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resources necessary to achieve the United Nations' standards.<sup>24</sup>

## DUTCH SUPREME COURT RULING MARKS SEA CHANGE IN CLIMATE LITIGATION

*by Adrian Lewis\**

On December 20, 2019, the Dutch Supreme Court upheld lower-court rulings on *State of the Netherlands v. Urgenda Foundation*, in which the court ordered the Dutch government to reduce the Netherlands' greenhouse gas emissions to twenty-five percent below 1990 levels by the end of 2020.<sup>1</sup> This successful conclusion to more than four years of court proceedings has been called the strongest legal response to climate change in history and may represent the dawn of a new era in climate litigation.<sup>2</sup> These proceedings are representative of environmental activists' latest strategy to prompt more ambitious government responses to the climate crisis. The European Union (EU) has been the vanguard of progressive climate policy, imposing legally binding emissions targets on member states,

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<sup>1</sup> Dutch supreme court upholds landmark ruling demanding climate action, THE GUARDIAN (Dec. 20, 2019), <https://www.theguardian.com/world/2019/dec/20/dutch-supreme-court-upholds-landmark-ruling-demanding-climate-action> (last visited Sep. 27, 2020).

<sup>2</sup> Landmark Decision by Dutch Supreme Court, URGENDA, <https://www.urgenda.nl/en/themas/climate-case/> (last visited Aug. 23, 2020); John Schwartz, In "Strongest" Climate Ruling Yet, Dutch Court Orders Leaders to Take Action, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html>; Environmental Law Alliance Worldwide, Climate Litigation Primer, (2018), [https://elaw.org/system/files/attachments/publicresource/ELAWprimer\\_4.pdf](https://elaw.org/system/files/attachments/publicresource/ELAWprimer_4.pdf).

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<sup>24</sup> Press Release, Dawn Harris-Young, North Carolina Receives \$3,682,900 Million Grant to Support Efforts to Improve and Protect Water Quality, U.S. ENVTL. PROT. AGENCY (Sep. 19, 2019), <https://www.epa.gov/newsreleases/north-carolina-receives-3682900-million-grant-support-efforts-improve-and-protect-0>.

while seeing the member states meet them.<sup>3</sup> In 2018, the Netherlands reduced its greenhouse gas emissions to twenty-three percent below 1990 levels.<sup>4</sup> Member states across the EU should take note of the landmark decision in *Netherlands v. Urgenda* and take proactive steps to ensure their national policies aimed at combatting climate change match the precedent set by the Netherlands.<sup>5</sup>

Rapid advances in the scientific community's understanding of climate change have resulted in significant momentum around efforts to quantify state and corporate actors' liability for environmental degradation.<sup>6</sup> The widespread availability of such evidence makes it easier for lawyers to bring readily actionable claims capable of holding corporations and governments accountable for their role in creating the current climate crisis.<sup>7</sup> Environmental groups in the EU have adopted strategic climate litigation tactics.<sup>8</sup> For example, mounting public pressure led the European Commission, the twenty-seven-country bloc's executive body, to announce a "Green Deal" agenda in March 2020.<sup>9</sup> The EU's stated goal is to cut greenhouse gas emissions to zero by 2050, and the proposed "Green Deal" legislation would make associated country-level policy

<sup>3</sup> 2020 Climate and Energy Package, European Commission, [https://ec.europa.eu/clima/policies/strategies/2020\\_en#tab-0-1](https://ec.europa.eu/clima/policies/strategies/2020_en#tab-0-1) (last visited Aug. 23, 2020); Progress Made in Cutting Emissions, European Commission, [https://ec.europa.eu/clima/policies/strategies/progress\\_en](https://ec.europa.eu/clima/policies/strategies/progress_en) (last visited Aug. 23, 2020).

<sup>4</sup> *EU Greenhouse Gas Emissions Down 23% Since 1990, Still Implementation Will Have to be Further Accelerated to Reach Current 2030 Targets*, EUROPEAN COMMISSION (Oct. 31, 2019), [https://ec.europa.eu/clima/news/eu-greenhouse-gas-emissions-down\\_en](https://ec.europa.eu/clima/news/eu-greenhouse-gas-emissions-down_en).

<sup>5</sup> James L. Huffman, *Dutch ruling will set precedent for courts to review climate science*, THE HILL (Dec. 29, 2019, 3:00 PM), <https://thehill.com/opinion/energy-environment/476166-dutch-ruling-will-set-precedent-for-courts-to-review-climate>.

<sup>6</sup> GREENPEACE INTERNATIONAL, *Who is Responsible for Climate Change?* (Greenpeace, 2013).

<sup>7</sup> *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change*, INT'L BAR ASS'N, <https://www.ibanet.org/Climate-Change-Model-Statute.aspx> (last visited Sep. 27, 2020).

<sup>8</sup> *Urgenda Foundation v. State of the Netherlands*, CLIMATE CHANGE LITIGATION DATABASES, <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> (last visited Aug. 23, 2020).

<sup>9</sup> Samuel Petrequin, *EU Commission Unveils Climate Law Amid Criticism*, AP NEWS (Mar 4, 2020), <https://apnews.com/22d55a676a7d49ed11a9ac2d1ad8d208>.

requirements legally binding and irreversible for all EU member states.

Arguments made in the *Urgenda* lawsuit, and reiterated in the Dutch Supreme Court's opinion, emphasized the disastrous effects of climate change on citizens' basic human rights and invoked the Netherlands' treaty obligations under regional and international human rights law, including the European Convention on Human Rights (ECHR).<sup>10</sup> The Supreme Court's decision was based on principles of international law and establishes a strong legal foundation for recognizing governments' necessary role in mitigating climate change.<sup>11</sup>

*Urgenda* Foundation, the Dutch environmental non-profit that brought the suit, based its successful legal argument largely on the Dutch government's obligations to address environmental degradation under regional and international human rights law.<sup>12</sup> The central issue in the case was whether the state had a duty to impose greater reductions in greenhouse gas emissions beyond limits already imposed by Dutch climate policy.<sup>13</sup> While *Urgenda's* case was based on the State's duty of care under the national civil code, the legal argument emphasized principles articulated in Article 2 of the ECHR.<sup>14</sup> Article 2 ensures the right to life and has been interpreted by Dutch courts to

<sup>10</sup> Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot*, 8 (Grantham Research Inst. eds., 2019), [https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI\\_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf](https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf)

<sup>11</sup> André Nollkaemper & Laura Burgers, *New Classic in Climate Change Litigation: the Dutch Supreme Court Decision in the Urgenda Case*, EJIL:TALK! (Jan. 6, 2020), <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/>.

<sup>12</sup> Katherine Dunn, *Climate Change Litigation Enters a New Era as Court Rules that Emissions Reduction is a Human Right*, FORTUNE (Dec. 20, 2019, 8:40 AM), <https://fortune.com/2019/12/20/climate-change-litigation-human-rights-netherlands/>.

<sup>13</sup> *Urgenda Foundation v. The State of the Netherlands*, ENVTL. LAW ALLIANCE WORLDWIDE, <https://elaw.org/nl.urgenda.15> (last visited Aug. 23, 2020).

<sup>14</sup> Isabelle Kaminski, *Final Appeal in Historic Urgenda Case May Hinge on Human Rights*, CLIMATE DOCKET (May 28, 2019), <https://www.climatedocket.com/2019/05/28/urgenda-netherlands-emissions-human-rights/>; European Convention on Human Rights, art. 2, Nov. 4, 1950, C.E.T.S. No. 194. 6, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

impose a positive obligation on states in the context of dangerous activities, such as nuclear tests, the operation of chemical factories, and the release of toxic emissions from waste-collection sites).<sup>15</sup> In its 2015 ruling, the Court of Appeal called the State's policy emphasis on a thirty percent reduction insufficient.<sup>16</sup> The court noted that as a highly developed nation, the Netherlands "has profited from fossil fuels for a long time and still ranks among the countries with the highest per capita greenhouse gas emissions in the world."<sup>17</sup> The court then invoked the country's international treaty obligations and explained, "the State should assume its responsibility, a sentiment that was also expressed in the United Nations Framework Convention on Climate Change and the Paris Agreement."<sup>18</sup>

The European Court of Human Rights (ECtHR) has also concluded that under Articles 2 and 8 of the ECHR, governments must take positive steps to safeguard human rights that are directly affected by adverse environmental factors.<sup>19</sup> Under the "doctrine of positive obligations," the Court has required national governments to take positive measures to mitigate harm, including (1) ending the offensive behaviors; (2) guaranteeing access to information for affected citizens; (3) ensuring the offender's compliance with applicable regulations; and (4) financing citizens'

relocation in situations where the activity is deemed to be in the public interest.<sup>20</sup>

In *López Ostra v. Spain*, the Court held that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely," thereby violating Article 8 of the ECHR.<sup>21</sup> In addition, rulings from the European Court of Justice (ECJ) have held that states must uphold citizens' procedural right to access European courts for the adjudication of environmental cases.<sup>22</sup> Finally, the Netherlands ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1978. Under Article 11(2)(a) of the ICESCR, the Netherlands, along with seventy other signatory states, committed to take necessary measures to achieve the most efficient utilization of natural resources.<sup>23</sup> Under Section 2(a), States must "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources."<sup>24</sup>

Strategic climate litigation has seen a rapid uptake in domestic courts around the world, in countries like Norway, Ireland, Switzerland, Colombia, and

<sup>15</sup> *Guide on Article 2 of the European Convention on Human Rights*, (European Court of Human Rights, ed., 2020), [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf) (see para. 4.49(2)(b)).

<sup>16</sup> Sike Goldberg & Benjamin Rubinstein, *Decision of the Dutch Court of Appeal, Urgenda Foundation v Kingdom of the Netherlands – Case Summary*, HERBERT SMITH FREEHILLS (Oct. 17 2018), <https://www.herbertsmithfreehills.com/latest-thinking/decision-of-the-dutch-court-of-appeal-urgenda-foundation-v-kingdom-of-the->

<sup>17</sup> *Netherlands*, U.S. ENERGY INFO. ADMIN. (Aug. 2016), <https://www.eia.gov/international/analysis/country/NLD>.

<sup>18</sup> United Nations: Framework Convention on Climate Change: Conference of the Parties, Twenty-first session, Proposal by the President, *Adoption of the Paris Agreement*, Dec. 12, 2015, <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>

<sup>19</sup> *Manual on Human Rights and the Environment*, 8 (Council of Europe Publishing, ed., 2nd ed. 2012), [https://www.echr.coe.int/LibraryDocs/DH\\_DEV\\_Manual\\_Environment\\_Eng.pdf](https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf)

<sup>20</sup> Jean-François Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights* 47 (Council of Europe, ed., 1st ed. 2007), <https://rm.coe.int/168007ff4d>.

<sup>21</sup> *López Ostra vs. Spain*, 1994 (Application no. 16798/90), ESCR-Net, <https://www.escri-net.org/caselaw/2008/lopez-os-tra-vs-spain-application-no-1679890> (last visited Aug 23, 2020).

<sup>22</sup> *Urgenda Foundation v. Netherlands*, 2015 (Case Number C/09/456689), Hague District Court, Chamber for Commercial Affairs, June 24, 2015, [https://elaw.org/system/files/urgenda\\_0.frp.pdf](https://elaw.org/system/files/urgenda_0.frp.pdf)

<sup>23</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Elisabeth Wickeri & Anil Kalhan, *Land Rights Issues in International Human Rights Law*, INST. FOR HUMAN RIGHTS AND BUS., [https://www.ihrb.org/pdf/Land\\_Rights\\_Issues\\_in\\_International\\_HRL.pdf](https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf) (last visited Aug 23, 2020).

<sup>24</sup> *Id.*



Pakistan.<sup>25</sup> While such cases have met with varying degrees of success, environmentalists are becoming more effective strategic litigants. Civil society and the scientific community have joined forces, leveraging statistical and quantitative evidence of environmental degradation to strengthen legal arguments that demand government action to combat the disastrous effects of climate change.<sup>26</sup>

Reflecting on the international significance of the decision, the UN High Commissioner for Human Rights, Michelle Bachelet, applauded the Dutch Supreme Court's confirmation that governments have binding obligations under international human rights law to undertake strong reductions in emissions of greenhouse gases.<sup>27</sup> Climate litigants should build on the Dutch Supreme Court's holding by bringing claims that emphasize the clear link between the imminent threat to life posed by climate change and EU citizens' guaranteed right to life under the ECHR,

establishing a body of case law that strengthens this nascent human rights-based legal framework.<sup>28</sup>

International law creates norms and standards that signatory states agree to uphold in international and domestic spheres. It establishes policies that reflect the existing practices of some States but may reflect only the aspirations of others. In the European context, the ECHR establishes binding legal standards for the protection of human rights across Europe. For a legal instrument like the ECHR to have teeth however, cases like *Urgenda* must be brought before courts that will interpret the meaning of the text and determine its appropriate application.

In *Urgenda*, lawyers focused on European citizens' right to life under Article 2 of the ECHR and successfully argued for a judicial interpretation of the article that requires the Dutch government to realize quantifiable reductions in greenhouse gas emissions in order to fulfill its obligation to protect citizens' right to life. The landmark decision creates legal precedent that is binding on the domestic courts of every EU member State. The precedent it establishes can now be argued in courts across Europe, forcing national governments to pursue similar reductions. In this way, a progressive interpretation of the "right to life" by a Dutch court could result in a dramatic reduction in greenhouse gas emissions across the continent.

<sup>25</sup> Uclia Wang, *Overturn Landmark Urgenda Climate Ruling*, CLIMATE DOCKET (May 30, 2018), <https://www.climatedocket.com/2018/05/30/urgenda-climate-ruling-netherlands/>; Uclia Wang, *Norway Court Affirms Climate Rights, but Oks Oil Leases Anyway*, CLIMATE DOCKET (Jan. 5, 2018), <https://www.climatedocket.com/2018/01/05/norway-climate-change-rights/>; Karen Savage, *Ireland Recognizes Constitutional Right to a Safe Climate and Environment*, CLIMATE DOCKET (Dec. 11, 2017), <https://www.climatedocket.com/2017/12/11/ireland-constitutional-right-climate-environment-fie/>; *English Summary of our Climate Case*, KLIMASENIORINNEN, <https://klimaseniorinnen.ch/english/> (last visited Aug. 23, 2020); Santiago Ardila Sierra, *The Colombian Government has Failed to Fulfill the Supreme Court's Landmark Order to Protect the Amazon*, DEJUSTICIA (Apr. 5, 2019), <https://www.dejusticia.org/en/climate-change-colombia-lawsuit/>; Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENVTL L. 37, 37-67 (2018).

<sup>26</sup> *State of Netherlands v. Urgenda Foundation*, 132 HARV. L. REV. 2090, 2090-2097 (2019), [https://harvardlawreview.org/wp-content/uploads/2019/05/2090-2097\\_Online.pdf](https://harvardlawreview.org/wp-content/uploads/2019/05/2090-2097_Online.pdf)

<sup>27</sup> *Bachelet Welcomes Top Court's Landmark Decision to Protect Human Rights from Climate Change*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (Dec. 20, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E>.

<sup>28</sup> *Netherlands v. Urgenda, Summary of the Decision* (English, not authoritative), Dec. 20, 2019, <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>; Siobhán McNerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*, 33 HARV. ENVTL L. REV. 431, 431-437 (2009); Jo Crichton, et al., *Human Rights Legal Framework*, GSDRC, (March 2015), <https://gsdrc.org/topic-guides/human-rights/human-rights-legal-framework/>.