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CLIMATE ACTION AS POSITIVE HUMAN RIGHTS  
OBLIGATION: THE APPEALS JUDGMENT IN  
URGENDA V THE NETHERLANDS

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## **Climate action as positive human rights obligation: The Appeals Judgment in Urgenda v The Netherlands**

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# *Climate action as positive human rights obligation: The Appeals Judgment in Urgenda v The Netherlands*

Laura Burgers and Tim Staal<sup>1</sup>

**Abstract** On 9 October 2018, the Hague Court of Appeal confirmed the first instance judgement rendered in the world-famous *Urgenda* case: the Dutch State commits a tort by setting a goal for greenhouse gasses emissions reduction of only 20% by the end of 2020, compared to 1990 levels. The State is ordered to raise this goal to at least 25%. Both judgments are heavily criticised by constitutional and administrative law scholars. Most of this critique is ultimately linked to the objection that the Courts overstepped their task in the constitutional separation of powers. With this objection the State also takes the case to the Supreme Court.

This annotation analyses the appellate court's decision step by step, pointing out where it differs from the lower court's decision and engaging with the various critiques. The Court of Appeal directly applies Articles 2 (right to life) and 8 (right to family life) of the ECHR, finds that these rights cover climate change related situations, and on the basis of Dutch civil procedure determines that 25% reduction is the factual minimum to prevent ECHR violations. Although parts of the decision could have been motivated in more detail, the authors conclude that the Court applied the law correctly and that neither the separation of powers, nor the political question doctrine were infringed.

**Keywords:** Urgenda, separation of powers, ECHR, climate change litigation, human rights, right to life, right to family life, environment, private law, civil procedure, political question doctrine

## Introduction

The 9<sup>th</sup> of October 2018 was of great importance for the global climate change litigation trend. The Court of Appeal in The Hague was about to make public its decision in the world famous *Urgenda* case.<sup>2</sup>

Three years earlier, in June 2015, a Court of First Instance had ordered the Dutch State to reduce greenhouse gasses emissions with at least 25% by the end of 2020, compared to the levels of 1990.<sup>3</sup> To do less would constitute a tort. The Dutch State shortly after

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<sup>2</sup> Court of Appeals of The Hague (*Gerechtshof Den Haag*, hereafter: Court of Appeals) *Urgenda v State of the Netherlands*, ECLI:NL:GHDHA:2018:2591, 8 October 2018.

<sup>3</sup> District Court of The Hague (*Rechtbank Den Haag*, hereafter: District Court) *Urgenda v State of the Netherlands*, ECLI:NL:RBDHA:2015:7145, 24 June 2015.

announced to appeal the judgment. Although it promised to comply with the judgment, the State disagreed on a principled basis: the separation of powers, or *trias politica*, would stand in the way of a national court giving such an order.

One of us went to the Court of Appeal to attend the reading of the judgment. It was an Indian summer morning, unusually warm for the time of the year. Supporters of the claimant, the environmental NGO Urgenda (portmanteau for ‘urgent agenda’), had come in large numbers, as had journalists covering climate change. Waiting for the doors to open, all present were nervous – even the Court staff who had to make sure everyone would fit in the courtroom.

Throughout the half hour that the Court Chamber’s president took to read a summary of the judgment, people sighed with relief when she – just like the lower court – fully acknowledged the dangers of climate change; jurists had surprised looks on their faces hearing that the appellate court – in contrast to the 2015 decision – based its decision on a direct application of Articles 2 and 8 European Convention of Human Rights (ECHR); and everyone applauded, laughed and some even cried after the president finished by sustaining the 25% reduction order.

Less enthusiastic comments, from several eminent Dutch administrative and constitutional law professors, dominated the national media during the week that followed.<sup>4</sup> To their mind, the judgment did little to abate fears for, as a Dutch constitutional law expression goes, judges ‘sitting on the chair of the government’: The Court would have exceeded its adjudicative powers at the expense of the other branches of government.

Meanwhile, it is far from evident that the State will reach the 25% reduction in 2020 mandated by the Court. In the next few weeks, suggestions of how to achieve it ranged from closing coal-fired electricity plants to stimulating nuclear energy. To top it all off, the government has stated that it will appeal the judgment to the Supreme Court, again for the principles reason that it would have infringed the powers of the political branches of government.<sup>5</sup>

In other words, the controversy regarding the *Urgenda* case, which already began before the 2015 decision, is alive and kicking.<sup>6</sup> In the meantime, the first instance decision has already inspired many foreign climate lawsuits.<sup>7</sup> The *Urgenda* case therefore has both theoretical and practical, national and transnational significance, warranting careful analysis.

The judgment, written in exceedingly clear language, takes a more straightforward line of reasoning than the lower court -- at times perhaps too straightforward, to the point of making itself vulnerable to the critique that it is cutting corners without proper motivation. Motivation aside, however, we believe that the core of the judgment withstands the withering critiques of unconstitutionality. The Court of Appeal takes four crucial steps to reach its decision, in addition to many supporting arguments worth mentioning in their own right.

In this contribution, we devote a section to each of those four steps: the legal standing of Urgenda and, as a result, the admissibility of the ECHR claims (§1); the applicability of Articles 2 and 8 ECHR to, and their proper interpretation in the context of, the dangers of

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<sup>4</sup> *Inter alia* 2018; Breebaart 2018; Boogaard 2018; Jong 2018; Hommes 2018; Leijten 2018.

<sup>5</sup> Ministerie van Algemene Zaken 2018.

<sup>6</sup> Just like Tim’s daughter Halina who was born in the week the Appellate Court rendered its Urgenda decision.

<sup>7</sup> For a sophisticated analysis of the transnational links between climate lawsuits, see Colombo 2017.

climate change (§2); the factual relevance attached to (semi-)legal sources in the context of the private law character of the case and the dismissal of the State's objections (§3); and, in light of the previous steps, the rejection of the State's separation of powers argument (§4).

## 1. The admissibility of Urgenda's claims

### 1.1. Direct applicability of the ECHR

In the upheaval surrounding Urgenda's initial victory three years ago, it was quickly forgotten that the District Court had ruled *against* the NGO on a major procedural point: it held Urgenda's claims based on direct application of the ECHR to be inadmissible.

This decision caused the District Court to veer off into uncharted and complicated territory. That is, in the Dutch civil code, Article 6:162 distinguishes between three types of tortious acts: 1) violations of someone else's right/entitlement; 2) an act or omission breaching a duty imposed by law; and 3) an act or omission in violation of what according to unwritten law is deemed fit in societal interrelations. Without the directly applicable ECHR articles, the court could not go for the 'simple' torts of type 1 or 2.

Instead, the District Court turned to tort type 3. Dutch case-law consistently held that a violation of 'what according to unwritten law is deemed fit in societal interrelations' includes hazardous negligence. The District Court said that the State acted hazardously negligent in aiming for a target of less than 25% reduction by the end of 2020. To come to this verdict, it applied Articles 2 and 8 of the ECHR 'indirectly', together with an intricate web of international and EU law as well as a national constitutional duty of care.<sup>8</sup> All these sources would 'reflect' through the mirror of the private legal duty not to act hazardously negligent contained in Article 6:162. The ECHR-norms, after first having been set aside, returned as 'sources of inspiration' in this rickety contraption.<sup>9</sup>

It is common practice in the Netherlands for Courts to interpret national law consistently with international law, even when that international law lacks direct applicability. This practice is known as the 'reflex effect' in Dutch legal lingo.<sup>10</sup> Yet the unprecedentedly complicated construction in *Urgenda* led the State and others to make scathing remarks about the District Court stretching this concept to breaking point.<sup>11</sup>

Why then had the lower court concluded to the inadmissibility of Urgenda's ECHR-claims, and made its life so difficult? It appears to have come under the impression that it had to apply the criteria for the admission of a case to the European Court of Human Rights (ECtHR). Given that Article 34 ECHR restricts claims by NGOs to violations of which they are personally a victim, it was hard to see how Urgenda could itself be seen as a potential victim of climate change. 'After all,' the district court reasoned, 'unlike with a natural person,

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<sup>8</sup> Article 21 Dutch Constitution.

<sup>9</sup> District Court, 4.46. Critical is Gijsselaar 2015.

<sup>10</sup> 'Reflexwerking' in Dutch.

<sup>11</sup> Pleadings of the State, 1.22-1.26.

a legal person's physical integrity cannot be violated nor can a legal person's privacy be interfered with'.<sup>12</sup>

Despite its extraordinary win, Urgenda took the step to specifically appeal the judgment on this point, and it paid off. The Court of Appeals declares Urgenda's claims based on Articles 2 and 8 ECHR admissible. This set the Court on a much more straightforward path, albeit to achieve the same outcome: the order to reduce at least 25% of greenhouse gasses emissions by the end of 2020.

In support, the Court of Appeals notes it is irrelevant for Urgenda's admissibility before *Dutch* courts, that Article 34 ECHR does not accept an *actio popularis* as a rule of standing for the *Strasbourg* Court: 'Such would not be possible. This is for the Dutch judiciary to decide. This means that Article 34 ECHR cannot serve as a basis for denying Urgenda the possibility to rely on Articles 2 and 8 ECHR in these proceedings.'<sup>13</sup> The Dutch rules *do* provide for class actions of interest groups, in Article 3:305a of the Civil Code.

To pursue a civil claim, Article 3:303 Civil Code requires a 'sufficient interest'. This must be an interest of a legal subject, whether the legal subject herself is pursuing the claim or whether an NGO does so on her behalf.<sup>14</sup> The appellate court thus reasons: 'Since individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf.'<sup>15</sup>

### ***1.2. Future generations and people abroad***

On first instance, the lower court had remarkably stated that Urgenda itself could invoke interests of both people outside the Netherlands and future generations, since its internal by-laws stipulate that the NGO strives for 'a sustainable society, beginning in the Netherlands,' and since sustainability has an inherent intergenerational element.<sup>16</sup> Yet the unborn are in principle no legal subjects under Dutch law,<sup>17</sup> which makes it hard to see, under current law, how their interest may constitute a sufficient interest to pursue a civil claim under Article 3:303. The State complained about this on appeal.

The appellate court circumvents the question and leaves unresolved whether NGOs may defend the interests of (non-Dutch) future generations under Dutch civil procedural law. It finds that the State has no procedural interest in objecting Urgenda's admissibility in this regard, since admissibility as such is already a given, for the current generation of Dutch nationals.<sup>18</sup>

### ***1.3. Uptake***

The ECHR-claims being admissible may seem a small, intermediary step. Yet the applicability of the ECHR-Articles does two important things for Urgenda's case. First, it brings on board the extensive case law of the ECtHR on Articles 2 and 8 relating to the environment. The 'incorporation doctrine' requires national courts to interpret the ECHR in

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<sup>12</sup> District Court, 4.45.

<sup>13</sup> Court of Appeals, 35.

<sup>14</sup> See Bleeker 2018a.

<sup>15</sup> Court of Appeals, 36.

<sup>16</sup> District Court, 4.7-4.8.

<sup>17</sup> Cf Article 1:2 Dutch Civil Code.

<sup>18</sup> Court of Appeals, 37 (emphasis added).

accordance with Strasbourg's case law as *res interpretata*.<sup>19</sup> Second, the appellate court opens up the road to an argumentation that might be more readily acceptable for constitutional lawyers than the construction built by the District Court.<sup>20</sup> After all, the ECHR has been directly applied by Dutch courts since the mid-70s. As we will argue in more detail later, it makes the State's main source of indignation about the first *Urgenda* judgment -- that the district court disrespected the *trias politica* -- less pressing: directly applying the ECHR has been the bread and butter of the national courts for decades.

## 2. Articles 2 and 8 ECHR's Duty of Care to Protect against Dangers of Climate Change

The Court of Appeals' judgment has come under attack for making the move to read an overly specific and far-reaching obligation to protect citizens from climate change into human rights.<sup>21</sup> Consequently, the question is whether the Court's application of Articles 2 and 8 ECHR is the human rights revolution the commentators make it out to be, or whether it is an application of a robustly developed case law to a new set of facts that was simply never before submitted to a court of law?<sup>22</sup>

### 2.1. The Strasbourg standard for the prevention of future environmental dangers

The Court reminds us that the Strasbourg case law has since long included environment-related situations in the protection offered by Articles 2 and 8. This also entails positive obligations for the state to *prevent future violations* of the right to life,<sup>23</sup> and 'severe environmental nuisances'<sup>24</sup> to private and family life and the home.<sup>25</sup> As the Court summarizes: 'A future infringement of one or more of these interests is deemed to exist if the interest concerned has not yet been affected, but is in danger of being affected as a result of an act/activity or natural event.'<sup>26</sup> This has been uncontroversial since at least the 2004

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<sup>19</sup> This doctrine is usually traced back to Article 32 ECHR, according to which: 'The jurisdiction of the Court shall extend to all matters concerning the *interpretation* and application of the Convention...' (emphasis added), eg Gerards et al. 2013, p. 43.

<sup>20</sup> Cf Besselink 2018.

<sup>21</sup> Hommes 2018; Leijten 2018.

<sup>22</sup> Defending the latter is Eckes 2018. This question is of extra importance, because some older case law of the Dutch Supreme Court has been understood by some commentators to prevent Dutch courts from interpreting the ECHR more generously than the European Court of Human rights. See *X v Y*, Dutch Supreme Court (*Hoge Raad*), 10 August 2001, ECLI:NL:HR:2001:ZC3598 and discussion of potential consequences for *Urgenda* by Leijten 2018.

<sup>23</sup> *Öneryildiz v Turkey*, ECtHR Grand Chamber, No. 48939/99, 30 November 2004, 89, 90 ('deterrence against threats', 'preventive measures'). Although the positive obligations of states under Article 2 and 8 include other aspects as well, such as an obligation to stop ongoing nuisances and a procedural obligation to investigate, these are irrelevant here, since *Urgenda*'s claim concerns the future conduct of the state.

<sup>24</sup> *Fadeyeva v Russia*, ECtHR Chamber, No. 55723/00, 9 June 2005, 64.

<sup>25</sup> *Fadeyeva*, 89 ('to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights'); *Brincat and Others v Malta*, Nos. [60908/11](#), [62110/11](#), [62129/11](#), [62312/11](#) and [62338/11](#), 24 July 2014, 116 ('to legislate or take other practical measures to ensure that the applicants were adequately protected').

<sup>26</sup> Court of Appeals, 41 (emphasis added). There is some boldness in the Court converging Articles 2 and 8 into a single norm. Arguably that is misguided insofar as the greater role that the concept of fair balance plays under Article 8. For this point, see also <https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights->



*Öneriyildiz* judgment.<sup>27</sup> But does this case law's interpretation of Articles 2 and 8 also apply to environmental dangers of the nature of climate change?

On the one hand, although the judgments the Court cites in support all concern environmental dangers of a smaller scale, with consequences for smaller numbers of people, no indications can be found in the ECtHR's case law that climate change would necessarily be excluded from the scope of positive obligations under Article 2.<sup>28</sup> As Eckes submits, the Court of Appeals was simply confronted with a more fundamental environmental problem than ever before. This in itself cannot be a reason not to apply existing law to new facts, particularly considering the 'living instrument' doctrine of the ECHR.<sup>29</sup>

On the other hand, the Court should be criticized for failing to acknowledge more explicitly that it is quite a leap from a state's obligations concerning pollution by a single leather factory,<sup>30</sup> or waste site,<sup>31</sup> to the consequences of climate change. Even more advisable would have been for the judges to explain in more detail why they think this leap finds support in these or other cases.<sup>32</sup> Not doing so makes the judgment unnecessarily vulnerable to cassation by the Supreme Court.

What the Court does recognize is that the case law holds that Articles 2 and 8 ECHR have to be explained in a way that does not place an 'impossible or disproportionate burden' on the government. This means that governments can only be required to take actions that are 'reasonable', and only when there is a real and imminent threat the government knew or should have known of. But despite these limitations, the Court points out, effective protection of the rights may demand 'early intervention' by the government. In short, the Court concludes, the following standard extracted from *Öneriyildiz* must be applied: 'If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible.'<sup>33</sup>

Once the real and imminent threat and the state's knowledge thereof is factually established, there is little wiggle room left not to take precautionary measures.<sup>34</sup> But which

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[potential-and-constitutional-unease/](#). We do not pay more attention to this point because a violation of either Article would be sufficient to arrive at the same verdict.

<sup>27</sup> Referring to *Öneriyildiz v Turkey*. As the emphasized part makes clear, the norm requires a *factual* assessment, the importance of which we will get to in a moment.

<sup>28</sup> *Öneriyildiz*, 71 ('The Court considers this obligation must be construed to apply in the context of any activity, whether public or not, in which the right to life may be at stake ...'). Cf also Eckes 2018.

<sup>29</sup> Eckes 2018.

<sup>30</sup> *Lopez Ostra v Spain*, ECtHR Chamber, No. 16798/90, 9 December 1994.

<sup>31</sup> *Öneriyildiz v Turkey*.

<sup>32</sup> Human rights scholar Rick Lawson pointed us to a decision that the Court of Appeal could have invoked, ECtHR *Mastromatteo/Italy* 24 October 2002, nr. 37703/97, in which it was considered whether the right to life was violated when criminals on prison leave murdered the son of the applicant. Although no violation was found, the ECtHR did deem this situation to fall within the scope of Article 2, which demonstrates this Article does not require the State would know in advance specifically *who* or *how many people* would be at risk in the absence of required preventive measures.

<sup>33</sup> Court of Appeals, 43. *Öneriyildiz*, 101.

<sup>34</sup> *Öneriyildiz*, 98 ('a decisive factor for the assessment of the circumstances of the case, namely that there was practical information available to the effect that the inhabitants of certain slum areas of Ümraniye were faced with a threat to their physical integrity ...'), 100 ('neither the reality nor the immediacy of the danger in question is in dispute'). For Article 8, some guidance can be found in *Fadeyeva*, 133 ('there is no indication that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels').

precautionary measures exactly? What role does the ‘wide margin of appreciation’ of the state play? In the case law from Strasbourg, the factual situation that a state is or should be aware of is decisive: if the nature of the threat dictates which particular precautionary measures would be ‘necessary and sufficient’ to quell the danger,<sup>35</sup> the state’s margin of appreciation quickly diminishes.<sup>36</sup>

Although some authors reproach the Court for minimizing the margin of appreciation, and consequently for neglecting the *trias politica*, this critique arguably rests on a misunderstanding of the concept. The margin of appreciation, at least in the European human rights context, functions as a principle of subsidiarity dealing with the division of power between the Council of Europe and the Member States, not with the division of power between the executive and judicial branches within a Member State.<sup>37</sup>

## **2.2. Climate change: a real threat resulting in serious risk**

Hence, the Court turns to the factual dangers posed by climate change, which it summarizes as follows:<sup>38</sup> dangerous climate change is caused by man’s emission of greenhouse gases; manmade warming is already happening - up 1.1 degrees Celsius from pre-industrial levels so far; if temperatures rise above 2 degrees Celsius it will have a range of catastrophic consequences, both foreseeable and unforeseeable, costing hundreds of thousands of lives in Western Europe alone;<sup>39</sup> both worldwide and Dutch emissions of CO<sub>2</sub> continue to rise<sup>40</sup> at speeds that are quickly moving toward the maximum ‘carbon budget’ of 450 parts of greenhouse gas per million; and perhaps the most crucial fact for the application of Articles 2 and 8 of the ECHR to this case: ‘The longer it takes to achieve the necessary emission reduction, the greater the total amount of emitted CO<sub>2</sub> and the sooner the remaining carbon budget will have been used up.’<sup>41</sup> These facts are not (convincingly) disputed by the government.

Considering all this, the Court finds it appropriate to speak of ‘a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life.’<sup>42</sup>

Thus, the Court considers that positive obligations of the State concerning ECHR-rights might come at play in disputes about climate change. This is not entirely new. A number of other recent and ongoing climate change lawsuits invoke Articles 2 and 8 of the ECHR, for instance the so-called *People’s Climate Case* initiated last summer against the

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<sup>35</sup> *Öneryildiz*, 101 (‘it was impossible for the administrative and municipal departments responsible ... not to have known of the risks ... or of the necessary preventive measures’). (emphasis added)

<sup>36</sup> Court of Appeals, 42.

<sup>37</sup> True, the ECtHR sometimes acknowledges that the margin of appreciation might have effect on the national separation of powers, such as in the case *Jane Nicklinson and Paul Lamb v United Kingdom*, ECtHR, Nos. 2478/15 and 1787/15, 16 July 2015 – yet this was in relation to formal legislation rather than to policy, the latter of which is at issue in the Urgenda case.

<sup>38</sup> Court of Appeals, 44.

<sup>39</sup> Deaths caused by heatwaves and forest fires, for instance.

<sup>40</sup> While Dutch CO<sub>2</sub> emissions are still rising, total Dutch emission of greenhouse gases are falling. See also Court of Appeals, 26.

<sup>41</sup> Court of Appeals, 44, last bullet point.

<sup>42</sup> Court of Appeals, 45.

EU,<sup>43</sup> and the case of the *Klimaseniorinnen* against the Swiss State.<sup>44</sup> In the Swedish so-called *Magnolia* case, two Courts even already have considered climate change related complaints in light of Articles 2 and 8 ECHR, however without finding any violations.<sup>45</sup>

Moreover, only two weeks after the appellate decision in the *Urgenda* case, the Human Rights Committee published its *General Comment 36*, holding that the right to life as enshrined in the International Covenant on Civil and Political Rights (ICCPR) also includes positive obligations for States to act against dangerous climate change.<sup>46</sup> This General Comment could serve as an argument for the Dutch Supreme Court to uphold the *Urgenda* judgment. After all, the Netherlands has also ratified the ICCPR.

### **2.3. Preventing infringement ‘as far as possible’**

Whether the Dutch State did violate these Articles – and thus acted ‘unlawful’ under the Dutch Civil Code - is the core issue of the case. Does it violate Articles 2 and 8 to reduce greenhouse gas emissions with less than 25% by 2020? Or does a less ambitious target remain within the range of precautionary measures that suffice to ‘prevent infringement as far as possible’?<sup>47</sup>

In tackling this question one can observe the Court joining the human rights standard with an approach to facts dictated by Dutch civil procedure. Before we can definitively analyse whether the Court has stayed close enough to established human rights discourse to refute the label ‘political’, therefore, we have to turn to the weighing of the facts.

## **3. Law, Facts and Civil Procedure**

In Dutch civil procedure, like in most private law systems, courts base their decisions on those facts agreed upon by the parties.<sup>48</sup> If one party posits a fact and the other does not (convincingly) argue against it, this fact is deemed true for the purposes of the procedure.

*Urgenda* and the State agree on a considerable amount of facts: not only everything enumerated by the Court of Appeal in its paragraphs 4-26, but also everything the District Court had observed in its paragraphs 2.1-2.78: the already described scientific consensus on the dangers of climate change; the international and regional endeavours the Netherlands engaged in to tackle these dangers; and what the State has so far done on the national level. The parties agree on the end goal: ultimately, all greenhouse gasses should be phased out.<sup>49</sup>

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<sup>43</sup> Cf *The People’s Climate Case* claim at <https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/05/application-delivered-to-european-general-court-1.pdf>.

<sup>44</sup> Cf the *Klimaseniorinnen* claim at [https://klimaseniorinnen.ch/wp-content/uploads/2017/05/request\\_KlimaSeniorinnen.pdf](https://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf).

<sup>45</sup> Stockholm District Court (*Stockholms Tingsrätt*) 30 June 2017 Push Sverige, Fältbiologerna et al v Staten, *Magnolia*; and Stockholm Court of Appeal (*Svea Hovrätt*) 23 January 2018 Push Sverige, Fältbiologerna et al v Staten, *Magnolia*. The claimants chose not to go to the Supreme Court.

<sup>46</sup> Human Rights Committee (2018) General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life

<sup>47</sup> Court of Appeals, 43.

<sup>48</sup> Article 149 Dutch Code of Civil Procedure.

<sup>49</sup> Court of Appeals, 3.7

The question is whether this implies that the Netherlands have to reduce already 25% in 2020, or whether a slower reduction path is also an option.<sup>50</sup>

### **3.1. 25 % as the unassailable minimum**

The Netherlands has ratified the 1992 United Framework Convention on Climate Change (UNFCCC) and, at the yearly conference of the parties (COP) to this convention, has consistently subscribed to the importance of tackling climate change. During the last 10 years, the COPs have declared that developed countries ('Annex I countries', in UNFCCC jargon) should all reduce emissions with 25-40%, compared to 1990 levels, by the end of 2020.<sup>51</sup> This is necessary for global warming not to exceed 2 degrees Celsius compared to pre-industrial levels – a threshold that, if surpassed, is determined to imply serious dangers to mankind.

It is important to note that, although the Court does consider both non-legal and legal sources here, they are all presented as facts rather than as law. The Netherlands being party to the UNFCCC and having advocated at COPs for developed countries to reduce 25-40% by 2020, serve as the *factual* basis for the Court of Appeal to assume that the Netherlands, like all developed nations, has to reduce no less than 25%.

Commentators again criticise the Court of Appeal for unclearly applying the 'reflex effect', albeit for different reasons than their critique of the District Court.<sup>52</sup> Yet this is a misperception of the appellate court's reasoning. Unlike the District Court, the Court of Appeals does not read the UNFCCC or the COP decisions into Articles 2 and 8 ECHR or into Dutch tort law as binding.<sup>53</sup> The Netherlands' ratification of the UNFCCC and its support of the COP statements, in the reasoning of the appellate court, has factual rather than legal significance.

Although the outcome might have been the same had the Court of Appeal indeed interpreted human rights consistently with international climate law and policy expressions, procedurally the court is merely considering facts.<sup>54</sup> This might also explain why the Court does not even seriously analyse which of these sources are legally binding and which of them are not. In fact, this is why it does not even discuss or mention the concept of 'reflex effect'. In other words, it is not engaged in some lewd circumvention of the limitations of international norms' domestic effect, it is simply applying Dutch civil procedure, as it is bound to do.

### **3.2. Negative emissions**

The State has tried to challenge the assumption that the facts leave it no choice but to reduce

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<sup>50</sup> Court of Appeals, 3.7-3.8

<sup>51</sup> Court of Appeals, 50.

<sup>52</sup> Besselink forthcoming.

<sup>53</sup> For a general treatment of the authority of COP decisions and other 'post-treaty rules', see Tim's forthcoming monograph *Authority and Legitimacy of Environmental Post-Treaty Rules* (Hart Publishing 2019) and 'Exercising or Evading International Public Authority? The Many Faces of Environmental Post-Treaty Rules' (2016) 7 *Goettingen Journal of International Law* 303.

<sup>54</sup> Facts of which it would be difficult to see how they could have been established differently in a public law proceeding.

25% at minimum, for it only wants to reduce 20% in 2020 compared to 1990 levels.<sup>55</sup> The State pointed to other, slower, reduction scenarios put forward by the scientific body of the UNFCCC: the international panel on climate change (IPCC). These scenarios include so-called *negative emissions*.<sup>56</sup> That is, they assume that greenhouse gases may be distracted from the atmosphere in the future, which would mean emissions may now be kept at higher levels. Urgenda objected that effective negative emission techniques have not yet been invented, which the state acknowledged. Moreover, the IPCC designed the reduction paths the State invoked for the year 2030 rather than 2020.<sup>57</sup> In light of these considerations, the Court of Appeal finds that the State has not convincingly challenged the 25% target for 2020 as factually necessary to prevent climate change.

The Court notes that even with the scenario in which developed nations reduce 25-40% in 2020, it is more likely than not that global warming exceeds 2 degrees Celsius. Moreover, the 2015 Paris Agreement<sup>58</sup> shows that global consensus is now: 1,5 rather than 2 degrees of warming is to be preferred in light of the dangers predicted by science.<sup>59</sup> The State knew about the 25-40% reduction goal for developed nations since 2007,<sup>60</sup> so it cannot rely on the defence that there is little time left until 2020.<sup>61</sup>

Another fact supporting the 25 percent minimum, is that the Dutch State, until 2011, had set *itself* a 30% reduction goal for 2020. According to the responsible minister in 2009, this was necessary to stay at a credible trajectory to remain below 2 degrees of global warming.<sup>62</sup> The State did not present any climate science related arguments when it later lowered its reduction goal to 20%, nor has it motivated why this number would be ‘credible’ today.

In light of these facts, the court cannot do anything else than conclude that 25% is the minimum for the State to live up to its duty of care regarding the protection of the right to life and private life.<sup>63</sup> Although ‘full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking’, the precautionary principle prevents the state from relying on this as an excuse for refraining to take further measures.<sup>64</sup> The margin of appreciation of the state is limited to choosing the measures that it will take to achieve the target.<sup>65</sup>

### **3.3. Dismissal of the State’s other objections**

The Court proceeds to concisely dismiss the other objections of the State.

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<sup>55</sup> Court of Appeals, 48.

<sup>56</sup> Court of Appeals, 49.

<sup>57</sup> *Ibid.*

<sup>58</sup> This agreement was adopted in December 2015, a few months of the *Urgenda* decision on first instance, delivered in June 2015. The Court of Appeal however, considers all facts up until the day of the hearing held on 28 May 2018.

<sup>59</sup> Court of Appeals, 50.

<sup>60</sup> Court of Appeals, 51.

<sup>61</sup> Court of Appeals, 66.

<sup>62</sup> Court of Appeals, 52.

<sup>63</sup> Court of Appeals, 53.

<sup>64</sup> Court of Appeals, 63. The Court refers to the case of *Tatar v. Romania* of the ECtHR.

<sup>65</sup> Court of Appeals, 74.

The first objection is that the 25% order would prevent the Netherlands to effectively engage in the European Trading Scheme (ETS) system, which only aims at a 20% reduction for certain sectors of industry.<sup>66</sup> As observed by several academics, however, this EU system is one of minimum harmonisation, it does not prevent Member States to reduce more.<sup>67</sup> The appellate court is therefore not convinced of this argument.<sup>68</sup>

The State also argued that the 25% minimum for the Netherlands would not make sense, as this would create space for other countries in the ETS to emit more – the so-called *waterbed effect*. However, the court notes, this argument mistakenly assumes that other nations would use all the allowances for emissions under the ETS, which is clearly not the case, as *inter alia* Germany, the UK, Denmark and France reduce significantly more than the Netherlands.<sup>69</sup>

Also, the State failed to substantiate the risk of ‘carbon leakage’ - i.e. the risk that polluting industries would move to other countries than the Netherlands, continuing to pollute there. And to the extent that the State wanted to rely on a diminishing level playing field for industry, the Court says not to understand why such would be contrary to any rule of law, and again points to the more stringent climate policies in other ETS-states.<sup>70</sup>

The court notes that the Netherlands in the meantime has adopted a 49% reduction goal for 2050, so apparently the State itself is not truly restrained by the waterbed effect nor by carbon leakage.<sup>71</sup>

The State additionally argued that adaptation and mitigation measures are complementary, but the court notes that, although adaptation measures probably will be necessary to protect people in the Netherlands, these cannot prevent dangerous climate change.<sup>72</sup>

The Court is neither convinced of the State’s argument that the goal of 25% applies to developed nations as a whole rather than to the Dutch State.<sup>73</sup> Furthermore, the State’s contention that the Netherlands contributes relatively little to global emissions and that there is not sufficient causality between Dutch emissions and global climate change fails: whereas for finding damages, causality needs to be proven, Urgenda’s claim merely aims at stopping unlawful behaviour.<sup>74</sup> Hence, only unlawfulness and not causality to specific damages need to be proven under Dutch tort law.<sup>75</sup>

Moreover, if this reasoning of the State would be followed, an effective remedy against a global problem like this would be lacking, says the Court: every State could then argue to have no obligations until other nations start acting. This consequence cannot be accepted, if only since Urgenda is unable to bring all States in the world before the Dutch courts.<sup>76</sup>

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<sup>66</sup> This point was also made by Peeters 2014, 2016; Thurlings 2015.

<sup>67</sup> De Vries and Somsen 2016; Roy 2017.

<sup>68</sup> Court of Appeals, 54.

<sup>69</sup> Court of Appeals, 55-56.

<sup>70</sup> Court of Appeals, 57.

<sup>71</sup> Court of Appeals, 58.

<sup>72</sup> Court of Appeals, 59.

<sup>73</sup> Court of Appeals, 60.

<sup>74</sup> Court of Appeals, 61-64.

<sup>75</sup> Bleeker 2018b.

<sup>76</sup> Court of Appeals, 64.

Lastly, the Court devotes some considerations to the argument of the State, that an order to reduce 25% would violate the constitutional separation of powers, or *trias politica*. Since almost all the critique towards the Urgenda case is linked to this argument, we devote the next section to this intriguing issue.

#### 4. Separation of powers

Entire dissertations could be written on the question whether the *Urgenda* decisions are too political to meet the threshold of legitimacy.<sup>77</sup> Most critiques of the two judgments ultimately converge around this question, from many different perspectives. We will therefore not state a final word on this issue in the present case-note.<sup>78</sup> We would however like to pay attention to three points: firstly, what the District Court and the appellate court respectively said on the separation of powers. Secondly, whether the appellate judgment has overstepped legal limits that, added up, amount to an infringement of the constitutional division of powers. Thirdly, whether the Courts should still have refrained from giving an order in this case, even when assuming the remainder of the reasoning would be legally correct, because of the political question doctrine.

##### 4.1. The Courts' considerations

The District Court in 2015 almost lectured on the separation of powers concept in the Netherlands.<sup>79</sup> The core of its exposé is that there is a division and balance of powers rather than a sharp separation, and that courts are under an obligation to do no more and no less than to apply the law, including in cases against the government, while abstaining from policy considerations. Courts should be aware of the difference between deciding a two-party dispute on the one hand, and adopting policies for society at large on the other, and should be very restrained when its orders are likely to affect third parties. Yet the mere fact that a judicial decision has political consequences and may strike through legislative proposals, cannot inherently prevent such a decision. The court also points out that the judiciary is no less a democratic institution than parliament and the government. The power of the judiciary to review government acts against international and national law is based on democratically adopted legislation.

The Court of Appeals is more concise, which can in part be explained by the different legal reasoning it adopted. As described above, rather than reading climate change obligations into a private legal duty of care (as the District Court did), the appellate court directly applied the fundamental rights to life and family life of the ECHR. Since such direct application of international (human rights) law is an accepted avenue for courts to legitimize interference with other branches of government, lengthy explanations on the doctrine of the *trias politica* are less needed.

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<sup>77</sup> As testified by Laura's PhD thesis to be, covering various climate cases litigated in European private law.

<sup>78</sup> For instance, we will not discuss the many threats and warnings of the practical effects of the judgment, such as the impossibility for the Court to deal with a failure to implement the judgment, or a decreased willingness of the State to conclude or support international agreements and declarations.

<sup>79</sup> District Court 4.94-4.102.

The Court of Appeal first dismisses the argument that it would order the State to adopt legislation, something which Dutch courts may not do.<sup>80</sup> It is most probable that parliamentary legislation is not necessary to achieve the 25% target, it says, and even insofar as such legislation would be necessary, the Court refrains from dictating its substance. Therefore, in the Court's view, an order to adopt the reduction target of 25% is not an order to legislate; it does not clash with the legislature's prerogative to law-making.

The Court of Appeals then devotes a mere three sentences to the issue of separation of powers specifically:

This defence fails. The Court is under an obligation to directly apply provisions with direct effect of treaties to which the Netherlands is a party, including Articles 2 and 8 ECHR. After all, such provisions form part of the Dutch legal order and even take precedence over Dutch laws that deviate from them.<sup>81</sup>

In other words, direct application of international law is the Court's constitutional duty. This may come across as an overly simplistic and even somewhat arrogant disdain for the public's concern for this issue. Critics scold the Court for failing to acknowledge and motivate the unprecedented scale of its decision.<sup>82</sup> The Court however does state:

Incidentally, the Court acknowledges that, especially in our industrialised society, measures to reduce CO2 emissions are drastic and require financial and other sacrifices but there is also much at stake: the risk of irreversible changes to the worldwide ecosystems and liveability of our planet.<sup>83</sup>

The Court recognizes the unusual impact of its decision, but simultaneously it shifts the perspective of the case from legislative decision-making to that of the duty of any court to deliver an effective remedy when individual rights are breached.<sup>84</sup> Opposite the question whether it is for the Court to push the government towards action, it places the question whether it is lawful for the government to adopt life-threatening policy without convincing reasons.<sup>85</sup> We will return to this balancing act while discussing the political question doctrine below.

#### ***4.2. Did the Court overstep the separation of powers by misinterpreting the law?***

The Court's direct application of human rights as such is not controversial. But, of course, this is not what the State and its supporters dispute. It is not the *application* but the *interpretation* of the ECHR articles that allegedly intrudes the territory of the government. The Court would therefore have been wiser to repeat more clearly why it thinks its

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<sup>80</sup> This was decided by the Supreme Court in the *Waterpakt* case. Supreme Court of the Netherlands (*Hoge Raad*) 21 March 2003 *Waterpakt v State of the Netherlands* ECLI:NL:HR:2003:AE8462.

<sup>81</sup> Court of Appeals, 69.

<sup>82</sup> Boogaard 2018.

<sup>83</sup> Court of Appeals, 67.

<sup>84</sup> Cf Articles 6 and 13 ECHR, Art 47 CFREU.

<sup>85</sup> Cf also van den Berg 2017.



interpretation of the ECHR Articles is mandated, and as such deflects separation of powers objections.

Yet, as our assessment so far suggests, it is difficult to pinpoint where the Court has made an obvious legal error. This is certainly so in regard of civil procedure, but also its interpretation of Article 2 ECHR.<sup>86</sup> The Dutch Supreme Court might refer the case back to another Court of Appeals for better motivation, but is highly unlikely to overturn the dictum that human rights necessitate protection by the state from dangerous climate change. Since the Supreme Court deals only with questions of law, not with questions of fact, we also do not see how it could rule differently on the establishment of the factual minimum of 25% necessary to prevent climate change dangers.

The charge that Articles 2 and 8 have never been applied to an environmental issues of the scope and scale of climate change,<sup>87</sup> is not convincing either. The law should apply to comparable situations, be they smaller or larger in scale.<sup>88</sup> It is hard to understand why the number of people endangered should have an impact on the applicability of international human rights law. On the contrary, with a larger scale threat, one would expect more protection rather than less. Again, the Court could have motivated this in more detail.

Another objection attacks the Court's preference for one reduction scenario over the other; it should rather have recognized that all these scenarios can be equally effective – making a preference for any of them subject to political choice.<sup>89</sup> Yet as the Court repeatedly points out, the equal effectiveness of all those scenarios has not sufficiently been substantiated by the State.<sup>90</sup>

In this context, it is good to note that the IPCC is a scientific body delivering descriptive rather than prescriptive models. Its models including negative emissions do not equal an *advice* to go for negative emissions. They rather show that if we let emissions rise above a certain concentration, the only way to still mitigate sufficiently is to rely on (at present not invented) negative emissions techniques.

The worry that judges are unable to weigh scientific climate evidence falls flat too.<sup>91</sup> Judges rely on expert evidence all the time, this time on IPCC reports encompassing all available climate change science, reports also relied upon by the State.<sup>92</sup>

#### ***4.3. Should Courts sometimes refrain from delivering legally correct decisions?***

By now it must be no longer a secret to the reader that we are of the opinion that the Court's application of the law is correct. Yet critics seem to suggest that even when otherwise legally correct, there is nevertheless a legal doctrine or principle according to which the Court must refrain from reaching judgment, or at least from issuing an order. Should it not have stopped at merely finding the State to be in violation of the law, without ordering it to remedy that

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<sup>86</sup> More doubt remains with regard to the Court's treatment of Article 8 ECHR, implying that it contains the same standard as Article 2.

<sup>87</sup> Hommes 2018.

<sup>88</sup> Cf Eekes 2018.

<sup>89</sup> Hommes 2018.

<sup>90</sup> See §3.2.

<sup>91</sup> Enneking and De Jong 2014; Elbert De Jong 2015; Roy and Woerdman 2016.

<sup>92</sup> Cf Eddy Bauw in De Jong 2018.

violation?<sup>93</sup> Or should it have even refused to take the case at all? In other words, the separation of powers argument would then be a separate legal principle that may be violated even when a Court otherwise neatly applies the law: the *political question doctrine*.

In its United States version, this doctrine dictates courts to refrain from adjudicating certain issues that are within the exclusive purview of the executive. Dutch private law also recognizes some form of the doctrine, even using the English term for it. But it does not figure prominently in the Dutch case law and is interpreted much more narrowly than its US counterpart.

During oral argument, the State indeed argued that this case ‘goes to the heart of the political question doctrine.’<sup>94</sup> The Court of Appeals does however not engage directly with the doctrine in so many words, nor does it discuss the criteria for its application.

The Dutch version of the doctrine has however been reiterated in a recent decision of the Amsterdam District Court, in a case concerning the consequences of the impending Brexit for the EU citizenship of UK nationals.<sup>95</sup> That judgment provides three criteria: (1) Does the constitution attribute the competence to deal with a certain task or subject matter to one particular branch of government other than the judiciary?<sup>96</sup> (2) Do sufficiently clear and objective criteria exist to arrive at a legal decision? (3) Would a judicial decision get in the way of the possibility for another competent branch of government to arrive at a political solution of the matter? The mere fact that the procedure concerns sensitive political issues is not conclusive, and the threshold for the criteria is not easily met.<sup>97</sup>

In the Brexit-decision, the Amsterdam court reasoned that the claimants sought judicial protection of their fundamental rights, which - echoing the District Court in the *Urgenda* case - is precisely the task the constitution charges courts with. The circumstance that the future existence of these rights is currently subject to political negotiations does not alter this.<sup>98</sup> Postponing a decision about the protection of the fundamental rights of these persons until after political negotiations conclude could cause irreparable harm.<sup>99</sup>

Applying these criteria to the *Urgenda* situation, the first one - division of competences - is fulfilled because fundamental rights protection is the primacy of the courts, and most likely no-one would argue that climate change as a subject matter is the exclusive provenance of the executive branch in the way that the military and foreign policy are. The second hinges on one’s acceptance of the Court of Appeals’ previously discussed human rights reasoning.<sup>100</sup>

As to the third criterion - disturbing the political process - we would observe that, when it comes to reductions per 2020, there is not really a political decision-making process ongoing anymore. The State was no longer pondering which course of action to take until

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<sup>93</sup> As argued by Boogaard 2016.

<sup>94</sup> Pleadings of the State, 1.18, 3.12; Court of Appeals, 30.

<sup>95</sup> District Court of Amsterdam, *X c.s. v Staat der Nederlanden en Gemeente Amsterdam (Citizenship after Brexit)*, 7 February 2018, ECLI:NL:RBAMS:2018:605.

<sup>96</sup> This concerns topics such as defense policy or foreign policy where the Court cannot oversee all interests and information. For an example, see Supreme Court of the Netherlands (*Hoge Raad*) 29 November 2002 *Danikovic c.s. v State of the Netherlands*.

<sup>97</sup> *Citizenship after Brexit*, 5.3, 5.4.

<sup>98</sup> *Citizenship after Brexit*, 5.8, 5.9.

<sup>99</sup> *Citizenship after Brexit*, 5.7.

<sup>100</sup> See §2.

then (although the *Urgenda* judgments have of course changed this). The State had already decided which action to take until then. The current negotiations, following the world-famous *polder model*,<sup>101</sup> are all aimed at reductions per 2030. A court decision about reductions per 2020 therefore does not intervene in an ongoing political process, but adjudicates the outcomes of a political process that has already concluded.

Apart from that, the third element is, in essence, a balancing act. It ultimately poses the question whether there are situations in which fundamental rights protection should be trumped by the interest in an unencumbered political decision-making process. This balancing act, while the Court does not explicitly tackle it in terms of the political question doctrine, can be found all over the judgment.

The Court's concluding considerations are a case in point. The indications that the Dutch policy until 2020 is insufficient to prevent dangerous climate change, are simply too overwhelming for the court to ignore. It cannot leave options on the table that would create an unacceptable increase in this risk.<sup>102</sup> At the same time, it leaves the State full freedom which measures to choose in achieving the 25% reduction. And because of new methods of calculation, the State is in fact only 2% behind the target, which makes the policy changes that the Court mandates relatively small.<sup>103</sup>

Naturally, balancing two interests against each other, as is quite common in human rights protection, remains subject to discussion. In all 'hard' cases, it is possible to find arguments to let the balance swing either way. We believe that the Court has convincingly supported its decision to swing the balance towards safeguarding the right of Dutch citizens to effective protection against climate change.

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<sup>101</sup> A Dutch style of decision-making aimed at consensus.

<sup>102</sup> Court of Appeals, 72.

<sup>103</sup> Court of Appeals, 73.

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