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ORIGINAL ARTICLE

The Privatisation of Climate Change Litigation: Current Developments in Conflict of Laws

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Abstract
The purpose of this contribution is to analyse climate change litigation in an innovative way, considering it as an example of "privatisation" of international law, and unravelling the "ecological" side of conflict-of-laws climate change litigation. The paper will first explain the concept of privatisation of law as applied to international law and what it means in the context of climate change litigation, before moving to a landmark case, whose appeal is still pending in front of a domestic court in Europe: *Milieudefensie* et al. *v. Royal Dutch Shell plc*. The focus of the analysis of the cases will be limited to the use of the conflict-of-laws mechanism present in the Rome II Regulation, namely Article 7. The paper critically assesses the principle of ubiquity included in this provision, by looking at the concept of "event giving rise to the damage" as applied in CO_2 reduction claims in the existing legal scholarship and using an underexplored ecofeminist perspective. Inspired by the work "A relational feminist approach to conflict of laws" by Roxana Banu (2017), the paper argues for a relational understanding of the concept of "event" and goes further to consider in an ecofeminist perspective the environment as composed of human, non-human beings and natural objects, and of their relations with each other. The article is meant to be a starting point for further research, which for the first time applies ecofeminist theories to private international law.

Keywords Climate Change Litigation · Conflict of Laws · Rome II Regulation · Ecofeminism · Privatisation

1 Introduction: New Frontiers for Climate Change Litigation

According to a policy report prepared by scholars affiliated with the Grantham Research Institute on Climate Change and the Environment, more than 1800 cases of climate change litigation have been filed from around the world as of

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31 May 2021, the majority of which were before US courts (Setzer and Higham 2021, p. 10). More than 1000 cases have been filed since 2015, which is the year of adoption of the Paris Agreement. As it is known, the vague expression "with a view to enhancing its level of ambition" (Article 4(11) of the Paris Agreement) was used as gatekeeper by several judges, interpreting legal obligation that states must abide by according to the international agreement in a more stringent way. It is not surprising, owing to the nature of legal obligations, that the great majority of cases have been brought against governments, with "a small but significant number of cases" that are filed against corporations (Setzer and Higham 2021, p. 12). It is also not surprising that in similar cases, the interests at stake are more than mere individual ones. The category of "strategic litigation", in which the applicants' purpose is not only to achieve a result for themselves, but also to pursue public goals, has been reported to be on the rise, with the idea of using courts to advance climate policies, to create public awareness, and to change the behaviour of governments and/or industry actors (Ibid., p. 12). Looking at the cases brought against private actors, namely transnational corporations, the purpose of this contribution is to analyse climate change litigation in an innovative way, considering it as an example of "privatisation" of international law, and unravelling the "ecological" side of conflict-of-laws climate change litigation.[1]

The paper will first explain the concept of privatisation of law as applied to international law and what it means in the context of climate change litigation, before moving to a landmark case whose appeal is still pending in front of a domestic court in Europe: *Milieudefensie* et al. *v Royal Dutch Shell plc*.[2] The focus of the analysis of the cases will be limited to the use of the conflict-of-laws mechanism present in the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter "Rome II Regulation"[3]), namely Article 7. According to this provision, the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to another provision of the Regulation, Article 4(1), which is the law of the country in which the damage occurred, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred. The paper critically assesses the principle of ubiquity

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[2] Rechtbank Den Haag, Klimaatzaak tegen Royal Dutch Shell, 26 May 2021, C/09/571932 / HA ZA 19–379 (English version). Available at http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/

[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, pp. 40–49.

included in this provision, by looking at the concept of "event giving rise to the damage" as applied in CO_2 reduction claims in the existing legal scholarship and using an underexplored ecofeminist perspective. It will argue that Article 7 of Rome II Regulation as applied by the Dutch Court in the *Milieudefensie* case indeed reflects an ecofeminist approach, even though that was not surely the intention of the domestic judges. Inspired by the work "A relational feminist approach to conflict of laws" by Roxana Banu (2017), this paper argues for a relational understanding of the concept of "event" and goes further to consider in an ecofeminist perspective the environment as composed of human, non-human beings and natural objects, and of their relations with each other. What if the event is a slow-onset event, like climate change, meaning an event that stretches over time and put into question time and space in international law? It is clear that the ubiquitous nature of the applicable law in the case of environmental damage is not only important but reflects the need to respond to unprecedented threats. The contribution will eventually contend that these "private" cases could potentially bridge the gap between public and private international law solving private disputes with a global governance perspective. The article welcomes the possibilities that private climate change litigation has opened but warns against the risk of reducing everything to private actors without a change of perspective that puts the environment, to which humans belong, at the core of the discussion. Contemporary private international law is not impermeable to human rights,[4] but still seems impermeable with regard to approaches that no longer consider humans at the centre of the debate.[5] The article is meant to be a starting point for further research, which for the first time applies ecofeminist theories to private international law. There are several theories that endorse non-anthropocentric perspectives to law; however, we believe that revitalising ecofeminism and using it as a method of international law opens new interesting paths of research that can better look at schemes of oppression within and across species. It is not necessarily the best method[6] — we are actually convinced that all methods have points of strength and weakness, mirroring an author's background and sensitivity — for working on climate change litigation, but one that combines an understanding of persistent discriminations in our societies, with the knowledge that humans belong to the environment and not vice versa. It is a method that unravels dynamics of power and oppression within and between different species, expanding its analysis beyond humans.

[4] See, in that respect, *ex multis*, Kinsch (2005) and Salerno (2014).

[5] See in this journal, De Vido (2021).

[6] One could have used Marxism, for example, which works on the relationship between the base and the "superstructure," on concepts of ideology and hegemony, but not on the exploitation of nature by (a part of) humanity. "Marxist approaches are committed to grounding the law in its wider material context: understanding the ways in which political-economic relationships—and their attendant conflicts—shape and are manifested within (international) law": cfr. Knox (2021). One could have used radical naturalism, which is also underdeveloped in international law (see an application of Spinoza's thought in international environmental law in Dahlbeck De Lucia 2018).

2 The Meaning of Privatisation of International Law, with Specific Regard to Climate Change Litigation

Privatisation generally means to shift from public to private in several domains. It can involve property (nationalisation of privately owned assets and expropriation of money or property), it can refer to services traditionally provided by public entities (energy, sewage, water, transport to make some examples) and then handed over to the private sector, it can open to leases given to the private sector for the performances of some services (such as exploitation of a public resource), and it can define an economic strategy devoted (at least in its intention) to efficiency. The list is clearly non-exhaustive, the involvement of the private sector being stronger and stronger in a hyper-globalised world. Leaving aside the economic theories on privatisation, which go beyond the scope of this paper (e.g. Yarrow et al. 1986; Boycko et al. 1996), it should be acknowledged that the phenomenon of privatisation is not new to law, including international law. Looking, though briefly, at the evolution of public international law, privatisation can be linked to the increasing number of State commercial activities over the twentieth century that led not only to the affirmation of the theory of restrictive immunity, but also to the performance of public functions by non-State actors with consequences in terms of State responsibility (Mills 2023, pp. 5–6). International investment law, which has increasingly developed over the last decades, is another example of the challenging public/private boundaries in modern international law (Ibid., p. 8).

However, privatisation can also mean to shift from public to private in law making, in law enforcement (such as in the management of detention centres) and in judicial settlement resolution. In the context of law making, States and international organisations within the limits of their competences claim the legislative power in the international legal system. However, several forms of "private" law making are worth mentioning here. One example is the *lex mercatoria,* a body of law of ancient origin established by private merchants (Lando 1985, Marrella 2003). In that respect, the Principles of International Commercial Contracts elaborated by Unidroit codified (a part of) the corpus of *lex mercatoria*, by systematising general principles of transnational commercial contracts (Marrella 2003, p. 27; Marrella 2023). Standards elaborated by standard-setting bodies composed of public–private entities, especially as a consequence of the 2008 financial crisis, are another example of this trend towards privatisation. These standard-setters have been called as informal networks because they are neither States nor international organisations: They are "soft" entities, which are capable of showing "strong" powers (De Vido 2020). Slaughter boldly saw these bodies as constituting a "new world order" (2005, p. 14). An author reflected on this increasing role of private actors in the making of international law, which however "has not stripped the state of its influence" (Stephan 2011, p. 1577). In modern administrative law,[7] lawmaking functions are delegated to agencies, which make law "in the application" combined with the production of

[7] See the global administrative law, see Cassese et al. (2012)

standards (Stephan 2011, p. 1587). This phenomenon of private production has been interestingly called "upstream privatisation" (Stephan 2011, p. 1595 ss.).[8]

When it comes to the solution of disputes, Mills identifies class actions as an example of privatisation (2023, p. 10). In particular, without delving into the complexity of the mechanism, it was argued that in these cases the State's role is limited "essentially to providing a court system" (Prichard and Trebilcock 1978, p. 5).[9] What is relevant, especially in the USA, is that litigation in huge cases involving major corporations in the field of cigarettes or guns or drugs has become the mechanism forcing and pushing for regulatory changes: The private interest of the individuals affected blurs with a more general interest in promoting support for governmental policies (Kip Viscusi 2002).[10] Class actions can be purely "internal", filed by national of the forum State against a corporation of that State, but they can also present a cross-border dimension. In terms of solution of disputes having a cross-border dimension, the analysis of privatisation deserves a closer look.

The word "private" in private international law originally did not mean that the role of the parties was particularly important or significant. Quite to the contrary, the choice of the court and the choice of the law were entirely left to objective — "neutral" — connecting factors (Mills 2018, p. 44 ss). Increasingly in conflict-of-laws issues, "the answers to the jurisdiction and applicable law questions […] do not come from connecting factors, they come from agreements reached by the parties themselves" (Mills 2023, p. 12). According to Mills, the development of party autonomy in private international law constitutes an example of "legal privatisation" (Mills 2023, p. 2). Private parties can choose national courts or private arbitral tribunals, the latter being composed of arbitrators rather than judges, applying private procedural rules. Muir Watt defines this phenomenon as "la libéralisation des conflits de juridictions" which is not devoid of risks, such as the *fraude à la loi* and a sort of disqualification of the *lois de police* (Muir Watt 2005, p. 140 and 160).[11] This form of "downstream privatisation" (Stephan 2011, p. 1606) is characterised by not only private dispute resolution, private access to international tribunals, but also private access to domestic courts (Ibid., p. 1612). The latter is an interesting development in law and consists in the "expansion of opportunities for private persons to make international law relevant to domestic litigation" (Ibid.). The Alien Tort Statute in the USA explains how old laws might be applied for new "public" purposes.

[8] Stephan also refers to customary international law, illustrating "the emergence of private voices in the upstream formation of customary international law", 1606.

[9] See also Pakamanis (2016), who stressed how the national regimes of European Union Member States regarding collective redress are diverse. These considerations implies the need for a uniform collective redress system across the European Union.

[10] In the EU, the European Commission investigated the possibility of suing tobacco firms to recover health costs. See GHK (2012) and also Jarman (2018), stating that litigation is also "a public health tool".

[11] Muir Watt (2011) contends that the law can regulate the cross-border exercise of private power by a variety of market actors. She is convinced that the time has come to unravel how private international law may impact upon the balance of informal power in the global economy.

This aspect is of particular relevance for climate change litigation, in its "private" dimension, as we are going to illustrate in the next section.

2.1 The Concept of Privatisation as Applied to Climate Change Litigation

The "private side" of international environmental law is not unknown. It refers to conventions and European acts aimed at addressing corporate liability for environmental damages deriving from business activity (Bergkamp 2001; Huglo 2010; García-Castrillón 2011). Examples are the 1969 Convention on Civil Liability for Oil Pollution Damage, replaced by the 1992 Protocol, concluded under the auspices of the International Maritime Organisation or the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention). The latter Convention has never entered into force. Within the European Union system, the Directive 2004/35/CE[12] establishes a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage (Viney and Dubuisson 2006, Winter et al. 2008, Munari and Schiano di Pepe 2012). Despite their "private side", which is mainly concerned with the nature of the actors involved and the type of liability (civil one), these legal instruments, directives included, do not contain conflict-of-laws provisions, but they are rather inspired by environmental principles, such as sustainable development (Marino 2021, p. 904). They have not been much invoked in climate changes cases either.

In climate change issues, we have seen dozens of cases brought to the attention of domestic and regional courts invoking international human rights law.[13] Private actors choose the forum and frame the arguments to support their quest for compensation.[14] Individual and public interests converge[15] in the sense that, by searching for a court assessment of the applicant(s)' violations of human rights, private litigators emphasise either the need for more regulation or the importance of pushing for more ambitious objectives to be achieved. In that respect, interpretation of existing laws given by domestic courts can lead to unprecedented results, that go beyond the mere pursuance of individual interests. The meaning of privatisation in climate change litigation does not refer much to the jurisdictional body chosen, but rather to the legal nature of the applicant(s) — namely private individuals — acting against States for the attainment

[12] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, in OJ L 143, 30.4.2004, 56–75. The Directive adopts an administrative or public law approach to liability and has been considered disappointing because it did not take the opportunity to address the issue of civil liability (Munari and Schiano di Pepe 2006, 188).

[13] On climate change litigation, see, *ex multis*, Tabau (2010); Montini (2020); Simlinger and Mayer (2019); Kahl and Weller (2021); and, with regard to the underexplored issue of climate litigation in the Global South, Peel and Lin (2019).

[14] Table of cases in http://climatecasechart.com/. This article will not discuss climate change cases filed against governments and related to their policies on mitigation and adaptation measures.

[15] Stephan warns against an absolute faith in the mechanism, considering that private litigants can achieve results that enrich them but at the expense of the general welfare (2011, 1617).

of both individual and public goals. Climate policy is no longer a mere matter of States' obligations stemming from an international treaty like the Paris agreement, but it refers to private interests that are brought to the attention of courts with the purpose of receiving compensation and pushing forward regulatory changes.[16]

In a few recent cases, the element of privatisation is even stronger, because it refers to both the legal nature of the respondent, namely transnational corporations,[17] and the use of the mechanisms of private international law.[18] It is against this backdrop that "old laws" show their potential when applied for (relatively) new "public" purposes, such as the action against climate change. Litigation in this sense attempts to address "justice-sensitive externalities of national policies" (Kumm 2016, p. 251), by responding to the detrimental effects of lax climate policies in countries where transnational corporations operate. In the European Union system, for example, Regulation No. 1215/2012[19] (hereinafter "Bruxelles I *bis*") matters in terms of jurisdiction (Dickinson and Lein 2015; Malatesta 2016; Mankowski 2020). According to Article 7 (2) of the Regulation, a person domiciled in a Member State may be sued in another Member State "in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur". The ubiquitous nature of the provision and its potential universal application have been mitigated by the jurisprudence. As it was argued (Marino 2021, p. 910 ss.), according to the jurisprudence of the Court of Justice of the EU (CJEU): (a) Indirect damages are irrelevant (e.g. damages to property as a consequence of a natural disaster caused by climate change); (b) the competent court for the determination of the damage in its entirety is the court of the place where the conduct leading to the damage occurred; as alternative, the courts of the place where the damages are suffered will be competent for the sole damages suffered in the forum State; (c) the need for legal predictability requires the clear identification of the potential victim(s). The Regulation does not contemplate hypotheses of universal jurisdiction or *forum necessitatis*, and it cannot attract within the orbit of EU law cases that present a feeble connection with the European Union (Marino 2021, p. 914).[20] The Regulation does not impair however the power of EU Member States to rely on domestic grounds of jurisdiction, including "exorbitant" ones, when the defendants are domiciled in a non-EU country (Marongiu Bonaiuti 2021).[21] Article 6 establishes that if

[16] This contribution highlights the "private" nature — in terms of applicants — of cases that are filed against States, because it stresses the importance of individuals as main actors in climate change litigations. See, however *contra*, Simlinger and Mayer 2019, 181, looking at the actions of the respondent in order to identify the public or private nature of the litigation: "Public law litigation puts the action or inaction of national authorities under scrutiny".

[17] See, for example, the Huaraz case, on which Frank et al. (2019): http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/

[18] See *below*.

[19] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in OJ L 351, 20.12.2012, p. 1–32.

[20] On the reform regarding the *forum necessitatis* in the EU, see Franzina 2009 and Marongiu Bonaiuti (2023) (on the proposal for a reform of Brussels I *bis*).

[21] On the right of aliens not to be subject to so-called excessive civil jurisdiction, see Focarelli (1997).

a defendant is not domiciled in the territory of a Member State, the national rules on jurisdiction apply. It is within this residual jurisdiction that Member States can provide for exorbitant grounds, including *forum necessitatis*, which might be used as a tool for more accountability for transnational corporations (La Manna 2021, p. 149).

In terms of applicable law, the aforementioned Rome II Regulation comes to play.[22] The key provision is Article 4(1) of the said Regulation, stating that the law applicable to non-contractual obligations stemming from a tort is the law of the country where the damage occurs (the so-called *lex loci damni*), without considering either the place where the event giving rise to the damage occurred or the place where the indirect consequences of that event were produced.

Article 7 of the said regulation adds a special rule of conflict, entirely devoted to environmental damage[23]:

> the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Whether or not climate change may amount to environmental damage is controversial. Recital No. 24 refers to adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms. Climate change surely determines these multiple effects on the environment. However, some authors refer to global warming as a cause of ecological damage, not as a damage per se (Petersen Weiner and Weller 2021/2022, p. 265). Compared to the rules on jurisdiction, the scope is very broad: it includes indirect damages and extensively protects the victim, who can choose the application of the most favourable law to his/her case. This rule is also called "principle of ubiquity" and "forces the operators of ecologically dangerous activities, established in countries with a low level of civil-law protection of the environment, to abide by the higher levels prevailing in neighbouring countries, while discouraging operators established in high protection countries from placing their facilities at the border" (Bogdan 2009b, p. 221). Is this *favor laesi* (Ivaldi 2013, p. 877) — or, better, as we will demonstrate further, *favor naturae* — sufficient to address the effects of climate change? Can the word "event", meaning the tortious event, cover the complexity of climate change cases? What about an event occurring miles away from the place of the production of the damage or composed of multiple actions? It is precisely on the interpretation of the concept of "event" provided by domestic courts that the

[22] On the Rome II Regulation, see, *ex multis*, Brière (2008); Corneloup and Joubert (2008); Ahern and Bichy (2009); Marongiu Bonaiuti (2013); Lein et al. (2021); Mosconi and Campiglio (2022), 475 ss. The Regulation is interestingly analysed from a US perspective, by Symeonides (2008 and 2023).

[23] On the need to extend this exception to all torts, not only the environmental ones, see Symeonides (2023). On Article 7, see, *inter alia*, Kadner Graziano (2008), Bogdan (2009a), Bogdan (2009b), Guinchard and Lamont-Black (2009).

potential (and the limits) of the Rome II Regulation in the "privatisation" of climate change litigation can be appreciated at its best.

3 *Milieudefensie* et al. *v Royal Dutch Shell plc*.: the application of the conflict-of-laws provisions to tackle climate change

The interest in the potential (and the limits) of Article 7 of the Rome II Regulation stems from a pending case filed with Dutch courts. The class action *Milieudefensie* et al. *v Royal Dutch Shell plc*. is the first (to our knowledge, but for sure one of the very few) climate change case(s) in which a court used the mechanisms of private international law (Mantovani 2023; Castro and El Daouk 2023). In 2019, an environmental group called *Milieudefensie* (Friends of the Earth), along with other NGOs and more than 17,000 Dutch citizens, complained in front of the Hague District Court that Shell violated its duty of care under Dutch law and human rights obligations by failing to reduce greenhouse gas emissions. It should be noted that since 2005 RDS, a public limited company, established under the laws of England and Wales, has been the top holding company of the Shell group, having headquarters in the Hague. The company decides the general policy of the Shell group and defines the investment guidelines in support of the energy transition. The cross-border elements of the case are the place of incorporation of the decision-making corporation, and the place of the emitting plants. In contextualising the case, the Dutch Court referred to the effects of climate change both in Europe and in the Netherlands, which registered "high per capita CO_2 emissions compared to other industrialised countries" that led to heat waves, drought, floods, damage to ecosystems, threat to food production and damage to health (para. 2.3.7). The applicants requested the court to order that RDS reduce the CO_2 emissions volume in accordance with the best available climate science, in light of the objectives of the Paris agreement. They also referred to corporate obligations under Dutch law. The decision in favour of the applicants was rendered by the Hague District Court on 26 May 2021. On 20 July 2022, Shell appealed the decision. More than the merits, on which this article will not comment in detail, what is of interest here is how and to what extent conflict of laws is relevant to the solution of disputes on climate change involving two private actors. In other words, how conflict of laws can lead to the application of a law that is more favourable to the people affected by climate change and potentially, as this piece is going to show, to nature.

The initial legal questions to start with the analysis are on the one hand whether the Hague District Court was competent to hear the case, and, on the other hand, whether Dutch law was applicable to the case at issue. In terms of jurisdiction, the Dutch court accepted the public interest class action under the civil code of the country, explaining that it could only take into account the effects of climate change on "current and future generations of Dutch residents and […] of the inhabitants of the Wadden Sea area" (para. 4.2.4). The potential effects of climate change for the entire humanity were not considered. If the collective claims of the NGOs were accepted, that was not the case for the individual complaints, failing actual individual interests. There is not much to say on this part, considering that class actions are

regulated by domestic legislation and therefore fall outside the scope of this analysis.[24] It is the part on applicable law that however deserves a careful reading. The applicants' legal argument was that the law applicable to the dispute was Dutch law under Article 7 of the Rome II Regulation or, as alternative, under its Article 4 (1). To determine what is "an event giving rise to the damage" in the sense of Article 7, the Court reflected on how every emission of CO_2 and other greenhouse gases, whether or not produced in the Netherlands and whether or not coming from Shell's plants, contribute to climate change and to the damages caused to Dutch residents in the Netherlands. It also stated, however, that "every contribution towards a reduction of CO_2 emissions may be of importance", and that "these distinctive aspects of responsibility for environmental damage and imminent environmental damage" must be considered in the interpretation of Article 7 of the Rome II Regulation (para. 4.3.5). The legal argument of the applicant was that RDS was a policy-setting entity of the Shell group. RDS counter-argued that a policy cannot cause damage and that a corporate policy constitutes a mere preparatory act. The court broadly interpreted the provision under Article 7 by suggesting that it opens to situations in which multiple events giving rise to the damage in multiple countries can be identified (para. 4.3.6). According to the Court, the RDS corporate decision that was taken in the Netherlands for Shell represented one of these multiple events and "an independent cause of damage, which may contribute to environmental damage and imminent environmental damage" for Dutch residents. In other words, since the relevant business decisions concerning the numerous Shell's emitting plants were taken in the Netherlands, Dutch law was applicable. *Ad abundantiam*, the court also confirmed that the general rule under Article 4 (1) of the Rome II Regulation was applicable, given that the class actions is aimed at protecting the interests of the Dutch residents.

Having established the application of Dutch law, the court continued its analysis by assessing the respect of RDS' reduction obligations stemming from the unwritten standard of care laid down in the Dutch civil code. It is interesting to notice that the court referred to the structure of the corporation, by examining how RDS exercises a remarkable influence over the companies in the Shell group. It considered the "best-efforts obligation" a corporation has in removing or preventing the serious risks ensuing from the CO_2 emissions generated by them and in limiting lasting consequences as much as possible (para. 4.4.24). This reasoning is also valid for the Shell's suppliers in an attempt to affirm the responsibility of parent companies for the environmental impact of their subsidiaries' activities. Shell was indeed considered responsible for Scope 3 emissions, meaning indirect emissions resulting from greenhouse gas sources owned or controlled by third parties. Even though a corporation is not bound by the provisions of an international treaty, like the Paris agreement, the court used its provisions, and human rights law, in particular Articles 2 and 8 of the European Convention on Human Rights, in the "composite interpretation of the unwritten standard of care" (Macchi and van Zeben 2021, p. 411) required by book 6 s. 162 of the Dutch civil court. In this way, the Court opened to "an indirect application of international law, meaning an interpretation of domestic law consistent with

[24] See, on procedural matters, Mayer (2022), 409.

international norms" (Ibid., p. 412). The court eventually included possible pathways for the reduction of the emissions and defined as guideline that the Shell group's emissions in 2030 must be net 45 percent lower relative to 2019 levels. The detailed analysis provided by the court is undoubtedly innovative, and it is based on a general thought that all contributions to the reduction of CO_2 emissions matter. The conclusion was an order addressed to RDS "both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO_2 emissions into the atmosphere […] due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at the end of 2030, relative to 2019 levels" (para. 5.3). RDS was also required to pay the costs of the proceedings.

4 Reflecting on the Concept of "Event" Under Article 7 of the Rome II Regulation: a Critical Assessment

The interpretation of the wording "event giving rise to the damage" included in Article 7 of the Rome II Regulation offered by the Dutch Court is of particular interest. The court argued that the event giving rise to the damage is located at the place where the business policy, potentially leading to the damage, was adopted. The argument is thought-provoking and broad, because it disrupts the idea that an event leading to environmental damage is fixed in time. Climate change, as other forms of "slow violence" (Nixon 2011[25]), stretches along time and space and do not necessarily produce immediate and cause-effect disastrous events. Effects can manifest across space, species, and generations.

As the Hague District Court stated in the *Milieudefensie* case, "there is some uncertainty about the precise manner in which dangerous climate change will manifest in the Netherlands and Wadden region", and this uncertainty is "inherent in prognoses and future scenarios but has no bearing on the prediction that climate change due to CO_2 emissions will lead to serious and irreversible consequences for Dutch residents and the inhabitants of the Wadden region" (para. 4.4.7). This new temporality of law is fascinating and troubling.[26] It is indeed fascinating because it

[25] And the legal interpretation of the concept in Cusato (2021), De Vido (2023a), Rogers (2023).

[26] On the temporality of international law see McNeilly and Warwick (2022). Persistent poisoning commonly becomes a matter of concern both at the international and domestic level when it "explodes" as a fact, causing disturbing and irreparable damages to human beings. The so-called Minamata case (Minamata City is an industrial city located at the southern tip of Japanese Archipelago in Kyushu) is an example. Minamata disease is a methylmercury poisoning contacted by people who ingested fishes and shellfishes contaminated with methylmercury discharged in wastewater from a chemical plant. At the beginning, in the 1950s, cats and sea birds eating fish were affected, causing them blindness and eventually death, however "in spite of these abnormalities in the environment, neither the company nor the administration paid attention to these changes" (Harada 1994). When the disease affected humans, there had been attempts to identify what was thought to be an epidemic. A study group of the university of Kumamoto found in 1959 the etiology of the illness, which was however officially recognised by the government in 1968 only. As stated by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, in a report of

poses unprecedented questions and reveal the importance of the interpretative role of judges. It is also troubling because the respect for the rule of law, the freedom to conduct a business, and the right to private property must be balanced with more and more compelling environmental — and ecological — interests. As a consequence, it should be assessed whether legal instruments such as the Rome II Regulation have the potential to be used to attract in cross-border cases on CO_2 emissions within the scope of application of laws (mainly domestic) that establish a stringent duty of care for corporations.[27] Not only climate change, but also other forms of slow violence cannot be caught within the limits of a single occurrence; they combine places and times. The place of emitting plants sometimes scattered all over the world in a period of time that is not well determined.

Four approaches have emerged in legal scholarship (Petersen Weiner and Weller 2021/2022, p. 268 ss.). The first one is the broad approach, which reflects the decision by the Hague District Court and considers that the event giving rise to a damage corresponds to the business decision determining the policy of the emitting plants of the corporation. This broad approach is in favour of the injured party, and also is in favour of environmental protection, but places a "further burden on the person causing the damage" (Ibid., p. 270). Looking at the drafting process of the Rome II Regulation, it was argued that the "event" was meant to be "one event" directly leading to the damage in question (Ibid.). However, it is possible to contend that today's environmental challenges cannot be limited to the cross-border, "neighbour's" damage, clearly identifiable in time and space, and that the effort should be made (both as a matter of law and/or interpretation) to assess new legal scenarios, within EU competences and respecting the rule of law. This approach will be discussed in the following paragraphs using an innovative method in private international law. The place of the emitting plant represents the narrow approach. This approach can be considered the "neutral" one which however is insufficient to adequately tackle climate change, especially because it is hard to identify the exact emission plant that caused that specific damage (Ibid., p. 271). The third "focal point" approach entails the identification of one among several polluting plants in order to establish "where the damage is caused in the most prominent way" (Ibid., p. 272). Inspired by a jurisprudence referring to jurisdictional matters, this approach might in principle be working, but in practice it is difficult to establish which plant is causing the major damage. A scientific analysis can be carried out, but by whom? By the corporation

Footnote 26 (continued)

2022: "Women and girls aged 14–45 years are particularly vulnerable to the neurotoxic impact of mercury. Particular risks involve the impact on unborn children. In utero exposure to mercury at very low levels can result in significant IQ deficits and developmental disorders. If mothers have highly elevated mercury levels, their children can be born with deformities, severe cognitive impairment, and symptoms reported in Minamata disease such as paraesthesia, ataxia, dysarthria, tremors, and constriction of visual fields, or 'tunnel vision'. These symptoms can be progressive and sometimes fatal. Offspring of survivors of Minamata disease have intellectual disabilities, limb deformities, chorea, seizures and microcephaly". Cfr. Human Rights Committee, Mercury, small-scale gold mining and human rights, A/HRC/51/35, 8 July 2022.

[27] In the USA, for example, conflict-of-laws issues have emerged as relationship between state law and federal law, with cases filed by municipalities and other public entities.

itself? Who is the actor bearing the costs of this analysis? The fourth "liberal" approach is to leave the choice to the injured party, who can decide where to file the complaint. This is problematic in terms of both predictability and encouragement of a practice of law shopping which misses the point of the connection of the facts with the applicable law (Ibid., p. 272). Petersen Weiner and Weller, in one of the few articles on the *Milieudefensie* case, propose an interesting alternative, represented by a four-step analysis, which starts from the "mosaic approach" (Ibid., p. 274 ss.). Following the mosaic approach, "each law should be applicable only to the extent that the relevant plant emits CO_2" (Ibid.). In this way, the damage is a multi-dimensional one and it is attributed to each plant according to its contribution to the emissions.[28] The mosaic approach is meant to distribute the percentage of the damage. Given the difficulties in determining who is responsible for what in a multitude of emissions, the idea is to allocate the biggest proportion to the major emitting plant of the corporation and distribute the rest among the remaining operating plants (Ibid., p. 275). However, this goes back to the problem emerged following the focal point approach: it lacks a scientific assessment of the exact proportion of the damage caused. That is the second step proposed by the two scholars, which is to leave to the court the opportunity to estimate the proportion of liability of a reasonable number of emitting plants around the world, probably with the involvement of experts in the field. The third step failing the previous two consists in the identification of the central place of action: the emitting plant with the highest emissions for the longest period of time and with the most direct impact on the environmental damage (Ibid., p. 278). As *ultima ratio*, the two authors suggest that the place where the parent company effectively has its seat should be the place of the event giving rise to the damage.

4.1 The Limits of the Current Framework on Environmental Damage with Regard to the So-called Slow Violence

The main limit of the current legal framework applicable to cases of damages as a result of climate change consists in a general incapacity of existing laws to grasp the complexity of current phenomena. The example of environmental damage at the basis of the drafting process of Article 7 of the Rome II Regulation was simple: an event occurring in a defined period of time in State A causing a damage in State B (a neighbouring country). The Rome II Regulation for the time in which it was adopted was surely advanced in acknowledging in its preamble the protection of the environment based on the precautionary principle and the principle of prevention (Recital no. 25) but did not imagine the extension and the multi-faced nature of climate change.

This paper reflects for the first time[29] on the understanding of "slow violence", including climate change, as a relevant issue to be tackled with by using the mechanisms of private international law. In the *Cambridge Dictionary*, violence is

[28] This is based on the jurisprudence related to defamation cases.

[29] For an account of slow violence in public international law, see De Vido (2023a) and De Vido (2023b).

described as extreme force and as an action that aims at hurting something/one. In international law, violence expressed as "coercion" is a ground for invalidating an international treaty[30]; it is the illegal action committed by pirates according to the law of the sea[31]; it is violence during armed conflicts addressed by international humanitarian law (Venturini 2001). It has not been addressed as a form of "climate violence".[32] Violence is often conceived as an event or action that "erupts" at a particular moment in history, such as a natural disaster. International disaster management law focuses on legal issues arising from the prevention, response and recovery of various natural catastrophic events, but also from human-made disasters such as large-scale industrial accidents. However, this conception of violence is only able to capture a part of the situations produced by human activity and fails to identify other forms that are "neither spectacular nor instantaneous", but rather "incremental" (Nixon 2011). Slow violence is an apparently invisible form, although its effects occur as much on human beings, in an intragenerational and intergenerational perspective, as on nature. Examples are climate change, thawing permafrost, ocean acidification, deforestation, rising seas, pesticide use, and the use of substances such as mercury. Looking at the event giving rise to a damage, to what extent and when is the gradual pollution of a lake through mercury by a transnational corporation amounting to an event giving rise to an environmental damage? All the examples cited will sooner or later, in the short, medium, long, very long term, result in a disaster of great proportions — but the peculiarity of slow violence is that it occurs gradually and, precisely for this reason, is rarely and not sufficiently considered, even in legal terms, stuck in the "trap" of the present or at least the imminent (De Vido 2023a). CO_2 emissions do not have immediate results in terms of environmental and social damage. Yet, civil society — and, especially in the USA, more and more public entities such as municipalities[33] — has understood the importance of this moment of history in which there is an increasing awareness of the effects of climate change.

4.2 Relational Feminism as Method in Conflict of Laws

Feminist analysis in private international law is still underdeveloped.[34] "New critical conversations" have been launched to put into question consolidated categories of public and private international law (Knop 2021, p. 379). In the analysis of the concept of "event" as included in the Rome II Regulation, this article takes inspiration from Roxana Banu's analysis of relational feminism to go further and apply

[30] Vienna Convention on the law of treaties of 1969, Treaty Series, vol. 1155, p. 331, Articles 51 and 52.
[31] Montego Bay Convention on the law of the sea, Treaty Series, vol. 1833, Article 101.
[32] We used the expression climate violence as associated to slow violence in De Vido (2023b). See also Rogers 2023.
[33] See in that sense, for example, *City of New York v BP plc*, 18–2188, http://climatecasechart.com/case/city-new-york-v-bp-plc/; and Rhode Island v Shell Oil Products Co, PC-2018–4716, http://climatecasechart.com/case/rhode-island-v-chevron-corp/
[34] See, for example, some "exceptions" to the general trend that ignores the potential of a feminist perspective in private international law: Isailovic (2014), Knop and Riles (2017), and Keyes (2019).

in an innovative way the ecofeminist method to conflict of laws. Feminist theories reveal the "imbalance of power and wealth and the variety of oppressive relationships for people, especially women, in the international realm" (Banu 2017, p. 4). As Muir Watt argued, private international law has "contributed very little to the global governance debate, remaining remarkably silent before the increasingly unequal distribution of wealth and authority in the world" (2005, p. 1). This happened despite an interest of private international law for the private dimension of human affairs: from contracts to marriages, from the private status of individuals to issues of nationality of married women. It is the "lost" private side of international law an outstanding author like Karen Knop tried to recapture and reassess from a feminist perspective, through a different account of history (2021). Using a feminist lens in the analysis does not necessarily mean to talk about women and/or family matters. This is one of the stereotypes inherent in the general scholarship that diminishes the feminist method as referring to women only. Using a feminist method (Chinkin and Charlesworth 2022) means to read international law by disrupting traditional categories of law, unravelling patterns of discrimination and power imbalances tolerated and reproduced by the States. Other interesting approaches have developed criticism against the structural patterns of oppression in the legal system and unravelled critical aspects of the mainstream international law.[35] However, the feminist, and the ecofeminist method more specifically, is here considered as a possible perspective which adds to the analysis of schemes of oppression and subordination the layer of intersectionality, and, for what concerns ecofeminism, the layer of nature. It means indeed to emphasise intersectionality as a lens of analysis, by looking at how different grounds of discrimination determine the position of an individual in the society, and, looking beyond humanity, in the environment. It is not necessarily the best method to describe the phenomenon of privatisation of climate change litigation — which method could be? — but it is rather a way to change point of view and elaborate new legal solutions that combine an understanding of the patterns of discrimination within our human societies with the acknowledgement of oppression between different species and even across generations. Asked "Why is your method better than others?", the current judge of the International Court of Justice Hilary Charlesworth answered that the feminist method was not alternative to other fundamental legal methods, but certainly one that was capable of producing "conversations and dialogue rather than the production of a single, triumphant truth" (Charlesworth 1999).

For the purpose of this article, Banu's analysis of relational feminism in private international law is of particular interest. She started from the tension between

[35] We mentioned already Marxism above, but in general we can refer to critical international legal studies. As it was explained (Beckett 2022), "although most writings on public international law (PIL) possess an *esprit critique*, what distinguishes critical international legal theory (CILT) is a sense that the failings in the project are not marginal or exceptional, but endemic, consistent, and structural. Known as CLS (critical legal studies), NAIL (new approaches to international law), Newstream, or simply "the crits", this school of thought uses a broad array of techniques to address separate, but interrelated, failings perceived in the international legal project: gender biases; racialized exclusions and differentiations; class, poverty, and exploitation; cultural imperialisms; and hidden violence".

State-centric and individualistic perspectives in conflict of laws and then disrupted this binarism by putting the individual at the centre of a "web of relationships" in the transnational context (Banu 2017, p. 8). She used this method to reconsider transnational surrogacy arrangements in an innovative way, both from the point of view of characterisation (contract, filiation, adoption) and of applicable law,[36] but she also paved the way for what we are interested in here, namely transnational torts of multinational corporations. With regard to the latter, Banu puts into question the nineteenth-century State-centric theories focused on "a formalist notion of State sovereignty", according to which transnational torts of multinational corporations are submitted to the law of the place of tort "on the assumption that this country should have the authority to regulate all torts in its territory" (Banu 2017, pp. 12–13). This understanding of the applicable law is based on a general principle of neutrality and distribution of authority, but it fails to grasp the imbalance of power and resources between different States as well as the imbalance of power between multinational corporations and the local population (Banu 2017, p. 13).[37] On the contrary, a relational feminist approach considers the social context and the relational nature of transnational life (Ibid., p. 28). For example, requiring the highest standard of care under the law of the place where the corporation has its headquarters, people affected by its activity "may attempt to restructure an investment relationship characterised by inequality"; in other words, the choice of a connecting factor depends on the nature of the relationships (Ibid., p. 31). What if in the web of relationship human beings are considered as part of a whole, where this whole is the environment, composed of different elements and stretching across generations? Relational feminism as theorised by Banu in its application to private international law is useful because it puts courts at the forefront in structuring tort relationships by reference to particular values (Banu 2017, p. 44). Human rights law forms a community of judgment and inspires the values that judges must consider in their decisions. In terms of climate change litigation, this means for example to consider in the interpretation of norms that are in force the right to a healthy environment as elaborated by the Inter-American Court of Human Rights in its opinion of November 2021: "as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals".[38] Therefore, in the choice of the law applicable to the case, the concept of "event" incorporates emerging values and concerns and appreciates, on the one hand, the relation between different elements of the environment, including human beings; on the other hand, how and to what extent transnational corporations must be held liable for their contribution to climate change. As put by a feminist

[36] The fresh feminist analysis of surrogacy arrangements puts women and the children at the centre and does not offer a one-size-fits-all solution that defines the surrogate mother's autonomy either through choice or consent.

[37] On the climate crisis as structural injustice from a Republican and Constitutional perspective, see Herlin-Karnell (2023a, b).

[38] Inter-American Cour of Human Rights, Advisory opinion OC-23/17 of 15 November 2017, requested by the Republic of Colombia, *The Environment and Human Rights*, para. 62.

scholar decades ago, working with the common law system, "mak[ing] corporate decision-makers personally responsible for the consequences of their decisions, thus humanizing corporations and their activities" (Bender 1993, p. 583).

4.3 The Promise of Ecofeminism as a Method in Conflict of Laws: the Interpretation of the Concept of Event

The promise of an ecofeminist analysis for conflict of laws starts from the understanding of the relationship existing between different elements of the environment, with (a part of) humanity dominating over nature, and how this unequal relation between non-human animals, natural objects and humans reflects structural discrimination rooted in human society. In a moment of history in which climate change and other forms of slow violence have been challenging the space and the temporality of law, an ecofeminist approach unhinges the neutrality of conflict of laws and unravels its potential by introducing in the legal argument ecological concerns. This matters in the debate on privatisation, because ecofeminism challenges the dynamics of power and oppression that contribute and reinforce climate change. A legal understanding of ecofeminism does not ban privatisation, but rather considers the possibilities opened by cases filed by private parties against other private parties and inspires — *rectius*, hopefully is going to inspire — the reasoning of judges and lawyers alike. Ecofeminism is a philosophical framing (Warren 1990; Davia 2001) that led to the elaboration of different approaches: from the essentialist to the cultural one, from the socialist to the one incorporating intersectionality.[39] For a lawyer, this thought is intriguing because it puts into question law itself in the reproduction of schema of oppression and domination, but also allows legal scholarship (willing to listen) discover how to approach things in a different way: having in mind the environment and the interconnections between its different elements at the core of the debate. The premise on which the ecofeminist thought is construed is that patterns of oppression and domination are not only intra-species but also inter-species, in the relation between humans and the nature (Grear 2015, p. 241).

When it comes to conflict of laws, at first sight the idea of endorsing an ecofeminist method is out of question. How can private international law, characterised by rules of conflict, take into consideration nature and its relations with human beings? Nonetheless, if we take a closer look at Rome II Regulation and at the emblematic case *Milieudefensie*, we will see that this method has infiltrated the system already and offers an innovative response to current challenges. In its nature, the elaboration of ecofeminism we are using here reflects Banu's opinion in her outstanding article but includes nature in the relation (non-human animals and natural objects) and disrupts inequality in the relation between human beings. According to this line of thought, that this article starts to elaborate as preliminary application of a recent research, Article 7 of Rome II Regulation as applied by the

[39] On ecofeminism and law see Morrow (2022) and De Vido (2023b).

Dutch Court in the *Milieudefensie* case reflects an ecofeminist approach. There are two reasons for that. The first one is textual and pertains to the choice by the parties affected: the general rule of conflict established by the Regulation (Article 4 (1)), namely the *lex loci damni*, or the special rule of conflict identified in the law of the country in which the event giving rise to the damage occurred. In this way, the law allows the injured parties to restructure their "human" relationship with a corporation: a relationship that is (generally) characterised by inequality. The second reason is an ecological interpretation. By interpreting the place of the event as the place of the decision-making, a court understands that the environmental damage caused by climate change has an ecological impact that transcends proximity and a clear relationship between the cause and the consequence. It emphasises how, to tackle the challenge of climate change, there is a need to balance the relationship between the different parties and make corporations liable for their impact on the environment. Private international law in this sense is key, because through mechanisms of jurisdiction and choice of law, it can justify the attraction of a certain case in the orbit of this or that State's law (the one having a more stringent duty of care, usually the place of the decision-making process). In this understanding, the ecofeminist method puts into question the oppression provoked by the activity of transnational corporations and tries to rebalance this inequality by leaving a choice to the injured parties and by determining the law of the place of the decision-making. When it comes to transnational corporations, it is evident that these are composed of a parent company (let us say EU company) and one or more non-EU based subsidiaries. According to a common technique in corporate tort litigation, the *forum connexitatis* jurisdiction, the cases involving a EU-based parent company and a non-EU-based subsidiary (let us imagine a EU energy company and the emitting plants that operate as subsidiaries around the world) can be joined, "thus allowing the courts of the forum to exercise their jurisdiction over the foreign subsidiary" (La Manna 2021, p. 149).

There are two main comments stemming from this argument that justifies from an ecofeminist perspective the understanding of the concept of "place of the event" as the place of the decision-making process. First, it can be questioned that this interpretation of the rule of conflict is excessively vague and jeorpardises freedom to conduct a business. The answer in light of both relational and ecofeminist approach is that the choice of law is not necessarily a sterile and objective mechanism to solve issues of conflict of sovereignty or State interests. It is rather a way "restructure oppressive relationships" (Banu 2017). This might be seen as a disproportionate burden imposed on corporations. However, we are convinced that it is time to consider the importance of values and that courts should give strength to interpretation that are not only in favour of the applicants (the victims) but also of nature. This trend in the practice of courts could induce corporations to adopt code of conducts and industry climate policies that take into account the multiple interests at stake. The second comment refers to the still insufficient extent of the debate. It is time to make corporations liable for their contributions to climate change, but it is also time to acknowledge that the effects of climate change are not equal, and disproportionately affect certain categories of people, such as women, children, elderly people, people living in certain areas and social contexts,

and migrants.[40] As it was argued (Herlin-Karnell in this issue), according to the republican theory, pollution and climate change could be seen as acts of domination where individuals are dominated if they are not entitled to the basic virtues of a decent life and thereby deprived of their dignity and innate right of humanity. This element matters in the identification of the injured party. In the *Milieudefensie* case, the Dutch court referred to the impact on the Dutch population at that time of the complaint. However, an ecofeminist approach looks at the injured party as the part of the population that suffers the most, and in a disproportionate way using an intersectional lens, from the consequences of climate change. In the respect of procedural requirements, which are not challenged here, this approach would stress that the analysis of the "victim" would be linked to the disproportionate impact of climate change on specific groups of our society. To put in a very simplistic way, in the *Milieudefensie* case, it would not mean to consider the entire Dutch population, but the part of the population that suffers the most (because of intersectional grounds of discrimination) from climate change.

5 Concluding Remarks

"Private" climate change litigation that uses conflict of laws to indicate the law applicable to a case of environmental damage is a new frontier in law. This article is a first attempt to apply an innovative and disruptive method such as ecofeminism, in its "dialogue" with relational feminisms, to private relations having a cross-border dimension that do not involve States as either applicants or defendants. It unravels the possibility for individuals to bring complaints against other private actors, indirectly affecting national climate policies. Through this kind of litigation, the line between private and public gradually blurs, because choosing the law of the place where decisions on climate change policies are adopted paves the way for the attainment of both private and public goals. There is a risk to leave these compelling issues in the hands of the private sector, though, and domestic courts have expressed this concern. For example, in *ClientEarth v Secretary of State,* the UK High Court ruled in favour of the defendant (the Secretary of State that authorised a large gas plant in Europe), in a case that was filed by the environmental NGO ClientEarth, stating that the decision involved "policy questions requiring a balance of interests", and that "other public interests weigh against the UK's climate goals" (Ziebarth

[40] This reasoning would avoid cases such as *Smith v. Fonterra Co-Operative Group Limited,* 2020, http://climatecasechart.com/non-us-case/smith-v-fonterra-co-operative-group-limited/ (see also Kraybill 2022), where a climate change spokesperson for the Iwi Chairs' Forum, a Māori development platform, filed a case against seven New Zealand companies in the agriculture and energy sectors on the grounds of "public nuisance, negligence and breach of a duty to cease contributing to climate change". The case was dismissed, the court stating that "tort law was not the appropriate vehicle for dealing with climate change" and that "every person in New Zealand — indeed, in the world — is (to varying degrees) both responsible for causing the relevant harm, and the victim of that harm". This is the approach that we tried to challenge by using an ecofeminist method.

2022).[41] In other words, it is the State, having accepted legal obligations at the international level, that has to decide its regulatory policies in order to control the activities of transnational corporations having an impact on climate change, operating in its territory or through subsidiaries abroad. At the same time, however, the system of international legal obligations is not perfect, with the Paris Agreement lacking an efficient monitoring system and being binding only upon the States that ratified it. Therefore, climate change litigation, including the one that uses conflict of laws as mechanisms for the identification of the applicable law, can be considered as complementary, not alternative, to the pursuance of fundamental public goals. It can help in addressing the extraterritorial detrimental effects of certain countries' lax environmental policies. Private climate change litigation, in the way we examined it here, has an enormous potential, but it cannot adequately address all the challenges of climate change unless, as this article tried to demonstrate, a change of perspective in the legal reasoning is invoked, one that puts the environment, of which humans belong, at the core of the discussion.

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[41] *The Queen on the application of ClientEarth v Secretary of State for Business, Energy and Industrial Strategy* Case No: CO/4498/2019 High Court of Justice Queen's Bench Division Planning Court 22 May 2020 [2020] EWHC 1303 (Admin) 2020 WL 02630763, upheld in front of the Court of Appeal on 21 January 2021. See also another recent case that invoked *Milieudefensie*. It was not successful for the applicants. High Court Queen's Bench Division, UK, 2 March 2020 [2020] EWCH 459 (TCC) on which see Chalas and Muir Watt (2020). Also, on 9 February 2023 ClientEarth brought a case against Shell PLC board of directors, which was dismissed on 12 May 2023.

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