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Belgian public authorities held liable for flawed climate policy: Klimaatzaak case

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Abstract

The judgment handed down in the Klimaatzaak case by the French-speaking Court of First Instance of Brussels on 17 June 2021 was largely confirmed by the well-reasoned 160-page judgment of the Brussels Court of Appeal of 30 November 2023. This judgment raises fundamental issues relating to the judicial review of inaction by public authorities that leads to a failure to mitigate greenhouse gas (GHG) emissions. In reviewing the Belgian climate change policies in the light of the fundamental rights to life and private and family life and the general duty of care inherent in fault-based civil liability, the Court of Appeal narrowed the gap between Belgian GHG emission reduction targets and public mitigation measures. It follows that political rhetoric must be fleshed out into legal instruments that are properly designed to counter the impacts of climate change on life and privacy.

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1 Introduction

The *Klimaatzaak* case has already triggered heated doctrinal debate in Belgium. It is anything but an easy case to understand. The aim of this case note is to systematically describe the reasoning of the Court of Appeal of Brussels for foreign lawyers. This is important because the civil courts of other States party to the ECHR might apply the same reasoning in cases brought against State authorities due to climate inaction. The judgment handed down by the Brussels Court of Appeal is all the more important in that the European Court of Human Rights (ECtHR) found on April 9, 2024 in *Klima Seniorinnen* that the fundamental rights to private and family life encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life.[1]

2 Jurisdictional powers

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

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

Citing Articles 144-145 of the Belgian Constitution, the Brussels Court of Appeal recalled firstly that disputes concerning "*civil and political rights*" fall within the remit of the judiciary.

Jurisdiction is determined by the "*real and direct object of the claim*". When the claim concerns an administrative act, it is necessary for the Court "to *verify whether a subjective right is at stake*" (§113).[2] Traditionally, a subjective right can only exist where the authority is bound by a legal obligation arising from an rule of objective (public) law that leaves the authorities no room for manoeuvre in deciding how to apply it to the specific case (concept of "*competence liée*") (§113). The Court of Appeal refused to endorse the restrictive interpretation of subjective rights suggested by the public authorities. It held that the judiciary has "*the power both to prevent and to remedy any unlawful infringement of subjective rights by authorities in the exercise of their discretion*"[3] and that the subjective rights in the case at hand are enshrined in the ECHR.

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

3 Admissibility of claims

Climate litigation differs from other types of litigation in that claimants seek to obtain an injunction from the courts in order to prevent the occurrence of a swath of ecological disasters likely to occur over the long term. Their aim is therefore not to seek damages.

Since the *actio popularis* is not available under Belgian judicial law (§119), the respondents – the Belgian authorities – challenged on appeal the admissibility of the appeal brought by the NGO Klimaatzaak, which they argued should have limited itself to seeking compensation for non-material damage.

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

Accordingly, the reference to "*national environmental law*" in Article 9(3) cannot be construed narrowly. These terms encompass rules of international law as well as Article 1382 of the Belgian Civil Code, which establishes fault-based liability. It follows that the appellant NGO was able to bring proceedings within

[1] Case *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, n° 53600/20. The case was brought by elderly ladies against Switzerland for insufficient GHG emission reduction. The ECtHR found a violation of their right to respect for private and family life (Article 8) and access to court (Article 6 § 1).

[2] Cass., 24 Septembre 2010, Pas., I, p. 2375, concl. of the General Advocate Vandewal; Cass., 8 mars 2013 Pas., I, p. 601 and concl. of the General Advocate Werquin.

[3] Cass., 3 January 2008, Pas., I, n°4; Cass., 24 November 2006, Pas., I, n°599; Cass., 26 Decembre 2014, Pas., I, p. 3037.

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the meaning of Articles 17 and 18 of the Belgian Code of Judicial Procedure, insofar as it alleged a breach of Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code (§ 125).

Nevertheless, the Court of Appeal stressed that the appeal brought by the NGO was also admissible as the NGO's official aim of combating climate change could not be confused with the avoidance of "*pure ecological damage*" ("*prejudice écologique pur*"), which is not recognised in Belgian civil law.[4] The Court of Appeal took the view that the NGO's statutory aim encompasses a range of "*individual ecological damages*", some of which had already occurred (§ 126). "*Individual ecological damage*" covers damage resulting from nuisance and pollution caused by climate change (deterioration of the appellants' health, reduced quality of life, etc.) or to their property (destruction, deterioration, loss of value, etc.).[5]

Finally, the appellant NGO was also able to claim non-material damage in the event of damage to the environment (§ 127). According to the case law of the Belgian Constitutional Court, "*a legal person that has been established with the specific objective of protecting the environment may [...] actually suffer non-material damage and bring such an action*".[6]

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

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

With respect to the standing of the thousands individuals appealing against the judgment of the Court of First Instance, the Court of Appeal reasoned by analogy in relation to the standing of the NGO Klimaatzaak. The Court also dismissed the respondents' argument according to which the natural persons were seeking compensation for "*pure ecological damage*", which in contrast to the position under French civil law[7] is not recognised in Belgian civil law. The damages claimed by the claimants were "*individual*" and not diffuse as they related to food and water supplies, damage to their property, impacts on their physical and mental health, etc. (§132). The Court referred in this connection to the ECtHR judgment in *Cordella v. Italy*, in which the Court held that "*it is often impossible to quantify the effects of significant industrial pollution in each individual situation and to distinguish the influence of other factors, such as, for example, age and occupation. The same applies to the deterioration in quality of life resulting from industrial pollution. Quality of life is a highly subjective concept that does not lend itself to a precise definition*".[8]

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

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

4 The merits of the case

The Court of Appeal went on to examine in detail both the scientific data as well as the international and EU obligations incumbent on the Belgian authorities. After a comprehensive, systematic presentation of the relevant scientific reports of the Intergovernmental Panel on Climate Change (IPCC) and the array of international standards to which the European Union (EU) and Belgium are subject, the Court of Appeal proceeded to examine the two grounds of appeal in turn, namely the breach of Articles 2 and 8 ECHR, and then the breach of Articles 1382-83 of the Belgian Civil Code establishing fault-based liability.

4 In contrast, in *Neubauer*, the Bundesverfassungsgericht (BVerfGE) found the association's claim inadmissible on the ground that the personal character of fundamental rights excludes an action of a legal person representing a collective interest. BVerfG order of 24.03.2021 1 BvR 2656/18, 78, 96, 288/20 (Neubauer et al), BVerfGE 157, 30, § 136.

5 De Sadeleer, 2021.

6 Case n° 7/2016, 21 January 2016.

7 In virtue of Article 1247 of the French Civil Code, "*Ecological damage consisting of non-negligible harm to the components or functions of ecosystems or to the collective benefits derived by man from the environment may be compensated ...*".

8 *Cordella and Others v. Italy*, 24 January 2019, §160.

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4.1 First plea relating to respect for the rights to life and to privacy

As regards the first ground of appeal, the Court of Appeal focused on respect for the right to life enshrined in Article 2 ECHR, insofar as the case law on that provision can be applied, *mutatis mutandis,* to Article 8 ECHR (§ 214). Article 2 of the ECHR imposes two types of obligation: firstly, a negative obligation on each State to "*refrain from causing death intentionally and unlawfully*" and, secondly, a positive obligation to "*take such measures as are necessary to protect the lives of persons under its jurisdiction*"[9] (§139). The right to life necessarily implies the adoption of preventive measures (§139).

The Court of Appeal highlighted the essential features of Articles 2 and 8 ECHR in environmental matters, as developed by the European Court of Human Rights (ECtHR), namely that they require States to 'regulate preventively' environmental risks. The Court began by pointing out that although *"[t]he ECHR does not as such enshrine a right to a healthy environment' (§138), it has nevertheless developed a significant body of case-law relating to rights that may be violated 'by ricochet' as a result of damage to the environment.[10] Indeed, the ECHR amounts to 'a living instrument*" (§138).

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

4.1.1 Subsidiarity and the scope of judicial review

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

Although the principle of subsidiarity[11] has the effect of increasing the margin of appreciation left to the national authorities, the fact remains that this room for manoeuvre, understood within the meaning of the ECHR, "*is not binding on the judiciary when it is reviewing the actions of the legislative and executive branches*" (§ 148).

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

4.1.2 Direct effect of fundamental rights

Judicial review of the inaction on the part of the public authorities was trickier as the Court of Appeal had to rule on the direct effect of the two ECHR fundamental rights (§ 150 et seq.). The appellants could only object to the positive measures taken by the Belgian State authorities if Articles 2 and 8 had direct effect. In principle, it is settled case law in Belgium that the direct effect of a provision of international law can only be inferred if the purpose of the norm is to give rise to rights to individuals and it is sufficiently precise and unconditional.[12] The Belgian Court of Cassation has previously ruled that, insofar as it imposes positive obligations on the State, Article 8 ECHR is not sufficiently precise and complete to give rise to subjective rights and therefore does not have direct effect.[13]

In *Klimaatzaak*, the Brussels Court of First Instance departed from these traditional criteria, ruling that consideration had to be given to the margin of appreciation that the provisions of the ECHR vest in the court in charge of applying the provision of treaty law. Adopting "*a contextualised and gradual approach to direct effect*" (§152), the Court of Appeal agreed with the findings of the Court of First Instance.[14] The ECHR is a "*living instrument"*, which must be interpreted in the light of "*current conditions, including soft law*".[15] In assessing the scope of Articles 2 and 8 ECHR in climate-related matters, it is therefore possible to take into account the constitutional objective of sustainable development

9 *Kurt v. Austria*, 15 June 2021, §157.

10 De Sadeleer (2012).

11 See Protocol No. 15 to the ECHR.

12 Cass. (1st Ch.), 9 February 2017, J.T. 2019, p. 33.

13 Cass., 6 March 1986, Pas. 1986, 1l, p. 433.

14 Thunis (2022).

15 12 November 2008, *Demir & Baykara v Turkey*, § 76.

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(Article 7a of the Belgian Constitution), the precautionary principle (Article 3(1) of the 1992 UN Framework Convention on Climate Change (UNFCCC)) and the protection of future generations (preamble to the 1998 Aarhus Convention), as well as factual aspects such as scientific studies on which there is unanimous agreement, or even "*political consensus*" at international, European or national level (§152). Indeed, when assessing the risk and determining preventive measures, the Belgian public authorities were required to "*refer to experts*" knowledge in the field' of climate change (§ 153).[16]

Belgian lawyers, both academics and judges, have generally been divided on the question of granting direct effect to articles 2 and 8 ECHR. Generally speaking, a dual approach has been adopted by several authors. The negative obligation contained in Article 2, for example to refrain from causing death wilfully and wantonly, imposes a sufficiently definite course of conduct. It therefore has direct effect. On the other hand, the positive obligation arising from that provision, for example to take appropriate and reasonable measures to protect life in the event of a real and immediate threat, is not sufficiently precise to have direct effect.

This binary approach has been criticised, some authors supporting "*a contextual and gradual approach to direct effect, which is closely related to the principle of the separation of powers*" (§ 152). The Court of Appeal accepted this interpretation. It considered that the clear and precise nature of Articles 2 and 8 should not be assessed *in abstracto*, by examining the text alone. Against this background, the case law of the European Court of Human Rights and the context requires an assessment *in concreto* of Articles 2 and (§152). The Court of Appeal thus took into account the fact that the Convention is a "*living instrument*" that must be interpreted in the light of current conditions,[17] which implies taking into account non-binding sources. In concluding that Articles 2 and 8 have direct effect, the Court took into account the constitutional objective of sustainable development,[18] the UNFCCC, the preamble to the Aarhus Convention, scientific studies on which there is unanimous agreement, and political consensus at international, European and national level. This context obliges the Belgian public authorities to assess the existence and extent of the risks entailed by the absence of a public policy in the field of global warming. This openness both to non-binding provisions (international soft law) and to an array of scientific data does not, in any event, have the effect of transforming the judiciary into a government of judges. The courts are not replacing the lawmaker as the "*facts*" are merely taken into account to "*inform the law, without, however, ... creating or abolishing it*" (§ 152).

The Court of Appeal departed thus from the classic doctrine, which holds that direct effect is conditional on the international provision invoked being sufficiently precise and complete.

The question arose as to whether a court could request the State to adopt global warming mitigation measures without interfering with politics. Some Belgian legal scholars take the view that determining the appropriate level of GHG emission reductions is a political issue that requires a democratic decision taken by federal and regional parliamentary assemblies.[19] The Court's answer was straightforward. As the protector of the rule of law, judicial power does not slide into the political realm of democracy as long as it confines itself to reviewing the appropriateness and reasonableness of State measures intended to guarantee the effective application of the rights enshrined in Articles 2 and 8 ECHR in the light of "*the soundest scientific knowledge at the time*" (§ 156).

4.1.3 Right to life

The impacts of climate change are undeniably distant in time and space.[20] As the climate gradually warms, to what extent do the attendant risks entail the potential of "*real and immediate*" harm for potential victims? Were this question to be answered in the affirmative, public authorities would be obliged to intervene to counter such risks by adopting preventive measures (§ 160). The Court of Appeal held that the fact that the feared impacts are remote in time does not preclude the application of the ECHR (§ 142).[21] Moreover, the "*real and immediate*" nature of the risk was not disputed (§164).

As climate change is a global phenomenon, the Belgian authorities argued that the efforts that should be made by them in order to implement an optimal mitigation policy would only have a minimal impact on climate change. However, in the Court of Appeal's view, the international dimension of global warming and the limited contribution of Belgian emissions to the overall volume of emissions did not negate the "*responsibility*" of the various Belgian State authorities, which were called upon to "*do their part*"

16 By the same token, the Hoge Raad held that Articles 2 and 8 ECHR cannot be interpreted in isolation. These provisions must be interpreted in the light of an understanding of the scientific facts ("*wetenschappelijke inzichten*") and general standards ("*algemeen aanvaard standaarden*") (§5.6.2).

17 *Demir v Baykara v Turkey*, 12 November2008, § 76.

18 Article 7bis of the Belgian Constitution.

19 Dubuisson (2022).

20 De Sadeleer (2020a), p. 260-264.

21 See *Taskin and others v. Turkey*, 46117/99. In *Urgenda*, the Hoge Raad held, with respect to Articles 2 and 8 ECHR, that whilst the "*danger*" that must be averted must be "*tangible and direct*", its "*immediacy*" does not however imply that the damage suspected must arise immediately (§5.2.3), which would be impossible to demonstrate in relation to climate risks.

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(§ 159). The Court of Appeal thus adopted a line of reasoning similar to that pursued by the German Constitutional Court[22] and the Dutch Supreme Court.[23]

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

a) With respect to the first commitment period, it became clear as early as 2015 that the threshold for reducing GHG emissions by 25% ran contrary to the Belgian State's international obligations as this objective would be insufficient to keep global warming below 2°C (§§176, 182). In finding this threshold to be insufficient, the Court of Appeal could not rely on a binding regulatory threshold insofar as international law does not provide for binding targets for reducing GHG emissions. In order to assess the violation of the right to life due to a weak policy, the Court had to rely on the declarations made by the various COPs to the 1992 UNFCCC (§169) as well as on the IPCC reports (§175). The Court highlighted that these reports called for the pursuit of a reduction target of -25% to 40% to be achieved by 2020, which was far more ambitious than the 25% Belgian objective.

The Court of Appeal therefore held that a 30% reduction in GHG emissions by 2022 could be regarded as the minimum that had to be achieved by the Belgian authorities in the light of the obligations stemming from Article 2 ECHR (§176).[24] Moreover, it took the view that the Belgian public authorities had not demonstrated that pursuing the -30% target would have entailed "*an excessive burden*". The Court also concluded that the authorities had not taken "*reasonable appropriate measures to ensure that the Belgian State did its part to prevent a threshold considered dangerous by the scientific community from being crossed*" (§ 183).

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

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

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

b) With respect to the second commitment period 2021-2030, the appellants argued that the Belgian public authorities should have pursued a much more substantial reduction in GHG emissions, namely -81%, or at least a minimum of -61% by 2030 compared to 1990 (§184 to 189). These thresholds were set by Professor Joeri Rogelj based in his study of Belgium's remaining carbon budget from 2021 (§187). His study was based on the global residual carbon budget established by the IPCC's 6th Assessment Report, which gave a two-in-three likelihood of reaching the threshold of dangerous global warming of 1.5°C, i.e. 400 GtCO2.[26]

The Court of Appeal had to ascertain whether Belgium can be prohibited from exceeding these thresholds for the period in question, having regard to the protection afforded by Article 2 ECHR. Despite recognising "*a scientific and political consensus*" since 2018 on the need to limit global warming to 1.5°C rather than 2°C (§191), the Court considered that the pursuit of the optimum scenario -61% /-81% for reducing GHG emissions was a "*political decision involving the consideration of many factors*" and therefore fell outside the scope of Article 2 ECHR (§195). Accordingly, no violation of Article 2 ECHR could be inferred from the fact that the public authorities did not undertake to achieve a level of emissions reduction below the 81% or 61% thresholds by 2030 (§ 196).

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

It was necessary to establish the point in time after which the target of less than 55% had to be achieved by 2030, as a minimum, in order to put an end to the violation of Article 2 of the ECHR. Reckoning on various administrative reports, the Court noted that the objective of -55% became relevant from 2019 onwards. This target was therefore established before

22 BVerfG order of 24.03.2021 1 BvR 2656/18, 78, 96, 288/20 (Neubauer et al), BVerfGE 157, 30, § 203. See Roller (2024), p. 51.

23 HR, *Urgenda*, 19/00135 [2019] ECLI: NL: HR: 2019: 2006, §§5.7.1.-5.8.

24 In *Urgenda*, the Hoge Raad held that the Dutch mitigation measures must involve a 25% reduction of GHG emissions by the end of 2020, instead of the government's projected reduction of 20%. Such a target was deemed to be necessary in order to limit the concentration of GHG in the atmosphere to 450 ppm in order to prevent the dangerous climate change that would be associated with any temperature rise in excess of 2°C.

25 See Article 173 TFEU. De Sadeleer (2014).

26 Groejl (2023).

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the entry into force of the European Climate Act[27] on 29 July 2021 (§ 203).

In this respect, the Court considered that this threshold was a "*minimum*" and that, consequently, Belgium could not go below it without failing "*to comply with Article 2*" (§ 202). After highlighting the inadequacies of federal and regional climate policies, except for that of the Walloon Region, the Court found that Article 2 had been infringed by the respondents. The judgment of the Court of First Instance was therefore upheld, except as regards the Walloon Region (see § 211).

4.1.4 Right to privacy

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

4.2 Second plea relating to breach of Articles 1382 and 1383 of the Belgian Civil Code as formerly in force

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

4.2.1 Principles applicable to civil liability in Belgium

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

- the fault of the public authorities,
- the damage claimed by the appellants,
- and the causal link between the fault and that damage.

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

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

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

Although the authorities can go further, this does not fall within the jurisdiction of the court, which is only empowered to set a minimum threshold.

Because of these limits on the court's power and in the absence of scientific consensus, the Court of Appeal dismissed the request for an order to pursue a higher target of at least 61%, as contemplated in the study by Professor Joeri Rogelj. Conversely, the Court held that compliance with the 55% reduction threshold is a non-negotiable requirement. Below this threshold, there is, in the Court's words, "*no longer any room for trade-offs with other interests such as, for example, the*

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

De Sadeleer, https://doi.org/10.46850/elni.2024.002

preservation of social cohesion or economic growth" (§240).

4.2.2 The alleged fault

Since no rule of international law imposes specific conduct on the Belgian public authorities as regards the reduction of GHG emissions, the Court of Appeal had to ascertain whether the authorities had complied with the standard of a *bonus paterfamilias* (§ 229). From the point of view of the equivalence of conditions, the slightest fault is in principle sufficient in order to engage Articles 1382-1383 of the Belgian Civil Code (§ 233). Once again, the Court distinguished between the 2013-2020 period and the ongoing 2021-2030 period.

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

Furthermore, as regards the period 2021-2030 the Court of Appeal concluded that the public authorities were also at fault, with the exception of the Walloon Region, given that the federal and regional measures currently in force pursue insufficient reduction targets.

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

The lack of cooperation between the federal State and the federated entities, which has been highlighted on several occasions, is indicative of fault. Both Belgian (National Climate Commission) and European institutions (§248) have confirmed this failure,[28] which constitutes *fault* for the purposes of civil liability. In the same way, scientific reports make it possible to establish the conduct expected of a "*normally reasonable and prudent authority*" (§ 244).

Due to the combination of poor results achieved in reducing GHG emissions, chaotic climate governance and repeated warnings from the EU institutions (§ 244), the Belgian authorities had not acted with the prudence and diligence expected of a *bonus paterfamilias* within the meaning of Article 1382 of the Belgian Civil Code. It is not, therefore, the breach of Articles 2 and 8 ECHR that constitutes the civil wrong that gives rise to liability on the part of the Belgian authorities but the failure to exercise prudence and diligence. This wrongful conduct does not require the Constitutional Court to annul legislation or that any EU measures that have not been applied by the Belgian authorities must have direct effect.

4.2.3 Damage and causal link

While the Court of first instance had not examined these two conditions in detail, the Court of appeal held, first, that the damage claimed was "*actual and both current and future*", insofar as natural persons were personally affected, regardless of their geographical location (§ 257). Moreover, the appellant NGO could invoke non-material damage insofar as it was harmed by the risk of global warming in excess of 1.5°C (§ 258). Secondly, the Court of Appeal held that, as regards the harmful effects of GHG emissions from 1980 to the present day, the causal link "*lies*" in the breaches observed from 2013 onwards. Indeed, the lack of ambition in the past is continuing to produce its effects today (§ 266). The Court of Appeal also accepted that there is a causal link between the fault of the public authorities and future damage that will occur around 40 years into the future, even if it is still possible to prevent or even only limit that damage (§ 267 and 268).

5 Injunctions

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

At the risk of deviating from the traditional functions of civil liability, the Court of Appeal considered that an injunction was "*the best, if not the only, remedy for a breach of Articles 2 and 8 ECHR, particularly in environmental litigation*" (§ 277). While the respondents argued that the courts could not order the public authorities to prevent damage that had not yet occurred, despite the controversial nature of the issue the Court of Appeal considered that this was indeed an option here, provided that the future damage was certain (§281).[29] The injunction was thus founded on the breach of the general rule of prudence.

Since the injunction issued by the Court of Appeal is limited to an objective of reducing GHG emissions, it

[28] The European Commission criticized the draft National Energy and Climate Plan 2021-2030 for its absence of an impact assessment of planned policies and measures and the lack of information. See also the Commission Recommendation (EU) 2024/1042 of 23 February 2024 on the draft updated integrated national energy and climate plan of Belgium covering the period 2021-2030, C/2024/1195.

[29] In *Urgenda*, the HR insisted on the exceptional nature of the case at hand as it involved a "*threat of dangerous climate change and it is clear, […,] that urgent action needs to be taken*" (§8.3.4).

De Sadeleer, https://doi.org/10.46850/elni.2024.002

does not infringe the principle of the separation of powers (§286).[30]

The Court considered that an injunction against all defendants was conceivable. However, an order *in solidum* was not tenable from a constitutional point of view. Indeed, the principle of apportionment of jurisdiction requires that those authorities be left free to determine the manner in which the burden should be apportioned. The order could therefore only concern a single result to be achieved collectively by the federal State and the Flemish and Brussels regions (§ 286), with each of them having to 'do their part' within the limits of their respective competences. Accordingly, the different authorities will now have to negotiate and determine among themselves the share that each will have to invest in order to achieve the overall objective.

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

6 Conclusion

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

In ruling that the public authorities are infringing the right to life and the right to respect for private and family life (Articles 2 and 8 of the ECHR), the Court of Appeal has adopted the same reasoning as the Dutch Supreme Court, which on 20 December 2019 held that the Netherlands was violating these two fundamental rights.[31]

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

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[30] The Brussels Court of Appeal reasoned along the same lines than the Hoge Raad in *Urgenda*. The Dutch Court held that whilst it is a matter "*solely for the legislator concerned to decide, taking account of constitutional rules, whether legislation with a certain content must be adopted*", the courts may nevertheless issue a declaratory ruling of unlawfulness (§8.2.4).

[31] De Sadeleer (2020b).

elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

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