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Ambition as a Legal Concept in the Paris Agreement and Climate Litigation: Some Reflections

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Abstract. "Ambition" and its variants "progression" and "highest possible ambition" are cornerstones of the Paris Agreement and its 2/1.5 degrees C global warming goals, while ambition is at best implicit in the Framework Convention on Climate Change. Even though only a normative expectation in a system of self-assessment, under the Paris Agreement ambition serves as a yardstick for judging and discussing the adequacy of the NDCs. However, the content and meaning of "ambition" are far from being agreed upon and the applicability of the reformulated principle of common but differentiated responsibilities and respective capabilities does not provide clear answers. In these circumstances, the article looks for guidance from national court decisions that interpret, apply or consider the notion of ambition "on the ground". These decisions address a number of elements of ambition. They may encourage more ambitious national action. However, they are mostly not specific enough to draw robust conclusions from them regarding concrete questions of application.

Keywords: Ambition of climate protection, climate litigation, prescriptiveness of treaty rules, self-differencing

1. Introduction

The Framework Convention on Climate Change (FCCC) and the Paris Agreement (PA) are the essential contractual sources of international climate law. The FCCC contains formally binding substantive and procedural obligations on mitigation and adaptation the prescriptiveness of which, however, is strongly reduced by the lack of precision of their content. The Paris Agreement also is a formally binding international agreement. Even more than the Framework Convention, it has a hybrid structure of prescriptive and aspirational norms, precision and vagueness of content and substantive and procedural requirements. The agreement uses a multitude of different, finely nuanced wordings to describe the commitments of Parties that make it difficult to draw a clear borderline between prescriptive norms, aspirational norms and mere factual statements and between hard law and soft law. In legal literature, the classification ranges from binding rules to duties of care to soft law to more or less strong normative expectations.[1] The prescriptive cornerstone of the Paris Agreement is the now generally accepted goal to avoid global warming by keeping average temperature well below 2 degrees Celsius above the pre-industrial

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1 See, e.g., D. Bodansky, The Legal Character of the Paris Agreement, *RECIEL* 25 (2016), 142, at 145-150; S. Oberthür & R. Bodle, Legal Form and Nature of the Paris Outcome, *Climate Law* 6 (2016), 40, at 48-53; L. Rajamani, The Paris Agreement: Interplay between Hard, Soft and Non-Obligations, *JEL* 2016, 337-358; D. Bodansky, J. Brunnée & L. Rajamani, *Climate Protection Law*, 2017, at 223-224, 231; C. Franzius & A. Kling, The Paris Climate Agreement and Liability, in: W. Kahl & M.-A. Weller, *Climate Change Litigation*, 2021, 197, at 200-202, 203.

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level and pursue efforts to limit global warming to 1.5 degrees Celsius (Article 2(1) PA). Taking into account the already existing stocks of greenhouse gases in the atmosphere, a global rest budget of carbon that can be emitted without missing these goals can be derived.[2] According to the Agreement's new allocation, this is to be allocated to state Parties through pledges on national emissions reduction targets.

"Ambition" is a key concept of the Agreement to achieve the temperature goals. Even though its legal content is controversial, it is a yardstick for implementing the Agreement; it dominates the substantive requirements on mitigation and adaptation and serves as guidance for fulfilling the procedural obligations set out by the Agreement. In contrast, ambition is at best implicit in the general obligations under the FCCC on updating emission reduction programs (Article 4(1)(b) and the specific provisions on emissions reduction policies and measures programs of developed countries (Article 4(2)(a) and (b) FCCC). Thus, the expectation that the policies and measures of developed countries "will demonstrate that [they"] are taking the lead" in returning to 1990 emission levels by 2000 and the motivation of the respective information obligations to the extent that these countries individually aim "to promote progress" in this regard (which are now moot) can be understood as an expression of ambition.[3]

The article discusses the meaning and content of "ambition" as a legal concept of international climate law, especially with respect to mitigation under the Paris Agreement. As there is as yet no relevant international case law and progress in mitigation under the umbrella of the Paris Agreement has been far from being satisfactory, the article lays particular emphasis on the contribution national court decisions can make to the understanding and application of the ambition concept in the framework of national policy and law designed to implement the Paris Agreement.

Ambition under the UNFCCC will only be addressed where this convention contains additional requirements. In the negotiations on the Paris Agreement, its relationship to the FCCC was controversial between developing and developed countries. This controversy has been solved by a compromise text contained in the chapeau of Article 2(1) PA. According to this provision, the Paris Agreement by enhancing the implementation of the FCCC, including its objective, aims to strengthen the global response to the threat of climate change. There is common agreement that the Paris Agreement is an ancillary agreement that does not dismantle but rather builds on the FCCC. It concretises and supplements the FCCC.[4] Under the Vienna Convention on the Law of Treaties there are no specific rules regarding the rank of a later treaty that concretises and supplements an earlier one. However, Article 30(3) of the Convention is in principle also applicable to supplementary treaties.[5] Since in most cases such treaties only are different but not incompatible with the earlier treaty, there is not normally any ranking problem and hence no justification for the application of the "lex posterior" rule.[6] As regards the mitigation obligations and commitments under the two treaties, compliance with the FCCC, especially its Article 3(3), certainly is not sufficient to meet the requirements of the Paris Agreement but does not impair the implementation of the latter agreement. However, since the Paris Agreement establishes more concrete and more stringent, partly also more extensive requirements, it at least practically supersedes the FCCC which is reduced to a mere gap filling function.

2. Summary of the provisions of the Paris Agreement on ambition

2.1. Substantive provisions

The substantive provisions of the Paris Agreement on mitigation operate with a variety of different wordings that reflect differences as to the relevant addressees (collective vs. individual requirements), the content of

2 Intergovernmental Panel on Climate Change (IPCC), Special Report, Global Warming of 1.5° C, October 2018, *Summary for Policy-Makers*, Part C 1.

3 Cf. D. Bodansky, J. Brunnée & L. Rajamani, supra note 1, at 132.

4 Bodansky, Brunnee & Rajamani, supra note 1, at 212, 222; A. Savaresi, The Paris Agreement and the Future of the International Climate Regime: Reflections on an International Law Odyssee, *European Society of International Law*, Conference Paper No. 13/2016, at 6.

5 K. von der Decken, Article 30, in: O. Dörr & K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2nd ed. 2018, at 539-555, para 12; N. Matz-Lück, Treaties, Conflicts between, in: R. Wolfrum (ed.), *Max-Planck Encyclopedia on Public International Law*, 2012, at 1096-1103, para 5.

6 von der Decken, supra note 5, para 13.

requirements (obligation of conduct vs. obligation of result) and in particular as to prescriptiveness, which renders the respective classification a difficult task. As regards prescriptiveness, frequently used wordings are "aim to", "are to", "will", "should" and "are encouraged", while the classic expression of bindingness, that is, "shall" is very rare. According to Article 2(1) PA the Agreement aims to strengthen the global response to the threat of climate change by holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius. Article 3 sentence 1 PA provides that all Parties are to pursue and communicate ambitious efforts with a view to achieving the purposes of the Agreement. The second sentence of this article embodies the principle of progression (ratcheting concept) whereby the efforts of the parties will represent a progression over time. According to Article 4(1) PA the Parties aim to reach global peaking of greenhouse gas emissions as soon as possible (with a larger delay for developing countries) and in the second half of the century achieve climate neutrality. Article 4(2) PA, the only clearly binding obligation, provides that each Party shall prepare, communicate, maintain and achieve the objectives of successive nationally determined contributions (NDCs). According to Article 4(3) PA the updated NDCs of each Party will represent a progression beyond the Party's existing NDCs and reflect its highest possible ambition. Article 4(4) PA provides that developed country Parties should continue to take the lead by undertaking absolute emission reduction targets, while developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over towards absolute emission reduction or limitation targets.

As regards the provisions on conservation of sinks, adaptation, loss and damage, financial support, technology transfer and capacity building the global reference of Article 3 PA to ambition applies.

2.2. Procedural provisions

The mostly binding procedural provisions of the Paris Agreement and major implementing decisions, especially the NDC guidelines,[7] the transparency framework and the provisions on the global stocktake, are designed to promote voluntary collective achievement of the 2/1.5 degrees Celsius goal in an effective and equitable manner. To a major extent, they also have a bearing on the understanding and fulfilment of the ambition-related requirements of the Agreement. In particular, the NDC guidelines mandate information of the Parties about their assessment of fairness and ambition of their NDC in the light of national circumstances.[8] The transparency framework requires Parties to provide, in their periodical reports, information necessary to track progress to implementing and achieving their NDCs.[9] This information will be subject to a facilitative, multilateral discussion among the Parties (Article 13 (11) PA).[10] The global stocktake is to periodically assess collective progress as well as opportunities and challenges in the light of equity and best available science and to inform Parties to updating and enhancing their NDCs (Article 14(1) and (3) PA).[11] The Paris Rulebook has specified many of these procedural provisions.[12]

3. Recent developments

Although progress in implementing the Paris Agreement has been slow and much time has been spent to take the requisite decisions on specifying the procedures provided for in the Agreement, one can state that with the outcomes of the Katowice and Glasgow climate conferences most of the "formal" work is done by now. The Glasgow Climate Conference has also generated some substantive outcomes. These are, in particular, the new

7 Decision 4/CMA.1, Part 2, Annex I and II, FCCC/CMA/2018/3/Add. 1; completed by Decision 3/CMA.3, FCCC/PA/CMA/2021/10/Add. 1.

8 Decision 4/CMA.1, supra note 7, Part 2, Annex I, paras 6 and 7.

9 Decision 1/CP.21, FCCC/CP/2015/add. 1, para 90; Decision 18/CMA.1, Part 2, FCCC/CMA/2018/3/Add.2, Annex, paras 10, 59-60, 70, 78; Decision 4/CMA.1, supra note 7, para 31.

10 The Glasgow Climate Conference, Decision 1/CMA.3, FCCC/PA/CMA/2021/10/Add. 1, para 31, in addition provided for annual high level meetings regarding tracking of pre-2030 ambition.

11 Specification by Decision 19/CMA.1, Part 2, FCCC/PA/2018/3/Add. 2, para 36(h).

12 See L. Rajamani & D. Bodansky, The Paris Rulebook: Balancing International Prescriptiveness with National Discretion, *ICLQ* 68 (2019), 1023-1040.

target of a reduction of 45 percent of the emissions in 2010 by the year 2030, a statement on the importance of the 1.5 degrees goal and the urgency of upgrading ambition and accelerated action for meeting it, the inclusion of an important non-carbon greenhouse gas, an integrated view of climate protection and the conservation and restoration of biodiversity[13] and last but not least the objectives of phasing down unabated coal power and phasing out inefficient fossil fuel subsidies,[14] even though the two latter objectives could be more ambitious.

4. Perspectives on the content of the ambition concept

The Paris Agreement basically relies on incentives for voluntary emissions reduction based on self-assessment by the Party states and the catalyst effect of transparency and procedure. However, self-assessment is bounded by substantive requirements of unclear prescriptiveness. Major elements are the requirements of "ambition", "highest possible ambition" and "progression". Most commentators classify these requirements as mere normative expectations,[15] others see in them duties of care, at least with respect to "highest possible ambition" as laid down in Article 4(3) PA.[16] In any case, the pursuance of highest possible ambition in the NDCs does not exclusively rest on free self-judgement by the state Parties. Rather, ambition arguably is an objective yardstick for assessing and justifying the quality of NDCs in the facilitative multilateral discussion among the parties under Article 13(11) PA and the stocktaking under Article 14(1) and (3) PA.[17] The NDCs are open to comments and criticism for lack of sufficient ambition.

However, the problem is that the Agreement does not contain any definition of ambition and progression and there is a lack of clear ideas about the meaning of these notions, especially of "highest possible ambition". As regards mitigation, arguably a contribution to emissions reduction that is not merely insignificant must be made to deserve a classification as "ambitious". Progression is equivalent to increased ambition, while the notion of highest possible ambition contains a value judgment as to the strength of efforts pursued by the relevant state. Ambition and progression can consist in a transition from soft law to binding rules, from emissions reductions in particular sectors to economy-wide reductions, from carbon-intensity to absolute carbon reductions.[18] According to the Agreement, the emphasis is to be laid on absolute emissions reductions rather than a mere improvement of carbon efficiency (Article 4(4) PA). Developing country Parties possess much more leeway, but are encouraged to engage in a transition towards absolute emissions reductions or limitations. However, what counts, is the amount of emissions reductions. This must be assessed in the light of the goals of the Paris Agreement which in turn are based on scientific assumptions about the need for emissions reductions in absolute, quantitative terms before reaching climate neutrality in 2050. Since accumulation of greenhouse gases is the major cause of global warming, the reduction path over time by 2050 also needs to be included. Accelerated action is addressed in the Paris Agreement only with respect to peaking (Article 4(1) PA), but has been generalized by an implementing decision of the Glasgow Climate Conference.[19] According to best available climate science, if one wants to achieve the 1.5 degrees C goal an emissions reduction of at least 45 percent by 2030 before reaching climate neutrality in 2050 is required.[20] The remaining global budget of accumulated emissions needs to be translated into national targets (budgets) which may be lower or may be higher than 45 percent.

Major guidance for interpreting the notion of requisite ambition and allocating the remaining budget is provided by the principle of common but differentiated responsibilities and respective capabilities in the light of different

13 Decision 1/CP.26 - Glasgow Climate Pact, FCCC/CP/2021/12/Add.1, Part Two, paras 5-6, 15-18, 21, 50.

14 Supra note 13, para 20.

15 M. Doelle, The Paris Agreement: Breakthrough or High Stakes Experiment? *Climate Law* 6 (2016), 1, at 8-10, 16; Bodansky, Brunnée & Rajamani, supra note 1, at 223-224, 231-232; C. Franzius & A. Kling, supra note 1, at 203.

16 C. Voigt & F. Ferreira, Differentiation in the Paris Agreement, *Climate Law* 6 (2016), 58, at 66.

17 Bodansky, Brunnée & Rajamani, supra note 1, at 234; but see Franzius & Kling, supra note 1, at 202-203.

18 L. Rajamani, Ambition and Differentiation in the Paris Agreement: Interpretative Possibilities and Underlying Politics, *ICLQ* 65 (2016), 493, at 501; Bodansky, Brunnée & Rajamani, supra note 1, at 234.

19 Decision 1/CP.26 - Glasgow Climate Pact, supra note 13, para 17.

20 IPCC, supra note 2, Part C 1.

national circumstances (CBDR principle) as well as by considerations of equity.[21] Moreover, the precautionary principle and the principle of sustainable development set out by Article 3(3) and (4) FCCC are relevant. The CBDR principle as embodied in the Paris Agreement constitutes an evolution from the former, mostly binary CBDR principles (developed vs. developing countries)[22] to a more flexible and dynamic concept. Some scholars[23] even recognize it as an entirely new distributional principle. The modified CBDR principle is explicitly referred to in Article 2(2) PA and besides in Article 4(3) and (19) PA. However, the distinction between developed and developing countries has not been entirely abolished but survives in several other provisions of the Agreement, even though without a classification by country lists and, as regards the requisite actions, in a more flexible and dynamic form. According to Article 4(4) PA the developed country Parties should continue taking the lead in reducing greenhouse gas emissions and they are the major source of financing and technology transfer under other provisions of the Agreement. Developing country Parties should continue enhancing their mitigation efforts (see also Article 3, second sentence on NDCs).

The new formula of the CBDR principle embodies responsibility, problem-solving capability and social and economic national circumstances. In addition, equity considerations are relevant. All this raises problems of interpretation, but also of weighting and balancing the different elements of the new formula. In principle, the CBDR principle is open to self-differencing.[24] This means that the state Parties to the Agreement may, and realistically speaking will, sustain different positions as to particular issues in response to their interests. However, there are boundaries in the shape of normative expectations or even duties of care which can be invoked by other state Parties in the facilitative multilateral discussion under Article 13(11) PA and the periodic stocktaking under Article 14 (1) and (3) PA.[25]

Responsibility reflects the contribution of a country to the problem (Rio Principle Article 7). However, the long history of discussion on the CBDR principle shows that there is no agreement on the constituent elements and modulations of responsibility. Especially the issue of historical responsibility for the existing concentration of greenhouse gases in the atmosphere (stocks) – as opposed to current emissions (flows) – has remained controversial.[26] Apart from this, there has been no agreement on the criteria for determining the extent of (present and historical) responsibility. Consequently, depending on their interests, the states will either assert or reject particular allocation criteria. The polluter pays principle is too abstract to provide guidance for determining responsibility for climate damage.

Capability is easier to grasp and apply. Financial, technological and human capacity, the national GDP, carbon efficiency, reduction costs and opportunity costs will enter into the account of capability.[27] These factors provide arguments that may become relevant in taking a decision on a particular degree of ambition, considering the major national measures envisaged for devising and implementing the NDCs and their economic and social consequences. Especially in the context of "highest possible ambition" the abstract possibility of emission reduction needs to be qualified in order to avoid excessive burdens. Relevant criteria could be practical possibility, reasonableness, proportionality and conformity with the constitutional protection of justified expectations.

National circumstances is a fall-back criterion for considering other elements of relevance that may justify a lesser degree of ambition or suggest a higher degree of ambition to be pursued by a particular state. One can mention the state of development, the institutional structure, the economic, transport and energy structure, social problems, geographical and climate profiles and vulnerability to climate change.

21 Voigt & Ferreira, supra note 16, at 66, 68, 72; Rajamani, supra note 18, at 501, 507-508; id., Common but differentiated responsibilities, in: L. Krämer & E. Orlando, *Principles of environmental Law*, 2018, 291, at 295-300.

22 See T. Honkonen, CBDR and Climate Change, in: D.A. Farber & M. Peeters, Climate Change Law, 2016, at 142-151; Rajamani, in: Krämer & Orlando, supra note 21, at 293-296; L. Rajamani et al., "National fair shares" in reducing greenhouse gas emissions within the principled framework of international environmental law, *ICLQ* 70 (2021), 983, at 989, 994.

23 A. Rosencranz & K. Jamwal, Common but Differentiated Responsibilities and Respective Capabilities: Did this Principle Ever Exist? *EPL* 20 (2020), 391-397.

24 Bodansky, Brunnée & Rajamani, supra note 1, at 224, 234; Rajamani, supra note 18, at 510-511.

25 Bodansky, Brunnée & Rajamani, supra note 1, at 231-232, 234; Voigt & Ferreira, supra note 16, at 67-68.

26 See Rajamani, in: Krämer & Orlando, supra note 21, at 293-296; M. Friman & M. Hjerpe, Agreement, significance, and understandings of historical responsibility in climate change negotiations, *Climate Policy* 15 (2015), 302-330.

27 See H. Winkler et al., What factors influence mitigative capacity, *Energy Policy* 35 (2007), 692-703; G. Winter, Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection, *TEL* 9 (2020), 137, at 153-155.

It appears reasonable to assume that the three elements of requisite or expected ambition and progression need to be balanced with one another, considering proportionality. However, balancing is a complex process. As there are no recognized rules on how to weight the three criteria, the state Parties may weight them differently and balance them with one another differently and all this in changing combinations. Moreover, equity considerations allow for a correction and flexible assessment of the results generated by application of these three elements of ambition. Equity may include fairness, justice, intergenerational equality, the right to development, poverty eradication, redistribution and restoration.[28] Equity considerations may lead to further differentiation, the more so since equity concepts vary between countries.

An expression of the reformulated CBDR principle including equity is the postulate of a "fair share" in the global rest emissions budget, that is, a fair remaining national emissions budget.[29] The Paris Agreement has abstained from including any language about the expected concrete shares of state Parties in efforts to reduce emissions. This issue has as yet solely been the subject of academic discussion and to certain extent court decisions. As from the 1990 s, there have been dozens of proposals for allocation rules by legal scholars, economists or political scientists. The population size (emissions per capita), size of the economy (emissions per GDP), geographic size of the country (emissions per square kilometre) or ecological footprint are among the factors proposed. Besides using a single factor, also a number of composite factors based on varying "mixture rules" have been discussed.[30] It is evident that these criteria would render quite different results as to what one accepts to be a "fair share" of the remaining global emissions budget. Based on the Paris Agreement's concept of self-differentiation, state Parties have a major degree of allocation discretion, so that one could at best make the negative statement that particular factors are not appropriate and need to be discarded or at least be given a low weight.

Against this backdrop, it appears overoptimistic to believe that the new CBDR principle will work as a catalyst for a race of the state Parties to the top of climate protection.[31] What can be concluded with more certainty is that the CBDR principle may raise the justification burden for a lack of ambition of the respective NDCs and their implementation and that it may also promote political ambition alliances at international level.

All told, based on experience gained so far, there are considerable difficulties in identifying a generally accepted, uniform interpretation of ambition in the Paris Agreement. Since the ambition test does not only pertain to the mere choice of the quantity and timing of national emissions reductions, but also – and even more – the selection of measures of implementation and the conflicts that may be caused by particular measures, national practice is of particular importance. From the perspective of the international climate regime, the process, that is, the transparency, joint discussion and global stocktake of the NDCs and their expected improvement over time are at the centre of attention. In a legal perspective, it makes sense to also look for guidance by the national judiciary that has dealt with, or has otherwise been relevant to, the application of the ambition requirement "on the ground."

5. Inspirations for the interpretation of "ambition" by national court decisions

5.1. General characterisation of the decisions

By now, there have been quite a number of remarkable national court decisions that deal with the implementation of the Paris Agreement by state Parties. All relevant decisions more or less rely on climate science, especially the scientific consensus on probabilities of climate damage associated with different emission trajectories reached by the Intergovernmental Panel on Climate Change (IPCC). However, the decisions have different subject-matters and use different legal approaches. One can distinguish between litigation based on human rights, litigation to enforce statutory obligations to set or implement climate targets

28 Rajamani et al., supra note 22, at 990-991.

29 See Rajamani et al., supra note 2

30 See, e.g., Honkonen, supra note 22, at 146; Sargl et al., Distribution of a Global CO2 Budget – A Comparison of Resource Sharing Models, https://doi.org/10.5281/zenodo.4503032, 2021, both with further references; Winter, supra note 27, at 149-154.

31 Contra Voigt & Ferreira, supra note 16, at 72-73.

and litigation on the authorization of individual projects.[32] As regards human rights-based litigation, there are two landmark decisions from the Netherlands and Germany that address the issue of ambition of national climate protection law beyond existing national targets. In the two other categories of climate litigation, the extent to which ambition of climate protection as foreseen by the Paris Agreement could become a crucial factor for the outcome of the litigation depends on the structure and content of the domestic legal framework conditions including the constitutional powers of the judiciary so that one can observe quite different outcomes.

5.2. Human rights litigation

a) The Netherlands

The first of the two landmark climate decisions based on human rights is that of the Dutch Supreme Court of 20 December 2019 in the "Urgenda" case.[33] In that case, the plaintiffs challenged the regression of the climate protection targets that had previously been set by the Dutch Government. The formal legal basis of the case was an action in tort (for violation of a duty of care) which under Dutch law also applies to governmental action and inaction. For specifying the state duty of care, the Court relied on an extensive interpretation of the human rights set out in Articles 2 and 8 of the European Convention on Human Rights. In doing so, the Court went beyond the existing case law of the European Court on Human Rights that had never before held that threats of remote environmental harm and in particular future climate damage were encompassed by the relevant human rights.[34] Even though the Supreme Court departed from the proposition that the Paris Agreement was not self-executory, it held that the Agreement with all its non-binding components as well as international climate policy declarations, insofar as widely accepted, had to be taken into account in interpreting the contents of the relevant fundamental rights and determining the duty of care.[35] The Court did not explicitly refer to the concept of a national rest emission budget. However, it required that the Netherlands assume a "fair share" of the greenhouse gas emission reduction burdens in cooperation with all other states concerned and expressed sympathy for a per capita allocation as an expression of capability and responsibility.[36]

As regards the requisite measures, the Court did not explicitly refer to the concept of ambition. It recognized that the government in principle possessed a broad margin of political discretion. In exercising its discretion, also the precautionary principle had to be respected.[37] Ultimately, the Court held that in the concrete case the limits of the Government's discretion were exceeded as it was possible to reduce greenhouse gas emissions in the Netherlands in the next decade by 25 percent as demanded by plaintiffs (and originally set out by the government). In the opinion of the Court this emissions reduction was reasonable and suitable and the Government had failed to sufficiently substantiate that this "is an impossible or disproportionate burden."[38] Reasoned arguments as to what the Court considered to be possible, reasonable, and proportionate are missing so that only the future will tell us about the potential of the judgement and the extent to which the judiciary will intervene in matters that primarily are within the competence of Government and Parliament.

A special case on ambition of climate protection is the remarkable judgment of a Dutch lower court in the civil matter "Milieudefensie v Shell"[39] which recognized far-going climate protection obligations of private

32 Cf. Franzius & Kling, supra note 1, at 209-214, who only distinguish two categories.

33 Hoge Raad (Supreme Court), Judgment of 20 December 2019, no 19/00138, The State of the Netherlands v Stichting Urgenda, ECLI:NL:HR:RH<H 2019 : 2007 (English translation; original Dutch version in ECLI:NL:HR:2019 : 2006); for a critical comment see C.W. Backes & G. van der Veen, Urgenda: the Final Judgement of the Dutch Supreme Court, JEEPL 17 (2020), 307-321; as to the preceding Court of Appeal judgement see P. Minnerop, Integrating the "duty of care" under the European Convention on Human Rights and the science and law of climate change: the decision of the Hague Court of Appeal in the Urgenda case, *Journal of Energy and Natural Resources Law* 37 (2019), 149-179.

34 To the same extent N. de Sadeleer, The Hoge Raad judgment of 20 December 2019 in the Urgenda case: an overcautious policy for reducing GHG emissions breaches Articles 2 and 8 of the European Convention on Human Rights, *elni review* 2020, 7, at 8-9.

35 Supra note 33, paras 4.8, 6.3, 7.23, 7.2.8, 7.3.2; de Sadeleer, supra note 34, at 10, 11; critical Backes & van der Veen, supra note 33, at 311-314.

36 Supra note 33, paras 6.3, 7.2.9, 7.3.4.

37 Supra note 33, paras 5.3.2, 5.6.2, 7.2.10.

38 Supra note 33, paras 5.2.3, 5.3.2-5.3.4, 7.5.3.

39 Rechtsbank Den Haag, Judgment of 26 May 2021, Milieudefensie v Shell, ECLI:NL:RBDHA:2021 : 5339 (original Dutch version in ECLI:NL:RBA:2021 : 5337);

enterprises under tort law. Extending the "Urgenda" rationale, the Court derived climate protection obligations of private enterprises including enterprise groups from the asserted horizontal effect of human rights and soft law declarations of the United Nations on the environmental responsibilities of the private sector.[40] Leaving aside the fundamental question of whether this approach is legally tenable, the judgment is interesting for its way to deal with the requirements arising from the Paris Agreement.

The starting point of the Court's reasoning was the linear emission reduction path of 45 percent of the emissions in 2010 by the year 2030 as envisaged by the IPCC in order to achieve the (non-binding) 1.5 degrees climate target of the Paris Agreement. The Court translated this global reduction path directly to the enterprise level, sustaining that bearing "its share" in the requisite reduction of emissions (including indirect emissions) was compatible with Shell's capacity and responsibility as a major polluter. The Court denied that the need for Shell to totally change its business model and reinvent itself ensuing from its judgement would impose a disproportionate burden because the plaintiffs' interest in emission reduction was paramount to Shell's business interests.[41] The position taken by the Court seems to reflect the perception that the Netherlands and each of its domestic economic sectors and major enterprises should be equally subject to the same 45 percent emissions reduction target. However, it is highly doubtful that this concept is compatible with the requirements of a balanced national climate policy.

b) Germany

The second landmark climate decision based on human rights is the order of the German Federal Constitutional Court of 24 March 2021[42] on constitutional complaints against the German Climate Protection Act. The order dealt with two different rights of action: on the one hand the state duty to protect the environment derived from the fundamental rights to life, bodily integrity and health and the constitutional guarantee of property (Articles 2(2) and 14 of the Federal Constitution), and on the other hand the state duty to abstain from interference with the enjoyment of intertemporal freedom rights of individuals.

The Court denied a present violation of protective duties derived from Articles 2(2) and 14 of the Federal Constitution.[43] Applying the restrictive general standards of constitutional review of protective duties, the Court declared that the Climate Protection Act was not manifestly unsuitable or insufficient, considering the existing scientific uncertainties and the need for balancing human health with conflicting concerns. It also emphasized the possibility of amending the targets and mitigation measures and taking adjustment measures against the adverse effects of global warming on human health where experience and new scientific knowledge suggested this. The flaw of this line of argumentation is that it ignored the demand of climate science for early, accelerated action, that is, in the pre-2030 period.

However, the crucial innovation of the ruling is that the Court recognized a farther-going state duty to defend the exercise of all freedom rights of individuals against excessive future state-imposed restrictions and burdens to be expected in response to increasing scarcity of resources, especially energy. According to the Court such restrictions and burdens would of necessity arise as a consequence of irreversibly depleting the national rest emissions budget by offloading major reduction requirements to the post-2030 period.[44] The Court declared that the German Climate Protection Act had a present "advance interference-like effect" on the enjoyment of general freedom rights because the law had only established statutory reduction targets for the period up to the year 2030 and thereby caused disproportionate risks of impairment of constitutional freedom rights in the future.[45]

The Court did not find a justification for this advance interference that, according to previous Court practice, would have to rest on compliance with the entire constitutional order. In this context, the Court examined

40 Supra note 39, paras 4.4.9-4.4.10, 4.4.14, 4.4.11-4.4.21, 4.4.26. The major soft law references were to the UN Guiding Principles on Business and Human Rights: Implications from the "Protect, Respect and Remedy" Framework, 2011 and the recitals of the Decision of Parties to adopt the Paris Agreement, Decision 1/CP.21, supra note 9, paras 133, 134.

41 Supra note 39, paras 4.4.34, 4.4.55. The only concession the Court was prepared to make to climate action taken by governments was an exemption of direct emissions subject to the EU emissions trading system.

42 Bundesverfassungsgericht (Federal Constitutional Court), Order of 24 March 2021, 1 BvR 2656/18 and others, ECLI:DE:BVerfG:2021:rs20210324, 1bvr265618 (For the English translation add the suffixes "en.html"); also published in *BVerfGE* 157, 30 and *Neue Zeitschrift für Verwaltungsrecht* 2021, 951.

43 Supra note 42, paras 143-172, in particular paras 152-168.

44 Supra note 42 paras 116-125,182-187.

45 Supra note 42, paras 183-184.

the compatibility of present inaction regarding the post-2030 period with the objective state duty to protect the environment laid down in Article 20a of the Federal Constitution. This state duty explicitly extends to the interests of future generations and therefore also encompasses the living younger generation. However, despite major doubts, the Court affirmed the compatibility with Article 20a of the Federal Constitution since the boundaries of political discretion granted to the state were still respected.[46] In the second place, the Court examined compliance with the principle of proportionality which in its opinion required an equitable distribution of the burdens of climate protection over time between the generations.[47] On this ground the Court decided in favour of the plaintiffs.[48]

Like many other relevant national court decisions, the Constitutional Court to a certain extent applied the Paris Agreement indirectly as the basis of balancing in the framework of its constitutional analysis. The Court accepted the 2/1.5 degrees Celsius target of the Paris Agreement which was incorporated in the German Climate Protection Act also as an expression of the state duty to protect the environment. It underlined that each state had to contribute to the reduction of global greenhouse gas emissions which required to seek, beyond national efforts, a solution at international level.[49]However, apart from reference to Articles 2(2) and 4(4) PA,[50] the Court failed to integrate the ambition concept of the Paris Agreement into its constitutional reasoning. For specifying the requisite reduction obligations and achieving distributive justice, the Court relied on the concept of the national rest emissions budget, considering the precautionary principle (special due diligence obligation). The Court assumed that the German Climate Protection Act rested, at least in a rudimentary form, on this concept, which raised the problem of the international distribution of the global rest budget as well as the intertemporal distribution of the national rest budget. At international level, the Court regarded the egalitarian criterion of a per capita allocation as plausible. However, since Article 20a of the Federal Constitution did not prescribe a particular path to reach distributional justice, it conceded that against the backdrop of uncertainties and the need for valuations, other criteria would be permissible.[51] At national level, as stated, the Court required an equitable distribution of the burdens of climate protection over time between the generations. Ultimately, the Court held that the absence of statutory emissions reduction targets for the period starting with the year 2030 and the mere statutory empowerment of the German Government to set such targets by way of a regulation without indicating the relevant criteria constituted an unjustified advance interference-like effect on freedom rights of all younger people.[52]

The Court ruling undoubtedly constitutes a major contribution to raising the weight of climate protection in national policy and has been hailed for that reason. However, the doctrinal construct of a present advance interference-like effect on general freedom rights through insufficient national climate targets for the future appears to be somewhat artificial. Moreover, the whole construct hinges on the existence of a national emissions budget and fails where no such budget has been established.[53] In essence, the Court does not address an interference with rights but rather the omission of sufficient protection. For this reason, the ruling has been quite controversial among German constitutional lawyers.[54] Moreover, the question is why the concept of an advance effect could not also have been applied to the protection of the human rights to life, health and property from climate damage. The Court could have recognized, on the basis of the precautionary principle, a protective duty to reduce increasing climate risks for life, health and property that are associated with the present, ongoing accumulation of unabated CO_2 emissions. The reason for "inventing" the advance

46 Supra note 42, paras 195, 236-256.

47 Supra note 42, paras 182, 192-194, 243.

48 Supra note 42, paras 182, 243-254.

49 Supra note 42, paras 201-204, 216.

50 Supra note 42, para 225.

51 Supra note 42, paras 224-225, 228-229, 237, 247.

52 Supra note 42, paras 256-264.

53 To this extent explicitly Federal Constitutional Court, Order of 18 January 2022, 1 *BvR* 1565/21, ECLI:D:BVerfG:2022:irk:202201.1bvr156521, *Neue Zeitschrift für Verwaltungsrecht* 2022, 321, paras 14-17.

54 For a good critical analysis from abroad in English see P. Minnerop, The 'Advance Interference-Like Effect' of Climate Targets on Fundamental Rights: Intergenerational Equity and the German Federal Constitutional Court, JEL 34 (2022), 135-162; see also G. Winter, The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection, *JEL* 34 (2022), 209-221, point 4.

interference-like effect seems to lie in the general requirements for judicial scrutiny of the violation of objective duties to protect which, in contrast to interferences with subjective rights, are quite restrictive. Despite the threat of global warming to the survival of humankind, the Court was not prepared to further develop these criteria just for the sake of climate protection.

Since the Court focussed on the need for target setting, the decision does not contain much language about the requisite content of the relevant targets and even less about measures of implementation. It recognized that the state possesses a margin of political discretion and may balance the affected civil liberties with countervailing concerns, respecting proportionality.[55] The conflicts that may arise and become visible when concrete implementation measures are devised were outside the focus of the Court. Therefore, the practical impact of the ruling on the implementation of the Paris Agreement can only be tested in future climate litigation on concrete sectoral targets and associated measures.

c) Other jurisdictions

A British lower court decision in the matter "Plan B. Earth,"[56] inter alia dealt with the compatibility of governmental decisions taken under the Climate Change Act 2008 with the Human Rights Act which had incorporated the European Convention on Human Rights into the UK legal system. However, the Court accorded the government a wide margin of appreciation and also rejected an indirect enforcement of the Paris Agreement in the context of human rights. Therefore, it did not deal with the core issues posed by the requirements of the Agreement.[57]

5.3. Litigation to enforce statutory obligations to set or implement climate targets

Many national court decisions are confined to the question of whether the measures taken by the government to achieve the national climate targets by the year 2030 are sufficient to comply with these targets. While they do not arrive at the point of scrutinizing the compatibility of the national targets with the Paris Agreement, they contain dicta on the requirements set by the Agreement. A major exception is a Mexican lower court decision[58] which declared a mitigation of Mexico's original NDCs to be incompatible with the progression requirement of Article 4 para 3 of the Paris Agreement.

The judgment of the French State Council in the matter "Commune de Grande Synthe"[59] in a dictum recognized an obligation to take the Paris Agreement into account and achieve an equitable national contribution to global climate protection. However, the judgement rested on non-compliance by the government with the statutory reduction targets.

A decision by the Irish Supreme Court in the matter "Friends of the Irish Environment"[60] held an official measures plan for implementing the existing national climate targets to be too vague and only goal-oriented. In a dictum the Court also declared that Ireland at present was not in breach of international and EU climate obligations and that there may well be cases where constitutional rights and obligations may be engaged. This suggests that the door could be open to future litigation in which the Paris Agreement can be invoked.

55 Supra note 42, paras 207, 211, 216, 249.

56 High Court for England and Wales, Q.B. Div., Administrative Court, Judgment of 21 December 2021, Case No CO/1587/2021, Plan B. Earth & Others v Prime Minister & Others, [2021] EWHC 3469 (Admin), paras 48-52.

57 The Swiss Federal Court, Judgement of 5 May 2020, "Verein KlimaSeniorinnen Schweiz", BGE 146 I 145, paras 5.4, 5.5 dismissed a civil rights action for lack of sufficiently intensive impairment of the fundamental rights to life and private and family life. The EU human rights case "Carvalho" was already dismissed for lack of standing because (potential) victims of climate change were not held to be individually concerned in a legal sense; see Court of Justice, Judgment of 25 March 2021, Case C-565/19 P, Armando Carvalho and Others v. Parliament and Council, ECLI:EU:C:2021 : 252, paras 49-52, 67-73.

58 Greenpeace v. Instituto Nacional de Ecologia, 11th Collegiate Court of the First Circuit in Administrative Matters, Decision of 21 September 2021, RA INC 81/2021, p. 69, 73 et seq., 96 (appeal pending).

59 Conseil d'État, Judgment of 19 November 2020, N° 4273901, Commune de Grande Synthe et autre, paras 12, 15. To the same extent regarding administrative liability Tribunal Administratif Paris, Judgment of 14 October 2021, N° 1904967 etc., Oxfam France et Autres ("Affaire du siécle").

60 Supreme Court of Ireland, Judgment of 31 July 2020, Case 205/19, Friends of the Irish Environment v Government of Ireland, [2020] IESC 49, paras 4.6, 6.44-6.48.

In the Australian "Bushfire Survivors" case[61] the Land and Environment Court for New South Wales dealt with a mandamus action whereby the Government was to be ordered, under the State Environmental Protection Act, to develop quality objectives, guidelines and policies with the aim of achieving the 1.5 degrees climate goal. Relying only on the formal ground that the existing policies were not sufficiently documented and specified, the Court held that the Government had exceeded the limits of its discretion.

Finally in this context, the High Court of New Zealand[62] held, inter alia, that the competent Minister's decision on the target for 2050 was compatible with then existing scientific evidence and that the decision on the NDCs for 2030 constituted a fair contribution to achieving the common global climate goals and was within the proper bounds of discretion since the Government could decide on the appropriate level of ambition.

5.4. Litigation on authorization of projects

There are also a number of national court decisions on the authorization of individual projects in which the Paris Agreement was considered. Since the only directly pertinent treaty provision, that is, Article 4(1)(f) FCCC foresees the relevance of climate change considerations to taking national actions only in a rather general and vague form, it is no surprise that the outcomes of litigation have been quite varied. However, an open denial of the relevance of the Paris Agreement has been rare.[63] Sometimes, courts simply refer to the Paris Agreement including its provisions on ambition but base their decision on other sources of law, especially domestic human rights, or primarily or even exclusively refer to their domestic climate protection laws.[64]

In "Gloucester Resources"[65] the Land and Environment Court for New South Wales upheld the refusal by the competent Minister to grant planning permission for a new open-cut coal mine. The lengthy decision was essentially based on an interpretation of the applicable Environmental Planning and Assessment Act. Inter alia, the Court also took the requirements of the Paris Agreement into account as balancing materials. This includes the 2/1.5 degrees goals and the long-term goal of climate neutrality, the need for rapid and deep emission reductions even for reaching the 2 degrees goal and the commitment of developed countries to take the lead in ambitious efforts to reduce emissions. According to the Court, an overall balancing of benefits and risks associated with the coal mine justified the denial of the permit application. In contrast, in "Sharma", the Australian Federal Court of Appeal,[66] deciding on the extension of a coal mine, rejected a duty of care of the Government for climate protection because such a "novel" duty was inconsistent with the text and structure of the applicable statutory rules and was a matter of high politics not amenable to judicial disposition. The Court did not question the Minister's view that under the Paris Agreement emissions from the use of exported coal had to be attributed to the consumer countries.

In a South African case regarding an authorization for a new coal mine,[67] the competent District High Court recognized that climate protection was an environmental concern to be taken into account by the competent Minister and remitted the case to consider new evidence based on a climate change impact assessment. After

61 Land and Environment Court of New South Wales, judgment of 26 August 2021, Bushfire Survivors for Climate Action Inc. v Environmental Protection Agency, [2021] NSWLEC 92, paras 97, 102; regarding the principles relevant for interpreting the Act see paras 43, 61, 79.

62 High Court of New Zealand, Judgment of 2 November 2017, Sarah Thomson v Minister for Climate Change Issues, [2017] NZHC 733, paras 97, 158-160, 161-176.

63 Exception: Austrian Constitutional Court, Decision of 29 June 2017, GZE 875/2017-32 and 886/2017-31, Schwechat Airport Extension, para 21.

64 To this extent: German Federal Administrative Court, Judgment of 4 May 2022, 9 A 7.21, ECLI:DE:BVerwG:2022 : 040522U9A7.21.0, paras 62, 69, 85-86, 97; Norwegian Supreme Court, Judgment of 22 December 2020, HR-2020-P, case no. 20-051052SIV-HRET, civil, Nature and Youth Norway and Greenpeace Nordic v. Ministry of Petroleum and Energy ("People v. Arctic Oil"), paras 57-59, www.klimasøksmål.no/wp-content/uploads/2021/01/judgment_translated.pdf; for a critical comment on the latter decision see C. Voigt, The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics, *JEL* 33 (2021), 697-710.

65 Land and Environment Court for New South Wales, Order of 8 February 2019, Gloucester Resources Ld. v Minister for Planning, [2019] *NSWLEC* 7, especially paras 486-539, 686-699.

66 Federal Court of Appeal of Australia, Order of 15 March 2022, VID 389 of 2021, Minister for the Environment v Sharma, [2022] FCAFC 35, paras 7, 38, 41, 214-233, 246-266, 267-272, 346.

67 High Court of South Africa, Gauteng Division, Judgment of 8 March 2017, case 65662/16, Earthlife Africa Johannesburg v Minister of Energy and Other, [2017] 2 All SA Law Reports 519, para 35.

having carried out this assessment, the Minister granted a new authorization which was then impugned again. However, pursuant to a settlement, the project was abandoned in 2020.[68] It should be noted that the Court had held that the project was compatible with the Paris Agreement and South Africa's NDCs which lawfully prioritized poverty alleviation.[69]

In a British case regarding the authorization of a third runway at Heathrow airport,[70] the UK Supreme Court emphasized that the United Kingdom had already met its obligations under the NDCs and these could be stiffened in the future, where need be. It further pointed out that the competent authority had taken the Paris Agreement into account, even though it had discretion as to whether and to which extent to do so. Therefore, in the opinion of the Court the question at most was as to whether the authority had exercised its discretion in an appropriate way, that is, not irrationally or giving the public interest in climate protection too low weight. Ultimately the Court accepted the authority's decision, overturning a contrary Court of Appeal judgement.

6. Conclusion

To sum up, the national decisions that deal with "ambition" of climate protection address some constitutive elements of this concept, even though they proceed in a rather selective way and focus on different aspects of ambition. The term "ambition" is rarely explicitly referred to. Implicit arguments regarding ambition prevail. Some decisions are based on human rights which offer the chance of achieving a higher degree of ambition, while the majority simply apply domestic statutory law. The relevant elements of ambition referred to with respect to target-setting, especially with relevance to the NDCs, are climate science and the concept of a global rest emissions budget as posited by the various IPCC reports, the need to take the Paris Agreement into account, a fair or just national share in reducing global greenhouse gas emissions and/or the concept of a fair national rest emissions budget, international cooperation, the duty to take care including precaution and intergenerational justice and the need for a long-term planning trajectory for emissions reduction. With respect to measures of implementation, the power of national legislatures and governments to balance climate protection with conflicting concerns, taking due account of the future climate risks for younger and future generations, is emphasized. In the balancing process, the principle of proportionality plays a major role. Measures that are unsuited or impossible to take or impose disproportionate burdens on the addressees are not permissible. As target-setting to a major degree also depends on the feasibility of particular measures and the solution of conflicts arising at the level of implementation, a generous grant of implementation discretion also has major repercussions on target-setting.

In any case, the decisions do not shed sufficient light on concrete questions of application "on the ground" so that crucial issues remain open. For instance, they do not or at best only summarily discuss the concrete meaning of a "fair share". They do not inform the government about which factual circumstances could justify to assume impossibility and/or disproportionality of concrete implementation measures. The decisions are valuable as they may enrich the deliberations on the concept of ambition and encourage more ambitious national action and litigation on mitigation, including through transnational learning. However, they are mostly not specific enough to draw robust conclusions from them. This also means that their power in the international negotiation process on the further implementation of the Paris Agreement is bound to remain limited. Apart from their contribution to the understanding of the notion of "ambition", some decisions also raise serious questions of the constitutional division of competences between parliament, the government and the judiciary which, however, depend on the respective constitutional order and are not amenable to generalisation.

68 High Court of South Africa, Gauteng Division, Order of 19 November 2020, case 21559/18, Earthlife Africa Johannesburg and Groundwork Trust v Minister of Environmental Affairs.

69 Supra note 67.

70 UK Supreme Court, Judgment of 16 December 2020, Friends of the Earth v Heathrow Airport Limited, [2020] UKSC 52 paras 121-122, 125-129, 131.