

Urgenda: A How-To Guide for Enforcing Greenhouse Gas Emission Targets by Protecting Human Rights

INTRODUCTION

The Supreme Court of the Netherlands ended 2019 as the first court in history to establish that protection from dangerous climate change is a human right thereby requiring the reduction of greenhouse gas emissions to align with internationally recognized climate targets.¹ *The State of the Netherlands v. Urgenda Foundation* establishes that the European Convention on Human Rights (ECHR) requires the Netherlands to take adequate action to prevent the real and imminent risk of dangerous climate change.² Specifically, the *Urgenda* decision enforces a national goal to reduce greenhouse gas emissions by at least 25 percent by 2020.³ This ruling adds teeth to several climate-focused reports and treaties such as the Intergovernmental Panel on Climate Change (IPCC) 2007 Fourth Assessment Report (AR4), the Kyoto Protocol, and the Doha Amendment.⁴ While the ECHR applies to all European nations, the Dutch Supreme Court's interpretation of the ECHR in *Urgenda* is not binding outside the Netherlands.⁵ The European Court of Human Rights creates binding interpretations and precedent of the ECHR.⁶ Because the *Urgenda* decision was cemented in the Court of Human Rights' case law and precedent, however, the decision may serve as a strategic template for how to achieve similar results using

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1. HR 20 december 2019, RvdW 2020, 24 m.nt. GA van der Veen, Ch.W Backes (De Staat der Nederlanden/Stichting Urgenda) (Neth.) [hereinafter *Urgenda*]; John Schwartz, *In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html>.

2. *Urgenda*, *supra* note 1, ¶¶ 9, 2.3.2. The court defines “dangerous climate change” as the realization of the dangers associated with global warming beyond the safe level of 1.5 degrees Celsius. *Id.* ¶ 4.3.

3. *Id.* ¶ 7.5.3.

4. *See id.* ¶ 2.1; U.N. Env't Programme and World Meteorological Org., Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2007: Mitigation of Climate Change* 775–76 (Bert Mertz et al. eds., 2007) [hereinafter IPCC AR4]; Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162; Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 8, 2012, amend. 2303 U.N.T.S. 162.

5. Public Relations Unit, *European Court of Human Rights: The ECHR in 50 Questions*, EUR. CT. H.R. 9 (2014), https://www.echr.coe.int/Documents/50Questions_ENG.pdf [hereinafter ECHR FAQ].

6. *See id.* at 3–4, 9.

the ECHR to hold national governments legally accountable to climate change mitigation targets. For non-European nations outside the scope of these laws, *Urgenda* may provide a bode of confidence that there may yet be avenues available in the fight against dangerous climate change.

I. BACKGROUND

A. *The European Convention on Human Rights*

The ECHR is an international treaty securing the civil and political human rights of everyone within its member states.⁷ The rights protected by the ECHR reflect those rights included in the Universal Declaration of Human Rights.⁸ All of the member states of the Council of Europe⁹ have signed and are bound by the ECHR.¹⁰ The ECHR and its case law are not binding upon any nation outside the Council of Europe.¹¹ Each member state has written the convention into its legislation and is therefore required to uphold it as the law.¹² The European Court of Human Rights oversees the implementation and interpretation of the ECHR.¹³ National courts can also hear cases regarding violations of the ECHR¹⁴ because the convention requires that there be a remedy at the national level for any violations of the ECHR.¹⁵ Decisions made by national courts interpreting the ECHR are not binding on any other member state; only the cases decided by the Court of Human Rights set precedent for ECHR decisions in all member states.¹⁶

To interpret the rights granted by the ECHR, the Court of Human Rights uses the “common ground” method.¹⁷ This method involves referencing general principles of international law, practices and values of European states, and specialized international instruments.¹⁸ These resources, drawn from the international community, provide context for the court to establish international consensus, a common ground. The court uses this method to ensure it interprets

7. European Convention on Human Rights, *opened for signature* Apr. 11, 1950, C.E.T.S. No. 194 [hereinafter ECHR].

8. *Id.* at preamble.

9. COUNCIL OF EUROPE, THE COUNCIL OF EUROPE: GUARDIAN OF HUMAN RIGHTS (2019). The Council of Europe is a human rights organization consisting of forty-seven member states, including the Netherlands. *Id.*

10. See ECHR FAQ *supra* note 5, at 3.

11. *Id.*

12. *Id.* at 9.

13. *Id.*

14. *Id.* at 3; see, e.g., *Urgenda*, *supra* note 1, ¶ 8.3.3 (noting that “the Netherlands is bound by the ECHR and the Dutch courts are obliged . . . to apply its provisions in accordance with the interpretation of the ECHR”).

15. *Urgenda*, *supra* note 1, ¶ 5.5.1 (citing ECHR, *supra* note 7, at art. 13).

16. ECHR FAQ, *supra* note 5, at 9.

17. *Urgenda*, *supra* note 1, ¶ 6.3.

18. *Id.* ¶ 5.4.2.

the protected rights practically and effectively, reflecting the evolving norms of Europe and the international community.¹⁹

Because there is common ground consensus among European nations about the value of the precautionary principle, the Court of Human Rights uses it as a tool for ECHR interpretation.²⁰ The precautionary principle suggests that a lack of “full scientific certainty” should not be an excuse for inaction in the face of risk.²¹ In practice, the use of the precautionary principle allows the Court of Human Rights to offer protection for harms that are likely to materialize, but which are not completely certain. While this principle was historically regarded as a philosophical concept, it is now a foundation of European environmental policy.²² The court’s use of the precautionary principle is an example of how the court uses the common ground method to interpret the ECHR. Together, the common ground method and precautionary principle provide the analytical framework needed to interpret the protections outlined in the Articles of the ECHR. The interpretation of the ECHR Articles by national courts, like the Netherlands Supreme Court in *Urgenda*, must be consistent with the interpretive strategies used by the Court of Human Rights and its precedent.²³

B. *The Netherlands and Climate Change Goals*

The Netherlands’ greenhouse gas emissions target for 2020 has fluctuated since its original inception. Prior to 2011, the Netherlands targeted a 30 percent reduction of greenhouse gas emissions as compared to 1990 levels.²⁴ This was based on a target established by the IPCC’s AR4 to limit greenhouse gas concentrations in the atmosphere to 450 parts per million (ppm) by 2100 and limit global warming to two degrees Celsius.²⁵ To achieve this goal, the IPCC and consecutive U.N. Framework Conventions on Climate Change (UNFCCC) endorsed the AR4’s target of a 25-40 percent reduction of greenhouse gas emissions by 2020.²⁶ In 2009, a Dutch government official issued a letter stating that a reduction scenario with less than a 25-40 percent reduction was not “credible.”²⁷ After elections resulted in a switch of political power in 2011,

19. *Id.* ¶ 5.4.1.

20. *See id.* ¶ 7.2.5; *see, e.g.*, *Tătar v. Romania*, 2009-III Eur. Ct. H.R. ¶ 120.

21. Daniel A. Farber, *Coping with Uncertainty: Cost-Benefit Analysis, the Precautionary Principle, and Climate Change*, 90 WASH. L. REV. 1659, 1673 (2015) (quoting the United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. No. A/CONF.151/26/Rev.1 (Vol. I), Annex I, princ. 15 (Aug. 12, 1992)).

22. Dinah L. Shelton, *Human Rights—Environmental Harm—Precautionary Principle—Causation—Just Satisfaction*, 104 AM. J. INT’L L. 247, 251 (2010).

23. *Urgenda*, *supra* note 1, ¶ 5.6.1.

24. *Id.* ¶ 7.4.1.

25. IPCC AR4, *supra* note 4.

26. *Id.*; *see also Urgenda*, *supra* note 1, ¶ 2.1 (giving a history of consecutive U.N. conferences of the parties that upheld the AR4 targets, including the Bali Action Plan, Cancún Pledges, and Doha Amendments).

27. *Urgenda*, *supra* note 1, ¶ 2.1.

however, the Dutch government lowered its goal to a 20 percent target.²⁸ The newly elected Dutch government provided no scientific rationale that the lowered target would remain consistent with the IPCC targets required to limit dangerous climate change.²⁹

C. *Urgenda's Legal Challenge under the ECHR*

In 2015, Urgenda Foundation (Urgenda), a Dutch non-governmental organization, sued the State of the Netherlands seeking a declaration that the country must reduce greenhouse gas emissions by at least 25 percent by the end of 2020.³⁰ The organization's argument was based on the premise that the Netherlands violated human rights under Articles 2 and 8 of the ECHR by not adequately protecting its residents from dangerous climate change.³¹ These Articles protect the right to life and right to respect for private and family life, respectively.³² In December 2019, the Netherlands Supreme Court agreed with Urgenda and declared that the ECHR includes an implicit obligation to adequately mitigate dangerous climate change, the Supreme Court itself has the authority to determine an adequate target, and the Netherlands must contribute to climate change mitigation based on its minimum fair share.³³

Articles 2 and 8 of the ECHR place a positive obligation upon national governments to protect residents against known, real, and imminent risks by taking reasonable and appropriate preventative measures.³⁴ The ECHR does not explicitly include the right to a clean environment as a protected human right held by individuals.³⁵ In cases where environmental hazards threaten large groups or populations, however, the Court of Human Rights has read in ECHR protections.³⁶ The Court of Human Rights has also interpreted imminent risks to include those that may not materialize for some time but require present action.³⁷ Climate change poses a global threat, and, though the worst effects will not

28. *Id.* ¶ 7.2.6. The new target aligned with the European Union's Cancun Pledges. U.N. Climate Change Conference, *Cancun Pledges* (2010).

29. *Urgenda*, *supra* note 1, ¶ 2.3.2.

30. *Id.* ¶¶ 2.2.1–2.

31. Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands*, 79 CIGI Papers 1, 1, 4 (2015).

32. ECHR, *supra* note 7, at arts. 2, 8.

33. *Urgenda*, *supra* note 1, ¶¶ 5.6.2, 8.3.4, 7.5.1.

34. *Id.* ¶ 2.3.2.

35. *Id.* ¶ 5.2.3.

36. *Id.* ¶ 5.3.1; *see, e.g.*, *Budayeva v. Russia*, 2008-I Eur. Ct. H.R. ¶ 133 (stating “[i]t has been recognised [sic] that in the context of dangerous activities the scope of the positive obligations under . . . the Convention largely overlap . . . [c]onsequently, the principles developed in the Court's case-law relating to the planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life”); *Brincat v. Malta*, 2014-V Eur. Ct. H.R. ¶ 102 (reasoning “[t]he Court has also held on many occasions that the State has a positive duty to take reasonable and appropriate measures to secure an applicant's rights under . . . the Convention . . . [i]n particular, the Court has affirmed a positive obligation of States . . . to provide access to essential information enabling individuals to assess risks to their health and lives”).

37. *Urgenda*, *supra* note 1, ¶ 5.2.2.

materialize immediately, mitigation will take time to completely implement and therefore requires present action.³⁸

Using the tools of the Court of Human Rights, the *Urgenda* court interpreted the ECHR's positive obligation to include taking preventative measures against dangerous climate change. In interpreting the Articles of the ECHR, national courts are required to use the same methods as the Court of Human Rights, including the common ground and precautionary principle.³⁹ To establish the common ground, the Court of Human Rights looks to international agreements and scientific insight.⁴⁰ The *Urgenda* court followed these methods and used IPCC reports and other widely accepted scientific authorities, including those included in the U.N. Convention on Climate Change and U.N. Environmental Programme, to establish that there is an international consensus on the urgency of addressing climate change. The reports emphasized that measures to mitigate climate change require immediate action to prevent hazardous outcomes.⁴¹ The *Urgenda* court then concluded that climate change is a "real threat" to the current generation of residents, who will subsequently face "loss of life and/or disruption of family life" due to the effects of climate change.⁴² The rights to life and respect for family life are protected by Articles 2 and 8. With the common ground established, the *Urgenda* court ruled for the inclusion of climate change in its interpretation of the protection from environmental hazards that had previously been read into Articles 2 and 8 of the ECHR.⁴³

The *Urgenda* court further ruled that the positive obligations outlined in Articles 2 and 8 of the ECHR include the duty of individual nations to do their part to prevent dangerous climate change.⁴⁴ Though the problem of climate change is global in nature, and individual reductions will not abate the danger alone, the *Urgenda* court ruled that every bit of reduction matters.⁴⁵ This obligation stems from the "no harm" principle.⁴⁶ The no harm principle is the internationally accepted belief that no country should create harm for another.⁴⁷ The UNFCCC references the no harm principle in its preamble, providing evidence that it is within the common ground, as required for ECHR interpretation.⁴⁸ The *Urgenda* court ordered that the Netherlands "is obliged . . .

38. *Id.* ¶ 5.6.2.

39. *Id.* ¶ 5.6.1.

40. *Id.* ¶¶ 5.4.3, 6.3.

41. *Id.* ¶ 7.2.5.

42. *Id.* ¶ 4.7.

43. *Id.* ¶¶ 4.2–4.8.

44. *Id.* ¶ 5.6.2.

45. *Id.* ¶¶ 5.7.1, 5.7.8 (stating that "the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change" and that "every reduction [in greenhouse gas emissions] means that more room remains in the carbon budget").

46. *Id.* ¶ 5.7.5. Countries must "ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." *Id.* ¶ 5.7.2.

47. *Id.* ¶ 5.7.5.

48. *Id.*

to take appropriate measures against the threat of dangerous climate change”⁴⁹ However, it defined the role of national courts in this process narrowly.⁵⁰ Where non-binding rules or agreements are the sources declaring the appropriate measures to protect from such human rights violations, a court shall only make judgments against a state when a minimum “fair share”⁵¹ can be established through the common ground method.⁵² If the court can establish a state’s fair share based on the common ground, the court may declare those measures a legal obligation of that state.⁵³

In *Urgenda*, the Netherlands Supreme Court determined that the minimum fair share for the Netherlands in preventing climate change was a reduction of at least 25 percent by the end of 2020 as compared to 1990 levels.⁵⁴ This target tracks the 25-40 percent of greenhouse gas emission reductions for Annex I countries, including the Netherlands.⁵⁵ By pointing to the reports from the UNFCCC from 2007 through 2015, which consistently referenced a 2020 reduction target for Annex I countries of 25-40 percent,⁵⁶ the court demonstrated that the common ground supported the 25-40 percent target.⁵⁷ After 2015, the parties to the UNFCCC continued to emphasize the urgency of achieving a sufficient reduction of greenhouse gas emissions.⁵⁸ The sufficient reduction in this case is one that prevents exceeding 430-50 ppm by 2100.⁵⁹ The court reasoned that, in order for the Netherlands to take adequate action against climate change, it must at least hit the 25 percent goal by the end of 2020.⁶⁰

II. ANALYSIS AND IMPLICATIONS

The outcome in *Urgenda* is binding only in the Netherlands, but the Netherlands Supreme Court established steps future litigators can follow in order to hold other European governments accountable to climate change mitigation targets. The court’s logic can be distilled into three steps: (1) reinforce the positive obligation to implement measures to prevent dangerous climate change implicit in Articles 2 and 8 of the ECHR, (2) establish the national court’s

49. *Id.* ¶ 5.9.1.

50. *Id.* ¶ 6.6.

51. *Id.* ¶ 6.5.

52. *Id.* ¶ 6.3.

53. *Id.* ¶ 6.6.

54. *Id.* ¶ 7.3.6.

55. *Id.* ¶ 2.1. (providing “[t]he parties to the UNFCCC are referred to as Annex I countries and non-Annex I countries. The Annex I countries are the developed countries, including the Netherlands. According to Article 4(2) of the convention, the Annex I countries must take the lead, in an international context, in counteracting climate change and its negative consequences”).

56. *Id.* ¶ 2.1 (“Article 7 UNFCCC provides for the Conference of the Parties [(COP)] . . . the highest decision-making body within the UNFCCC. Resolutions passed by the COP are generally not legally binding. The COP meets annually at climate conferences.”).

57. *Id.* ¶ 7.2.11.

58. *Id.* ¶ 7.2.3.

59. *See id.* ¶ 7.2.4.

60. *Id.* ¶ 5.7.1.

authority to assess the suitability of climate change targets, and (3) set an enforceable target using methods required by the Court of Human Rights in interpreting the ECHR. Despite some inherent limitations on the *Urgenda* decision, the successful application of the *Urgenda* template could hold other European governments accountable to climate change mitigation targets for 2030, 2050, and beyond.

The *Urgenda* court used the verbiage of the ECHR and case law from the Court of Human Rights to establish step one, that the positive obligation to implement measures to mitigate dangerous climate change is implicit in Articles 2 and 8. Both the case law used in the *Urgenda* decision and the ECHR itself are authorities available to all European courts hearing human rights cases.⁶¹ Therefore, future litigation could duplicate the rationale of the decision in *Urgenda* by relying on the same authorities.

To be clear, the *Urgenda* decision itself is not binding authority outside of the Netherlands because the case was tried by the Netherlands' national court instead of by the Court of Human Rights. Only cases decided by the Court of Human Rights create binding case law for other nations subject to the ECHR.⁶² Additionally, reliance on the ECHR means that countries outside its scope, such as the United States, who is not a member state, cannot use the *Urgenda* template for future climate change litigation. Within Europe, however, a receptive national court could adopt the rationale in *Urgenda* to read climate change into Articles 2 and 8 of the ECHR.

Step two, establishing the national court's authority to assess the suitability of climate change targets, requires constitutional permission from each individual nation to apply the *Urgenda* template. In the Netherlands, the government and parliament hold the decision-making power to establish greenhouse gas reduction targets.⁶³ The courts then decide whether those bodies have acted as required by the law.⁶⁴ Although these power structures may vary slightly across nations, the ECHR is written into each member state's legislation and their national court is required to enforce the ECHR provisions.⁶⁵ Therefore, the national courts across Europe likely have the ability to assess whether existing targets set by their respective governments are sufficient to protect human rights.⁶⁶ If a state's targets are insufficient to protect against dangerous climate change, Article 13 provides its national court the authority to establish a concrete standard.⁶⁷ The universal enforceability of the ECHR means that step two can also easily be translated to future litigation, despite variances in governmental structure from that of the Netherlands.

61. ECHR, *supra* note 7, at art. 32.

62. ECHR FAQ, *supra* note 5, at 3.

63. *Urgenda*, *supra* note 1, ¶ 8.3.2.

64. *Id.*

65. *See id.* ¶ 8.3.3.

66. *Id.* ¶ 6.5.

67. *Id.* ¶ 6.4.

Step three, setting an enforceable target using the methods required by the Court of Human Rights, will require the most deviation from *Urgenda*. The *Urgenda* decision established that the 2020 targets met the common ground criteria under the ECHR, but it did not explicitly recognize any future targets.⁶⁸ Due to the length of time required for both litigation and implementation of amended targets, future litigation will need to focus on targets beyond 2020. Based on the *Urgenda* decision, to establish an enforceable target, the court must determine the minimum fair share. The minimum fair share is based on the international consensus, founded upon the common ground method and precautionary principle.⁶⁹

To establish common ground needed for the 2020 goals, the *Urgenda* court relied on the scientific insight provided by the IPCC's AR4, which has been superseded by the Fifth Assessment Report (AR5) for targets beyond 2020.⁷⁰ AR5 repeats the 430-50 ppm cap of greenhouse gas levels for 2100 but shifts its focus towards reduction targets for 2030 and beyond.⁷¹ Because the ultimate 2100 targets in AR5 align with those in AR4, the common ground goal of using a 430-50 ppm cap on greenhouse gas levels to establish yearly goals has not changed.⁷²

While the *Urgenda* court relied heavily on AR4, applying the same concepts using AR5 will not be simple. AR5 discusses the role of future carbon-capture technology in setting emission reduction goals.⁷³ However, this technology does not yet exist at levels needed for dangerous climate change mitigation.⁷⁴ The precautionary principle advises setting targets in line with what is required to achieve goals based off of currently available technology. Therefore, setting more lenient targets based off those in AR5 in anticipation of future carbon capturing technology is at odds with the precautionary principle and will not meet the international consensus test of *Urgenda*.⁷⁵ In the absence of an IPCC report to establish the target for 2030 or 2050, other sources may provide sufficient international and scientific consensus to form a common ground. For instance, the *Urgenda* court relied on reports from the yearly UNFCCC, the U.N. Environmental Programme reports, and European climate policy.⁷⁶

The gap between the emissions reductions needed to meet the 430-50 ppm target required to curb dangerous warming and the targets currently set by the world's governments continues to widen.⁷⁷ According to the United Nations

68. See *id.* ¶ 7.5.1.

69. See *id.* ¶ 6.3.

70. See *id.* ¶ 7.2.4.

71. *Id.* ¶ 2.1. Although, 87 percent of these scenarios contained carbon-capture technology that is not yet widely available. See *id.*

72. See *id.* ¶ 7.2.4.

73. *Id.* ¶ 7.2.5.

74. See *id.*

75. See *id.* ¶ 7.2.10.

76. See *id.* ¶ 2.1.

77. See U.N. Environment Programme, Emissions Gap Report 2019, DEW/2263/NA, at 3 (2019).

Environment Programme 2019 Emissions Gap Report, global greenhouse gas emissions have increased annually by roughly 1.5 percent in recent years.⁷⁸ In 2018, emissions hit a record high.⁷⁹ The report from the 2019 Convention on Climate Change emphasized the need to limit warming to 1.5 degrees, requiring a reduction of 45 percent by 2030 and carbon neutrality by 2050.⁸⁰ The European Union is considering a revision of its 2030 reduction target from 40 percent to 50 percent and its 2050 target from 80 percent to 95 percent to greenhouse gas neutrality.⁸¹ In early 2019, the Netherlands passed a Climate Act outlining the specific steps it plans to take to reach the 2020 target and carbon neutrality by 2050.⁸² As legislators and courts across the world move towards cohesive targets for mitigating climate change, and in light of the *Urgenda* decision, the common ground for future action grows wider.

CONCLUSION

The *Urgenda* court's reliance on the ECHR makes *Urgenda* an instructive decision for European nations to uphold greenhouse gas reduction targets in future litigation. The *Urgenda* decision read an implicit obligation into Articles 2 and 8 to protect against dangerous climate change, established the national court's authority to assess climate change targets, and used the tools of the Court of Human Rights to interpret the ECHR. While *Urgenda* is not binding outside the Netherlands, the decision may serve as a totem for human rights-based climate action elsewhere.⁸³ Using the template provided by the decision in *Urgenda*, national governments across Europe could be required to set and uphold more aggressive climate mitigation targets in an effort to protect the human rights of individuals living within their borders.

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78. *Id.*

79. *Id.* at XIV.7.3

80. U.N. Secretary-General, *2019 Climate Action Summit and the Way Forward in 2020* 3 (Dec. 11, 2019).

81. Jesse Reynolds, *Netherlands' Supreme Court Demands More Emissions Cuts*, LEGALPLANET (Dec. 20, 2019), <https://legal-planet.org/2019/12/20/netherlands-supreme-court-demands-more-emissions-cuts/>.

82. Klimaatwet 10 juli 2019, Stb. 2019, 253.

83. See, e.g., URGENDA: GLOBAL CLIMATE LITIGATION, <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/> (last visited May 3, 2020) (providing a list of climate-related cases worldwide).

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