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The Impact of Climate Change on Human Rights and the Legal Obligations of States to Protect Them – A Comparative Jurisdictional Analysis

*Zunaida Moosa Wadiwala**

The Urgenda judgement in 2019 has paved the way for courts in Global North jurisdictions to root out strong links between human rights and the climate crisis. The UNEP Global Climate Litigation Report 2023 recognises that climate litigation is growing globally as a key tool in delivering climate justice. The report has unearthed human rights linkages to climate change and how this is leading to greater protections for vulnerable groups is society as well as compelling governments to pursue more ambitious mitigation and adaptation climate goals. This paper interrogates these statements within a transboundary climate litigation framework and considers, inter alia the global character of climate change and its influence in the courts' reasoning. The objective of this study is to consider these claims by analysing the lens through which judges in Global North jurisdictions have viewed the climate crisis in comparison to their counterparts in other jurisdictions. This study is based on landmark transnational cases and considers how if, at all, the human rights turn has traversed to Global South jurisdictions. The anticipated findings will contribute to understanding the role and obligations of courts as part of securing climate justice for people using a rights-based approach in litigation in different jurisdictions.

I. Introduction

"The climate crisis is a human rights crisis."[1] In linking the climate issue to a human rights issue, consequences such as an increase in litigation have become evident. The latest data on global climate litigation, published during July 2023 by the United Nations Environment Programme (UNEP) and the Sabin Center for Climate Change Law, Columbia Law School,[2] reports that as that 31 December 2022 the Sabin Center's database contains 2,180 climate cases.[3] Along with the increase in climate litigation, there is an increase in human-rights based claims which establish duties and obligations for increased climate mitigation and adaptation approaches on states.[4]

This article provides an analysis of the human rights turn in climate litigation in different jurisdictions by first considering the impact of climate change on human rights and how this translates to legal obligations by states to protect them, and secondly, what these heralds on a transboundary level. The objective is to consider human rights linkages to climate litigation in different jurisdictions by

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1 David R. Boyd and Stephanie Keene 'Mobilizing Trillions for the Global South: The Imperative of Human Rights-based Climate Finance' United Nations Human Rights Special Procedures Policy Brief 5.

2 Michael Burger and Maria Antonia Tigre, 'Global Climate Litigation Report: 2023 Status Review' (Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme, 2023).

3 Ibid at XIV, this number includes 1,522 cases in the United States of America and 658 cases in all other jurisdictions combined.

4 Joana Setzer and Catherine Higham (2022) 'Global Trends in Climate Change Litigation: 2022 Snapshot.' Grantham Research Institute on Climate Change & the Environment & the Centre for Climate Change Economics & Policy, London School of Economics & Political Science, 3-4. The authors connect these trends in climate litigation to the Glasgow Climate Pact which was adopted at COP26 in 2021. These trends include climate litigation which seek domestic accountability for climate targets, accountability for fossil fuel expansion and human rights-based climate litigation.

analysing first how the norms and principles enunciated by the courts travel to other jurisdictions. Secondly, to analyse the sphere of considerations brought to courts into their decision-making. The anticipated findings will contribute to understanding the role and obligations of courts as part of securing climate justice for people using a rights-based approach in litigation in different jurisdictions.

II. The State of the Netherlands v Stichting Urgenda

1. Synopsis

The *Urgenda* judgement[5] is renowned for being the first judgement in the Global North to support climate change claims under human rights law, and to thus establish a legal duty of a State to increase climate ambition.[6]

At issue was the obligation of the Dutch state to reduce greenhouse gases (GHG) originating from the Netherlands.[7] The judgments in the Hague District Court in 2015, the Hague Court of Appeal in 2018 and the Dutch Supreme Court in 2019 all concurred in favour of *Urgenda*.

In 2007 the Netherlands had decided to reduce GHG emissions by 25 to 40 percent by the year 2020 which was in comparison with the reduction target of 30 percent in 1990 as outlined in the 2007 Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report.[8] In 2011 the Dutch government stated that it was unable to meet that target and instead aimed for a reduced target of 14 to 17 percent.[9] *Urgenda* proceeded with legal action against the Dutch state in 2013, applying for GHG emissions to be reduced by 40 percent by 2020, or by a minimum of 25 percent compared to the 1990 levels.[10]

The court *a quo* in its 2015 judgement[11] held that the Dutch state was obliged to reduce its GHG emissions by the end of 2020 to at least 25 percent compared to 1990,[12] considering *inter alia* that the Dutch state may be acting unlawfully by violating its duty of care to prevent dangerous climate change,[13] based on tort Law and the doctrine of negligence.[14] In the District Court's interpretation of hazardous negligence, the behaviour is tortious if it unnecessarily creates danger and acts contrary to the unwritten law of what is deemed fit in societal interrelations.[15] The court referred to the 1965 Netherlands *Kelderluik* judgement in applying the criteria relevant to interpreting a duty of care.[16] The District Court held, on the basis of this reasoning, that the state of Netherlands has a duty of care to take mitigating measures, without which there is a strong likelihood that 'dangerous climate change' will occur.[17]

In 2018 the Hague Court of Appeal confirmed the District Court's decision.[18] Here the court stated that because the district court had ordered a reduction of at least 25% as of end-2020 relative to 1990, and rejected all other claims of Urgenda, the only matter to be decided at these appeal proceedings concerned the reduction of 25% as the rest of the claims by Urgen-

5 *The State of the Netherlands v Urgenda Foundation, The Supreme Court of the Netherlands*. (20 December 2019) Case number: 19/00135 Citation for the English Translation ECLI:NL:HR: 2019:2007 (Original Dutch citation from the Supreme Court of the Netherlands: ECLI:NL: 2019:2006)

6 Danting Fan, Boya Jiang, Dimitri de Boer and Xiaoyo Zhang with expert advisors Christina Voigt, Brian Preston, Jacqueline Peel and Others, '10 Landmark Climate Change Cases' (2022) ClientEarth <https://www.clientearth.org/latest/documents/10-landmark-climate-change-cases/> accessed 29 February 2024.

7 *Urgenda* 2019, 815.

8 Andre Nollkaemper and Laura Burgers, 'Introductory Note to the State of the *Netherlands v Urgenda* (NETH. SUP.CT.)' (2020) 59 The American Society of International Law, 811.

9 ibid.

10 ibid.

11 *Urgenda Foundation v The State of Netherlands, District Court of the Hague*. (24 June 2015). Case Number: C/09/456689/HAZA The citation for this judgement is C/09/456689/HA ZA and the official judgement in the Dutch language is available at ECLI:NL: RBDHA: 2015:7145.

12 *Urgenda* 2019 para 2.3.1

13 ibid. It was held that the legal obligations of the Dutch state towards *Urgenda* were not derived from the Article 21 of the Dutch Constitution which provides for the fundamental right to a clean environment, nor from the internationally recognised 'no harm' principle and neither from the UNFCCC protocols which aim to preserve, protect and improve the quality of the environment and to protect human health. Based on this, *Urgenda* could not rely on the provisions of Articles 2 (the right to life) and 8 (the right to respect for private and family life) of the ECHR. *Urgenda* 2019 paras 5.2.2 and 5.2.3. See also Zunaida Moosa Wadiwala 'Rights-Based Climate Litigation in South Africa and the Netherlands' [2023] Chinese Journal of Environmental Law, 238-239.

14 Nollkaemper (n 8) 811.

15 ibid.

16 *Urgenda* 2019 para 2.3.1.

17 ibid.

18 *The State of Netherlands v Urgenda Foundation, The Hague Court of Appeal* (9 October 2018) Case Number 200.178.245/01. The citation of the judgement in the Dutch language is ECLI:NL: GHDHA: 2018:2610.

da were no longer disputed.[19] The Court of Appeal found that there was a 'genuine threat of dangerous climate change'[20] posing a serious risk to the current generation of Dutch inhabitants of either losing their lives or of having their family lives disrupted.[21] The court cited Articles 2 and 8 ECHR[22] which implies that the State has a duty to protect against the genuine threat of dangerous climate change.[23] The State appealed the decision of the court *a quo* and argued that there is no basis for the Dutch State to take reduction measures in the emission of its GHG's. The state based its argument first by asserting that neither the requirements of Article 3[24] nor Article 6[25] of the Dutch Civil Code have been met and secondly by claiming that neither national nor international law lays down a legal duty for the State to take measures to achieve the climate reduction targets as sought.[26] *Urgenda* cross-appealed to include the human rights provisions of Article's 2 and 8 of the ECHR.[27] The Court of Appeal held first that in terms of standing, *Urgenda*, as a class action, may rely on Articles 2 and 8 ECHR. Secondly that the State has a positive obligation within its jurisdiction to uphold the protection laid out in Articles 2 and 8 of the ECHR which necessitated protection of the rights of Dutch citizens and to take precautionary measures to prevent infringements of these rights in the face of any real or imminent threats. The third factor considered by the Court of Appeal was the genuine threat of dangerous climate change and lastly the Court considered if the State was acting unlawfully by not adhering to at least 25 percent reduction in GHG by the end of 2020.[28]

The Dutch State then instituted an appeal in cassation.[29] Since the Supreme Court of appeal was a court of cassation *in casu*, and it is of particular importance for this research to analyse both the application of the law as well as the reasoning behind the Court of Appeal, the final judgment ought to be read in conjunction with the judgment of the Hague Court of Appeal as has been proposed by Backes and Van Der Veen.[30] This was met, in September 2019 by opinions of the Advocate General and the Procurator General.[31] On the 20 December 2019, on the advice of the Advocate General and the deputy Procurator Dutch Supreme Court upheld the decision of the Court of Appeal.[32]

2. The Transnational Analysis

a. Establishing the Transnational Activity

The transnational activity stems from the global impacts of GHG emissions with which the court placed its scientific discussions on a 'global level' by considering international frameworks, treaties and discussions.[33] Included in this context the court expounded on the establishment of the UNEP, the IPCC and particularly its assessment reports AR4 and AR5, the

19 *Urgenda* 2018 para 3.9 2018. See also para 28 where the court states that *Urgenda*, although largely agreeing with the judgement of the court *a quo*, believes that the state of Netherlands is doing too little to limit GHG emissions and that swift intervention is needed to save the planet. The grounds of appeal of the State and of Urgenda on the cross-appeal are set out in paragraph 3.1 and 3.2 respectively, as follows: the State disagrees with the judgement of the court a quo and seeks to submit the dispute in its entirety on appeal. *Urgenda* on the other hand, seeks to rely on Articles 2 and 8 ECHR in this appeal proceedings.

20 *Urgenda* 2019 para 2.3.2.

21 ibid.

22 Unlike the court *a quo* which based its findings on Tort law and Negligence, see (n 13).

23 *Urgenda* 2019 para 2.3.2.

24 Article 3:296 of the Dutch Civil Code, which provides that under Dutch law, 'injunctions are based on article 3:296 DCC, which indicates that if someone is obligated to give, to do, or to refrain from doing something towards another, he is ordered so by court.'

25 Article 6:162 of the Dutch Civil Code, which provides that 'a person who commits a wrongful act against another person, which can be attributed to him, is obliged to compensate the damage that the other person suffers as a result.'

26 *Urgenda* 2019 para 2.2.3.

27 Nollkaemper (n 8) 811.

28 *Urgenda* 2019, 825 and para 2.3.2; Wadiwala (n 13) 239 -241.

29 This was the main task of the Supreme Court.

30 Chris W. Backes and Gerrit A. Van der Veen, 'Urgenda: The Final Judgement of the Dutch Supreme Court' (2020) Journal for European Environmental & Planning Law, 308. Here the authors point out that the Court of Appeal agreed with the decision of the District Court although on different grounds as the District Court based its findings on Tort Law whereas the Court of Appeal based its findings on the duty of the Dutch State to protect the Human Rights. See also Margaretha Wewerinke-Singh and Asleigh McCoach 'The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation' (2021) 30 RECIEL, 276. Here the authors note, 'In analysing the Supreme Court's judgement, it is important to note that it is based on the facts as established by the Court of Appeal – which were not disputed by either party in cassation.'

31 Nollkaemper (n 8) explains that the Advocate-General and the Procurator-General are considered the 'most authoritative advisors of the Supreme Court' and were tasked was to consider the cassation appeal and whether to quash the ruling of the Court of Appeal. They agreed with and advised their approval of the judgement of the Court of Appeal.

32 *Urgenda* 2019 815.

33 *Urgenda* 2018 para 4.

conclusion of the UNFCCC and its articles 2, 3 and 4 as well as the list of significant COPs; and these mechanisms all illustrate the transboundary activities of this case.[34] In addition, the Appeal court spent considerable time on the analysis of global warming and established that the current level is around 1.1 degrees Celsius warmer than the beginning of the Industrial Revolution.[35] The court further clarified the global 'carbon budget' in accordance with the latest scientific insights[36] and stated that the 'worldwide community' acknowledges the need to reduce carbon emissions.[37]

The Supreme Court's conceptualisation of climate change further established a transboundary element by situating climate change and its inherent risks[38] as that of 'global climate change.'[39]

b. Transnational Principles Enunciated by the Court

In the interpretation of whether Articles 2 and 8 ECHR oblige the State to take measures to protect against dangerous climate change, four norms and principles applied by the court may be recognised as transboundary in nature.

The first is that dangerous climate change and its consequences are recognised at an international level.[40] The Supreme Court, much like the Court of Appeal before it, expended much time in an analysis of the danger as well as the consequences of climate change, *inter alia* that it poses a global challenge with inherent risks to the ecosystem jeopardising food supply.[41] The State contended that Articles 2 and 8 ECHR do not make it obligatory to offer protection from the very real threat of dangerous climate change and the State claimed further that since the threat of climate change is global in nature, it did not fall within the ambit of protection afforded by the ECHR.[42] The court considered the meaning of the positive treaty obligations in accordance to the provisions of Articles 1, 2 and 8 ECHR and found that the obligations require the State to take both mitigation as well as adaptation measures and that a court may determine what is reasonable and suitable in this regard.[43] The court found further that the obligations of these provisions refer to the State ensuring it takes measures, and does not pertain to the achievement, or guarantee of an achievement of the expected outcome.[44] Pursuant to these findings, the court held that no other conclusion can be drawn aside from that in terms of Articles 2 and 8 of the ECHR, the state is obliged to take measures to counter the genuine threat of dangerous climate change.[45] Nollkaemper considers this as a key holding relevant to international law and deduced that this decision could be grounded in human rights law, which reinforces the argument that climate change is a human rights issue and is likely to have a positive impact and influence on future transnational climate litigation.[46]

The next principle applied by the Supreme Court which may be considered transboundary in nature is the lens from which the court viewed these obligations as that of being "common ground."[47] The court interpreted "common ground" within the ambit of Article 31(1) of the Vienna Convention on the Law of Treaties, which provides protection of human rights in terms of the general principles of international law.[48] This stems from the many ways that these

34 *Urgenda* 2018 paras 5 and 6.

35 *Urgenda* 2018 para 3.5.

36 ibid.

37 *Urgenda* 2018 para 3.6. The court identifies differing levels of urgency between these assessments for the global community and separates treaties, agreements and arrangements that have been applied within the UN context, the EU and by the Netherlands.

38 Urgenda 2019 para 2. The court discusses the facts as established by the court of appeal, which include climate change and its consequences, the IPCC reports, the UNFCCC and COP conferences, the Paris Agreement and the UNEP reports, all which are significant in the context of being international.

39 ibid. Terminology used by the court include 'warming the planet,' 'the rise in the planet's temperature,' 'climate change and the international community,' 'if the earth warms substantially,' and 'global warming progresses.' See also Wadiwala (n 13) 241 - 242.

40 Drawing on conclusions based on insights derived from climate science, the Supreme Court stressed that the consequences of dangerous climate change are now recognised at an international level, and the State did not challenge this conclusion. *Urgenda* 2019 paras 4.1 - 4.8.

41 ibid.

42 *Urgenda* 2019 para 5.1 2.

43 Urgenda 2019 paras5.2.1 - 5.3.4

44 ibid.

45 *Urgenda* 2019 para 5.6.2. The court expressed also that the State is to treat this as a national problem constituting a 'real and immediate risk' entailing the risk that the lives and welfare of Dutch residents could be seriously jeopardised.

46 Nollkaemper (n 8) 812.

47 *Urgenda* 2019 paras 5.4.1 – 5.4.3.

48 The Vienna Convention on the Law of Treaties, adopted in 1969 but only entered into force in 1980, governs international treaties and applies to written treaties between States. Pat Bauer 'Vienna Convention on the Law of treaties' <https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties> accessed 1 August 2023. The third part of the Vienna Convention, which deals with the application and interpretation on treaties is relevant *in casu* and which the court used in its interpretation of the ECHR.

obligations have been enforced by the European Court of Human Rights (ECtHR) and which establishes that the provisions of the ECHR must be effective and practical in their interpretation.[49] The stipulation, in Article 31(1) is that the treaty must be interpreted first, in good faith, and secondly, according to the ordinary meaning given to the treaty based upon its objectives and purposes.[50] The court also referred to precedent[51] which held that in the interpretation of the ECHR, Article 31(3)(c) of the Vienna Convention which provides that the provisions of the ECHR ought not to be applied in a vacuum but rather in harmony with the principles of international law.[52] The result of this interpretation meant that the target to reduce GHG emissions by 25% by 2020 was incorporated into the positive obligations binding on the Dutch State by Articles 2 and 8 ECHR. Nollkaemper further adds that the fact that the 25% had been transformed into "common ground" stemmed from its endorsement by the annual Conferences to the Parties (COP) to the UNFCCC and because the European Union had taken this as its point of reference.[53] The Supreme Court viewed this from an international perspective, in that the resolutions and statements derived from COP gave a stronger consensus on developed countries to urgently reduce GHG emissions, which in turn gave a more concrete meaning to Articles 2 and 8 ECHR, and this was how the "common ground" method of interpretation made the distinction between legally binding and positive obligations and non-binding resolutions and documents.[54]

Thirdly, and also likely to have the most influence on transnational aspects of climate litigation, is the point raised by Nollkaemper that the court, in response to the State that the Netherlands was only a minor contributor to global climate change, nevertheless held that the Netherlands be subject to its own obligations and was bound to prevent harmful climate change according to Articles 2 and 8 ECHR.[55] The court stressed on the obligations of the ECHR and the UNFCCC and applied the "no harm" principle to demonstrate and reveal that if each state fulfils its own obligations, it will be bound to prevent harm from climate change.[56]

Lastly, the court addressed the State's arguments within the context of the precautionary principle.[57] In essence, the precautionary principle, which is an accepted principle in international law, and which has been incorporated in the UNFCCC as well as confirmed in case law of the ECtHR, is a way to prevent the State of relying on any uncertainty with regards to climate change science.[58]

Similarly, literature on the *Urgenda* decision shows that when using an integrated approach to international law to apply the obligations of Articles 2 and 8 ECHR, the Dutch Supreme Court provided a wider perspective from the angle of international law.[59] The conclusion is drawn that in so-doing, judicial interpretation is a tool to reduce legal ambiguity in branches of international law.[60]

c. Sphere of Transnational Considerations Included in the Judgment

The Hague Court of Appeal acknowledged the risk and threat of climate change globally[61] and held that the State has done too little to prevent dangerous climate change and further that it was doing too little to catch up.[62] Thus the court also considered risks in the face of imminent danger as well as social costs that could come into play.[63] The court looked at the reduction percentages expected from both the EU and the Netherlands, as an Annex I country[64] but made no reference to any other jurisdictions. There was also no mention of the risks faced by developing countries.

The Supreme Court clearly expressed its agreement with climate science and the international community that the warming of the earth above 1.2 de-

49 *Urgenda* 2019 paras 5.4.1 – 5.4.2.

50 ibid para 5.4.2.

51 ibid.

52 ibid

53 Nollkaemper (n 8) 812.

54 ibid.

55 ibid 813.

56 ibid.

57 *Urgenda* 2018 para 63.

58 Ibid

59 Margaretha Wewerinke-Singh and Asleigh McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation' (2011) RECIEL 276.

60 Ibid.

61 *Urgenda* 2018 paras 44 – 45.

62 *Urgenda* 2018 para 71.

63 ibid.

64 *Urgenda* 2018 para 72.

grees Celsius could have dire consequences affecting lives, welfare and the environment of people around the world.[65]

The court relied on Article 1 ECHR to limit the ambit of protection to the Netherlands.[66] The court considered the provisions of Article 2 ECHR with reference to established precedent from the ECtHR which encompasses a positive obligation on the State to safeguard lives of people within its jurisdiction in the event of hazardous activities, including natural disasters and the courts on many occasions found that Article 2 ECHR was violated by the State's acts of commission or omission with regards to natural or environmental disasters.[67] In a similar vein the court found that the provisions of Article 8 apply *mutatis mutandis* to environmental issues.[68] Most salient from this judgement, however, is that the Supreme Court interpreted the provisions of Articles 2 and 8 to be applicable to the facts and thus refuted the claim by the State.[69]

Within its sphere of considerations, the Supreme Court also examined the global problem of climate change and the national responsibility that this entailed in pursuance of the provisions of Articles 2 and 8 ECHR. The court arrived at the finding that due to having found Articles 2 and 8 applicable to the matter[70] and that the State is thus required to take measures to counter dangerous climate change and the risks therein associated.[71] The court stipulated further that this constitutes a 'real and imminent risk' to large amounts of Dutch residents,[72] and even the mere existence of a 'sufficiently genuine possibility' of the materialisation of these risks holds the State accountable to exert suitable measures.[73]

Ironically though, the Dutch Supreme Court did not consider the parties not before it, particularly the developing world, in its decision. This, despite the thread of global climate change being consistently weaved throughout the judgement.

III. Neubauer et al v Germany

Judgement for the *Neubauer*[74] case was given on the 24 March 2021 in the German Federal Constitutional Court *(Bundesverfassungsgericht)*. Scholars have referred to this case as "ground-breaking" and it has been classified as the first example of a new paradigm termed planetary climate litigation.[75] This is the first time that a climate case anywhere in the world had taken the approach of a constitutional rights-based climate protection which recognised climate protection as a human right, and which also included the duty to protect fundamental rights of future generations. Secondly, this is also the first climate case to have explored a 'planetary perspective' in that the Constitutional Court considered not only a purely domestic perspective but instead adopted a

65 *Urgenda* 2019 paras 4.1 - 4.8. The court also found that as the Netherlands is a party to both the UNFCCC and the Paris Agreement, it is required to reduce its GHG emissions. The court then contextualised this within the ambit of the claim by the State, questioning whether these obligations are based on the provisions of Articles 2 and 8 ECHR. At paragraph 4.8 2019 judgement.

66 *Urgenda* 2019 para 5.2.1. Article 1 ECHR makes provision for contracting parties within their jurisdiction to have their rights and freedoms secured.

67 *Urgenda* 2019 para 5.2.2. 2019 and at footnote 8 of the 2019 judgement. The ECtHR cases referred to by the Supreme Court *in casu* to illustrate the requirements of Article 2 ECHR having been met were three, namely *Oneryildiz/Turkey* which concerned the long-standing risk of a gas explosion at a landfill occurring at any time and which had been known to the authorities for years. Secondly, the case of *Budayeva et al./Russia* in which the authorities were aware of the dangers of the risks of life-threatening mudslides occurring and which eventually did occur. Thirdly, the case of *Kolyadenko et al./Russia* which concerned the authorities knowing that evacuation would be necessary in the event of exceptionally heavy rainfall.

68 *Urgenda* 2019 para 5.2.3

69 *Urgenda* 2019 para 5.3.1 where the court held that Articles 2 and 8 are not limited to specific persons but to the population within that region at large within the scope of environmental hazards.

70 *Urgenda* 2019 para 5.6.2 where the court had made a cross-reference to paragraphs 5.2.1 to 5.3.4 where it found that the State is obliged to protect the human rights provisions of Articles 2 and 8 ECHR.

71 *Urgenda* 2019 para 5.6.2

72 *Urgenda 2019* para 5.6.2 where the court once again made cross references, first to the findings in paras 4.2 to 4.7 which pertained to the assumptions regarding the danger and consequences of climate change, *inter alia* that it warmed the planet and has been recognised at international level and therefore there was a real threat of dangerous climate change. Secondly to the provisions of para 5.3.1 and to the conclusions of paras 5.2.2 and 5.2.3 which considers the meaning of Articles 2 and 8 ECHR, and which find that they apply to this case and not only to risks that may materialise in the longer term and that the risks need not exist in the short term.

73 *Urgenda* 2019 para 5.6.2 2019.

74 Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Mar. 24, 2021. Case No 1 BvR 2656/18. 1 BvR 96/20. 1 BvR 78/20. 1 BvR 288/20.

75 Louis J. Kotze 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?' (2022) 22 Cambridge Core 8, 1-2.

planetary view in reaching its decision.[76] This is the first time that a court focused on the extraterritorial obligations of Germany.

The relevant German legislation on climate change in this matter is first, Article 2(2) first sentence of the Basic Law[77] which provides for protection of rights against environmental pollution, and which also provides for the duty to protect life and health against climate change risks with the possibility of the duty to protect future generations. Secondly, Article 20a of the Basic Law which is the provision obliging the state to take climate action to achieve climate neutrality. Similar to the position in South Africa[78] rights are not absolute and must be weighed against other rights guaranteed by the Constitution.[79] This provision, with the obligation to accord greater wight to climate action gives rise to an international dimension of Article 20a.[80] The legislator is also mandated to set out the necessary provisions for emissions in the form of parliamentary legislation in order to protect the fundamental rights of the Basic Law.[81]

Thirdly is the Federal Climate Change Act (Hereafter referred to as KSG).[82] Prior to the enactment of the KSG, Germany's climate targets were based on the various plans and programmes it had defined for the period 2020 onwards. However, with Section 3(1) of the KSG, these climate targets were now given statutory force.[83] In this way, the KSG responds to the needs for greater protection in terms of climate action and is considered the legal basis for Germany's obligation in terms of the Paris Agreement.[84] However, the challenge brought by this application concerns the specific climate targets as set out in the KSG.[85]

1. Synopsis

This was a lengthy judgement based on a complex legal and factual matrix. Part A discussed the legal bases of the case and considered first the KSG and the legislator's purpose and climate targets within the framework of the Act, and secondly, the aims of the Paris Agreement.[86] The constitutional complaints in this case were directed against the provisions of the KSG in that the applicants claimed that the legal framework did not cater, swiftly enough, for the reduction of GHG's, particularly carbon dioxide (CO2), which is necessary to limit the increase in global temperature below 2 degrees Celsius and preferably 1.5 degrees Celsius.[87] The court relied on the scientific reports published by the IPCC which conclude that it is the human-induced increase in GHG that lead to global warming.[88] The court considered the effects on the environment and climate and the impacts of global warming and climate change as well as the

76 ibid 4. '…how the Court (either wittingly or unwittingly), has innovatively managed to embrace a more holistic planetary view of climate science, climate change impacts, planetary justice, planetary stewardship, earth system vulnerability, and global climate law, within the context of a human-dominated geological epoch, to guide its reasonings and findings.'

77 The Basic law refers to the Constitution of Germany, called the *Basic Law* or *Grundgesetz* (GG).

78 There is a limitation of constitutional rights and freedoms, and they are not absolute, but have boundaries set by the rights of others as well as by important social concerns such as public order, safety, health and democratic values. The Constitution in section 36 has a general limitation clause which provides the criteria for the justification of restrictions of the rights in the Bill of Rights. Ian Currie and Johan de Waal, *The Bill of Rights Handbook* (2005) 163.

79 *Neubauer* Headnote, which also states that within this balancing process, increasing weight is given to the obligation to consider climate change as it intensifies.

80 ibid, 'The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate action at the global level and is required to promote climate action within the international framework.'

81 ibid.

82 Federal Climate Change Act of 12 December 2019 known as *Bundes-Klimaschutzgesetz* – KSG.

83 *Neubauer* para 5

84 *Neubauer* para 3

85 Section 3 of the KSG sets out the specific climate targets and these were the challenges put forth by the claimants *in casu*. Section 3 provides for the gradual reduction of GHG emissions, with at least 55% reduction by the year 2030 compared to levels in 1990. This reduction quota applies to all GHG emissions contributing to climate change but excludes GHG emissions from land-use change and forestry and from international aviation and shipping attributed to Germany. *Neubauer* para 4.

86 Article 2.1.a of the Paris Agreement highlights its central aim to strengthen the global response to the risks and threats of climate change in the context of sustainable development by 'holding the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels'.

87 *Neubauer* para 1. The Constitutional complaints were based on the protection of fundamental rights of Article 2(2) first sentence and Article 14(1) of the Basic Law. At para 7 which specified that according to Article 2(1)a of the Paris Agreement, the increase in global temperature should be well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels.

88 *Neubauer* para 16.

sources of emissions.[89] The judgement then considered the factual bases of climate action and stated that the reduction of CO2 emissions is the only way to significantly slow down human-induced climate change.[90] The judgement looked at the available options with which to limit the CO2 concentrations in the earth's atmosphere[91] while reduction measurements and the amount of CO2 concentrations needed to be restricted (the CO2 budget)[92] were considered separately from the scale of transformation.[93]

There were four constitutional complaints which make the Neubauer decision[94] in which the primary complainant is that the German state has failed to create a legal framework to sufficiently reduce GHG emissions, particularly CO2.[95]

Part B[96] dealt with matters of admissibility and standing and the court ruled that in so far as the complainants were natural persons, their constitutional complaints were admissible. The court held that the complainants, in certain instances, could base their claims on Article 2(2) first sentence GG and on the violation of Article 14(1).[97] The court also allowed the complainants living in Bangladesh and Nepal standing on the basis that it was yet to be clarified if the fundamental rights entrenched in the Basic Law oblige Germany to protect people abroad against global climate change.[98] The issue of the merits discussed in Part C were divided into three categories, being the duties of protection vis-à-vis the complainants living in Germany, the duties of protection vis-à-vis the complainants living in Bangladesh and Nepal and the intertemporal guarantee of freedom.[99] In reaching its final results in Part D, the court declared that section 3(1) second sentence and section 4(1) third sentence of the KSG, in conjunction with Annexure 2 are unconstitutional in that they do not meet the requirements of the fundamental rights with respect to the reduction targets from 2031 until reaching climate neutrality as stipulated in Article 20a GG,[100] and this decision was unanimous.[101]

2. The Transnational Analysis

a. Establishing the Transnational Activity

The German federal Constitutional Court, relied on the findings of the IPCC and unanimous scientific opinion, and acknowledged the climate crisis as a global crisis caused by human-induced increases in

89 *Neubauer* paras 16 - 30.

90 Para 31 – 32, 'There is presumed to be a roughly linear relationship between the total amount of anthropogenic CO2 emissions accumulated over time and the global temperature increase.'

91 Measures such as emission reduction for example by not burning fossil fuels, negative emissions technology, which although considered essential by the IPCC are difficult to implement, particularly on larger scales due to economic risks and impediments and adaptation strategies which could possibly involve work on dykes, changes in the growing of crops, planting more trees and conservation of forests and updated urban planning were discussed in paras 33 - 34.

92 The court held the view that the restrictions of CO2 concentrations ought to be a matter of climate policy, together with targets and measurement parameters from climate science and the Paris Agreement targets. *Neubauer* paras 35 - 36.

93 *Neubauer* para 37.

94 These are *BvR 2656/18* (which was lodged prior to the KSG coming into force and thus the complainants alleged that the state/legislator had failed to act. The German *Bundestag* (German Federal Parliament), the *Bundnis 90/Die Grunen* (a parliamentary group) and the Federal Government all considered this complaint as inadmissible), *BvR 288/20* (This complaint was directed against the KSG and was instituted by adolescents and young adults who claimed the violation of a fundamental right to a future consistent with human dignity, and they also claimed that the climate actions by the German legislator was insufficient and that the national climate target for the year 2030 is insufficient with the annual emissions amounts allowed being too high and that the provisions of the KSG allowing unused emission allocations to be sold to other EU member states thereby negating the efforts of climate action, as a failure by the legislator to fulfil its duties of protection. The German *Bundestag* and the Federal Government found these complaints to be inadmissible and unfounded), *BvR 96/20* (these proceedings were also instituted by children and adolescents who complained that the climate efforts by the legislator are insufficient and that the KSG is incompatible with the minimum standard for the protection of their fundamental rights based on the findings of the IPCC. The German Bundestag considered these complaints as inadmissible and unfounded) and *BvR 78/20* (these proceedings were instituted by complainants living in Bangladesh and in Nepal and claimed that Germany had violated its duties of protection due to insufficient climate efforts, in that Bangladesh and Nepal are especially vulnerable in a range of different way to the changes brought about by climate change. The German Bundestag found this complaint inadmissible and unfounded while the Federal Government was of the view that fundamental rights violations are to be excluded due to the non-domestic circumstances of this matter), respectively. Neubauer paras 39 - 89.

95 These constitutional complaints are based on the duty by the state to protect fundamental rights and these are *inter alia* Article 2(2) first sentence and Article 14(1) of the Constitution on a fundamental right to a future consistent with human dignity and a fundamental right to an ecological minimum standard of living based on Article 2(1). *Neubauer* paras 38 - 89.

96 *Neubauer* paras 90 - 141

97 ibid. Article 2(2) first sentence provides for the fundamental right to life and physical integrity and Article 14(1) provides for the right to property, inheritance, and expropriation.

98 *Neubauer* para 101.

99 *Neubauer* paras 142 - 265.

100 Article 20a stipulates the obligation on the state to take climate action.

101 *Neubauer* para 266 and 270.

GHG concentrations which lead to global warming.[102] The court stated that without additional measures to combat climate change, it is likely that the global temperature will increase by more than 3 degrees Celsius."[103] This global temperature rise was considered as "drastic."[104] The court made it clear that climate change, is anthropogenic in origin, and results in a global crisis with worldwide consequences,[105] This was the first transboundary dimension of this case.[106]

The second aspect that lent it a transboundary element to this case was Germany's obligations, in the face of the global climate crisis, to take nationally determined actions for climate mitigation and adaptation to strengthen the global response to the threat of climate change.[107]

An extraordinary feature of this judgement was the understanding that as Germany has an obligation to take climate action and Article 20a of the Basic Law has an international dimension in that no state can resolve the problems of climate change on its own due to the global nature of the climate. The state is thus compelled to engage in internationally oriented activities to tackle climate change at the global level and to promote climate action within the international framework.[108]

b. Transnational Principles Enunciated by the Court

The transnational principle applied by the court was its use of a 'duty of protection' vis-à-vis the complainants living in Bangladesh and Nepal, where the court found that no violation of a duty of protection arising from fundamental rights is ascertainable.[109] The court found no need to decide whether duties of protection that arise from fundamental rights place an obligation on Germany to take actions against difficulties caused by global climate change, towards Bangladesh and Nepal.[110] The court reasoned that the complainants were, in their own countries, exposed to the risks associated with global warming, and since this was caused by GHG emissions which have a global impact, the only way in which further global warming could be prevented is by climate action taken by all states.[111] This would entail the reduction of GHG emissions to climate-neutral levels in Germany as well, which was for Germany to limit,[112] and therefore the court held that no violation of a duty of protection was ascertained for the foreign complainants.[113]

Related to the duty of protection, is the courts classification of anthropogenic climate change[114] as giving rise to the duty to implement 'adaptation' strategies.[115] The court outlined the provisions of Article 20a of the German Constitution that when there is a causal relationship of environmental reliance,[116] then there is an obligation to take climate action.[117] The court acknowledged that this obligation has an international dimension[118] and that this placed an obligation on the state to engage in 'internationally orientated activities to tackle climate change at the global level' with the further requirement to promote climate action within the international framework.[119] The court stated further that although fundamental rights are binding on Germany by virtue of Article 1(3) GG, this binding effect is not restricted to German territory.[120] The court noted an exception to this oblig-

102 *Neubauer* para 17 - 19.

103 *Neubauer* para 19.

104 *Neubauer* para 22.

105 For example, the court cites the impacts of global warming on the environment and Earth's climate on ice masses (cryosphere) which melts continental ice sheets in Greenland and Antarctica, leading to the retreat of glaciers that are observed worldwide and are seen in rising sea levels. See, Para 20.

106 Which is that legislation in Germany makes it obligatory to reduce GHG emissions in accordance with the aims of the Paris Agreement.

107 This stems from the fact that Germany has ratified the Paris Agreement, an international and binding treaty and according to which countries pledge, inter alia, to take nationally determined, quantifiable and progressive action for climate mitigation and adaptation for the 1.5 and 2 degrees Celsius. See, Articles 2-3 Paris Agreement.

108 *Neubauer* headnote.

109 *Neubauer* para 173.

110 *Neubauer* para 174.

111 ibid.

112 *Neubauer* para 174.

113 *Neubauer* para 173.

114 *Neubauer* paras 16 and 31 - 32.

115 *Neubauer* para 34.

116 Hence the double reference to anthropogenic climate change in this article.

117 *Neubauer* Headnote para 2.b - c.

118 *Neubauer* Headnote para 2.c 'The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action.'

119 ibid.

120 *Neubauer* para 175.

ation that, despite this comprehensive binding effect, there are specific fundamental rights protections whose scope would vary for countries abroad, as per the circumstances that they are applied.[121] This would necessitate distinguishing between different dimensions of fundamental rights.[122] However, the different circumstances in which fundamental rights could be relied upon in establishing duties of protection for those living abroad have yet to be clarified fully, with a possible factor to consider in this duty of protection would be the severity of the climate change impacts already or potentially faced by the claimants.[123]

For the parties living in Germany the court ruled on the merits of the cases that the constitutional complaints were partially successful.[124] The risks posed by climate change are what gave rise for the claimants living in Germany to duties of protection.[125] The court outlined two ways in which to fulfil its duties of protection for people living in Germany, first by adopting measures slow down global warming and secondly by the implementation of adaptation measures.[126]

The duty of protection for both groups of people, those inside and those outside Germany, stemmed from the court's application of the precautionary principle. The court applied the precautionary principle differently for the overseas cases, in that the German state would not have the option of implementing adaptation measures as a precaution but would be restricted to possible and necessary measures for protecting against climate change abroad.[127]

c. Sphere of Transnational Considerations included in the Judgement

The court had established that a duty of protection resting on the German state could not be the same for people living outside of Germany as it is for those living in Germany.[128] However, it also clarified that this does not mean then that Germany is excluded from assuming responsibility, either politically or in terms of international law, to ensure that positive steps are taken to protect people in countries that are poorer and more severely impacted by climate change.[129] The court reasoned further that even if there was an obligation on Germany to protect those living in Bangladesh and in Nepal, the protection afforded would be to limit the rise in temperature and the provisions of Article 2(2) first sentence and Article 14(1) GG, as relied upon by the complainants', would not be violated. The court stated that it could not be asserted that the legislator has taken insufficient measures to limit climate change and relied on the fact that because Germany has ratified the Paris Agreement, the legislator had based the KSG upon the obligations of the Agreement and upon the commitments by Germany to achieve carbon neutrality by 2050. The court specified further criterion for precautionary measures in the domestic obligations of Germany, in that they must not fall short of the protection goals and stated that these are not applicable to a duty of protection for those living abroad. The court found that the difference in duty of protection is that for some overseas cases, Germany would not have the option of implementing adaptation measures as a precaution, and that they would be restricted to only certain protection methods. This would entail asking whether the protection measures are sufficient to protect fundamental rights which would be evaluated by comparing climate action measures taken with the possible adaptation options. Since the duties of protection based on fundamental rights are inextricably linked with emission reductions and adaptation measures, it would make ascertaining whether a duty of protection had been violated extremely difficult. Instead, the court concluded in this regard that the German legislator would have fulfilled its duty of protection simply through their international commitment to prevent climate change together with the specific measures aimed at implementing the globally agreed upon climate action.[130]

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121 ibid.

122 And the court cites as examples, positive obligations of the state, defensive rights against state interference or as decisions on values enshrined in the Constitution. At para175.

123 ibid.

124 *Neubauer* para 142. The court reasoned that fundamental rights are thus violated because the emission amounts that were allowed by the KSG for the current period render the possibility of substantial burdens to reduce future emissions.

125 *Neubauer* para 143. The duties of protection referred to her are Article 2(2) first sentence GG, rights to life and physical integrity and Article 14(1) GG, rights to property, inheritance and expropriation.

126 *Neubauer* para 177.

127 *Neubauer* para 180-181.

128 *Neubauer* para 178.

129 *Neubauer* para 179.

130 *Neubauer* paras 180 -181.

The court did find however, that with regards to intertemporal guarantees of freedom, the legislator has violated fundamental rights in that it has failed to take sufficient precautionary measures to manage its obligations with respect to fundamental rights,[131] but this was not referring to the claimants from Bangladesh and Nepal.

IV. Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others

Significantly, this case[132] has left positive obligations for climate change impacts to be considered in the authorisation process for granting Environmental Impact Assessments (EIA). This heralds a victory for environmental and climate change activists as the case has laid down the importance of considering global climate change and upholding the aims of the UNFCCC and the Paris Agreement.

The court, in acknowledging South Africa's international obligations and its anticipation to decrease reliance on coal across all emissions in order to pursue its NDC targets as per the Paris Agreement.[133] Such a ruling affirms the claim made by Peel and Lin,[134] that courts are important role players in shaping 'multilevel climate governance' in the way that domestic litigation is furthering the global climate response by holding states accountable for their individual NDCs.[135]

1. Synopsis

At issue was the environmental impacts of building a coal-powered fire station and the granting of the environmental authorisation for this purpose.[136] The High Court had to assess if the decision to grant the environmental authorisation was irregular in terms of South African administrative law[137] in that it did not follow the proper procedure of conducting a climate change assessment[138] before duly granting the environmental authorisation.

The Thabametsi power plant, planned and procured in 2015 raised environmental concerns.[139] The legal mechanisms relevant to this environmental authorisation were, *inter alia*, section 24 of the National Environmental Management Act (hereafter NEMA)[140] which provides that activities listed or specified by the Minister of Environmental Affairs must obtain an environmental authorisation before commencement. The construction of the Thabametsi power plant fell under this category of listed activities and on the 25 February 2015 the Chief Director of the Department of Environmental Affairs (DEA) granted an environmental authorisation for Thabametsi[141]. *Earthlife* appealed to the Minister of Environmental Affairs who subsequently upheld the decision to grant the environmental authorisation on the 7 March 2016. The application *in casu* begins with *Earthlife* seeking a review of the decision to grant the environmental authorisation as well as the appeal decision by the Minister.[142] *Earthlife* relied on three grounds; first non-compliance of all relevant considerations according to the provisions of section 24O(1) NEMA. Next, that the absence of a climate change impact assessment resulted in both the decision to the grant the environmental authorisation and the appeal decision as 'irrational and unreasonable.'[143] Finally that the Minister, in her appeal decision, had committed material errors of law.[144] After a lengthy consideration[145] the court on the 8 March 2017 ruled in favour of the applicant *Earthlife* due to the contention on the issue of

131 *Neubauer* para182.

132 2017 (5) SA 227 (WCC); [2017] ZAWCHC 50 Case No: 65662/16.

133 *Earthlife* para 35. South Africa has signed and ratified the UNFCCC, acceded to the Kyoto Protocol, and signed the Paris Agreement. South Africa is an Annex I and a Developing Country and has different emissions targets but has obligations under the Paris Agreement to describe its own emission targets to achieve climate mitigation.

134 Jacqueline Peel and Jolene Lin 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 The American Journal of International Law 4 681

135 ibid 681.

136 *Earthlife* paras 1- 2.

137 In terms of section 8 Promotion of Administrative Justice Act 3/2000 (PAJA).

138 In terms of section 240 NEMA.

139 Which was intended to be a 1200MW coal-fired power station near Lephalale in the Limpopo Province and which was intended to be in operation until at least 2061. See, para 1.

140 Act 107 of 1998.

141 *Earthlife* para 2.

142 In its application, *Earthlife* relied on section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

143 ibid.

144 ibid.

145 The court considered the grounds of review raised by the applicant Earthlife, the South African governments climate change and energy policies, the decision of the Chief Director to grant the environmental authorisation, and the Minister's appeal decision.

climate change impacts, and the court saw fit to not open the authorisation process *ab initio,* but to have the appeal decision by the Minister be reinstated.[146]

Despite the court's judgement on 8 March 2017, the Minister, in 2018 upheld the environmental authority for the Thabametsi plant and Earthlife, now joined by Groundwork, launched new court proceedings, known as the second *Thabametsi/Earthlife* case.[147] The High Court once again, on the 19 November 2020 found in favour of the applicants and ordered that the environmental authority granted to Thabametsi in 2015 be reviewed and set aside. This court also reviewed and set aside the appeal decision of the Minister of 30 January 2018. Finally, the court ordered that the application for environmental consideration by Thabametsi be remitted back to the Chief Director for reconsideration.[148]

2. The Transnational Analysis

a. Establishing the Transnational Activity

There are at least two transboundary activities arising in this matter. First, it can be understood that the transboundary nature arises from climate change, a global problem, and the main issue concerning the environmental authorisation. In defining climate change the court referred to the Government's climate change and energy policies, particularly the National Climate Change Response White Paper of 2012 which outlined the consequences of climate change for global warming.[149] Of relevance is that coal is an emissions-intensive carrier causing climate change through the significant amount of GHGs emitted from coal-fired power stations.[150] This was seen as particularly concerning given that South Africa is a significant contributor to global GHG emissions, and being a water-stressed country, is especially vulnerable to the effects of climate change.[151]

Secondly, there are 'human rights' implications arising from this decision which are directly related to climate change. This is because the court, in its interpretation of section 24O(1) of NEMA, which concerns the criteria to be considered for environmental authorisations, together with section 24 of the Constitution,[152] as well as South Africa's domestic environmental policies and obligations under international climate conventions, concluded that 'a mandatory, pre-requisite' climate change impact assessment must be conducted prior to the granting of the environmental authorization.[153] In so doing, the court gave a human rights dimension to climate change in South Africa.[154]

b. Transnational Principles Enunciated and Applied by the Court

Humby has framed three clear norms and principles applied by the court which are already transboundary in nature.[155] The first is that of sustainable development, the second is intergenerational equity and the third is the precautionary principle. Within the South African context, the Constitution in section 24 recognises and therefore protects the interrelationship between the environment and development. The court recognised that environmental considerations are balanced with socio-economic considerations in order to provide for sustainable development,[156] and addressed the effects of climate change in the form of rising temperatures, increased water scarcity and the increasing patterns of natural disasters and linked these to sustainable development and the duty of the state to protect the environment for the current and future generations as per intergenerational justice and the precautionary principle.[157]

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146 *Earthlife* para 117 – 125; Tracy-Lynn Humby, 'The Thabametsi Case: Case No 65662/16 *Earthlife Africa Johannesburg v Minister of Environmental Affairs'* (2018) 30 Journal of Environmental Law 149.

147 Case no 21559/2018.

148 ibid 2.

149 *Earthlife* paras 25 – 29. Wadiwala (n 13) 234 – 236.

150 *Earthlife* para 25.

151 ibid.

152 The Constitution of the Republic of South Africa, Act 108 of 1996. Section 24, the right to a healthy environment is placed within the Bill of Rights.

153 *Earthlife* paras 12 and 119. Wadiwala (n 13) 235-236

154 Wadiwala (n 13) 236; Humby (n 149) 146.

155 Humby (n 149) 149.

156 *Earthlife* para 82. The court stated that ~sustainable development provisions are in section 24(b)(iii) of the Constitution and provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development' and the court referred to *The Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

157 *Earthlife* para 82 and Humby (n 149) 149.

The duty of care was also pronounced in this matter. Despite no direct legislation requiring a climate change impact assessment, the court confirmed a legal duty to consider climate change as a relevant consideration and recommended an expert report on climate change impact assessments will serve as evidence of establishing its relevance.[158]

c. Sphere of Transnational Considerations Included in the Judgement

Important transnational factors influencing the judgement include first the courts reading and understanding of section 24O(1) NEMA confirming that climate change impacts are relevant to consider environmental authorisations.[159] In speaking to what this entailed, the court included any pollution, environmental impacts or environmental degradation as logically expected in the consideration of climate change.[160] The court confirmed that all parties accepted that GHG emissions from a coal-fired power plant constitute pollution leading to adverse effects in the environment, including adverse effects in the future. Based on this, the judge held that all relevant legislation and policy instruments entail a consideration of how to prevent, mitigate, or remedy environmental impacts of a project, including the climate change impacts.[161]

Secondly, the court made clear that NEMA 'must be interpreted, like all legislation, purposively and in a manner that is consistent with the Constitution,'[162] and consistently with international law.[163]

IV. Conclusion

The above analysis captures the transboundary elements arising from climate litigation in the Netherlands, Germany and South Africa. The similarities between the different jurisdictions are seen in the transnational principles enunciated by the courts, where a duty of care by states toward their citizens featured prominently in all three decisions. Climate change and its associated risks and harms were central to the sphere of transnational considerations included in the three judgments. Relevant domestic provisions were interpreted in accordance with international law, and ultimately human rights provisions underlie the final judgments. These human rights linkages are seen to have led to climate governance; in *Urgenda* by holding the state responsible for increased climate protection, in *Neubauer* by declaring the climate laws as incompatible with human rights and in *Earthlife* by setting precedent for climate considerations to be amongst the necessary factors to consider in the granting of environmental authorisations.

These decisions are rightfully lauded for climate protection in their individual jurisdictions. Writing from the perspective of transnationalism however, it is evident that there is no recognition from the courts that judgements in climate litigation are transnational in character. Judges' conceptualisation of climate change as a global problem stops there; and there is no exploration of procedures or policies that look further than nation states. The climate crisis is widely acknowledged as global, courts have acknowledged that individual states cannot solve the problem on their own and developed countries are called on to assist developing countries financially. The law needs to step up to meet this challenge with solutions outside individual jurisdictions and there is scope for research of how restrictions in climate litigation can be overcome to pronounce judgments that have truly global solutions.

158 *Earthlife* para 88.

159 *Earthlife* para 78-79. The court in looking at the review decision of the Chief Director had to decide whether the administrative action of the Chief Director was tainted by irregularity and held that the answer depends partly on whether climate change impacts had to be considered when the environmental authorisation was granted to Thabametsi.

160 *Earthlife* para 79. These factors include '(i) any pollution, environmental impacts or environmental degradation likely to be caused; (ii) measures that may be taken to protect the environment from harm as a result of the activity and to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation; (iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted; (iv) any feasible and reasonable alternatives to the activity and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment; and (v) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application.'

161 *Earthlife* para 78.

162 *Earthlife* para 80. The court referred to section 2 of NEMA which sets out the binding directive principles that must inform all decisions taken under the Act, including those pertaining to environmental authorisations. The court referred to the general principle that in the interpretation of any legislation, the court is bound by section 39(2) of the Constitution which calls for the promotion of the purport, spirit and objectives of the Bill of Rights in the process of interpretation.[?]

163 *Earthlife* para 83. This is accordance to the provisions of section 233 of the Constitution.