KRISTINA FORSBACKA

SEE YOU IN COURT

The effectiveness of litigation as a climate tool

Governments and companies are increasingly being summoned to court in climate litigation errands. These litigations, reinforced by science, indicate that a healthy climate is a human right and, consequently, climate policy might be enforced through legal action. Successful court cases in this matter have drawn the public's attention, which indicates that a further increase in climate litigation is likely. This development raises the question in which ways climate litigation can be used to tackle climate change. The purpose of this report is to give insight to the development of the use of climate litigation as a way to tackle climate change, using four examples from European courts. The first two cases are litigation against the Dutch and UK governments, while the third and fourth ones are corporation litigation against German RWE and Polish Enea SA.

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FOUR STRATEGIC CASES

FORES

See you in Court
The effectiveness of litigation
as a climate tool Four strategic cases

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About the author

Kristina Forsbacka is a Ph.D. (Law) student at Lulea University of Technology. Her research concerns green bonds from a legal perspective. She has several years of experience as a lawyer, and is specialised in climate, renewable energy and environmental law. She was one of the experts in a reference group for the governmental All-Party Committee on Environmental Goals (Miljömålsberedningen), tasked with investigating a Swedish Legal Climate Framework. Her assignment was to investigate the recent legal developments in international Climate Change Law and the initiatives taken internationally, as well as climate litigation. She has also successfully represented the Swedish Energy Agency in the European Court of Justice in the landmark *Ålands Vindkraft*-case regarding the compatibility of the Swedish support scheme to renewable energy with the EU Renewables Directive and the EU regulations on the free movement of goods – a precedent in renewable energy law.

Foreword

In international agreements and national climate change policies, states have committed themselves to mitigating greenhouse gas emissions and minimizing the negative effects of climate change. But climate change is a slow global process, often undervalued by many people, which makes it difficult to defy concepts of liability, responsibility and illegality. This has led to an accountability deficit within the area of climate change, which is one of the compounding reasons for why tackling the problem has proven so difficult.

While the number of international agreements and national laws have increased around the globe, practice around tackling climate change often shows the opposite. Greenhouse gas emissions levels have continued to increase and the effects on human made climate change are starting to show. Environmental groups and advocates have therefore increasingly turned to the courts to fill the void in climate change governance, as government efforts to address climate change have been weak in both countries and at the international level. In essence,

they have turned to litigation seeking to fill the gaps left by legislative and regulatory inaction in tackling climate change.

This is especially true in liberal societies as liberalism is a political doctrine that centres on protecting and enhancing the freedom of the individual. The problem, then, is to devise a system that gives the government the power necessary to protect individual liberty, but also prevents those who govern from abusing that power. Rule of law is vital in ensuring that the system works, and as our knowledge on climate change has increased, it is perhaps not strange that climate change litigation has increased.

The increasing focus on human rights within the climate change debate has also contributed towards the surge of climate litigations. Questions regarding the right to a healthy planet, the rights of future generations and the obligations of companies and states to follow international agreements are all examples of topics which have been brought before a court.

Climate litigation is also likely to increase further as there have been a number of successful cases in the media that have brought attention to litigation as a tool in the fight against climate change. In particular, 2019 ended with a huge decision by the Dutch Supreme Court upholding Urgenda v. The

Netherlands, ordering the government to protect its citizens by fighting climate change, with potential ripple effects worldwide. 2020 also formally sets the start of the commitments made by nations under the Paris Agreement, and this may provide a setting for future litigation across a number of fronts.

But how effective of a tool is litigation to achieve outcomes consistent with a net zero emissions future within the EU? This text gives us an overview of a few successful cases and also draws out some analysis to be aware of in the future.

Ruben Henriksson
Climate Programme
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Introduction and Purpose

Climate litigation is increasingly being admitted in courts and this development is likely to continue. The scientific evidence on climate change and its adverse effects are being considered common ground and generally recognised by the courts. These litigations, reinforced by science, indicate that the right to a healthy climate is a human right and, consequently, climate policy can be enforced through legal action. With the potential to reshape the way the world thinks about climate policy, this development therefore needs to be studied further. While the claims brought forward to date have had varying degrees of success, we have seen some successful climate cases that have received great attention among the public.

The purpose of the study is a better understanding of how, and if, climate litigation can be used to tackle climate change alongside common challenges and potential gains and to identify a common sense of ways forward, potentially helping others to iden-

tify new routes to tackle climate change.

I will describe four cases that exemplify the development in climate litigation from different perspectives. The description does not aim at a complete analysis of ongoing climate litigation, but is focussed on four examples in European courts that indicate the recent development and direction of climate litigation.

The first case is the landmark ruling of the Netherlands Supreme Court's decision in December 2019, when the court decided that the Dutch Government must limit its greenhouse-gas emissions by the end of 2020 by 25 per cent from 1990 levels, based on Articles 2 and 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The court accepted the fundamental legal principle that the State has a duty to protect the human right of citizens against the dangers posed by climate change.[1]

The decision received great attention worldwide. It was also highlighted by Linos-Alexandre Sicilianos, the President of the European Court of Human rights (ECtHR) in his speech at the opening

1 Supreme Court of the Netherlands (Hoge Raad), 20 December 2019, case number 19/00135. See also: the Advisory Opinion of the Procurator General of the Supreme Court of the Netherlands, Parket bij de Hoge Raad, 8 October 2019, 19/00135, the decision of the Hague Court of Appeal (Gerechtshof Den Haag), 9 October 2018, 200.178.245/01, and the decision of the Hague District Court (Rechtbank Den Haag), 24 June 2015, C/09/456689 / HA ZA 13-1396

of the judicial year in Strasbourg in January 2020. Sicilianos emphasised that the ECtHR cannot act alone and monopolise the fight for the survival of the planet, and referred to the Dutch case above as a recent example of shared responsibility:

> *"In giving this decision, which has been hailed as historic, the Dutch Supreme Court relied explicitly on the European Convention on Human Rights and the case-law of our Court. By relying directly on the Convention, the Dutch judges highlighted the fact that the European Convention of Human Rights really has become our shared language and that this instrument can provide genuine responses to the problems of our time."* [2]

This case is truly a landmark case for climate litigation, as it is based on the ECHR and was finally decided by a Supreme Court, and it has been followed and referred to in climate litigation worldwide.

Another important ruling followed in February 2020, when a UK Court of Appeal declared that the decision to give the go-ahead to a third Heathrow runway was unlawful, as the Paris Agreement ought to have been taken into account by the Secretary

2 Linos-Alexandre Sicilianos, speech, Strasbourg (2020).

of State in the preparation of the Airports National Policy Statement (ANPS), but was not.[3] It should be noted, though, that this decision is different from the Urgenda decision as it concerns judicial review of a procedural issue in one specific project, and not the climate policy as a whole. Furthermore, the case was won on procedural grounds. The court said that it was "legally fatal" to the Government's Heathrow expansion policy that it did not take the Paris Agreement climate commitments into account. However, the court emphasised that it has not decided, and could not decide, that there will be no third runway at Heathrow, nor that a national policy statement supporting the project is necessarily incompatible with the UK's commitments under the Paris Agreement. The Secretary of State has the opportunity to reconsider the ANPS taking the Paris Agreement into account and can thereafter reach the decision that the third runway shall be approved. The case has not yet been finally settled.

The Heathrow case differs from the Urgenda case, and the direct effects of the case on climate litigation are more limited as it concerns a procedural issue in a planning decision under national law. Furthermore, the case has not yet been finally settled.

3 Plan B Earth versus Secretary of State for Transport, Court of Appeal (civil division), 27 February 2020, case number: C1/2019/1053

However, the Heathrow case shows that the court found that the fact that the UK Government has committed to the Paris Agreement means this needs to be taken into account.

Both the above decisions are of special interest going forward, as they make it clear that courts view breaches against climate commitments in a new way.

Litigation against companies is also increasing alongside climate-related claims. These claims are being pursued by investors and activist shareholders, as well as private citizens who are being affected by the adverse effects of climate change. Examples are ClientEarth's litigation against Polish utility Enea SA, in which it owns shares, and a Peruvian citizen's litigation against German utility RWE AG.[4] Enea decided not to go forward with the intended investment in the coal plant as planned, and new majority owners of the plant have announced their intention to transform the plant into a gas-fired plant instead, which would cut emissions. The case against RWE is pending awaiting following the court's decision to take evidence.

These two cases show how not only governments, but also companies that are major emitters of greenhouse gases (carbon majors), are increasingly

4 Essen Regional Court, Lliuya versus RWE AG, 2015, case number: 20 285/15

confronted with climate liability. The Enea case is an example of how climate change is developing into an issue that needs to be taken into account by corporations' commercial decisions. It shows that climate change can have real impact on the operations of corporations and anticipated financial outcomes, either directly through court enforcement or indirectly through pressure from shareholders or the public. The Lliuya case against RWE, though still pending and not decided, is of interest as an example of a claimant pushing for an extension of individual liability to combat the effects of climate change against corporations. A positive outcome in this case would push climate litigation even further and be truly groundbreaking.

Climate litigation was reignited after the failure of the climate conference in Copenhagen in 2009 (COP15), and has increased following the Paris Agreement in 2015.[5,6] It has emerged in response to institutional failures at both the international and national level. After the Paris Agreement was adopted, the general opinion is that the parties have not shown sufficient ambition to achieve the emission reductions required. Governments and corporations continue to engage in high-emission

5 Bouwer & Setzer (2020). "New trends in Climate Litigation: What works?"
6 Byrnes. & Setzer (2019). "Global trends in climate change litigation: 2019 snapshot". Policy report.

activities that are inconsistent with the pathway towards the targets of the Paris Agreement, and take inadequate steps to protect people from the impacts of climate change.[7] Climate litigation is currently exploding due to increasing scientific evidence on the risks of climate change and increased attention to the climate issue among the public and climate activists, not least by the global climate school-strike movement for climate started in 2018 by 15-year-old Greta Thunberg. Climate litigation includes a wide variety of cases.[8] In total 1,587 cases have been brought worldwide between 1986 and the end of May 2020, the majority of which (1,213) is in the United States.[9]

The objective of this study is to analyse four strategic climate cases in Europe that represent different perspectives on climate litigation, and specifically to:

- Analyse, discuss, disseminate and transfer knowledge about the climate litigation examples above and the effect of these going forward

7 Bouwer & Setzer (2020). "New trends in Climate Litigation: What works?"
8 For a comprehensive description of on-going climate cases, see the UN Environment Programme: https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y as well as the the inter alia Sabin Centre for Climate Change Law Databases of climate change caselaw: https://climate.law.columbia.edu/content/climate-change-litigation http://climatecasechart.com/
9 Bouwer & Setzer (2020), p.4. "New trends in Climate Litigation: What works?".

- Understand how climate litigation can push Governments to take action against climate change and increase mitigation efforts
- Understand how climate litigation can impact the market and businesses, and also the decisions of individual corporations
- Investigate how European domestic courts have recently responded to four different issues, either regarding Government responsibility or responsibility of corporations

The main focus of the study will be on:

(i) the Urgenda case as it is a precedent as the first successful climate case on the basis of human rights law against a Government's climate mitigation targets, based on scientific evidence and human rights law, and;

(ii) the Heathrow case as it clarifies that the Paris Agreement must be considered part of the UK climate policy, and needs to be taken into account in the Government's decision making.

Though the cases both led to victories by NGOs, they also show some fundamental differences that I will analyse further.

The paper is organised as follows: (i) a summary of the conclusions in section 2, (ii) a short introduction to the international climate framework in section 3, an analysis and description of each of the four climate cases referred to and the effect of these going forward: (iii) the Urgenda case, which concerns the obligation for Governments to mitigate greenhouse gas emissions, in section 4, (iv) the Heathrow case, a climate case referring to the Paris Agreement, in section 5, (v) the Enea case, where shareholders challenged a corporation's decision to open up a new coal plant, in section 6, and (vi) the Lliuya case, which concerns a private citizen's claim on a corporation, in section 7. I conclude with Discussion and Conclusions on the implications of the climate litigation described in section 8.

Summary of the Conclusions

The conclusions based on the analysis of the Urgenda and Heathrow cases against the Governments can be summarized as follows:

- There is such a high degree of consensus in the international community and in climate science that the urgent need to reduce greenhouse-gas emissions can be considered common ground. Furthermore, states have an individual responsibility and each country must do its share.
- Governments might increasingly be held to their legislative and policy climate change commitments based on human rights (Articles 2 and 8 ECHR). This reflects the continuous evolution in the norms and principles of the ECHR required. The protection granted is not limited to individuals but includes society or the population as a whole.

- The Urgenda case is ground-breaking as the Dutch judiciary interpreted the ECHR creatively and progressively in an unprecedented way, which is a positive development towards embracing a human rights-based approach in climate change matters.
- National law must offer an effective legal remedy before a national authority (Article 13 ECHR, and the Aarhus Convention).
- When it comes to separation of powers, courts have a mandate to offer legal protection to the citizens, even against the Government, if the politicians do not remain within the limits of the law. However, Governments have a large degree of discretion as regards the specific measures to be taken.
- The commitment to the Paris Agreement can be considered part of the Government policy, meaning that the agreement should be taken into account by the Government when arriving at a planning decision, though the Government may not be obliged to act in accordance with

the Paris Agreement or to reach any particular outcome.

- As the court decided to grant a remedy on the basis of "exceptional public interest" in the Heathrow case, regardless of the fact that the outcome might be the same if review is carried out again with inclusion of the Paris Agreement, it recognised the importance of taking into account climate change agreements and the Government's need to be aware and act upon it.

As regards litigation against corporations, there are not yet similar groundbreaking rulings. However, the following can be noted.

- Individual obligations for corporations are being claimed and methods to calculate the responsibility for individual corporations for damage caused by climate change are emerging (see Lliuya vs RWE).[10]
- Climate litigation cases are filed against carbon majors on a variety of other grounds as well, such as claims that companies have not sufficiently taken into

10 Essen Regional Court, Lliuya versus RWE AG, 2015, case number: 20 285/15.

account the effects of climate change at commercial decisions (see ClientEarth vs Enea).[11]

- Other risks related to climate change that corporations need to take into account, such as risks to the valuation of the company, reputational risk and credit risk that may be as relevant as the risks involved with the litigation itself.[12]

11 Regional Court in Poznan, Client Earth versus Enea, August 2019, case number 26/2019.
12 Bouwer & Setzer (2020). "New trends in Climate Litigation: What works?".

Chapter 1

The United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement

The above implies that Governments and corporations could increasingly be held to their legislative and policy climate change commitments. To conclude, though it is still not clear to what extent climate litigation strengthens climate governance or permanently moves climate policy forward, litigation can be expected to increasingly be used as one of a number of tools for the transition to a climate-resilient society.

Anthropogenic climate change is the greatest threat to humankind. The risk of dangerous climate change is global in nature, and the consequences of those emissions are also experienced around the world. The countries have therefore negotiated and agreed on the United Nations Framework Convention on Climate Change and accessory agreements, the Kyoto Protocol and the Paris Agreement, to regulate this matter of greatest importance. The Intergovernmental Panel on Climate Change (IPCC) is an independent scientific organ of the United Nations which provides reports on science related to climate change to policy makers.

The IPCC and the UNFCCC

The IPCC

The IPCC, the United Nations independent body for assessing science-related to climate change, was created under the United Nations by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988. The IPCC does not conduct the climate research itself, but assesses the most recent scientific and technological information available. Recognised experts from all over the world have

been assigned to create an inclusive panel that serves as an authoritative information provider. It has the role of linking science to policy. The IPCC is not just a scientific organisation, but also an intergovernmental organisation with 195 member states. The IPCC provides policy makers with regular assessments on climate change, its implications and potential future risks, and puts forward adaptation and mitigation options.[13] With the IPCC's Synthesis Reports, the IPCC provides for an approachable and concise translation of otherwise highly abstract and technical scientific findings. The IPCC publishes comprehensive Assessment Reports and accompanying sub-reports about the state of climate science and climatological developments. The Assessment Reports are approved by the member states.

Based on the IPCC Assessment Reports, there has long been a consensus in climate science and in the international community that the average temperature on earth may not rise by more than 2°C compared to the average temperature in the pre-industrial era. In the Fourth Assessment Report by the IPCC it is made clear that human activities have contributed to the emissions of greenhouse-gases and that the emission of these gases contribute to

13 IPCC Official Website (n.d.). "History of the IPCC". https://www.ipcc.ch/about/history/

the warming of the planet.[14] According to climate scientists, if the concentration of greenhouse gases in the atmosphere has not risen above 450 ppm by the year 2100, there is a reasonable chance that the two-degree target will be achieved. The IPCC Fourth Assessment Report from 2007 (AR4) arrives at the conclusion that in order to achieve the 450 ppm scenario, the total emissions of greenhouse gases by Annex I countries in 2020 must be 25-40 per cent lower than 1990. In recent years, new insights have shown that the temperature should not rise by more than 1.5°C which translates into a greenhouse gas concentration level of no more than 430 ppm in the year 2100.[15] The accumulation of CO_2 in the atmosphere may also cause the climate change process to reach a tipping point, resulting in abrupt climate change for which we are not prepared. If global warming reaches between 1 and 2°C the risk of reaching a tipping point increases substantially.[16] The worldwide community acknowledges that global warming needs to be prevented or reduced by ensuring that less greenhouse gases are emitted into the atmosphere, "mitigation". In addition, measures

14 IPCC (2007) "Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change" p. 2-3
15 IPCC (2014) "Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change" p. 21.
16 Ibid, p. 72-73.

can be taken to counter the consequences of climate change, "adaptation". Regardless of the IPCC's independent status, there is an important interplay between the United Nations Framework Convention on Climate Change regime and the IPCC as its collected data are designed to function as guidance to fulfil the objective of the convention and therewith to form the basis of many of the convention regime's negotiations.

The UNFCCC

The United Nations Framework Convention on Climate Change (UNFCCC)[17], which was adopted in May 1992 and entered into force in March 1994, has the objective to keep the concentration of greenhouse gases in the atmosphere to a level that would prevent dangerous human induced interference with the climate system (Article 2). Article 3 contains various principles to achieve this objective, and mentions several principles such as the *principle of equity*, the *precautionary principle* and the *sustainability principle*. For instance, Article 3(1) provides that the parties should

> "*protect the climate system for the benefit of present and future generations of humankind,*

17 United Nations. (1992). United Nations Framework Convention on Climate Change, New York.

> *on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities, giving full consideration to developing countries that are particularly vulnerable to climate change or that would have to bear a disproportionate burden under the Convention"*

Article 3(3) provides that the parties

> *"should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effect"*

Article 4 provides that all parties will take measures and develop policy in this area, *inter alia*

> *"taking into account their common but differentiated responsibilities"*

It follows from these provisions that each state has an obligation to take the necessary measures in accordance with its specific responsibilities and possibilities. Taking into account their per capita emissions, the long history of their emissions and their resource bases, the industrialised countries must take the lead in fighting climate change and its adverse effects.

At the annual Climate Change Conferences (COPs) held on the basis of UNFCCC since 1992, the provisions mentioned above have been further developed in various COP decisions, based on the understanding that all countries will have to do what is required to prevent dangerous climate change. This understanding corresponds to the *no harm principle*, a generally accepted principle of international law which entails that countries must not cause each other harm. This is also referred to in the preamble to the UNFCCC.[18]

The Kyoto Protocol

The Kyoto Protocol is an additional protocol to the UNFCCC which was agreed upon at the climate conference in Kyoto in 1997, with the purpose of operationalizing the commitments of Article 4 UNFCCC.[19] The Protocol is based on the principle of *common but differentiated responsibilities*, established in Article 4 in the UNFCCC. It acknowledges that individual countries have different capabilities in combating climate change, owing to economic deve-

18 United Nations. (1992). United Nations Framework Convention on Climate Change, New York

19 United Nations. (1997). Kyoto Protocol to the United Nations Framework Convention on Climate Change. Entered into force 16 February 2005. , Treaty series vol. 2303

lopment. It is therefore the obligation of the developed countries to reduce current emissions as they are historically responsible for the current levels of greenhouse gases in the atmosphere. The Protocol's first commitment period started in 2008 and ended in 2012. The Protocol records binding reduction targets for the industrial countries, referred to in the protocol as Annex I countries, for the period 2008-2012. The Bali Action Plan[20], adopted at the climate conference in Bali in 2007, acknowledged the need for the parties to reduce their emissions of greenhouse gases by 2020 by 25-40 per cent to achieve the 450 ppm scenario (the amount of carbon dioxide in the atmosphere corresponding to limiting warming to a 2ºC increase) by the year 2100, based on the AR4 by IPCC (see above). No agreement could be reached at the climate conference in Copenhagen in 2009 regarding a successor to or extension of the Kyoto Protocol. At the climate conferences *inter alia* in Cancún in 2010[21] and in Doha in 2012[22], the target in the Bali Action Plan was again acknowledged, though the Doha Amendment did not enter into

20 UNFCCC (2008) Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, FCCC/CP/2007/6/Add.1, Decision 1/CP13
21 UNFCCC (2011) Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1, Decision 1/CP16
22 UNFCCC (2013) Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012, FCCC/CP/2012/8/Add.1, Decision 1/CP18

force. At the climate conference in Warsaw in 2013, there was a call for Annex I countries to align their reduction targets with the target of 25-40 per cent by 2020.[23]

The Paris Agreement

The Paris Agreement was adopted in December 2015 by consensus of the Parties at the climate conference in Paris, by all 195 participating member states and by the European Union.[24] The agreement entered into force in 2016 and covers the period from 2020 onwards. The Paris Agreement is a separate instrument within the UNFCCC, and not an amendment of the Kyoto Protocol. The Paris Agreement is the first agreement to recognise that climate change is a common concern for humankind and a human rights issue (see the preamble). The agreement is a stronger international commitment to combat climate change, and aims at holding the increase in the global average temperature to well below 2°C above pre-industrial levels, and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels (article 2(1)(a)). Contrary to

23 See para. 11 of the Hague Court of Appeal's decision.
24 United Nations. (2015). Paris Agreement, Entered into force 4 November 2016, Treaty series vol. C.N.92.2016.TREATIES-XXVII.7.d

the Kyoto Protocol, the Paris Agreement does not include binding mitigation commitments for some countries, but includes a pledge-and-review system. Each contracting party shall account for its own responsibilities. The Paris Agreement is based on national climate plans or Nationally Determined Contributions (NDCs) to be determined by each party to the agreement (article 4(2)). The parties to the agreement shall prepare successive NDCs that they intend to achieve, and shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions. The NDCs shall represent a progression beyond the then current nationally determined contribution and reflect the party's highest possible ambition (article 4(3)).[25]

25 United Nations. (2015). Paris Agreement, Entered into force 4 November 2016, Treaty series vol. C.N.92.2016.TREATIES-XXVII.7.d

Chapter 2

Urgenda Foundation vs. the State of the Netherlands
(Ministry of Economic Affairs and Climate Policy)

The Urgenda case has ignited legal and political debate about climate change and possible legal remedies. In this groundbreaking climate case, the Dutch Supreme Court ruled that the Dutch Government must reduce its greenhouse gas emissions by the end of 2020 by 25 per cent compared to 1990 levels. The court accepted the fundamental legal principle that the State has a duty to protect the human rights of Dutch citizens.

Urgenda is a foundation under Dutch law (*Stichting*), engaged in developing plans and measures to prevent climate change. Its object is to stimulate and

accelerate transition processes towards a more sustainable society, starting in the Netherlands.[26] Based on the IPCC reports, Urgenda claimed that the lives and livelihoods of both current and future generations would be endangered if the Government did not take sufficient action against the dangers posed by climate change.[27]

This is the first case in the world where a national court has issued a specific order to reduce greenhouse-gas emissions to a Government based on human rights.

Summary of the Supreme Court's Decision

The Supreme Court decided on 20 December, 2019 that the State's appeal in cassation must be rejected. This means that the order issued by the District Court to the State, which was confirmed by the Court of Appeal, directing the State to reduce greenhouse gases by the end of 2020 by 25 per cent compared to 1990, will stand as a final order. The Supreme Court ruled that pursuant to Articles 2 and 8 ECHR, which protect the *right to life* and the *right to respect*

26 For more information about Urgenda visit: https://www.urgenda.nl/en/home-en/
27 It can be noted that Urgenda started the procedure on behalf also of 886 concerned citizens.

for private and family life, the Court of Appeal "can and may conclude that the State is obliged to achieve that reduction, due to the risk of dangerous climate change that could have severe impact on the lives and welfare of the residents of the Netherlands".[28]

It should be noted that the case in the Supreme Court concerned cassation, which means that the Supreme Court limits its examination to the grounds on which the appeal in cassation is based. The court made no assessment of facts, but merely an assessment of the legal reasoning of the lower instance court (Court of Appeal) based on the grounds brought forward by the appellant in cassation.

The Urgenda case deals with several legal questions which are of principal relevance for climate cases more generally, and the decision of the Supreme Court. The case-analysis of this paper will be structured as follows: First, attention will be given to the key issues presented before the Supreme Court; second, the Court's assessment of scientific findings, which form an important basis of this decision, will be discussed; then the substantive assessment of Articles 2 and 8 ECHR will be analysed; consequently, the Court's State liability

28 See the Summary of the Supreme Court's decision: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026

assessment will be discussed; and lastly, procedural considerations of locus standi (standing) and the principle of separation of powers (the political domain), will be analysed.

Standing – Class Action Suit

Pursuant to Article 13 ECHR, national law must offer an effective legal remedy "[…] before persons acting in an official capacity"[29]. This means that the national courts must be able to provide effective legal protection from possible violations of the rights and freedoms.

As described above, Urgenda is a foundation engaged in developing plans and measures to prevent climate change, its object is to stimulate and accelerate transition processes towards a more sustainable society, starting in the Netherlands. Urgenda instituted its claim pursuant to Article 3:305a of the Dutch Civil Code (DCC), which enables interest organisations to bring *class action* suits. Urgenda brought its claims forward on behalf of the current residents of the Netherlands who are being threatened with dangerous climate change. The

29 European Convention on Human Rights. Amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos 1, 4, 6, 7, 12 and 14.

court found that "since individuals who fall under the State's jurisdiction may rely on Articles 2 and 8 ECHR, which have direct effect in the Netherlands, Urgenda may also rely upon these provisions *on behalf of these individuals*, pursuant to Article 3:305a DCC"[30] (emphasis added). The Supreme Court noted that it was not disputed that Urgenda "has standing to pursue its claim to the extent it was acting on behalf of the *current generation* of Dutch nationals against the emission of greenhouse gases in Dutch territory".[31] (emphasis added) "[T]he current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced."[32]

To conclude, the Supreme Court found that Urgenda had legal standing and could legally represent the claim on behalf of residents in the Netherlands who are victims of a violation of their rights.[33] The court stated that

> *"after all, the interests of those residents are sufficiently similar and therefore lend*

30 Dutch civil law. (n.d.). Book 3, property law in general, Dutch Civil Law
31 See para. 2.3.2 in the Supreme Court's decision
32 See para. 5.5.1-5.5.3 and 5.9.2 in the Supreme Court's decision
33 See para. 5.9.2 in the Supreme Court's decision

> *themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. This is also in line with Article 9(3) in conjunction with Article 2(5) of the Aarhus Convention, which guarantees interest groups access to justice in order to challenge violations of environmental law, and in line with Article 13 ECHR."*[34]

Concluding Remarks

The Supreme Court found that Urgenda had legal standing and could legally represent the claim on behalf of residents in the Netherlands who are victims of a violation of their rights. Under Article 34 ECHR, the ECtHR may receive complaints from victims of a violation under ECHR. The Supreme Court found that the fact that Urgenda did not have the right to complain to the ECtHR on the basis of Article 34 ECHR, because it is not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, did not deprive Urgenda of the right to institute a claim under Dutch law in accordance with Article 3:305a DCC on behalf of residents who are in fact such victims.[35]

34 Convention on access to information, public participation in decision-making and access to justice in environmental matters (1998).
35 See para. 5.9.1-5.9.3 in the Supreme Court's decision

Key Issues

The Urgenda case

The key issues in the case were

(i) whether the Dutch State is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25 per cent compared to 1990, and

(ii) whether the courts can order the State to do so, in light of the principle of separation of powers and in light of the alleged court "order to create legislation".[36]

Urgenda sought a court order directing the State to reduce the emissions of greenhouse gases so that, by the end of 2020, those emissions will have been reduced by 40 per cent, or in any case by at least 25 per cent, compared to 1990. In 2015, the District Court allowed Urgenda's claim and ordered the State to reduce emissions by the end of 2020 by at least 25 per cent compared to 1990.[37] In 2018, the Court of Appeal confirmed the District Court's conclusion.[38] It can be noted that the Court of Appeal overruled the District Court's legal reasoning to find

36 See para. 8.1 in the Supreme Court's decision
37 See the decision of the Hague District Court: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196
38 See the decision of the Hague Court of Appeal: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610

State liability, *shifting* from liability on the basis of tort (pursuant to Art. 6:162 DCC) *to liability on the basis of human rights* (the ECHR).

The issues in the Supreme Court

The case was thereafter brought by the State to the Supreme Court for cassation proceedings. At cassation proceedings new findings are not given. The Supreme Court is in these proceedings bound by the Court of Appeal's findings of fact, and limits its examination to *the grounds* on which that appeal in cassation is based. The grounds are the reasons a litigant relies upon for the reversal of the disputed judgement. A judgment can be reversed if certain procedural requirements have not been met, or if the law has been violated.[39]

The question for the Supreme Court in the cassation was to determine

(i) whether the Court of Appeal properly applied the law, the main focus being on the substantive applicability of Articles 2 and 8 ECHR and political domain / the legislative order, and

(ii) whether the Court of Appeal's opinion was comprehensible and adequately substantiated.

39 See para 1.31-1.35 in the decision of the Advisory Opinion https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026

Dangerous Climate Change – Assessment of Scientific Evidence

First, the Supreme Court noted that Urgenda and the State both endorse the view of climate science that a genuine threat exists that the climate will undergo a dangerous change in the coming decades, and that this will pose the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. The court further noted that climate science and the international community largely agree on the premise that the warming of the earth must be limited to no more than 2 degrees C, and according to more recent insights to no more than 1,5 degrees C as prescribed in the Paris Agreement. The Netherlands is a party to the UNFCCC and to the Paris Agreement, and the State had acknowledged the facts stated in the case.[40]

Concluding remark

The State did not challenge the urgent need to take measures to reduce greenhouse gas emissions, but challenged that Articles 2 and 8 ECHR oblige it to take these measures and oblige it to ensure that the

40 See para. 4.-4.8 in the Supreme Court's decision and the Summary of the decision

volume of greenhouse gases being emitted at the end of 2020 is 25 per cent less than it was in 1990.[41]

Protection of Human Rights Based on the ECHR

The next question was whether Articles 2 and 8 of the ECHR can be applied on climate change claims.

The ECHR is a regional Convention with the objective to protect human rights and political freedoms in Europe, and has also established the European Court of Human Rights (ECtHR)[42]. All 47 Council of Europe member states are party to the ECHR. Any person who feels their rights have been violated under the Convention by a state party can take a case to the ECtHR.

According to the ECHR, the contracting states must secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR, which includes Articles 2 and 8 (see Section 1 "Rights and Freedoms" of the ECHR). Article 2 ECHR protects *the right to life*, and encompasses "a contracting state's positive obligation to take appropriate steps to safeguard the lives within their jurisdiction".

41 See para. 4.1-4.8 in the Supreme Court's decision

42 Convention for The Protection of Human Rights (1950), Section II article 19. Signed in Rome on 4 November 1950.

This obligation applies, according to ECtHR case law, *inter alia*, at hazardous industrial activities and natural disasters. The State is obliged to take appropriate steps if there is *a real and immediate risk*. The term "immediate" means that the risk in question is directly threatening the persons involved, and also regards risks that may only materialise in the longer term. Article 8 protects *the right to respect for private and family life*. This provision also relates to environmental issues. The Supreme Court refers to established ECtHR case law according to which states have "the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment". The court clarifies that the risk need not exist in the short term. This means that a contracting state is obliged to take suitable measures if a real and immediate risk to people's lives or welfare exists, and the state is aware of that risk.[43]

Furthermore, the Supreme Court makes the unprecedented interpretation based on the common-ground method that protection granted under Articles 2 and 8 ECHR is "not limited to specific persons, but *includes society or the population as a whole*" (emphasis added).[44]

43 See para. 5.2.2-5.2.3 in the Supreme Court's decision
44 See para. 5.3.1 in the Supreme Court's decision

The obligation to take appropriate measures also includes the duty for the states "to take *preventive measures* to counter danger, even if the materialisation of that danger is uncertain. This is consistent with the generally accepted *precautionary principle*," (emphasis added) and means that the states are obliged to take appropriate steps without having a margin of appreciation. The states have a discretion in choosing the steps to be taken, but these must be reasonable and suitable. There is a limitation in the liability, as Articles 2 and 8 ECHR "must *not result in* an impossible or under the given circumstances *disproportionate burden* being imposed on a state" (emphasis added). [45]

In its reasoning, the court refers to established ECtHR case law, according to which the provisions of ECHR must be interpreted and applied so that its safeguards are made practical and effective, the *effectiveness principle*. This follows from "the object and purpose of the Convention as an instrument for the protection of individual human beings". The treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the light of its objective and purpose (reference is made to the Vienna Conven-

45 See para. 5.3.2-5.3.4 in the Supreme Court's decision

tion on the law of Treaties[46]). An interpretation of provisions must also take into account the relevant rules of international law (referred to in the Vienna Convention) and be interpreted in harmony with the general principle of international law. Furthermore, an interpretation must also take the member states' application practice. The Supreme Court emphasised that "the relevant international instruments denote a continuous *evolution in the norms and principles* applied under international law or in the domestic law of the majority of member states" (emphasis added), and show that there is "*common ground* in modern societies" (emphasis added). Referring to ECtHR case law, the court states that at the interpretation and application of the ECHR, "scientific insights" and "generally accepted standards" must also be taken into account.[47]

It follows from the Dutch Constitution that in particular situations, Dutch courts must apply every provision of the ECHR that is binding on all persons (Articles 93 and 94)[48], and therefore Dutch courts must interpret those provisions as the ECtHR has, or interpret them based on the same interpretation standards used by ECtHR.[49]

46 Vienna Convention on the laws of Treaties (1969)
47 See para. 5.4.1-5.4.3 in the Supreme Court's decision
48 Government of the Netherlands (2008). "The constitution of the Kingdom of the Netherlands."
49 See para. 5.6.1 in the Supreme Court's decision

Concluding Remarks

The Supreme Court referred to the Court of Appeal's conclusion that there was "a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or disruption to family life". It was "clearly plausible that the current generation of Dutch nationals, in particular, but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced".[50]

The Supreme Court concludes that a contracting state is obliged to take suitable measures if *a real and immediate risk to people's lives or welfare* under Articles 2 and 8 ECHR exists, and the safeguards must be practical and effective. International instruments denote a *continuous evolution* in the norms and principles and take scientific insights and generally accepted standards into account. The protection granted under Articles 2 and 8 ECHR against dangerous climate change is not limited to specific persons, but *includes society or the population as a whole*.[51]

50 See para. 4.7 in the Supreme Court's decision
51 See para. 5.4.2 and 2.3.2 in the Supreme Court's decision

Global Problem and National Partial Responsibility of Individual States

The next question is then whether Articles 2 and 8 ECHR apply to the global problem of the danger of climate change. Could the global nature of the emissions, and the consequences thereof, mean that no protection can be derived from Articles 2 and 8 ECHR, such that those provisions impose no legal obligation on the State in this case?

There is a possibility for the highest courts to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR (Protocol No. 16 to the ECHR).[52] The Procurator-General's office suggested that the court would ask for such an opinion in its independent advice to the Supreme Court, noting that it would be of high value to receive guidance in this matter. However, the State requested that the Supreme Court make its decision before the end of 2019, and Urgenda agreed to this, considering that the time for the court's order is the end of 2020. The Dutch Supreme Court stated it considered the answer to this question sufficiently clear, and therefore

52 Convention on the Protection of Human Rights and Fundamental Freedoms, Strasburg, (6.10.2013), protocol No.16

answered the question itself and did not submit it to the ECtHR for an advisory opinion.[53]

The Supreme Court first noted that the risk of dangerous climate change is global in nature, and that the consequences of those emissions are also experienced around the world. The court continued stating that "[t]he Netherlands is party to the UNFCCC", and that "[t]he objective of that convention is to keep the concentration of greenhouse gases in the atmosphere to a level at which a disruption of the climate system through human action can be prevented".[54] The convention is based on the idea that climate change is a global problem that needs to be solved globally, and on the premise that all member countries must take measures to prevent climate change, in accordance with their specific responsibilities and options. Where emissions of greenhouse gases take place from the territories of all countries and all countries are affected, measures will have to be taken by all countries. As described above, Article 3(1) of the UNFCCC provides that the parties "should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities

53 See para. 5.6.4 in the Supreme Court's decision
54 See Summary of the Decision in the Supreme Court's decision

and respective capabilities", and Article 4 provides that all parties will take measures and develop policy in this area. It follows from these provisions that each state has an obligation to take the necessary measures in accordance with its specific responsibilities and possibilities.[55]

Furthermore, the court noted that at the annual climate conferences held on the basis of UNFCCC since 1992, the provisions of Articles 2, 3 and 4 have been further developed in various Conference of the parties (COP) decisions, based on the understanding that all countries will have to do what is necessary. This is also reiterated in the Paris Agreement. This understanding corresponds to the *no harm principle,* a generally accepted principle of international law, which implies that countries must not cause each other harm and is also referred to in the preamble to the UNFCCC. The Supreme Court finds that this approach "justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect".[56]

Furthermore, the Supreme Court finds that a country cannot escape its own share of the responsibility to take measures by arguing – as the State did – that compared to the rest of the world, its own

55 United Nations Framework Convention on Climate change (1992).
56 See para. 5.7.2-5.7.5 in the Supreme Court's decision

emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale, or that the State does not have to take responsibility because other countries do not comply with their partial responsibilities. The court finds that if these defences would be accepted this would mean "that a country could easily evade its partial responsibility by pointing out other countries or its own small share" and further emphasizes that "each reduction of greenhouse gas emissions has a positive effect on combating climate change, as every reduction means that more room remains in the carbon budget".[57] By choosing a conduct-based approach instead of a harm-based approach, the Court managed to remain within the territorial jurisdictional parameters of Article 1 ECHR.

Concluding Remarks

The Supreme Court concludes that each country is responsible for its own share, and that the Netherlands is obliged to do "its part" based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.[58] "This interpretation is in

57 See para. 5.7.7-5.7.8 in the Supreme Court's decision

58 The court also referred to inter alia the Draft Articles on Responsibility of States for Wrongful Acts, as proposed by the UN International Law Commission and adopted by the UN General Assembly, and the fact that many countries have corresponding rules in their liability system.

accordance with the standards [...] that the ECtHR applies when interpreting the ECHR, and which the Supreme Court must also apply when interpreting the ECHR".[59]

What Does the State's Obligation to Do "Its Part" Entail?

The Supreme Court noted that the answer belongs, in principle, to the political domain. However, according to the court, "the State cannot at any rate do nothing at all"[60]. Under Article 13 ECHR national authorities must provide effective legal protection for citizens. This means that Supreme Courts must examine "whether there are sufficient objective grounds from which a concrete standard can be derived in the case in question"[61]. Notably, in determining the State's minimum obligations, "the courts must observe restraint, especially if the rules or agreements involved are not binding in themselves".[62]

The Supreme Court found that the 25 - 40 per cent reduction in greenhouse gas emissions in 2020 com-

59 See para. 5.8 in the Supreme Court's decision
60 See para 6.3 in the Supreme Court's decision
61 See para 6.4 in the Supreme Court's decision
62 See para. 6.2-6.6 in the Supreme Court's decision

pared to 1990, which is based on the IPCC Fourth Assessment Report (AR4), formulated as a target for Annex I countries (i.e. the countries included in Annex 1 of the UN framework convention on climate change which includes all of the OECD countries and countries with an economy in transition)[63], represents a corresponding obligation for the State.[64] The target is not a binding rule or agreement in and of itself. There is, however, a *high degree of consensus* in the international community *on the urgent need* for Annex I countries to *reduce greenhouse gas emissions by 25-40 per cent by 2020* compared to 1990 levels, in order to achieve at least the two-degree target, which is that maximum target to be deemed responsible. The court finds that "[t]his high degree of consensus can be regarded as *common ground* within the meaning of the ECtHR case law referred to" by the Supreme Court, "which according to that case law must be taken into account when interpreting and applying the ECHR" (emphasis added). [65]

The Dutch State contended that the 25 per cent reduction order was unjustified because the State acted in line with EU-directives and was therefore not allowed to do more than the set 20 per cent tar-

63 IPCC (2007) "Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change"

64 See para. 7.2.7 in the Supreme Court's decision

65 See para. 7.2.11 and 7.5.1 in the Supreme Court's decision

get. However, the Supreme Court found that agreements on EU level are without the prejudice to the individual responsibility of the EU member states by any other virtue.[66] The State used the agreements on EU level as an argument to counter-argue the 25 per cent reductions claim from Urgenda.[67]

According to the EU Effort Sharing Decision (ESD), which regulates the EU member states individual mitigation targets for 2020, the Netherlands has an obligation to reduce its emissions of greenhouse gases by 2020 with 16 per cent.[68] The ESD states that the decision does not preclude more stringent national objectives (see consideration 17 of the preamble). This follows also from Article 193 the Treaty of the Functioning of the European Union.[69] The Supreme Court also noted that the EU itself deemed a reduction of more than 20 percent for 2020 necessary to prevent dangerous climate change, and that the EU as a whole is expected to

66 See para. 73.1, 7.3.3 and 7.3.6 in the Supreme Court's decision

67 The State furthermore argued that the requested decision falls outside the jurisdiction of the court, and instead would fall solely within the political domain, which is best suited to make a proper assessment of conflicting interests. The State argued that "[t]here is no absolute need to reduce emissions by 25 to 40% by end-2020. The State's scope for policymaking includes, after considering all interests involved, such as those of the industry, finances, energy-provision, healthcare, education and defence, to choose the most appropriate reduction path. This is a political question, the trias politica (principle of separation of powers) prohibits judges from making such decisions." (See para. 30 in the Hague Court of Appeal's decision)

68 European Union (2009) "Decision No 406/2009/EC of the European Parliament and of the council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020"

69 The Treaty on the Functioning of the European Union, consolidated version (2012).

achieve a reduction of 26-27 per cent, much higher than the agreed 20 per cent. The court also took into account that other EU countries pursue much stricter climate policies, and specifically that the Netherlands is one of the countries with very high per capita emissions of greenhouse gases. The Supreme Court concluded that the Court of Appeal therefore rightly ruled that the urgent need for a "25-40 per cent reduction by 2020" also "applies to the Netherlands individually". The Supreme Court regarded this target as an absolute minimum.[70]

It can be noted that up to 2011, the State's policy was aimed at achieving an emissions reduction in 2020 of 30 per cent compared to 1990.[71] After 2011, however, the State lowered its reduction target for 2020 to a 20 per cent reduction, the same reduction target that the EU as a whole agreed to.[72] The Supreme Court notes that the State did not explain why. After the reduction in 2020, the State informed that it intends to accelerate the reduction to 49 per cent in 2030 and 95 per cent in 2050. As the State has not been able to provide a proper substantiation

70 See para. 7.3.1, 7.3.3-7.3.4 and 7.3.6 in the Supreme Court's decision

71 In a letter dated 12 October 2009 the Minister of Housing, Spatial Planning and the Environment informed the House of Representatives about the Dutch objectives in the negotiations in Copenhagen (COP 15): "The total of emission reductions proposed by the developed countries so far is insufficient to achieve the 25-40% reduction in 2020, which is necessary to stay on a credible track to keep the 2 degrees objective within reach.

72 The EU had first discussed a target for reducing emissions by 2020 by 30 per cent, but subsequently decided on a reduction target of 20 per cent in the Effort Sharing Decision, as other countries did not meet up on the higher target proposed by the EU.

of its claim that deviating from that target is nevertheless responsible, it must adhere to the target of 25 per cent. The Supreme Court also noted that the State has "*not* sufficiently *substantiated* that the reduction of at least 25 per cent by 2020 is an *impossible or disproportionate burden*" (emphasis added). Furthermore, the court took into account that "the District Court's order to the State dates back to 2015, i.e. has been in force since then, and that the State has moreover been aware of the seriousness of the climate problem for some time, and initially pursued a policy aimed at 30 per cent reduction by 2020".[73]

Concluding Remarks

The Supreme Court concluded that "there is a large degree of consensus in the international community and climate science that at least a reduction of 25-40 per cent by 2020 by the Annex I countries, including the Netherlands, is urgently needed" and that the State has not substantiated that such a reduction would provide an impossible or disproportionate burden. This degree of consensus can be regarded as common ground which must be taken into account under ECtHR case law. "Proper legal protection means that this consensus can be invoked when

73 See para. 7.4.1-7.5.3 in the Supreme Court's decision

implementing the positive obligations incumbent on the State pursuant to Articles 2 and 8 ECHR." The policy that the State has pursued since 2011 and intends to pursue in the future, whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this. At least the State has failed to make it clear that its policy is in fact in accordance with the above.[74]

The Courts and the Political Domain

One legal question which has been widely debated in the context of climate litigation, is to what extent climate policy belongs to the *political domain*, and whether courts can decide on issues related to climate change without stepping into the political domain.

The State asserted that it is not for the Supreme Court to undertake the political considerations necessary for a decision on the reduction of greenhouse-gas emissions, and argued that a court order to reduce Dutch greenhouse gas emissions by at least 25 per cent in 2020 compared 1990 levels, is impermissible for two reasons:

74 See para. 7.4.6 and 7.5.1 and the Summary in the Supreme Court's decision

(i) the ordinance amounts to an order to create legislation, which according to the Supreme Court is not permissible, and

(ii) it is not for the courts to make the political considerations necessary for a decision on the reduction for greenhouse-gas emissions.[75]

The Supreme Court found that the State has a legal duty on the basis of Articles 2 and 8 ECHR in order to provide the residents of the Netherlands *protection of* their *right to life* and their *right to private and family life*. In the Dutch system of government, the decision-making on greenhouse-gas emissions belongs to the Government and Parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is, however, up to the courts to decide whether, in taking their decisions, "the government and parliament have *remained within the limits of the law* by which they are bound" (emphasis added). Those limits can be derived from the ECHR, among other things. The Dutch Constitution requires Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions.[76]

75 See para 8.1, 8.2.1-8.3.5 in the Supreme Court's decision

76 See the Summary of the Supreme Court's decision and para. 8.1-8.3.5 in the Supreme Court's decision

Concluding Remarks

The Supreme Court found that the courts have a mandate to offer *legal protection*, even against the Government, is an *essential component of a democratic state under the rule of law*. The order leaves it up to the State to determine which specific measures it will take to comply with that order.[77]

The Supreme Court's Conclusion

The Supreme Court concluded the following:

> *"In short, the essence of the Supreme Court's judgment is that the order which the District Court issued to the State, which was confirmed by the Court of Appeal, directing the State to reduce greenhouse gases by the end of 2020 by at least 25 per cent compared to 1990, will be allowed to stand. Pursuant to Articles 2 and 8 ECHR, the Court of Appeal can and may conclude that the State is obliged to achieve that reduction, due to the risk of dangerous climate change that could have serious impact on the lives and welfare of the residents of the Netherlands."*[78]

77 See the Summary of the Supreme Court's decision and para. 8.3.3-8.3.5 in the Supreme Court's decision

78 See the Summary of the Supreme Court's decision

Another high-profile climate litigation is the case concerning the planned expansion of Heathrow airport's runways, where the Court of Appeal of England and Wales (the Court of Appeal) issued a landmark judgement on 27 February, 2020. The case was brought by Plan B Earth[79] against the Secretary of State for Transport (the Secretary of State), which was decided by the Court of Appeal. It should be noted, however, that it concerns a case in which the court was limited to *procedural judicial review* of one major infrastructure project decision. The court decided on procedural grounds that the decision was *not rightfully produced* as the Minister had failed to take into account the recently adopted Paris Agreement. Notably, the decision does not exclude that a new decision is taken with the same result, provided that the correct procedure is applied.

The case has not yet been finally settled. The Supreme Court in May 2020 has given permission for an appeal by Heathrow to go ahead.[80] The State has announced that it will not appeal the decision.

79 Plan B Earth official website (n.d) "About Plan B Earth" https://planb.earth/about/
80 The Supreme Court (2020). "Permission to appeal decisions".

Chapter 3

Plan B Earth & others vs. the Secretary of State for Transport – Heathrow

Summary of the Judgement

The case concerns the disputed third runway at Heathrow airport. The project was ruled unlawful by the Court of Appeal at judicial review, as the Paris Agreement had not been taken into account at the preparation of the 2018 "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" (ANPS) designated by the Secretary of State under section 5 of the UK Planning Act 2008. The case did not challenge the climate policy of the Government but

judicially reviewed the legality of a specific infrastructure project decision.[81]

The Court of Appeal found that the ANPS was not produced as the law requires as the Government, when it published the ANPS, had not taken into account its policy commitments on climate change under the Paris Agreement. The court stated this was legally fatal to the ANPS in its present form, and that it will not permit unlawful action by a public body to stand. The court concluded that the appropriate remedy is a declaration, the effect of which will be to declare the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the relevant statutory provisions of the Planning Act.[82]

The Court of Appeal emphasised that it "has not decided, and could not decide, that there will be no third runway at Heathrow." It continued that "the consequence of our decision is that the Government will have the opportunity to reconsider the ANPS in accordance with the statutory requirements that Parliament has imposed".[83]

Though the case is far more judicially conservative than the Urgenda case, it is argued by members

81 Heyvaert (2020). "Beware of populist narratives: The importance of getting the Heathrow ruling right".
82 See para.280 in the Court of Appeal's decision.
83 See para.285 in the Court of Appeal's decision

of the Friends of the Earth campaign group that the judgement has "exciting wider implications for keeping climate change at the heart of all planning decisions", and also that "it is time for developers and public authorities to be held to account when it comes to the climate impact of their damaging developments".[84]

Background

As stated in the introduction of the Court of Appeal's decision, Heathrow is a major international airport, the busiest in Europe and the busiest in the world with two runways.[85] It has been argued that the aviation capacity of Heathrow, if the UK is to maintain its status as a leading aviation "hub", must increase. The question was if this increase in capacity should be supported in national policy, and in particular whether it should involve the construction of a third runway at Heathrow. This has been a matter of political debate and controversy, based on environmental concerns and the global effort to combat climate change. The case involved judicial review proceedings based on an appeal of the decision of

84 Espiner (2020). "Climate campaigners win Heathrow expansion case".
85 See introduction in the Court of Appeal's decision.

the Divisional Court brought by Plan B Earth.[86]

The claim – one of originally five claims versus the Secretary of State for Transport as defendant – with (1) Heathrow Airport Ltd. (HAL) and (2) Arora Holdings Ltd. (Arora) as interested parties, was brought by the claimant NGO Plan B Earth.[87] Plan B Earth is a not-for-profit organisation which has been established to support strategic legal action against climate change.[88] HAL is the airport operator at Heathrow, and is promoting a scheme for the third runway, and Arora represented a group of companies that own land within the boundary of that development and intends to build and operate the new terminal.

In its judgement, the Court of Appeal agreed with the Divisional Court on most issues. The court found, however, that the challenges should succeed in one respect, the claim brought by Planet Earth B, and found that in one important aspect the ANPS was not produced as the law requires and as Parliament has expressly provided.

86 Ibid.

87 The case deals with several challenges brought by a number of local authorities, the Mayor of London, Greenpeace Ltd., Friends of the Earth Ltd, and Plan B Earth against the decision of the Divisional concerning the planning aspects of the ANPS and its process. See para 4-9 in the Court of Appeal's decision

88 Plan B Earth is a Charitable Incorporated Organisation (CIO) registered with UK Charity Commissioners

Judicial Review of a Planning Decision

The case in the Court of Appeal concerned *judicial review*. The Court of Appeal emphasised the long-established *limits of the court's role* when exercising its jurisdiction in claims for judicial review. The proceedings did not face the court with the task of deciding whether and how Heathrow should be expanded. This is not the kind of decision that the court can make, but is ultimately a political question for the Government. The only question that the court was required to determine was whether the Divisional Court was wrong to conclude that the ANPS was *produced lawfully*. The court concluded that this is an entirely legal question which does not touch the substance of the policy embodied in the ANPS.[89]

89 See para. 2, 135-137, 281-284 in the Court of Appeal's decision

Did the Commitment to the Paris Agreement Constitute Government Policy?

National policy statements are the statements of national planning policy for "nationally significant infrastructure projects" in England and Wales under the Planning Act. The Planning Act specifies the procedural steps that must be undertaken before a national policy statement can be formally "designated" by the Secretary of State. It also obliges the Secretary of State, when determining an application for development consent, to have regard to any relevant national policy statement. Section 5(8) of the Planning Act provides that ....

> "(8) *The reasons must* (*in particular*) *include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change* [...]"[90]

It was agreed between the parties in the case that the Secretary of State did not take the Paris Agreement into account in the course of making his

90 See para. 37-38 in the Court of Appeal's decision

decision to designate the ANPS.[91] The question that was raised in the case was whether the Paris Agreement constituted such governmental policy which the Secretary of State was under a legal obligation to take into account. The Committee on Climate Change has said in a report of October 2016 that

> *"We welcome the Government's commitment to ratifying the Paris Agreement by the end of the year. The clear intention of the Agreement is that effort should increase over time. While relatively ambitious, the UK's current emissions targets are not aimed at limiting global temperature to as low a level as in the Agreement, nor did they stretch as far into the future." (the Court of Appeal's emphasis)*[92]

The Court of Appeal refers to several statements by the Government, from the UK's ratification of the agreement in November 2016, as well as the fact that there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers. It concludes that it is clear that it was the Government's expressly stated policy that it was committed to adhering to the Paris Agreement

91 See para. 233 in the Court of Appeal's decision
92 See para. 204-206 in the Court of Appeal's decision

to limit the rise in global temperature to well below 2° C and to pursue efforts to limit it to 1,5° C. In the view of the court, the Government's commitment to the Paris Agreement was clearly part of "Government policy" by the time of the designation of the ANPS. The court noted that the executive (the Government) must comply with the will of Parliament.[93]

According to section 5(8) of the Planning Act, the ANPS should explain how the Secretary of State has "taken into account" government policy. The Court of Appeal found that this means that the Secretary of State must first have taken that government policy into account. The court emphasized that "[t]his is an important act of transparency of the Secretary of State's actions and his accountability, both to Parliament and to the wider public." The court continued to explain that the words "Government policy" are words of ordinary English language, that they do not have any specific technical meaning, and that the concept of policy is necessarily broader than legislation. Though the wording does not require the Secretary of State to act in accordance with any particular policy, it does require him to take that policy into account and explain how it has been taken into account. This was not done in the present case.[94]

93 See para. 222 and 228-229 in the Court of Appeal's decision
94 See para 223-224, 226 and 231 in the Court of Appeal's decision

Concluding Remarks

The court of Appeal found that requiring the Government to comply with what has been enacted by Parliament (the obligations in section 5(8) of the Planning Act)[95] is an entirely conventional exercise of public law. This duty does "not require the executive to conform to its own policy commitments". It simply requires it to "take them into account and explain how it has done so".[96] The court concluded that the Secretary of State consciously chose – on advice – not to take the Paris Agreement into account. The Paris Agreement was, according to the court, obviously relevant to the case.[97]

Should the Court Grant Relief?

In a claim for judicial review, the court has a discretion *whether to grant any remedy*, even if a ground of challenge succeeds on its substance. Generally speaking, it needs to be highly likely that the outcome would not have been "substantially different" for the claimant. Also, the court can grant a remedy

95 UK Public General Acts, Housing and Planning Act 2016, Section 5, Paragraph 8
96 See para 226 and 230-231 in the Court of Appeal's decision
97 See para 226, 233, and 238 in the Court of Appeal's decision

on grounds of "exceptional public interest". There is a high threshold for judicial review, and courts should be cautious about assessing the merits of a public decision challenged through judicial review, as Parliament has not altered the fundamental relationship between the courts and the executive. On the other hand, courts should not lose sight of their fundamental function, which is to maintain the rule of law.[98]

First, the Court of Appeal found it "impossible to conclude that it is "highly likely" that the ANPS would not have been "substantially different" if the Secretary of State had performed his task in accordance with law". Secondly, and in any event, the court found that this was such a case in which it would be right for the court to grant a remedy on grounds of "exceptional public interest" as the Heathrow infrastructure project

> *"is one of the largest. Both the development itself and its effects will last well into the second half of this century. The issue of climate change is a matter of profound national and international importance of great concern to the public – and, indeed, to the Government*

98 See para 272-273 in the Court of Appeal's decision

of the United Kingdom and many other national governments, as is demonstrated by their commitment to the Paris Agreement".[99]

Concluding Remarks

The Court of Appeal determined that regardless of the expected outcome of reconsideration of the ANPS with the Paris Agreement, the case is considered to be of "exceptional public interest". This is an explicit recognition regarding the climate change risks humanity is facing, and of the fact that the Paris Agreement is not to be left out of consideration. Thus, appropriate relief must be granted in the case, to ensure that the ANPS does not remain effective in its present unlawful form. The appropriate form of relief was to "declare the designation decision unlawful" and to "prevent the ANPS from having any legal effect" unless and until the Secretary of State decides to conduct a review of it in accordance with the judgement of the court. The initiation, scope and timescale of any review would be a matter for the Secretary of State to decide.[100]

99 See para 276-277 in the Court of Appeal's decision
100 See para 277-278, 280, 284-285 in the Court of Appeal's decision

The Conclusion of the Court of Appeal

In its conclusion the Court of Appeal emphasised the limits of its role at claims for judicial review. The court determined only "whether the Divisional Court was wrong to conclude that the ANPS was produced lawfully". It did not touch the substance of the policy embodied in the ANPS, nor "the merits of expanding Heathrow by adding a third runway, or of any alternative project, or of doing nothing at all to increase the United Kingdom's aviation capacity. Those matters are the Government's responsibility, and the Government's alone". However, the court found that "in one important respect *the ANPS was not produced as the law requires*" (emphasis added), ... "as the Government, when it published the ANPS, had not taken into account its own policy commitments on climate change under the Paris Agreement." The court found that this was "*legally fatal to the ANPS in its present form*" (emphasis added). The result for judicial review is that the Supreme Court will not permit unlawful action by a public body to stand.[101]

The Court of Appeal specifically noted that it has "not decided, and could not decide, that there will be no third runway at Heathrow", nor "that a

101 See para 281-284 in the Court of Appeal's decision

national policy statement supporting the project is necessarily incompatible with the United Kingdom's commitment[s]" ... "under the Paris Agreement, or with any other policy the Government may adopt or international obligation it may undertake". The court further concluded that "the consequence of our decision is that the Government will have the opportunity to reconsider the ANPS in accordance with the clear statutory requirements that Parliament has imposed".[102]

Chapter 4

Shareholders/ ClientEarth vs. corporations – Enea SA

ClientEarth, an environmental NGO and shareholder in the Polish utility Enea SA, sued the company, seeking invalidation of a resolution consenting to construction of the 1 GW Ostrołęka C coal-fired power plant. The plant was to be jointly sponsored by Enea[103] and Energa[104], both state-controlled utilities.[105]

In September 2018, ClientEarth wrote to Enea, stating that it regarded "the proposed resolution, and the Management Board's proposal of that resolution, as clearly and obviously harmful to the interests of Enea and its shareholders" and warned that Enea's ongoing actions in relation to the plant "risk

103 Enea Official Website (n.d.) "History Group" https://www.enea.pl/en/history-group
104 Energa Official Website (n.d.) "Grupa Energa" https://grupa.energa.pl/
105 ClientEarth (2018). "ClientEarth v Enea".

breaching board members' fiduciary duties of due diligence and to act in the best interest of the company and its shareholders." The claim was filed in October 2018 to the Regional court of Poznan under the Polish Commercial Companies Code.[106]

In August 2019, the Regional Court decided in ClientEarth's favour and ruled Enea SA's plan to participate in the construction of a new coal-fired plant invalid.[107] ClientEarth applauded the decision, stating that "the plant is a stranded asset in the making, facing clear and well-documented financial risks".[108] ClientEarth won a separate decision in November 2019 that demanded the company publish documents that would explain how the plant would be profitable. The company had not provided these documents, nor an explanation of where the necessary extra funding would come from.[109]

In February 2020, Enea and Energa announced that the funding would be pulled from the Ostrołęka coal-fired plant due to changing market circumstances triggered by climate policy, and the continued flight of global capital away from coal. Energa and Enea have allegedly between them written off €1 billion of sunk construction costs in the coal

106 Ibid.
107 Barteczko (2019). "Polish court ruling undermines Poland's last coal power plant plan".
108 Rack (2019). "Polish court strikes down Polenergia's 1,600-MW coal project"
109 ClientEarth (2020). "Climate victory: Companies put Poland's last new coal plant on ice".

fired project.[110] Environmental lawyers have hailed "the end for new coal" in the EU as the two Polish utilities announce they will suspend funding to the country's last planned new coal plant over economic concerns[111].

It can be noted that Poland's largest energy firm, PKN Orlen, has since taken over the majority of the shares of Energa. PKN Orlen announced in June 2020 that it has co-signed a new agreement with its subsidiary Energa, formalising a deal with Enea to continue the Ostrołęka C power plant construction plan in northern Poland, moving to gas-fired instead of coal-fired generation[112]. According to Orlen, the average emissions of CO_2 per unit of energy produced from burning gas are half of those produced from burning coal[113]. ClientEarth lawyer Peter Barnett said: "All energy providers must think extraordinarily carefully about their future investment decisions. Regulation and market forces have rarely changed so fast and, as we've seen with Ostrołęka C, companies cannot bank on finance for fossil fuels in today's climate"[114].

110 Poland In (2020). "Orlen, energy firms sign deal resurrecting power plant project"
111 ClientEarth (2020). "Climate victory: Companies put Poland's last new coal plant on ice".
112 Enea, which was an equal partner in the Elektrownia Ostrołęka project was said to become a minority shareholder in the project. Orlen's chairman Daniel Obajtek, fresh from the takeover of an 80 percent share of electricity firm Energa, said they would only support the project if the plant was gas powered.
113 Poland In (2020). "Orlen, energy firms sign deal resurrecting power plant project".
114 ClientEarth (2020). "Climate victory: Companies put Poland's last new coal plant on ice".

Chapter 5

Individual citizens vs corporations – Lliuya vs RWE

The last case to be discussed, which is of relevance for this paper's upcoming discussion, concerns a Peruvian farmer, Saúl Luciano Lliuya, contending that German electric utility company Rheinisch-Westfälisches Elektrizitätswerk (RWE) should be held liable for 0.47 per cent of the costs of flood protections that needed to be installed in Mr. Lliuya's home city of Huaraz, following the melting of a glacier due to rising temperatures – the equivalent proportion to RWE's historic responsibility for total greenhouse-gas emissions. The case is pending in the Higher Regional Court of Hamm, which has made a request to the State of Peru to be allowed to inspect the premises that are subject to the lawsuit. The Court is at present awaiting response from the competent authorities, which can take quite some

time to process.[115]

Mr. Lliuya filed a civil lawsuit claiming for damages, which was classified by the District Court Essen as "a legal matter with fundamental significance" in November 2015. However, in December 2016 the District Court Essen dismissed the lawsuit against RWE due to lack of causation between RWE AG's emissions and the threat to Mr. Lliuya's property. He filed an appeal before the Higher Regional Court Hamm (the court of Appeal) against the ruling of the Regional Court Essen. The Court of Appeal announced its decision to take evidence to determine whether causation could be established in November 2017.[116] The Court of Appeal was thereby writing legal history.

The Court of Appeal found that climate damages can give rise to corporate liability and decided to appoint experts for the case. In September 2018 experts selected by the Court of Appeal accepted their appointment.[117] The experts are to provide an opinion on the question whether or not there is a serious threat of impairment of the plaintiff's property. If this question is answered positively, there will be taking of evidence with regards to the

115 Essen Regional Court, Lliuya versus RWE AG, 2015, case number: 20 285/15.
116 Higher regional court of Hamm, (2018). "Order of the Regional Court of Hamm in the case of Mr Saul Ananias Luciano Lliuya, Provincia de Huaraz, Peru, Plaintiff/ Appellant"
117 Aird Berlis & Aird McBurney (2019) "Climate Change Litigation: Actions Against Corporations".

defendant's part of responsibility for this impairment due to RWE's CO_2 emissions.

On the recommendation of the experts, the Court of Appeal has made a request to the State of Peru to be allowed to inspect the premises that are the subject of the lawsuit. The Court is awaiting response from the competent authorities, which can take quite some time to process. The final outcome of the case remains to be determined.[118]

The cases against corporates struggled to prove a causal link between the actions of corporations and climate impacts. However, a paper by Richard Heede in 2014, the so-called "Carbon Major's Report", was a breakthrough in overcoming this challenge[119]. The paper identified the top 90 corporations collectively responsible for 63 per cent of global emissions since the Industrial Revolution, i.e. the "carbon majors"[120]. It can also be noted that Richard Heede's Carbon Major's Report formed the basis of a petition filed with the Philippines' Commission on Human Rights that sought to establish liability against 47 major-emitting corporations for their role in contributing to severe typhoons in the Philippines.[121]

118 Byrnes (2019). "Will Companies Be Held Liable for Climate Change?".
119 Byrnes (2019). "Will Companies Be Held Liable for Climate Change?".
120 Heede (2014). "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers".
121 Greenpeace Philippines (2019). "First-ever finding on corporate responsibility for climate crisis issued by CHR; Groups hail landmark climate justice victory for communities".

Discussion and Conclusions

Climate change litigation raises novel issues and there are challenges to pursuing climate litigation.[122] Above, four different European climate litigation examples have been identified, analysed and discussed, as well as the response of European domestic courts to the issues presented in the cases. The discussion below will refer to the effect of these climate cases going forward, focusing on understanding how climate litigation can (i) force Governments to take action against climate change and increase mitigation efforts, and (ii) impact the market and businesses, and also the decisions of individual corporations.

122 Clifford chance (2019). "Climate change litigation, tackling climate change through the courts".

How can climate litigation force Governments to take action against climate change and increase mitigation efforts?

Some general conclusions can be drawn especially from the Urgenda case. The conclusions from the Heathrow case are more limited due to the limited scope of the issue and the fact that the decision was based on national planning law.

The separation of powers – the courts and the political domain

One of the most debated questions in climate litigation – and a barrier to climate litigation against Governments – has been the line between *the political domain* and *the judiciary*. Traditionally, it has been said to be the task of the Government to decide on issues related to climate policy. Courts have generally found that climate change is a political or global policy issue and therefore not appropriate to address in a lawsuit.[123]

One main reason that the Urgenda decision of the Supreme Court is so groundbreaking, is that it clearly states that the courts have not only a right but also an obligation to provide *legal protection* to its citizens against dangerous climate change, also

123 Ibid

against the Government. The court finds that this is an essential component of a democratic state under *the rule of law*. It is then within the political domain, and up to the Government, to decide what specific measures to take.

In this respect, the Urgenda decision is a landmark case.

Common ground on climate science and the threat of dangerous climate change

Climate science is becoming generally accepted among the world community. In the Urgenda case, the Supreme Court finds that there is such a high degree of consensus in the international community and *climate science* on the urgent need to reduce greenhouse gas emissions that this can be considered "common ground". It is the view of climate science that *a genuine threat exists* that the climate will undergo dangerous climate change in the coming decades, and this view is being embraced by courts.

Furthermore, another conclusion from the Urgenda decision is that each country is responsible for "its share" and that the Netherlands is obliged to do "its part", based on Articles 2 and 8 ECHR.[124] The

124 The court also referred to inter alia the Draft Articles on Responsibility of States for Wrongful Acts (2001), as proposed by the UN International Law Commission and adopted by the UN General Assembly, and the fact that many countries have corresponding rules in their liability system.

Supreme Court finds that this degree of consensus also can be regarded as *common ground* which must be taken into account under ECtHR case law.

Enforcement of increased mitigation based on human rights

Another groundbreaking conclusion by the court that makes the judgement in the Urgenda case the most far reaching climate case so far, is that it *orders the Government* to *increase its mitigation efforts* based on *human rights*. Articles 2 and 8 ECHR, which protect *the right to life and the right to respect for private and family life*, apply on climate change. The court concludes that a contracting state is obliged to take suitable measures if *a real and immediate risk* to people's lives or welfare under Articles 2 and 8 ECHR exists, and the safeguards must be practical and effective. Furthermore, the protection granted under Articles 2 and 8 ECHR against dangerous climate change is not limited to specific persons, but *includes society or the population as a whole*.

The court refers to the *continuous evolution* in the norms and principles in international instruments and takes scientific insights and generally accepted standards into account. The ECtHR's case-law has not dealt with the general dangers of environmental degradation. Thus, this conclusion of the Supreme

Court is unprecedented with regard to the scope of the issue discussed (climate change).

This conclusion is groundbreaking as it shows that legislated state ambition can be challenged based on human rights.[125]

The effect of the Urgenda decision on human rights issues

The Dutch Supreme Court recognized that ECHR has direct effect in courts of the contracting parties. This implies that the regulations in the ECHR might be applied by European national courts which are contracting parties to the ECHR. The Dutch Supreme Court also largely refers to general international principles in its decision.

As the provisions of the ECHR generally apply in all European countries, and as reference is made to international legal principles, the Urgenda case could be generally applicable, and Governments can increasingly expect to be held liable for their climate policies. However, an Advisory Opinion from the ECtHR would have been of great interest as that could have provided an authoritative precedent for future human rights-based climate change litigation throughout Europe. It could have given (even) more authority to the ruling as well.

125 Bouwer & Setzer (2020). "New trends in Climate Litigation: What works?"

Notably, though, as described above, the views expressed in the Urgenda case have been referred to by the President of the ECtHR. Linos-Alexandre Sicilianos noted that the Supreme Court has relied explicitly on the ECHR and the case law of the ECtHR. Referring to the Urgenda decision and the recent case law of the ECtHR, Sicilianos noted that the "evolutive interpretation method" used by courts "has allowed the text of the Convention to be adopted to "present day conditions", without any need for formal amendments to the treaty",[126] and that the Dutch judges have highlighted that the ECHR can provide genuine responses to the problems of our time. Furthermore, he noted that this mode of interpretation has also been confirmed on several occasions by the case law of the International Court of Justice, and that the respective courts ensured the performance of the Convention, since it is still incredibly modern in 2020.[127]

It can also be added that already in January 2019, Laurent Fabius, President of the French Constitutional Council, in a speech at the solemn hearing of the ECtHR raised "the theme of the climate and, more broadly, the environment, which, as we all are aware, threatens the survival of humanity itself".

126 Linos-Alexandre Sicilianos, speech, Strasbourg (2020).
127 Linos-Alexandre Sicilianos, speech, Strasbourg (2020).

He asked what the role of the courts as guardians of fundamental rights is, and claimed that "[i]n protecting the environment, we are also protecting human rights, namely the rights to health, safety and, beyond these, human dignity". He continued: "As environmental threats worsen and certain politicians demonstrate a lack of ambition, we can all sense that human rights litigation as applied to the environment will grow in importance, making courts, even more than they are at present, major players in the construction of environmental justice."[128]

A general observation is that it seems like the political and legal establishment is growing more receptive to human rights-arguments concerning climate change.[129] There is also a strong will to replicate the Urgenda decision. So far, however, these attempts have been largely unsuccessful, which can be due to difficult prospects and arguments that are not convincing enough.[130]

Access to justice

One barrier to climate litigation has been that clai-

128 Laurent Fabius, speech, Strasbourg (2019).
129 Collins (2020). "Climate Change Litigation and Civil Society".
130 Bouwer & Setzer (2020). "New trends in Climate Litigation: What works?". See also inter alia Greenpeace Nordic and Natur og Ungdom vs Norway, Push Sweden and Fältbiologerna vs the Government of Sweden (the Magnolia case), Union of Swiss Senior Women for Climate Protection vs the Swiss Federal Council and Others and Friends of the Irish Environment vs the Government of Ireland, Ireland and the Attorney General

mants must be able to demonstrate standing. An issue in most climate cases has been the claim that there is an inadequate interest in the outcome of the action at issue which can be an obstacle to pursuing a claim.[131]

In the Urgenda case, the Supreme Court found that Urgenda had *legal standing* pursuant to *national legal regulations*, namely Article 3:305a DCC through a class action and could legally represent the claim on behalf of residents in the Netherlands who are victims of a violation of their rights. This conclusion on standing is unique to the Dutch legal system, and that standing in a class action thus depends on the respective states' domestic laws.[132]

It should be noted though, that pursuant to Article 13 ECHR, national law must offer *an effective legal remedy* before a national authority at possible violations of the rights and freedoms under Articles 2 and 8 of the ECHR. This means that the national courts must be able to provide effective legal protection from. Notably, the Aarhus Convention (which the Supreme Court also mentioned) guarantees interest groups access to justice in order to challenge

131 Clifford chance (2019). "Climate change litigation, tackling climate change through the courts".

132 It can be noted that in the Urgenda-inspired Norwegian case of Greenpeace Nordic Association and Natur og Ungdom v. the Government of Norway, for example, this was pointed out by the Oslo Court of Appeal as Norwegian law only allows standing if a 'concrete and identifiable victim'-requirement has been fulfilled

violations under environmental law. This means that other countries also need to have similar legal regulations in place granting interest groups a right to access to justice. It is likely that we will see these issues play out in future climate change litigation and that some clarity will be developed, at least on a national or a regional basis, about how they should be addressed.[133]

The effect of the commitment to the Paris Agreement

This Heathrow case concerned judicial review of a procedural issue concerning an infrastructure project under national law. The case therefore has a much more limited scope than the Urgenda decision, and the outcome is vulnerable as the case is limited to a procedural issue and can be repeated. The Government can simply abide by a lawful procedure to reach the same outcome.[134]

There are, however, some important conclusions that can be drawn from the outcome.

Notably, the Court of Appeal concluded that the Paris Agreement is part of the Government policy, as it had been approved by the Parliament and Gov-

133 Clifford chance (2019). "Climate change litigation, tackling climate change through the courts".
134 Bouwer & Setzer (2020). "New trends in Climate Litigation: What works?".

ernment.[135] This means that the UK Government could not ignore the Paris Agreement, but had to take it into account when arriving at the decision on ANPS. However, the Government was *not obliged to act* in accordance with the Paris Agreement or to *reach any particular outcome* based on the agreement. The only legal obligation of the Secretary of State was *to take the Paris Agreement into account* as part of Government policy when arriving at his decision. He was not obliged to act in accordance with the Paris Agreement or to reach any particular outcome (see the reasoning above on the separation of powers). Taking into account the Paris Agreement means, according to the court, also *explaining how* the agreement had been taken into account. [136] Though the outcome of the decision is limited, it could add to additional *transparency on climate issues at decision making*.

Another important conclusion is that the Court of Appeal determined that regardless of the expected outcome of reconsideration of the ANPS with the Paris Agreement, the case is considered to be of "exceptional public interest". [137] This is an *explicit recognition* regarding the climate change

135 See para 222 in the Court of Appeal's decision
136 See para 226, 229 and 238 in the Court of Appeal's decision
137 See para 277 in the Court of Appeal's decision

risks humanity is facing, and of the fact that the Paris Agreement is not to be left out of consideration This is a recognition of the weight an environmental law document can have in current and future State decision-making. As noted above, the decision has not been finally decided yet.

How can climate litigation impact the market and businesses, and also the decisions of individual corporations?

As demonstrated by the Enea and Lliuya cases, corporations are also facing the risk of becoming involved in climate litigation. The claims are different and may include a number of different procedures.

Shareholder activism and financial impact

Climate change litigation has included shareholder action. In the Enea case the legal grounds for the claimant, an NGO that was also a shareholder of the company, were mainly based on financial reasons, and the risk of investing in a non-profitable plant that could become a stranded asset[138]. The objective was to create pressure on the corporation to change its financial decision to invest in a new fossil fuel plant.

138 "Stranded asset" is a term introduced inter alia by Mark Carney, the governor of Bank of England in his speech at Lloyds in September 2015, and refers to assets that are rendered worthless due to climate change

As the Enea case indicates, an investment in a fossil fuel plant can be a transition risk as climate-related regulations and changing market conditions may force the company to change its decision. At litigation against corporations, it should be noted that the effects extend can beyond the potential damages or abstaining from a potential investment in fossil fuel. Involvement in climate litigation poses such as reputational risks and risks as regards the value of the company, costs that may be incurred even if the litigation is not successful. In order to avoid future litigation risk, corporations need to take climate change action seriously.[139] Avoiding litigation and instead working together with civil society could be more fruitful if corporations are willing to implement credible, transparent and target-based greenhouse gas reduction strategies and demonstrate a genuine intent to achieve these changes.[140]

Notably, litigation against corporations has been brought on a broad range of bases. In addition to corporate claims (such as the ClientEarth vs. Enea case) and claims for damages (such as the Lliuya vs. RWE case), actions have also involved claims alleging inadequate disclosure regarding climate change

139 Byrnes (2019). "Will Companies Be Held Liable for Climate Change?".
140 Ibid.

impacts and risk exposure.[141]

The financial sector is moving towards increased transparency and the reputational risks are becoming considerable. Disclosing climate risk in accordance with regulations and best practice guidelines, such as e.g. those established under the EU Action Plan for Sustainable Finance from 2018,[142] or the recommendations published by the G20 Financial Stability Board's Task Force on Climate-related Disclosures from 2017[143] will probably reduce litigation risk as it provides an opportunity to assess and respond to climate change risks.[144]

It can be noted that major international lenders such as the European Investment Bank are going to stop supporting coal-fired power plants[145] and the EU's green energy certificate programme penalises high CO_2 emissions[146]. Private investors are following, and investors are increasingly paying attention to the climate impact of corporations and the risks involved with fossil fuel investments. In his annual letter for 2020 to chief executives, chairman and

141 Clifford chance (2019). "Climate change litigation, tackling climate change through the courts".
142 European Commission (2019). "Guidelines on reporting climate-related information".
143 Task force on climate-related financial disclosures, TCFD (2017). "Task Force on Climate-related Financial Disclosures, Overview".
144 Byrnes (2019). "Will Companies Be Held Liable for Climate Change?".
145 European Investment Bank (2019) "EIB energy lending policy - Supporting the energy transformation"
146 European Environment Agency (n.d). "Green certificate". https://www.eea.europa.eu/help/glossary/eea-glossary/green-certificate-electricity

chief executive Larry Fink of BlackRock, the world's largest asset manager, said that "Climate change has become a defining factor in companies' long-term prospects", and in a separate letter to investors, he announced BlackRock would exit investments with high environmental risks, including thermal coal, which is burned to produce electricity and creates carbon dioxide, a greenhouse gas.[147] Investing in fossil fuel plants can be seen as a transition risk as climate-related regulations and changing market conditions force companies to make new decisions.

Individual corporate liability for carbon majors

Claims have been pursued in several jurisdictions against carbon majors claiming that they are responsible for climate change. This trend is continuing and is expected to increase in 2020. Plaintiffs have sought damages to compensate e.g. for the impacts of climate change.[148, 149]

In the Lliuya case the claim is for damages, which means that the claimant needs to show that there is causation between the actions of the corporation

147 Fink (2020). "A Fundamental Reshaping of Finance".
148 de Wit, Senevirante & Calford (2020). "Governance in practice: Climate change litigation update".
149 Clifford chance (2019). "Climate change litigation, tackling climate change through the courts".

and the damage incurred. Improvements in climate science and a growing body of case-law could clarify the possibilities to successfully pursue climate claims on corporations. Climate science is becoming more accomplished at proving a causal link between major carbon emitters and the harm caused by their emissions.[150] Richard Heede's study on individual liability for carbon majors (see above) shows that a limited number of corporations are responsible for a large part of global greenhouse emissions since the Industrial Revolution, and that quotas can be determined for these corporations.[151]

Though the Lliuya case against RWE has not yet been decided, it is interesting as a positive outcome would open up for damages targeting a relatively small group of corporations who are responsible for a large part of global emissions.[152] This would be a groundbreaking outcome for litigation against carbon majors.

Concluding comment

We see climate awareness and activism grow, and world leaders, international institutions and business leaders also express concern at the slow pace of legislative and regulatory action. As political

150 Ibid.
151 Bouwer. & Setzer (2020). "New trends in Climate Litigation: What works?".
152 Ibid.

and regulatory action falls short and corporations continue to engage in high-emission activities, this could increasingly encourage the pursuit of claims against both governments and corporates.[153] Litigation based on human rights, fiduciary duty, and corporate responsibility is increasing. [154] Climate cases against carbon majors and other corporates, including financial institutions and investors, are also anticipated to increase, as local and regional governments and shareholders seek accountability for their role in greenhouse-gas mitigation. 2020 also formally sets the start of the commitments made by nations under the Paris Agreement. The extent to which climate litigations strengthen climate governance or permanently move climate policy forward is still not clear. Litigation can, however, be expected to increasingly be used as one of a number of tools for the transition to a climate-resilient society.[155]

153 Global justice (n.d). "Oslo Global Climate principles, commentary". https://globaljustice.yale.edu/sites/default/files/files/Oslo%20Principles%20Commentary.pdf
154 Clifford chance (2019). "Climate change litigation, tackling climate change through the courts".
155 For more information regarding the use and future of climate litigation, see de Wit, Seneviratne & Calford (2020), Collins (2020) and Bouwer & Setzer (2020).

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