State obligations in National and International Law to mitigate and adapt to climate change and law enforcement by climate change litigation

Stephanie ROLHFING-DIJOUX

Professor at the University of Paris Nanterre

Centre de Recherches Pluridisciplinaires Multilingues (EA 4418)

With the accelerating realities of climate change, all regions of the world are at risk. Increasing heat waves (42°C last summer in Paris), during the previous two decades, the flooding occurrences were heavier and more often, rising water temperatures, led to irreversible damages to the environment crossing all borders. All States have to make efforts to reduce carbon emissions and curb climate change.

States took engagements related to climate change on different levels. One of the primary sources for these State obligations issued by international law is the Paris agreement of 2016[1]. It sets different levels of State obligations, but most of them remain soft law. Nevertheless, they may lead to an individual or joint responsibility of a State in case of violation of the contractual targets. General international environmental law may equally be a source of State obligations for environment protection resulting from the principle of due diligence and the no-harm rule.

Moreover, this article considers national, international and European Union law rules as a base for a court action in environmental law concerning Germany, France and EU and the question of how these States have ratified the Paris agreement.

The legal situation is one side, the other important side concerns the enforcement of national and international rules. Here, there has been a turning point in recent years. In the jurisprudence of various countries, the state has been

[1] *Paris Agreement,* 4 November 2015, retrieved from http://treaties.un.org on the 2.12.20.

condemned by the courts to comply with the environmental protection goals to which it has committed itself in international agreements. Recent examples in France and Germany demonstrate this trend[2] . In some countries these actions can also be brought by private groups in the form of public interest litigation.

However, not only lawsuits against the state, but also private law enforcement contribute to forcing compliance with climate targets. These are pursued through class actions or individual claims for damages. The different types of lawsuits are illustrated by examples in Part 2.

I. Sources of Law

A. General International Environmental Law

Climate change is a global phenomenon, and hence only a global approach with international and worldwide involvement could be able to show measurable results. In the last decades, various international agreements and international customary law in the field of environmental law created State obligations, but also sources of national law by ratification. Various international agreements serve the protection of the earth atmosphere and climate protection.

The first important step in this field was the Vienna Convention for the protection of the Ozone Layer adopted in 1985 and entered into force in 1988[3] and the Montreal Protocol on substances that deplete the ozone layer adopted in 1987[4]. In 2016 the parties of the former Montreal Protocol Treaty decided on a conference in Kigali to extend the state obligations on a reduction of hydrofluorocarbons (HFCs) emissions[5].

Since the first world environment conference in 1992 in Rio de Janeiro, where the member States adopted the United Nations Framework Convention on

[2] Decision of the First Senate of the Federal Constitutional Court (BVerfG) of 24 March 2021 (1 BvR 2656/18 et al.); Conseil d'Etat, 19 November 2020, *Commune de Grande-Synthe v. France* op. cit. infra note 21.

[3] The Vienna Convention for the protection of the Ozone Layer of 22 march 1985 retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2&chapter=27&clang=_en on the 2.12.2020.

[4] The Montreal Protocol on substances that deplete the ozone layer of 16 september 1987, retrieved from https://www.environment.gov.au/protection/ozone/montreal-protocol on the 2.12.2020.

[5] The Kigali Amendment to the Montreal Protocol of 14 October 2016, retrieved from https://www.unenvironment.org/news-and-stories/news/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate on the 2.12.2020.

Climate Change (UNFCCC)[6], conferences on climate and environment protection (COP) have taken place since 1995 every year. The framework convention provides for a progressing concretisation of measures for limitation anthropogenic emissions of greenhouse gas emissions. The concretisations came with the other agreements that followed.

On the world climate conference in Kyoto in 1997, the Parties found a compromise on a convention on a successive reduction of greenhouse gas emissions embodied in the Kyoto Protocol[7].

In December 2015[8], the contracting Parties of the Framework Convention on Climate Change set out with the Paris agreement[9] (PA) a global framework to avoid climate change by global warming. This Agreement is the most important international convention of the last years in the field of climate protection because it is not only creating climate policy objectives but a concrete obligation for reduction of greenhouse gas emissions of every member State. One hundred ninety-five States out of one hundred ninety-seven adopted the Paris agreement and one hundred eighty-nine States ratified it until now. The Paris Agreement entered into force on November 4, 2016.

Following the Paris agreement (PA), member States have to adopt two types of measures to combat climate change: anticipatory measures with the aim to a limitation of degradation of climate change and adaptation measures with the objective of containment of effects of climate change[10].

The PA is a keystone of collective efforts to limit global warming and to avoid catastrophic harm, especially for developing countries and low-lying island States. Greenhouse gas emissions are fundamentally responsible for global warming and produce a significant rise in the sea level. The aim of the PA is limiting these emissions on an international level and local consequences of global warming.

The PA is divided into two separate parts: firstly, the adoption of National Determined Contributions (NDC's) and Intended National Determined Contributions (INDC's) with the aim to a limitation of the global warming in the

---

[6] The United Nations Framework Convention on Climate Change (UNFCCC), retrieved from https://unfccc.int/resource/docs/convkp/conveng.pdf on the 2.12.2020.
[7] The Kyoto Protocol of 11 december 1997 , retrieved from https://unfccc.int/kyoto_protocol on the 2.12.2020.
[8] December 12 2015, at the 21. Conference des United Nations on climate change « COP 21 ».
[9]The Paris Agreement on climate change of 22 april 2016, Retrieved from https://unfccc.int/fr/process-and-meetings/the-paris-agreement/l-accord-de-paris on the 2.12.2020.
[10] M. HERDEGEN, *"Internationales Wirtschaftsrecht*", München 2017, § 8, Rn.18, p.124.

next decades and secondly in the Annex measures of adaptation and loss and damages concerning the cost of climate change.

The obligation of States to stipulate NDC's and INDC's for the limitation of warming on less than 2°C (and if possible, less than 1,5°C) is the core of the PA. The States shall review these contributions every five years. The use of the verb "shall" in a clear peremptory language shows that it is considered as an obligation of the States. The Agreement also establishes an obligation of the States regularly having to submit NDC's to the UNFCCC secretariat. States are also obliged to upgrade their NDC's with progression periodically. It represents an obligation to the advancement and reflects its highest possible ambition.

Alongside the State obligations to limiting climate change, the PA contains in its second part measures for adaptation. The general lines of these measures are a Warning system for Natural Catastrophes, the Risk Management an Information Exchange (with Transparency), a Climate Risk Insurance and Financial and Technological Support of Developing Countries. The rules concerning Loss and Damages are in Art. 8 of the Paris Agreement. We come back to these rules in the second part of the article relative to climate change litigation.

The PA is supposed to be implemented according to the principle of common but differentiated responsibility (CBDR) as established in Art. 2 paragraph 2 "This Agreement will be implemented to reflect equity but differentiated responsibilities and respective capabilities, in the light of different national circumstances". The quotas for the reduction of CO_2 emissions are not fixed by this treaty but are nationally determined in light of the possibilities of the country. The developed countries have to support financially developing countries (Art. 9).

The PA is a special law in the field of climate change, but until the PA doesn't have a special stipulation, General International Environmental Law remains applicable. States have to regulate activities on their territory in a way that does not harm other States.

The latest Climate summit was held in Madrid in December 2019 (COP 25) without having made significant progress in the fight against climate change. In 2020 no climate conference could be held because of the COVID-19 pandemic. However, a platform, "Climate Change Dialogues 2020", has been set up by the UNFCCC[11].

Besides the special agreements, General International Environmental Law remains applicable but is subsidiary to the PA. International law contains a

[11] The Climate Change Dialogues 2020 of 23 november-4 december 2020, retrieved from https://unfccc.int/cd2020 on the 2.12.2020.

principle that the sovereignty of a State is limited in the way that the State can't do or tolerate measures or private actions that could have an environmental impact on a neighbour State. International arbitration sentences recognised this principle. In the *Trail Smelter Arbitration* (USA v. Canada)[12] this general "No Harm Rule" has been developed a long time before the PA. This rule concerns the principle of precaution and prevention and establishes the principle of liability of a State for border crossing environmental activities.

Already in this decision of 1941, the Arbitral tribunal founded the preventive liability of a State to prevent environmental damages on the territory of other States. After the principles of precaution and prevention, the liability for damages of border crossing environmental activities (loss and damages) has been established[13].

The jurisprudence of the International Court of The Hague has confirmed the constitutional duty of care of States[14]. It results in a due diligence obligation of each State for the enforcement of the NDC's and the general limitation of climate change.

The concept of sustainable development with the aim to harmonize economic development and careful use of natural resources was developed in the late 1990s. It constitutes an interpretation rule for International environmental law. Moreover, the precautionary principle plays a central role. It protects not only against scientifically proven risks but also against other threats of serious or irreversible damage even if the causality is not fully established. This principle is also integrated in Art. 191(2) TFEU in European Union law. The principle also results from Art. 8 ECHR[15].

A violation of the NDCs is considered as a violation of international obligations and can lead to a joint and individual responsibility of the States. A breach of the INDCs is regarded as a violation of the due diligence rule and constitutes hence an internationally wrongful act engaging the responsibility of the State. It results in a due diligence obligation of each State for the enforcement of the NDCs.

---

[12] *Trails Smelter* casa (United States, Canada) 16 April 1938 and 11 March 1941, https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

[13] M. HERDEGEN, "§ 8, Rn.5, 6, p. 116".

[14] International Court of Justice, Case concerning *Pulp Mills on the River of Uruguay* (Argentina v. Uruguay), ICJ reports 2010, p.14 para 204.

[15] ECHR, *Tatar v. Romania*, Judgment of 27 January 2009, Application no 67021/01.

B. European Union Law

The European Union law has enshrined the fight against climate change as an objective of the Union's policy in Art. 191(1) TFEU[16]. The European Union has got in Art. 191 ss. TFEU a special competence for supranational law for the protection of the environment.

Hence, in 2002, the European Union has ratified the Kyoto Protocol and in 2016 the PA, which provides for limiting global warming to 1.5°C - 2°C above pre-industrial levels by the end of the century. As a result, climate and environmental interests are generally integrated into EU law and used for interpretation and application of all provisions of the TFEU[17]. However, this provision does not imply any concrete obligations for the Member States and does not call for specific measures to be taken[18]. Special EU regulations contain concrete commitments by the member States to limit global warming[19]. Member States must also give concrete expression to this general principle in their national legislation. They did it according to the principle of common but differentiated responsibility (CBDR).

C. National Law

1. France

For implementing this commitment, the European Union and its Member States have decided to reduce their emissions by 30% from 2005 levels by 2030, with a target of 37% for France. Besides, France has set itself, by law, an even more ambitious target of reducing its emissions by 40% in 2030 compared to 1990.

To achieve France's individual CO_2 reduction target, the Government has adopted by decree a reduction trajectory extending over four periods (2015-2018, 2019-2023, 2024-2028 and 2029-2033), each with a progressively decreasing emissions ceiling (known as the "carbon budget")[20]. A later decree of April 21, 2020, postponed part of the emission reduction effort to be made after 2020 and in particular after 2023.

---

[16] EPINEY A., "*Umweltrecht in der europäischen Union"*, 3. Auflage 2013, p .153.
[17] Art. 11 TFEU.
[18] W. FRENZ, "EU Digitalisierung : Datennutzung – Wettbewerb – Klimaschutz", EuR 2020, p. 210, 228.
[19] Regulation (EU) 2018/842 of the European Parliament and of the Council of May 30 2018 available online at http://data.europa.eu/eli/reg/2018/842/oj on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013.
[20] https://www.ecologie.gouv.fr/strategie-nationale-bas-carbone-snbc on the 6.4.2021.

In a recent case, a French coastal village, named Grande-Synthe, and situated close to the English Channel was particularly concerned by the climate change in the form of the sea-level rise. The municipality brought proceedings before the Conseil d'Etat against the French State for failure to fulfil its obligations under those regulations.

In a decision of November 19 2020, the Conseil d'Etat asked the Government to justify that its refusal to take more stringent measures is compatible with compliance with the 2030 target[21]. The French Government has three months to explain that the State can fulfil the targets until 2030 despite the delays accumulated during the last years. This decision was the first time in France that a jurisdiction controlled the compliance of the State with the targets limiting global warming.

2. Germany

The Climate Protection Act of December 2019 (*Klimaschutzgesetz* - KSG)[22] sets out the targets for greenhouse gas reduction in Germany. The Act sets binding greenhouse gas reduction targets for the years 2020 to 2030 in the various sectors as permissible annual emission quantities. Accordingly, Germany has to reduce greenhouse gas emissions by at least 35 % in 2020 and by at least 55 % until 2030 (in each case compared with 1990).

II. Domestic Climate Change Litigation

The global concept of climate change lawsuits covers very different types of lawsuits, which will be briefly described below using examples.

A. Individual Action

For individual litigation, a concrete, actual or imminent injury has to be proved in most of the countries, which is very difficult in this matter.

French Law changed on this point when the legislator introduced in 2016 by the biodiversity Law[23] a new concept of ecological damage in Art. 1246 Civil

[21] CE, 19 novembre 2020, *Commune de Grande-Synthe*, n° 427301; Retrieved from https://www.conseil-etat.fr/actualites/actualites/emissions-de-gaz-a-effet-de-serre-le-gouvernement-doit-justifier-sous-3-mois-que-la-trajectoire-de-reduction-a-horizon-2030-pourra-etre-respectee on the 2.12.2020.

[22] Klimaschutzgesetz, 12 December 2019, *BGBl*. I p. 2513.

[23] Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages JORF n°0184 du 9 août 2016 .

Code. It covers the objective damage to the environment and the collective subjective harm by removing the individual condition of the injury. The provision anchors the principle that "any person responsible for ecological damage is obliged to repair it". This person can be everyone, the State, a private undertaking or a physical person. But another essential difficulty for individual lawsuits claiming compensation for environmental damage remains the question of causality.

B. Class action

In the Netherlands, in the Urgenda case, a collective and a group of 900 Dutch citizens sued the Dutch Government to force them to comply with the targets for reducing greenhouse gas emissions. In this case, the third instance tribunal, the Dutch Supreme Court (*Hoge Raad*) decided on 20.12.2019[24] in a landmark decision, that the Government of the Netherlands has to reduce the gas emissions of the country by 25 % compared to the emissions of 1990 (basis year). The judgement confirmed the decision of the two other previous instances in 2015 and 2018[25]. The judgement is so important because it was the first in the world in which citizens established that their Government has a legal duty to prevent dangerous climate change[26].

The tribunal argued directly on the base of the fundamental rights of Art. 2 und 8 EMRK, protection of life and private and family life. One can deduct obligations for climate protection on these fundamental rights (ECHR) for the member States. One cannot use fundamental rights to establish that the State must make impossible or disproportionate efforts to protect them. However, the Court requires the State to comply with measures capable of preventing possible infringements of fundamental rights. The Hoge Raad refers on the one hand to international obligations which Netherlands has taken within the Paris Climate Convention and on the other hand to the reduction requirements which have been developed by the IPCC to determine the exact requirements for the State. In a system of common, shared and differentiated responsibilities, the Netherlands would have a reduction commitment of at least 25% by the end of 2020.

[24] Hoge Raad der Nedeerlanden, December 12, 2019, *Urgenda Foundation v. State of Netherlands*, ECLI :NL :HR :2019 :2007.
[25] *Urgenda Foundation v. State of Netherlands*, The Hague Court of Appeal, October 9, 2018, HAZA C/09/00456689 and *Urgenda Foundation v. State of Netherlands* (First instance - District Court The Hague) June 24 2015.
[26] Hoge Raad der Nederlanden, December 12, 2019, op. cit. supra note 24.

In France, an environmental class action was introduced in French law in 2016 according to Art. L142-3-1 of the Environment Code[27]. It makes possible a group action of an association that acts on behalf of a group of natural persons who have suffered a loss of common origin if it is mandated by the at least two natural persons with interest in acting. However, so far, in practice, very few of these group actions have been carried out.

The German law didn't introduce a class action in environmental law yet. But the new European Union "collective redress directive"[28] that was finally adopted on November 24, 2020, by the European Parliament, will oblige the Member States to establish a real collective consumer action within a term of 24 months.

C. Public Interest Litigation

Public interest litigation is not possible in certain countries such as Germany, France or Mauritius neither in the European Union Law. In Germany, we need a concrete, actual and imminent injury. In the most recent case in Germany, the admissibility of constitutional complaints underlying the climate decision of the Federal Constitutional Court, which had been filed by citizens from Nepal and Bangladesh, among others, are doubtful with regard to a concrete, actual and imminent injury. However, the courts' interpretation here was extremely broad. The complainants were "entitled to lodge a complaint because it cannot be ruled out from the outset that the fundamental rights of the Basic Law also oblige the German state to protect them from the consequences of global climate change"[29] . This is practically tantamount to allowing a public interest litigation and has been severely criticized by the doctrine. In some other countries with a different legal culture, such as Pakistan and India, this legal action is possible.

1. Public Interest Action in Pakistan

In the *Ashgar Leghari v. Federation of Pakistan* case, the plaintiff filed a public interest action against the Government of Pakistan, for failure to implementation of the climate change policy "and inaction, delay and lack of

[27] loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI[e] siècle *JORF* n° 0269 du 19 novembre 2016.
[28] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance) *OJ L 409, 4.12.2020, p. 1–27,* available online at http://data.europa.eu/eli/dir/2020/1828/oj
[29] Decision of the First Senate of the Federal Constitutional Court (BVerfG) of 24 March 2021 (1 BvR 2656/18 et al., Nr.90.

seriousness (…) to meet the vulnerabilities associated with climate change"[30]. The highest Court of Pakistan mentioned here already in 2015 an obligation of the State for a global energy transition concerning the PA and asked the State as a remedy to present a list of action points by the end of December 2015. This decision is comparable with the decision of the Conseil d'État of November 2020 in France[31].

2. Public Interest Action in Austria

In the Vienna Airport Litigation[32], 28 plaintiffs (various NGOs and individuals) gathered an action against the Austrian State authorizing construction of a third airport runway for Vienna's Main airport Vienna-Schwechat. The procedure was successful, as the highest administrative Court decided that the interest of the population in protecting the environment and climate was a priority and after a survey of the economic interests and a balance with the ecologic interest the latest were considered as dominant. Consequently, the Court refused to authorize the extension of the airport in the judgement. But the Austrian Constitutional Court overturned the Federal Administrative Court's decision in June 2017[33], because of several errors, in particular, to give too much weight to the climate change and land use considerations by

> – misinterpretation of the State obligations under the PA, and the Kyoto Protocol superimposing them with regional greenhouse gas emissions reduction targets,
>
> – overvaluing the environmental impacts of air traffic.

The Constitutional Court referred back to the case *BVwG*, which had to take a new decision. In March 2018, the Federal Administrative Court issued a new decision taking into account the allegations of the Constitutional Court. It rejected the requests of the applicants by approving the construction of the third runway with several requirements for climate and noise protection[34].

---

[30] Pakistan High Court Green Bench, 4 September 2015, *Ashgar Laghari v. Federation of Pakistan,* W.P. 25501/2015.

[31] *Commune de Grande-Synthe v. France*, Conseil d'Etat du 19 Novembre 2020, N°20, op. cit. supra note 21.

[32] *Vienna Airport v. Bundesverwaltungsgericht* (Federal Administrative Court) February 9, 2017,

[33] Österreichischer Verfassungsgerichtshof (Vfgh), June 29, 2017 (E 875/2017, E886/2017).

[34] BVwGH (Federal Administrative Court), March 23, 2018 (W109 2000179-1/350E).

3. Public Interest litigation in the European Union

The Court of Justice has hitherto refused legal proceedings relating to climate protection in its case-law, since the Act in question must concern the applicant individually, directly and in a limitable manner[35] which was not the case. In the "Carvalho'" case[36], the Court of Justice did not uphold the applicants' application for annulment of European legislation based on Art. 191 TFEU and the prevention of violations of the rights to life and physical integrity, but also the right to exercise a professional activity and the property right, caused by climate change and protected by the Charter of Fundamental Rights of the European Union. The applicants argue that the European Union is bound by the PA and therefore obliged to take measures to limit greenhouse gas emissions. The Court declared the application inadmissible, as individual persons are not entitled to have recourse to the European courts to have the compatibility of European policy with international climate protection law reviewed. The applicants do not have to stand based on Art. 263 TFEU. An appeal against the judgment is pending.

Contrary to this approach of European law, in India and Pakistan, we can find significant examples of public interest litigation.

D. Loss and damages – an example of Civil Liability of Private Undertakings in Germany

In the litigation *Luciano Lliuya v. RWE AG in Germany*[37], a Peruvian farmer sued the most significant German energy producer *Rheinisch Westfälisches Elektrizitätswerk* (RWE) for damages. RWE is the second-largest CO_2 emitter in Europe, but the company had no activity at all in Peru. The farmer claimed that the German undertaking was nevertheless responsible for 0,04 % of the climate mitigation and that it is consequently liable for the same percentage of the damages of this farmer in South America. The farmer sued for the assumption of 0.47 percent of the costs he needed for the protection measures, about 17,000 euros. According to an expert opinion (the Carbon Majors Study), this is the share of human-made greenhouse gas emissions for which RWE has been responsible since the beginning of industrialization.

The problem here was not the concrete, actual or imminent injury but the question of causality. After the general 'conditio sine qua non' formula, the causality is not given if you can't remove the relevant fact without removing the damage. In this case, it means that if the RWE didn't produce energy in Germany,

[35] *Plaumann Formel* : ECJ 15.07.1963, C-25/62, ECLI :EU :C :1963 :17, NJW 1963,2246.
[36] EC, T-330/18 (Carvalho).
[37] *Luciano Lliuya v. RWE AG in Germany* (OLG Hamm 30 November 2017), 5 U 15/17, ZUR 2018, 118; W. Frenz, Kausalität des Bergbaus für Klimaschäden, in FS für Huber, 2020, p.129.

the farmer wouldn't have his damage. Of course, this causality doesn't work in this case. If we remain on our causality theories, never a responsibility couldn't be established in these cases. The applicants had lost the case in the first instance.

Whereas, in the second instance, the German judge ordered the hearing of evidence for the question of causality[38]. This was already a success for the plaintiffs because, for the first time, such a causal connection was declared to be legally relevant.

Conclusion

The PA constitutes a milestone on the path to "climate justice" and "climate litigation". Climate litigation is getting more and more significant in the whole world. The recent lawsuits in Germany (*Lliuya v. RWE*) and France (*Commune de Grande-Synthe v. France*) illustrate that since the *Urgenda case*, case law is subject to rapid development in favour of climate protection. The control of compliance with the climate commitments of the States is continuously increasing even if a concrete liability of private polluting undertaking has not been established yet.

One question also remains the enforceability of international agreements and rules of international law. Therefore, there is still a need for implementation of fundamental principles of environmental protection, such as the duty of care of the State and due diligence in National Constitutions. But, already, even in domestic Climate Litigation, the Courts pondered the principles of the Paris Agreement in their reasoning even if it remains soft law.

[38] *Luciano Lliuya v. RWE AG in Germany* (OLG Hamm November 30 2017), 5 U 15/17, ZUR 2018, 118.