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A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case

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The judgment of the Dutch Supreme Court in *State of the Netherlands v Urgenda* is a landmark for future climate change litigation. On the 20th of December 2019, the Supreme Court held that on the basis of the European Convention on Human Rights (ECHR) the Netherlands has a positive obligation to take measures for the prevention of climate change and that it has to reduce its greenhouse gas (GHG) emissions with at least 25% by the end of 2020, compared to 1990 levels. An unofficial translation of the full judgement will be published on the website of the Dutch judiciary after the 13th of January 2020.



The judgment is significant as it demonstrates how a court can determine responsibilities of an individual state, notwithstanding the fact that climate change is caused by a multiplicity of other actors who share responsibility for its harmful effects. Around the world, a flood of lawsuits has been initiated to establish legal responsibility for actors contributing to climate change. The *Urgenda* judgment, that has been heralded as the 'strongest' of all, makes clear that the fact the a state is only a minor contributor compared to many other actors, does not preclude its individual responsibility. The judgment contains important pointers that plaintiffs and courts can rely on in similar cases.

In this blogpost we briefly recap the procedure leading to the Supreme Court judgment and discuss three conclusions reached by the Supreme Court that will be of wider interest:

- 1) the ECHR imposed a positive obligation to take appropriate measures to prevent to climate change;
- 2) these measures should at least ensure that the Netherlands realizes a reduction of GHG emissions by 25%, compared to 1990, by the end of 2020; and
- 3) even though the Netherlands was only a minor contributor to climate change, it had an independent obligation to reduce emissions.

Recap of the proceedings

Central to the proceedings was the reduction target for developed nations of 25%-40% by 2020, compared to 1990 levels, originally identified as one scenario in the 2007 Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC). The Netherlands had embraced this target in 2007, stating that it aimed to reduce Dutch emissions with 30% by 2020. Yet in 2011, the government indicated that it would not meet the target, instead aiming for 14-17% reduction.

In 2013, a Dutch NGO with a mission to contribute to sustainability and innovation called Urgenda ('urgent agenda'), initiated a lawsuit against the Dutch State with the aim to order the State to reduce Dutch GHG emissions by 40% at the end of the year 2020, or at least by a minimum of 25% in comparison the year 1990.

In the 2015 judgment of the Hague District Court, Urgenda prevailed. The District Court ordered the State to 'limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, such that this volume will have been reduced by at least 25% at the end of 2020 compared to the level of the year 1990'. The District Court based this order on the doctrine of hazardous negligence, which is read into the provision on tort in the Dutch Civil Code: behaviour is *inter alia* considered tortious if it unnecessarily creates danger and thus is contrary to what 'according to unwritten law is deemed fit in societal interrelations' (Article 6:162). Contrary to Urgenda's claim, the District Court did *not* ground its conclusion directly on human rights law, as it held that Urgenda could not invoke human rights provisions stemming from the ECHR (nor could it invoke the United Nations Convention against Climate Change (UNFCCC)).

The *Urgenda* judgement on first instance was applauded by many, but also heavily criticized. In debates in the Netherlands, many considered that the Court had overstepped the boundaries of its role within the governmental separation of powers, not least for transforming IPCC models and non-justiciable norms into a binding order for the government. *Inter alia* for these reasons, the State appealed. Urgenda filed a cross-appeal, arguing that it should be able to rely directly on the human rights provisions stemming from the ECHR.

In its judgment of 9 October 2018, the Court of Appeal affirmed the District Court's order and also accepted Urgenda's cross-appeal. It based its judgment directly on Articles 2 and 8 ECHR, protecting respectively the rights to life and to private and family life.

The State instituted appeal in cassation. In September 2019, the Advocate-General and Procurator-General, the most authoritative advisors of the Supreme Court, issued a lengthy opinion in which they expressed their approval for the judgement of the Court of Appeal and advised the Supreme Court not to quash the ruling. On 20 December the Supreme Court decided accordingly, rejected all the State's arguments, and affirmed the judgment of the Court of Appeal.

The proceedings in all instances was governed by the Dutch Civil Code and the Dutch Code on Civil Procedure; in addition, the provisions of Dutch constitutional law relating to the effect of international law in the domestic legal order were highly relevant. We highlight three relevant aspects of this Dutch legal framework.

First, Urgenda had standing to file a collective action claim under art. 3:305 of the Dutch Civil Code. The Supreme Court noted that the interests of residents of the Netherlands in relation to climate change are sufficiently identical and can be ‘bundled’, so that legal protection by a collective action suit can be more efficient and effective. It found that this was also supported by the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

Second, under the rules of the Dutch Code of Civil Procedure, courts could take for granted those facts on which the parties agree, and facts that are presented by one party and not (sufficiently) disputed by the other. Given that the Dutch state agreed with Urgenda that climate change presented serious risks, the courts did not need to take a decision on these facts.

Third, throughout the procedure international law played an important role. On the basis of Article 93 of the Dutch Constitution, provisions of international law with which may be ‘binding on all persons’, are directly applicable in the national legal order. The Court of Appeal and the Supreme Court recognized the direct effect of the ECHR, on which also Urgenda could rely. Many other principles that had no direct effect were relied upon for interpretative purposes or to support conclusions reached partially on other grounds; these included the UNFCCC, the 2015 Paris Agreement, the obligation to exercise due diligence in preventing significant transboundary harm, and the precautionary principle.

Against this background, we will briefly discuss the three main conclusions formulated by the Supreme Court that are of interest from an international law perspective.

Human rights as a basis for obligations to prevent climate change

The Supreme Court agreed with the Court of Appeal that the obligation of the Netherlands to take preventive action to reduce its GHG emissions with at least 25% by the end of 2020, could be grounded in human rights law. Hereby it gave a significant boost to the argument that climate change is a human rights issue, articulated among others by the UN Special Rapporteur on Human Rights and the Environment and the Human Rights Council, the 2018 Advisory Opinion of the Inter-American Court of Human Rights (IACHR), some domestic court cases as well as a growing body of scholarship.

The Dutch State had argued that even though it recognized the risks of climate change, Articles 2 and 8 ECHR would not contain obligations to offer protection against risks of climate change. Its argument was that the risks would not be sufficiently specific; that

they would be of a global nature, and in any case that the environment as such would not be protected by the ECHR.

The Supreme Court rejected these arguments and affirmed that the risks of climate change were squarely within the scope of the European Convention. Building on the ECtHR 's case law on Article 2 (eg *Öneriyildiz v Turkey*) and Article 8 (eg *Tătar v Romania*) it held that these provisions obliged the State to take measures against the risk of dangerous climate change.

There are two important takeaways from this part of the judgment. The first is that the risks caused by climate change are sufficiently real and immediate to bring them within the scope of Articles 2 and 8. The Supreme Court noted that these risks may take a wide variety of forms, including sea level rise, heat stress, deteriorated air quality, increasing spread of infectious diseases, excessive rainfall and disruption of food production and drinking water supply (§4.2). We may not know what risks will materialize when. But the Supreme Court found that without adequate climate policy, the combined effect of such risks may lead to hundreds of thousands of victims in Western Europe in the second half of this century alone (§2.1.8). The fact that these risks would only become apparent in a few decades did not mean that Articles 2 and 8 ECHR would not offer protection against this threat (§5.6.2). In this context, the Court also relied on the precautionary principle.

A second takeaway is that in relation to climate change, the question whether the protection offered by the European Convention is limited to residents of the contracting parties, is of limited relevance. The same may apply for other human rights treaties.

In the *Urgenda* case, the Supreme Court appeared to be only concerned with the protection of interests of inhabitants in the Netherlands, due to the fact that *Urgenda* relied on art. 3:305a DCC, and that the State had *not* disputed standing in so far as the claim concerned the protection of the interests of the inhabitants of the Netherlands from dangerous climate change (§2.2.1 and 5.9.2). In first instance, the District Court had accepted *Urgenda*'s standing on behalf of people outside the Netherlands and on behalf of future generations, to which the State objected. The Court of Appeal did not assess whether *Urgenda* could have standing in this latter respect, noting that anyway, *Urgenda*'s standing on behalf of current Dutch nationals was undisputed between the parties (and thus had to be accepted as a matter of civil procedure). The Supreme Court, therefore, did not discuss whether the jurisdictional scope of the ECHR would have allowed it to consider also interests *outside* the Netherlands, but limited itself to the Netherlands' inhabitants. It was perhaps for this reason that the court specifically singled out the risk of a sharp rise in sea level, which may make the low-lying Netherlands partly uninhabitable (§5.6.2).

The Supreme Court thus neither rejected nor supported the conclusion of the IACHR relating to jurisdiction, in its 2018 advisory opinion on human rights and the environment. The IACHR had concluded that when transboundary harm or damage

occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory.

However, the distinction between interests of residents of the Netherlands on the one hand and affected individuals or groups outside Dutch territory is a limitation without much practical relevance. The effects of preventive measures that the Netherlands will be required to take (or of its failure to take such measures) will not distinguish between residents of the Netherlands and populations elsewhere in the world.

The 25% target as common ground

Once the Supreme Court had determined that the positive obligations under Articles 2 and 8 covered climate change risks, the next question was whether these positive obligations contained a specific obligation of result to reduce GHG emissions by 25% in 2020, as had been claimed by Urgenda. The approach of the Dutch courts to this question is perhaps the most remarkable aspect of the judgments.

The conceptual tool that the Supreme Court relied on to read the target to reduce emissions by 25% by 2020 into the positive obligations of art 2 and 8 ECHR was the so-called 'common ground' method. The ECtHR had articulated that method in *Demir and Baykara v Turkey* (§85-86): in the interpretation of the Convention, courts can rely on international instruments, whether binding or not, as long as these 'denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.' In other judgments, the ECtHR had, in the interpretation and application of the Convention, also given weight to scientific insights and generally accepted standards that did not take the form of binding obligations; see eg *Öneriyildiz v Turkey* (where the Court considered a variety of non-binding texts of the Council of Europe in the field of the environment and industrial activities), and *Oluić v Croatia* (referring to WHO Guidelines and facts sheets for Community Noise).

On this basis, it still was quite a step for the Supreme Court to conclude that a target as specific as 25% reduction by 2020 was common ground, certainly if we consider that in the 2007 IPCC report, the 25% target was not more than an expert scenario contained in a box deep down (on p 776) in an Annex. What transformed the 25% target from a scenario into a 'common ground' was the fact that it had been endorsed in various shapes and forms by the yearly Conferences of the Parties to the UNFCCC and that the EU had taken this scenario as its point of reference. The Supreme Court found that these resolutions and statements established a high degree of consensus on the urgent need for developed countries to reduce GHG emissions by at least 25-40% by 2020, and that this consensus gives concrete meaning to the positive obligations under Articles 2 and 8 ECHR.

In relation to this use of the common ground method to fill in the positive obligations under the ECHR, we highlight three points.

The first is that this common ground method shows that the distinction between legally binding obligations and resolutions or other non-binding documents can be relative. Almost 40 years ago, Prosper Weil noted that there is no warrant for considering that 'by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect: the accumulation of non-law or prelaw is no more sufficient to create law than is trice nothing to make something' (p. 417). The *Urgenda* judgment shows that when an accumulation of resolutions (that states did not intend to be legally binding) can be hooked onto a positive obligation of the ECHR, repetition can actually transmute non-binding norms into binding law. The judgment may well reignite the discussions on distinction between law and non-law, the role of intent, and the risks of blurring law and non-law, eg in terms of discouraging states to adopt progressive resolutions.

The second point to highlight concerns the impact of the common ground method on the relationship between the courts and the political branches. In the Netherlands, it will in principle be for the political domain to determine the positive State obligation to do its share in preventing climate change entails. However, the Supreme Court affirmed that the judiciary should safeguard that parliament and government remain within the legal boundaries to their role, which are laid down in *inter alia* the ECHR (§8.3.3). Applying human rights enshrined in the ECHR is essential for the rule of law, and does not encroach on the political branches of government. Therefore, the Supreme Court concludes: 'the Court of Appeal could do nothing else than conclude that the State is obliged to at least the mentioned reduction of 25%' (§8.3.5). It remains for the political branches of government, to determine *how* to implement the 25% order.

The third point to highlight is that while the 25% target was a collective target, it fully applied to the Netherlands individually. The Netherlands had argued that the 25% target applied to developed nations of a group, not to the Netherlands individually. The Court rejected this argument, as the State had not substantiated why a lower percentage should be applicable to the Netherlands (§7.3.4). Here it was relevant that the Netherlands belong to the States with the highest per capita emissions in the world. Moreover, the State has failed to substantiate that 25% reduction by the end of 2020 would be an unreasonable or unbearable burden in the sense of the ECtHR's case-law (§7.5.3).

Shared and partial responsibility

The Dutch state offered still one fundamental argument against the application of the ECHR to climate change. This was the argument (that is likely to arise in many climate litigation cases, and played a role in the Oslo District Court declining a climate claim against the Norwegian government) that the State was only a minor contributor to climate change. Given that the problem of climate change is caused by contributions of

a large number of states (and other actors), could the Netherlands be singled out and held responsible for its (small) share in the global climate problem? The State had answered this question in the negative and argued that the Dutch proportion in global emissions is negligible, so that Dutch reductions are not effective in addressing the global problem of climate change.

In principle, the approach of the Supreme Court could be rather straightforward. The Court held that the Netherlands was subject to its own independent obligations and thereby was bound to do its part to prevent harmful climate change, as defined by these obligations. The Supreme Court did not only refer to obligations under the ECHR, but also to the UNFCCC and the 'no harm'-principle to drive home the point that each state has its own, independent obligations to prevent harm from climate change.

In this respect, the judgment simply reflects the general principle that the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations (the Supreme Court cited the commentary to art 47 of the Articles on State Responsibility in support of this principle).

Nonetheless, the Supreme Court engaged in more depth with the argument that the contributions of the Netherlands were relatively minor and advanced the proposition that 'partial causation justifies partial responsibility': each state can be held responsible for its share in the reduction of the emission of greenhouse gasses (§5.7.5).

From an international law perspective, this proposition can be understood in two ways, that do not exclude each other. First, this proposition justifies holding the Netherlands to a positive obligation to reduce emissions by 25%. The Dutch contribution may be relatively minor, but the Netherlands still should do its part. This was probably the reasoning of the Supreme Court, as it indicated that reading the 25% target into the individual positive obligations of the Netherlands was justified by the principle that the Netherlands had to perform obligations so that it could take responsibility for its own share.

A second way to understand the proposition that 'partial causation justifies partial responsibility' is that this would underpin the allocation of responsibility for the harmful *effects* of climate change to multiple contributing actors, for instance in relation to claims for reparation. For this reading, a key question whether and how it could be determined what parts of the injury are caused by particular states, or whether the injury should be treated as indivisible. This question has come up in other climate cases, for instance the one initiated by the Peruvian farmer Lliuya against the German Energy company RWE – Lliuya claims that 0.47% of his climate change related damages should be paid by RWE, because it causes 0.47% of global GHG emissions. The Dutch Supreme Court did not take a position, but cited several approaches to this question, including Article 47 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, principle 3:105 of the Principles of European Tort Law (providing that when it is certain that no single actor has caused the entire damage or an

identifiable part thereof, all actors that contributed to the damage are presumed to have caused equal shares thereof), as well as an an earlier Dutch case, in which proportional liability was accepted in relation to transboundary water pollution, suggesting that this also may apply to climate change.

Since Urgenda's claim was not for damages, but only for an order to perform an obligation, the Supreme Court did not need to explore the consequences of the 'partial causation justifies partial responsibility' proposition for the question how multiple states should share reparation or compensation in relation to climate change.

Either way, the Dutch Supreme Court did release a few one-liners to bolster its rejection of the State's argument: the fact that other states fail to meet their responsibility is no ground for the State not to perform its obligations; (§5.7.7); the fact that Dutch emissions are minor compared to the global whole similarly is no ground for non-performance since 'otherwise, a State can simply avoid its responsibility by pointing to other nations,' (§5.7.7.); and no single reduction is negligible, since every reduction has a positive effect in diminishing dangerous climate change (§5.7.8). These statements are likely to find their way into future climate change litigation, especially since similar arguments are made by the claimants in, for instance, the Norwegian case and the case of *Lliuya v RWE*.

Final remarks

The judgment of the Supreme Court is likely to have influence on future climate change litigation. Its conclusions that climate change was covered by the rights to life and to respect for private and family life; that the state in relation to both has rights a due diligence obligation to take preventative measures, in line with the precautionary principle, and that these obligations can be connected to the targets negotiated in relation to GHG emissions will be important points of reference for future litigation. In particular on the latter point, the judgment goes beyond the often cited 2017 Advisory Opinion of the IACHR.

The open question is what the Netherlands will and can do to comply with the judgment. Recent predictions indicated that without further measures, the Netherlands would achieve reductions in the order of 20-21% compared to 1990 levels. The Supreme Court's affirmation of the target of 25% within one year therefore will be demanding. Earlier this year, Urgenda presented a plan containing 40 suggested measures to still cut the emissions in the one year that there is left. The State is now scrambling to put together a package of measures, including the early shut-down of coal plants and lowering the maximum speed on highways. The government has announced that early 2020 it will present a comprehensive package of additional measures to comply with the judgment.