



German climate legislation on the pathway to the 1.5°C Temperature goal?

Uta Stäsche*

Abstract

Climate lawsuits are rising worldwide. Correspondingly, there are a growing number of landmark rulings by courts. On 29 April 2021, the German Federal Constitutional Court (BVerfG), issued its significant Order on the deficiencies of German Climate Change legislation. This paper analyses in detail the court's key deliberations and outlines its unacceptable features. In this context, the similarities and differences between the Court Order and the historic Urgenda ruling of the Hoge Raad, the Supreme Court of the Netherlands, are illustrated. This paper explores the reasons why the amended German Climate Change Act of 2021, also lacks compatibility with the Basic Law of Germany, i.e., its Constitution. In the last section, the serious consequences of the current European security crisis caused by Russia's war against Ukraine are highlighted. Here, the strong interweaving of fossil energy dependence and climate emergency is shown.

Keywords: German Federal Constitutional Court, German Climate Change Act 2021, Paris Agreement, ECtHR, Urgenda, European Energy security crisis

* Berlin School of Economics and Law Lichtenberg Campus (Hochschule Für Wirtschaft und Recht Berlin (HWR Berlin) – Campus Lichtenberg, Berlin, Germany; uta.staesche@hwr-berlin.de

1. Introduction

Climate change lawsuits against countries, the European Union, and major companies are accelerating worldwide due to the increasingly visible consequences of climate change. Non-state actors such as Non-Governmental Organisations (NGOs) and citizens, as well as cities and municipalities, are exerting greater influence by demanding more ambitious climate action and adequate climate adaptation measures based on their fundamental rights. As of 19 May 2022, according to the databases of the Sabin Center for Climate Change Law, there were 1,426 lawsuits pending in the United States and 564 lawsuits pending outside the United States. In recent years there has been a slow but growing move towards successful lawsuits against Governments which might enforce national initiatives and measures to combat climate change.

On 29 April 2021, in response to four constitutional complaints, the German Federal Constitutional Court (henceforth referred to as 'Court') joined the canon of international climate justice established by the Hoge Raad, the Supreme Court of the Netherlands, with its historic ruling of 20 December 2019, in *Urgenda Foundation v. State of the Netherlands*. In both decisions, the judges stipulated that their own Governments have a legal obligation to protect the fundamental rights of their citizens from the real threat of climate change and that they were doing too little to protect the climate. The main emphasis of this paper is the Court Order (section 2.), that will be presented with a view on the Federal Climate Change Act of 2019 and the unacceptable features of the Court ruling (section 2.1-2.3). Thereafter, an effort will be made to highlight the parallels between the Court Order and the *Urgenda* litigation (section 2.4). Further, the legal implications of the amended Climate Change Act of 2021 are outlined (section 2.5), serving as a basis for the Act's necessary revision in 2022, by the German legislator (section 2.6). In addition, the impact of the ECtHR's ruling on the court's jurisprudence as well as the current negotiations on the EU's accession to the European Convention on Human Rights (ECHR) will be illustrated (section 2.7).

Given the latest decision of the International Committee on the Rights of the Child (CRC) of 8 October 2021, dealing with the

relevant global level of protection – 1.5°C above pre-industrial levels – the observations deal with the extent of the impact of its ruling on national jurisdiction and national climate regimes (Section 3.). In the following section, the line to further landmark decisions against Governments, having been praised as victories in the struggle against climate change cases is drawn (Section 4.). Notably (i) the unprecedented decision of the Paris Administrative Court of 14 October 2021, considering the climate inactivity of the French State as illegal in the case *Notre Affaire à Tous v. France*, and the two decisions of the Conseil d'État of July and November 2021 in the case *Commune de Grande-Synthe v. France* (Section 4. a); (ii) the decision of the Mexican First Circuit in Administrative Matters of 21 September, 2021, to suspend Mexico's 2020 Nationally Determined Contribution (NDC) in the case *Greenpeace v. Instituto Nacional de Ecología y Cambio Climático* (section 4. b); (iii) the decision of the Supreme Court of Justice of Colombia of 5 April 2018, on the preservation of the Amazon in the case of *Future Generations v. the Colombian Ministry of the Environment* (section 4. c); (iv) the Irish Supreme Court Judgement of 31 July 2020, on the quashing of the Irish National Mitigation Plan in the case of *Friends of the Irish Environment v. the Irish Government* (section 4. d); and (v) the affirmation of the European Court of Human Rights (ECtHR) of 4 February 2021, of its fast-tracking decision in the case *Duarte Agostinho and Others v. Portugal and other States party to the ECHR* (Section 4.e). Lastly, with a view on the serious consequences of the current European security crisis caused by Russia's war against Ukraine, the challenge for countries including Germany to tackle the global climate crisis and the European energy security crisis together (Section 5) are demonstrated.

2. Order of the First Senate of 24 March 2021, of the Federal Constitutional Court

On 29 April 2021, the court ruled that the Federal Climate Change Act ("Bundes-Klimaschutzgesetz") of December 2019 (henceforth

KSG 2019)¹ is partly unconstitutional.² It stated that the Federal Government's climate protection measures are insufficient to protect future generations. Accordingly, the judges required the legislator to draw up clearer reduction targets for greenhouse gas (GHG) emissions for the period from 2031 onwards, by the end of 2022.

The court's historic unanimous ruling came after four climate constitutional complaints filed by a group of nine, mostly young people alleging that the KSG 2019 violated their human rights as protected by the Basic Law, Germany's Constitution. The Order was welcomed as "epochal"³ for climate protection in Germany and the rights of young people, as well as "a slap and a wakeup call for the German Federal Government to finally start on an ambitious climate protection policy."⁴ One of the complainants, Luisa Neubauer, an activist from Fridays for Future, said: "This is huge. Climate protection is not nice to have. Climate protection is our basic right, and that's official now."⁵ The German Federal Government responded quickly and presented an amended Climate Change Act 2021 on 12 May 2021. The KSG 2021⁶ was passed by the German legislator (the Bundestag and the Bundesrat) in June 2021.

¹ Federal Climate Change Act of December 12, 2019, Federal Law Gazette, Bundesgesetzblatt – BGBl I, at 2513.

² BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618, <https://t1p.de/62yc> (last visited May 19, 2022).

³ Peter Altmaier, former German Federal Minister for Economic Affairs and Energy, Twitter, April 29, 2021. <https://t1p.de/lzye> (last visited May 19, 2022).

⁴ Kate Connolly, 'Historic' German ruling says climate goals not tough enough, THE GUARDIAN, Apr. 29, 2021. <https://t1p.de/0v1da> (last visited May 19, 2022).

⁵ *Id.*

⁶ Federal Climate Change Act of August 18, 2021, Federal Law Gazette, Bundesgesetzblatt – BGBl I, at 3905.

On the one hand, the court's ruling marks a significant step towards the constitutional recognition of climate protection. The judges reaffirmed the established constitutional principle that the freedom of the individual ends where the freedom of others begins, embedding it in a contemporary concept of freedom in the climate crisis, simultaneously considering it from an intergenerational perspective. On the other hand, here, the court missed the opportunity to strengthen the substantive aspects of the legislator's obligation to take climate action, as is shown below.

2.1. The Federal Climate Change Act of 12 December 2019

After years of attempts, the KSG 2019 gave the German climate targets a legally binding form and enforceability at the federal level. The KSG 2019 was associated with the expectation that the national target of reducing the German GHG emissions would come to the fore and that the amounts of emissions would be examined more efficiently. The KSG, which serves as a framework law, covers all economic sectors and thus bundles climate targets, measures, monitoring, and evaluation. The triggering factor for its enactment was the expectation or rather the realization at that time that Germany was likely to fail its 2020 climate target. Moreover, it was clear that the Effort-Sharing Regulation (EU) No. 2018/842⁷ establishes even stricter requirements from 2021 onward. If the EU climate targets were not met by Germany, the acquisition of emission certificates from the other EU Member States might be expected. Due to this foreseeable scenario, the German Government also intended to prevent considerable burdens on the federal budget.

For the first time, the KSG 2019 set binding national climate targets for Germany. It required reductions in GHG emissions of 55 % by 2030, compared to 1990 levels. In addition, for the post-2030 period, the Federal Government will have to set annually decreasing emission budgets by means of an ordinance, pursuant to § 4(1) fifth sentence in conjunction with § 4(6) first sentence KSG 2019.

⁷ Regulation (EU) 2018/841, OJ L 156 of 19/06/2018, at 26.

Moreover, the KSG 2019 and its amendment of 2021 (see Section 2.e) require decreasing annual emission budgets for various economic sectors such as energy, transport, buildings, and agriculture. The classification of the sectors follows the standard classification used in international reporting. Before the adoption of the KSG 2019, these sector targets, which distinguish the quantity emission structures from the higher-level targets, were laid down in the legally non-binding Federal Government Climate Protection Plan 2050.⁸ § 3(1) second sentence and § 4(1) third sentence in conjunction with Annex 2 KSG 2019 specified the amount of CO₂ emissions allowed until 2030, thereby determining how much of the remaining CO₂ budget may be used up. Regardless of recommendations,⁹ the German legislator has refrained from setting a single numerical German CO₂ budget that could serve as a metric for national climate policy. The discussion on how a potential national carbon budget has to be calculated still continues.¹⁰

2.2. The Key Points of the Constitutional Court

One of the court's main results was the finding that the German Government's climate protection measures in the pre-2030 period

⁸ Federal Ministry for the Environment-Nature Conservation, Building and Nuclear Safety, *Climate Action Plan 2050 Principles and goals of the German government's climate policy*, at 32 (2016).

<https://t1p.de/6lsn8>(last visited May 19, 2022).

⁹ SRU, *Environmental Report 2020.05.14: Towards an ambitious environmental policy in Germany and Europe*, at 5 (2020). <https://t1p.de/sivu1>(last visited May 19, 2022); Sabine Schlacke, *Klimaschutzrecht – Ein Grundrecht auf intertemporale Freiheitssicherung*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 912, 916 (2021); See Walter Frenz, *Verfassungsrechtlich verbindliche CO₂-Reduktionsmengen für die Energiewirtschaft?*, ZEITSCHRIFT FÜR DAS GESAMTE RECHT DER ENERGIEWIRTSCHAFT 358 (2021).

¹⁰ Sonja Simon et al., *A Pathway for the German Energy Sector Compatible with a 1.5 °C Carbon Budget*, SUSTAINABILITY (2022).

<https://doi.org/10.3390/su14021025> (last visited May 19, 2022); Georg Kobiela & Sascha Samadi, *CO₂-neutral bis 2035: Eckpunkte eines deutschen Beitrags zur Einhaltung der 1.5-°C-Grenze* (2020). <https://t1p.de/sqscv>(last visited May 19, 2022).

are insufficient since overly generous sectoral emission amounts specified until 2030 were allowed under 3(1) second sentence and § 4(1) third sentence in conjunction with Annex 2 KSG 2019.¹¹ The court held that subsequent generations are left with a risk of serious restriction burden in the post-2030 period, so extraordinary efforts would be required to reduce CO² emissions. By exposing their lives to serious losses of freedom, the court stated, there is a potential threat to their fundamental freedoms. Since virtually all aspects of human life involve the emission of GHG, it ascertained that “practically all forms of freedom are potentially affected”¹². Accordingly, the court declared the overly generous emission amounts until 2030 unconstitutional— however, with the explicit restriction: “ only in so far as they lack provisions that satisfy the requirements of fundamental rights (...) on the updating of reduction targets from 2031 until the point when climate neutrality is reached as required by Article 20a Grundgesetz (GG)”¹³.

Regardless of the legislator’s overly generous legal framework for emissions until 2030, the court emphasized that it did observe its special duty of care, which includes responsibility for future generations, arising from the principle of proportionality.¹⁴ According to the Court, the legislator acted in compliance with its constitutional obligation to take climate action pursuant to Article 20a of the Basic Law. Moreover, the court assessed, that the legislator has not exceeded its “significant decision-making leeway” in fulfilling its duty of protection emanating from fundamental rights¹⁵ by basing the national climate change

¹¹ BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618at paras. 117, 120, 123, 126, 192, 245.

¹² BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618at para. 117.

¹³ *Id.* at para. 266.

¹⁴ *Id.* at para. 192.

¹⁵ *Id.* at head note 1, para. 143.

legislation on the Paris Agreement (PA)¹⁶ goal of limiting global warming to well below 2°C.¹⁷ In this regard, the court stated, that the legislator was right to specify the climate goal of Article 20a of the Basic Law in § 1 third sentence KSG 2019, which refers to the PA temperature goals. As agreed in Article 2(1)(a) PA, the increase in the global average temperature must be limited to well below 2°C and preferably to 1.5°C above pre-industrial levels. The court argued that focusing on the range of between 2°C and 1.5°C, instead of the aspirational 1.5°C goal alone, as chosen by the Intergovernmental Panel on Climate Change (IPCC) as the principal basis for its calculations, is constitutional. Here, the court recognizes “the considerable lack of certainty reflected in the ranges and uncertainties stated by the IPCC”¹⁸. This may explain why the danger of largely exhausting the remaining national CO₂ budget by 2030 is, in the court’s view, not relevant “given the uncertainties presently involved in the calculation of the remaining budget”. Apart from this, the court showed restraint towards the calculations of the German Advisory Council on the Environment (SRU) on the remaining national budget, arguing that they were based “on the stricter 1.75°C limit” instead of the “normative range (...) of well below 2°C and preferably 1.5°C”¹⁹.

Regarding the post-2030 period, the court acknowledged that involving an executive ordinance-issuing authority in the regulatory task, pursuant to § 4(1) fifth sentence in conjunction with § 4(6) first sentence KSG 2019, did not satisfy the constitutional requirements. Rightly, the court held that the legislator failed to create the necessary development-promoting planning horizon required by fundamental rights. In this sense, the court made clear that the legislator is required to set out a legal framework on the size of the annual emission amounts from 2031

¹⁶ FCCC/CP/2015/10/Add.1.

¹⁷ BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618at paras. 162, 165.

¹⁸ *Id.* at paras. 208, 211.

¹⁹ *Id.* at para. 237.

onwards in formal parliamentary legislation, until the end of 2022, thereby providing the essential matters for defining the amounts.²⁰

2.3. The Unacceptable features of the Order

To sum up, these partially modest findings of the First Senate appear somewhat inconsistently towards its further deliberations: First, the court recognized that fundamental rights as intertemporal guarantees of freedom afford the protection against comprehensive threats to freedom by GHG reduction burdens being unilaterally offloaded onto the future.²¹ Second, it visibly strengthened Article 20a of the Basic Law, which protects “in responsibility for future generations, the natural foundations of life and animals,” and becomes, according to the court, enforceable (justiciable), thereby limiting political discretion.²² Third, as already mentioned, the court, adopting an intergenerational perspective, stated that the significant sectoral emission amounts specified until 2030 would cause a potential threat to the fundamental freedoms of subsequent generations.²³ Fourth, it developed the new constitutional figure of the “advance interference-like effect on fundamental rights”, emanating from § 3(1) second sentence and § 4(1) third sentence in conjunction with Annex 2 KSG 2019, which allowed huge sectoral emission amounts in the current period, thereby giving rise to substantial burdens to reduce emissions in later periods.²⁴ The court determined, by the required drastic restrictions in the post-2030 period, that “practically all forms of freedom are potentially affected because virtually all aspects of human life involve the emission of greenhouse gases”²⁵ and that young people’s fundamental rights are potentially threatened.

²⁰ BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618atparas. 251, 259.

²¹ *Id.* at head note 4, paras. 122, 183.

²² *Id.* at head notes 2a), 2c), 2e), paras. 117, 167, 198.

²³ *Id.* at paras. 117, 120, 123, 146, 192, 245.

²⁴ *Id.* at paras. 116, 183, 194, 244.

²⁵ *Id.* at para. 117.

Considering these results, the question arises as to why the court made the constitutional compliance of the emission amounts for the various economic sectors until 2030, solely dependent on the specific form of the legal framework – on the size of the annual emission amounts from 2031 onwards. It required formal parliamentary legislation instead of the executive ordinance-issuing authority chosen by the legislator. Here, the court missed the opportunity to deepen its fundamental substantive reasoning in a second step stating that the sectoral emission amounts specified until 2030 as such are not compatible with the Basic Law.²⁶ Likewise, it is argued that the court should have assessed that the German legislator has violated its special duty of care which includes a responsibility to take account of sufficiently reliable indications pointing to the possibility of serious or irreversible impairments of fundamental rights. On the one hand, the court recognized that the remaining CO² budget will not even last until 2031²⁷. On the other hand, it ignored that thereby the risk of an intense encroachment on fundamental rights will be exacerbated. Although the court stressed that the legislator is obliged to minimise the risk of significant violations of fundamental rights,²⁸ it refrained from stating that the sectoral emission amounts represent an “advance interference-like effect” on the freedom of the complainants, that is not justified under German Constitutional Law.

²⁶ See *Contra* Kurt Faßbender, *Der Klima-Beschluss des BVerfG – Inhalte, Folgen und offene Fragen*, NEUE JURISTISCHE WOCHENSCHRIFT 2085, 2090 f. (2021); See also Christian Calliess, *Das “Klimaurteil” des Bundesverfassungsgerichts: “Versubjektivierung” des Art. 20 a GG?*, ZEITSCHRIFT FÜR UMWELTRECHT 355, 357 (2021).

²⁷ The BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618atpara. 246.

²⁸ *Id.* at para. 247.

2.4. Comparison with Urgenda Foundation v. State of the Netherlands

The Constitutional Court, as well as the Hoge Raad, the Supreme Court of the Netherlands, ascertain that the respective legislator violated the fundamental rights of the citizens. For a comparison of these court decisions, let us recall the key points of the landmark decision *Urgenda Foundation v. State of the Netherlands*. The Hoge Raad, in its ruling of 20 December 2019²⁹, upheld the rulings of the two lower courts – the District Court ruling of 14 June 2015, which is considered historic, and the appeal ruling of the Civil Court of The Hague of 9 October 2018 – and thus the Dutch State’s obligation to reduce GHG emissions by at least 25 % by 2020 compared to 1990. The climate lawsuit filed by the NGO Urgenda and 886 additional plaintiffs constitutes the first successful lawsuit targeting emission reductions against a State and proves to be internationally ground-breaking for climate justice. The last-instance ruling of the Hoge Raad derives the obligation of the Dutch Government in particular from (i) the EU GHG reduction targets; (ii) the fundamental rights of Articles 2 and 8 ECHR (the right to life and the right to private life, family life, home, and correspondence), which are to be directly taken into account according to Articles 93 f. of the Dutch Constitution; (iii) the “no harm” principle of international law; and (iv) the UNFCCC principles of fairness, precaution and sustainability.

Apparently, the Hoge Raad obliges the Dutch legislator to a greater extent to climate action than the German Constitutional Court did. On the one hand, it can be noted that if the court had required a stricter 2030 quantified national reduction target, the constitutional principle of the separation of law provided by Article 20(2) and 20(3) of the Basic Law might have been violated. However, on the other hand, the system of checks and balances between the jurisprudence and the legislator would have been observed if the court had ruled (i) that the overly generous sectoral emission

²⁹ Hoge Raad, *Urgenda Foundation v. Kingdom of the Netherlands*, ECLI:NL:HR:2019:2007; previous instances: ECLI:NL:RBDHA:2015:7196, ECLI:NL:GHDHA:2018:2610.

amounts specified until 2030, pursuant to § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2, as such were not in compliance with the fundamental freedoms of the Basic Law and; (ii) that the German legislator acted unlawfully in contravention of its special duty of care under Article 20a of the Basic Law. The same would have applied if the court had ordered the German State to take immediate and stronger climate actions to comply with the national climate targets within a specified timeline. In fact, ruling to that effect, the court would have been in compliance with its principal task of monitoring the constitutionality of the legal system and working towards the most effective possible elimination of unconstitutional conditions, according to Article 92 of the Basic Law.

2.5. Lessons learnt? The Federal Climate Change Act of 18 August, 2021

The immediate reaction of the German Federal Government unfolds what power, climate complaints can have in strengthening climate protection and climate justice. Whereas at the climate summit hosted by U.S. President Joe Biden on April 22/23, 2021 – unlike the U.S., Japan, Canada, and South Korea – the German Government missed the opportunity to announce a more ambitious 2030 national climate target, the Government reacted to the Court Order six days after its publishment on 29 April 2021, announcing on 5 May 2021, that it will raise Germany’s 2030 climate target to 65 % and aim for climate neutrality as early as 2045. The German Federal Government and the legislator amended the Climate Change Act (henceforth: KSG 2021) in the following months, and the KSG 2021 entered into force on 31 August 2021.³⁰ In addition, the amendment was embedded in the ambition process of the EU climate targets, which resulted in the “EU Climate Law” (ECL, Regulation (EU) 2021/1119)³¹.

³⁰ Federal Climate Change Act of August 18, 2021, Federal Law Gazette, Bundesgesetzblatt – BGBl I, at 3905.

³¹ Regulation (EU) 2021/1119, OJ L 243 of 09/07/2021, at 1.

On the road to climate neutrality, the KSG 2021 comprises more ambitious reduction targets. § 3(1), 3(II) first sentence KSG 2021 enshrines the stricter target of achieving GHG neutrality as early as 2045 (instead of 2050) in law and stipulates the higher 2030 reduction target of at least 65%, as well as the new 2040 reduction target of at least 88%. According to § 3(II) second sentence KSG 2021, from 2050 onward, Germany strives to have a negative emission balance. This means that more GHG will be removed using natural sinks than Germany emits. Beyond that, increased amounts of CO₂ emissions in individual sectors, including energy, transport and the building sector up to 2030, are specified by § 4(I) sentences first through fourth in conjunction with Annex 2 KSG 2021. In addition, § 4(1) sixth sentence, in conjunction with Annex 3 KSG 2021, enshrines the annual reduction targets for the 2031-2040 period in law, thereby observing the “essential matters doctrine” (Wesentlichkeitsgrundsatz = materiality principle) and providing the fundamental orientation required by the court.

The court repeatedly referred in its ruling on the specific CO₂ remaining budget for Germany from 2020 onward that is necessary to make an adequate contribution to the Paris temperature goal.³² The SRU, one of the highest expert advisory bodies to the German Federal Government has estimated the remaining national budget from 2020 onward. The national budget is derived from the remaining global budget. For this reason, the SRU’s calculations for Germany are founded on the figures for the carbon budget for a given temperature increase provided by the IPCC³³ and are based on a maximum permissible global warming of 1.75°C, with a 67% probability of meeting the target.³⁴ Therefore, according to the SRU,

³² BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618 at paras. 219, 231.

³³ Valérie Masson-Delmotte et al., *Global Warming of 1.5°C - An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, 108, table 2.2 (2019).

³⁴ SRU, *supra* note 10, at 13, 19 (2020); *See also* SRU, *supra* note 10 at 19.

a maximum of 6.7 Gt CO₂ is left. However, scientific studies have shown that ca. 90% of the remaining national budget will already be exhausted as early as 2030– this is on the basis of the just increased amounts of CO₂ emissions in the various sectors, pursuant to § 4(I) third sentence in conjunction with Annex 2 KSG 2021.³⁵ In so far, like its predecessor, the KSG 2021 does not abolish but perpetuates the “advance interference-like effect on fundamental rights”³⁶ emanating from the provisions allowing overly generous sectoral emission amounts. So, not only the KSG 2019, but also the KSG 2021 allows significant sectoral emission amounts in the pre-2030 period, simultaneously transferring an “immense reduction burden”³⁷ on subsequent generations in the post-2030 period irreversibly. Apparently, this does not appear to be in line with the requirements of Article 20a of the Basic Law.

Taken together, it may be doubtful whether the KSG 2021 enables intergenerational equity, which is, according to the court’s findings³⁸, of paramount importance. In this regard, the judges ruled that if there is an “obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations”³⁹ and if “fundamental rights afford (...) protection against the greenhouse gas reduction

³⁵ Greenpeace, *Das Recht auf Zukunft, Konsequenzen aus dem Urteil des Bundesverfassungsgerichts für die Klimaschutzpolitik der Bundesregierung*, 1, 3 (2021). Jakob Kopsiske et al., *2030 kohlefrei, Wie eine beschleunigte Energiewende Deutschlands Beitrag zum Pariser Klimaschutzabkommen sicherstellt* (2018). <http://publica.fraunhofer.de/dokumente/N-518419.html> (last visited May 19, 2022); See also ClaudiaKempf et al., *Grenzen einer CO₂-Bepreisung, Dekarbonisierungsmaßnahmen jenseits eines CO₂-Preises*, i, 5 (2021). <https://t1p.de/fx72>(last visited May 19, 2022); Mercator Research Institute, carbon clock, <https://t1p.de/5y0a>(last visited May 19, 2022).

³⁶ BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618atparas. 116, 183, 194, 244.

³⁷ *Id.* at para. 192.

³⁸ *Id.* at head note 4, paras. 146, 183, 192, 197, 200, 206, 229.

³⁹ *Id.* at para. 183.

burdens imposed by Article 20a GG being unilaterally offloaded onto the future”⁴⁰, a fair distribution of the burdens between the generations in the pre-2030 period and the post-2030 period is required. Read in this light, the KSG 2021 seems to be not strong enough to effectively address the consequences of the climate crisis today and in the future.

2.6. Looking ahead: Amendment of the Federal Climate Change Act by the new German Federal Government in 2022: on the road to 1.5°C

The new Federal Government, in its coalition agreement⁴¹ between Social Democrats (SPD), Greens, and Free Democrats (FDP), signed on 7 December 2021, has pledged to amend the KSG in 2022, setting a “new dynamic” in motion to help Germany stick to the goal of keeping global warming below 1.5 degrees Celsius, i.e. above pre-industrial levels (paras. 54 f., 1780, see also paras. 711, 1764-1767, 5376). For the reasons mentioned above, this merely political commitment must not be the last step. The key challenges for the new Government are to ensure that the principal goal of 1.5°C will be enshrined in law and that adequate implementation measures will follow.

The German legislator does not only have a mere political leeway, but a constitutional duty to adapt the KSG 2021 as soon as possible to the stricter 1.5°C goal instead of the current range of “well below 2°C and preferably 1.5°C”. It cannot be denied that a significant number of provisions of the PA, its accompanying Decision 1/CP.21⁴², and subsequent UN World Climate Conferences require stronger and more ambitious climate action by all PA Parties.⁴³

⁴⁰ *Id.* at para. 183.

⁴¹ SPD, BÜNDNIS 90/DIE GRÜNEN, FDP, *Mehr Fortschritt wagen, Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit* (2021).

⁴² *Report of the Conference of the Parties on its twenty-first session*, <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> (last visited May 19, 2022).

⁴³ Uta Stäsche, *Entwicklungen des Klimaschutzrechts und der Klimaschutzpolitik 2018/19 Internationale und europäische Ebene (Teil 1)*,

Specifically not least, the Glasgow Climate Pact by the COP26 has made clear that the temperature goal of 1.5°C constitutes the key target.⁴⁴ Consequently, the Parties have to adjust their climate targets toward the aspirational goal of 1.5°C. In this sense, also the court assessed that the temperature range, pursuant to § 1 third sentence KSG 2021, is not rigid. It stated: “New and sufficiently reliable findings on the development of anthropogenic global warming, its consequences, and controllability might make it necessary to set different targets within the framework of Article 20a GG, even when taking the legislator’s decision-making leeway into account.”⁴⁵ In so far the legislator is placed “under a permanent obligation to adapt environmental law to the latest scientific developments and findings.” Further, the court held that if the temperature range “proves inadequate to sufficiently prevent climate change”, the legislator’s obligation to resolve the climate problem also involves the international level in seeking to reach more stringent international agreements.”⁴⁶ It is self-evident that the legislator’s obligation to adapt the temperature goal is not restricted to Germany’s activities at the international level but also applies to the national level. Rightly, the court emphasized:

Article 20a GG also makes it obligatory to take national climate action even in cases where it proves impossible for international cooperation to be legally formalised in an agreement. State organs are obliged to take climate action irrespective of any such agreement...⁴⁷

At the COP26, the Glasgow Climate Pact was softened with the last-minute “phasing-down” of coal use by China and India instead

ZEITSCHRIFT FÜR DAS GESAMTE RECHT DER
ENERGIEWIRTSCHAFT 248, 251 (2019).

⁴⁴ *Glasgow Climate Pact*, Decision 1/CP.26, at para. 16,
https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf; Decision 1/CMA.3, para 21.

⁴⁵ BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -,
ECLI:DE:BVerfG:2021:rs20210324:1bvr265618 at para. 211.

⁴⁶ *Id.*

⁴⁷ *Id.* at para. 200.

of the “phasing out” advocated by most Parties.⁴⁸ However, this leaves the responsibility of the German legislator unaffected. There are, in fact, latest scientific developments and findings which strongly recommend getting on track to meet the stricter 1.5°C goal. In particular, the IPCC has proved in its fundamental Sixth Assessment Report (AR6) of 7 August 2021, referred to as “a code red for humanity”⁴⁹ by UN secretary-general Antonio Guterres, as well as in its report on global warming (SR1.5) of 8 October 2018, the “indisputable” influence of human activities on the climate, underlining that every tenth degree above 1.5°C increases the probability of further and stronger catastrophic extreme weather events in every region across the globe.⁵⁰ Hence, there is no alternative to an immediate and consistent reduction in GHG emissions. Global climate change has turned into an emergency. Even if it is still possible to limit global warming to 1.5°C, some long-term effects already taking place will be inevitable and irreversible, for example, the melting of Arctic ice. Three quarters of the area of the Amazon rainforest have already lost resilience since the early 2000s, which is perceived as a sign of the approaching tipping point.⁵¹ Furthermore, in March 2022, the International Energy Agency (IEA) has predicted the historic high of global energy-related CO₂ emissions of 36.3 Gt in 2021, of which 15.3 Gt from coal, 7.5 Gt from natural gas, and 10.5 Gt are

⁴⁸ *Glasgow Climate Pact Decision*, 1/CP.26, at para. 20, https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf; Decision 1/CMA.3, at para. 36; COP26 CLOSES WITH ‘COMPROMISE’ DEAL ON CLIMATE, BUT IT’S NOT ENOUGH, SAYS UN CHIEF UN NEWS, Nov. 13, 2021. <https://news.un.org/en/story/2021/11/1105792> (last visited May 19, 2022).

⁴⁹ UN, Secretary-General, statement, August 9, 2021. <https://t1p.de/a99u5> (last visited May 19, 2022).

⁵⁰ IPCC, *Sixth Assessment Report, Climate Change 2021: The Physical Science Basis* (2021), pp. SPM-5. <https://t1p.de/gplw> (last visited May 19, 2022); IPCC, *SR1.5*, *supra* note 34, at 254, 273, 282.

⁵¹ Chris A. Boulton et. al., *Pronounced loss of Amazon rainforest resilience since the early 2000s*, 12 NATURE CLIMATE CHANGE, 271 (2022), <https://doi.org/10.1038/s41558-022-01287-8> (last visited May 19, 2022).

accounted for by crude oil.⁵² In May 2022, the World Meteorological Organization has estimated that the world is likely to temporarily reach 1.5°C of warming in one of the next five years.⁵³ These essential scientific findings must be incorporated by the German legislator in the realignment of the KSG 2021 to get on the pathway to the 1.5°C goal.

The urgency and importance of an immediate and strong attempt to close the huge 2030 GHG emissions gap is substantiated, as noted above, by the AR6 of the IPCC, whose core task was explicitly recognized by the World Climate Conferences.⁵⁴ Furthermore, (i) the synthesis report of the United Nations Framework Convention on Climate Change (UNFCCC) secretariat of September 2021⁵⁵ on the latest available NDCs communicated by the 191 PA Parties, as well as (ii) the latest UNEP's Emissions Gap Report of October 2021⁵⁶ showing that the new NDCs, combined with other mitigation pledges, put the world on the path of a global temperature rise of 2.7°C by the end of the century, are to be noted. To stand a chance of limiting global warming to 1.5°C, the UNEP sets out that there are only eight years left to take an additional 28Gt CO₂ e off annual emissions, which is equivalent to almost halving current GHG emissions. Climate Action Tracker's latest analysis of November 2021 shows similar global warming levels until the end of the century under the submitted PA targets and pledges (2.4°C) and currently implemented policies (2.9°C).⁵⁷

⁵² IEA, *Global Energy Review: CO₂ Emissions in 2021, Flagship Report* (2022).

⁵³ WMO, *50:50 chance of global temperature temporarily reaching 1.5°C threshold in next five years* (2022).

⁵⁴ Decision 1/CP.25, at para. 6; decision 1/CP.24, at paras. 24-29.

⁵⁵ FCCC/PA/CMA/2021/8; UN Climate Press release, *Full NDC Synthesis Report: Some Progress, but Still a Big Concern | UNFCCC*, September 17, 2021. <https://t1p.de/h8ngc>(last visited May 19, 2022).

⁵⁶ UNEP/UNEP DTU Partnership, *Emissions Gap Report 2021: The Heat Is On* (2021). <https://t1p.de/oysz>(last visited May 19, 2022).

⁵⁷ Climate Action Tracker, *Climate target updates slow as science ramps up need for action* (2021). <https://t1p.de/co3r>(last visited May 19, 2022).

2.7. The role of the protection level in the jurisdiction of the ECtHR

The reality of serious climate change impacts, which recently could also be observed in Germany in massive floods, challenges, on the one hand, the German state bodies, in particular the legislator.⁵⁸ On the other hand, it may not be excluded that the German Federal Constitutional Court, as well as further supreme Courts around the globe, will follow the jurisdiction of the ECtHR. In several pending cases⁵⁹ (see Section 4.5), the global level of protection – 1.5°C or 2°C – is currently under judicial review regarding the State's obligation to establish a legislative and administrative framework that provides effective protection against threats to the fundamental right to life and the right to privacy, as provided in Articles 2 and 8 ECHR. The guarantees of the ECHR, considered an indirect constitutional standard of review, must be taken into account in the methodologically justifiable interpretation of German fundamental rights. The ECHR, for its part, is substantiated in terms of content by the decisions of the ECtHR.⁶⁰ Therefore, the described obligation to be considered comprises the guarantees of the ECHR, as well as the jurisdiction of ECtHR. If the ECtHR issues a decision against Germany itself, consideration follows from Article 46(1) ECHR and from the commitment of the Basic Law to international law. The fundamental binding effect of all German state bodies is based on Articles 20(3) and 59(2) in conjunction with Article 19(4) of the Basic Law. However, according to the Constitutional Court, if an ECtHR's decision is issued against other States which are party to

⁵⁸ Frank Kreienkamp et al., *Rapid attribution of heavy rainfall events leading to the severe flooding in Western Europe during July 2021* (2021).

⁵⁹ ECtHR, Application no. 39371/20, *Duarte Agostinho & Others v. Portugal & 32 Other States*; ECtHR, Application no. 53600/20, *Verein KlimaSeniorinnen Schweiz & others v. Switzerland*.

⁶⁰ BVerfG, Order of the Second Senate of October 14, 2004 - 2 BvR 1481/04 -, at 307, 320, 324, head note 1.

the Convention, the ECtHR likewise has a normative effect⁶¹ and has to fulfil the function of orientation and guidance⁶².

Excursus: Consequences of the EU's accession to the ECHR: If the ECtHR considers the global level of protection at the stricter 1.5° goal, its findings will at least be a guideline for the 27 EU Member States (EU-27), which are party to the Convention. In addition, once the EU accession to the ECHR is completed, the EU itself will have to take the ECtHR's findings into account. Moreover, the EU legislator (the European Parliament and the Council of the European Union) will have the legal duty to adapt the ECL⁶³, which sets the current EU climate targets based on the range of between 2°C and 1.5°C above pre-industrial levels, pursuant to Article 1(2) ECL in conjunction with Article 2(1)(a) PA. The EU accession became a legal obligation under Article 6(2) of the Treaty of the European Union (TEU), with the Lisbon Treaty taking effect in December 2009. In the last two decades, the two distinct legal orders have become increasingly intertwined, and the boundaries between the fundamental rights protected in national constitutions, the EU Charter, and the ECHR are increasingly blurred. So, questions must be answered on the interpretation of fundamental rights under the ECHR and the EU Charter, the relationship between the ECtHR and the European Court of Justice (CJEU), and the impact of the ECHR on the EU and national law. The reasons for an EU accession to the ECHR are manifold: First, the status quo is not satisfactory due to the imbalance between the EU Member States having accepted to be subject of an external control of their respect for fundamental rights other than the EU. Hence, there is no coherent framework of human rights protection throughout Europe. Second, the status quo does not allow an adequate representation of the EU in the procedure before the ECtHR, nor is it capable of ensuring in the long-term, comprehensive and stable consistency between EU law and the

⁶¹ BVerfG, Judgement of the Second Senate of June 12, 2018 - 2 BvR 1738/12, 1395/13, 1068/14, 646/15-,
ECLI:DE:BVerfG:2018:rs20180612.2bvr173812, at paras. 126.

⁶² *Id.* at 351, 354, head note 3b.

⁶³ Regulation (EU) 2021/1119, OJ L 243 of 09/07/2021.

Convention.⁶⁴ Third, in the European Parliament's view, the principal benefit of EU accession to the ECHR lies in the possibility for individual recourse against the actions of the Union, similar to that already enjoyed against Member States' actions.⁶⁵ Due to the ECJ's opinion of 18 December 2014,⁶⁶ pointing out that certain conditions for preserving the specific characteristics of the EU and of EU law were not yet fulfilled, the first attempt at an EU accession failed. Nonetheless, the renegotiation of the agreement was relaunched in June 2020, and the 13th negotiation meeting will be held on March 1-4, 2022.⁶⁷ The EU accession will depend on ratification, not only by the Member States but also by the States party to the Convention. Furthermore, the European Parliament's consent to the accession agreement is required under Article 218(6) of the Treaty on the Functioning of the European Union (TFEU). In any case, it is crucial to ensure that the same standards of interpretation and application of the same fundamental rights are adhered to.

2.8. Conclusion

To conclude, it must be noted that, on the one hand, there are important steps in the right direction in the German supreme climate change jurisdiction as well as in law and politics that have

⁶⁴ JOHAN CALLEWAERT, THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13 (Council of Europe Publ Council of Europe) (2014), <https://t1p.de/68o3>; See Danutė Jočienė, *Interaction between the States' obligations under the European Convention on Human Rights (ECHR) and the European Union Law* (2021). <https://t1p.de/345m>(last visited May 19, 2022).

⁶⁵ European Parliament, *legislative train 11.2021: completion of EU accession to the European Convention on Human Rights*, <https://t1p.de/dv3x>; See, Adam Łazowski & Ramses A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 GERMAN LAW JOURNAL 179, 212 (2015).

⁶⁶ CJEU, opinion 2/13, Draft international agreement – EU Accession to the ECHR - Compatibility of the draft agreement with the EU and FEU Treaties, ECLI:EU:C:2014:2454.

⁶⁷ See EU accession to the ECHR Human Rights Intergovernmental Cooperation. (<https://t1p.de/ix7o>(last visited May 19, 2022).

been unthinkable before. The Order of the First Senate marks a successful dynamic in the interaction of environmental constitutional law pioneers, and the court's ruling has highlighted Article 20a of the Basic Law, from its niche status. The Order shows that climate change has been embraced socially and legally as a global, as well as a national challenge that requires a powerful response from the German Federal Government and the German legislator. Rightly, climate protection has finally been recognized as a constitutional good.

3. Global level of protection in international children's rights jurisdiction

The global level of protection was also the subject of the current CRC ruling. In September 2019, 16 children and youth from 12 countries filed a petition alleging that the five major emitters, Argentina, Brazil, France, Germany, and Turkey, violated their rights under the United Nations Convention on the Rights of the Child (UNCRC) by taking years of inadequate mitigation and climate adaptation measures above the 1.5°C limit.⁶⁸ In particular, the youths alleged that the countries failed to respect their obligations under the UNCRC to fundamental children's rights – the right to life, the right to the enjoyment of the highest attainable standard of health, the right to enjoy his or her own culture and the best interests of the child (Articles 3, 6, 24 and 30 UNCRC). The petitioners did not seek compensatory damages but asked the CRC to understand that climate change is a children's rights crisis and that the respondent States have caused and are perpetuating the crisis by disregarding available scientific evidence on prevention and mitigation. On 8 October 2021, the CRC rejected the petition as inadmissible for failure to exhaust domestic remedies (respectively to give specific information justifying those domestic remedies would be ineffective or unavailable) under Article 7(e) of the Optional Protocol. However, as regards the existence of a sufficient

⁶⁸ Committee on the Rights of the Child, Communications n°105/2019 (Brazil), n°106/2019 (France), n°107/2019 (Germany), Sacchi et al. v. Argentina et al.

causal link between the harm alleged by the petitioners and the States' actions or omissions for the purposes of establishing jurisdiction, the CRC stated that the petitioners have (i) sufficiently justified that the violation of their rights under the UNCRC as a result of the States' carbon emissions was reasonably foreseeable, and (ii) justified their victim status by establishing that they have personally experienced significant harm.⁶⁹ Moreover, following the reasoning of the Inter-American Court of Human Rights (IACtHR) 2017 advisory opinion⁷⁰, the CRC found that countries have extraterritorial responsibilities related to carbon pollution.

Bearing in mind the petitioners' claim, the significance of the CRC's ruling results from the referred aspirational global goal of keeping global warming to below 1.5°C instead of the goal of 2°C. Here, in contrast to the BVerfG, the CRC has based its ruling on the scientific figures for the carbon budget for a given temperature increase provided by the IPCC. Irrespective of the legally non-binding nature of the CRC's decisions, its described substantive reasoning is a strong signal to the States party to the Convention, including Germany, that the 1.5°C goal should be regarded as the relevant basis for decisions, that climate change is indeed a child rights crisis, and that the countries are legally responsible for the harmful effects of emissions originating in their territory on children outside their borders. Moreover, as per Article 11 of the Optional Protocol, the State Party involved shall give the CRC Committee's views and recommendations "due consideration". Consequently, CRC's decisions might have an impact on national laws and policies relating to children and can facilitate changes to the national legal regimes.

4. Further climate suits against Governments

The decision of the Hoge Raad, as well as the Constitutional Court Order, will impact further proceedings, providing a new impetus

⁶⁹ Committee on the Rights of the Child, CRC/C/88/D/105/2019, Abs. 10.11, 10.13, 10.14.

⁷⁰ IACtHR, advisory opinion OC-23/17, The environment and human right, paras. 238-240.

for climate litigation that is globally rising. The same will probably apply to selected legal disputes being discussed in more detail hereafter.

4.1. Notre Affaire à Tous and Others (Trial of the Century) & Commune de Grande-Synthe v. France

The fundamental Urgenda litigation influenced, inter alia, the litigation *Notre Affaire à Tous and Others v. France*⁷¹. On 14 March 2019, Oxfam France, Greenpeace France, and the foundation of former French Environment Minister Nicolas Hulot, “*Foundation pour la Nature et l’Homme*”, as the alliance “*Notre Affaire à Tous*” sued the French Government for negligence in climate protection. France committed to reducing its GHG emissions by 40 % by 2030 compared to 1990 but regularly exceeds its CO₂ budget. On 3 February 2021, the Paris Administrative Court ruled in the “*Trial of the Century*” that the French Government bears responsibility in the climate crisis, that its failure to meet its emission reduction commitments is unlawful, and that it is responsible for some of the environmental damage, which to date has existed solely under civil law. Recently, on 14 October 2021, the Paris Administrative Court rendered its final decision in this case. Here, for the first time, a court has ordered the French Government to compensate for the consequences of its failure to combat climate change. The court determined that France had exceeded the first carbon budget for the period 2015-2018 by 62 Mt CO₂ eq, though lowering the amount to 15 Mt, considering the drop in emissions in 2020 mainly linked to the effects of the Covid-19 crisis. The court held that the French Government is obliged to take immediate and concrete actions to comply with its commitments to cutting carbon emissions and thus repair the ecological damage caused by its inactivity by 31 December 2022, leaving the methods to achieve this to the Government. According to one of the plaintiffs, if the Government does not take appropriate action by the end of 2022, the court could

⁷¹ Tribunal Administratif de Paris, N°1904967, 1904968, 1904972, 1904976/4-1. <https://t1p.de/x4o7>(last visited May 19, 2022).

follow up on its ruling and impose penalties.⁷² The October 2021 decision comes after two decisions in July 2021, in which the Conseil d'État, France's supreme administrative court, fined the French Government a sum of 10 million € (\$11.8 million) for failing to improve air quality in the period from January to July 2021.⁷³ The Conseil d'État will evaluate the actions of the Government for the second half of the current year in early 2022 and decide whether the Government must pay an additional fine.

In the same vein, the climate lawsuit filed on 23 January 2019 by the Commune de Grande-Synthe (Département Nord of the Hauts-de-France region), was settled. Grande-Synthe's existence is threatened because of rising sea levels. The Conseil d'État, on 19 November 2020,⁷⁴ ruled that the case was admissible and instructed the French Government to prove within three months that it is making sufficient efforts to meet its climate targets. Even though this judgment is primarily based on European and French law, it contains the relevant conclusion that, notwithstanding the non-direct applicability of the Paris Climate Agreement, the French Environmental Code must be interpreted in its light. For this, the Conseil referred to Art. L. 100.4 of the code de l'énergie, according to which the principles of the Framework Convention on Climate Change and the PA must be implemented. On 1 July 2021, the Conseil d'État joined the French Government to take additional measures by 31 March 2022 to meet the target of reducing GHG emissions by 40% by 2030.⁷⁵

⁷² Arie Alimi, FRENCH COURT ORDERS STATE TO HONOUR ITS CLIMATE COMMITMENTS, REUTERS, October 14, 2021. <https://t1p.de/qd8f> (visited May 15, 2022)

⁷³ Conseil d'État, decision No. 394254, July 12, 2017; decision No. 428409, July 10, 2020.

⁷⁴ Conseil d'État, N° 427301. <https://t1p.de/jz8r> (last visited May 19, 2022).

⁷⁵ Conseil d'État, N° 427301, <https://t1p.de/oyz7b> (last visited May 19, 2022).

4.2. Greenpeace v. Instituto Nacional de Ecología y Cambio Climático and Others

On 9 March 2021, Greenpeace filed an amparo, an emergency proceeding, against the Mexican Government, challenging Mexico's updated NDC. In its original 2015 NDC, Mexico aimed at reducing 22% GHG emissions by 2030 as compared to 2000 levels. However, instead of proposing a more ambitious 2020 NDC, up for review in Glasgow in 2021, as stipulated in Art. 4 PA in conjunction with paras. 23 f. decision 1/CP.21), in its revised 2020 NDC, Mexico raised only the baseline against which the GHG emission reduction is measured. Accordingly, the new 2020 NDC, in fact, revised the business-as-usual scenario upwards. Greenpeace argued that the 2002 NDC would not only effectively cause 14 Mt CO₂e additional emissions but also eliminate the peak of GHG emissions stipulated for 2026 and rule out the 50% reduction target for 2050. On 21 September 2021, the Eleventh Collegiate Court of the First Circuit in Administrative Matters decided to suspend Mexico's 2020 NDC.⁷⁶ Since Mexico's mitigation commitments are regressive and in violation of human rights, the judges ruled that Mexico's 2015 commitments on mitigation and adaptation for the 2020-2030 period are valid.

4.3. Future Generations v. Ministry of the Environment and Others ("Demanda Generaciones Futuras v. Minambiente")

On 29 January 2018, 25 young people filed a claim called a "tutela", a special constitutional mechanism for individuals to claim immediate protection of their fundamental rights, inter alia against the Colombian Government and municipalities. They argued that their fundamental rights are threatened due to climate change along with the Colombian Government's failure to ensure compliance with the target for net-zero deforestation in the Colombian Amazon by 2020, as agreed under the National Development Plan 2014-2018 and determined in its First NDC⁷⁷,

⁷⁶ First Circuit in Administrative Matter, Reference no. R.A. (I) 81/2021. <https://t1p.de/gygp> (last visited May 19, 2022).

⁷⁷ Republic of Colombia, Intended Nationally Determined Contribution, at 8 (2018). <https://t1p.de/k38e> (last visited May 19, 2022).

submitted to the UNFCCC secretariat in 2018. On 5 April 2018, the Supreme Court of Justice of Colombia allowed the youths' petition, recognizing the Colombian Amazon as an "entity subject of rights" being entitled to protection, conservation, maintenance, and restoration.⁷⁸ The Supreme Court ordered the Government to create an "intergenerational pact for the life of the Colombian Amazon" and to implement measures against deforestation in the Amazon.

4.4. Friends of the Irish Environment v. The Government of Ireland

In the case of Friends of the Irish Environment (FIE), on 31 July 2020, the Irish Supreme Court issued a ruling which quashed the National Mitigation Plan in 2017 adopted by the Irish Government.⁷⁹ The Supreme Court determined that the Plan fell short of the standards required by the enabling legislation. It noted, that a reasonable reader of the Plan would not understand how Ireland will achieve its 2050 targets. Not with standing that the FIE lacked standing to bring its claims under the Irish Constitution or the ECHR, intensified attention is drawn to the fact that the Supreme Court addressed the possibility of environmental constitutional rights, thus stimulating further discussion on this topic.⁸⁰

4.5. Duarte Agostinho and Others v. Portugal and 32 Other ECHR States

On 2 September 2020, six Portuguese youth filed a complaint with the ECtHR against Portugal and 32 other States party to the ECHR and the Signatory States to the PA. The lawsuit attracts significant attention regarding the question of the global level of protection of

⁷⁸ Superior Court of the Judicial District of Bogotá, Reference no. 11001-22-03-000-2018-00319-01, STC4360-2018. <https://t1p.de/9e52>; see key excerpts from the Supreme Court's decision, <https://t1p.de/305j> (last visited May 19, 2022).

⁷⁹ The Supreme Court, Appeal No: 205/19. <https://t1p.de/sgij> (last visited May 19, 2022).

⁸⁰ Hugh Callagher, *Environmental Constitutionalism After Friends of the Irish Environment* (2021). <https://t1p.de/d8t6> (last visited May 19, 2022).

the PA - 1.5°C or 2°C - and the accompanying question of intergenerational climate justice (see Section 2.c&e). According to the youths, these States are violating their human rights because they are not reducing their GHG emissions sufficiently to limit global warming to 1.5°C. On 30 November 2020, the ECtHR fast-tracked and communicated the case to the defendant countries, requiring them to respond by the end of February 2021.⁸¹ On 4 February 2021, it affirmed its fast-tracking decision and asked the 33 Governments to submit a defense on both admissibility and the merits of the case until 27 May 2021.⁸²

5. Tackling the global climate crisis and the European security crisis together

Russia's war against Ukraine, which expanded on February 24, 2022, not only painfully demonstrates the cruelty of war again, but also makes obvious, the serious consequences, for a number of countries, of being dependent on dictatorial regimes through their purchase of fossil fuels. In the current European security crisis, their increased vulnerability in their energy supply is forcing countries to quickly develop new energy sources and enter into energy partnerships. While some of these partnerships, such as between Germany and Qatar, even with permanent human rights violations in Qatar⁸³ hardly meet the fundamental principles of the rule of law, a stronger purchase of natural gas from Norway to Germany⁸⁴ is acceptable from a security perspective, but not from a climate perspective. Likewise, the planned sourcing of green

⁸¹ ECtHR, Application no. 39371/20, Duarte Agostinho & Others v. Portugal & 32 Other States.

⁸² ECtHR, rejecting a motion by the defendants asking the Court to overturn its fast-tracking decision. <https://t1p.de/p04r> (last visited May 19, 2022).

⁸³ Amnesty international, *Amnesty International Report 2021/22: The state of the world's human rights*, at 305 (2022). <https://t1p.de/0rmtj> (last visited May 19, 2022).

⁸⁴ Nerijus Adomaitis & Nora Buli, *Norway to supply more gas to Europe this summer*, REUTERS, March 16, 2022. <https://t1p.de/xc6mg> (last visited May 19, 2022).

hydrogen produced by renewable energy sources from Norway⁸⁵ is not only carbon neutral, it is also expected to be competitive by 2030.⁸⁶

The Russian war surprised many, and few were prepared for the compulsion to act. As often in history, the war has also drawn attention to other issues, in this case to the global climate crisis. The European security crisis caused by Russia shows the strong interweaving of fossil energy dependence and climate emergency and requires a determined continuation of the climate process. The use of fossil fuels to an extent that permanently exceeds the carbon sink function of the global biosphere is contrary to human reason and leads directly to an existential crisis of the planet in the Anthropocene.

For that reason it is true that renewable energy is freedom energy⁸⁷. Dictatorial regimes finance wars and sustain their existence by exporting fossil fuels. In the case of Russia, almost half of the state budget comes from oil and gas revenues.⁸⁸ Russia has the world's largest gas reserves and is the second-largest producer of natural gas behind the United States and the world's largest gas exporter. In 2021 alone, Russia produced 762 billion cubic meters (bcm) of natural gas and exported around 210 bcm via pipeline. The dependence of the EU-27 on Russian gas is illustrated by the following figures: In 2021, the EU-27 imported around 90% of its

⁸⁵ Joint Statement Germany – Norway (2022). <https://t1p.de/a79oa> (last visited May 19, 2022).

⁸⁶ Agora Energiewende/Guidehouse, *Making renewable hydrogen cost-competitive: Policy instruments for supporting green H₂* (2021); PwC, *Laying the foundations of a low carbon hydrogen market in Europe* (2021).

⁸⁷ German Federal Minister of Finance Christian Lindner, Andrew Lee, 'Renewable energy is freedom energy', *Germany speeds all-green target to 2035 to ease Russia grip*, RECHARGE, March 1, 2022. <https://t1p.de/or88d> (last visited May 19, 2022).

⁸⁸ IEA, *Energy Fact Sheet: Why does Russian oil and gas matter?* (2022); IEA, *Oil Market and Russian Supply* (2022); IEA, *Gas Market and Russian Supply* (2022); *Commission Communication concerning joint European Action for more affordable, secure and sustainable energy*, COM (2022) 108 final (March 8, 2022).

natural gas consumption, 45% of which came from Russia. Globally, Germany, Italy and Turkey purchased the most Russian natural gas. Russia is also the third largest oil producer (behind the United States and Saudi Arabia) and the second largest crude oil exporter. In 2021, the EU-27 imported 27% oil and 46% coal from Russia. By the end of 2021, about 60% of Russian oil exports went to OECD Europe, another 20% went to China.

The need for countries including Germany to once again focus on their fundamental values, in particular on human rights, climate protection and the rule of law, have been emphasized by the Hoge Raad in its Urgenda ruling and by the Conseil d'État in the Grande-Synthe lawsuit, as already pointed out. Likewise, the German Federal Constitutional Court underlined in its Order of 24 March 2021, that the reflection on values must be read inter temporally⁸⁹ and incorporates a protective mandate for subsequent generations⁹⁰. In this regard, it can be recognized that every step out of fossil dependency on third countries, from co-financing of armed conflicts and human rights violations as well as from the domestic use of fossil energies is essential, and every transformative act of a country to bring its economy and its society on the pathway to ecological and social sustainability is to be welcomed. Not only the G7 (Group of 7), currently under Germany Presidency, are phasing out Russian oil and coal imports,⁹¹ but also the EU has imposed energy sanctions on Russia. On April 8, 2022, the Council of the EU has issued an import ban on Russian coal, pursuant to Article 215 TFEU.⁹² In its sixth package of sanctions of

⁸⁹ BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618 at head note 4, paras. 122, 183.

⁹⁰ BVerfG, Order of the First Senate of March 24, 2021, - 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 -, ECLI:DE:BVerfG:2021:rs20210324:1bvr265618 at head notes 2a), 2c), 2e), paras. 117, 120, 123, 146, 167, 192, 245.

⁹¹ G7 Foreign Ministers, *Statement on Russia's war against Ukraine*, at para. 13 (2022); G7 Leaders' Statement, at 3 (2022).

⁹² Council Regulation (EU) 2022/576, 2022 O.J. (L 111) 1.

May 4, 2022, the European Commission has considered a gradual oil embargo against Russia, whereby further negotiations, especially with Hungary, are required.⁹³

GHG - intensive fossil fuels pose a potential risk to security of supply. They are climate-damaging and finite, and are associated with catastrophic consequences such as the current extreme heat wave in India. What remains clear is that the climate crisis and the security crisis must be tackled together by phasing out fossil energy imports and by rapidly expanding renewable energy, energy efficiency and energy sufficiency. The IEA's Fuel Report of March 2022 and further studies prove the feasibility of the process globally, in Europe and in Germany.⁹⁴

Driven by the latest developments, Germany's climate legislation seems to get on track with the requirements of the PA and the challenges of the global crisis. The German Federal Cabinet's "Easter package" of March 6, 2022,⁹⁵ classifies for the first time the use of renewable energy as "overriding public interest" and "serving public safety". Another core element is the radical expansion of renewable energy on land and at sea. By 2030, at least 80% of German gross electricity consumption is to be covered by renewables, by 2035 all electricity shall be sourced almost entirely from renewable energy. This positive political momentum has to be

⁹³ Ursula von der Leyen, President of the European Commission, Speech at the European Parliament Plenary on the consequences for the EU of the Russian war in Ukraine (May 4, 2022); Jennifer Rankin, *Hungary 'holding EU hostage' over sanctions on Russian oil*, THE GUARDIAN, May 5, 2022. <https://t1p.de/qel7z> (last visited May 19, 2022).

⁹⁴ IEA, *A 10-Point Plan to Reduce the European Union's Reliance on Russian Natural Gas* (2022); See also Institute For Advanced Sustainability Studies Potsdam, <https://t1p.de/68d0> (last visited May 19, 2022); IEA, *Flagship Report 2021, Net Zero by 2050, A Roadmap for the Global Energy Sector* (2021); Thure Traber & Hans-Josef Fell et al., *100 % Erneuerbare Energien für Deutschland bis 2030 Klimaschutz – Versorgungssicherheit – Wirtschaftlichkeit* (2021); SPD, BÜNDNIS 90/DIE GRÜNEN, FDP, *supra* note 42, para. 1804.

⁹⁵ Federal Ministry for Economic Affairs and Climate Action, *Overview of the Easter Package* (2022). <https://t1p.de/jmiqc> (last visited May 19, 2022).

maintained when realigning the Climate Change Act 2021, with the 1.5°C temperature goal in 2022.

6. Concluding Observations

This paper has demonstrated that the unprecedented Court Order is a milestone in German climate change jurisprudence, significantly strengthening climate action. Notwithstanding the fact that the court abstained from stating that (i) the sectoral emission amounts specified until 2030 under the Climate Change Act 2019 as such are not compatible with the Basic Law and (ii) the German legislator has violated his special duty of care, the court sent a strong signal to the German legislator, as well as the German Government to consider climate protection as a constitutional good. As shown in detail, due to the deficiencies also of the current KSG 2021 that perpetuates the prohibited “advance interference-like effect on fundamental rights”, the German legislator has the duty to bring the KSG 2021 on a 1.5°C - consistent pathway in 2022. To achieve the crucial 1.5°C goal, German climate protection law, as well as climate protection policy, will have to become considerably more ambitious in the near future. As the overview on selected decisions of mainly Supreme Courts has shown, the same applies to other states around the globe. Also due to the European security energy crisis, the continuation of Germany’s ecological and social transformative process seems more essential than ever before.