

Case Comment—*Urgenda v. The State of the Netherlands: The “Reflex Effect”*—*Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care*

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## 1. INTRODUCTION: THE CONFLUENCE OF HUMAN RIGHTS LAW AND CLIMATE CHANGE

The *Urgenda Foundation v The State of the Netherlands* ruling,<sup>1</sup> decided at the District Court of the Hague in June 2015, marked the first time any court in the world ordered its own government to strengthen its response to the climate change crisis. The decision has a dual significance in the development of the law of climate change. Until the *Urgenda* decision, no court had held a government responsible for its national contribution to global greenhouse gas emissions originating from its territory or for its failure to aggressively mitigate these emissions, nor had any court given human rights norms a central role in defining the greenhouse gas emission standards that government must uphold. At the same time, the court gave an expansive reading to the duty of care under Dutch law, by viewing this duty in the context of international and constitutional obligations.

In *Urgenda*, the judiciary broke new ground by requiring the other governmental branches to take stronger action to immediately reduce greenhouse gas emissions.<sup>2</sup> The *Urgenda* Foundation—a citizens' platform in the Netherlands representing itself and 886 individual

<sup>1</sup> *Rechtbank Den Haag* [District Court of The Hague, Chamber for Commercial Affairs], June 24 2015, *Urgenda Foundation v The State of the Netherlands*, Case No. C/09/456689/HA\_ZA 13-1396 (Netherlands), online: <elaw.org/system/files/urgenda\_0.pdf> [*Urgenda*].

<sup>2</sup> This discussion uses the English translation that the Court presented on the day of its decision. However, the reader must bear in mind that the original decision is in Dutch and that notable aspects of the English version may not be significant in the Dutch version. For example, the claim supposedly is aimed at “emissions in the Netherlands,” while the order is using the words “Dutch emissions,” suggesting that the Court considers the difference between the place of emission and the nationality of its source. However,

members from various sectors committed to preventing catastrophic climate change—was successful in a claim that the State of the Netherlands (the State) had improperly weakened the national commitment to reduce greenhouse gas emissions from its initial pledge of a 25–40 percent reduction by the year 2020 below 1990 levels, to 20 percent.<sup>3</sup>

The *Urgenda* decision was based on the court’s interpretation of the domestic Dutch legal definition of the State’s duty of care toward its citizens. Thus, the case was decided in the context of tort law or, as it is put in the continent of Europe, in a private law context. However, the court expanded that duty by interpreting it in the context of human rights and constitutional principles—an expansion it termed “the reflex effect.”<sup>4</sup> The court concluded that international law obligations “have a ‘reflex effect’ in national law.”<sup>5</sup> The State of the Netherlands filed an appeal at The Hague Court of Appeal; the appeal is pending.

Since the Dutch court’s ruling, other courts have taken similar approaches and have reached comparable conclusions. These included a court in Pakistan,<sup>6</sup> and a United States District Court,<sup>7</sup> among others, and has generated significant commentary.<sup>8</sup> Although the

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in Dutch these differences do not appear. This is not problematic for this case note, as we will concentrate on the line of reasoning of the Court rather than various technical details of the decision.

<sup>3</sup> Under Dutch law, a foundation or association with full legal capacity may bring an action to court pertaining to the protection of general interests or the collective interests of other persons, insofar as the foundation or association represents these general or collective interests; art 3:305a Dutch Civil Code, online (English translation): <[www.dutchcivillaw.com/civilcodegeneral.htm](http://www.dutchcivillaw.com/civilcodegeneral.htm)> [DcC].

<sup>4</sup> The Court stated: “This does not affect [sic] the fact that a state can be supposed to want to meet its international-law obligations. From this it follows that an international-law standard—a statutory provision or an unwritten legal standard—may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and concepts, including social propriety, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a ‘reflex effect’ in national law.” *Urgenda*, *supra* note 1 at para 4.43.

<sup>5</sup> *Ibid.* Lars Adam Rehof, “Article 12” in Gudmundur Alfredsson & Asbjørn Eide, eds, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International, 1999), 251 at 254 (The reflex effect has been applied to interpret human rights norms in other contexts—for example, where a human rights norm was drafted to prohibit unwarranted government intrusion, individual rights may be derived by the reflex effect of the “negatively defined areas of protection”).

<sup>6</sup> *Leghari v Federation of Pakistan*, [2015] W.P. No. 25501 (Lahore High Court Green Bench Pakistan), online: <[blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150414\\_2015-W.P.-No.-25501201\\_decision-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150414_2015-W.P.-No.-25501201_decision-1.pdf)> [*Leghari*]; See also *Rabab Ali v Federation of Pakistan & Another*, [2016] Constitutional Petition No. / I of 2016, filed 6 April 2016 (Supreme Court of Pakistan), online: <<https://www.elaw.org/system/files/Pakistan%20Climate%20Case-FINAL.pdf>>..

<sup>7</sup> *Juliana v United States*, 217 F Supp (3d) 1224, (D Or 2016) [*Juliana*].

<sup>8</sup> See e.g. Jolene Lin, “The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*” (2015) 5:1 *Climate L* 65; K. J. de Graaf & J. H. Jans, “The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change” (2015) 27 *J Envtl L* 517; Lucas Bergkamp, “A Dutch Court’s ‘Revolutionary’ Climate Policy Judgment: The Perversion of Judicial Power, the State’s Duties of Care, and Science” (2015) 12:3–4 *J European Environmental & Planning L* 241; Josephine van Zeben, “Establishing a

ruling is pending appeal, it has already shifted the ground for climate change litigation in other jurisdictions by establishing that a government’s domestic obligations of care, interpreted in a human rights context, can extend to the protection of the planet’s climate.

*Urgenda* also has significance in the development of law and policy surrounding issues of sustainability. The definition of sustainability has emphasized the creation of a self-perpetuating ecosystem. Given the increasing impacts and recognition of climate change, sustainability is now considered to encompass the active reversal of the actions and policies that engender climate catastrophe. The climate change discourse has also shifted the emphasis from individual or local action to the global stage.<sup>9</sup> The *Urgenda* decision places the obligation to take meaningful action to safeguard the present and future environment, public health, and well-being squarely upon the national government. Litigants elsewhere are seeking—and in some cases obtaining—similar judicial action.<sup>10</sup>

This case comment focuses on these holdings and their implications for future climate change litigation. The comment provides, in Section 2, the factual and legal background for the decision. In Section 3, it offers an overview of the ruling. Section 4 contains an analysis of the *Urgenda* court’s use of the reflex effect and concludes with a discussion of the court’s interpretation of the duty of care in the context of constitutional and human rights obligations. Section 5 discusses the court’s application of Dutch private law principles, as well as its treatment of justiciability issues: separation of powers and redressability. Section 6 situates the *Urgenda* decision in the context of prior attempts to litigate climate change using human rights norms, and notes constructive developments post-*Urgenda*, including the inclusion of human rights language in the 2015 *Paris Agreement*, the September 2015 decision in *Leghari v Federation of Pakistan*,<sup>11</sup> and favorable rulings by two American courts on atmospheric trust claims.<sup>12</sup> Section 7 considers the possible expansion of human rights obligations following *Urgenda*.<sup>13</sup> Section 8 concludes on a hopeful note for the future of climate change litigation internationally in the

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Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?” (2015) 4:2 *Transnational Environmental L* 339; and Roger Cox, “A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*”, online: (2015) 79 *Center for International Governance Innovation* <[www.cigionline.org/sites/default/files/cigi\\_paper\\_79.pdf](http://www.cigionline.org/sites/default/files/cigi_paper_79.pdf)>.

<sup>9</sup> See e.g. Keith Hirokawa & Jessica Owley, eds, *Rethinking Sustainability to Meet the Climate Change Challenge* (Washington, D.C.: Environmental Law Institute, 2015) at xii.

<sup>10</sup> See *Juliana*, *supra* note 7; *Leghari*, *supra* note 6.

<sup>11</sup> *Leghari*, *supra* note 6.

<sup>12</sup> *Foster v Washington Department of Ecology*, No. 14-2-25295-1 SEA (Wash Sup Ct 2015) (filed September 2014) (order for the Department to reconsider its denial of the petition, June 2015; petition for review denied, November 2015); *Juliana*, *supra* note 7 (in the State of Oregon: motions to dismiss denied, stay of proceeding granted, US Court of Appeals for the Ninth District, 25 July 2017); Commentaries include Michael B. Gerrard, “Climate Litigation Scores Successes in the Netherlands and Pakistan” (2016) 47:5 *ABA Trends* 7; Lin, *supra* note 8; and Suryapratim Roy & Edwin Woerdman, “Situating *Urgenda v The Netherlands* Within Comparative Climate Change Litigation” (2016) 34:2 *J Energy & Nat Resources L* 165, online: <[papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2695077](http://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2695077)>.

<sup>13</sup> Antonio Benjamin et al, “Oslo Principles on Global Climate Change Obligations” (Paper delivered at a Symposium at Kings College, London, 30 March 2015), online: <[globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf](http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf)> [*Oslo Principles*].

context of a new syntheses of existing climate change law, and the potential further extension of the duty of care to include both enterprise and state liability.

## 2. BACKGROUND: THE FACTUAL AND LEGAL BASIS OF URGENDA'S CLAIMS

The *Urgenda* case originated in the petition of the citizen organization Urgenda Foundation against the State of the Netherlands. Urgenda (a contraction of “urgent” and “agenda”) Foundation—a coalition of non-governmental organizations, academia, business, and media—was formed to advocate for a sustainable Netherlands. After unsuccessfully requesting that the State voluntarily increase its climate change commitment, Urgenda Foundation filed this petition.<sup>14</sup> In its petition to the District Court of The Hague, Urgenda Foundation sought, among other things, a court order requiring the Dutch government to reduce the volume of annual greenhouse gas emissions in the Netherlands by 40 percent (or at least 25 percent) below 1990 levels by the end of 2020. Urgenda Foundation asserted that this reduction was necessary in order for the State to do its part to ensure that global temperatures do not exceed preindustrial temperatures by more than 2°C by the end of this century.<sup>15</sup>

A detailed consideration of the current state of climate change science played a key role in this decision. The Urgenda petition adduced, and the court considered and analyzed, an exhaustive factual record including the findings of the leading international scientific body on climate change, the Intergovernmental Panel on Climate Change (IPCC).<sup>16</sup> The court was convinced about a critical aspect of this record concerning the centrality of realizing early greenhouse gas emission reductions. The court adopted the Urgenda Foundation's conclusion that early reductions greatly increase the possibility of attaining longer-term, more aggressive reductions, such as the ultimate European goal of an 80–95 percent reduction in greenhouse gas emissions below 1990 levels by 2050.<sup>17</sup> In addition, the court was persuaded that achieving early goals is demonstrably less expensive than delaying action on mitigation.<sup>18</sup> The factual record also included the history of the global climate negotiations and the successive commitments of both the European Union and its member state, the Netherlands.<sup>19</sup>

Urgenda Foundation sought relief from the State because as sovereign, it had the authority to manage, control, and regulate emissions from the Netherlands. According to Urgenda Foundation, the State had “systemic responsibility” for the total greenhouse gas emission level of the Netherlands, and through its inadequate climate policy, it substantially contributed to a cause of hazardous climate change; therefore, the asserted injuries were attributable to the State.<sup>20</sup>

<sup>14</sup> *Urgenda*, *supra* note 1 at para 2.6.

<sup>15</sup> *Ibid* at paras 3.1–3.2.

<sup>16</sup> *Urgenda*, *supra* note 1 at paras 4.11–4.23.

<sup>17</sup> *Ibid* at para 4.29.

<sup>18</sup> *Ibid* at paras 4.29, 4.73.

<sup>19</sup> *Ibid* at paras 4.24–4.29.

<sup>20</sup> *Ibid* at para 3.2.

The 2010 Cancun Agreements adopted the IPCC recommendation that developed countries must reduce emissions in the 25–40 percent range below 1990 levels by 2020.<sup>21</sup> In order to achieve these reductions, developed countries were required to submit commitments to sufficient near-term greenhouse gas emissions.<sup>22</sup> The *Urgenda* court noted that the Netherlands, as part of the European Union commitment, originally committed to a reduction of 25–40 percent below 1990 levels in their emissions by 2020. The European Union initially aimed for a 30 percent reduction in emissions by 2020; it subsequently reduced that commitment to 20 percent by 2020. Concomitantly, the Netherlands reduced its original commitment from a 30 percent reduction by 2020 to a target of 20 percent by 2020, reflecting its proportionate contribution to European emissions.<sup>23</sup>

The State did not dispute Urgenda Foundation's comprehensive presentation of current climate science. The court agreed with the IPCC assessment that the greenhouse gas emissions of developed “Annex I” countries must be reduced by 80 percent by 2050, compared to 1990 levels, in order to avoid a global temperature increase exceeding 2°C.<sup>24</sup> As part of the European Union March 2015 commitment anticipating the *Paris Agreement*, the Netherlands continues to be committed to an 80 percent reduction by 2050. Like all the nationally determined contributions to greenhouse gas emission reductions, the European Union commitment was incorporated into the December 2015 *Paris Agreement*.<sup>25</sup> But the State contested the Urgenda Foundation view that it was falling short, in its *interim* 2020 targets, of the greenhouse gas emission reductions necessary to reach the 2050 goal, relying on the adoption by the European Union of a 20 percent reduction goal for 2020.<sup>26</sup>

The heart of the Urgenda Foundation's claim was that the State had failed to fulfill its duty of care to the people of the Netherlands. The bases of this claim were, first, the State's obligations pursuant to article 21 of the Dutch Constitution,<sup>27</sup> which imposes a duty of care on the State “relating to the [livability] of the country and the protection and improvement of the living environment.”<sup>28</sup> Second, Urgenda Foundation asserted that under articles 2 and 8 of the European Convention on Human Rights (ECHR), the State has an obligation to

<sup>21</sup> *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex 1 Parties under the Kyoto Protocol at its fifteenth session*, Decision1/CMP.6/FCCC.KP/CMP/2010/12/Add.1 at 3, online: <unfccc.int/resource/docs/2010/cmp6/eng/12a01.pdf>.

<sup>22</sup> European Commission, News Release, “Environment Council approves the EU's intended nationally determined contribution to the new global climate agreement” (3 March 2015), online: <ec.europa.eu/clima/news/articles/news\_2015030601\_en>.

<sup>23</sup> *Urgenda*, *supra* note 1 at paras 4.25, 4.28–4.29.

<sup>24</sup> *Ibid* at paras 3.3, 4.14, 4.29.

<sup>25</sup> *Paris Agreement*, CP Dec 1/CP.21, 21st Sess (2016) FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016) at 21, art 3, online: <unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> [*Paris Agreement*].

<sup>26</sup> *Urgenda*, *supra* note 1 at paras 3.3, 4.29.

<sup>27</sup> The Constitution of the Kingdom of the Netherlands 2008, art 21 (as last amended June 27, 2008), online (English translation): <www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> [*Dutch Constitution*].

<sup>28</sup> *Urgenda*, *supra* note 1 at para 4.36.

protect its populace.<sup>29</sup> Urgenda Foundation argued that the 25–40 percent reduction target is the standard accepted by climate science and adopted in international agreements, and that deviation from this standard by the State constitutes a breach of duty toward the people of the Netherlands. Third, Urgenda Foundation asserted that the State owed a duty of care to its citizens—and to the world beyond—under principles of Dutch common law.<sup>30</sup> The State agreed that CO2 emissions must be reduced by 80 percent by 2050, compared to 1990 levels, to avoid exceeding the 2°C increase. At issue was whether the State is falling short—as Urgenda argued—in its selection of its interim goals, and whether it has breached its duty of care by pursuing a reduction target for 2020 that is less ambitious than 25–40 percent, which was the standard recommended by the IPCC.<sup>31</sup>

### 3. OVERVIEW OF THE DECISION: A GOVERNMENT’S DUTY OF CARE TO MITIGATE CLIMATE CHANGE

The court granted the Urgenda petition in part, ordering the State “to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25 percent at the end of 2020 compared to the level of the year 1990.”<sup>32</sup>

Assessing the claims, the court took as a starting point that anthropogenic greenhouse gas emissions are causing climate change, accepting the conclusion of the IPCC that a highly hazardous situation for humanity and the environment will result from a temperature rise of over 2°C compared to the pre-industrial level. The court examined the scientific evidence in unprecedented detail, and grounded its holding in large part on that evidence. Accepting the conclusions of the IPCC Fourth (2007) and Fifth (2013) Assessment Reports, the court adopted the 2°C target as the guidepost for climate policy and recognized the dangers of melting polar ice, rising sea levels, increased hurricane activity, expansion of deserts, and heat-related species extinctions threatening global biodiversity.<sup>33</sup> Accordingly, the court recognized the necessity of rapid reductions of current anthropogenic greenhouse gas emissions.<sup>34</sup>

The court carefully considered whether the State had a duty of care to Urgenda Foundation, and its members, derived either from the Dutch Constitution, the principles of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the ECHR, or the Treaty on the Functioning of the European Union (TFEU). The court concluded that none of these instruments provide a binding duty of care under these circumstances, for reasons detailed below. However, the court did not stop there: it concluded that these sources of obligation are persuasive in determining the scope of the State’s duty of care under Dutch law. The court located the State’s duty of care in Dutch private law, and reasoned that the provisions of constitutional and human rights law contained in these authorities provide a standard of

<sup>29</sup> *Ibid* at paras 4.35, 4.45.

<sup>30</sup> *Ibid* at paras 4.35, 4.51.

<sup>31</sup> *Ibid* at para 4.35.

<sup>32</sup> *Ibid* at para 5.1.

<sup>33</sup> *Ibid* at paras 4.14, 4.16.

<sup>34</sup> *Ibid* at para 4.18.

interpretation of the State’s duty of care derived from Dutch private law.<sup>35</sup> The court termed this interpretative standard the “reflex effect”. As the court stated:

In order to determine the scope of the State’s duty of care and the discretionary power it is entitled to, the court will therefore also consider the objectives of international and European climate policy as well as the principles on which the policies are based.<sup>36</sup>

Persuaded by the evidence of the magnitude of the climate crisis globally and for the Netherlands, and of the importance of early action, the court crafted a commensurate interpretation of the Dutch government’s duty of care to its citizens drawing on available sources of law. The following section examines in depth the court’s application of these objectives, policies, and principles to Urgenda’s claims.

### 4. THE REFLEX EFFECT: CONSTITUTIONAL AND INTERNATIONAL NORMS REFLECTED IN THE DUTY OF CARE

The court concluded that neither the Dutch Constitution nor international norms applied directly to the present case. However, the court looked to these sources of law to derive a framework of analysis, and a set of principles, which it then applied to the duty of care applicable in the present case. First, the court examined the applicability of article 21 of the Dutch Constitution and international environmental norms, and second, it considered guarantees of personal rights under articles 2 and 8 of the European Convention on Human Rights.

#### 4.1. ARTICLE 21 OF THE DUTCH CONSTITUTION AND INTERNATIONAL CONVENTIONS

The court analyzed article 21 of the Dutch Constitution, which provides that “[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment,”<sup>37</sup> and found it to include a duty of care to the population of the low-lying Netherlands. The court included in this duty of care concerns for water defenses, water management, and the living environment—all clearly subject to the impacts of climate change. The manner in which this duty should be carried out, the court noted, is subject to the government’s discretionary powers.<sup>38</sup>

The court also noted that the Netherlands is party to both the UNFCCC and the Kyoto Protocol. While the decisions of the Conference of the Parties and other implementing mechanisms do not necessarily create binding obligations on the State towards its citizens, the court found that they might directly inform the interpretation of national-law “open standards and concepts”, and affect the obligations of the parties.<sup>39</sup>

Further, the court recognized (and the State did not contest) the long-standing “no-harm” principle in general principle of international environmental law, referred to as “no

<sup>35</sup> *Ibid* at para 4.63.

<sup>36</sup> *Ibid* at para 4.52.

<sup>37</sup> *Dutch Constitution*, *supra* note 28 at art 21.

<sup>38</sup> *Urgenda*, *supra* note 1 at para 4.36.

<sup>39</sup> *Ibid* at paras 4.42–4.43.

cross-border harm,” which means that “no state has the right to use its territory, or have it used, to cause significant damage to other states.”<sup>40</sup> The court referred to this principle in the context of the provisions of the Kyoto Protocol concerning emissions trading. Amplifying this general principle of international environmental law is the role of the European Union, which is increasingly recognizing the importance of environmental protection, including in articles 191–192 of the Treaty on the Functioning of the European Union (TFEU).<sup>41</sup>

Although the court noted that the UNFCCC, the Kyoto Protocol, and the “no cross-border harm” principle bind the State, it concluded that these obligations were only binding as to other states that could pursue a claim against the Netherlands for cross-border harm, not as to Urgenda. The Dutch Constitution uniquely provides that treaties and other international decisions are self-executing and binding under domestic law: there is no requirement of independent parliamentary adoption. But this provision only applies to those international law instruments that, by their content and terms, bind citizens as well as states.<sup>42</sup> Under the Dutch Constitution, citizens can derive a right of action from a treaty or an international obligation if it is an obligation that expressly “connects one and all.”<sup>43</sup> International obligations such as treaties do not create a private right of action or otherwise apply directly to citizens. The climate treaties, the court held, do not bind citizens and therefore Urgenda could not rely upon them.<sup>44</sup>

Nonetheless, the court held that as a general rule these international law obligations should be interpreted in such a way that the State can be presumed to be in compliance with these norms. On this basis, the court took them into account as a “reflex effect” on national law.<sup>45</sup> The court applied this analysis to the TFEU provisions as well, as those provisions also do not directly provide rights to citizens.<sup>46</sup> This interpretation is a common application in Dutch law: that international obligations contribute to open standards of national law.

<sup>40</sup> *Ibid* at para 4.39.

<sup>41</sup> *Ibid* at para 4.40; Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ, C 115/47 at art 191 [TFEU]. TFEU article 192 provides for the European Parliament and the Council to decide what action is to be taken by the Union in order to achieve the environmental objectives referred to in Article 191.

<sup>42</sup> Gerhard van der Schyff & Anne Meuwese, “Dutch Constitutional Law in a Globalizing World” (2013) 9:2 Utrecht L Rev 1 at 1.

<sup>43</sup> *Dutch Constitution*, *supra* note 28 at art 93 (“[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.” This provision determines that citizens can derive a right from a specific provision of international law if its contents can connect one and all).

<sup>44</sup> *Urgenda*, *supra* note 1 at para 4.42 (referring to the Dutch Supreme Court case *Rechtbank Den Haag, Eerste Kamer*, 6 February 2004, *Vereniging van Juristen voor de Vrede v the Netherlands*, ECLI:NL:HR:2004:AN8071, Netherlands).

<sup>45</sup> *Urgenda*, *supra* note 1 at para 4.43.

<sup>46</sup> *Ibid* at para 4.52. See also *ibid* at paras 3.2, 4.40, 4.60, 4.55 and 4.62.

#### 4.2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND VIOLATION OF A PERSONAL RIGHT

The court turned its attention to the applicability of the ECHR, specifically articles 2 (protection of the right to life) and 8 (respect for private and family life and the home).<sup>47</sup> In assessing the question of whether or not the State with its current climate target is breaching Urgenda’s rights, the court concluded that the advocacy organization—a legal but not a natural person—could not be considered a victim of human rights abuse within the meaning of the ECHR, as it has rights neither to privacy nor physical integrity. However, the court reasoned, in the context of environmental rights these ECHR guarantees also provide a source of interpretation of private law standards of care.<sup>48</sup>

The court referred to the 2012 *Manual on Human Rights and the Environment*<sup>49</sup> of the Committee of Ministers of the Council of Europe, and its interpretation by the European Court of Human Rights, in considering the relationship between the protection of human rights and the environment under the ECHR. Noting that the ECHR contains no explicit environmental protections, the court pointed out that environmental degradation can impinge on the enjoyment of guaranteed rights (for example, industrial pollution can adversely impact enjoyment of life) and that where environmental impacts create a dangerous situation, the state should act to protect life.<sup>50</sup>

The court also noted that the European Court’s decisions have increasingly considered human rights law and environmental law to be mutually reinforcing.<sup>51</sup> The court concluded that it is national, not European, authority that governs environmental issues, with their technical and social implications.<sup>52</sup> Nonetheless, the court found the ECHR a relevant source of analysis. In particular, the court drew on article 2, the protection of the right to life, interpreted by the European Court to include a positive obligation on States

to take appropriate steps to safeguard the lives of those within their jurisdiction. This means that public authorities have a duty to take steps to guarantee the rights of the Convention even when they are threatened by other (private) persons or activities that are not directly connected with the State.<sup>53</sup>

This view was applied only in exceptional cases where human life was threatened, for example, related to protection from natural disasters and protection from inherently dangerous activities, such as nuclear tests.<sup>54</sup> In addition, the court broadly interpreted ECHR article 8, on respect for private and family life and the home, to include environmental impacts on the enjoyment of these rights. However, the court limited this application to circumstances when

<sup>47</sup> Council of Europe, *The European Convention on Human Rights* (Strasbourg: Directorate of Information, 1952) at arts 2, 8.

<sup>48</sup> *Urgenda*, *supra* note 1 at paras 4.45–4.46.

<sup>49</sup> Council of Europe, Committee of Ministers, *Manual on Human Rights and the Environment*, Council of Europe Publishing, 2nd ed (2012).

<sup>50</sup> *Urgenda*, *supra* note 1 at paras 4.48–4.49.

<sup>51</sup> *Ibid* at para 4.48.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid* at para 4.49.

<sup>54</sup> *Ibid*.

there is a causal link with environmental damage. In addition, this interpretation did not conflate general environmental regulation with human rights violations. It also required that the negative environmental impacts attain a “certain threshold of harm.”<sup>55</sup>

#### 4.3. THE COURT’S CONCLUSION ON THE DUTY OF CARE

The court rejected Urgenda’s claim that the State’s legal obligations were based on either article 21 of the Dutch Constitution, the “no cross-border harm” principle, the UNFCCC, or the TFEU, holding that Urgenda could not directly derive rights from these rules. However, the court concluded that in the context of private law these provisions “still hold meaning, namely in the question of ... whether the State has failed to meet its duty of care towards Urgenda.”<sup>56</sup> The court concluded by applying this continuum of rules to determine to what extent the State is entitled to discretion in deciding how to comply with these principles and rules, and to determine a “minimum degree of care” owed its citizens; in making its determination, the court relied upon the goals of international and European climate policy and principles.<sup>57</sup>

The court applied the principles of the UNFCCC addressing: (1) protection of the climate system for current and future generations; (2) the precautionary principle; and (3) the sustainability principle, in the context of the requirements of current climate science.<sup>58</sup> Reasoning that without ambitious reduction targets, greenhouse gas emissions will reach a level by 2030 that would make realizing the 2°C limit unachievable, and that the State has the power to control the Dutch emission level, the court concluded that it would be most efficient and cost-effective to mitigate immediately: “these mitigation measures should be taken expeditiously. After all, the faster the reduction of emissions can be initiated, the bigger the chance that the danger will subside.”<sup>59</sup>

## 5. DUTCH LAW: THE DUTY OF CARE AND JUSTICIABILITY

### 5.1. DUTCH LAW AND THE DUTY OF CARE

Having established the context of international and constitutional norms, the court turned to the general duty of care under Dutch law.<sup>60</sup> The duty of care is considered an open norm in Dutch law: that is, a norm defined in general terms that must be tailored to the specific circumstances of the case where it is applied. The duty of care has been developed in a line of Dutch cases in which a party, having created a dangerous situation, must take reasonable measures to diminish the risk. Dutch civil law courts have found a duty of care to warn the endangered of potential injury when a potentially dangerous situation is created, and to take

<sup>55</sup> *Ibid* at para 4.50.

<sup>56</sup> *Ibid* at para 4.52.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* at paras 4.56–4.59.

<sup>59</sup> *Ibid* at paras 4.65, 4.73.

<sup>60</sup> See DcC, *supra* note 3 at art 6:162 part 2 (definition of a tortious act as a violation of a duty). The concept is similar to the duty of care in *Donaghue v Stevenson*, House of Lords (1932) AC 562 or to the liability on the basis of negligent violation of the required standard of conduct in the Principles of European Tort Law; see *infra* par. VII at note 97. See Hans Nieuwenhuis, *Cornerstones of Tort Law* (Deventer: Wolters Kluwer, 2017) at 14-16.

measures to prevent the occurrence of the harm.<sup>61</sup> The *Urgenda* court analogized the potential hazards of climate change to other dangerous activities.

The court inquired whether the State had taken the required reasonable measures to diminish the risk of climate change. In addressing this question, the court sought to determine whether the State exercised due care taking into account a set of objective standards, and considering the State’s discretionary power. The standards included the nature and extent of climate change damage, foreseeability, probability of occurrence, the nature of State acts or omissions, onerousness of precautionary measures, and State discretion including the cost-benefit ratio of these measures.<sup>62</sup> In reaching its conclusion that the State fell short in exercising its duty of care, the court derived standards to measure this standard from the precautionary principle and similar general provisos, including the severity of climate change impacts and the likelihood of hazardous consequences. Applying these criteria, the court concluded that “to prevent hazardous climate change, the Netherlands must take reduction measures” in accordance with the 2°C limit.<sup>63</sup> The court also concluded that the State’s 20 percent reduction target failed to fulfill its duty of care and therefore the State had acted unlawfully.<sup>64</sup> The court ordered the State to adopt a minimum of a 25 percent reduction from 1990 emissions levels.<sup>65</sup> However, it declined Urgenda’s request to set a 40 percent reduction target on the ground that the State possessed the discretionary power to choose its emission reduction measures, more ambitious than the court-defined legal minimum.<sup>66</sup>

Thus, the State’s duty of care is influenced by the State’s duties with regard to human rights and the climate treaties discussed above.<sup>67</sup> The court concluded:

Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring—without mitigating measures—the court concludes that the State has a duty of care to take mitigation measures. The circumstance that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this. Now that at least the 450 scenario [the concentration of 450 parts per million of CO<sub>2</sub> equivalent in the atmosphere, one of the measures defined as a tipping point for climate change] is required to prevent hazardous climate change, the Netherlands must take reduction measures in support of this scenario.<sup>68</sup>

This conclusion followed from the court’s interpretation of the duty of care and its application of the framework provided by the Dutch Constitution and international law principles. Based on the evidence adduced, the court defined the minimum level of mitigation that is needed

<sup>61</sup> Marjan Peeters, “Case Note: *Urgenda Foundation and 886 Individuals v The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States*” (2016) 25:1 RECIEL 123 at 124; Josephine van Zeven, ‘Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?’, 4:2 Transnational Environmental Law (2015), 339.

<sup>62</sup> *Urgenda*, *supra* note 1 at para 4.63.

<sup>63</sup> *Ibid* at para 4.83.

<sup>64</sup> *Ibid* at para 4.85.

<sup>65</sup> *Ibid* at para 5.1.

<sup>66</sup> *Ibid* at para 4.86.

<sup>67</sup> *Ibid* at paras 4.64–4.82.

<sup>68</sup> *Ibid* at para 4.83.

to reach the goal. Given the 20 percent greenhouse gas emission reduction level determined by the State, the court was able to conclude that the State did too little to protect the interests involved in the case. As such, it ordered the State to make more ambitious plans. The court concluded that Urgenda Foundation seeking legal protection was within the scope of judicial review; it noted, however, that its decision may also have political consequences and affect political decision-making. But the court saw no reason for curbing its authority to decide these matters.<sup>69</sup>

### 5.2. JUSTICIABILITY OF THE CLAIMS

Before granting Urgenda relief, however, the court still had to address the justiciability challenges raised by the State. These fell into two primary categories: (1) the claim that the Dutch contribution to global greenhouse gas pollution was so minute that no judicial remedy could actually have a recognizable impact; and (2) the claim that judicial intervention in an area bordering the legislative power to set environmental standards violated the Dutch doctrine of separation of powers.

The court considered the issue of redressability, in light of the State's argument that the Dutch contribution to the global sum of greenhouse gas pollution was so insignificant as to nullify any judicial remedy in terms of meaningfully mitigating global greenhouse gas emissions. The court considered the State's assertion that the current Dutch greenhouse gas emissions are relatively minor on a global scale. The court rejected the State's argument that it had therefore fulfilled its obligations and no real harm would result from a reduction of the ambition of its greenhouse gas emission reduction target. The court held that the relative modesty of the Dutch emissions did not alter the reality that these emissions contribute to climate change.<sup>70</sup>

The court also rejected the State argument that a judicial requirement that the State further limit greenhouse gas emissions would interfere with the Dutch separation of powers. Instead, it considered the authority to resolve this legal dispute between citizens and their government a core judicial function. In addition, the court exercised restraint by not mandating any specific method of government compliance.<sup>71</sup>

The separation of powers issue has played a major role in the disposition of US climate change challenges, and in contrast to the outcome in *Urgenda*, has usually resulted in their dismissal. In the 2011 decision of *American Electric Power v Connecticut*, the leading case on this issue, the United States Supreme Court found nonjusticiable the dispute by a group of US states, the city of New York, and conservation organizations against five electric power generators, the United States' largest greenhouse gas emitters.<sup>72</sup> This challenge was based on a common law tort theory of public nuisance; the plaintiffs asserted that climate change constituted a public nuisance writ large, which the court could remedy at least in part with an order requiring greenhouse gas emission reductions from power plants. The Supreme Court dismissed the claim as nonjusticiable on the ground that Congress, through the *Clean*

<sup>69</sup> *Ibid* at para 4.98.

<sup>70</sup> *Ibid* at para 4.90.

<sup>71</sup> *Ibid* at paras 4.94–4.95, 4.101.

<sup>72</sup> *American Electric Power v Connecticut*, 564 US 410 (2011).

*Air Act* as interpreted by the court in *Massachusetts v Environmental Protection Agency*, had delegated jurisdiction to the Environmental Protection Agency (EPA) to regulate the emission of greenhouse gases.<sup>73</sup> The court concluded that this statutory delegation, and the EPA actions implementing greenhouse gas reductions, entirely displaced any judicial role in directly ordering further reductions by polluters. However, a judicial challenge to EPA action as inadequate would still be possible to objectors. *Urgenda* is closer to that approach.

The *Urgenda* court noted that the Dutch system established not a hierarchy of authority among governmental branches, but distinct roles and responsibilities. The responsibility for resolving individual disputes rests with the judiciary; even when, as in this case, the resolution of individual disputes has implications far beyond the parties, although generally the executive and legislature must establish policies and regulation applicable to all. In addition, the court noted that challenges to the legality of government action were within the purview of the judiciary, in its capacity as protector against misuse of state power.<sup>74</sup> A court must exercise restraint, however, when its orders may have consequences reaching far beyond the parties before it. In this regard, the court noted that its requirement that the State pursue additional greenhouse gas emission reductions does not prescribe any particular measures or methodology, recognizing the State's discretion to craft its own remedies.<sup>75</sup>

## 6. THE HUMAN RIGHTS CONTEXT FOR CLIMATE CHANGE POLICY AND LITIGATION

Until *Urgenda*, no litigant had succeeded in a climate change challenge relying on human rights jurisprudence. The first such claim, a 2005 petition by the Inuit Circumpolar Conference against the United States at the Inter-American Commission on Human Rights, placed the issue of human rights violations caused by climate change impacts on the world's legal agenda.<sup>76</sup> It was dismissed on the ground that the Inuit had not established a violation of the rights protected by the American Declaration of the Rights and Duties of Man;<sup>77</sup> this cast into doubt the proposition that state failures to adequately address climate change could be redressed in judicial fora, at least in the context of human rights violations. In 2013, similar

<sup>73</sup> *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007).

<sup>74</sup> *Urgenda*, *supra* note 1 at para 4.95.

<sup>75</sup> *Ibid* at paras 4.96, 4.101.

<sup>76</sup> *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (7 December 2005), online: <www.ciel.org/Publications/ICC\_Petition\_7Dec05.pdf>.

<sup>77</sup> Andrew C. Revkin, "Inuit Climate Change Petition Rejected", *The New York Times* (16 December 2006), online: <www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html?\_r=0>. An exception may be the Nigerian court decision holding for plaintiffs in *Gbemre v Shell Petroleum Development Company Nigeria Ltd* (2005) AHRLR 151 (Nigeria) (on claims against the oil company for uncontrolled gas flaring, on the grounds of the environmental and human health injuries suffered in violation of the Nigerian Constitution and the African Charter on Human and Peoples' Rights. In addition, today some pending atmospheric trust litigation at the state level in the United States holds promise). See also, Mary Christina Wood, "Atmospheric Trust Litigation Across the World" in Ken Coghill, Charles Sampford & Tim Smith, eds, *Fiduciary Duty and the Atmospheric Trust* (Farnham, UK: Ashgate, 2012) 99. See also Jessie Hohmann, "Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?" (2009) 18 *Transnat'l & Contemp Probs* 295.



claims were raised before the Inter-American Commission on Human Rights by the Arctic Athabaskan peoples. Their petition alleges that Canada's lack of controls over emissions of black carbon, which contribute to rapid Arctic warming, results in a violation to their human rights to health, culture, and property.<sup>78</sup> The Athabaskan petition is pending.<sup>79</sup>

The *Urgenda* decision marks a sea change in jurisprudence and lays the basis for broader recognition of the application of human rights norms to the global climate change crisis. Some courts have followed *Urgenda* in being willing to hold their governments liable for the consequences of climate change.<sup>80</sup> For instance, in the November 2016 decision of *Juliana v United States*, the US District Court for the district of Oregon denied motions to dismiss a petition challenging the US government's claimed failure to take sufficiently aggressive action to rein in greenhouse gas emissions.<sup>81</sup> This case addressed an intergenerational equity challenge of a group of young people in the State of Oregon, who sued for injunctive and declaratory relief, asserting that the government had contributed to and failed to protect against climate change, violating their constitutional rights to life, liberty, and property. The action also raised the atmospheric trust theory, where the litigants asserted that protection of the atmosphere—as well as the more traditional protection of the land and water resources—is a trust obligation of the state and federal sovereign.<sup>82</sup> The sovereign holds the atmosphere in trust for present and future generations, and can be held responsible for squandering this trust. They claimed that the government had failed to fulfill its historic public trust obligation to safeguard them and the environment. Ruling on motions to dismiss by the US government and fossil fuel industry representatives, the *Juliana* court concluded that the young petitioners had established standing and that their claims entitled them to trial. “Exercising my ‘reasoned judgment,’” the judge wrote, “I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>83</sup> In March 2017, the Trump administration filed a motion to certify an expedited appeal of the denial of the motions to dismiss and set trial for

<sup>78</sup> Verónica de la Rosa Jaimes, “The Petition of the Arctic Athabaskan Peoples to the Inter American Commission on Human Rights” (22 July 2013), *ABlawg: The University of Calgary Faculty of Law Blog* (blog), online: <ablawg.ca/2013/07/22/the-petition-of-the-arctic-athabaskan-peoples-to-the-inter-american-commission-on-human-rights/>.

<sup>79</sup> Don McCrimmon, “The Athabaskan Petition to the Inter-American Human Rights Commission: Using Human Rights to Respond to Climate Change” (2016) 6:2 *Polar J* 398, online: <www.tandfonline.com/doi/abs/10.1080/2154896X.2016.1241484>.

<sup>80</sup> Similar claims are pending, including *VZW Klimaatzaak v Kingdom of Belgium* (26 July 2017), online: <climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/> (This action was brought by a Belgian citizens organization against the Belgian federal and regional governments in 2015 to reduce greenhouse gas emissions 40 percent below 1990 levels by 2020 and 87.5 percent below 1990 levels by 2050, asserting that failure to reduce emissions constitutes a violation of human rights laws.).

<sup>81</sup> *Juliana*, *supra* note 7; see also Mary Christina Wood & Charles W. Woodward, IV “Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last” (2016) 6:2 *Wash J Envtl L & Pol’y* 634.

<sup>82</sup> First Amended Complaint, *Kelsey Juliana et al v The United States*, (2016) (No 6:15-cv-01517-TC) at 92–93, online: <static1.squarespace.com/static/571d109b04426270152febe0/t/57a35ac5ebbd1ac03847eece/1470323398409/YouthAmendedComplaintAgainstUS.pdf>.

<sup>83</sup> *Juliana*, *supra* note 7 at para 82.

February 2018. However, on July 25, 2017, the US Court of Appeals for the Ninth Circuit temporarily stayed the proceeding.<sup>84</sup>

In 2015, the High Court of Justice in Lahore, the capital of Pakistan's Punjab Province, ruled that its government must do more to protect its citizens from climate change, ordering the appointment of governmental councils to ensure that Pakistan fulfills its domestic climate commitments. In that case, petitioner Ashgar Leghari, a farmer, submitted extensive evidence of the threat of climate change to his community and livelihood, relying upon IPCC reports. The claim was that the Government of Pakistan and the Ministry of Climate Change had adopted a framework for climate change policy, but no implementation had been forthcoming. Mr. Leghari's claim was that this failure on the part of government violated his rights under the Pakistani Constitution and international environmental principles including the doctrine of public trust, sustainable development, the precautionary principle, and intergenerational equity. Noting the devastating effects climate change has had on Pakistan, notably the change from being a water-rich to a water-scarce country, the judge stressed the urgency of policy implementation on the ground. In addition, like the *Urgenda* court, the *Leghari* court pointed out that although Pakistan's contribution to global greenhouse gas emissions is small, the country has a responsibility to the global community to combat climate change through mitigation efforts in such areas as energy, industry, and agriculture.<sup>85</sup>

These holdings demonstrate that some courts, at least at the trial level, have begun to recognize human rights analysis in the context of climate change. This trend is not limited to courts, however.

United Nations (UN) bodies and parties to climate treaties are recognizing this link. In a review of Australia's climate commitments, a June 2017 statement by the United Nations Committee on Economic, Social and Cultural Rights concluded that the country's failure to adopt sufficient greenhouse gas emission reduction measures may be considered a violation of fundamental human rights. This was the first time a UN body has found that a country has violated human rights obligations by failing to address climate change.<sup>86</sup>

The parties to the December 2015 *Paris Agreement* also recognized the application of human rights to climate change, although in a somewhat guarded manner. The *Paris Agreement* urged parties

when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.<sup>87</sup>

<sup>84</sup> See Order, *US v US District Court of Oregon (Juliana)* DC No 6:15-cv-01517-TC-AA (D Or 2016).

<sup>85</sup> *Leghari*, *supra* note 6 at 7.

<sup>86</sup> *Concluding Observations on the Fifth Periodic Report of Australia*, UNCESCR, 61st sess, E/C.12/AUS/CO/5 (2017) paras 11–12; Jessica Wentz, “UN Body Finds that Human Rights Treaty Requires Climate Action” (30 June, 2017), Sabin Center for Climate Change Law, *Climate Law Blog* (blog), online: <blogs.law.columbia.edu/climatechange/2017/06/30/un-body-finds-that-human-rights-treaty-requires-climate-action/>.

<sup>87</sup> *Paris Agreement*, *supra* note 26 at 21. See Benoit Mayer, “Human Rights in the Paris Agreement” (2016) 6 *Climate L* 109, 110 online: <www.benoitmayer.com/files/Human%20rights%20in%20the%20

Thus, the reference to human rights appeared not in the context of human rights violations caused by climate change, but in parties' consideration of national actions taken to mitigate climate change consequences. This language, however, was the strongest nexus between climate change and human rights to appear to date in international climate agreements.<sup>88</sup>

## 7. THE OSLO PRINCIPLES AND ENTERPRISE LIABILITY: NEW AVENUES

The 2015 publication of the *Oslo Principles on Global Climate Obligations* codifies some human rights principles in the climate change context.<sup>89</sup> More broadly, the authors seek to define the current obligations of all states and enterprises to defend and protect the Earth's climate, warning that fulfilling these obligations is urgent to avoid an unprecedented catastrophe.<sup>90</sup> The *Oslo Principles* seek to develop a comprehensive analysis of existing legal authority sufficient to enable judicial intervention; while they have persuasive authority they do not bind any jurisdiction. However, creative and powerful theories originating in academic work can take root, be adopted by advocates and judges, and eventually become law. The atmospheric trust litigation discussed above is a timely example.

The *Oslo Principles'* authors assert an obligation to protect the Earth's climate and an "immediate moral and legal duty to prevent the deleterious effects of climate change," and they conclude that the "primary legal responsibility rests with States and enterprises."<sup>91</sup> The authors, in the *Oslo Principles Commentary*, called upon courts and their judges to recognize the predominant global view "that it is high noon and that *much more* must be done to avoid that we pass the fatal threshold."<sup>92</sup>

The unique contribution of the *Oslo Principles* was to extend the application of the duty of care analysis to enterprises. The first of these principles, the Precautionary Principle, is applied to enterprises as well as to nations. It requires that:

1. GHG [greenhouse gas] emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided; and
2. the level of reductions of GHG emissions required to achieve this, should be based on any credible and realistic worst-case scenario accepted by a substantial number of eminent climate change experts.<sup>93</sup>

Paris%20Agreement.pdf>.

<sup>88</sup> Mayer, *supra* note 88.

<sup>89</sup> *Oslo Principles*, *supra* note 13 at 4 (Section II, Specific Obligations), Preamble (for nexus with human rights principles).

<sup>90</sup> *Ibid*, at Preamble.

<sup>91</sup> *Ibid*, at Preamble.

<sup>92</sup> *Oslo Principles Commentary*, Principle 12 at 79, online: <columbiaclimatelaw.com/files/2016/10/oslo-principles-commentary.pdf>

<sup>93</sup> *Oslo Principles*, *supra* note 13 at Principle 1.

The sixth principle also makes it clear that enterprises, like states, should take the Precautionary Principle into account:

States and enterprises must take measures, based on Principle 1, to ensure that the global average surface temperature increase never exceeds pre-industrial temperature by more than 2 degrees Celsius.

- a. The extent of the measures legally required must be determined in light of the Precautionary Principle, defined in Principle 1.
- b. The permissible quantum of GHG emissions that a State or enterprise may produce in a specific year must be determined in accordance with this Principle.

They must do so, even if their contributions to total emissions are small (Principle 11) and even if relevant national law or international agreements would result in lesser reduction of greenhouse gas emissions (Principle 12).

The *Oslo Principles* do not quantify obligations of enterprises, either for enterprises in developing countries or more fundamentally for specific categories of enterprises, such as transport companies. Yet they offer a set of procedural standards set forth in Principles 27–29, based upon the Organisation for Economic Co-operation and Development (OECD) *Guidelines for Multinational Enterprises* (2011); the *Equator Principles*; the International Finance Corporation's (IFC) *Environmental, Health and Safety Guidelines*; and the IFC *Performance Standards on Environmental and Social Sustainability*.<sup>94</sup>

The *Oslo Principles* aspire toward a change of ambition and attitude in order to combat climate change, rather than promoting claims for damages. Their unique contribution is to apply and extend traditional tort law—a body of law applicable to states and enterprises alike—to the problem of climate change. The accompanying commentary refers to various duties of care, such as the required standard of conduct, an offspring of one of the Principles of European tort law:<sup>95</sup>

Art. 4:102. Required standard of conduct

- (1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of

<sup>94</sup> OECD, *Directorate for Financial and Enterprise Affairs, Guidelines for Multinational Enterprises*, (2011), online: <dx.doi.org/10.1787/9789264115415-en>; The Equator Principles Association, *Equator Principles* (June 2013) online: <www.equator-principles.com/resources/equator\_principles\_III.pdf> (a risk management framework adopted by financial institutions for determining, assessing and managing environmental and social risk in projects); World Bank Group & International Finance Corporation, *Environmental, Health, and Safety (EHS) Guidelines*, (2007), online: <www.ifc.org/wps/wcm/connect/554e8d80488658e4b76af76a6515bb18/Final%2B-%2BGeneral%2BEHS%2BGuidelines.pdf?MOD=AJPERES>; World Bank Group & International Finance Corporation, *IFC Performance Standards on Environmental and Social Sustainability*, (2012), online: <www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC\_Performance\_Standards.pdf?MOD=AJPERES>.

<sup>95</sup> European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Vienna: Springer, 2005) at 4.102; also available online: <civil.udg.edu/php/biblioteca/items/283/PETL.pdf>.

proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.

The duty of care is further defined with an eye toward dangerous situations:

Art. 4:103. Duty to protect others from damage

A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty.<sup>96</sup>

This basis for the duty to protect others when the actor creates a dangerous situation, taking into consideration the balance of the seriousness of the harm and the cost of avoiding damage, is the same as the one used by the *Urgenda* court. The party that is either creating or controlling a dangerous situation may be under a duty to act affirmatively to protect others from damage, according to the court. This can be a basis for the extension of the *Urgenda* decision to enterprises.<sup>97</sup>

In contrast to the duty of care of states, the duty of care of enterprises does not directly engage with human rights agreements. Yet human rights instruments may have a horizontal effect upon enterprises, and specific enterprises may voluntarily adhere to human rights treaties and environmental agreements. For example, over 9,000 companies and small or medium-sized enterprises have joined the United Nations Global Compact's initiative, embracing its ten principles in the areas of human rights, labour, the environment, and anti-corruption.<sup>98</sup>

It may not be easy to formulate specific obligations for each enterprise. However, the *Oslo Principles* suggest that enterprises should “refrain from starting new activities that cause excessive [greenhouse gas] emissions, including, for example, erecting or expanding coal-fired power plants.”<sup>99</sup> Standards already in place apply. One example is article 4:103 of the Principles of European Tort Law, which—applied in the context of climate change—could be formulated as follows: the more an enterprise may be considered to contribute or control the pace of global warming, the higher the level of ambition that may be demanded with regard to the cuts in the emissions that can be attributed to the enterprise.

The case of *Lliuya v RWE AG*, brought in the courts in Essen, Germany in 2015 by Peruvian farmer Saúl Luciano Lliuya against the German utility giant RWE, was one attempt to create a vehicle to determine such enterprise liability.<sup>100</sup> The claimant asserted that the extraordinary

<sup>96</sup> *Ibid* at 4.103.

<sup>97</sup> *Ibid* at 4.53.

<sup>98</sup> See United Nations Global Compact, “Our Participants”, online: <www.unglobalcompact.org/what-is-gc/participants>; United Nations Global Compact, “The power of principles”, online: <www.unglobalcompact.org/what-is-gc/mission/principles>.

<sup>99</sup> *Oslo Principles*, *supra* note 13 at Principle 8 (the principle concludes that states may take countervailing measures or adopt GHG intensive programs only if these are indispensable given a state's circumstances).

<sup>100</sup> Landgericht Essen [Essen District Court], Essen, *Lliuya v RWE AG*, (15 December 2016), No 2 O 285/15 (Germany) (*Lliuya*), online: <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215\_Case-No.-2-O-28515-Essen-Regional-Court\_decision-1.pdf>; *German Court Rejected Peruvian Farmer's Claim That German Utility Was Liable for Costs*

level of greenhouse gases emitted by RWE contributed, in part, to the excessive melting of a glacier threatening the village of Huaraz, Peru, where he lives. He sought compensation in proportion to RWE's contribution to climate change. His claim has not been successful: the *Landgericht* Essen dismissed the claim, partly because it held the claim was not sufficiently specific according to German procedural law, and partly because it found that the causal link between RWE's emissions and the threat in Peru was too weak.<sup>101</sup> However, appeal is pending at the *Landesgericht* Hamm.<sup>102</sup>

## 8. CONCLUSION: URGENDA AND PROSPECTS FOR FUTURE CLIMATE CHANGE LITIGATION

In April 2016, the State of the Netherlands submitted its grounds for an appeal of the *Urgenda* decision at the Court of Appeal in The Hague.<sup>103</sup> As of this writing, the Urgenda Foundation has filed no response and no action has been taken on this appeal. Since the Dutch government publicly announced that it shared Urgenda's concerns, there are essentially no remaining issues of fact. The court found that a hazardous situation is at hand, as a matter of fact; both Urgenda and the State agreed. This assessment was based on the strong scientific record contained in the case documents. Further, the assessment of risks and goals is not disputed, and the court noted that there was no defense with regard to the government's capability of increasing the ambition of its climate targets.<sup>104</sup>

On appeal, the government argued—in short—that the *Urgenda* court misunderstood the goals set for 2020, alleging it is acting in line with its international commitments, in particular with the *Paris Agreement*. The government asserted it is meeting its nationally determined contribution, which will grow in ambition in the 2020–2050 time period. Furthermore, the State argued that none of the international commitments have a direct effect on the relationship between the State and its citizens. Finally, according to the government, the court risked interfering with the distribution of powers in the democratic system of the Netherlands.<sup>105</sup> The *Urgenda* court steered away from constitutional interference to a great extent, but the appellate court may have a different view.<sup>106</sup>

We expect it may not be persuasive to the Court of Appeal that the parties more or less agree that strong emission reductions by 2020 are needed to avoid the imminent danger of

*of Dealing with Melting Andean Glacier*, online: <blogs.law.columbia.edu/climatechange/2017/01/09/climate-case-chart-updates-january-2017/>.

<sup>101</sup> *Lliuya*, *supra* note 100.

<sup>102</sup> Kiyo Dörner, “Peruvian farmer loses round in lawsuit against German power company RWE”, Deutsche Welle (16 December 2016), online: <www.dw.com/en/peruvian-farmer-loses-round-in-lawsuit-against-german-power-company-rwe/a-36794843>.

<sup>103</sup> See Urgenda, “Climate Case Explained”, online: <www.urgenda.nl/en/climate-case/legal-documents.php>.

<sup>104</sup> *Urgenda*, *supra* note 1 at para 4.101.

<sup>105</sup> *Ibid* at para 4.94.

<sup>106</sup> The grounds for appeal are published in Dutch on the website of the government of the Netherlands: Rijksoverheid, “Memorie van grieven [Memorandum of Complaints] (9-4-2016)”, online: <www.rijksoverheid.nl/onderwerpen/klimaatverandering/documenten/publicaties/2016/04/09/memorie-van-griev-9-4-2016>.

climate change. The Court of Appeal will have to decide according to the *Paris Agreement* and the nationally determined contributions in place, which do not specifically support the 2015 court order.

Nonetheless, the *Urgenda* decision represents a breakthrough in the attempt to bring together civil and human rights and climate change jurisprudence. Even if this decision is modified or reversed at the appellate level, the principle has been explored that brings together the objectives and ethics of international human rights principles and the urgency of climate change. The dismissal of the 2005 Inuit Petition against the United States by the Inter-American Commission on Human Rights, on the ground that the Inuit had not established a violation of their human rights, discouraged such claims for a decade. Until the *Urgenda* decision, no litigant succeeded in persuading a court that climate change is a matter for consideration through the lens of human rights. Today, the importance of human rights norms in the interpretation of state—and potentially enterprise—responsibility is being recognized in courts from the Netherlands, to Pakistan, to the United States.

Following the holding of the *Urgenda* court, these courts are addressing the climate crisis with creative applications of international human rights principles and a generous interpretation of the domestic law doctrine of duty of care. The result is that they are increasingly able to hold their governments—and potentially, in the future, enterprises—accountable for the present and anticipated human rights impacts of catastrophic climate change.