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Rights-Based Climate Litigation in South Africa and the Netherlands

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Abstract

Academic research into international climate change litigation has shown that the courts yield significant power in bringing about an awareness of climate impacts as well as firmly entrenching rights and responsibilities for claimants and defendants. In April 2022, the IPCC's Sixth Assessment Report noted in some detail how climate litigation is shaping climate governance. This article considers these statements within the framework of how courts have drawn on fundamental constitutional rights even without an exclusive reliance on the right to a healthy environment within the jurisdiction of South African climate litigation. The objective of this study is to investigate this claim by analysing the available legal mechanisms in South Africa and what legal strategies have been used in climate litigation to determine how South African climate litigation has shaped climate governance in comparison to climate litigation from the Netherlands. The core analysis examines firstly what the litigation is seeking to achieve, secondly which legal mechanisms and avenues were relied upon and thirdly, how this resonates between different jurisdictions. The key results will contribute to an understanding of the contribution that South African and Dutch climate litigation lends to global climate governance, the extent to which litigation relies on entrenched fundamental rights; it further tracks how, if at all, transnational climate governance litigation has developed in this respect.

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Keywords

climate litigation – climate governance – climate constitutionalism – transnational climate law

1 Introduction

Climate change continues to dominate headlines around the globe.[1] Climate litigation, in response to climate change,[2] is increasing globally[3] and being used as a mechanism[4] to develop law and enforce rights by relying on a combination of fundamental rights.[5]

This article provides an analysis of the legal mechanisms employed in South African climate litigation[6] with a comparison to climate litigation in the Netherlands.[7] The objective is to draw comparative lessons from rights-based litigation in the Global North as compared to the Global South to determine whether any transboundary elements are becoming evident in the global challenge posed by climate change.

1 For example, climate change has been on the agenda of recent conferences, including the Africa Climate Summit that took place in Nairobi, Kenya on 4th–6th September 2023, the G20 New Delhi Summit with the theme 'One Earth, One Family, One Future' on 9th–10th September 2023 and COP 28 in Dubai on 30th November–12th December 2023.

2 More specifically, human-induced or anthropogenic climate change caused by burning fossil fuels such as coal, oil and other gases leading to temperature rises and increased risks associated with natural disasters.

3 The UNEP Global Climate Litigation Report 2023 indicates that as of 31 December 2022 there are 2,180 cases included in the Sabin Center's Climate Change Litigation database. In its overview of global climate litigation, the report identifies climate litigation as having an upward trajectory. This increase is due both to the number of cases filed as well as the number of jurisdictions where they were filed. The global distribution of cases reflects the continent of Africa as holding only 2.3% of all cases according to geographical representation. Therefore, although litigation is present, it is still nascent in both South Africa and in the continent of Africa.

Michael BURGER & Maria Antonia TIGRE, *Global Climate Litigation Report: 2023 Status Review*, Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme, 2023. <https://buff.ly/3QxaJTJ>.

4 For example, as the IPCC Sixth Assessment Report on the influence of climate litigation on climate governance, <https://www.ipcc.ch/assessment-report/ar6/>.

5 As will be discussed below.

6 As a 'developing country'.

7 As a 'developed country'.

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2 Transboundary Climate Litigation: An Analytical Framework

To establish transnationalism in climate change litigation, it is necessary to analyse the way that judgments are given in matters that have transnational implications.[8] In formulating categories of climate litigation as an issue of transnationalism, some issues at play would be verifying its dimensions and limitations and the identity of the transnational actors involved. By considering these factors I have developed a theoretical framework[9] (hereafter 'Transnational Analytical Framework') with which to analyse the relevant court cases, and in this article two questions from the Transnational Analytical Framework are used. This transnational Analytical Framework serves as a 'checklist' to analyse the contributions of courts in climate litigation matters from different jurisdictions to look at the role of transnationalism in climate litigation. At its core, the goal of this Transnational Analytical Framework is to uncover what contributions, if any, has litigation in South Africa and in the Netherlands made to global climate litigation and governance. Elements of the Transnational Analytical Framework include eight different analytical questions.[10]

3 *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and Others*

3.1 *Introduction*

This case[11] has left a responsibility and an obligation on authorities granting Environmental Impact Assessment (EIA) regulations to consider climate change impacts in its authorisation process. In the context of climate change law and governance, this is in line with the aims of the UNFCCC and the Paris Agreement to reduce global greenhouse gas emissions. It has received

8 Such as climate change which affects the planet.

9 Zunaida Moosa WADIWALA *Transnationalism as a Framing Concept for African Climate Change Litigation* (unpublished LLM thesis), University of the Witwatersrand, 2023, Chapter 2, in which a Transnational Analytical Framework is developed.

10 For purposes of this article the two questions from the Transnational Analytical Framework which are considered are firstly the transnational activity of the activity in question and secondly, how the global character of the problem features in the courts' reasoning.

11 *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others* 2017 (5) SA 227 (WCC); Case No: 65662/16, hereafter referred to as *Earthlife*.

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widespread attention and its victories have been enumerated by Field.[12] The court, in acknowledging South Africa's international obligations and its anticipation to decrease reliance on coal to pursue its NDC targets in accordance with the Paris Agreement, plays a role in shaping climate governance.[13]

3.2 *Factual Background and Decision*

The issue in the High Court of South Africa centred around the environmental impact of building a coal-powered fire station and the granting of the environmental authorisation for this purpose.[14] The court had to assess if the decision to grant the environmental authorisation was irregular in terms of South African administrative law[15] in that it did not follow the proper procedures for conducting a climate change assessment.[16]

In 2015 several coal-fired power plants were being procured and this application concerned the environmental implications of constructing the Thabametsi plant.[17] The dispute arose with regard to the compliance of s 24(1) of the National Environmental Management Act 107 of 1998 (hereafter NEMA), which provides that in the construction of a coal-fired power station,

12 Tracy-Lynn FIELD (HUMBY) 'A Landmark Case on Climate Change in SA' *Global Change Institute – University of the Witwatersrand*. Available at: https://www.wits.ac.za/gci/gci-news/news-archive/a-landmark-case-on-climate-change-in-sa/ Amongst others, that this judgment makes it clear firstly that climate change poses a risk to sustainable development in South Africa which is linked to intergenerational justice which is why consideration of climate change impact is necessary for the protection of future generations. Secondly, that climate change is an important and necessary factor which ought to be assessed in the consideration by the State on whether to grant environmental authorisations. Third is that in the environmental authorisation process, climate change impact should support mitigation and adaptation measures and provision for a professionally researched climate change impact report is most appropriate.

13 *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 ascribe its own emission targets to achieve climate mitigation. And Jacqueline PEEL & Jolene LIN 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113:4 The American Journal of International Law, 681, in the very first piece of literature to shed light on the contribution of the Global South to transnational climate litigation, note 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.

14 *Earthlife* paras 1 to 2.

15 In terms of s 8 of the Promotion of Administrative Justice Act 3/2000 (PAJA).

16 In terms of s 240 NEMA.

17 The plant was intended to be a 1200MW coal-fired power station near Lephalale in the Limpopo Province in operation until at least 2061. At *Earthlife* para 1.

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an environmental authorisation can only be granted if all relevant factors are taken into account and a further requirement in s 24O(1)(b) that GHG emissions and climate change impacts be taken into account.[18] The Applicant contended that the Chief Director and the Minister had not considered these factors in granting the environmental authorisation.

In February 2015 the Chief Director of the Department of Environmental Affairs (DEA) granted an environmental authorisation for Thabametsi.[19] *Earthlife* then appealed to the Minister of Environmental Affairs who subsequently upheld the decision in March 2016. *Earthlife* initiated litigation seeking a review based on s 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) of the decision to grant the environmental authorisation as well as the appeal decision by the Minister.[20] *Earthlife* relied on three grounds.[21] The first was the claim that of non-compliance with s 240(1) NEMA.[22] Next was the claim that the absence of the climate change impact assessment resulted in the granting of the environmental authorisation and the appeal decision being 'irrational and unreasonable.'[23] The third ground was that the Minister, in her appeal decision, had committed material errors of law.[24] The court, on 8 March 2017, ruled in favour of the applicant *Earthlife* and ordered that the appeal decision by the Minister be reinstated and that relevant new evidence[25] be taken into consideration and to reconsider the application for the environmental authorisation.[26]

Despite the court's judgment in 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 *Earthlife* case.[27] The High Court once again, on 19 November 2020 found in favour of the applicants and ordered that the environmental authority granted

18 *Earthlife* paras 5 to 6 and NEMA s 24(1), s 24O(1)(b).

19 *Earthlife* para 2.

20 ibid.

21 *Earthlife* para 11.

22 ibid. In essence S240(1) confirms that climate change impacts are amongst the relevant factors that must be considered for an environmental authorisation.

23 ibid.

24 ibid.

25 Consisting of a climate change impact assessment report and a paleontological impact assessment report with comments from interested and affected parties. Earthlife para 117 to 121.

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

27 Case no 21559/2018.

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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 to the Chief Director for reconsideration.[28]

3.3 *The Analysis within the Transnational Framework*

3.3.1 The Transboundary Activity

That climate change, a global problem, is the determining factor in this case, and with the further understanding that climate change is a problem which knows no boundaries and is affecting people across the globe, is what lends it its transboundary character.[29] The court referred to the National Climate Change Response White Paper of 2012 to define climate change and its consequences for global warming.[30] Included in this definition is the harmful effect of GHG emissions which make the planet warmer, resulting in climate change.[31] For the construction of the coal-fired power station, a climate change impact assessment would need to consider the extent to which the plant would contribute to climate change over its lifetime, calculated by quantifying the GHG emissions during construction, operation, and decommissioning. Additionally, the resilience of the coal-fired power plant to climate change and its impact on *inter alia* rising temperatures, diminishing water supply as well as extreme weather patterns and how these impacts would be avoided, mitigated, or remedied would also be considered.[32]

South Africa, due to its mining and minerals processing, as well as its coal-intensive energy system, is a significant contributor of global GHG emissions.[33] The court stressed that South Africa is especially vulnerable to the effects of climate change because of its socio-economic and environmental positions.[34] The court looked at climate variability and the increased frequency and intensity of weather events having detrimental results for society and that South Africa, being a water-stressed country, could face droughts in the

28 ibid.at 2.

29 Climate change is regarded as a transboundary issue in that it affects all jurisdictions across the planet.

30 Earthlife para 4. See also paras 25–29. The White Paper defines climate change as a 'trend' which is on-going in its effect of changing the planet's general weather conditions because of increased amounts of GHG emissions by human activities.

31 ibid.

32 *Earthlife* para 6.

33 *Earthlife* para 25. The court expanded on coal as an emissions-intensive carrier and how coal-fired power stations emit significantly high levels of GHGs, causing climate change.

34 ibid.

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future.[35] These factors contributed to the court's reasoning on how coal-powered fire stations contribute to global climate change.[36]

Having understood from the above that climate change itself is the transboundary element of this decision, what needs to be recognised in this context is the effect of climate change on developing countries.[37] Van der Bank and Karsten explain that climate change, despite its global impacts, extends more intensely to developing countries.[38] In the case of South Africa as a developing country, the risks associated with climate change are exacerbated due to its inherent social and economic problems which ultimately results in South Africa being unable to cope with these hazards.[39] This is because of the dependence on agriculture, water and other climate sensitive sectors.[40] South Africa, being an arid region, is sensitive to even the smallest variations in rainfall and temperature and this has worsened with the global rise in GHG emissions.[41]

What also emerges from this decision are the 'human rights' implications resulting as a direct consequence of climate change. The court, in its overview of issues, stressed that in its interpretation of s 240(1) NEMA,[42] read together with the Environmental Impact Assessment Regulations, s 24 of the Constitution, South Africa's domestic environmental policies and South Africa's obligations under international climate change conventions, concludes that 'a mandatory,

35 ibid.

36 ibid, the picture painted was gloomy and akin to a catch-22 situation where climate change will result in water scarcity which would place electricity generation at risk as it is a water intensive industry.

37 Article 4 of the Paris Agreement provides a framework for a variety of mechanisms for States to carry out their individual obligations. Within this context it is important to distinguish it from the 1997 Kyoto Protocol which had a top-down approach and was more rigid and set qualified specific obligations for Annexure 2 countries each of which had a deadline; for example, Germany had to reduce its emissions by 8% compared to 1990 with a deadline set between 2008 and 2012.

38 Marjone VAN DER BANK & Jaco KARSTEN 'Climate Change and South Africa: A Critical Analysis of the *Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16* (2017) Case and the Drive for Concrete Climate Practices' (2020) 13: 1–11 Air, Soil and Water Research Journal 2.

39 ibid. South Africa is already facing droughts and floods associated with climate change and as the risks increase, it will inevitably result in South Africa being unable to deliver water, sanitation, power, communication services, and other fuel combustion services that it relies upon to its people with the result that the well-being and poverty reduction goals of South Africa people will not be achieved.

40 ibid. The authors suggest that this is why, for developing countries such as South Africa, sustainable development ought to have climate adaptation at its forefront.

41 ibid.

42 Regarding the criteria to be considered by competent authorities when considering applications.

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pre-requisite' climate change impact assessment must be conducted prior to the granting of an environmental authorisation.[43] The human rights element stems from the placement of the Right to an Environment within the Bill of Rights part of the Constitution.[44] The Bill of Rights, protects fundamental human rights and is based on the principle 'where there is a right there is a remedy.'[45] Thus this is the first South African case that concerns climate change, and simultaneously gives a human rights dimension to climate litigation in South Africa. Murcott proposes that climate change gives rise to social justice and human rights and stresses that environmental impacts of the climate crisis will hamper efforts to attain social justice, particularly for the vulnerable in countries with deep inequalities such as Global South countries like South Africa, India, Bangladesh, and Pakistan.[46] Bouwer and Field also point to the 2005 Nigerian case of *Gbemre v Shell*[47] in which an action brought against fossil fuel companies was based on human rights grounds.[48] It is clear from the above analysis that human rights issues were part of climate litigation in Africa before this was a characteristic of climate litigation in the Global North.

3.3.2 How the Global Character of Climate Change Affects the Court's Judgment

The court found that the granting of the environmental authorisation constituted an administrative action and thus it was just and equitable that it be set aside for reconsideration in terms of judicial review based on s 8 PAJA.[49] The court did not however order that the authorisation process commence *de novo* but rather set aside the Ministers ruling on the appeal and granted her

43 *Earthlife* par 12 on the Applicants stance and par 119.

44 As contained in s 24 of The Constitution of the Republic of South Africa, 1996.

45 Ian CURRIE & Johan DE WAAL *The Bill of Rights Handbook* 5 ed, 2005, 23. 'The Bill of Rights instructs the state to use the power that the Constitution gives it in ways that do not violate fundamental rights and that promote and fulfil those rights.'

46 Melanie MURCOTT *Transformative Environmental Constitutionalism* 2022, 24. Murcott thus argues for climate vulnerabilities and impacts to be given cognisance at the level of environmental law and governance, including their adjudication. Murcott notes further that the Climate Justice Charter 2020, as developed by the Climate Justice Charter Movement asserts that social justice is climate justice, at 25.

47 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others* (2005) FHC/B/CS/53/05.

48 Kim BOUWER and Tracy-Lynn FIELD Editorial: 'The Emergence of Climate Litigation in Africa' (2021) 2 Carbon and Climate Law Review 126.

49 *Earthlife* para 117. The *Earthlife II* decision concurred and was also reviewed and set aside. *Earthlife* 2020 para 2.

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the opportunity to reconsider.[50] The court framed this decision by asking if climate change impacts had to be considered in granting the environmental authorisation to Thabametsi, and in so doing interpreted legislation and policy instruments with global climate change at the forefront of its decision.[51] This is seen firstly in the application of s 240(1)(b) NEMA as it compels certain factors to be considered in an environmental authorisation process.[52] Secondly that the environmental impact assessment ought to contain all necessary information to enable a decision to be made.[53] Thirdly that NEMA was interpreted according to international law.[54]

Fourthly, that NEMA, in its interpretation, must necessarily be consistent with the Constitution,[55] and this becomes relevant when any fundamental right as contained in the Bill of Rights is interpreted, such as the right to the environment in s 24 of the Constitution.[56] It is important to add that s 33 of the Constitution, which provides for Just Administrative Action, is also contained in the Bill of Rights and is the reason for the enactment of PAJA.

In conclusion therefore, all the relevant legislative and policy schemes that were relied upon to find that the climate change impact assessment was necessary, were interpreted according to international law, with climate change consequences as the material issue.

4 *State of the Netherlands v Urgenda*

4.1 *Introduction*

The *State of the Netherlands v Urgenda*[57] judgment has received widespread academic attention. It has been said that it 'marks a historic development in

50 *Earthlife* para 121.

51 *Earthlife* para 78.

52 *Earthlife* para 79. These include any pollution, environmental impacts or possible environmental degradation and protective measures against harms resulting from activity or to prevent, control, abate or mitigate pollution or any environmental harm.

53 ibid. These requirements are from the Regulations.

54 The court used international law to interpret NEMA, Earthlife para 83 and HUMBY(FIELD) (n 26) 149.

55 *Earthlife* paras 80–81. Section 39 of the Constitution provides that all legislation be interpreted in a way that promotes the purport, spirit, and objects of the Bill of Rights, when a fundamental right contained in the Bill of Rights.

56 ibid.

57 *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

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international jurisprudence on climate change.'[58] Backes and Van der Veen refer to the judgment as perhaps the best-known Dutch court ruling ever, and further as a victory in the battle against climate change.[59]

4.2 *Factual Background and Decision*

The issue centred around the obligation of the Dutch state to reduce greenhouse gases (GHG) originating from the Netherlands.[60] The judgments in all three courts, 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 the applicants.

The government of the Netherlands had, in 2007, decided to reduce GHG emissions by 25 to 40 percent by the year 2020.[61] This 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. In 2011. However, the Dutch government aimed for a reduced target of 14 to 17 percent.[62]

In 2013, *Urgenda* proceeded with legal action against the Dutch state asking for GHG emissions to be reduced by 40 percent by 2020, or by a minimum of 25 percent compared to 1990 levels.[63]

ECLI:NL:HR: 2019:2007 (Original Dutch citation from the Supreme Court of the Netherlands: ECLI:NL: 2019: 2006) (hereafter referred to as *Urgenda*).

58 The reason given for this being that this case answered the question of an important legal process, which is whether a domestic court can enforce compliance by a national government of international treaties. N SHANNON, N and E DE WIT, 'Urgenda Foundation v Netherlands: Historic climate change decision upheld' [2019] Norton Rose Fulbright Publications <nortonrosefulbright.com>.

59 Chris W. BACKES and Gerrit A. VAN DER VEEN 'Urgenda: the Final Judgment of the Dutch Supreme Court' [2020] Journal for European Environmental & Planning Law 307–321 and 311–312 where the authors discuss the differences between legal obligations and international policy *in casu,* finding that all courts, commencing with the District and going upwards, hold that there is nothing in either international law, EU law nor Dutch law that would be legally binding norms obliging the State to reduce GHG emissions as claimed by Urgenda.

60 *Urgenda* 2019 at 815.

61 Andre NOLLKAEMPER & Laura BURGERS 'Introductory Note to the *State of the Netherlands v Urgenda* (NETH. SUP.CT.)' (2020) 59 The American Society of International Law 811.

62 Ibid.

63 Ibid.

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The Hague District court, as the court *a quo*, decided in its 2015 judgment[64] that the Dutch state was obliged to reduce its GHG emissions by the end of 2020 to at least 25 percent compared to 1990.[65] The District court considered *inter alia* that the Dutch State may be acting unlawfully by violating its duty of care to prevent dangerous climate change.[66] It held that the legal obligations of the Dutch state towards *Urgenda* are not derived from[67] the Dutch Constitution,[68] the 'no harm' principle[69] or the UNFCCC protocols.[70] Rather, the District Court grounded its decision on tort law and the doctrine of negligence,[71] and held 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.[72]

The Hague Court of Appeal, on 9 October 2018 confirmed the District Court's decision.[73] The Court of Appeal held that there was a 'genuine threat of

64 *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 judgment is C/09/456689/HA ZA and the official judgment in the Dutch language is available at ECLI:NL: RBDHA: 2015:7145 and the English translation is available at <https://uitspraken>.

65 *Urgenda* 2019 at p815 and at par 2.3.1.

66 *Urgenda* 2019 para 2.3.1.

67 ibid.

68 *Urgenda* 2019 para 2.3.1 referred to Article 21 of the Dutch Constitution which provides for the fundamental right to a clean environment.

69 The no-harm rule is a concept from environmental governance and rights and a well-recognised part of customary international law, obliging a state to reduce or prevent the risk of environmental harm to other states; see UN Environment Programme – Law and Environmental Assistance Platform. <https://leap.unep.org>.

70 *Urgenda* 2019 para 2.3.1 refers to the following protocols, Article 191 TFEU (This is the European Union's (EU) environmental policy which is based on the Treaty of the Functioning of the EU and which aims to preserve, protect and improve the quality of the environment and to protect human health). The EU environmental policy is available at <http://eur-lex.europe.eu/> as well as to the ETS Directive and Effort Sharing Decision which is based on Article 191 TFEU.

71 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. The court referred to the 1965 Netherlands *Kelderluik* judgment in applying the criteria relevant to interpreting a duty of care. NOLLKAEMPER (n 61) 812.

72 *Urgenda* 2019 para 2.3.1.

73 *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 judgment in the Dutch language is ECLI:NL: GHDHA: 2018: 2610 and the translation into the English language is available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf.

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dangerous climate change'[74] and held further that this poses the serious risk to the current generation of Dutch inhabitants of either losing their lives or of having their family lives disrupted.[75] The court relied on Articles 2 and 8 ECHR[76] that the State has a duty to protect against the genuine threat of dangerous climate change.[77] 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[78] nor Article 6[79] 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.[80] The court also allowed *Urgenda's* cross-appeal to rely on the human rights provisions of Article's 2 and 8 of the ECHR.[81] In reaching its judgment, the Court of Appeal held first, in terms of standing, that *Urgenda*, as a class action, may rely on Articles 2 and 8 ECHR. Next the court held that the State has a positive obligation within its jurisdiction to uphold the protection laid out in Articles 2 (Right to Life) and 8 (Right to respect for private and family life) of the European Convention on Human Rights,[82] 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. Lastly, the Court considered if

According to this 2018 judgment, the court stated that in brief, 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 is the reduction of 25% as the rest of the claims by Urgenda are no longer disputed.

74 *Urgenda* 2019 para 2.3.2.

75 ibid.

76 Unlike the court *a quo* which based its findings on Tort law and Negligence.

77 *Urgenda* 2019 para 2.3.2.

78 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.' From the Dutch Civil Code <https://wilmap.stanford.edu/entries/article-3296-dutch-civil-code>.

79 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.' From the Dutch Civil Code <https://minerva-advocaten.nl/en/news/unlawful-act#:~:text=Article%206%3A%20162%20DCC%3A%20the,person%20suffers%20as%20a%20result>.

80 *Urgenda* 2019 para 2.2.3.

81 NOLLKAEMPER (n 61) 811.

82 European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950) ETS 5 (hereafter ECHR).

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the State was acting unlawfully by not adhering to at least 25 percent reduction in GHG by the end of 2020.[83]

The Dutch State then instituted an appeal in cassation in the Netherlands Supreme Court. This was met, in September 2019, by opinions of the Advocate General and the Procurator General.[84] On the 20 December 2019, on the advice of the Advocate General and the Deputy Procurator, the Dutch Supreme Court upheld the decision of the Court of Appeal.[85]

4.3 *The Analysis within the Transnational Framework*

4.3.1 The Transboundary Nature of the Activity

The emission of GHG and its global climate change impacts constitutes the transboundary nature of this case.

The Hague Court of Appeal spent considerable time on the analysis of global warming and establishes that the current level is around 1.1 degrees Celsius warmer in comparison to the beginning of the Industrial Revolution.[86] The court also clarified the global 'carbon budget' according to the latest scientific developments and insights[87] and determined that the 'worldwide community' acknowledges the need to reduce GHG emissions in general and CO_2 in particular.[88]

The Appeal Court placed the facts of the case on a 'global level' by discussing the international frameworks, treaties and discussions that make this matter a transboundary one.[89] The establishment of the UN Environment Programme, the IPCC and particularly its two assessment reports, AR4 and AR5, the conclusion of the UNFCCC and its articles 2, 3 and 4 as well as the list of significant Conferences of the Parties are all discussed,[90] and situated within this context to illustrate the transboundary nature of this case.

83 *Urgenda* 2019 para 2.3.2.

84 NOLLKAEMPER (n 61) 811 that the Advocate-General and the Procurator-General are considered the 'most authoritative advisors of the Supreme Court' and who were tasked was to consider the cassation appeal and whether to quash the ruling of the Court of Appeal. They agreed with and approved of the judgment of the Court of Appeal.

85 *Urgenda* 2019 p 815.

86 *Urgenda* 2018 para 3.5.

87 ibid.

88 *Urgenda* 2018 para 3.6. The court however distinguishes between the urgency of these assessments between the global community and then separates treaties, agreements and arrangements that have been applied first within the UN context, secondly the EU and lastly by the Netherlands.

89 *Urgenda* 2018 para 4.

90 *Urgenda* 2018 paras 5 to 6.

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The Supreme Court's conceptualisation of climate change and its risks[91] is of 'global climate change'.[92] The UNFCCC and the Paris Agreement also recognised climate change and its consequences as a 'common concern of humankind', a classification further confirmed in the literature.[93] This international obligation to protect human rights is what led to the judgment compelling the state of Netherlands to reduce its emissions.[94] It is this recognition and compliance with international law that has boosted international climate litigation.[95] On 29 March 2023 the United Nations General Assembly, on the initiative by the Republic of Vanuatu had adopted a resolution by consensus, requesting an advisory opinion on the obligations of global states with regard to climate change.[96]

4.3.2 How the Global Character of Climate Change Affects the Court's Judgment

The Court of Appeal contextualised the global character of the problem with an acknowledgement that CO_2 is the primary gas exacerbating global warming.[97] The court then discussed treaties and international agreements, policy proposals, and an assessment of the climate situation at global, Dutch and EU level.[98] Analyses of current levels of global warming in relation to the levels

91 *Urgenda* 2019 para 2. The discussion of the facts as are established in the court of appeal, include a discussion of climate change and its consequences, the IPCC reports, the UNFCCC and the COP conferences, the Paris Agreement, and the UNEP reports, all which are international.

92 ibid. The use of terminology such as 'warming of the planet,' 'the rise in the planet's temperature,' 'climate change and in the international community,' 'if the earth warms substantially,' 'global warming progresses.'

93 Benoit MAYER 'Climate Change Mitigation as an obligation under Customary International Law' (2023) 48 *The Yale Journal of International Law* 106.

94 ibid at 107.

95 ibid at 108 where the author refers to the Vanuatu case which requested an advisory opinion of the International Court of Justice.

96 Maria Antonia TIGRE and Jorge Alejandro CARRILLO 'The ICJ;s Advisory Opinion on Climate Change: What Happens Now' 2023 Climate Law – A Sabin Centre Blog <https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now/#> The questions which were requested by the United Nations General Assembly to the ICJ were first with regard to the obligations of States under international law to ensure the protection of the climate system from anthropogenic GHG emissions for both present and future generations, and the second question pertained to the legal ramifications on states for acts of commission or omission which cause significant harm to the climate system.

97 *Urgenda* 2018 para 3.2–3.3.

98 *Urgenda* 2018 para 3. This reliance on international frameworks highlighting again that the court had to resort to the global nature of climate change to reach a decision.

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at the beginning of the Industrial Revolution and a consideration of scientific recommendations[99] led the court to conclude that the 'worldwide community' needs to reduce the GHG emissions, especially that of CO_2.[100] The court scrutinized Articles 2 and 8 ECHR and dangerous climate change and found that the state has a positive obligation to protect lives of its citizens within its jurisdiction in terms of Articles 2 and 8 ECHR.[101]

The Supreme Court, in consideration of dangerous climate change, examined the relevant climate science and concluded that high concentrations of CO_2 are 'warming the planet', which in turn has 'hazardous consequences.'[102] The court recognises this as dangerous climate change 'at international level,'[103] and found that the State has a duty to protect its citizens and is obliged to take appropriate measures against dangerous climate change based on the protection afforded by Articles 2 and 8.[104]

Recent literature indicates that there is a relationship between this global character of climate change and international law being invoked to affect the court's judgment. A broad perspective has been put forth by Mayer, who refers to the fact that climate treaties recognise that climate change is a 'common concern for humankind', as first stated in paragraph 2 of the UNFCCC,[105]

99 The court established that the current level of global warming is 1.1 degree Celsius warmer than levels at the beginning of the Industrial Revolution with current levels of GHG concentrations at approximately 401 parts per million (ppm), and that human-induced CO_2 emissions have increased by 2% annually leading to the continuation of global warming. At paragraph 3.5 2018 judgment.

100 ibid.

101 *Urgenda* 2018 paras 40–45. When addressing the severity of 'dangerous climate litigation' on a global scale, the Court of Appeal considered the available science and data in detail and found that there is a very real threat of dangerous climate change, within a global context, yet the court only found that the State has a duty to protect people within its jurisdiction in terms of Article 2 and 8 ECHR.

102 *Urgenda* 2019 paras 4.1–4.4.

103 Urgenda 2019 paras 4.4–4.5.

104 *Urgenda* 2019 paras 5.1–5.9.3. The court considered the meaning of the positive treaty obligations in 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. *Urgenda* 2019 paras 5.2.1–5.3.4. 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.

105 Mayer (n 93) at 106, 107. He refers to the UNFCCC, the Paris Agreement, and the Kyoto Protocol. He identifies however, that these treaties have a major limitation in that the level of ambition is left for individual countries to determine and he finds that this gives rise to a greater reliance on other sources of obligations for climate change mitigation. It has been demonstrated that in various jurisdictions, plaintiffs have come to rely on other

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Drawing on conclusions from climate science, the Supreme Court stressed that the consequences of dangerous climate change are now recognised at an international level.[106]

NOLLKAEMPER holds this relevant to international law and could be grounded in human rights law, reinforcing 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.[107]

The Dutch Supreme Court in interpretation of the obligations based on ECHR considered 'common ground,'[108] as enforced by the European Court of Human Rights (ECtHR).[109] 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.[110] The court also referred to the Urgenda precedent[111] which held that in the interpretation of the ECHR, the effect of Article 31(3)(c) of the Vienna Convention was that the provisions of the ECHR ought not to be applied in a vacuum but rather in harmony with the principles of international law.[112] The target to reduce GHG's was incorporated into the positive obligations binding on the Dutch State by Articles 2 and 8 ECHR.[113]

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sources of obligations to mitigate climate change. The Kyoto Protocol is an exception as it had pre-determined levels for Annex 1 & 2 countries.

106 ibid.

107 NOLLKAEMPER (n 61) 812.

108 *Urgenda* 2019 paras 5.4.2–5.4.3. The court interpreted the ECHR consistently with the European Court of Human Rights (ECtHR) and the 'effectiveness principle' in international law. This is because Article 31(1) of the Vienna Convention on the Law of Treaties stipulates that a treaty must be interpreted in good faith according to its object and purpose. Most of the written submissions for the request for an advisory opinion submitted by the Commission of Small Island States (COSIS) at the International Tribunal for the Law of the Sea (ITLOS) hearings held during September 2023 based interpretation of the United Nations Convention on the Law of the Sea (UNCLOS) Agreement on Article 31(1) of the Vienna Convention. https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

109 *Urgenda* 2019 para 5.4.1 which establishes that the provisions of the ECHR must be effective and practical in their interpretation.

110 *Urgenda* 2019 para 5.4.2. 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.

111 *Urgenda* 2019 para 5.4.2. There is explanation on the use of the jurisprudence relied upon by the court in para 5.2.6.

112 ibid.

113 NOLLKAEMPER (n 61) 812 adds that the fact that the 25% had been transformed into 'common ground' stems from its endorsement by the annual Conferences to the Parties

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Also relevant to transnational aspects of climate litigation is the point raised by NOLLKAEMPER that the court, in response to the argument 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.[114]

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. As stated by WEWERINKE-SINGH and MCCOUGH, 'The Supreme Court's methodology in this respect is of great import from an international climate change law perspective, as it demonstrates how the legal ambiguity that characterizes this branch of international law (and undermines its effectiveness) can be reduced through judicial interpretation.[115]

5 Conclusion

The Transnational Analytical Framework referred to above provides that transnationalism has an inner processual character which is powerful enough to enable transformation in contemporary societies.[116] This happens when globalisation, as a vehicle of transnationalism, forces world leaders, including judges', to create policies and procedures that look further than just their nation states.[117]

Both these decisions are an illustration of how globalising concepts and relying on international law for interpretation have begun to shape transnational climate governance in accordance with the Transnational Analytical

(COP) to the UNFCCC and because the European Union had taken this as its point of reference. The Supreme Court viewed this from an international perspective, in that the resolutions and statements derived from COP provided a stronger consensus for developed countries to reduce GHG emissions urgently, 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.

114 The court stressed the obligations under 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.

115 Margaretha WEWERINKE-SINGH and Ashleigh MCCOUCH, 'The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation.' RECIEL. 2021, 1–9, at 2.

116 Wadiwala (n 9) chapter 2.

117 ibid.

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Framework. The three common threads weaved throughout both jurisdictions are firstly, the conceptualisation of climate change as having a global character and presenting a global challenge. Secondly, in interpreting legislation, both jurisdictions resort to international jurisprudence. Thirdly, both the judgments were based on fundamental human rights provisions.

The implications of these observations are that a concept of transnational climate governance is emerging from precedents in different jurisdictions. These decisions are without question a major victory for claimants in their respective jurisdictions. At the same time, there is a flaw to the extent that while the court identified climate change to be a global problem, it provided a remedy only for the claimants within the court's jurisdiction. The judges in South Africa and the Netherlands could have substantially strengthened the influence of these cases had they considered and extended solutions outside their jurisdictions.

For now, climate litigation is shaping climate governance at a national level,[118] but in this author's view, it is not yet at a point where it has developed a concept of emerging transnational climate governance.

118 As has been seen in how these cases rely on fundamental human rights and constitutional provisions.

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