

## ***Climate litigation against national governments: breakthroughs and new frontiers***

Presentation by Lucy Maxwell, at the First Annual Conference of the European Commission  
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Good afternoon, my name is Lucy Maxwell and I'm the Co-Director of the Climate Litigation Network, a project of the Urgenda Foundation.

The Climate Litigation Network is an international project of the Urgenda Foundation. We support communities and their legal teams around the world to bring climate cases against their national governments to increase their efforts to prevent dangerous climate change.

Today, I'll touch on four topics:

1. Why are communities turning to the courts?
2. A closer look at the Dutch *Urgenda* climate case
3. What has been the impact of the *Urgenda* case in the Netherlands and outside?
4. The next frontier for climate litigation against governments

### **1. Why are communities turning to the courts?**

First, whenever I speak about climate litigation, I like to ground the conversation in the facts of climate science – because *that's* what's informing communities' decisions to turn to the courts.

Today, I'll highlight two facts:

1. First, last year, the world's leading climate scientists – the Intergovernmental Panel on Climate Change (IPCC) – [told us](#) that there remains “a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all”. The report is crystal clear about how *short* the time frame is to secure a liveable future.
2. Second, last year, the UN Environment Programme reviewed governments' climate commitments and [found that](#), “current policies and [Nationally Determined Contributions] are woefully insufficient to meet the temperature goal of the Paris Agreement”. So, the degree of State action on climate change – or I should say, *inaction* – is very clear.

Thus, in the same year, we had the clearest statement yet from the world's leading climate scientists about the degree of the climate crisis and the short time remaining – and confirmation about just how weak States' climate efforts remain.

So it's with gap in mind – between science, and the action of our elected representatives – that communities see no other choice but to turn to the courts.

As we've heard earlier today, many people bringing climate cases are those who are most affected by climate change, both now and in the future. This includes children, elderly people, people with disabilities, and First Nations peoples. Their message to their governments is clear: "You are not protecting us now. And your failures now will affect us disproportionately in the future".

With that in mind, let's consider the decision of the Dutch courts in the famous Dutch *Urgenda* climate case.

## **2. A closer look at the Dutch *Urgenda* climate case**

The *Urgenda* climate case was brought by a Dutch sustainability organisation, the Urgenda Foundation, and about 900 Dutch residents. The case was filed in 2013, and the plaintiffs were *looking ahead* to Dutch Government's planned emissions reductions by the year 2020. The primary claim was that the Dutch Government's plan did *not* align with what climate science indicated is necessary for a developed country to do to prevent global warming above 2 degrees (because at that time, that was considered a 'safer' level of warming).

After attempting political dialogue with the Dutch Government, the plaintiffs decided to file legal action. The legal action had two different legal bases:

- The Dutch Civil Code, which includes a general duty of care in hazardous negligence; and
- The Government's positive obligations to protect the right to life and the right to private and family life under the European Convention on Human Rights (ECHR), based on well-established jurisprudence of the European Court of Human Rights relating to other forms of environmental harm.

The case was thus premised on those two legal bases, that the government has an obligation to protect people within its jurisdiction from the harm posed by climate change by taking measures now to *reduce emissions* – because that's the only *preventative action* available when it comes to climate change.

The Dutch District Court of the Hague in 2015 issued the very first decision in the case – and one that sent ripples around the world. The District Court upheld the case against the Dutch Government on the basis of its duty under the Dutch Civil Code. The appellate courts elaborated on this, and focused upon the Government's positive obligations under the ECHR.

The Dutch courts made a number of findings which help us to understand how a court in any country might grapple with this question of government accountability in the climate crisis – which many courts around the world are now facing.

The first question the Dutch courts had to consider is: does it make sense to impose a duty on a government with respect to climate change, when this is a global problem, to which every country in the world has contributed? The Dutch courts at every level affirmed that it *did* make sense because there is an *individual* responsibility of every State Party to the UN Framework Convention on Climate Change and subsequently to the Paris Agreement, to do ‘its part’ to combat dangerous climate change.

The second question the Dutch courts had to consider is: is it right to impose a legal obligation with respect to climate change, when much of the harm related to climate change in the Netherlands has not yet happened? The plaintiffs had provided evidence, for example, of sea level rise in the Netherlands to occur in decades to come. The Dutch courts affirmed that it *is* appropriate because it is inherent to the science of climate change that emissions *now* will have impact in the future, and it is thus necessary to take the action now to prevent such harm. The Dutch courts also indicated that it’s not unusual to impose *preventive* duties where there exists a foreseeable risk of serious harm, particularly in the context of negligence. The courts concluded that it was not an unusual situation, even though it was a new kind of harm that the court was asked to adjudicate.

With these two questions answered, the District Court (and two appellate courts) was satisfied that it was appropriate to apply an existing legal obligation to the problem of climate change.

The big question that remained was: what standard applies to that duty? How can a court determine if there is compliance with that duty? Here, the District Court, the Court of Appeal and Supreme Court looked to a number of different sources to determine the *content* of the duty to take preventive measures to reduce GHG emissions.

The most important was the findings of the IPCC regarding the emissions reductions that are needed to hold global warming to a particular level – such as well below 2 degrees or 1.5C (as is the current approach of many courts). On the facts of the case, this was an emissions reduction of between 25 – 40% by 2020 compared with 1990 levels. The Dutch courts considered that this informed the content of the State’s duty. The courts found, in particular, that there was no evidence that the Government was on track to reduce its emissions in line with the reductions indicated by the IPCC, and the Government had not put forward any evidence forward as to why it should not reach that level.

On that basis, the District Court found that there was a legal duty and issued a binding order on the Dutch State to reduce its emissions by at least 25% by 2020 on 1990 levels. The Dutch State appealed twice, and at each level, the Dutch courts affirmed this decision.

While the appellate courts' decisions focused on the State's positive obligations under the ECHR as the primary legal basis, the legal reasoning remained very similar throughout the three levels of the Dutch courts. In December 2019, the Supreme Court of the Netherlands affirmed the primary order made by the lowest court. This decision had immediate effects around the world. The (then) UN High Commissioner for Human Rights, Michelle Bachelet issued a [statement](#) which said: "The decision confirms that the Government of the Netherlands and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases."

### **3. What has been the impact of the *Urgenda* case in the Netherlands, and outside?**

I'll turn now to consider briefly the impact of the Dutch case in the Netherlands. Put simply: the Dutch Government adopted immediate climate action, from the first decision in 2015. The Dutch Government closed coal-fired power stations, introduced a new Climate Change Act, and [invested massively](#) in renewable energy.

And importantly for today's discussion, the decisions of the Dutch courts had ripple effects well outside the Netherlands. From only one case back in 2013, there are now around [eighty of these cases](#) worldwide.

Ten of these cases regarding a government's overall climate efforts have gone to the highest court in a country. Of these ten apex court decisions, seven have been successful in terms of favourable climate outcomes. These include judgments from the highest courts in Germany, France, Ireland, Colombia and Brazil.

In each of these cases, the highest court of a country, within its own legal framework and legal culture, has affirmed that it is appropriate for a court to adjudicate a climate case against the government. Courts have determined it appropriate to, among other things: hold the government to account to its own targets (as we heard about in the *Grande Synthe* case in France); to scrutinise whether there is enough detail in the Government's climate plan (as in the *Friends of the Irish Environment* case); and to assess whether the emissions reduction measures adopted are in fact reasonable and appropriate, given the government's duty to protect rights under the ECHR (as in *Urgenda*) or to avoid 'inter-temporal' interference with constitutional freedoms (as in the German Constitutional Court's decision in *Neubauer*).

The clear message from these national courts is: we can adjudicate these cases.

#### **4. What is the next frontier for climate litigation against governments?**

I'll end with some reflections about the next frontier for climate legal accountability.

As I said, there are now eighty of these cases around the world that are proceeding through national courts.

We can see a growing consensus, particularly amongst courts in Europe, that *existing* legal obligations can be applied to the problem of climate change, with a variety of answers about the standards and limits that apply to such adjudication.

Looking ahead, we can anticipate many more cases on issues of loss and damage, and on the issue of adaptation. It is clear that governments need to adopt both preventive action through mitigation, *and* take steps to protect people against the harms that are already here because of climate change.

I hope this presentation has given you some food for thought about the developments in climate legal accountability that have happened in the past 10 years, and some ideas about what is ahead!

Thank you.