



Principles of EU law in climate litigation

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Abstract

The present contribution questions the role of principles of EU law in climate litigation. Notwithstanding their importance within the EU general regulatory framework, their operationalisation in climate litigation is underexplored. To appreciate EU principles in the context of climate change litigation, this paper positions them within the scope and dynamics of climate change litigation worldwide. Secondly, with this background, the analysis develops as a case law review on the emerging role of the precautionary principle, intergenerational equity, and the minimum harmonisation principle in the climate litigation. To date, five relevant climate lawsuits have unfolded before the courts of EU Member States, which allows for canvassing the content, status, and significance of the principles under examination with concrete examples of the climate lawsuits where these principles have been applied. In this regard, the paper finds that courts in Member States have steadily provided protection of the climate and future generations through rights-based arguments supported by principles. In this context, domestic courts seem to be filling the normative gap left by the CJEU by interpreting fundamental rights in relation to EU environmental principles in what I conceptualise as “the rights turn through principles.” As a final point, the paper concludes with the prospective development of EU principles in the EU legal order and beyond, possibly enabling comparisons with other jurisdictions.

Keywords Climatelitigation · European Union · Environmental principles · Courts

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1 Introduction

The European Green Deal (EGD) is not only the bloc’s “man on the moon moment”.¹ It has also spawned a *regulatory* moment that is unprecedented in terms of its scope and focus on climate change. Spanning the Climate Law and more general sustainability legislation addressing business and corporate entities,² the European Union (EU) has turned climate change into its make-it-or-break-it policy area. Dissonances, however, still exist. Notably, the EGD has yet to operationalise established EU environmental principles, such as precaution, fully.³

Operationalising the EGD-era legislation through established principles can be an advantage in terms of effective climate action. The implementation of the EU Climate Law – in particular, climate neutrality by mid-century (Art. 2(1) of the Climate Law) and a 55% emissions reduction by 2030 (Art. 4(1) of the Climate Law) – will happen via the “Fit for 55” package,⁴ the RePowerEU plan, and the Green Deal Industrial Plan for the Net-Zero Age.⁵ Nevertheless, gaps remain. The Green Deal Industrial Plan is still in its embryonic phase, the RePowerEU plan mainly aims to make Europe independent from Russian fossil fuels well before 2030, and the “Fit for 55” package does not tackle structural compliance issues, such as the lack of a binding mechanism for compliance or the vague content of the European Commission’s recommendations regarding Member States’ National Energy and Climate Plans (NECPs) in the Governance Regulation.⁶ Meanwhile, climate litigation has been burgeoning across the European continent. With 61 cases lodged with the EU courts and 97 cases filed in individual Member States, the bloc remains the jurisdiction with most cases, after the United States.⁷ At this junction, a question arises: What is the role of EU principles in climate litigation?

¹ * Dr. Esmeralda Colombo, Esq., Research Fellow, Catholic University of the Sacred Heart, Milan, Law Faculty. The author would like to express her deepest gratitude to the editor of this special issue, Dr. Alexander Stark, for his leadership and relentless dedication, as well as to this article’s peer reviewers for sharing their insights. Gratitude is expressed also to the participants of the webinar discussing the articles in this special issue (July 2022, online event). Research for this article springs from the author’s trial lecture to achieve the grade of PhD at the University of Bergen, Faculty of Law (3 June 2021). Accordingly, deepest thanks go to Prof. Jørn Øyrehagen Sunde, Dr. Jessica Schultz, Prof. Beate Sjøfjell, and Prof. Louis Kotzé for inspiring feedback on this research in the context of the trial lecture. This publication resulted in part from research funded by the Professor Arvid Frihagens offentligrettslige minnefond, Saks nr 2019/52/FOL, which the author gratefully acknowledges. Ekblom and Baczyńska (2019).

² See, e.g., Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022)71 final, 2022/0051(COD); EU COM, Sustainable Finance Package: https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en#csrd. See, in general, Peeters and Misonne (2022, 58), and Reins, L and Verschuuren, J (2022).

³ See also Sikora (2021, 689). Probably due to its less demanding character, the EGD refers to a new policy principle – the “green oath: do no harm” as a common minimum denominator for sustainable legislation.

⁴ Cf the recent agreement between the Council and the European Parliament, Michielin (2022).

⁵ European Commission (2023).

⁶ Schlacke et al. (2022).

⁷ The cut-off date for the climate litigation analysis is 7 Jul, 2022. See the ranking without counting Member States’ cases, Setzer and Higham (2022, 9).

The present paper hinges on three thematic clusters. Firstly, to appreciate EU principles in the context of climate change litigation, we need to position them within the scope (*infra* 2) and dynamics (*infra* 3) of climate change litigation worldwide. Secondly, with this background, we will be able to dive into the core analysis of what I term *the emerging role* of EU principles in climate change litigation (*infra* 4). In particular, I want to outline the importance of the emerging role of the precautionary principle, intergenerational equity, and the minimum harmonisation principle. I will sketch their content, status, and significance with concrete examples of the climate lawsuits that have applied these principles. To date, five relevant climate lawsuits have unfolded before the courts of EU Member States, and I will focus on these cases and how they address intergenerational equity, the precautionary principle, and the minimum harmonisation principle. As a third and final point, I will conclude the paper with the prospective development of EU principles in the EU legal order and beyond (*infra* 5). The final section concludes (*infra* 6).

2 Assumptions, limitations, and methodological clarifications

This paper is premised on a set of assumptions and limitations that are worth presenting for at least two reasons. First, no project has been explicitly dedicated to the subject of EU environmental principles in climate litigation, making this paper instrumental in bridging the gap between existing knowledge on EU environmental principles and the most recent dynamics of climate litigation. As a second – consequential – consideration, it is vital to articulate as simply as possible the methodology underpinning the present take on the subject as the topic is susceptible to being examined in numerous ways. After clarifying the meaning of climate litigation and EU principles, the paper turns to the methodology deployed for examining relevant case law concerning EU principles in climate litigation.

This paper constructs climate change litigation as “litigation where climate change or greenhouse gases are an explicit subject of the case, though not necessarily the only subject.”⁸ This definition springs from academia and guides the most comprehensive climate case charts worldwide, which are peer-reviewed and published by the Sabin Center for Climate Change Law at Columbia University.⁹ Judicial litigation encompasses climate change mitigation and adaptation. Mitigation covers measures to limit greenhouse gas (GHG) emissions and measures to preserve or enhance sinks for absorbing GHGs. Adaptation focuses on the impacts and efforts to prepare for the current and anticipated impacts of climate change.¹⁰

By definition, EU principles, which feature in the title of the paper, can encompass many definitions. EU environmental principles have influenced the bloc’s regulatory

⁸ Gerrard (2021, 33). See similarly: Ruhl, JB and Markell, DL (2012, 27); Wilensky (2015, 134); Setzer and Higham (2022, 25).

⁹ See <http://climatecasechart.com/> (all internet sources were last accessed on 16 Feb 2023); Setzer and Higham (2022, 25). On the Sabin Center’s database as the most complete worldwide, see van Zeven (2021, 1506).

¹⁰ Bodansky et al. (2017); Gerrard (2021).

universe since the first Community Environmental Action Program in 1972, but they were first heralded in the treaties only in 1987 by the Single European Act.¹¹ Environmental principles can arise from either primary law or secondary law and are indirectly applicable to how each EU policy and activity is defined and implemented.¹²

In the “jungle” of environmental principles,¹³ a short overview of the main EU principles that can be employed in climate change litigation today might be helpful. For example, Article 191(2) of the TFEU includes such environmental principles as the principle of a *high level of environmental protection*, the *precautionary principle*, and the principle that *preventive action* should be taken in environmental matters, that environmental damage should as a priority be *rectified at the source*, and that *the polluter should pay*.¹⁴ Those principles have considerably influenced secondary EU legislation, national legislation, and the rulings handed down by the Court of Justice of the European Union (CJEU).¹⁵

Additionally, Article 193 of the TFEU lays out the principle of minimum harmonisation for measures adopted on an environmental legal basis, meaning that EU law is – in principle – a floor, not a ceiling, and Member States shall not be prevented from maintaining or adopting more protective measures.¹⁶ Moreover, sustainability is an *overarching objective* of the European Union. As a result, it serves as the guiding principle for the policies and activities of the EU within Europe and those targeted toward the rest of the world, as enshrined in Article 11 of the TFEU.¹⁷ This principle connects to the EU’s aim to promote “peace, its values and the wellbeing of its peoples.”¹⁸ Taken together, these principles offer significant and substantive standards, as well as procedural mandates that apply to climate change litigation.

Finally, we shall broadly consider the role of the *general* principles of the EU. European treaties make few relevant references to the general principles, but those that exist are of paramount importance. Notably, fundamental rights “shall constitute general principles of the Union’s law,”¹⁹ as guaranteed by the European Convention on Human Rights (ECHR). These rights result from the constitutional traditions common to EU Member States.²⁰ The formulation of the general principles of EU law is somewhat broad. Nevertheless, case law and scholarship have helped identify ten general principles in addition to fundamental rights.²¹ Among the general principles of EU law, those relevant to this paper’s topic are fundamental rights and the principle of effective judicial protection. In connection to Article 191(2) and Article

¹¹ Aragão (2018, 451).

¹² *ibid.*, 452.

¹³ *ibid.*, 454) – emphasis omitted.

¹⁴ Art. 191(2) of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016], OJ C202/1 (TFEU).

¹⁵ De Sadeleer (2020).

¹⁶ Przybojewska (2018).

¹⁷ Art. 11 of the TFEU.

¹⁸ Art. 3(1) of the Consolidated Version of the Treaty on European Union [2008], OJ C115/13 (TEU).

¹⁹ Art. 6(3) of the TEU.

²⁰ Art. 6(3) of the TEU.

²¹ Tridimas (2006; forthcoming).

11 of the TFEU, the EU Charter of Fundamental Rights enshrines a “high level of environmental protection” and the “improvement of the quality of the environment” in Article 37. Under Article 52(3) of the Charter, the rights encased within it that correspond to the rights guaranteed by the ECHR have the “same meaning and scope” as the rights protected under the ECHR, bundling the case law of the European Court of Human Rights. In this sense, Article 52(3) of the Charter makes ECHR litigation relevant for developing EU principles.

Future generations are mentioned in the Charter’s preamble and in Article 3(3)(2) of the Treaty on the European Union (TEU), which stipulates that the EU shall promote solidarity between generations.²² Along with solidarity between the Member States, intergenerational solidarity is “the bedrock of the European construction,” in the words of Advocate General Bot.²³

For the purposes of this paper, the Sabin Center’s litigation charts provide the climate cases most relevant for the topic under discussion.²⁴ To ensure comparability, the relevant case law includes concluded, as well as ongoing final, albeit not necessarily definitive, decisions rendered by both EU courts and Member States’ courts. It excludes cases that have been lodged but have not been decided. To select the relevant case law, the methodological process applied was inferential: “the use of facts that we know,” in this case climate change litigation, “to learn about facts we do not know,”²⁵ in this case, EU principles that are relevant to such litigation. I was able to establish such inferences through content analysis: first, through a jurisdiction-based search, I retrieved the climate decisions that have been rendered by both the EU courts and Member States’ courts; next, I selected the cases where EU principles have been applied;²⁶ I then coded and analysed them to uncover patterns.²⁷

3 Climate change litigation worldwide

Today, climate change litigation seems an unstoppable phenomenon. By May 2022, the Grantham Research Institute on Climate Change and the Environment reckoned that 2,002 climate change cases had been filed in 43 countries and 15 international

²² Art. 3(3)(2) of the TEU. See also the Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407, 6th preambular para.

²³ Opinion of Advocate General (AG) Bot delivered on 26 July 2017, Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, ECLI: EU: C:2017:618, para 19.

²⁴ See *supra* note 7.

²⁵ Epstein and King (2002, 1).

²⁶ Because of the variety of tags that the litigation charts display on cases applying EU principles, the case law was not retrieved based on a keyword search, such as through “EU principles,” but rather by a content analysis of the actual decisions in their original language (*Notre Affaire à Tous* and *Grande-Synthe*), official translation (*Urgenda*), and unofficial translation available on the Sabin Center’s website (*Neubauer and Klimatická žaloba ČR v. Czech Republic*). Cf the search based on keywords in van Zeven (2021, 1506).

²⁷ Hall MA, Wright RF (2008).

or regional courts or tribunals.²⁸ The number has more than doubled since 2015.²⁹ Outside of the United States, the largest number of cases have been filed in Australia, followed by the United Kingdom and EU courts.³⁰ Key trends include increasing numbers of cases invoking human rights, which has also been referred to as “the rights turn” in climate change litigation.³¹ Other trends have centred on enforcing existing legislation, disclosures, and real corporate sustainability.³² Pursuant to data I retrieved and elaborated upon by July 6, 2022, the EU courts presently appear in the Sabin Center’s litigation chart to have 61 ongoing cases. Member States are responsible for a total of 97 cases, while the same figure was 46 only one year ago.³³ As shown later, the EU courts have, for the most part, abdicated the role of an adjudicator in protecting the climate and future generations. Rather, courts in Member States have steadily provided this protection through rights-based arguments supported by principles: in particular, the precautionary, intergenerational, and minimum harmonisation principles.

4 The emerging role of EU principles in climate change litigation

4.1 EU principles in the context of climate change litigation

Today, EU principles enjoy no established role in climate change litigation. Scholarship has yet to develop a taxonomy of EU principles that are specifically relevant to climate litigation, nor have EU principles been empirically investigated in the context of climate litigation.³⁴ For the purposes of this paper, the relevant case law includes *Urgenda, Neubauer et al. v. Germany, Notre Affaire à Tous v. France, Commune de Grande-Synthe v. France*, and *Klimatická Žaloba ČR v. Czech Republic*, which make either explicit or implicit reference to EU law. All cases are now final, albeit not all definitive, and have become landmark examples of climate change litigation.³⁵ As the case law review shows (*infra* 4.2), an empirical analysis reveals two normative patterns unfolding in Member States’ domestic courts, which are worth introducing in high-level terms to permit a more in-depth analysis of the case law and its implications in the following sections.

First, the case law will show that domestic courts have enabled a rights turn in climate matters through the deployment of environmental principles, notably the precautionary and intergenerational principles, against the governments of EU Member States. The role of these principles is hardly surprising due to their application in

²⁸ Setzer and Higham (2022, 1–2).

²⁹ *ibid.*, 1.

³⁰ *ibid.*, 9. See also *supra* note 1.

³¹ *ibid.*, 1, 4, 12, 26, and 31 ff. On the “right turn”, see Peel, J and Osofsky, HM (2018, 40).

³² Setzer and Higham (2022, 1, 3, 4, 21, and 39); UNEP/SCCC (2021).

³³ Data refer to 6 Jul 2022, and 3 Jun 2021, respectively.

³⁴ Cf see an investigation of the EU charter in van Zeven (2021).

³⁵ See, e.g., Nollkaemper and Burger (2020); Kotzé, LJ (2021); Colombo (2023) and Torre-Schaub (2021).

the context of scientific, planning, and distributive uncertainties.³⁶ The precautionary principle shall apply where scientific information is insufficient, inconclusive, or uncertain but where the effects on the environment or on human, animal, or plant health may be potentially dangerous and inconsistent with the chosen level of protection.³⁷ The precautionary principle lies at the heart of EU risk management and is enshrined in Article 191(2) of the TFEU, as I mentioned above (*supra* 2). Importantly, it is now part of customary law in the EU, as one of the most influential manuals of international environmental law elucidated as early as 2018.³⁸

The precautionary principle is inherently entwined with intergenerational equity. Notably, it holds an ineluctable intertemporal dimension, whereby decisions taken by public authorities today impact the living conditions of present and future generations.³⁹ In its anti-discrimination case law, the CJEU has expounded on intergenerational equity as a “balance between the generations”,⁴⁰ but it has yet to articulate the status and content of the precautionary principle in relation to intergenerational equity.⁴¹ As shown in the following sections, domestic courts are filling the normative gap left by the CJEU by interpreting fundamental rights in relation to EU environmental principles in what I call the *rights turn through principles*.⁴²

Second, the following review of the case law reveals the increasing deployment of the principle of minimum harmonisation. According to Article 193 of the TFEU, EU measures do not pre-empt litigation in the courts of Member States because climate action above and beyond EU law can and should be achieved. Accordingly, domestic courts are not carrying out a detailed analysis of the harmonisation method entailed in each piece of EU legislation, which is difficult even for academics.⁴³ Rather, unless explicitly ruled in EU law, courts are combining instruments of EU legislation under the minimum harmonisation principle, which they seem to apply as the preferred harmonisation method. This approach allows for adjustments of EU legislation to the specificity of national circumstances and the requirements of international law. As shown in the next section, the principle of minimum harmonisation is emerging as a claw-back rule of power-sharing among legislatures at the EU and Member States levels.

I have now presented the relevant EU principles with relatively broad brushstrokes. However, a unified account of the applicable principles is impossible. In

³⁶ See Colombo (2021; ch. 6).

³⁷ Commission Communication on the Precautionary Principle, COM(2000)1 final, Annex III, p.7, Sect. 1, and p.12, Sect. 5.

³⁸ For both points, see Sands et al. (2018, 239). Cf on the precautionary principle as a general principle of EU law, de Cendra de Larragán, J (2011, 135).

³⁹ Separate Opinion of Judge Cañado Trindade, *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 135 (2010) para 90.

⁴⁰ Case C-268/09 (Joined Cases C-250/09, C-268/09) *Georgiev* ECLI: EU: C:2009:549, para 42. See also C-341/08 *Petersen* ECLI: EU: C:2010:4, and C-286/12 *Commission v Hungary* ECLI: EU: C:2012:687, paras 65, 50–54 and 78.

⁴¹ On the constraints over the CJEU’s legal use of environmental principles, Scottford (2019).

⁴² On the rights turn in climate litigation more generally, *supra* note 3.

⁴³ Przybojewska (2018, 119 ff.).

truth, only the case law can reveal the EU principles that are emerging in climate litigation (*infra* 4.2).

4.2 Case law review

4.2.1 Urgenda

The principles of intergenerational equity, precaution, and minimum harmonisation were applied in the Dutch case *Urgenda*, which is now considered foundational in climate change litigation.⁴⁴ In 2013, the NGO Urgenda filed a class-action suit against the government of the Netherlands on its own behalf and as the legal representative of concerned individuals. In 2015, the district court of The Hague found the Dutch state liable for hazardous negligence under tort law contrary to its constitutional obligations, specifically Article 21 of the Constitution of the Netherlands. In the court's view, state climate action was lacking, thus endangering the right to life and the right to respect for private and family life for both present and future generations, in breach of Articles 2 and 8 of the ECHR, which is mirrored in Articles 2 and 7 of the EU Charter. In the court's view, the Netherlands had positive obligations, namely a duty of care, to take protective measures.

As a result, the government was ordered to decrease GHG emissions by at least 25% by 2020, as compared to 1990 levels. According to *Urgenda*, the minimum fair share that the Netherlands should bear in climate mitigation goals was a 25% emissions reduction by 2020, based on scientific literature, notably the Intergovernmental Panel on Climate Change reports and decisions by the Conference of the Parties (COP).⁴⁵ The amount articulated by the court was higher than the reduction of GHG emissions for the Netherlands derived from European legislation.⁴⁶ In 2018 and 2019, the decision was confirmed upon appeal and, finally, before the Supreme Court of the Netherlands. The decision was modified somewhat during the appeal process, mainly concerning the way ECHR law was applied.

In this paper, however, I focus on the application of EU law, which was consistent across the three judgments. First, in the context of climate litigation, the Dutch courts were the first to deploy Articles 191 and 193 of the TFEU in climate policy matters. Concerning Article 191, the district court of The Hague applied three principles encased therein: the precautionary principle, the prevention principle, and the prin-

⁴⁴ Peel and Markey-Towler (2021); *Urgenda v The Netherlands*, The Hague District Court, ECLI: NL: RBDHA:2015:7196 (24 Jun 2015) (original language: ECLI: NL: RBDHA:2015:7145); *The Netherlands v Urgenda*, Court of Appeals of The Hague, ECLI: NL: GHDHA:2018:2610 (9 Oct 2018) (original language: ECLI: NL: GHDHA:2018:2591); *The Netherlands v Urgenda*, Netherlands' Supreme Court, ECLI: NL: HR:2019:2007 (20 Dec 2019) (original language: ECLI: NL: HR:2019:2006).

⁴⁵ Backes, CW and van der Veen, GA (2020, 312); see also Rajamani et al. (2021, 984).

⁴⁶ *Urgenda's* First Instance (2015, *supra* note 42), paras 4.26 and 4.31; Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC Text with EEA relevance, OJ L 275 (amended). See Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140.

ciple of maintaining a high level of environmental protection within the EU.⁴⁷ In particular, the court construed these principles as articulating that environmental policy merited a high priority and must be implemented strictly, as opposed to postponing measures until complete scientific certainty has been achieved. In short, it relayed the message that prevention is better than a cure. The protection scope provided by these principles was extended to future generations through a further principle, the principle of intergenerational equity. This concept means that current generations – those alive today – cannot deplete resources in an unsustainable way, disproportionately affecting generations of young people and the unborn.⁴⁸ The court noted that the principles of intergenerational equity and precaution are enshrined in the UN Framework Convention on Climate Change,⁴⁹ which is a mixed agreement, namely an agreement to which both the EU and its Member States are parties.

Turning to Article 193, the Dutch courts construed measures at the EU level as a floor rather than a ceiling, not impeding more ambitious measures at the national level to align with the remaining carbon budget, namely the cumulative amount of CO₂ emissions allowed over a period of time to keep within the 1.5 °C temperature increase threshold.⁵⁰

Thus, in *Urgenda* as a whole, the described provisions of the TFEU, enshrining the precautionary and minimum harmonisation principles, were applied along with the principle of intergenerational equity. Overall, such principles specified the content and application of human rights law (i.e., ECHR law) in what I have termed the rights turn through principles. Further, they contributed to setting boundaries in relation to the Dutch government's discretion over climate mitigation policy.

4.2.2 Neubauer

In *Neubauer*,⁵¹ the German Constitutional Court rendered a landmark decision, which is final and notable in many regards. For the purposes of this paper, I will focus again on EU principles, notably on the bundling of human rights protections with EU principles, referencing again what I called the rights turn through principles.

In 2020, a group of German youths challenged Germany's Federal Climate Protection Act, claiming that the target of reducing GHGs by 55% by 2030 from 1990 levels – though implementing EU law – would prove insufficient and in breach of the principle of human dignity, the right to life and physical integrity, and Article 20a of the Basic Law, which protects the natural foundations of life for future generations. Further, the plaintiffs referenced Articles 2 and 8 of the ECHR, the same articles invoked in *Urgenda*.

⁴⁷ *Urgenda's* First Instance (2015, *supra* note 42), paras 4.60–4.61; *Urgenda's* Appeal (2018, *supra* note 42), para 16; and *Urgenda's* Supreme Court (2019, *supra* note 42), para 25.

⁴⁸ *Urgenda's* First Instance (2015, *supra* note 42), para 4.57.

⁴⁹ *ibid.*, paras 4.56–4.59.

⁵⁰ Garben (2019).

⁵¹ Ekardt (2022, 7).

In its decision, the court established the government's constitutional duty to protect present and future generations from climate change.⁵² In terms of infringements, the court maintained that the emissions quantities envisaged *until* 2030 significantly reduced the remaining emissions possibilities after 2030, but it stated that the endangerment of the right to freedom was not unconstitutional. Hence, the court found no violation of the duty to protect because adopted measures are subject to judicial review only under three alternative scenarios: (1) if precautionary measures are lacking; (2) if the adopted measures prove manifestly unsuitable or wholly inadequate to achieve climate protection goals, or (3) if the adopted measures fall significantly short of climate protection goals.⁵³ However, the court found a lack of precautions to mitigate the high emissions reduction burdens to safeguard freedom for generations *after* 2030.⁵⁴ The challenged act was not poised to distribute freedom opportunities *proportionately* across generations,⁵⁵ a notable recognition of the principle of inter-generational equity.

By applying a theory of “advance interference-like effect,” the court established that the challenged provisions of Germany's Federal Climate Protection Act lacked the intermediary targets set by parliament and were thus set to subsume the carbon budget until 2030.⁵⁶ Conclusively, the challenged provisions of Germany's Federal Climate Protection Act were *de jure* interfering with the youth's future freedom, which can only be justified under strict constitutional standards.⁵⁷ Consequently, the court set an ultimate deadline – December 31, 2022 – for lawmakers to establish post-2030 emissions reduction targets compliant with the court's decision.⁵⁸

One issue confronting the court was how to fulfil this special duty of care toward future generations and their future freedoms. This obligation was eventually achieved by aligning precautionary measures with the carbon budget. Like *Urgenda*, the court referred to Article 3(3) of the UNFCCC, by which the lack of complete scientific certainty should not serve as a reason for postponing precautionary measures if “serious or irreparable” damage is imminent.⁵⁹ Further, the court stated that lawmakers are not free to regulate as they wish. By accounting for the global and national carbon budgets, they shall shape precautionary mitigation policies in the face of mere indications or threats of potentially serious or irreversible effects caused by climate change, as long as these indications are sufficiently reliable.⁶⁰

It is noteworthy that the German state opposed the carbon budget approach during the proceedings⁶¹ because this approach is not required by EU or international

⁵² German Federal Constitutional Court, Order of the First Senate of 24 March 2021, 1 BvR 2656/18 (“Neubauer”), para 145, referring to Arts. 2(2) and 14(1) of the Constitution.

⁵³ *ibid.*, para 152. The level of judicial scrutiny is high for defensive rights against state interference, *ibid.*

⁵⁴ *ibid.*, paras 145, 182, and 183.

⁵⁵ *ibid.*, para 192.

⁵⁶ *ibid.*, paras 182 and 183.

⁵⁷ *ibid.*, paras 184–187.

⁵⁸ *ibid.*, para 268.

⁵⁹ *ibid.*, para 229.

⁶⁰ *ibid.*

⁶¹ *ibid.*, para 69.

law and is subject to considerable uncertainties. However, the Constitutional Court rejected this argument⁶² and instead applied the minimum harmonisation principle – short of referring to Article 193 of the TFEU. That is, the German government could and should go beyond EU measures in alignment with a science-based carbon budget. More broadly, the background of the Climate Protection Act under EU law did not prevent the admissibility of the constitutional complaints, even if some of the provisions of the Climate Protection Act could be regarded as implementing EU law within the meaning of Article 51(1) of the Charter of Fundamental Rights. It is noteworthy that the Federal Constitutional Court has remained reluctant to discuss the applicability of the Charter to the case.⁶³

Compared with *Urgenda*, *Neubauer* applied EU law to a lesser degree but deployed the precautionary, intergenerational equity, and minimum harmonisation principles within the wider context of the international climate regime and the EU legislative frameworks implementing it.

4.2.3 Notre Affaire à tous

In a third case, *Notre Affaire à Tous* – also inspired by *Urgenda* – four nonprofits initiated a legal proceeding against the French government in 2018 for failing to meet its climate mitigation goals, including those adopted due to EU law. In 2019, the plaintiffs filed the lawsuit before the Administrative Court of Paris as a suit for failure to act, known in French as “*recours en carence fautive*.”⁶⁴ For the purposes of this paper, I will focus on EU principles, notably the bundling of human rights with EU principles, or what I previously called the rights turn through principles.

In February 2021, the Administrative Court of Paris rejected the plaintiffs’ arguments that the government could be forced to meet specific renewable energy and energy efficiency targets and declined to issue compensatory damages for ecological harm. Its underlying rationale stated that the French government was still in a position to remedy its inaction.⁶⁵ However, the court did recognize that France had exceeded its mitigation targets and that France’s inaction has caused ecological damage from climate change; consequently, it awarded the plaintiffs one euro for moral prejudice.⁶⁶ The court cited the global carbon budget, which should be preserved for present and future generations, referring to the international climate regime.⁶⁷

In October 2021, the court issued an injunction for France to repair the ecological damage caused by excess emissions and to prevent the aggravation of ensuing damage by December 2022. The injunction is final, albeit not definitive. As anticipated in

⁶² *ibid.*, para 217.

⁶³ An extensive analysis of the applicability of the Charter may have been avoided also because plaintiffs had invoked only Article 47 of the Charter and only for standing purposes.

⁶⁴ Cournil (2019).

⁶⁵ *Notre Affaire à Tous et al. v France*, no. 1,904,967, 1,904,968, 1,904,972, 1,904,976/4–1 (Administrative Tribunal of Paris, 3 Feb 2021), para 10; *Notre Affaire à Tous et al. v France*, no 1,904,967, 1,904,968, 1,904,972, 1,904,976/4–1 (Administrative Tribunal of Paris, 14 Oct 2021), para 8.

⁶⁶ *Notre Affaire à Tous et al. v France* (Administrative Tribunal of Paris, 3 Feb 2021), p. 37.

⁶⁷ *ibid.*, para 18.

its February 2021 decision, the court maintained that France is responsible for environmental damage due to its failure to meet climate and carbon budget goals under EU and national law by anchoring such obligation in Article 1246 of the French civil code (reparation of ecological damage).⁶⁸ It is salient to note that the target set by France, a GHG reduction by 17% by 2020, compared to 1990 levels, was more ambitious than what EU law required – implying minimum harmonisation in climate matters. For this paper, it is essential to underscore how the court required the French government to include its excess emissions in the mitigation targets set for 2021 and 2022.⁶⁹ With an emissions reduction target of 40% by 2030, compared to 1990, and carbon neutrality by 2050, France was called to compensate for the emissions exceeding its first carbon budget, emissions amounting to 15 Mt CO₂eq.⁷⁰

Overall, the court seemed to agree with the plaintiffs that the French Charter of the Environment, which has constitutional relevance, and other legislation, including EU legislation and the EU precautionary principle, supported a reduction of GHGs poised toward one objective: that current and future generations live in a sustainable climate and enjoy their human rights. Notably, these are the same claims we saw in *Urgenda* and *Neubauer*, referencing Articles 2 and 8 of the ECHR.⁷¹ The decision, however, did not expound on the interrelationship between the precautionary principle and the principle of intergenerational equity. Compared with *Urgenda* and *Neubauer*, *Notre Affaire à Tous* resembles *Neubauer* in its less visible application of EU law, yet it did not elaborate on the same principles, possibly due to the concise style of French case law.⁷² The court reviewed EU legislation as implementing international law, including the intergenerational equity principle, and maintained that the French government could and should go beyond it.

4.2.4 Commune De Grande-Synthe v. France

Similarly to *Notre Affaire à Tous*, another French case inspired by *Urgenda* has been decided with a final, albeit non-definitive, injunction. In 2019, the municipality of Grande-Synthe sued the French government for insufficient action on climate change before the French Council of State, the highest administrative court. Without being seriously challenged on this point, the plaintiffs underscored the vulnerability of Grande-Synthe to the impacts of climate change.⁷³ They claimed that the government was in breach of international law, including the ECHR, and asked for more comprehensive legislative and regulatory measures. For the purposes of this paper, I will focus on EU principles, notably what I previously called the rights turn through principles.

⁶⁸ *Notre Affaire à Tous et al. v France* (Administrative Tribunal of Paris, 14 Oct 2021), para 8.

⁶⁹ *ibid.*, paras 13 and 14.

⁷⁰ *Ibid.*

⁷¹ Among the sources cited by the court, see Art. 3 of the 1992 United Nations Framework Convention on Climate Change, 1771 UNTS 107, as well as Decision No 406/2009/EC, *supra* note 45.

⁷² Goutal (1976).

⁷³ *Grande-Synthe*, France's Council of State, 6e-5e ch., 19 Nov 2020, 427,301, para 3.

In November of 2020, the Council of State found that France had breached its first carbon budget and asked the government to substantiate, within three months, that it was taking adequate actions toward meeting its 2030 climate goals for the protection of present and future generations, as enshrined in the international climate regime.⁷⁴ Conversely, the plaintiffs' request for legislative measures "to make the climate priority compulsory" was rejected.⁷⁵ In July 2021, the Council of State issued an injunction for the French Prime Minister to take all practical measures to draw down emissions produced in all French territories by March 31, 2022.⁷⁶ The municipality of Grande-Synthe has already announced that it is seeking an administrative penalty for the Prime Minister's "climate inaction" by the court-determined deadline.⁷⁷

Compared to the three previous cases, *Grande-Synthe* is similar to *Notre Affaire à Tous*. The court reviewed government climate action against the benchmark of international law and EU law, including the precautionary and intergenerational equity principles, but stopped short of considering what such principles entail.⁷⁸ Interestingly, the court referred to the mitigation target for the EU, increasing from a 40% to a 55% emissions reduction, compared to 1990 levels, which at the time of the decision was yet to be enshrined in a binding legislative instrument.⁷⁹ Notwithstanding, it thereby derived a standard of due diligence for the French Prime Minister – the climate measures adopted by the government fell short of not only domestic targets but also EU targets. Notably, the 55% reduction target refers to the EU as a whole, but the court seemed to apply the minimum harmonisation principle implicitly while deeming the target relevant not only for the EU as a whole but also to assess the specific conduct of a Member State, France.⁸⁰ As a second intriguing feature, similarly to *Neubauer* and *Notre Affaire à Tous*, the court endowed the carbon budget with a normative character,⁸¹ which the French government did not necessarily foresee. Third, and in line with the previously reviewed case law, the court derived evidentiary consequences from ministerial and governmental declarations, suggesting a demanding burden of proof on state authorities to prove that mitigation measures are suitable and adequate. In particular, the Council of State held that the government had failed to prove that climate mitigation targets would be achieved by 2030. Notably, France's

⁷⁴ *ibid.*, paras 9 ff.

⁷⁵ *ibid.*, para 17 (author's translation).

⁷⁶ *Grande-Synthe*, France's Council of State, 6e-5e ch., 1 Jul 2021, 427,301, para 7.

⁷⁷ La ville Grande-Synthe va demander que l'État reçoive une astreinte pour « inaction climatique » (31 May 2022) <https://www.precarite-energie.org/recours-devant-le-conseil-detat-pour-inaction-climatique-la-reponse-du-gouvernement/>. See also the case brought by mayor of Grande-Synthe before the ECtHR, *Carême v. France*, App. no. 7189/21 (ECHR, 28 Jan 2021).

⁷⁸ *Grande-Synthe*, France's Council of State, 6e-5e ch., 19 Nov 2020, 427,301, paras 9 ff.

⁷⁹ *Grande-Synthe*, France's Council of State, 6e-5e ch., 1 Jul 2021, 427,301, para 5. On the day of the judgment, the content of the 'Fit for 55' was known, CAN Europe, 'The EU's upcoming climate and energy legislative package should be "Fit for 1.5°C"' (Press Release, 1 Jul 2021), <https://caneurope.org/climate-energy-legislative-package-ft55/>.

⁸⁰ On both points, *Grande-Synthe*, France's Council of State, 6e-5e ch., 1 Jul 2021, 427,301, para 5.

⁸¹ See similarly Torre-Schaub (2021, 1455).

emissions reduction target of 40% since ministerial proposals subject to parliament's approval suggested achieving a 38% emissions reduction by 2030.⁸²

Overall, *Commune de Grande-Synthe v. France* seems complementary to *Notre Affaire à Tous*. In both cases, the courts established a governmental duty to act through suitable and adequate climate mitigation measures. Accordingly, both decisions found that the French state had breached the national carbon budget and was not poised to attain future mitigation targets, endowing the rulings with a forward-looking perspective whereby more suitable regulatory measures shall be reinforced with adequate enforcement tools.

4.2.5 Klimatická žaloba ČR v. Czech Republic

As the fifth and chronologically last case within this case law review, the Czech case *Klimatická žaloba ČR v. Czech Republic* follows the likes of *Urgenda* and *Neubauer*. In 2021, an association of Czech citizens, Klimatická žaloba ČR, four individual plaintiffs, and one branch association of the Czech Ornithological Society, with the municipality of Svatý Jan pod Skalou as intervenor, sued the Czech government and four ministries for executive inaction over climate mitigation and adaptation, in breach of the ECHR, EU law, and international law.⁸³ In June 2022, the Municipal Court of Prague dismissed the lawsuit with regard to claims against the Czech government and those concerning adaptation matters.

Conversely, in matters of climate mitigation, the court established that, by their inaction, all sued ministries had affected the plaintiffs' right to a favourable environment, which results from the Czech Charter of Fundamental Rights and Freedoms, the 1992 Czech Environmental Protection Act, the ECHR, the Paris Agreement, and the UNFCCC.⁸⁴ Further, the court enjoined the ministries from further violations of the plaintiffs' rights by setting a 55% emissions reduction target for the Czech Republic, compared to 1990 levels, to be reached by 2030. For the purposes of this paper, I will restrain my analysis to the deployment of EU principles, what I previously called the rights turn through principles.

In its reasoning, the court established that all sued ministries had erred in failing to set specific mitigation measures. As the court reasoned, due to executive inaction, local impacts of climate change already impinged on the plaintiffs' right to a favourable environment, as protected by Article 35 of the Charter of Fundamental Rights and Freedoms, which is a constitutional document in the Czech Republic.⁸⁵ In the court's understanding of such a right, environmental principles were preemi-

⁸² *Grande-Synthe*, France's Council of State, 6e-5e ch., 1 Jul 2021, 427,301, para 5.

⁸³ The case was brought against four ministries, namely the Ministry of the Environment, the Ministry of Industry and Trade, the Ministry of Agriculture, and the Ministry of Transport.

⁸⁴ *Klimatická Žaloba ČR v. Czech Republic*, Judgment No. 14 A 101/2021 (Municipal Court in Prague, 15 Jun 2022), paras 159 ff. The Charter of Fundamental Rights and Freedoms constitutes part of the Constitutional Code of the Czech Republic. Plaintiffs had alleged violations of additional rights as well, e.g., the right to life and protection of health, the right to private and family life, property rights, the right to perform economic activity and the right to self-government, which the court did not find necessary to broach given the violation of the right to a favorable environment, *ibid.*, para 209.

⁸⁵ On the definition of the right to a favorable environment, *ibid.* paras 162 and 21.

ment. In particular, the court established that the precautionary principle played at least three roles.⁸⁶ First, it ensures that the state is under a positive duty to protect the right to a favourable environment well before basic needs become impossible to realise.⁸⁷ Second, the precautionary principle warrants that, notwithstanding unpredictable climate-related phenomena, the national carbon budget can be calculated in a way that is protective of the climate.⁸⁸ Third, in the absence of a nationally-determined contribution (NDC) submitted by the Czech Republic under the Paris Agreement, the court established that the EU's collective NDC of reducing GHG emissions by 55% by 2030 compared to 1990 levels, as updated by the EU in 2020, applied as an emissions reduction target for the Czech Republic.⁸⁹ In reality, the EU has yet to definitively allocate emissions reduction targets among its Member States, with a proposal to set the Czech Republic's share of emissions reduction to 26%.⁹⁰ Nevertheless, the court justified the application of the higher target of 55% by applying the minimum harmonisation principle and referencing *Urgenda*. In fact, in the court's view, the allocation of emissions reduction targets among Member States in EU secondary law does not exclude a more ambitious commitment of the Czech Republic according to the Paris Agreement.⁹¹

Overall, by applying domestic legislation in light of the Paris Agreement, the ECHR, and comparative climate litigation,⁹² the court found that the principle of effective judicial control already required domestic courts to check on the implementation of the Paris Agreement until 2030, as damage caused by executive inaction will be increasingly irremediable.⁹³ Although the plaintiffs had invoked the Charter of Fundamental Rights of the European Union, the court stopped short of applying it.⁹⁴ It is noteworthy that the court seemed reluctant to thoroughly discuss the applicability of the Charter to the case.

Compared to the other cases, *Klimatická Žaloba ČR* goes to a great length in citing relevant case law, notably *Urgenda*, and in articulating the principles of precaution and minimum harmonisation, even beyond *Urgenda* and *Neubauer*. Conversely, it only briefly referenced intergenerational equity, considering the principles of solidarity and fairness among Member States to realise climate neutrality in the European

⁸⁶ The precautionary principle was applied with no reference to legal sources, e.g., *ibid.*, paras 211 and 240; at other times as a general principle, e.g., *ibid.*, para 258; often as anchored in § 13 of the 1992 Czech Environmental Protection Act, *ibid.*, para 260.

⁸⁷ *ibid.*, para 211.

⁸⁸ *ibid.*, para 240.

⁸⁹ *ibid.*, para 241.

⁹⁰ Proposal for a Regulation amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement COM (2021) 555, Annex.

⁹¹ *ibid.*, para 257.

⁹² *ibid.*, paras 228–230.

⁹³ *ibid.*, para 260.

⁹⁴ Plaintiffs invoked Articles 6, 10, 11, 26, 31, 35 of the Charter. See *Klimatická Žaloba ČR* (21 Apr 2021, complaint) http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210421_13440_complaint.pdf. See also van Zeven (2021, 1507).

Union by mid-century.⁹⁵ Similarly to *Commune de Grande-Synthe*, targets that were set for the EU as a whole were construed as applicable to a single Member State – in this case, the Czech Republic – although, in this specific context, the Czech Republic was lacking an NDC against which its mitigation action could be evaluated. In line with the principle of minimum harmonisation, instead of declaring the absence of an evaluation benchmark, the court derived such a benchmark from EU law and applied the collective and onerous mitigation target of reducing emissions by 55% to the Czech Republic, in light of the precautionary and intergenerational equity principles.

4.3 Comparative take-aways

To review, all five cases I have outlined demonstrate the emerging role of the precautionary principle bundled with the intergenerational equity principle and the minimum harmonisation principle. In terms of justiciability, it is critical to note here that all principles have been applied indirectly, meaning that they were applied not as a direct legal basis for the decision but rather to interpret open standards in tort law, administrative law, constitutional law, and human rights law. Never before had courts in the EU Member States deployed these principles to shape a rule of conduct for rights-based state action in climate policy matters. Except for *Klimatická Žaloba ČR*, intergenerational equity is fairly spelled out and explicitly discussed in the context of international and EU law. Conversely, the precautionary and minimum harmonisation principles are implicitly set in the context of EU law, with the exception of *Urgenda*, where both principles are explicitly anchored in EU law, and *Klimatická Žaloba ČR*, where the minimum harmonisation principle is explicitly interpreted from EU law.

Building on the rights turn in climate litigation worldwide (*supra* 3), I call the entwinement of rights and principles in the selected case law a *rights turn through principles*. The key to interpreting this rights turn through principles seems to be the following: courts stipulate that by taking adequate and suitable precautionary measures – in particular through the quantified objective approach of the carbon budget⁹⁶ – legislatures, governments, or specific ministries shall preserve the rights and liberties of present and future generations. Under the minimum harmonisation principle, simply fulfilling EU climate targets is insufficient to protect the rights and liberties of those alive today and future generations.

What we can see emerging is an *integrative* model of policymaking in the EU – domestic law-making, whether judicially or through legislative organs, exceeds the level of EU climate ambitions. This integrative model of environmental policymaking has possibly arisen as a reaction to the limited access to justice that individuals and NGOs enjoy before EU institutions to lament inadequate climate policies.⁹⁷ In light of the similarities that have emerged in the case law review, I will briefly clarify four consequences of this emerging role of EU principles in climate litigation.

⁹⁵ *Klimatická Žaloba ČR v. Czech Republic*, Judgment No. 14 A 101/2021, para 253.

⁹⁶ On the quantified method approach, see Stark (2023).

⁹⁷ On limited access to justice in climate matters with regard to EU institutions, see Colombo (2021, 167 ff.).

First, this case law seems to support the finding mentioned above regarding scholarship (*supra* 4.1): the precautionary principle, which was first encased in the 1992 Maastricht Treaty, is now part of customary law in the European Union.

Second, the principle of intergenerational equity, which is enshrined in the EU treaties but has rarely been referenced in EU climate case law, seems to be slowly achieving its true constitutional value. Further, in the interpretation put forward by the German Constitutional Court in *Neubauer*, as seen previously, intergenerational equity entwines with the principle of proportionality, which is notably a general principle of EU law of German origin.⁹⁸

Third, EU principles seem general and flexible enough to allow state discretion. In all five cases, courts intervened on the climate objective to be attained, not on the means used to attain it.

Fourth, the principles of precaution and intergenerational equity seem “conventionalised” in the sense that all five decisions analysed have deployed such principles as part of EU law – or reference EU standards – and in light of the UNFCCC and Paris Agreement. Such a conventionalisation does not seem utterly unexpected as it allows courts in EU Member States to contribute to the ongoing judicial dialogue concerning climate litigation. Further, the role of international law to support EU principles seems far from outlandish, mainly because the Paris Agreement has leaned into the human rights turn in climate litigation, while EU courts have not supported rights-based arguments. The rights turn before EU courts was first attempted in 2018, when ten families from the European Union and abroad, along with one association representing indigenous Sámi youth, brought an action for the annulment and declaration of invalidity of one directive and two regulations concerning climate change mitigation. The plaintiffs alleged that the relevant legislation was inconsistent with international law and higher-ranking norms of the EU legal order, including the rights of children⁹⁹ and the precautionary and sustainability principles enshrined in the TFEU.¹⁰⁰ Moreover, the applicants maintained the non-contractual liability of the EU and requested an injunction. This case is often referred to as the *People’s Climate Case*.

However, the EU courts rejected the case on admissibility grounds, finding that the challenged instruments were not addressed to the applicants and thus failed to be of “direct or individual concern” to the plaintiffs. This case helped demonstrate that the current case law of the EU courts is unfavourable to climate change cases due to the strict standing requirements under Article 263(4) of the TFEU. Moreover, EU courts have clearly stated that Article 47 of the Charter of Fundamental Rights of the European Union on the right to an effective remedy and a fair trial “is not intended to change the system of judicial review laid down by the treaties, and particularly the rules relating to the admissibility of direct actions,” although the conditions of admissibility must nevertheless “be interpreted in the light of the fundamental right to effective judicial protection.”¹⁰¹

⁹⁸ The first appearance of the principle of proportionality, in Prussia, dates to 1794, Scaccia (2019, 2).

⁹⁹ Art. 24 of the EU Charter.

¹⁰⁰ Arts. 11 and 191 TFEU.

¹⁰¹ Case C-583/11 P *Inuit Tapiriit Kanatami* [2013] ECR II-0000 ECLI: EU: C:2013:625, paras 97–98.

Thus, a divide seems to have emerged regarding climate change matters in the European legal order. On the one hand, remedies that effectively protect the climate and future generations are steadily being provided by national courts through rights-based arguments supported by the precautionary and intergenerational principles and justified by the minimum harmonisation principle.¹⁰² On the other hand, existing climate litigation before EU courts is mainly statute-based rather than rights-based and limited to a few areas, notably the emissions trading system.¹⁰³ When plaintiffs have attempted to make rights-based arguments and tear down the normative wall to access EU courts, they have lost.

5 The prospective development of EU principles in the EU legal order and beyond

The previous takeaways on the case law under review bring us to the third and final thematic cluster for this paper: the prospective development of EU principles in the EU legal order and beyond.

The first prospective development of EU principles in climate litigation may be catalysed by the adjudication of climate cases by the ECtHR. Although the ECtHR has long been an underrated forum for environmental matters,¹⁰⁴ it has lately nurtured high expectations in terms of climate litigation.¹⁰⁵ An unprecedented number of climate cases are being filed, and three such cases have already reached the Grand Chamber, all raising a serious question affecting the interpretation of the Convention (Article 30 ECHR).¹⁰⁶ To review, many of the rights enshrined in the Charter of Fundamental Rights of the European Union overlap with the ECHR,¹⁰⁷ which may bring the ECtHR's case law into the discussion when broaching climate litigation in the EU legal order.

At the level of EU courts, the CJEU envisions the ECHR as a floor, rather than a ceiling, for the Charter's rights. This view means that, potentially, the CJEU may aim for more substantial and ambitious protections of fundamental rights in the EU, compared to the ECHR, even in climate matters.¹⁰⁸ However, based on the previous analysis, the reality is that rights-based climate litigation occurring before national courts is presently anchored in ECHR law rather than in the Charter of Fundamental Rights of the European Union, thus potentially leading to tensions between the CJEU and the ECtHR.

¹⁰² On little progress of climate litigation before EU courts, Hartmann and Willers (2022).

¹⁰³ Bogojević (2013; 2020).

¹⁰⁴ Kobylarz (2018).

¹⁰⁵ Spano (2020).

¹⁰⁶ Three cases are being examined by the Grand Chamber of the ECtHR: *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, App. No. 53,600/20 (ECHR, 26 Nov 2020); *Duarte Agostinho and Others v. Portugal and 32 Other States*, App. No. 39,371/20 (ECHR, 2 Sept 2020); and *Carême v. France*, App. No. 7189/21.

¹⁰⁷ *Supra* 2 and 4.2.

¹⁰⁸ van Zeben (2021, 1501–2).

A second prospective development is that domestic courts will avoid ruling on the legal basis provided by the Charter of Fundamental Rights of the European Union, thus perpetuating the avoidance techniques deployed by the courts in *Neubauer* and *Klimatická*, as seen previously.¹⁰⁹ In this context, the question is whether the Charter allows Member States and their courts to go beyond EU law. At first glance, the CJEU's interpretation of Article 53 of the Charter impedes an expansive interpretation of climate-related rights by domestic courts, which would sap the effectiveness of EU law and contravene the primacy principle.¹¹⁰ Notwithstanding, a more nuanced answer to the role of domestic courts in the context of EU fundamental rights law stems from the wording of Article 53 of the Charter, in particular the provision whereby “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized (...) by Union law and *international law* (...), including the [ECHR] and by the Member States’ constitutions.”¹¹¹ Hence, Article 53 EU Charter seems to allow Member States the option to go beyond the rights granted by EU law in two situations: first, if the subject matter has not been completely harmonised by the EU, and when applying national rights provisions beyond EU law will not affect its primacy; second, if a derogation from EU law strengthens rather than undermines the effectiveness of EU laws.¹¹²

Third, climate litigation is and will remain controversial, mainly because of the economic interests at play, but it is here to stay. In the EU particularly, EU principles seem to be developing in terms of sustainability. In *Notre Affaire à Tous*, one of the cases I described previously, the plaintiffs underscored the dependency of human rights on a sustainable climate as part of EU law and as a general principle of law.¹¹³ However, the Administrative Court of Paris did not expound on such an understanding, and whether it will become a general principle of law will likely depend on the climate case law that other domestic courts and the ECtHR will develop.

Fourth, sustainability is increasingly invoked in climate litigation vis-à-vis non-state actors, notably corporations and financial entities. In 2021, the district court of The Hague rendered a historic judgment – obliging the oil and gas Shell group to reduce its CO₂ emissions by 45% by 2030, compared to 2019, across its value chain and in end-use emissions. In the case, *Milieudefensie v. Shell*, the court argued that Shell violated the unwritten standard of care under Dutch tort law that had been applied in the first instance of *Urgenda*. The court found such a standard based on scientific reports, international consensus – notably the Paris Agreement, and the human rights of present and future generations. In particular, the court emphasised the twin challenges and intrinsic connection between addressing a dangerous climate and providing fair and equal access to sustainable development.¹¹⁴ It seems that the court

¹⁰⁹ *Supra* 4.2.2 and 4.2.5.

¹¹⁰ van Zeven (2021, 1510).

¹¹¹ Art. 53 of the EU Charter (emphasis added).

¹¹² van Zeven (2021, 1510); de Boer (2013, 1096); Case C-399/11, *Stefano Melloni v. Ministero Fiscal*, ECLI: EU: C:2013:107 (26 Feb. 2013), para 60, <https://curia.europa.eu/juris/liste.jsf?num=C-399/11>.

¹¹³ *Notre Affaire à Tous* (Administrative Tribunal of Paris, France, 14 Mar 2019, complaint), para 12.

¹¹⁴ *Milieudefensie v Royal Dutch Shell*, ECLI: NL: RBDHA:2021:5337 (District Court of The Hague, 26 May 2021), paras 4.4.40 ff.

applied the principle of minimum harmonisation, holding that the EU emissions trading system (ETS) does not exempt Shell from avoiding dangerous climate change. The ETS only applies to some of the emissions for which Shell is responsible, and the most recent emissions reduction targets in the ETS system, 43% by 2030 relative to 2005 – as the court stated – are still insufficient to achieve the goals agreed to under the Paris Agreement.¹¹⁵ Again, notwithstanding the plaintiffs' invocation of the Charter of Fundamental Rights of the European Union,¹¹⁶ the court did not broach its applicability nor its horizontal effect.¹¹⁷

Milieudefensie was inspired by *Urgenda* and filed by the same lawyer, suggesting that it can catalyse similar litigation against non-state actors, as *Urgenda* did against state actors. However, differently from *Urgenda*, references to EU law are few and far between, while references to global standards, such as the UN Guiding Principles on Business and Human Rights, abound. Unless its meaning is clarified in EU law, it may be fair to hold that a rights-based turn against corporations will not likely succeed through reliance on sustainability as an EU principle. In fact, legislation implementing sustainability in the EU seems to be faltering in directing corporate policy toward preserving a sustainable climate, as *Milieudefensie* and similar cases indicate.¹¹⁸

6 Conclusions

Concluding the analysis, it is important to stress once more that domestic courts in EU Member States are extensively clarifying the justiciability and significance of several EU principles in the legal field regarding protecting human rights in connection with climate change. The case law revealed that the role of EU principles in climate litigation seems to be one of catalysers and connectors.¹¹⁹ As catalysers, EU principles endow courts with a forward-looking and normative approach to climate matters. Accordingly, breaches of internal or external commitments, notably by exceeding national and global carbon budgets, equal a breach of fundamental rights and administrative duties toward present and future generations. In this sense, the

¹¹⁵ *ibid.*, para 4.4.45.

¹¹⁶ Plaintiffs minimally invoked the EU Charter as they solely referred to its preambular para 6, whereby the “[e]njoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.”

¹¹⁷ On the horizontal effects of rights that also are general principles of the EU, see Case C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT*, ECLI: EU: C:2014:2 (Jan. 15, 2014). See also van Zeben (2021, 1504–1505).

¹¹⁸ See, e.g., de la Garza (2022); *Envol Vert et al. v. Casino* (Saint-Étienne Tribunal, 2 Mar 2021, complaint); Methven O’Brien, C and Hartmann, J (2022); Zetzsche, DA and Anker-Sørensen, L (2022); on the missing opportunity to modernize the Energy Charter Treaty or have the EU withdraw therefrom, Norlander and Monti (2022); see also *Soubeste and Others v. Austria and 11 Other States*, Appl. No. 31,925/22 (ECHR, 21 Jun 2022).

¹¹⁹ On environmental principles as catalysers and connectors in general, see Scotford (2019). See also L. Lavrysen and F. Bouquelle (2023). Climate change litigation in the courts in Europe. In I. Alogna, C. Billet, M. Fermeiglia, & A. Holzhausen (Eds.), *Climate change litigation in Europe: regional, comparative and sectoral perspectives* (pp. 15–32). Intersentia.

precautionary principle impacts the construction of climate-related rights and duties by allowing for the operationalisation of scientific data, whereby scientific uncertainties shift the burden of proof to the proponents of an activity.

Notwithstanding, the central difficulty in any discussion of EU principles concerning climate litigation is the following. As mentioned previously, until the *Urgenda* decision in 2015, litigation in the EU was mainly statute-based rather than rights-based. *Urgenda* was decided only a short time ago, and, in terms of legal innovation, seven years is too short a time to take stock and pin down all potential features of the described rights turn through principles. However, what remains striking is the potential development of EU principles outside the precincts of EU courts. Indeed, the latter have yet to participate in the ongoing judicial dialogue on rights-based approaches toward state and business conduct in climate matters.

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