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INTERNATIONAL DECISIONS

EDITED BY HARLAN GRANT COHEN

European Convention on Human Rights—UN Framework Convention on Climate Change—state responsibility—right to life—right to respect for private and family life

STATE OF THE NETHERLANDS V. URGENDA FOUNDATION. ECLI:NL:HR:2019:2007. Judgment. *At* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007. Supreme Court of the Netherlands, December 20, 2019.

The judgment in *State of the Netherlands v. Urgenda Foundation*[1] marks one of the first successful challenges to climate change policy based on a human rights treaty. In this case, the Dutch Supreme Court upheld the lower court's opinion that the Netherlands has a positive obligation under the European Convention on Human Rights (ECHR) to take reasonable and suitable measures for the prevention of climate change. Although the Supreme Court recognized that climate change is a consequence of collective human activities that cannot be solved by one state on its own, it held that the Netherlands is individually responsible for failing to do its part to counter the danger of climate change, which, as the Court affirmed, inhibits enjoyment of ECHR rights. In reaching that conclusion, the Supreme Court determined the exact level of greenhouse gas (GHG) emissions reduction that the Netherlands is required to meet to comply with its ECHR obligation, specifically, a 25 percent reduction compared to its 1990 level by the end of 2020.

Urgenda is a foundation established under Dutch law to stimulate and accelerate the transition to a more sustainable society, starting with the Netherlands (para. 2.2.2). In November 2012, Urgenda asked the Dutch government to commit itself to reduce GHG emissions by 40 percent from its 1990 level by 2020.[2] After this request was denied, Urgenda brought the case to the District Court of The Hague, acting on its own behalf and as a representative of 886 individual citizens.[3] In June 2015, the District Court ordered, on the basis of the duty of care under Dutch tort law, the state to reduce the GHG emissions by at least 25 percent from its 1990 level by the end of 2020 (paras. 4.85, 4.86, 5.1).

[1] State of the Netherlands v. Urgenda Foundation, ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth.).

[2] Letter from M.E. Minnemsma, Executive Director of Urgenda, to M. Rutte, Prime Minister of the Netherlands (Nov. 12, 2012) (English translation), *available at* https://www.urgenda.nl/wp-content/uploads/Letter_to_the_government.pdf.

[3] Urgenda Foundation v. The State of the Netherlands, ECLI:NL:RBDHA:2015:7196, Judgment (Dist. Ct. The Hague June 24, 2015) (Neth.), *at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196

https://doi.org/10.1017/ajil.2020.52 Published online by Cambridge University Press

In its claim, Urgenda also argued that the inadequacy of actions to counter climate change amount to violations of ECHR Articles 2 (right to life) and 8 (right to respect for private and family life, home, and correspondence). Finding that Urgenda was neither a direct nor an indirect victim within the meaning of ECHR Article 34, the District Court rejected Urgenda's standing to raise those claims (para. 4.45). The state appealed, and Urgenda cross-appealed on the ground that they should be able to rely directly on ECHR provisions. In 2018, the Court of Appeal upheld the District Court's duty of care judgment but, applying Section 305a of the Dutch Civil Code, also found that the Dutch government breached its obligations under ECHR Articles 2 and 8.[4] In January 2019, the state appealed to the Supreme Court.[5]

The central questions before the Supreme Court were: (1) whether ECHR Articles 2 and 8 apply to a claim related to climate change; (2) whether the Netherlands is responsible for failing to adequately act to contain the adverse effect of climate change (the question of "partial responsibility"); and (3) what concrete state actions can be derived from those international obligations.[6] The Supreme Court first considered whether ECHR Articles 2 and 8 apply to a claim related to climate change. Drawing upon the case law of the European Court of Human Rights (ECtHR) on environmentally hazardous activities (paras. 5.2.2–5.3.4), the Court concluded that "the State is required pursuant to ECHR Articles 2 and 8 to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem" (para. 5.6.2).

The Supreme Court then turned to the second and third questions, following "the common-ground method" whereby the Court can rely on international instruments in interpreting the ECHR regardless of their binding nature (paras. 5.4.1–5.4.3). Under that method, Dutch courts can derive concrete content of positive obligation under the ECHR from the instruments as long as they "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" (para. 5.4.2).

While the Netherlands contended that a state should not be held responsible for the adverse effect of climate change, which is global in both cause and scope, the Court held that the global and joint nature of climate change is no obstacle to holding individual states responsible for failing to do their part to counter the adverse effects within their jurisdiction. In establishing such "partial responsibility," the Court went on to interpret the content of individual obligations under the United Nations Framework Convention on Climate Change (UNFCCC) and the "no harm" principle requiring each state to ensure that activities within its jurisdiction do not cause transboundary environmental damage. In this respect, the Court affirmed that each state has an international obligation under the UNFCCC to take measures within its jurisdiction in light of the objective "to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human induced

[4] Urgenda Foundation v. The State of the Netherlands, ECLI:NL:GHDHA:2018:2610, Judgment (Ct. App. The Hague Oct. 9, 2018) (Neth.), *at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610. For overturning the District Court decision on admissibility and ECHR claims, see paragraphs 35–36.

[5] Government Appeal to the Supreme Court of the Netherlands (Jan. 8, 2019) (in Dutch), *available at* https://www.rijksoverheid.nl/documenten/brieven/2019/01/08/procesinleiding-vorderingsprocedure-hoge-raad

[6] The issue on the separation of powers under the Dutch constitutional system is not included in this case note.

https://doi.org/10.1017/ajil.2020.52 Published online by Cambridge University Press

interference with the climate system (Article 2)" (paras. 5.7.2–5.7.4). The Court also derived this individual obligation to "do what is necessary" from the no harm principle, referenced in the preamble of the UNFCCC (para. 5.7.5). Drawing upon these principles, the Court established that each state is held to its own independent obligation to manage the activities within its jurisdiction, notwithstanding the fact that climate change is caused by a multiplicity of other actors. The Court concluded that despite the global nature of climate change, Articles 2 and 8 should be interpreted to require the state to fulfill "its part" of the integral efforts necessary to bring down the level of global GHG concentration to counter the threat of climate change (para. 5.8).

Having thus determined each state has an individual obligation to do "its part" with regard to climate change, the Court looked to Article 47 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which establishes that the responsibility of each state is determined individually according to its own conduct in respect to its own obligation (para. 5.7.6). Drawing upon this, the Supreme Court ruled that the Netherlands can be held individually responsible if it fails to carry out its part to prevent global hazardous effects that impair human rights under ECHR Articles 2 and 8. The Court further noted that corresponding rules on "partial responsibility" are widely accepted in the domestic legal systems as "'partial fault' also justifies partial responsibility" (*id.*).

The third question pertained to the substantive content of the obligation binding the Netherlands and its concrete implications. The Court found that under ECHR Articles 2 and 8, the Netherlands is obligated to adopt "reasonable and suitable" measures (para. 5.3.4). Here, the Court referred to the target of 25–40 percent GHG reduction in 2020 compared to 1990 for Annex I countries (like the Netherlands) under the UNFCCC. The Netherlands asserted that this target is not of a legally binding character (paras. 6.2, 7.1). Nevertheless, the Supreme Court found that the target reflects the consensus of the scientific and international communities and is meaningful for identifying the minimum substantive standard, a standard which, in turn, defines current state commitments under ECHR Articles 2 and 8 (para. 6.3). The 25–40 percent target is based on a mitigation scenario under the Fourth Assessment Report (AR4) of Intergovernmental Panel on Climate Change (IPCC) published in 2007. While the Supreme Court recognized that the Fifth Assessment Report in 2013–2014 had already moved away from the scenarios that hinge on the distinction of efforts between Annex I and non-Annex I countries (para. 7.2.4), it found that the 25–40 percent target and the underlying scenario still reflect international consensus manifested in the two degrees Celsius target of the 2015 Paris Agreement (para. 7.2.4, 7.2.7–7.2.8).

Having recognized partial responsibility in this case, the Court also rejected the state's argument that the 25–40 percent target only applies to the Annex I states as a group and not to each of them individually (paras. 7.3.2–7.3.3). As to the claim that the Netherlands is only a minor emitter, the Supreme Court upheld the assessment of The Hague Court of Appeal that the Netherlands' emission reduction responsibilities correspond to the fact that it has very high per capita emissions and that it would thus not make sense for the Netherlands to have a reduction rate lower than that applicable to Annex I parties as a whole (para. 7.3.4).

* * * *

Among the questions considered by the Supreme Court, the first two—(1) whether Articles 2 and 8 of the ECHR apply to claims regarding climate change, and (2) whether

https://doi.org/10.1017/ajil.2020.52 Published online by Cambridge University Press

an ECHR member state can be held individually responsible to prevent the harm of climate change—require interpreting relevant international law. As outlined by the Court, the ECtHR has held in previous cases that environmental harm can constitute a violation of human rights.[7] Because the negative impact of climate change is a type of environmentally hazardous consequence, it may seem natural, at first glance, to apply previous case law on human rights and environmental hazardous activities to climate change. Yet, the problem is that ECtHR case law has only considered environmental harm that does not cross borders. Outside the framework of the ECHR, there are advisory opinions of human rights bodies that have recognized that climate change affects the enjoyment of human rights.[8] Yet, not all such situations result in the violation of international legal obligations. As was also outlined by the Court, human rights law primarily concerns the obligation of member states toward individuals within their own jurisdictions. In turn, the nature of climate change does not allow a single government to solve the matter by striking a balance between environmental protection and other interests in society. In light of the scientific fact that China, the United States, the European Union, and India produce more than 60 percent of global GHG emissions, as the Netherlands claimed in its defense, there would be no practical effect on the adverse effects of climate change if most other states simply reduced emissions in their own jurisdictions. What is more, "human rights violations are normally established after the harm has occurred,"[9] while the threat of climate change largely concerns a problem of risk—anticipated harm.

The Supreme Court, unlike the Court of Appeal, explicitly sought to fill these gaps between the case law of the ECtHR and the nature of climate change harms. In so doing, the Supreme Court established that ECHR Articles 2 and 8 require states to take reasonable and suitable measures for the prevention of climate change as "if this were merely a national problem" (para. 5.6.2), then reasoned that such an obligation within its own jurisdiction requires it to do "its part" to prevent overall dangerous consequences of climate change (para. 5.8). In supporting this interpretation, the Court referred to the way the UNFCCC imposes obligations on each member state to mitigate the adverse effects of climate change. Under the UNFCCC, while responsibilities are differentiated according to individual capacities, each state owes an individual obligation to manage the activities within its jurisdiction to contain their adverse effects. In establishing this individual state obligation to counter climate change, the Court also applied the no harm principle to climate change (para. 5.7.5). While the principle refers to a state's due diligence obligation to

[7] *E.g.* Lòpez Ostra v. Spain, App. No. 16798/90, Judgment (Eur. Ct. Hum. Rts. Dec. 9, 1994); Öneryildiz v. Turkey, App. No. 48939/99, Judgment (Eur. Ct. Hum. Rts. Nov. 30, 2004); Fadeyeva v. Russia, App. No. 55723/00, Judgment (Eur. Ct. Hum. Rts. June 9, 2005); Tătar v. Romania, App. No. 67021/01, Judgment (Eur. Ct. Hum. Rts. Jan. 27, 2009); Brincat and Others v. Malta, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, Judgment (Eur. Ct. Hum. Rts. July 24, 2014).

[8] Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017); Report of the Office of the UN High Commissioner for Human Rights [OHCHR] on the Relationship Between Human Rights and Climate Change, UN Doc. A/HRC/10/61 (Jan. 15, 2009); Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, UN Doc. A/HRC/25/53 (Dec. 30, 2013); Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/31/52 (Feb. 1, 2016).

[9] OHCHR Report (2009), *supra* note 8, at 20.

https://doi.org/10.1017/ajil.2020.52 Published online by Cambridge University Press

prevent transboundary harms from activities within its jurisdiction,[10] the Court did not elaborate how the no harm principle provides the guidance to interpret ECHR Articles 2 and 8 in the context of climate change. The relevance of the principle remains unclear, given that it is only a rhetorical reference in the preamble and not a guiding principle of the UNFCCC.[11]

An especially important aspect of the Supreme Court's reasoning just outlined warrants attention. Despite its explicit reliance on the UNFCCC in conceptualizing partiality of obligation and responsibility in this case, it seems that, for the Supreme Court, partial causation entails partial responsibility in considering the hazardous effects of climate change (para. 5.7.6). It is submitted here that the Supreme Court does not adequately justify making this leap from the architecture of individual obligations under the UNFCCC to the possibility of partial responsibility. This is probably the most daring, but also the most problematic, dimension of the Supreme Court's judgment.

The Supreme Court's reasoning on partial responsibility is at loggerheads with the latest understanding of the UNFCCC as reflected in the Paris Agreement, which declared that a state's individual obligation is to be determined on the basis of respective national circumstances. While each member state is obligated to mitigate the adverse effects of climate change within its own jurisdiction, this obligation is solely to take the best possible ambitious actions to mitigate climate change with the "aim to achieve global peaking of GHG" as set forth in the state's "nationally determined contribution."[12] Contrary to conceptualization by the Court, individual state obligations under the Paris Agreement adopted within the framework of the UNFCCC are not understood as a part measured against the whole. For the Paris Agreement, the obligation is not premised on any direct causal link between a state's emissions and the individual obligation of reduction. Nor does violation of the Paris Agreement give rise to state responsibility for not doing its part as "allocated" based on the particular "total" GHG amount to be reduced. While the Paris Agreement's temperature target is collectively pursued by the member states, it is neither legally linked to nationally determined contributions nor used as the threshold to evaluate the lawfulness of the content of a state commitment. Hence, even if one accepts the proposition that "'partial fault' also justifies partial responsibility" (*id.*), this argument cannot be extended to individual obligations based upon the UNFCCC without creating divergences between obligations applicable to climate change. In identifying insufficiency of measures as a violation of the ECHR, the Court ruled that "25% compared to 1990" is the bottom line of lawfulness for the Netherlands by reasoning built upon its interpretation of the UNFCCC. Yet, as is alluded to above, the UNFCCC explicitly avoided defining an individual lowest rate of reduction as an international legal standard.

Without conceptualizing partial responsibility linked to partial causation, however, the Supreme Court could have reached the same conclusion within existing frameworks set by both the ECHR and the UNFCCC.[13] The case law of the ECtHR has been shaped to give

[10] The principle was first affirmed by the 1941 arbitral award of Trail Smelter. It is accepted as constituting a "general obligation of States" in the 1997 *Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons*.

[11] *See* United Nations Framework Convention on Climate Change, May 9, 1992, Art. 3, S. Treaty Doc. No. 102–38 (1992), 1771 UNTS 107 [hereinafter UNFCCC].

[12] Paris Agreement, Art. 4.2 (Dec. 13, 2015), *in* UNFCCC COP Report No. 21, Addendum, at 21, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement].

[13] For a similar position regarding causation, see André Nollkaemper & Laura Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the* Urgenda *Case*, EJIL:*Talk!* (Jan. 6, 2020),

https://doi.org/10.1017/ajil.2020.52 Published online by Cambridge University Press

each member state discretion to find the best balance between human rights and other legitimate interests. The ECtHR has even stated that if procedural safeguards are guaranteed, it is "only in exceptional circumstances" that the Court will revise the material conclusion of domestic authorities.[14] In holding a state party responsible for noncompliance with human rights treaties, the case law of the ECtHR and advisory opinions of other human right bodies indeed acknowledge that there are certain minimum standards of protection in cases relating to environmental hazards. Yet, such case law and advisory opinion do not provide clear guidance as to "whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense."[15] It largely depends on the domestic situation of each state, and this is why human rights courts have usually been very wary to shape such minimum standards in absolute terms.

Turning to the UNFCCC, it is historically characterized with what seems a minimum substantive standard, yet of a technical nature. As was mentioned in the judgment, the objective under UNFCCC Article 2 is "to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human induced interference with the climate system" (para. 5.7.3). This qualitative objective is what gave way to the two degrees Celsius target under the Paris Agreement. The two-degrees target is, however, a collective goal for the member states; member states are not legally and individually constrained by it in submitting their respective nationally determined contributions (paras. 6.2, 7.1).

In determining the level of the hazardous effect that hampers enjoyment of human rights for Dutch citizens, contrary to the ECtHR, the Supreme Court was not bound by this type of caution to refrain from substantially intervening in the decisions of the domestic authorities. Without prejudice to the issue of the separation of powers in the Dutch constitutional system, the Supreme Court had the liberty to unlock the full potential of human rights law to establish a substantial baseline of the state's obligation under ECHR Articles 2 and 8 in exercising the legitimate discretion of a national supreme court. In the same vein, although the UNFCCC detached the respective national contribution from any substantial legal baseline under international law, including the global carbon budget, states have full leeway to decide the content of their own contribution, relying on whatever standard they find appropriate according to their national circumstances. In short, without conceptualizing partial responsibility caused by partial failure in interpreting the UNFCCC, the Court could have grounded its judgment as exercising the discretion accepted under both the ECHR and UNFCCC jurisprudence in light of national circumstances of the Netherlands. In some parts of the judgment, the Court seems to even recognize this point, noting that "the Netherlands can also decide to reduce greenhouse gas emissions from its territory without binding or non-binding international agreements" (para. 6.3). Elaboration on the idea of partial responsibility while interpreting the UNFCCC was not only confusing but also unnecessary to determine the content of the Netherlands' individual obligations under the ECHR.

Given the potential innovations espoused by the Dutch Supreme Court that have been sketched out here, the way in which the judgment will be received will warrant attention.

at https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case.

[14] *Fadeyeva v. Russia*, *supra* note 7, para. 105.

[15] OHCHR Report (2009), *supra* note 8, at 23, para. 70.

https://doi.org/10.1017/ajil.2020.52 Published online by Cambridge University Press

Given ongoing and future litigation across the world, it may not be long until we hear what other courts and tribunals think of the Court's judgment.

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doi:10.1017/ajil.2020.52

World Trade Organization—Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994—zeroing—precedential value of Appellate Body reports

UNITED STATES—ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA. *At* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/534R.pdf&Open=True.
World Trade Organization Panel, April 9, 2019 (unadopted).

This dispute, brought by Canada against the United States, constitutes another chapter in three separate sagas: the enduring softwood lumber dispute between the two North American nations; the debate over the acceptability of the practice of "zeroing"; and the fight over the value and role of World Trade Organization (WTO) Appellate Body precedent. Notably, the panel departed from established Appellate Body decisions finding, inter alia, that zeroing was permissible under a weighted average-to-transaction (W-T) methodology. This departure is remarkable, not just because it runs counter to prior jurisprudence, but also for the reasoning supporting it and the circumstances in which it occurred. Indeed, the Panel Report was issued in the midst of a crisis of the WTO dispute settlement system arising from the United States' decision to block the reappointment of Appellate Body members.[1] The United States justified this action, which eventually resulted in the Appellate Body losing its quorum to hear new appeals on December 10, 2019, on the basis of complaints, among others, that the Appellate Body had championed an approach to precedent that the United States found incompatible with the intended role of dispute settlement within the WTO.[2] While members worked feverishly to formulate a compromise that might respond to the United States' criticisms and soften the effect of the Appellate Body's approach,[3] the Panel suggested its own. Thus, it found room to depart from prior precedent (which the United States argued had been wrongly decided) while paying lip service to the Appellate Body.

[1] *See* Kristina Daugirdas & Julian Mortenson, Contemporary Practice of the United States, 110 AJIL 573 (2016); Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 822 (2019).

[2] *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at 22–28 (2018), *available at* https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF [https://perma.cc/TZP9-SJFC] [hereinafter TRADE POLICY AGENDA].

[3] See the discussion in WTO, Minutes of Meeting of the Dispute Settlement Body Held in the Centre William Rappard on 18 December 2018, paras. 4.1–4.25, WTO Doc. WT/DSB/M/423 (Dec. 18, 2018). *See also* Communication from Honduras, WTO Doc. WT/GC/W/761 (Feb. 4, 2019). Additional discussion, in the broader context may be found in WTO, General Council, Minutes of Meeting Held in the Centre William Rappard on 7 May 2019, paras. 4.1–4.161, WTO Doc. WT/GC/M/177 (May 7, 2019).

https://doi.org/10.1017/ajil.2020.52 Published online by Cambridge University Press