Warming up for climate litigation around the world – recent court cases from The Netherlands, Germany and the United Kingdom

I. Introduction

This [chapter] in honour of our jubilee, who made such a splendid career in the judiciary and now continues unabated as an international arbitrator, discusses some recent court cases on climate change from three neighbouring jurisdictions, the Netherlands, Germany and the United Kingdom. In all three countries the highest courts handed down judgments – for short: the '*Urgenda*' judgment, the '*KSG*' judgment, and the '*Heathrow*' judgment – relating to the duties of states regarding greenhouse gas (GHG)[1] emissions. These judgments were delivered against the background of, but also interacted with, evolving domestic normative frameworks increasingly influenced by the 2015 Paris Agreement. Meanwhile, two ongoing cases, one in the Netherlands – '*MD v. RDS*' – and one in Germany – '*Lliuya v. RWE'* – are testing the courts regarding the responsibility, accountability and liability of companies regarding their contributions to the warming up of the Earth.

We first briefly compare the normative frameworks for the three countries. Second, we shortly present the cases, grouped by countries. Third, we offer some comparative remarks, first on the judgments involving governments, then on the cases against companies. Finally, we draw some conclusions.

II. The normative framework

1. The International and European level

The United Nations Framework Convention on Climate Change, UNFCCC (1992) laid the groundwork for a global legal system aimed at stabilizing GHG concentrations "at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system." Next, the Kyoto Protocol (1997) sought to control the main GHG emissions, based on the principle of common but differentiated responsibilities. Industrialized countries, the so called Annex I countries, being the source of most past and current emissions, were expected by the year 2000 to reduce their emissions to 1990 levels[2]. In addition, the Paris Agreement (2015)[3] acknowledges that climate change represents "an urgent and potentially irreversible threat to human societies and the planet". According to its Article 2:

[1] "A greenhouse gas (or GHG for short) is any gas in the atmosphere which absorbs and re-emits heat, and thereby keeps the planet's atmosphere warmer than it otherwise would be….Carbon dioxide (CO2) is the most common GHG emitted by human activities, in terms of the quantity released and the total impact on global warming", GHGs-CO2-CO2e-and-Carbon-What-Do-These-Mean-v2.1.pdf (ecometrica.com), with further details. In this contribution we will use both terms interchangeably.

[2] The Protocol establishes three "flexibility mechanisms" that can be used by Annex I Parties in meeting their emission limitation commitments: the International Emissions Trading (IET), the Clean Development Mechanism (CDM), and Joint Implementation (JI). IET allows Annex I Parties to "trade" their emissions.

[3] Concluded 12 December 2015, entered into force 4 November 2016)
https://unfccc.int/sites/default/files/english_paris_agreement.pdf

> "This Agreement…aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; ….
>
> This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

And Article 3:

> As nationally determined contributions [NDC] to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles…with the view to achieving the purpose of this Agreement as set out in Article 2.

Despite the common objectives it defines, the Agreement does not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives are met. The specific legal obligation imposed in that regard is to meet any NDC applicable to the state in question.

To implement the UNFCCC and the Kyoto Protocol, the European Union (EU) in 2004 adopted measures aimed at monitoring and reporting and offering regular assessments of Union and Member States' GHG emissions[4]. The EU and its Member States, acting jointly, committed to a binding target of a net domestic reduction of 40% in GHG emissions by 2030 compared to 1990. The Commission has proposed to raise this target, as part of the European Green Deal[5], to at least 55% compared to 1990 and climate neutrality by 2050[6].

Key input to the global climate negotiations has been supplied by the Intergovernmental Panel on Climate Change (IPCC). Established by the UN in 1988, the IPCC provides regular scientific assessments on climate change, its implications and future risks, and puts forward mitigation and adaptation options[7].

2. The national level

Well before the Paris Agreement, the United Kingdom was the first major country to adopt legislation on climate change targets, the Climate Change Act (CCA) 2008. Also in 2008 the UK adopted the Planning Act concerning the authorization of projects for the development of nationally significant infrastructure, such as airports. In contrast, for example, to the United States, climate change is a subject on which political parties in the UK are largely in agreement.

The CCA established a new system for setting domestic targets as well as tracking progress, comprising: (1) a legal requirement to ensure that the net UK carbon budget account for the

[4] Decision No 280/2004/EC replaced by Regulation (EU) No 525/2013.
[5] EU climate action and the European Green Deal | Climate Action (europa.eu)
[6] The EU Emissions Trading System, the Effort Sharing Regulation with Member States' emissions reduction targets and the Land use, land use change and forestry Regulation will be updated with a view to implement the proposed at least 55% net GHG reduction target by 2030.
[7] The IPCC does not conduct its own research but identifies where there is agreement in the scientific community on topics related to climate change, and where further research is needed.

year 2050 is at least 80% lower than the 1990 baseline level, (2) an independent Committee on Climate Change (CCC) to advise the UK on targets and the policies needed to meet them, and to monitor progress both on mitigation and adaptation, and (3) a system of five-yearly carbon budgets to be set by government 10 to 15 years in advance, based on advice from the CCC.

In 2019 the CCC recommended to further reduce GHG emissions from 80% to "net zero" by 2050. This advice was accepted under the CCA, after a short debate in Parliament.

The Netherlands and Germany have been slower in adopting climate change legislation. The Dutch Climate Act (*Klimaatwet*) was adopted in July 2019 and entered into force on 1 September 2019. This was four years after the courts had first ordered the government to take measures to reduce GHG emissions at the end of 2020 by at least 25% compared to 1990. The *Klimaatwet* establishes a framework for policy development aimed at reducing GHG emissions in 2050 by 95% compared to 1990. Ministers should strive to reduce such emissions in 2030 by 49% and ensure a 100% CO2 neutral electricity production by 2050. The government must adopt a Climate Plan, to be reviewed every five years. Every two years a report is made on the practical implementation of the Plan. The Council of State advices on the Plan and the progress report. In addition, an annual scientific report is submitted to parliament by the national Planning Bureau for the Environment.

Germany adopted its Federal Climate Act (*Bundes-Klimaschutzgesetz*)[8] on 12 December 2019, entered into force on 19 December 2019. The basis of the Act is the 2°C-1.5°C limit of the Paris Agreement as well as Germany's commitment to pursue GHG neutrality by 2050. The Act sets an overall target for the reduction of GHG emissions by 2030 of at least 55%, as well as annual allowable emission amounts per sector: energy, industry, transport, buildings, agriculture, waste and others. The Federal Environment Agency (*Umweltbundesamt*) compiles the annual data on GHG emissions. A Council of Experts on Climate Change examines the emissions data of the Federal Environment Agency and presents the government and parliament with an assessment of the published data.

Provisions applicable beyond 2030 were originally not contained in the Act. As we shall see, the German Constitutional Court ruled that this lack of provision for the reduction of GHG emissions from 2031 onwards was unconstitutional, and this has led the government to propose amendments to the Act.

III. The judgments

1. Introduction

We start with the Dutch *Urgenda* case, a civil lawsuit, which began with a ground-breaking order of the Hague District Court in 2015, confirmed by the Hague Court of Appeal in 2018, and upheld by the Dutch Supreme Court on 20 December 2019. The courts ordered the Dutch government to do more to reduce the GHG emissions from Dutch territory. *Urgenda* formed the inspiration for the civil lawsuit against a private company, *Milieudefensie et al. v. RDS*, again before the Hague District Court. This court handed down its judgment on 26 May 2021,

[8] KSG - englisch (gesetze-im-internet.de)

ordering the company to further limit future CO2 emissions into the atmosphere caused by the business of the Shell group.

Next, we move on to Germany, where on 24 March 2021 the German Constitutional Court gave a landmark order on the constitutionality of the Federal Climate Act. Earlier on, in 2015, in a civil lawsuit, a Peruvian farmer had sued the large German energy producer RWE before the German Regional Court in Essen. While that court rejected the claim, on appeal the Higher Regional Court in Hamm in 2017 declared the claim admissible, and issued an order for the hearing of evidence.

Finally, we turn to the United Kingdom for the *Heathrow* case, the outcome of which is no doubt of particular personal interest to the Collins family since it concerns the conditions for a possible future grant of development consent for the construction of a third runway at Heathrow Airport. In this administrative case, the Court of Appeal on 27 February 2020 ruled the expansion plans for Heathrow airport unlawful because the UK Government had failed to take into account its commitments under the Paris Agreement. While the government accepted the judgment, the owner company of Heathrow airport appealed, and on 16 December 2020 the judgment was overturned by the UK Supreme Court.

2. The Dutch cases[9]

    a. Urgenda v. the State of the Netherlands

This civil lawsuit started in 2013 when the NGO Urgenda, a Dutch foundation, asked the court to order the government to limit the volume of Dutch GHG emissions such that at the end of 2020 this volume would be reduced by 40%, or at least 25%, in comparison to 1990.[10] The case concerned the narrow question of whether Dutch emissions must be reduced by at least 25% in 2020 compared to 1990, rather than by 14-17% which the government claimed was sufficient to ultimately reach the 2°C target[11].

The Hague District Court's judgment of 24 June 2015[12] had the effect of a clarion call in the run up to the Paris Climate Change Treaty negotiations. It broke new ground in several respects. First, the District Court held that the NGO Urgenda could act in the interest not only of the current Dutch population, but also of persons outside the Netherlands and of future generations. Second, the court found that the State was acting unlawfully towards Urgenda for its failure to observe its duty of care ensuing from the open norm of "unwritten law pertaining to proper social conduct" of Dutch tort law[13]. Third, the court held that both the State's duty of care to

[9] For a more detailed discussion, see our "Strategic Climate Litigation in the Dutch Courts: a Source of Inspiration for NGO's Elsewhere?", *Acta Juridica Universitatis Carolinae* 4/2020, 69-84 https://karolinum.cz/data/clanek/8615/Iurid_66_4_0069.pdf

[10] Note that the judgment was rendered before the Paris Agreement which set the target of '…pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels…'.

[11] In the appeal stage, due to a new calculation method more in line with IPCC methodology, the aimed percentage for the state's GHG reduction for 2020 was adjusted to 23% with a margin of uncertainty of 19-27%, still considered unacceptable by the Court of Appeal.

[12] *Rechtbank* Den Haag, ECLI:NL:RBDHA:2015:7145; unofficial English translation ECLI:NL:RBDHA:2015:7196, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196

[13] Article 162 of book 6 of the Dutch Civil Code defines a 'tortious act' as follows:
'1. A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.

avoid dangerous impairment of the living climate and its margin of discretion were informed by the global and European normative framework concerning climate change binding upon the Netherlands. Fourth, the court found that the causal link between emissions from Dutch territory and climate change, including its effects on the Dutch living climate, was sufficiently established. That the current Dutch GHG emissions were limited on a global scale did not alter the fact that they contribute to climate change. Therefore, the government had an obligation to take precautionary measures. The court concluded that the State's duty of care required immediate additional mitigation action to ensure that by 2020 the Dutch GHG emission level was reduced by 25-40%. Given the State's margin of discretion, the reduction order was limited to 25% only.

The Court of Appeal confirmed the District Court's judgment[14], but took a different course both regarding the standing of Urgenda and the legal basis for the reduction order. The District Court had found that Urgenda was barred by Article 34 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and the case law of the European Court of Human Rights (ECtHR) to claim it was itself a victim of a violation of Articles 2 and 8. By contrast, the Court of Appeal held that, regarding access to the Dutch courts, Dutch law[15] was conclusive, and Urgenda's claim was admissible. This shift of focus regarding the *standing* of Urgenda paved the way for a shift in the *legal basis* for the order: the State was failing to fulfil its duty of care pursuant to the positive obligations flowing from Articles 2 and 8 ECHR.

The Supreme Court (the *Hoge Raad*)[16] followed the Court of Appeal. It held that Urgenda had the right to act before the Dutch courts on behalf of Dutch residents who are in fact such victims, and, like the Court of Appeal, based the government's due care obligation not on Dutch tort law but on the ECHR. The *Hoge Raad* decided that the 25-40% target applied to each Annex I country individually, irrespective of EU arrangements.

b. Milieudefensie et al. v. RDS

The Hague District Court's judgment of 26 May 2021[17] in the dispute between the NGO Milieudefensie et al. and the multinational Shell company ("*MD v. RDS"*) has attracted wide interest and even caused commotion. The court found inspiration in, but went far beyond, *Urgenda*. First, because the defendant was a private company, operating in a global market, not a state with jurisdiction over a specific territory. Second, because the issue was not about

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2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. 3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion' (translations from P. Haanappel & E. Mackaay, (eds.), *Netherlands Civil Code, Book 6*, 1990).

[14] *Gerechtshof* Den Haag, 9 October 2018, ECLI:NL:GHDHA:2018:2591, unofficial English translation ECLI:NL:GHDHA:2018:2610, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610

[15] Art. 3:305a Dutch Civil Code.

[16] *Hoge Raad*, 20 December 2019, ECLI:NL:HR:2019:2006, unofficial English translation at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007. See, J. Spier, "The 'Strongest' Climate Ruling Yet: The Dutch Supreme Court's Urgenda Judgment", Netherlands International Law Review (2020), 67:319—391, and C.W. Backes and G.A. van der Veen, "Urgenda: the Final Judgment of the Dutch Supreme Court", Journal for European environmental & planning law 17 (2020) 307-321, [18760104 - Journal for European Environmental & Planning Law] Urgenda the Final Judgment of the Dutch Supreme Court.pdf

[17] ECLI:NL:RBDHA:2021:5337, with unofficial English translation, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5337

current unlawful behaviour as in *Urgenda*, but about possible future unlawful conduct. Third, because RDS, as a private company, was not a Party to the UNFCCC, the Kyoto Protocol, the Paris Agreement, the ECHR, or any of the other treaties the court referred to in its judgment. Fourth, because the 45% reduction target by 2030 defined by IPCC formally applies to states, not to companies.

The court rejected RDS' standpoint that the energy transition required to achieve the goals of the Paris Agreement demands a concerted effort of society as whole, and that the solution should be provided not by a court but by the legislator and executive. The court, similar to the District Court in *Urgenda*, based RDS's duty of care on the open norm pertaining to proper social conduct of Dutch tort law. It considered fourteen factors to give content to this open norm, concluded that RDS was not at present violating its due care obligations, but to avoid this happening in the future RDS should be ordered to further reduce its emissions. RDS has lodged an appeal from the judgment.

3. The German cases

    a. The constitutional challenge of the KSG

In its judgment of 24 March 2021[18] the Constitutional Court (*Bundesverfassungsgericht, BverfG*) ruled that in so far as the Federal Climate Act (KSG) prescribed a reduction of GHG emissions by at least 55% by 2030 relative to 1990 levels and sets out the reduction pathways applicable during this period by means of sectoral annual emission amounts, the legislator had not:

> "violated its constitutional duty to protect the complainants from the risks of climate change or failed to satisfy the obligation arising from Article 20a of the Basic Law[19] ... to take climate action. However, the challenged provisions do violate the freedoms of the complainants, some of whom are still very young. The provisions irreversibly offload major emission reduction burdens onto periods after 2030"[20].

The court thus held back from criticising the 55% reduction by 2030 target, but did censure the lack of sufficient specifications for further emission reductions after 2030. In order to safeguard the fundamental freedoms to future generations also, the legislator should take more detailed precautionary steps. The government reacted promptly, and on 12 May 2021 proposed a revised Act[21]. The revised Act defines for the years 2031-2040 cross-sector annual reduction targets and provides that the government must present in 2032 at the latest a legislative proposal in

[18] Bundesverfassungsgericht - Entscheidungen - Verfassungsbeschwerden gegen das Klimaschutzgesetz teilweise erfolgreich, English summary
https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html

[19] Article 20a Basic Law [Protection of the natural bases of life]:
(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.
Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

[20] See Summary, fn. 18, par. 2

[21] Climate Change Act - climate neutrality by 2045 (bundesregierung.de)

order to legally establish the further annual reduction targets up to net greenhouse gas neutrality by, not 2050 but, 2045, and in addition raises the reduction targets (65% by 2030 and100% by 2045).

b. Saúl Lliuya v. RWE

In 2015 the Peruvian farmer Saúl Luciano Lliuya, with the support of the NGO Germanwatch, filed a civil lawsuit, based on article 1004 of the German Civil Code[22], in the District Court of Essen against the German energy company RWE. Lliuya claimed compensation for the safety measures he had taken to reduce the risk of flooding of the lake above his village Huaraz in the Andes, fueled by the retreat of a glacier as a result of climate change. He based the amount claimed of 17.000 € on the pro rata causal contribution of RWE's historical GHG emissions to global GHG emissions, approximately 0.5%. Contrary to the Dutch cases, the plaintiff in this case did not seek injunctive relief, which requires a relatively low degree of proof of causality, but damages. Therefore, the causal link between RWE's GHG emissions and the risk for Llluyas's property became the key question in this case.
The District Court ruled that it was not possible to prove a causal link between GHG emissions of single emitters and specific climate change impacts. In appeal Lliuya successfully argued that there was a scientifically provable causal chain between RWE's emissions and the increasing danger to his property being exposed to a possible outburst flood caused by a glacial ice avalanche. The Higher Regional Court of Appeal of Hamm accepted that a private company is in principle responsible for its share in causing climate change. The court ordered the taking of evidence on three questions: (i) is there indeed an acute threat to the Lliuya's property by a glacier outburst flood? (ii) Do RWE's historical emissions amount to 0.5% of global emissions since the beginning of industrialization? and (iii) Is there proof that these emissions contributed to accelerated glacier melting and the risk of flooding in Huaraz? The case is still in the evidentiary stage[23].

4. The UK Heathrow case

This administrative case concerned the much debated plans of Heathrow Airport to develop a third runway. Under the Planning Act 2008 (II.1 *supra*), these plans required the Government's support. That support was given on 26 June 2018, when the UK Secretary of State for Transport designated the "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" (the ANPS). The ANPS gave the green light for a new Northwest runway. It set the fundamental *policy* framework within which further planning decisions, via a Development Consent Order (DCO), will be taken.

A court case against the Secretary of State's decision was first brought before the Divisional Court, which found that the UK Government's policy was produced lawfully. Local residents

[22] Article 1004(1) [Claim for removal and injunction]: If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.
[23] For the full texts of judgments and pleadings in English, see https://germanwatch.org/en/14198

and councils, the Mayor of London, Greenpeace, Friends or the Earth and Plan B Earth then brought the case before the Court of Appeal.

On 20 February 2020, the Court of Appeal granting the appeal in part, referring to the precautionary principle, held: "The Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS, but was not… [T]his means… that the Government when it published the ANPS had not taken into account its own firm policy commitments on climate change under the Paris Agreement. That… is legally fatal to the ANPS in its present form."[24]

The government did not challenge the judgment (Prime Minister Johnson had famously declared after his election: "I will lie down with you in front of those bulldozers and stop the construction of that third runway"), but Heathrow Airport Ltd appealed to the Supreme Court, and so the case became a "Hamlet without the Prince"[25]. The Supreme Court reversed the judgment on 16 December 2020[26], and ruled that the Secretary of State when he made his designation followed the advice of the CCC that the existing measures under the CCA 2008 were "capable of being compatible" with the 2050 target set by the Paris Agreement. The words "government policy" in the Planning Act should be given a "relatively narrow meaning so that the relevant policies can readily be identified"[27]. As the domestic implementation of the Paris Agreement was still in development at the time of the Secretary's decision, its formal ratification did not mean that it constituted "government policy". The ANPS was structured in a manner to ensure that when Heathrow Airport actually applied for consent to construct the runway, it would have to show, at that stage, that the runway expansion would be compatible with the up-to-date requirements under the Paris Agreement and the CCA.

IV. Comparative remarks

1. Judicial activism?

Did the Courts in their judgments involving the Dutch, German and UK Governments enter the political domain? The 2015 District Court's *Urgenda* judgment sparked enthusiasm, but also critique because, it was argued, the court overstepped the boundaries of its judicial powers. Many expected that the order would not stand in appeal. But it did. Yet, the confirmation of the order by the Court of Appeal upheld by the *Hoge Raad* met, once again, with considerable criticism. Likewise, in respect of the Court of Appeal's Heathrow judgment, former chancellor

[24] [2019] EWHC 1070 (Admin) [2020] EWCA Civ 214, par. 283, 284
[25] D. Hart, "When is a policy not a policy: Supreme Court on Heathrow expansion", 21 December 2020, https://ukhumanrightsblog.com/2020/12/21/when-is-a-policy-not-a-policy-supreme-court-on-heathrow-expansion/
[26] [2020] UKSC 52.
[27] Ibid. par. 106

George Osborne, followed by others, complained of "overreaching undemocratic judicial activism"[28].

We do not share this view. The courts were right to provide legal protection by ensuring compliance by the executive of its duty of care regarding the GHG emissions from Dutch territory (*Urgenda*) and by ensuring that the correct procedures were followed for setting the government's policy with GHG emissions (*Heathrow*).

Part of the criticism about *Urgenda* (how can an NGO, acting without any check on whether it represents the interests it purports to promote, obtain an order from the courts requiring the state to reduce GHG emissions?) actually concerns the provision in Dutch law on collective actions upon which Urgenda relied, which is an unusually open-ended and hybrid procedural norm[29]. While certainly not beyond criticism, this norm did establish the legislative basis for the courts' taking up of the case. And, as the *Hoge Raad* pointed out, it is up to the courts to decide whether the government and parliament, notwithstanding their large degree of discretion, remained within the limits of the law, including those for the Government arising from the ECHR. Although one may doubt whether the ECHR in fact supported the reasoning of *Hoge Raad*, (see IV.5.), the courts did not overstep their powers. This case was indeed, as the *Hoge Raad* noted, "exceptional"[30]. The government, knowing it should do more to pursue an effective climate policy, nevertheless did not take the necessary action without a credible justification. Parliament let it happen. While pretending to lead, the government in fact stayed behind almost all other EU countries, thereby increasing the risk of irreversible harm to its own population and the rest of the world. Moreover, the government failed to demonstrate that the reduction of at least 25% by 2020 was impossible or disproportionate, and also to provide any insight into which measures it intends to take in the coming years. The State of the Netherlands manifestly fell short of its duty of care.

In contrast to the *Hoge Raad*, the German *BVerfG* is a constitutional court, created to deal with constitutional matters only. Its members are elected by Parliament by a two-third majority. This gives the *BVerfG* the political clout to issue decisions on the constitutionality of legislation if challenged by citizens, political parties or even parts of the government. In the case of the *KSG* judgment, the judgment was criticized, but certainly not as broadly as *Urgenda* in the Netherlands. Indeed, the Constitutional Court deferred considerably more to the government than the *Hoge Raad*, in so far as it respected the GHG emission targets until 2030. Contrary also to *Urgenda*, those targets were defined by law, together with detailed reduction pathways. One may notice a tension between the court's deferring attitude towards the 2030 targets and its criticism of the lack of post-2030 specifications. The government's proposed amendments to the law, however, resolve this tension, by not only providing clarity on the post-2030 policy, but also raising the targets themselves. Perhaps one might say that the court managed, in an elegant indirect manner, to make the government revise its policy beyond the strict limits of what the Constitution in the court's view required.

[28] George Osborne on Twitter: "Judges kill off Heathrow 3rd runway and Britain getting the modern air transport infrastructure we need, despite the elected Parliament voting for it overwhelmingly. Presumably this is the kind of overreaching undemocratic judicial activism Boris wants to curb ... or perhaps not" / Twitter

[29] Article 3:305 a. See article in fn.9, p.71,77.

[30] Judgment, fn. 16, par. 8.3.4.

In comparison with both *Urgenda* and *KSG*, the Court of Appeal's *Heathrow* judgment was a far more modest decision. It did not challenge the government's nation-wide climate change mitigation targets, but reviewed the legality of the 2018 ANPS policy decision regarding one major infrastructure project. And while *Urgenda* and *KSG* concerned the substance of the state's conduct and legislation, *Heathrow,* as the Court of Appeal stressed, dealt with a purely procedural issue. Also, there is nothing in the Supreme Court's reversal of the judgment suggesting that the Court of Appeal overstepped its powers.

The *MD v. RDS* case was directed not against the government but a private company. Yet, building on *Urgenda,* the Hague District Court ordered RDS "to limit…the aggregate annual volume of all CO2 emissions into the atmosphere …due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels"[31]. One may agree with the court that "[a]ssessing whether or not RDS has the alleged legal obligation and deciding on the claims based thereon is pre-eminently a task of the court". The question is, however, whether the legal foundation for this legal obligation by the Court is sufficiently strong (see IV.5.). The case of *Lliuya v. RWE* is different: there the issue is whether it is possible to attribute fractions of the *historical* accumulation of CO2 in the atmosphere to a given company and to claim damages accordingly.

2. The extraterritorial aspect: responsibility towards people living abroad

Urgenda initially brought the case both on its own behalf and on behalf of 886 individual persons, including people living outside the Netherlands. The District Court held that Urgenda, in so far as it was acting on its own behalf, could act in the interest not only of the current Dutch population but also of persons outside the Netherlands, and of future generations, since "all of them hav[e] an interest in a sustainable society which [Urgenda] seeks to protect"[32]. The court thus acknowledged that climate change affects people around the globe, and, by implication, that it affects them unevenly regarding time, space, severity of, and capability to cope with, its impacts. As the individual plaintiffs lacked any additional personal interest, their claims were denied.[33] The Court of Appeal confirmed the District Court's order. However, contrary to the District Court's ruling that Urgenda was barred from relying on the ECHR, the Court of Appeal took the view that it could, and that its claim was "already admissible insofar as Urgenda acts on behalf of the interests of the current generation of Dutch nationals…"[34]. The *Hoge Raad* followed suit. Both higher courts – though without rejecting the District Court's view – thus focused on the vertical relation between the State of the Netherlands and persons "within [its] jurisdiction" (Art. 1 ECHR). They thereby narrowed the dispute to the interests of the current *Dutch* population (Court of Appeal) or residents (Supreme Court). The interests of people living outside the Netherlands, foremost inhabitants of developing countries, the "Global South", who are particularly vulnerable to the adverse effects of climate change – as recognized in the Kyoto Protocol and the Paris Agreement – were thus out of sight.

[31] Judgment, fn. 17, decision 5.3.
[32] Judgment, fn. 12, par. 4.6-4.8.
[33] One would have expected the Court to declare these claims inadmissible instead of denying them. The decision was not questioned in appeal, so that these individual claimants were no longer involved in the case, which reinforced the abstract nature of the claim and the case.
[34] Judgment, fn. 14, par. 37.

By contrast, the *BVerfG* in *KSG* declared the complaints by individuals admissible but denied the standing of two environmental associations. As a result, this judgment was about individual people, not about Germany's population as a whole. Moreover, the court took account of the fact that the individual complainants included people living in Bangladesh and Nepal. The court admitted that under the German Constitution the government may have a duty to reduce German GHG emissions not only towards persons living in Germany but also those living abroad[35]. "In their home countries, the complainants are particularly exposed to the consequences of global warming caused by GHG emissions. Due to the global effects of greenhouse gases, further global warming can only be halted through climate protection efforts by all countries. To this end, GHG emissions must also be reduced to a climate-neutral level in Germany", and a possible constitution-based legal obligation "would be that the serious impairments to which the complainants could (further) be exposed due to climate change are caused, albeit to a small extent, by GHG emissions emanating from Germany"[36].

As the court implicitly recognizes the possibility of a causal link between exposure to the effects of climate change and GHG emissions from German territory, these passages will be read with interest by the parties in *Lliuya v. RWE.* The content of this constitutional duty of care regarding persons abroad, however, according to the *BVerfG* is not necessarily the same as that towards persons living in Germany. Although Germany has a general obligation to reduce CO2 emissions, its overall duty of care is a mix of measures of mitigation and of adaptation. Yet, Germany has no jurisdiction to take measures of adaptation in Bangladesh or Nepal. Ultimately, the Court found no violation of fundamental rights towards these plaintiffs.

The *Heathrow* case was brought by, among others, two international NGO's, Greenpeace and Friends of the Earth. But as pointed out already, contrary to both *Urgenda* and *KSG*, this case did not deal with substantive issues but with a specific procedural point, which did not affect its ultimate substantive outcome. The interests of persons outside the UK were not directly at stake.

In *MD v. RDS*, the District Court went a step further than the Court of Appeal and the *Hoge Raad* in *Urgenda*. After declaring the claims of the 17,379 individuals inadmissible, it curiously decided that Milieudefensie's claim *could* not be admitted in so far as it extended to "the interests of current and future generations of the world's population…Although the entire world population is served by curbing dangerous climate change, there are huge differences in the time and manner in which the global population at various locations will be affected by global warming caused by CO2 emissions. Therefore, this principal interest does not meet the requirement of 'similar interest' as required [for the representation of interests by NGO's under Dutch law]"[37]. That the global population's interests are diverse is of course correct. But that does not detract from the all-prevailing common, indeed "principal" interest of the global population. Indeed, the court's heavy reliance on human rights in its assessment is difficult to reconcile with its decision not to consider the interests of individuals and local communities in developing countries. While the human rights of many of them are clearly at stake, this is doubtful with regard to *the* Dutch population.

[35] "Art. 1 (3) of the Basic Law does not restrict the binding of the German state to fundamental rights on the national territory, but establishes a comprehensive binding of the German state authority to the fundamental rights of the Basic Law".
[36] Judgment, fn. 18, par. 174,175.
[37] Judgment, fn 17, par.4.2.3, referring to Article 3:305a Dutch Civil Code, cf. fn 15. .

3. The intertemporal dimension: the interests of future generations

While, as we saw, the Hague District Court had found that Urgenda could act in the interest not only of the current but also of future generations, the higher Courts restricted the scope of the dispute to the interests of the *current* Dutch generation, and found that their interests justified the GHG reduction order.

By contrast, in *KSG*, the *BVerfG* placed full emphasis on:

> "the requirement arising from the principle of proportionality that the reduction in CO2 emissions to the point of climate neutrality that is constitutionally necessary…be distributed over time in a forward looking manner that respects fundamental rights…[Therefore], one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom… [This requires] that precautionary steps are taken to manage the reduction efforts anticipated after 2030 in ways that respect fundamental rights… Transparent guidelines for the further structuring of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes …and planning certainty. ... While it cannot be expected that the decreasing emission amounts already be precisely defined from the present time until the date envisaged for achieving climate neutrality in 2050, it is nonetheless insufficient that the Federal Government is only obliged to draw up a new plan once – in 2025 – by means of an ordinance"[38].

Jointly with the *BVerfG*'s acceptance, in principle, of a constitutional duty towards persons living abroad, this ruling reinforces Germany's constitutionally based current and future responsibility worldwide regarding CO2 emissions[39].

Although in *Heathrow* the Court of Appeal did not raise any fundamental principles of fair distribution of Government's responsibilities over current and future generations, its decision breathes a similar "forward looking" spirit as the *KSG* judgment, in so far as it found that the Secretary of State had not taken the Paris Agreement sufficiently into account. The Supreme Court's overturning judgment was watertight from a formal legal perspective. But the Court, which dismissed the Court of Appeal's reliance on the precautionary principle[40], might have conveyed, through its judgment, albeit *obiter*, more of the sense of urgency to reduce global warming that was also reflected in the CCC reports[41].

[38] Summary, fn.18, under III.3.
[39] Cf. F. Bierman Germany's climate law ruled unconstitutional: First reflections (frankbiermann.org) , and J. Spier http://blogs.law.columbia.edu/climatechange/2021/05/10/guest-commentary-a-ground-breaking-judgment-in-germany/-breaking Judgment in Germany.
[40] Par. 165.
[41] Including the CCC's *The Sixth Carbon Budget*, published 9 December 2020.

In *MD v. RDS* the focus was again on the current residents of the Netherlands, which makes the question all the more pressing whether the court was right in its finding, based in part on human rights grounds, that those *current* interests justified the order against RDS.

4. The role of the UNFCCC, the IPCC and the Paris Agreement

The District Court in *Urgenda* based its finding that the Government had failed to observe its duty of care on the rule of unwritten law pertaining to proper social conduct referred to in the Dutch Civil Code[42]. With this duty of care being an 'open norm', the court set itself the task of determining its content in the case at hand.

To this end the court referred to international and European legal texts. Although those norms did not create rights that Urgenda could directly invoke, they did have a "*reflex effect*" upon the State's duty of care, which should be interpreted so as to avoid a conflict with its international obligations. These obligations, moreover, had to be considered in the light of the reports of the IPCC. The IPCC had determined that developed countries listed in Annex I to the Kyoto Protocol such as the Netherlands, should reduce their emissions in by 25-40% by 2020 in comparison to 1990 levels. In essence, although via a different route, the Court of Appeal and the Supreme Court followed the same reasoning. Since the Paris Agreement had entered into force in the meantime, these Courts could refer to this treaty in addition. The Supreme Court concluded that, although the 25-40% target was not a binding rule or agreement itself, there was a high degree of international consensus on the urgent need for the Annex I countries to reach that target, in order to achieve at least the 2°C, the maximum target to be deemed responsible. This target applied to each Annex I country individually, irrespective of EU arrangements.

The *BVerfG* in *KSG* based its ruling on the German Basic Act, but added that although it follows from Article 20a that GHG emissions must be reduced, this constitutional climate goal "is more closely defined in accordance with the Paris target as being to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels". Contrary to the Dutch courts, the *BverfG* did not specify any detailed consequences or concrete policies, as the Paris Agreement "left this to governments and parliaments". However, as we saw (IV.1), indirectly, the court's judgment caused the government to raise Germany's reduction targets.

In *Heathrow,* the Court of Appeal ruled that the Secretary of State failed to take the Paris Agreement into consideration. The Supreme Court, while recognizing that the Paris Agreement was "[at] the heart" of the case, disagreed. Contrary to the *Hoge Raad* and the *BVerfG*, which looked to the Paris Agreement for guidance in the interpretation of the law, the Supreme Court was satisfied that the UK's obligations under the Paris Agreement were given sufficient consideration in the Secretary of State's decision. Further reference to the Paris Agreement was, at this stage, not required.

In *MD v RDS,* the Hague District Court, while admitting that the Paris Agreement is binding on the ratifying States only and not RDS, observed that the States parties:

[42] Fn. 13 *supra*.

> "have sought out the help of non-state stakeholders…Since 2012 there has been broad international consensus about the need for non-state action, because states cannot tackle the climate issue on their own… the IPCC has found that the member states' national reduction pledges for 2030 added together are far from sufficient for reaching the goals of the Paris Agreement …it is generally accepted that global warming must be kept well below 2°C in 2100, and that a temperature rise of under 1.5°C should be strived for… in doing so [the court] does not formulate a legally binding standard for the prevention of dangerous climate change in the Netherlands …The court includes this broad consensus about what is needed to prevent dangerous climate change – viz. achieving the goals of the Paris Agreement – in its answer to the question whether or not RDS is obliged to reduce the Shell group's CO2 emissions via its corporate policy. [Moreover] the court includes [the] broad consensus [about the reduction pathways of CO2 emissions by net 45% in 2030, relative to 2010 levels, and by net 100% in 2050], in its interpretation of the unwritten standard of care. Again, the court does not formulate a legally binding standard for .. a reduction pathway to be chosen."[43.]

But can the insufficiency of the obligations established by the Paris Agreement for states be repaired via an obligation derived from the civil tort law of *one* State Party in respect of *one* multinational company that happens to be based in that State?

The case of *Lluya v. RWE*, as we saw, is based on German tort law, article 1004 BGB. Although reference is made in the pleadings to foreign judgments including *Urgenda* they do not rely on the Paris Agreement.

5. Human rights aspects

The *Hoge Raad* in *Urgenda* based the due care obligation of the Dutch government towards Urgenda on Articles 2 and 8 ECHR. The Court stressed the serious risks of climate change for Dutch residents (sea level rising, heat stress, deteriorated air quality, increasing spread of infectious diseases, excessive rainfall and disruption of food production and drinking water supply). The fact that these risks would only become apparent in a few decades did not mean that Articles 2 and 8 ECHR would not offer protection against this threat. Therefore, the risks caused by climate change were sufficiently "real and immediate", as required by the ECtHR's case law to bring them within the scope of Articles 2 and 8.

One can agree with the *Hoge Raad* that Articles 2 and 8 ECHR may, in principle and under the appropriate circumstances, offer protection to individuals and local communities against harm caused by climate change, all the more because of its irreversible effects. Articles 2 and 8 indeed establish, largely overlapping, positive obligations for national authorities, and offer protection in the case of serious, specific and immediate risk[44]. However:

> … the Convention does not allow complaints in abstracto alleging a violation of the Convention. The Convention does not provide for the institution of an actio popularis, meaning that applicants may not complain against a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the

[43] Judgment, fn. 17, 4.4.26-4.4.27

[44] Cf. also T. Eicke (Judge in the ECtHR) , "Human Rights and Climate Change: What Role for the European Court of Human Rights", 2 March 2021, https://www.coe.int/en/web/portal/-/human-rights-and-climate-change-what-role-for-the-european-convention-on-human-rights, - para. 39 et seq.

> Convention. In order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect [45].

We do not think, in the light of the ECtHR's case law, that, in the circumstances of the *Urgenda* case, and certainly not given the narrow issue at hand, it is a tenable position to say that "the *residents of the Netherlands*" are currently (potential) victims of a violation of their human rights under Articles 2 and 8 ECHR. The factual basis to which the *Hoge Raad* refers is weak. Moreover, the *Hoge Raad* – contrary to the *BVerfG* in *KSG* – does not take into account the effect of adaptation measures which a rich Annex I country like the Netherlands can, must and will take to prevent harm. The position of the *Hoge Raad* is also hardly defensible if one compares this case with cases of vulnerable people elsewhere on our planet - whose interests the *Hoge Raad* excludes from its considerations. Such an overly broad interpretation of Articles 2 and 8 risks stripping these human right provisions of their effectiveness[46]. The court having the choice to base the State's duty of care on civil tort law (following the District Court) or human rights (following the Court of Appeal)[47], chose the latter option. While agreeing with the outcome of the Supreme Court's judgment, we believe that the District's Court reasoning is more compelling than that of the Supreme Court[48].

The legal context of *KSG* was very different from *Urgenda*, because there it was not the ECHR, which lacks a provision on environmental damage, but the German constitution which does include such a provision.

Although the parties in *Heathrow* included human rights organisations, the arguments were based essentially on the Paris Agreement, which contains no substantive provision making the link between climate change and human rights[49].

In *MD v. RDS*, the District Court, as we have seen, based RDS's duty of care on the unwritten rule of Dutch tort law pertaining to proper social conduct. Although the court recognized that Articles 2 and 8 ECHR apply in the relations between citizens and the State only, so that Milieudefensie could not directly invoke them against RDS, the court "factor[ed] the human rights and the values they embody in its interpretation of the unwritten standard of care". The District Court in *Urgenda* had followed a similar reasoning, but there the defendant was the state, bound by the ECHR. Here, one would have expected the court to elaborate more on this "horizontal effect" of human rights in the relation between two private parties. Still, referring to *Urgenda*, the court went on to hold that the "serious and irreversible consequences of dangerous climate change in the Netherlands ... pose a threat to the human rights of Dutch residents…"[50] This argument suffers from the same weaknesses as that of the *Hoge Raad* in *Urgenda*. It *could* have been more compelling if invoked on behalf of individuals or local communities, in particular from parts of the Global South, exposed to serious, specific and

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[45] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC], No 47848/08, § 101, ECHR 2014 and case law cited therein (in relation to Article 34) and similar case law on Article 6.
[46] See, in more detail, article in fn. 9
[47] Cf. the Procurator General's advisory opinion, par. 6.16, ECLI:NL:PHR:2019:887; unofficial English translation ECLI:NL:PHR:2019:1026, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026
[48] See, on the human rights aspects also Spier (fn. 15), 322-325 and Backes and Van der Veen (fn. 15), 312-315.
[49] WWF-UK, allowed to intervene, argued that when the Secretary of State exercises his functions under the Planning Act with the objective of achieving "sustainable development" this must be interpreted in the light of the United Kingdom's obligations, in particular, under the 1989 UN Convention on the Rights of the Child.
[50] Judgment, fn.17, 4.4.9, 4.4.10.

immediate risks. But, as we saw (IV. 2.), they were excluded by the court's decision that the plaintiffs *could not* act on their behalf. Nonetheless, the least one can say is that this judgment animates the discussion on the role of (fossil fuel) companies' responsibility in dealing with, the warming of the Earth.

In *Lliuya v. RWE* human rights arguments have not been raised so far.

6. Private international law aspects

This brief comparison obviously has its limits. Even so, it would be incomplete, in the light of Lawrence Collins interest in and major contributions to the conflict of laws, if it did not briefly touch on private international law aspects of some cases.

Before the District Court in *Urgenda*, which held that the NGO could act on behalf of worldwide interests, Dutch law was applied to the tortious negligent conduct of the Dutch state without further ado[51]. Since the higher Courts only considered the interests of the Dutch population as being represented by the NGO, and so restricted the locus of the (threat) of damage to Dutch territory, they avoided applicable law issues.

By contrast, in *MD v. RDS* both parties raised issues concerning Article 7 Rome II, invoked by Milieudefensie[52]. The court held, with the parties, that (dangerous) climate change due to CO2 emissions constitutes "environmental damage". Regarding the question of what constitutes "the event giving rise to the damage", the plaintiffs argued that this was the corporate policy as determined by RDS in the Netherlands, and that their choice of law for the country in which this event occurred led to the applicability of Dutch law. RDS did not contest that its corporate policy is or may be of influence on the group's CO2 emissions. However, in its view, its corporate policy was a preparatory act that fell outside the scope of Article 7 because the mere adoption of a policy does not cause damage. The "event giving rise to the damage" were the actual CO2 emissions, which therefore led to the applicability of a plurality of legal systems.

The court, however, sided with the plaintiffs:

> "Although Article 7 Rome II refers to an 'event giving rise to the damage', i.e. singular, it leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage…. RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents…."[53]

[51] Regulation (EC) No 864/2007of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), would probably not have been applicable because of its exclusion in art. 1 (1) of "the liability of the State for...omissions in the exercise of State authority…"(see Dicey, Morris and Collins, *The Conflict of Laws*, Vol. 2, 34-015). Under the Dutch Private International Law Act, Art. 10: 159 Dutch law is applicable to obligations arising from the exercise of Dutch public authority.

[52] Art 7 Rome II: Environmental damage:
The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be [the law of the country in which the damage occurs], unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

[53] Judgment, fn.17, 4.3.1.-4.3.7.

Presumably, the decision that climate change due to CO2 emissions constitutes "environmental damage" should be understood in the sense that *specific, concrete damage*, such as impairment of water, soil, air, ecosystems and species, personal injury or material damages, *resulting from* climate change due to CO2 emissions constitutes such damage. Also, the reasoning of the Court regarding "the event giving rise to the damage" is not entirely clear. Is (the adoption of) a policy an "event giving rise to damage"? If so, one would presume that it is this single "event" causing damage across the planet, so that persons around the world claiming damage as a result of this "event" may also, under Article 7 Rome II, choose Dutch law.

In the ongoing *Lliuya v. RWE* case, the plaintiff is based in Peru and the defendant in Germany. The plaintiff's statement of claim sets out in detail the jurisdictional ground (Brussels I Recast) and designates, in respect of the applicable law, German law. Since "there is no singular event giving rise to damages, but rather a chain of damaging events", this choice of German tort law is based on Article 7 Rome II for the period after 11 January 2009 (date from which it applied), and for the period before, on the pre-existing analogous rule of German private international law. The courts have not (yet) discussed these private international law aspects. But in contrast to *MD v. RDS*, here the issue is not RWE's climate *policy*, but its concrete GHG *emissions* and their causal relationship to the damage in Peru. Therefore, and since the jurisdiction of the German courts is beyond doubt, no significant private international law questions are likely to arise in this case.

7. Concluding Remarks

1. One thing appears very clearly from the recent judgments here discussed: the courts in all three countries, the Netherlands, Germany and the United Kingdom, now take climate change actions very seriously. But they deal with the claims in different ways, and their deference to the legislator and the executive varies according to the robustness of their domestic climate laws and the diligence of their executive branch in respect of GHG emission control.

2. The UK was first to adopt an ambitious Climate Act in 2008 with an effective monitoring system. In *Heathrow,* the UK Supreme Court refrained from correcting the executive regarding its plans for the airport's expansion, and even the Court of Appeal, though disapproving of the executive's conduct emphasized that its judgment was simply procedural. The *BVerfG* corrected the Climate Act 2019 on constitutional grounds, but only regarding its time frames for future reduction measures. Undoubtedly, the Dutch courts went furthest in directing the government to act on the warming up of the Earth. This can be understood, and justified, in the light of the flawed legal framework and the government's negligent conduct.

Most recently, the Hague District Court extended the responsibility for climate change damage to future emissions by a private company, RDS, holding it subject to a standard similar to that for states. It would seem unlikely that courts in Germany or the UK would follow this path, and, indeed, it remains to be seen whether this judgment will be upheld on appeal, in particular in so far as it extends to the "sold energy-carrying products of the Shell group".

3. The courts differ in the way they take the interests of persons outside their own jurisdiction into account. In *Urgenda*, the District Court admitted that the plaintiff could act on behalf of current and future generations worldwide, yet the higher courts only considered the interests of the current Dutch population or residents. In *MD v. RDS* the court even ruled that only the interests of the current Dutch residents were admissible. In *KSG* the *BVerfG* accepted that the

government's constitutional responsibility to control GHG emissions in principle also extends to the interests of persons outside Germany and recognized the particular vulnerability of those in the Global South. In *Heathrow*, the interests of persons outside the UK were not explicitly addressed. *Lliuya v. RWE* illustrates how CO2 emissions from Germany may lead to claims from persons living in other continents.

4. Climate change affects current and future generations. Again, in *Urgenda* the District Court recognized the interests of future generations, yet those interests were not considered by the higher courts nor by the District Court in *MD v. RDS*. In contrast, the interests of future generations were key to the German *KSG* decision, which led the government to propose a new bill that also tightened the law's targets. The Court of Appeal's decision in *Heathrow* reflected a concern about insufficient consideration by the executive of future GHG emissions. However, the Supreme Court saw no legal fault in the government's conduct.

5. Through the Paris Agreement, states have embraced the aim of limiting the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. The implementation, path and pace of GHG reduction is left to the individual states "in accordance with equity and the principle of common but differentiated responsibilities and respective capabilities". "Paris" does not create rights and obligations for individuals. Yet, *Urgenda*, *KSG* and *Heathrow* show different ways in which individuals may still invoke the Agreement. In *Urgenda*, the Agreement informed the decisions of the higher courts. In *KSG* the *BVerfG* interpreted the German constitution in light of the Agreement, and in *Heathrow* the Agreement was at the heart of the case, the Court of Appeal ruling that the government had failed to take it into account, but the Supreme Court deciding that it had sufficiently considered it.

The Hague District Court in *MD v. RDS* based its decision on the standard of due care of Dutch tort law, which RDS must observe. In determining the obligations that follow from this standard for RDS, the Court ruled that although RDS is not bound by the Paris Agreement, its obligations are nonetheless informed by the goals of the Agreement.

6. Climate change is ubiquitous. Yet private international law is not (yet) prominent in these cases. It could have been raised in *Urgenda*, but was not. On the other hand, *Lliuya v. RWE* offers an archetypical example of a private international law case. The special article on environmental damage of Article 7 Rome II supports the plaintiff's argument for the applicability of German law, as the law of the "event giving rise to the damage", i.e. the emissions from German territory. This article is also central to the most recent, but not evident, decision of the District Court of the Hague that RDS' global corporate policy constitutes itself such an "event".

7. It is estimated that over 1800 climate lawsuits in 35 countries have already been brought against governments and corporations[54]. While more than 1600 of these cases have been filed in the USA, clearly the rest of the world is warming up to increase the volume of cases. In so far as states' legislative and executive branches fail to act upon the IPCC recommendations and the Paris Agreement, the climate crisis makes court action crucial. Civil climate litigation against companies is still in an early stage. The cases above demonstrate some of the challenges courts are already facing, but also some impressive, encouraging developments.

[54] See Climate Change Litigation Databases - Sabin Center for Climate Change Law (climatecasechart.com)