the Italian State and the continuation of the

situation of climate emergency actually translates into an irreversible damage (see p. 70, *atto di citazione*).

The Court's ruling – 6 March 2024

Despite the sophisticated reasoning brought by the claimants, the action was dismissed as the Court deemed the request of the claimants inadmissible for lack of jurisdiction.

The Court's decision mostly focuses on the question of justiciability, in response to the defendant's main contention that the claim bears on matters which are reserved to the discretion of the legislative branch and of the Government, and are a subject matter traditionally reserved to politics and not justiciable by the Courts.

Moreover, the Court notices that claimants have explicitly brought a civil action under Italian law – hence the jurisdiction of the ordinary judge – by framing their claim as a question of extra-contractual liability for the impairment of an individual right. Specifically, the plaintiffs have framed that right not as a corresponding to a State public law obligation, but as corresponding to a civil duty (thus a sort of duty of care, like in the Dutch case Urgenda?) of the State towards individuals, which finds the legal basis on the obligations assumed by the State with the signature of the international agreements (UNFCCC and Paris Agreement). As such, the reparation claim is not directed at having proper compensation, but rather at having the Court to scrutinize State action (or inaction) in the field of climate change against the constitutional parameters for the exercise of public powers (see p. 11 of the ruling) and to order the reduction of CO_2 emissions. Thus, the Court notices that since the claimants ask to ascertain the commission of an unlawful act, it is necessary also a review of the "timing" (when) and "modalities" (how) of the exercise of public powers, with the claim for damages being the consequence of those findings.

Yet, the judge notices that "the plaintiff's prognostic assessments of the inadequacy of the policy choices made by the Government to achieve the [climate mitigation] objectives are based on data which are contested by the defendant, and which cannot be verified by the Court, as the judge does not possess the required information to assess complex decisions taken by the Parliament and the Government". As such, the Court denies that there exist a legally protected subjective interest which could give rise to a right to reparation, since the decisions related to the modalities and timing of management of the climate change phenomenon entails a discretional assessment in terms of the socio-economic and cost-benefit impacts, which falls within the sphere of competence of the political institutions and is not subject to judicial review (p 12).

On that basis the Court finds that it has no jurisdiction to decide on this question. According to the Court, therefore, the Italian legal system does not recognize the subjective interest claimed by the plaintiffs. On that point, the Court also recalls previous jurisprudence which excludes the existence of a subjective rights of the citizen to the correct exercise of legislative powers, because of the fact that legislative functions are outside the field of judicial review.

Latvia

Norway

The Norwegian Supreme Court decision regarding petroleum production in the Barents Sea, which was decided by the court in plenary in December 2020, and where the environmental NGOs lost the case, has been followed up in two ways the past year.

The first has been the submission of the case to the European Court of Human Rights. On 16 December 2021, the Court decided to communicate its questions to the parties.[42] This case is one of six cases that the Court put on hold while awaiting the results of the three climate cases.[43] In light of the findings in the Swiss case, issues regarding violation of substantive provisions of the ECHR seem more relevant now than when the case was decided by the Supreme Court.

The second way in which the case has been followed up is through a new case before Norwegian courts. Even if the environmental NGOs lost the first case, elements of the 2021 Supreme Court decision mandated the corporations and public authorities to carry out follow-up environmental assessments. One key reason why the majority of the Court found in favour of the Government was that assessments of climate impacts of petroleum production could be carried out at a later state in the decision-making process, namely in connection with decisions on plans for development and operation of the petroleum projects ("plan for utbygging og drift", PUD). The new case concern (lack of) such assessments in relation to three subsequent projects: Brediablikk, Tyrving and Yggdrasil. The Court of First Instance (Oslo tingrett) concluded that there was no violation of articles 2 or 8 of the ECHR, but that the environmental assessments were insufficient, and that all three decisions therefore were invalid. Based on this finding, the Court also concluded that the authorities were not allowed to make further decisions in the three cases, that would depend on the validity of the PUD decisions, before the validity of the PUD decisions had been finally determined.[44] The Appeals Court (Borgarting lagmannsrett) decided to bifurcate the case,[45] and thereafter reversed the prohibition against new decisions pending a final decision on the validity of the PUD decisions.[46]

[42] Greenpeace Nordic and others v. Norway

[43] https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng

[44] A translation of the judgment is available here: https://www.greenpeace.org/static/planet4-norway-stateless/2024/02/6d675eb4-official-final-greenpeace-nordic-and-nature-and-youth-norway-v.-the-norwegian-government-represented-by-the-ministry-of-energy.pdf.

[45] LB-2024-36810-1.

[46] Decision 16 May 2024, LB-2024-36810-2.

Poland

Portugal

1. CLIMATE in national Courts:

Three environmental NGOs are claiming in the Supreme Court of Justice that the Climate framework law is being violated by default[47]. The law, adopted in December 2021 established obligations (on climate "refugees", on climate budget, etc) whose effectivity requires the adoption of implementing laws. Until now, which nothing has been done. A new association called "Last Resource" was expressly created for the purpose of questioning the legal inertia in court. Together with 2 other ENGOs they went to court but the case was dismissed for being "abstract, generic and obscure"[48]. They appealed to the Supreme Court of Justice[49] and the case is pending.

2. CLIMATE in the ECHR: Duarte Agostinho Case

The case was not accepted against 32-member states because it violated the criteria of extraterritoriality. It was dismissed against Portugal for not having exhausted the instances[50].

47 https://www.jornaldenegocios.pt/sustentabilidade/ambiental/detalhe/primeiro-caso-de-litigancia-climatica-em-portugal-segue-para-supremo-tribunal-de-justica

48 https://expresso.pt/sustentabilidade/crise-climatica/2024-04-15-tribunal-rejeita-acao-contra-estado-por-inacao-climatica-associacao-deve-recorrer-para-o-supremo-c23d152a

49 https://www.jornaldenegocios.pt/sustentabilidade/ambiental/detalhe/primeiro-caso-de-litigancia-climatica-em-portugal-segue-para-supremo-tribunal-de-justica

50 https://hudoc.echr.coe.int/eng#{%22appno%22:[%2239371/20%22],%22itemid%22:[%22001-233261%22]}

Slovenia

Spain

Angel M. Moreno
Agustín García Ureta

Spain could not escape from the global trend of climate litigation, and soon or later we were expected to have our own "strategic litigation" in this field.

In reality, there were two different and subsequent proceedings, each one producing its own final ruling. They are herein briefly presented:

First lawsuit-. In September 2020, Greenpeace and two other environmental associations filed a legal challenge against the central Government in the Supreme Court (Third Chamber, administrative jurisdiction). Contrary to the Dutch, Belgian and Italian cases, in Spain this litigation could only take place in the administrative jurisdiction, due to internal procedural rules. The plaintiffs filed this lawsuit against what they called the "climate inactivity" of the Government, due to the failure of Spain to approve a Long-Term Decarbonisation Strategy and an Integrated National Energy and Climate Plan ("PNIEC" in Spanish) as demanded by EU Law ("governance regulation"), which would establish GHG reduction targets in line with the commitments made by Spain with the ratification of the Paris Agreement and the scientific recommendations of the IPCC, while guaranteeing "human rights for present and future generations". The plaintiffs claimed that Spain should set a GHG reduction target not lower than 55%, to be attained by 2030

The legal challenge was admitted for processing and registered under number 265/2020.

However, during the handling of the case the Government approved first the Long-Term Decarbonization Strategy 2050 (November 3, 2020), and then (in March 2021) the long awaited PNIEC . The plaintiffs withdrew the claim in the part related to the decarbonization strategy, but not with respect to the PNIEC. However, in March 2022, the Administrative section of the Supreme Court issued an *ex officio* ruling by virtue of which the handling of this proceeding was terminated, given that another contentious-administrative appeal had been filed by the same plaintiffs against the PNIEC approved by the Government (see below). Therefore, the file was transferred to another "section" of the Administrative Chamber, concretely the 5th Section, for the purpose of being adjudicated jointly with the new challenged filed by the plaintiffs.

This first legal challenge was eventually dismissed by the Supreme Court (5th section) by its ruling of 18 July 2023 (ruling Nr.: 1038/2023). In this ruling, the Court dismissed entirely the legal challenge filed by the e-NGOs, mainly because the case became "moot" since the Government approved the referred documents. Moreover, the Court recalled (among other things) that the Spanish procedural law prevented it from establishing how the Integrated National Energy and Climate Plan (PNIEC) should be drafted. Therefore, it could not accept the plaintiff's claim (somewhat naïve, as well as technically incorrect), consisting of "declaring that the Government must approve a PNIEC that establishes greenhouse gas reduction targets... in no case less than 55% in 2030". Finally, the "governmental passivity" denounced by the plaintiffs did not fit exactly within the technical concept of "administrative inactivity" as defined by the procedural law

Second lawsuit.- On May 28, 2021, four environmental associations, three of which coincide with the previous proceedings, filed another legal challenge in the Administrative Chamber of the Supreme Court, this time against the PNIEC that had been approved by the Government a couple of months earlier. On this occasion, the plaintiffs alleged that the aforementioned plan was not ambitious enough to comply with international and EU climate change standards and objectives (specifically the temperature targets of the Paris Agreement); that the plan should have enshrined more ambitious reduction targets ; and that no effective public participation was allowed during decision-making,

from which it followed that no proper strategic environmental assessment of the plan was carried out.

In essence, the NGOs claimed that Spain should adopt more ambitious levels of emission reductions than currently envisaged by the PNIEC: in their opinion, Spain should assume a reduction of GHG emissions of at least 55% in 2030 compared to 1990 and "net zero" emissions in 2040, instead of the 23% reduction, as included in the plan. Extensive references were made by the plaintiffs to rulings issued by foreign courts (*Urgenda* and its aftermath).

The appeal was admitted for handling and further consideration in July 2021, and it was assigned to the 5th Section of the Administrative chamber, with the Nr.: 162/2021. In April 2022, the Court agreed to receive the evidence, admitting the expert and documentary evidence, but rejecting the witness evidence requested by the plaintiff. The plaintiff appealed the decision of the Court on this precise issue, which was rejected by Order of June 23, 2022.

The Court eventually issued its ruling 24 July 2023 (ruling Nr.: 1079/2023). In this ruling, the court dismissed the legal action in its entirety. In our opinion, the legal arguments and briefs submitted by the plaintiffs were not very good from the "legal-technical" point of view. This is especially relevant because the Spanish administrative jurisdiction is very formal and precise on procedure

The main reasons for dismissing the action may be summarized as follows:

1.- The separation of powers principle. Courts are not the appropriate forum for resolving complex social issues, which involve broad, compelling and contradictory public interests.

2.- No procedural failure was committed during the decision-making process of the PNIEC (another argument advanced by the plaintiffs)

3.- The reduction targets included in the PNIEC largely complied with the reduction obligations imposed on Spain by EU Law, while the Paris Agreement (ratified by Spain) did not imposed any precise reduction target

4.- The plan was considered to be a regulation, and under Spanish law (art. 73 of the law on administrative justice) an administrative court may well annul a regulation if it is "illegal" (when it violates a statute or an essential procedural requirements), but it cannot re-write the wording of the regulation. Therefore, the Court could not say or determine the exact amount of GHG reductions that Spain should attain (as demanded by the plaintiffs, that is 55%). The plaintiffs´ petition therefore fell beyond the reach of the Court´s powers.

After the publication of the ruling, the plaintiffs made extensive declarations in the media regretting the sense of the judgment, and even depicted the Court as refusing to protect the population, departing from international case-law, ignoring science, etc.

Sweden

Jan Darpö

Sweden's first climate case

Last year, I told about Sweden's first "real" climate action, the *Aurora* case, brought by a group of youngsters to the Nacka Land and Environmental Court; Climate Trials | Auroramålet (xn--auroramlet-75a.se) After the subpoena was issued against the State was, the Parties agreed to ask the court to make a request to the Supreme Court for a preliminary ruling on whether this kind of action is justiciable according to Swedish law and procedure Shortly after the ECtHRs judgement in *Klimaseniorinnen* (and simultaneous decisions on *Carême* and *Duarte Agostinho*) in the beginning of April, the Supreme Court granted leave to appeal to this request. One may only speculate, but it is hard to see that the Supreme Court will answer no to that question as European law on the matter stands after *Klimaseniorinnen*. The *Aurora* case will be very interesting to follow since the Government has taken a couple of important steps – such as the removal of the carbon reduction duty – that will increase the emissions of greenhouse gas, while at the same time it does not seem to have any clear plan on how to reach the climate goals (see below).

Switzerland

1. Grand Chamber Judgment of April 9, 2024 – Verein Klimaseniorinnen Schweiz and others v. Switzerland (App. 53600/20)

The reactions to the judgement in the Klimaseniorinnen case by the Grand Chamber of the ECHR in Switzerland were – as it was to be expected – quite mixed.
In the **political sphere** the statements more or less followed party lines, with quite some critical voices also in the political center and – more sporadically – even among exponents of the left. The reactions, especially the critical ones, immediately combined the assessment of the courts ruling with a generally critical stance towards the European Court of Human Rights and it legitimacy. Such statements occur frequently, not to say almost always, when Switzerland is convicted before the ECHR. In this case however, such reactions were particularly widespread and virulent and included the demand for Switzerland to leave the Council of Europe.
On May 22, 2024 the **Commission for Legal Affairs of the Council of States** (Second Chamber of Parliament), invoking the 15th additional protocol to the ECHR, openly criticized the Court, stating that the limits of a dynamic interpretation were transgressed and that the Court thus exposed itself to the accusation of inadmissible and inappropriate judicial activism. After laying out what legal measures have been taken in the meantime, the Commission called on the Federal Council – the government – not to give any further effect to the ruling of the court.
As for the **government**, while the Minister of Justice had taken a rather positive and open stance towards the ruling, the Minister responsible for environmental matters has stated that his ministry would first analyze the verdict before a decision on possible measures could be taken. It however seems that he personally is of the opinion that the Climate and Innovation Act foreseeing the net-zero principle until 2050 and providing for intermediate objectives in 2040 as well as for average objectives for 2031-2040 and 2041-2050 together with the amendments of the CO_2 Act and the modifications in the Energy Act regarding renewable energy production, which were all enacted or prepared after the complaint was filed, would suffice to fulfill the obligations of Switzerland in this respect.

In **academia** the reactions were generally more positive, some qualifying the judgment a landmark decision. But even there, some public international and human rights lawyers also tended to a more critical position.

Currently it is of course much too early to say whether the decision will have any concrete and tangible **consequences**. Yet, at this point in time the political willingness to coin any far-reaching measures to enhance climate protection seems rather limited. The other question to be studied concerns the necessary consequences with regard to **public procedural law**, as the Swiss courts did not even enter into the discussion of the conformity of the measures with the legal requirements.

United Kingdom

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The first two cases, both lost, were testing the boundaries of non-environmental law to see to what extent it should reflect climate change implications. The third case is dealing with mainstream climate change law.

1. ClientEarth v Financial Conduct Authority [2023] EWHC 3301 (Administrative Court)

An oil exploration company was going on the public stock exchange, and ClientEarth challenged the decision of the Financial Conduct Authority (FCA) to approve their prospectus. Prospectus regulations required them to contain information relevant to investment decisions, including risk factors. The prospectus did contain some information about risks associated with climate change, but ClientEarth claimed it wasn't adequate.

Court refused to intervene holding that compliance with the Prospectus Regulations was a matter of judgment for the Financial Conduct Authority and there was no evidence of irrationality: *"The claimant disagrees with the FCA's evaluation but it has failed to demonstrate any arguable error of law in the approach taken by the FCA or its conclusions. The court will not substitute its view or that of the claimant for the considered judgment of the FCA"*

2. *ClientEarth v Shell* [2023] EWHC 1137 (Chancery Court)

Client Earth owned 27 shares in Shell. It sought to bring an action against the directors of Shell for failure to manage risks presented by climate change in breach of their general duties under s 172 Companies Act 2006: *"A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to: (a) the likely consequences of any decision in the long term... (d) the impact of the company's operations on the community and the environment."*

Shell directors had already adopted an energy transition strategy to become net zero by 2050, but Client Earth felt they hadn't put forward adequate policies to achieve and wanted them fleshed out in more detail.

The court held essentially that it was a matter for the directors to determine how to balance the risks and factors : *'The impact of Shell's operations on the community and the environment is a matter which the Directors are required to weigh in the balance in that context (s.172(1)(d)), but their responses to the business risks for Shell associated with climate change, whether they be the adoption of a strategy or its implementation, are part of the decision making process by which the Directors manage Shell's business'.* The Court also felt that Client Earth was essentially using the procedures *to* pursue their own agenda rather than acting in the interests of the company which this sort of legal action by shareholders requires.

The outcome was not too surprising on conventional company law principles. But what was very unusual was that a former Supreme Court judge, Lord Carnwarth who has taken a great interest in

climate change and environmental law, published a lengthy critique of the decision on a university web-site: https://www.lse.ac.uk/granthaminstitute/publication/clientearth-v-shell-what-future-for-derivative

Lord Carnwath noted that on all points he found the judge's reasoning unpersuasive. This would have been an ideal test case to consider in detail the nature of directors' duties in the light of climate change. The negative decision may have been partly due because the case was heard not in the public law (administrative) courts more sensitive to these issues but in the more specialized Chancery court dealing with company law matters (a sort of reverse Urgenda scenario).

3. Friends of the Earth and others v Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin). 3 April 2024

Under the Climate Change Act 2008, regular carbon budges are produced (roughly five year intervals) intended to provide a smooth trajectory to next zero by 2050. Once a budget is produced and approved by Parliament, the Energy Minister must produce 'such proposals and plans' as he considers would enable the budget to be met.

Friends of the Earth challenged the plans and proposals. Two years earlier they had previously won a challenge to plans and proposals mainly on the ground the Minister had not be provided by civil servants with sufficient information on all the risks and uncertainties associated with proposed policies.

This challenge to the revised plan also succeeded but again largely on process rather than substantive grounds. But it raises general questions where a Minister must legally approve a highly complex plan, about the amount of detail about risks and uncertainties that they must absorb from briefings by civil servants.

The court held that the material as presented to the Minister still did not adequately state the risks of delivery involved in different policies: *'It is not possible to ascertain from the materials presented to the Secretary of State which of the proposals and policies would not be delivered at all, or in full. It was not possible, therefore, for the Secretary of State to have evaluated for himself the contribution to the overall quantification that each of the proposals and policies was likely to make, bearing in mind that this evaluation had to be made by the Secretary of State personally: he could not simply rely on the opinions of his officials…….It was necessary to say more if the Secretary of State was to work out for himself whether the proposal or policy was likely to miss the target by a small or large amount and if so by how much'*

But even though the Minister's decision to approve the plan was quashed, the court emphasized the limit of a court's role in this sort of decision. Were a court was asked to review the substance of such a plan (rather than process as here) the court should carry out a very light touch rather than an intensive approach to review:

'The Secretary of State's decision involved an evaluative, predictive judgment as to what may transpire up to 14 years into the future, based on a range of complex social, economic, environmental and technological assessments, themselves involving judgments (including predictive judgments), operating in a polycentric context. These are not matters in respect of which the Court

has any real expertise or competence, whereas the Secretary of State will be able to rely on officials with considerable expertise across the various domains (social, economic, environmental and technological), and the Secretary of State will himself have an experience of what is practicable within the governmental and wider political context'.