

## **The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?**

### **Introduction**

Climate change litigation is burgeoning around the world, and this summer it came to Belgium. On June 17, 2021, the Brussels Court of First Instance (the court or the Brussels court) pronounced its long awaited judgment in a closely watched case that challenged the Belgian state's (in)action on climate change.<sup>1</sup> In its 84-page judgment, the court ruled in favor of the claimant association *Klimaatzaak* and found that Belgium's current mitigation policies were insufficient to adequately address the effects of climate change. This was considered a violation of both the general duty of care recognized under Article 1382 of the Belgian Civil Code (CC) as well as Articles 2 and 8 of the European Convention on Human Rights (ECHR), which protect the right to life and the right to private and family life. This *Insight* provides a short commentary of the most significant aspects of the *Klimaatzaak* judgment and situates it within the broader context of human rights-based climate litigation.

### **The Belgian Climate Case in Context**

The potential negative impacts of climate change on human rights are now widely recognized, and the Belgian judgment is part of a broader recent trend of strategic litigation, using human rights standards to force states to more effectively address climate change.<sup>2</sup> This trend finds its roots in the ground-breaking *Urgenda* case, in which the Dutch Supreme Court condemned the Netherlands for violating its positive obligations under Articles 2 and 8 of the ECHR to protect Dutch citizens from the hazardous effects

of climate change.<sup>3</sup> That ruling went so far as to compel the state to reduce its national greenhouse gas (GHG) emissions by 25 percent by 2020 compared to 1990 levels, the latter being considered the lowest acceptable reduction target to avoid dangerous climate change. Similarly, in February 2021, the Administrative Court of Paris issued a judgment ruling that the French state's inadequate action on climate change had caused the four environmental associations that initiated the case moral and ecological damage that had to be repaired.<sup>4</sup> More recently, the German Federal Constitutional Court ruled that the current national climate change mitigation policy was insufficient and violated Article 20a of Germany's Basic Law, which imposes an obligation on the state to "protect the natural foundations of life and animals" while respecting inter-generational equity.<sup>5</sup> In addition to climate cases filed against states, human rights arguments have also successfully been invoked against private companies, most notably in the recent decision of the Hague District Court in *Milieudefensie et al. v. Royal Dutch Shell plc*.<sup>6</sup>

## **Significant Aspects of the Judgment**

In the instant case, the plaintiffs were 8,422 Belgian citizens who filed the case jointly with the association *Klimaatzaak*. They argued that the current national climate policy was insufficient to adequately protect Belgian citizens from the dangerous effects of climate change, in violation of both the state's general duty of care under Article 1382 CC as well as the right to life and the right to private and family life protected by Articles 2 and 8 of the ECHR. As reparation, they asked for the imposition of GHG emissions reduction targets of 42-48 percent by 2025 compared to 1990 levels, of 55-65 percent by 2030, and carbon neutrality by 2050.

### *A Broad and Flexible Approach to Standing*

The court addressed several interesting standing issues typical of climate cases. First, the individual plaintiffs faced the difficulty of establishing the individual nature of their interest in the case. Belgian procedural rules on standing prohibit *actio popularis* and require plaintiffs in civil lawsuits to establish the existence of a direct and personal interest to be distinguished from the public interest. The court took, however, a broad and flexible approach to the question of standing, influenced by the need to provide effective access to justice in environmental matters in accordance with Article 9(3) of the Aarhus Convention.<sup>7</sup> This Convention, ratified by Belgium in 2003, establishes three core procedural environmental rights: the right of access to information (Articles 4-5), the right to public participation (Articles 6-8), and the right of access to justice in environmental matters (Article 9). Considering that the existing and future negative impacts of climate change on the lives of the plaintiffs had been sufficiently established, the court ruled that

the fact that other Belgian citizens might also suffer comparable damages did not suffice to redefine the plaintiffs' personal interests as general or public interests.<sup>8</sup>

Second, on the standing of the association, the court first recalled that legal persons cannot traditionally derive their interest solely from their statutory goals.<sup>9</sup> However, according to the principles established in the Aarhus Convention, environmental associations should be granted a special status in this regard.<sup>10</sup> Based on the European and domestic case law applying those principles,<sup>11</sup> the court concluded that *Klimaatzaak* had an interest because the fight against climate change is its main statutory goal.<sup>12</sup>

### *Insufficient Climate Policy and Human Rights*

The court ruled that the Belgian state and its federated entities had collectively violated the general duty of care as well as their positive obligations under Articles 2 and 8 ECHR by adopting an insufficient climate policy. Regarding the general duty of care under Belgian law, the court recalled that the state's inaction in the face of a threat to security, public health, hygiene, or environmental harm can constitute a fault on the part of the state, in violation of Article 1382 CC.<sup>13</sup> With respect to Articles 2 and 8 of the ECHR, the court agreed with the plaintiffs' contention that those provisions impose on public authorities a positive obligation to take the necessary measures to prevent or remedy the negative effects of climate change on persons under their jurisdiction.<sup>14</sup>

### *Separation of Powers*

Despite the court's finding of a violation of both the domestic CC and the ECHR, it refused to impose any specific GHG emissions reduction targets, based on separation of powers considerations. This contrasts with the position adopted by the Dutch courts in the *Urgenda* case. The Brussels court followed the Dutch judges in ruling that it fell under its competence to examine the compatibility of the state's (in)action in accordance with its general duty of care and its positive human rights obligations.<sup>15</sup> However, the court considered that in the absence of specific international or domestic obligations in this regard, the development of an emissions reduction plan belonged to the discretionary power of the legislative and executive branches of the state.<sup>16</sup> The court therefore ruled that it was beyond its injunction power to fix specific GHG emissions reduction targets.<sup>17</sup> The liability of the Belgian authorities was thus established, but the court declined to provide reparation.

## **A Step Forward, a Pyrrhic Victory, or Both?**

Some parts of the court's judgment are significant, both for Belgium but also for the advancement of broader climate litigation. First, the double ruling on standing is groundbreaking and may open the door for future strategic climate litigation not only in Belgium but also in other states parties to the Aarhus Convention. Second, the finding of a violation of the state's positive human rights obligations is significant, not only in the Belgian context but also for human rights-based climate litigation elsewhere. With its general recognition that an insufficient climate policy can violate international human rights standards, the Belgian judgment develops an interesting precedent that could be relied upon by litigants in other countries and thus contributes to the emerging transnational judicial dialogue on climate change and human rights. At the same time, the refusal of the court to fix specific GHG emissions reduction targets based on separation of powers issues, thus providing no reparation, provides a cautionary tale for other climate cases. In that sense, the judgment is indeed a Pyrrhic victory in that it will most likely only have a marginal effect on the Belgian climate policy. Future climate litigants should continue to seek injunction relief, though aware that judges may see the imposition of specific GHG emissions reduction targets as overstepping their competencies. In Europe, part of the answer might come from the new Climate Target Plan recently issued by the EU, which raises the Union's GHG emissions reduction objective from 40 percent to 55 percent by 2030 compared to 1990 levels. Once transposed into EU climate legislation, this would create a new binding standard that could constrain the discretionary power of European states and help plaintiffs overcome the separation of powers obstacle in future climate cases.

While the *Klimaatzaak* decision and others like it confirm the potential of using human rights arguments in climate litigation, the enthusiasm they might generate must be tempered as those cases also point to legal hurdles that can be difficult to overcome. In particular, issues surrounding causation, standing, and separation of powers constitute significant obstacles.<sup>18</sup> As climate change is a global environmental phenomenon based on cumulative causes and widespread effects, it remains difficult to establish causation between a particular state's (in)action and the violation of the plaintiffs' human rights. In addition, the global and diffuse nature of climate change makes it difficult for plaintiffs to demonstrate a direct and personal interest. Indeed, the so called "People's climate case" filed in 2018 before the European Union General Court (seeking the annulment of three allegedly insufficient EU climate legal instruments) was declared inadmissible on precisely this ground.<sup>19</sup>

Furthermore, since many climate cases are filed by environmental associations, the issues surrounding standing of legal persons can be problematic. Whereas the Belgian court was not so troubled, the Irish Supreme Court, by contrast, ruled in 2020 that the association “Friends of the Irish Environment” did not have standing to raise arguments based on the rights to life and bodily integrity as it could not enjoy those rights as a legal entity.<sup>20</sup> Finally, as the Belgian case also illustrates, climate policy is a highly political and sensitive issue, entailing a careful balancing of diverse and competing interests by the state authorities. Therefore, the principle of separation of powers often constitutes a significant hurdle in climate litigation; it has even led to the dismissal of several climate cases.<sup>21</sup>

In short, as human rights-based challenges to climate change grow, continued vigilance is required for the many hurdles that still make it difficult to fully exploit the path of litigation.

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<sup>1</sup> Civ. [Tribunal of First Instance] Bruxelles (4<sup>th</sup> ch.), June 17, 2021, case 2015/4585/A, <http://climatecasechart.com/climate-change-litigation/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/> [hereinafter Judgment].

<sup>2</sup> For an overview of those cases, see: <http://blogs2.law.columbia.edu/climate-change-litigation/non-us-case-category/human-rights/>.

<sup>3</sup> Rb [District Court] Den Haag, June 24, 2015, ECLI:NL:RBDHA:2015:7196, Hof [Court of Appeal] Den Haag, Oct. 9, 2018, ECLI:NL:GHDHA:2018:2610, HR [Supreme Court], Dec. 20, 2020, ECLI:NL:HR:2019:2007 (Neth.), <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>.

<sup>4</sup> TA [Administrative Court] Paris, Feb. 3, 2021 (Fr.), <http://climatecasechart.com/climate-change-litigation/non-us-case/notre-affaire-a-tous-and-others-v-france/>.

<sup>5</sup> BVerfG [Federal Constitutional Court] 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, Apr. 29, 2021, <http://climatecasechart.com/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/>.

<sup>6</sup> Rb [District Court] Den Haag, May 26, 2021, ECLI:NL:RBDHA:2021:5337, <http://climatecasechart.com/climate-change-litigation/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>.

<sup>7</sup> Convention on access to information, public participation in decision-making and access to justice in environmental matters, June 25, 1998, 2162 U.N.T.S. 447.

<sup>8</sup> Judgment, pp. 50-51.

<sup>9</sup> *Id.* p. 51.

<sup>10</sup> *Id.* p. 51.

<sup>11</sup> *Id.* pp. 51-54.

<sup>12</sup> *Id.* pp. 54-55.

<sup>13</sup> *Id.* pp. 57-58.

<sup>14</sup> *Id.* p. 61.

<sup>15</sup> *Id.* p. 45.

<sup>16</sup> *Id.* p. 82.

<sup>17</sup> *Id.* p. 82.

<sup>18</sup> Jacqueline Peel, *Issues in climate change litigation*, 5 CCLR 15 (2011).

<sup>19</sup> Case T-330/18, *Armando Ferrão Carvalho v. European Parliament and Council*, ECLI:EU:T:2019:324 (May 8, 2019), <http://climatecasechart.com/climate-change-litigation/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/>.

<sup>20</sup> *Friends of the Irish Environment CLG v. the Government of Ireland, Ireland and the Attorney General* [2020] IESC 49 (Ir.), <http://climatecasechart.com/climate-change-litigation/non-us-case/friends-of-the-irish-environment-v-ireland/>. See also: Charlotte Renglet, *The decision of the Irish Supreme Court in Friends of the Irish Environment v Ireland: A significant step towards government accountability for climate change?* 14 CCLR 163 (2020).

<sup>21</sup> See, e.g., *Kelsey Cascadia Rose Juliana v. U.S.*, 947 F.3d 1159 (9th Cir. 2020), <http://climatecasechart.com/climate-change-litigation/case/juliana-v-united-states/>.