Supreme Court of the Netherlands
Case number: 19/00135
Court session: 21 June 2019

INFORMAL TRANSLATION
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Rejoinder

In the matter between

Urgenda Foundation, having its registered office in Amsterdam
respondent in cassation,
hereinafter: "**Urgenda**"
lawyer at the Supreme Court: F.E. Vermeulen
lawyers[1]: F.E. Vermeulen and J.M. Van Den Berg.

versus

The State of the Netherlands (Ministry of Economic Affairs and Climate Policy),
hereinafter: "**the State**",
appellant in cassation,
lawyers at the Supreme Court: K. Teuben,
M.W. Scheltema and J.W.H. Van Wijk

Contents

[1] J.M.B. Cramwinckel, P.B. Fritschy, M.E. Kingma, T.R. Van Der Lee and J.M. Wassenberg.

1 REDUCTION OBLIGATION OF AT LEAST 25% IS NECESSARY

1.1 Introduction

1. The State began its written explanation (**Written Explanation**) with the sentence that it is committed to an ambitious climate policy. According to the State, this ambition is confirmed in the legislative proposal for a Climate Act that is currently before the Senate and - in its opinion - sets very high targets for the Netherlands, one of which is the statutory basis of a greenhouse gas reduction target for 2050 of 95% compared to 1990 (Written Explanation 2).

2. Professor C.W. Backes has published[2] an extensive analysis of the legislative proposal, entitled 'The Dutch Climate Act – the most ambitious or most minimalistic in the world?' ('De Klimaatwet - de meest ambitieuze of de meest minimalistische ter wereld?'), and that flag appears to cover the cargo well. Urgenda would like to urge the Supreme Court to consider taking note of this publication. Backes' criticism of the legislative proposal is fundamental - and, according to Urgenda, even destructive - precisely on the points that are at the heart of the dispute in these proceedings. Urgenda will quote a few passages:

> '*The law has only one (main) objective (95% emission reduction) to be achieved in the most cost-effective way possible. Anything else is merely an aspiration and, moreover, subordinate to the main objective. The explanatory memorandum to the memorandum of amendment therefore makes it clear that the government could in due course argue, for example, that it will not and does not want to achieve the intermediate target for 2030 because it seems more cost-effective to postpone measures to a later date. (...) In fact, this means that failure to meet the intermediate target will become a matter of discussion without having to be qualified as a derogation from the law. This discussion does not take account of the fact that a lower intermediate target, or failure to meet the intermediate target, if the final target remains the same, means that the Netherlands will emit a great deal more CO2 in total, which will not disappear again if the final target is met. Therefore, it is certainly not true that only achieving the final target is important. The route that emissions take towards that target is at least as important, in fact even more important. Rapid reduction in the first few years will result much less (cumulative increases in) CO2 emissions. That is why, for the actual performance of the Netherlands, the intermediate target is at least as*

[2] C.W. Backes, 'De Klimaatwet – de meest ambitieuze of de meest minimalistische ter wereld?', *TBR* 2018/150. See Written Arguments of Urgenda, paragraph 64.

important, if not more important, than the final target.' (emphasis added by counsel)

3. In other words, as Backes also writes, achieving a 95% reduction by 2050 will only be sufficient if the prescribed pathway to that reduction target has also been followed. When transposed to the present dispute: if the Netherlands does not achieve the 25-40% target by 2020, the Netherlands will deviate from the prescribed pathway and it will no longer be sufficient to ultimately achieve a 95% reduction by 2050.[3] Urgenda refers by way of illustration (again) to the graphs it included in paragraphs 79 and 83 of the Statement of Defence, and its explanation of these graphs. It also refers to the calculation it added to this, which in fact quantifies what the graphs show (Statement of Defence, paragraphs 84 and 85). See also paragraph 131 of Urgenda's Statement of Defence. In this context, it is interesting to note that Backes makes similar calculations in footnote 16 of his article to illustrate why the achievement of intermediate targets is essential. He shows, for example, that a less ambitious final target can still lead to lower overall emissions than an ambitious final target, i.e. when emission reductions are started more quickly.

4. Please also consider the following passage from Backes' article:

'Although the final target of 95% is very ambitious, the legislative proposal is weak precisely on this point (setting the targets). Whether the final target by 2050 is a 95% or 80-95% emission reduction is not very important for either investment and other decisions, nor for political debate and decision. However, the fact that the medium-term objective (2030) has been lowered, that it is only a target value and that the door is already being opened quite a bit in order to be able to achieve this objective without having to deviate from the law, are - for the chances of an effective climate policy - much more important shortcomings. For politicians and government it is comparatively easy to make far-reaching promises (i.e. announcing intentions) for more

[3] The 25-40% reduction by 2020 and the 80-95% reduction by 2050 mark the reduction pathway that, according to Box 13.7 in AR4 WG III, Annex I countries should have to follow in order to achieve the 2° C target. It is good to realise that the stated reduction percentages for 2020 and 2050 relate to each other as communicating vessels. If the 'prescribed' 25-40% is not achieved by 2020, this is an indication that more is emitted annually, year on year, than if the reduction pathway set out were to be followed. Added together, these annually recurring exceedances result in total emissions that are considerably higher than total emissions when following the defined reduction pathway. In order to compensate for this surplus, it will then be necessary to achieve the 80-95% reduction that only needs to be achieved in the defined reduction pathway by 2050 at a much earlier stage (which requires a considerable increase in efforts), or to achieve a much greater reduction by 2050 than the 80-95% reduction, in other words, a substantial negative emission. See the visualisation of this in the graph of paragraph 79 in the Statement of Defence and, in legal ground 2.32 in the judgment of the District Court. The fact that these are indeed communicating vessels was also mentioned by Urgenda in the Defence on Appeal, paragraph 3.33 and in particular in the accompanying footnote 25. See also the footnote below. All of this points in the same direction each time, namely that it is very important to start reducing emissions immediately and not to postpone them.

than 30 years from now. Whether or not in 32 years' time 85 or 95% emission reductions will have to be achieved, I assume, will have little or no impact on the scope for policymaking for the next four to eight years. On the other hand, the intermediate target for 2030 has been significantly reduced and is not particularly high compared to other countries. In addition, every effort has been made to reduce the binding effect of this target as much as possible. This is an illogical choice that limits the effectiveness of the law. The cost-effectiveness argument put forward in this respect is not convincing. Defining intermediate targets in a clear and unambiguous manner at this very moment in time will help to ensure that the most cost-effective measures are taken to meet this target.' (emphasis added by counsel)

5. Backes has a strong point when he writes that delay is in fact not cost-effective. Not only because this is exactly what the IPCC and IEA have been warning about for years, but also because a telling example is currently emerging in the Netherlands. In the event that the State had already started an ambitious climate policy in 2009 that would give real substance to the then very firm objective of at least 30% emission reduction by 2020, three large new coal-fired power plants would not have been opened in 2015 and 2016. Just two year later the State tells us - by means of the relevant legislative proposal now before us - that all coal-fired power plants will be prohibited as soon as possible, and that existing coal-fired power plants will only be allowed a transitional period until 2030 at the latest. This example illustrates exactly why delaying emission reductions is not cost-effective (contrary to what the State claims in Written Explanation 1.11), and is a striking illustration of the consequences for which the IPCC and the IEA have been warning for years. But this aside.

6. Looking through Backes' critical eyes at the government's future plans for an ambitious climate policy in 2050, Urgenda now wants to discuss what is at stake in this case, as well as the need for judicial intervention in Dutch climate policy.

7. This case is about a 25% reduction in emissions which, according to Urgenda, the State should at least achieve by 2020. In a broader perspective, the aim is to achieve the 25-40% emission reduction by 2020, which is the first intermediate target[4] of the emission reduction pathway that

[4] The (most recent) IPCC SR1.5 report of 8 October 2018 states the following about the usefulness and function of such intermediate targets (paragraph 2.3.3, p. 115): '*Such intermediate targets provide a calibration moment or guideline that is in line with a predetermined temperature target. Although these intermediate targets do not prescribe a reduction requirement in the strict sense of the word, exceeding them almost invariably leads to an increase in the reduction target in any given year by increasing the rate of reduction or dependence on speculative technologies, including the chance that their implementation will become unfeasible.*'

Annex I countries have to follow in order to keep warming below 2 °C by 2100.

8. This pathway to emission reduction for Annex I countries was proposed by the IPCC in Box 13.7 of AR4 WG III and was subsequently endorsed and adopted by the international community of countries - acting within the framework of the United Nations Framework Convention on Climate Change (hereinafter: "**UNFCCC**") - in the 2010 Cancún Agreement and then repeated and confirmed annually by them in COP Decisions (see below paragraphs 85-99). The reduction percentage of 25-40% by 2020 has thus become the internationally used benchmark against which the adequacy of the climate policy of Annex I countries in the period up to and including 2020 is measured.

9. However, although the Netherlands is an Annex I country, the State is not prepared to achieve even the lower limit of this necessary emission reduction of 25-40%, i.e. a 25% reduction in emissions by 2020. Therefore, there is a risk that the Netherlands will exceed the target by a considerable margin as early as the first intermediate target. The serious consequences of not meeting the intermediate targets of a defined reduction pathway have already been briefly discussed above.

10. Nevertheless, the State argued that it pursues a particularly ambitious climate policy (Written Explanation 1.1-1.3, 6.3, 12.2.9). It used as a defence that it will accelerate its efforts after 2020 (Written Explanation 5.3.14-5.3.15, 6.3-6.8, 12.2.9-12.2.11) and pointed in this connection to - in its opinion – the very ambitious reduction target of 49% by 2030 that will be included in the Climate Act. It is clear from Backes' article that this objective is not particularly ambitious, and moreover that the State has completely stripped down the original legislative proposal in order to ensure that it can under no circumstances be held to the 49% in 2030. This 'stripping down' gives Urgenda little confidence for the time being that the State will actually proceed to accelerate, let alone an acceleration that will compensate for the surplus of emissions in 2020 compared to the reduction pathway. It is also clear from the above that the 'acceleration', which the State has so extensively praised and which is supposed to have been laid down in the Climate Act, is in fact not an acceleration. The State's efforts for 2030 and 2050 are aimed solely at 'returning' to the pathway (by 2050 at the latest) which is necessary to remain below 2 degrees. However, due to failing to meet the 2020 intermediate target, the result is an exceeding of the available carbon budget. Another relevant observation from Backes (section 4) is that the government could have

chosen '*to determine the objectives, including the distribution among the sectors, as the main lines of climate policy and thus to control the impact*', but that, on the contrary, the legislative proposal opted for a low degree of government control. This is not very encouraging either: major changes without control?

11. The State did not only use as a defence its ambitious plans and intentions for the distant future and for the year 2050 which is comfortably distant for the current government. The State also used as a defence that the emissions of the EU as a whole will have decreased by 26/27% by 2020 and that the EU reduction therefore does fit within the range of 25-40% for Annex I countries (Written Explanation 3.1.10, 3.2.13, 5.3.3-5.3.6). The State believes that as an EU Member State, it is doing enough and is not obliged to do more. This argument also shows that the State apparently does not want to be called to account for what it actually does; it asks to see how well others are doing and to hold it to account for that - it wants to free ride on the achievements of other EU Member States.

12. Urgenda' s response to this argument of the State is that ,according to the EU itself, an EU reduction of 30% by 2020 is actually necessary in order to keep warming below 2° C and that an emission reduction of 20% is insufficient for this purpose.[5] The reduction of all EU countries combined is not the result of an EU effort or redistribution, and even the reduction of 26/27% that the State invokes is not sufficient to keep the warming below 2° C.

13. In the meantime, the 2° C target has been further tightened up in the Paris Agreement; this tightening implies a smaller carbon budget, which in turn implies the need for even faster and steeper emission reductions than those proposed by the IPCC in Box 13.7.

14. Although Urgenda has already discussed the EU's reduction target for 2020 and its inadequacy in some detail, in its view this is essentially a sham debate, because what the EU does is not relevant to the present proceedings.

15. In the present proceedings the only question that is relevant is whether the Dutch State, measured according to the standards of Dutch law and in accordance with what is within its ability (see judgment of the Court of Appeal, legal ground 62) does enough to reduce emissions in the light of

[5] As also established by the Court of Appeal in legal ground 11 and 17.

the risks of climate change, in the light of the following (established) facts:

- In the Netherlands, greenhouse gas emissions have been reduced marginally compared to 1990 (in 2017, the State achieved a reduction of only 13% (Court of Appeal, legal ground 47); in 2018, the reduction was 14.5%[6] (both percentages, after upward adjustment of emissions in the base year 1990[7]));
- The Netherlands ranks among the top 20% of countries with the highest greenhouse gas emissions and within that group the Netherlands is number 10 on the list of the largest emitters per capita.[8]
- The Netherlands is very vulnerable to the consequences of climate change, particularly (but not exclusively) due to sea level rise.[9]
- The State has repeatedly recognised the need for a 25-40% reduction, both explicitly itself and in the European and COP context (for more details about this, see paragraphs 85-101 and 135-149 below).

16. The question in these proceedings is not whether the Netherlands meets its obligations towards the EU to implement EU climate policy. That is a different matter altogether.

17. Whether or not EU climate policy is adequate is, in principle, also independent of the question of whether Dutch climate policy is adequate according to the standards of Dutch law. After all, it may well be the case that, according to the standards of Dutch law, the Netherlands must pursue a stricter climate policy than the EU's climate policy which - as a result of political compromises - could be agreed within the EU to the maximum extent possible. It is not for nothing that the United Kingdom, Germany and Denmark have decided to implement a national climate policy that goes beyond what they consider to be the inadequate EU climate policy. Urgenda will return to the question of whether the State will be 'discharged' of its national responsibility if the EU countries as a whole achieve a reduction of at least 25% by 2020.

18. Therefore, the Netherlands cannot hide behind EU policy in relation to the question raised in these proceedings, namely whether Dutch climate policy is sufficient under Dutch law, and there can be no question of hiding behind EU policy at all if EU policy is insufficient, as is indeed the

[6] Written Arguments of Urgenda, paragraph 7 with reference to the latest figures from the National Institute of Public Health and Environmental Protection (RIVM) / Emissions Inventory and Statistics Netherlands (CBS) for 2018.
[7] Court of Appeal, legal ground 21.
[8] Exhibits 154 and 155, Written Arguments of Urgenda on appeal, paragraphs 75-82.
[9] Defence on Appeal, paragraph 8.237; Summons, paragraph 41; Written Arguments of Urgenda, paragraph 15.

case.

1.2 The reasoning of the Court of Appeal (in essence)

19. In its Statement of Defence, Urgenda has already discussed in detail how the reasoning of the Court of Appeal has been carefully constructed and how the various elements of this should be understood in their interrelationship.[10] In this case, the whole is greater than the sum of the parts.

20. In Written Explanation 3.1, the State in turn also outlines what in its opinion was the reasoning of the Court of Appeal by which it came to the opinion that a reduction of at least 25% by the end of 2020 is in line with the duty of care of the State. In footnote 13 (Written Explanation 3.1.2), the State observes that it will not take into account the provisions of legal ground 47, because this does not seem to be really conducive to the decision of the Court of Appeal and (only) concerns the apparently desirable even (linear) distribution of the reduction efforts of the State.

21. Urgenda is not sure what to think about the fact that the State apparently does not want to pay too much attention to legal ground 47 of the Court of Appeal. Urgenda regards legal ground 47 as one of the most important primary considerations of the Court of Appeal. This is why Urgenda devoted a relatively great deal of attention to it in its Statement of Defence (paragraphs 130-132).

22. Urgenda is of the opinion that legal ground 47 is so important because it shows that the Court of Appeal has understood the essence of the climate problem very well and has drawn the only correct conclusion from it, namely that delaying emission reductions entails major drawbacks, dangers and risks. The Court of Appeal based this conclusion in part on a report by the Netherlands Environmental Assessment Agency (hereafter also referred to by its Dutch abbreviation: PBL) of 9 October 2017, which was produced by the State itself as Exhibit 77 and which is also cited by the Court of Appeal in legal ground 47. Urgenda has already quoted the relevant passage from that report to which the Court of Appeal refers in legal ground 47 in its Statement of Defence, paragraph 78, and will repeat the key sentence here again: '*Short-term emission reductions are therefore also very important: every extra megaton of CO2 that is released into the atmosphere in the short term contributes to the rise in temperature.'* It is striking that the State, in its oral arguments to the

[10] Statement of Defence, paragraphs 128-138, 180.

Supreme Court after being given time to reply, referred to this report in support of the assertion that there would be no risks associated with not (further) reducing emissions by 2020, but that this reduction should be postponed until 2030. The quote from that report to which the Court of Appeal refers in legal ground 47 in fact shows the opposite. The State seems to have misunderstood PBL's report.

23. The essence of the climate problem - which the Court of Appeal has clearly explained in legal ground 47 - is that it does not matter how much is emitted today, or next week, or next year, but that what matters is how much is emitted *in total* and that it is therefore a question of the sum total, the total of all those individual emissions. It should also be noted that there is a total critical limit to this if one wants to stay below a critical level of warming and that this critical limit is reached very quickly when, day after day, a large amount of CO2 is emitted in a continuous stream. In essence, this last finding is also a sign of what needs to be done. In order to prevent this critical limit of the available carbon budget from being exceeded, it is necessary to limit the continuous daily/annual flow of CO2 as quickly as possible and to reduce it to zero before the critical limit is exceeded.[11]

24. Consequently, the inevitable conclusion is as follows: current emissions must be phased out to zero as soon as possible, at a rate that is on the one hand high enough to prevent the critical limit (of the carbon budget) from being exceeded, and on the other hand in such a gradual manual (i.e. linear) that society can adapt to this energy transition (financially, technologically, socially) and is not confronted with intermittent changes. This conclusion, in all its parts, is already contained in legal ground 47 of the judgment of the Court of Appeal and is also completely comprehensible in the light of the case documents and the arguments between the parties in the court of fact.

25. The next question is then: what reduction pathway (of phasing out) must global emissions follow in order to remain within the critical limit of the carbon budget as gradually as possible, but still just in time? To this end, the Court of Appeal refers (in legal ground 48) to Box 13.7 of AR4 WG III, in which the IPCC has proposed such a reduction pathway to the international political community. In this proposal, the IPCC distinguishes a number of groups of countries, some of which have not always been allocated the same phase-out rate: some have to phase-out faster than

[11] Similarly, see the judgment of the Court of Appeal, legal ground 47, and the conclusion of the District Court in legal ground 4.73.

others, but when added together, the reduction pathways set out by the IPCC lead to a single global reduction pathway that will (probably) keep warming below 2° C by 2100.[12]

> This differentiation in the phasing out rate results from the task of Article 3 of the UN Climate Convention, which states that the distribution of reduction efforts must be fair ('Common But Differentiated Responsibilities'). There is therefore a need for differentiation under the Treaty. As a result of this obligation to achieve fair distribution, the differentiation proposed in Box 13.7 is based on a scientific inventory and analysis of existing views and approaches on the equitable distribution of reduction efforts among countries, as explained in footnote (a) under Box 13.7. In other words, the differentiation made in Box 13.7 is a differentiation based on 'equity' and 'fairness'. For more elaborate information about this, see Statement of Defence, paragraph 150-155.

26. For Annex I countries, such as the Netherlands, this proposal meant - as already mentioned - that their emissions would have to follow a reduction pathway marked by an emission reduction of 25-40% by 2020, followed by an emission reduction of 80-95% by 2050 (both reductions compared to 1990). Whether or not this intermediate target of a 25-40% reduction in Dutch emissions by 2020 should actually be achieved is the subject of these proceedings, in which the arguments between the parties have now been narrowed down to the question of whether the State does not even have to meet the minimum of 25%.

27. Although the judgment of the Court of Appeal (and before that, the judgment of the District Court) is also embedded in other grounds, and all these grounds must be understood in connection to each other and in their connectedness provide the ground of the judgement, the Court of Appeal and District Court's selection of the emission reduction target of 25% by 2020 was derived from Box 13.7 from AR4, WG III, which represents the minimum of the specified 25-40% reduction range for 2020 for Annex I countries (as confirmed in the COP decisions and endorsed by the State). In cassation proceedings, the State complains that the Court of Appeal has thus given too much weight to Box 13.7 and, moreover, has given too much weight to the IPCC reports in general.

[12] See the document containing answers to the questions of the Court of Appeal and containing exhibits on the part of Urgenda dated 28 May 2018, in which it is explained in detail that the IPCC's global reduction scenarios are a spreading/distribution of the global carbon budget over the period up to 2100 (distribution of the carbon budget over time), and that the global emission curve drawn in this way represents the sum (the balance) of all national emissions (distribution of the carbon budget among the countries), but does not provide insight into or elaborate on this mutual distribution; Box 13.7, however, is one such elaboration.

Before Urgenda will respond to this complaint from the State, it wants to discuss another complaint from the State.

1.3 On the 'need' for a 25-40% reduction in emissions by 2020

28. The Court of Appeal ruled that a Dutch emission reduction of at least 25-40% by 2020 is necessary to (help) prevent dangerous climate change. The State seems to have difficulty (or pretends to have difficulty) with the question of whether the Court of Appeal has meant that a reduction of 25-40% is necessary is a *factual* sense, or whether it is necessary in a *normative* sense in order to achieve the two-degree objective. That is what Written Explanation 3.5 is about.

29. Urgenda believes that this distinction devised by the State is artificial: the reduction of 25-40% is necessary both in a normative and a factual sense, and moreover, the two are interrelated. Since this is a core argument of the State, despite the fact that it is only briefly mentioned in Written Explanation 3.5 but then appears in many other parts (see among others Written Explanation 4.1.17-4.1.18, 4.3 et seq., 5.4.6, 6.5, and Chapter 7), Urgenda will discuss it extensively and as a separate theme.

30. The main thing is that it is 'necessary' for global emissions to be phased out at such a rate that the total emissions remain within the carbon budget. The 25-40% reduction in emissions by 2020 is therefore an intermediate target that needs to be met in order to stay on track for the final target.

31. The State seems to want to argue that the 25-40% reduction target by 2020 should either be necessary in a factual sense or a normative sense, and that the two are mutually exclusive.

32. Urgenda has already pointed out in its Statement of Defence[13] that this distinction (which the State itself has come up with, for that matter, because in the judgment of the District Court and the judgment of the Court of Appeal this distinction is rightly not made) cannot be made as strongly as the State suggests, in which case it must be either one or the other, but not both, as a mixture. However, the latter does, in fact, occur here; the 'necessity' in this case has not two, but three aspects, which have already been touched upon above:

[13] See, for instance, Statement of Defence, paragraphs 115, 118, 119, 147, 148, 234, in which the three approaches mentioned here (normative necessity, legal necessity, factual necessity) can be recognised.

- In the first place, it can be argued on the basis of normative, ethical considerations that it is 'necessary' for the Dutch contribution to the global reduction effort (which is in turn (in fact) necessary to achieve the two-degree objective) to be a national emission reduction of 25-40% by 2020 (compared to 1990). The State rightly wrote (Written Explanation 3.5.2) that Urgenda has always strongly emphasised this normative aspect.

- Secondly, there is the legal argument that Article 3 of the UNFCCC (to which the Netherlands has committed itself) lays down a number of principles[14] that are intended to promote a fair distribution of the global effort ('Common But Differentiated Responsibilities' - CBDR) and to guide this by formulating some criteria for 'fairness' and 'equity'. The obligation to base measures to limit global warming on the standards of equity and CBDR was subsequently reiterated in Article 2 of the Paris Agreement. The 'need' for a 25-40% reduction percentage by 2020 therefore stems from the binding principles set out in the UNFCCC. (See judgment of the District Court, legal grounds 2.38 to 2.40, and judgment of the Court of Appeal in legal ground 7.) In the soft-law of several subsequent COP Decisions, in which the Cancún Agreement should be mentioned in particular, these principles from the UNFCCC were subsequently elaborated/created by agreeing that Annex I countries would *have to* reduce (i.e. necessary) their emissions by 25-40% by 2020.

- Thirdly, a fair distribution is *actually* necessary, as behavioural science demonstrates, in order to be able to solve the global problem. The climate problem is a global 'Tragedy-of-the-Commons' problem that can only be solved if all countries participate; however, the willingness of a country to make a (considerable) effort stands or falls

[14] *'...principles may serve a third function, different from those of either preamble or commitments: unlike preambular paragraphs, principles may embody legal standards, but standards that are more general than commitments and do not specify particular actions. In essence, the principles of the FCCC establish the general framework for the development of the UN climate regime. They provide benchmarks against which to evaluate specific proposals - for example relating to emissions targets (...). Some are climate specific, but most reflect more general principles of international law, such as the principle of common but differentiated responsibilities and respective capabilities (CBDRRC), intra- and intergenerational equity, and sustainable development.'* D. Bodansky, J. Brunnée & L. Rajamani, *International Climate Change Law*, Oxford: Oxford University Press, 2017, p. 127.
Urgenda points to the strong resemblance with what it wrote in paragraph 21 of its Statement of Defence about 'open standards' that - like principles - create a 'duty of care'/legal obligation, but not yet a (concrete) 'standard of care'. This concretisation of the 'principles' of Article 3 of the UN Climate Convention was subsequently achieved by means of the 25-40% emission target for Annex I countries that was agreed in the 'soft law' of the Cancún Agreement (and thus also provides the Dutch courts with an important starting point for the implementation of the 'open standards' of Article 6:162 of the Dutch Civil Code (DCC) and Articles 2 and 8 of the European Convention on Human Rights (ECHR)).

on its perception of whether a 'fair' effort is required of it and whether other countries also make a 'fair' effort. As Urgenda indicated in its oral arguments at the Supreme Court, in relation to the 'actual necessity' of emissions reduction: '*This may not be a rule of law, but it is a rule of general experience. This is how the world works.*'[15]

33. Thus, according to Urgenda, the 25-40% reduction percentage by 2020 is *normatively* necessary because it fits in with a fair distribution of global efforts; *legally* necessary because the UNFCCC and the Paris Agreement also stipulate in a legally binding way that the distribution of efforts must be fair; and also *actually* necessary to ensure that all countries participate voluntarily so that they perceive the effort required of them to be fair, and perceive that other countries are also doing their fair share.

34. The fact that 'equity' does indeed contain these three aspects, and that a 'fair' distribution of efforts is also '*actually necessary*' for solving the climate problem, can also be found in the IPCC's AR5 report:

> '*In the particular context of international climate policy discussions, several arguments support giving equity an important role: a moral justification that draws upon ethical principles; a legal justification that appeals to existing treaty commitments and soft law agreements to cooperate on the basis of stated equity principles; and an effectiveness justification that argues that a fair arrangement is more likely to be agreed internationally and successfully implemented domestically (medium evidence, medium agreement). A relatively small set of core equity principles serve as the basis for most discussions of equitable burden sharing in a climate regime: responsibility (for GHG emissions), capacity (ability to pay for mitigation, but sometimes other dimensions of mitigative capacity), the right to development, and equality (often interpreted as an equal entitlement to emit).*'[16]

35. The IPCC explicitly referred to behavioural science literature for the 'actual necessity':

> '*The third justification is the positive claim that equitable burden sharing will be necessary if the climate challenge is to be effectively met. This claim derives from the fact that climate change is a classic commons problem (Hardin, 1968; Soroos, 1997; Buck, 1998; Folke, 2007) (also see Section 13.2.1.1). As with any commons problem, the solution lies in collective action*

[15] Written Arguments of Urgenda, paragraph 70.
[16] IPCC, AR5 WG III, Chapter 4, Executive Summary, p. 287.

(Ostrom, 1990). This is true at the global scale as well as the local, only more challenging to achieve (Ostrom et al., 1999). Inducing cooperation relies, to an important degree, on convincing others that one is doing one's fair share. This is why notions of equitable burden-sharing are considered important in motivating actors to effectively respond to climate change.

(...)

Young (2013) has identified three general conditions — which apply to the climate context — under which the successful formation and eventual effectiveness of a collective action regime may hinge on equitable burden sharing: the absence of actors who are powerful enough to coercively impose their preferred burden sharing arrangements; the inapplicability of standard utilitarian methods of calculating costs and benefits; and the fact that regime effectiveness depends on a long-term commitment of members to implement its terms. With respect to climate change, it has long been noted that a regime that many members find unfair will face severe challenges to its adoption or be vulnerable to festering tensions that jeopardize its effectiveness (Harris, 1996; Müller, 1999; Young, 2012). Specifically, any attempt to protect the climate by keeping living standards low for a large part of the world population will face strong political resistance, and will almost certainly fail (Roberts and Parks, 2007; Baer et al., 2009).'[17]
(emphasis added by counsel)

36. Specifically, on the 'actual necessity' of a fair distribution of the reduction efforts in order to be able to achieve the global cooperation that is necessary at all, see also:

'*Perceived fairness can facilitate cooperation among individuals (high confidence). Experimental evidence suggests that reciprocal behaviour and perceptions of fair outcomes and procedures facilitate voluntary cooperation among individual people in providing public goods; this finding may have implications for the design of international agreements to coordinate climate changer mitigation.*'[18]

37. And finally:

'*The international climate negotiations under the UNFCCC are working toward a collective global response to the common threat of climate change. As with any cooperative undertaking, the total required effort will be*

[17] IPCC, AR5 WG III, Chapter 4, p. 295.
[18] IPCC, AR5 WG III, Chapter 3, Executive Summary, p. 213.

allocated in some way among countries, including both domestic action and international financial support. At least three lines of reasoning have been put forward to explain the relevance of equity in allocating this effort: (1) a moral justification that draws upon widely applied ethical principles, (2) a legal justification that appeals to existing treaty commitments and soft law agreements to cooperate on the basis of stated equity principles, and (3) an effectiveness justification that argues that an international collective arrangement that is perceived to be fair has greater legitimacy and is more likely to be internationally agreed and domestically implemented, reducing the risks of defection and a cooperative collapse.'[19]

38. In summary and conclusion: the 25-40% reduction target for Annex I countries by 2020, as an intermediate target for the timely global phase-out of all emissions, is based on a (scientifically established and presented in AR4) cross-section of the prevailing normative, ethical views on what a fair and equitable distribution of the global reduction effort would be that is *actually* necessary to achieve the two-degree objective. As a result, the reduction target meets the legal obligation of Article 3 of the UNFCCC and Article 2 of the Paris Agreement that efforts must be fairly distributed. Moreover, such a fair distribution of the required global effort is *actually* necessary to ensure that each country will voluntarily make the effort it was intended to make (and will not behave as a 'free rider'), and the fact that each country will do its part is in turn *actually* necessary in order to be able to solve the climate problem ('Tragedy of the Commons') in the first place. Free rider behaviour, as shown by the State, undermines the efforts of other countries (such as Denmark, Germany and the UK), which, with their higher ambitions, want to create the conditions for other countries to do their fair share as well. Free rider behaviour not only frustrates the commitment of other countries to similar efforts, but also creates the danger that these frontrunners will give up that position and renege on their higher ambitions.[20]

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[19] See IPCC AR5 WG III, Chapter 4, Frequently Asked Questions 4.4. 'Why is equity relevant in climate negotiations?' p. 327 (emphasis added).

[20] In this respect, see Scott Barrett, *Coordination vs. voluntarism and enforcement in sustaining international environmental cooperation*, Proceedings of the National Academy of Science, volume 113, 2016, p. 14,515 et seq., on p. 14,516:
'If the public goods game is played a finite number of times, some players - the 'conditional cooperators' - typically cooperate, at least partially, in the early rounds. Over time, however, cooperation generally declines. This decline arises partly because conditional cooperators reciprocate less than one for one (for example, if others contributed five on average in the previous round, a conditional cooperator might contribute only four in the next round), but it is also because of the presence of free riders.'
Similarly, see Lisa Schenck, *Climate Change "Crisis" - Struggling for Worldwide Collective Action, Colorado Journal of International Environmental Law and Policy*, volume 19, 2008, p. 321 et seq., on p. 337:
'In a global commons scenario, the Prisoner's Dilemma may occur when parties pursue their individual self-interest and behave in a way contrary to their shared collective interest, and which results in the power of self-interest in defeating any sense of moral obligation to advance the common good, and the ability of free-riders to undermine or even destroy the benefits of communally conscious actions.'

A striking example of the effect of free rider behaviour can be found in Written Explanation 3.2.18, in which the State argued that it does not need to reduce any more because there are other countries that do even less, such as the US. The free rider behaviour of the US undermines the willingness of the State to do its own 'fair' share.

39. In addition, for a completely different reason, it is *actually* necessary to achieve the reduction of 25-40% by 2020. Ethical, normative or legal considerations do not play any part in this. This actual necessity was addressed earlier in this rejoinder, namely when it came to the great importance of achieving the intermediate targets (25-40% by 2020 and 80-95% by 2050) of the emission reduction pathway set out, because otherwise it will at some point become *actually* impossible to phase out the emissions within the critical limit of the carbon budget. The Court of Appeal also refers to this actual necessity in legal ground 47 when it points out that the State's own proposed reduction target of 49% by 2030 will already require a particularly substantial effort (and in fact no further delay can be tolerated).

40. On the day of the oral arguments before the Supreme Court on 24 May 2019, Urgenda made a comparison with a car that drives at high speed to a red traffic light. If the car does not start braking in time, there comes a time when it can no longer come to a halt in time for the traffic light. After all, delaying braking means 1) that the car very quickly has hardly any braking distance left, while 2) its speed just before the traffic light is also much higher than if it would have started braking in time. These two effects reinforce each other; starting to brake too late means that it has become impossible to stop before the traffic light: the car simply does not have the braking power to do it anymore.

41. The carbon budget remaining in 2019 can be compared to the braking distance that the car still has in front of it: at the red traffic light the available carbon budget is used up. The speed of the car can be compared to the speed at which we currently emit CO2 into the atmosphere. Just as the speed of the car can be expressed in kilometres per hour, the rate/volume of our CO2 emissions can be expressed in tonnes of CO2 per year. The higher the speed of the car, the sooner one has to start slowing down. The higher the per capita emissions, the sooner one will have to start reducing emission in order to stay within the carbon budget. High per capita emission make such delay particularly problematic. In this case too, postponement of emissions reduction has the two mutually reinforcing effects already discussed in the previous paragraph, and this is clearly

shown in the graph in paragraph 79 of the Statement of Defence and the explanations given there.

42. Postponement therefore makes it *actually* impossible to remain within the available carbon budget at a certain point in time. We simply do not have the economic, technological, financial and social resilience to reduce our emissions quickly enough (i.e. within the carbon budget) to zero.[21]

43. Postponement increases the risk that we will fail to stay within the carbon budget. This is because, among other things, technologies that we hoped would give additional 'braking power', such as negative emissions that partly offset our emissions, are proving to be unavailable on the scale we had hoped for, or only at an unacceptable cost.

44. Urgenda already discussed in detail, with references to AR5, the *actual* necessity of commencing emission reductions in good time and not postponing them, for example in its Defence on Appeal. These passages show that postponing emission reductions - contrary to what the State claims but does not substantiate - is actually *less* cost-effective than starting as soon as possible, and also has other drawbacks (such as reliance on as-yet-unproven and risky/implausible scaling up of negative emissions).

> See Defence on Appeal, paragraph 6.27 for a citation from the UNEP Emission Gap 2013 report.
> See Defence on Appeal, paragraph 6.30 for a passage from IPCC AR5, WG III on the drawbacks (in terms of costs and risks) of postponement.
> See Defence on Appeal, paragraph 6.31 which confirms that these drawbacks will not only occur if the necessary emission reductions are postponed at global level, but also if emission reductions are postponed at national level.

45. The following passages are also taken from the Defence on Appeal (paragraphs 6.35 and 6.36), which specifically address the fact that postponing emission reductions ('starting to brake too late') carries the risk that the necessary temperature target will not be achieved. First, some passages from AR5 WG III, Summary for Policy Makers, p. 16 (the District Court

[21] In its ground for cassation and Written Explanation, the State talked wildly about an 'acceleration' between 2020 and 2030 that it has planned, but it did not come up with any specific plan as to what this should look like and whether it is sufficient. On the contrary, in the pending legislative proposal for a Climate Act, every effort has been made to prevent the State from being obliged to actually achieve the intended intermediate target for 2030, or any intermediate target at all: the legislative proposal seems primarily intended to facilitate and promote further postponement. For more information, see the cited article by C.W. Backes, 'De Klimaatwet – de meest ambitieuze of de meest minimalistische ter wereld?', *TBR* 2018/150.

quotes from the same passages in legal ground 2.19, p. 10):

> '*Delaying additional mitigation further increases mitigation costs in the medium- to long-term. Many models could not achieve atmospheric concentration levels of about 450 ppm CO_2eq by 2100 if additional mitigation is considerably delayed or under limited availability of key technologies, such as bioenergy, CCS, and their combination (BECCS).*'

> '*Only a limited number of studies have explored scenarios that are more likely than not to bring temperature change back to below 1.5°C by 2100 relative to pre-industrial levels; these scenarios bring atmospheric concentrations to below 430 ppm CO_2eq by 2100 (high confidence). Assessing this goal is currently difficult because no multi-models studies have explored these scenarios. Scenarios associated with the limited number of published studies exploring this goal are characterized by (1) immediate mitigation action; (2) the rapid upscaling of the full portfolio of mitigation technologies; and (3) development along a low-energy demand trajectory.*' (emphasis added by counsel)

And finally, the following passages from the AR5 Synthesis Report, Summary for Policy Makers, which summarise everything concisely:

> '*Delaying additional mitigation to 2030 will substantially increase the challenges associated with limiting warming over the 21st century to below 2°C relative to pre-industrial levels. It will require substantially higher rates of emissions reductions from 2030 to 2050: a much more rapid scale-up of low-carbon energy over this period; a larger reliance on CDR in the long term: and higher transitional and long-term economic impacts. Estimated global emission levels in 2020 based on the Cancún Pledges are not consistent with cost-effective mitigation trajectories that are at least about as likely as not to limit warming to below 2°C relative to pre-industrial levels, but they do not preclude the option to meet this goal (high confidence) (…)*
> *Delaying additional mitigation increases mitigation costs in the medium to long term. Many models could not limit likely warming to below 2°C over the 21st century relative to pre-industrial levels if additional mitigation is considerably delayed. Many models could not limit likely warming to below 2°C if bioenergy, CCS and their combination (BECCS) are limited (high confidence).*'[22] (emphasis added by counsel)

[22] IPCC AR5 Synthesis Report 2014, Exhibit 104, p. 23 and 24.

46. By means of the above, according to Urgenda, it has been made sufficiently clear that it is **necessary** to start reducing emissions as soon as possible and in any case to meet the intermediate target of a 25-40% reduction by 2020 in order to stay on the right reduction pathway (and thus remain within the carbon budget). The Court of Appeal was thus correct in its assessment.

1.4 Uniform (linear) distribution of the reduction effort (ground for cassation 6)

47. It follows from the above (addressing the question of whether a reduction of 25-40% by 2020 is 'necessary') that in order to limit *total emissions*[23] it is desirable and, at some point, even 'necessary' to deploy the reduction efforts as early as possible. Postponement of reduction leads to greater risks for the climate.[24]

48. Earlier in this Rejoinder (paragraph 24), Urgenda established that current emissions must be phased out to zero as soon as possible, at a rate that is on the one hand high enough to prevent the critical limit (of the carbon budget) from being exceeded, but on the other hand in such a gradual manner (i.e. linear) so that society can adapt to this energy transition (financially, technologically, socially) and is not confronted with intermittent changes.[25]

49. In this connection, (in legal ground 47) the Court of Appeal has referred to:

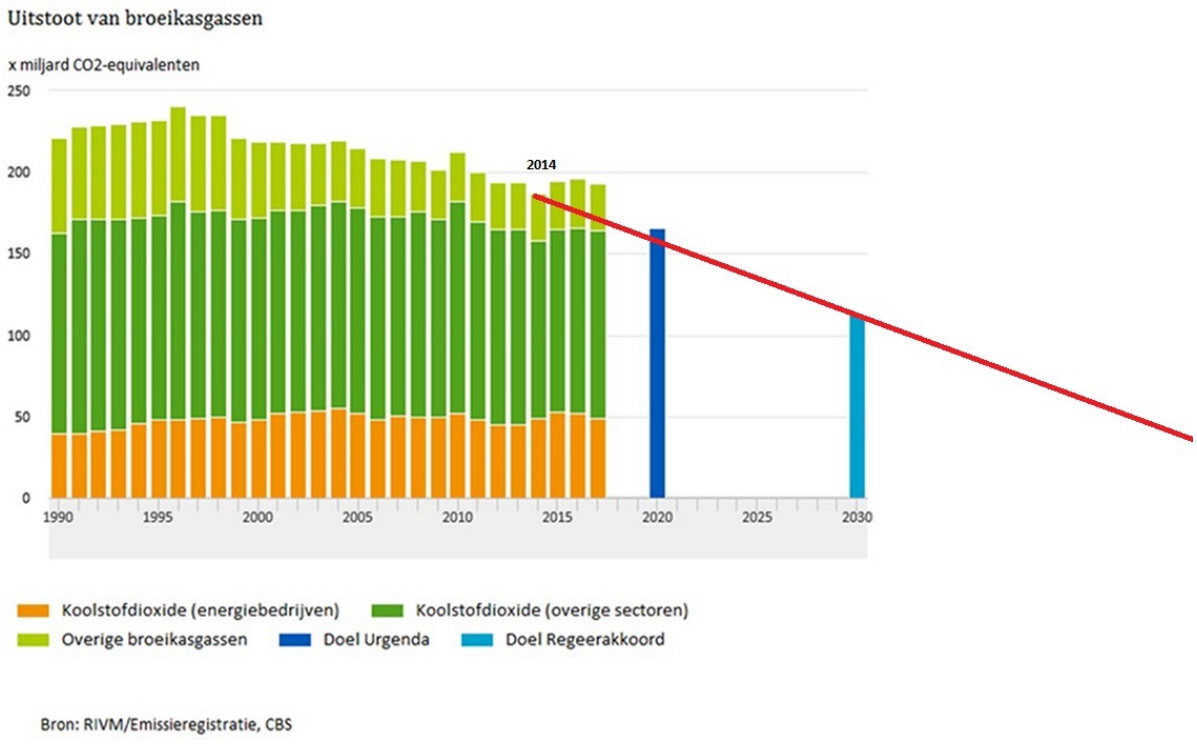
> '*...the report of the Environmental Assessment Agency (PBL) of 9 October 2017 (Exhibit 77 on the part of the State) p. 60, in which it notes that the achievement of the Paris climate objectives is not so much about low emissions by 2050, but also and above all about low cumulative emissions, since every megaton of CO2 released into the atmosphere in the short term contributes to the rise in temperature. An even distribution of the reduction effort over the period up to 2030 would mean that the State would aim for a significantly higher reduction than 20% by 2020. This even distribution is the starting point for the State's reduction target of 49% by 2030, which is*

[23] Urgenda points out once again: the climate problem is the sum/cumulation of all the emissions that have taken place since the beginning of the Industrial Revolution and of all the emissions that will take place, as a result of which billions of small, in themselves completely insignificant, emissions, when added together, create an existential problem on a planetary scale.
[24] See also the Court of Appeal, legal ground 47. Starting reductions too late creates the risk that emissions can no longer be phased out 'within the carbon budget'.
[25] The reduction pathways/reduction scenarios set out by the IPCC are in fact the result of the field of tension outlined above.

linearly derived from the target of 95% reduction by 2050. If the same line is extended to the present, this will result in a reduction target of 28% by 2020, as the State has confirmed in response to the questions of the Court of Appeal.'

50. In other words, the Court of Appeal points out the following in legal ground 47: in order to calculate what the intermediate target for 2030 should be, the State opted for a linear, even reduction pathway from the existing Dutch emission level in 2014 to 95% emission reduction by 2050. That turned out to be a reduction of 49% by 2030, and this intermediate target of 49% was then included in the coalition agreement as an official government policy (and is apparently also included as a target in the Climate Act). The Court of Appeal has established that, based on the same linear reduction pathway, the intermediate target for 2020 would be an emission reduction of 28%. That is a greater reduction than the 25% that Urgenda requires by 2020.

51. This is nicely visualised in the following graph. The graph, which Urgenda also used for the oral arguments on appeal, is taken from Statistics Netherlands (CBS). The linear reduction pathway from 2014 (the starting year for the PBL calculation) to 2030 has been sketched by Urgenda.



52. Achieving the intermediate target of 49% by 2030 already requires a very substantial increase in efforts which can no longer be postponed. At the rate of reduction which the State has chosen itself, the target of 49% in 2030 means that an emission reduction of 28% must be achieved by 2020. In legal ground 47, the Court of Appeal, apparently, and not incomprehensibly, took this fact into account when concluding that the 25% reduction required by Urgenda by 2020 is in line with the State's duty of care.

53. In Written Explanation 6, the State complains that, in doing so, the Court of Appeal (legal ground 47 read in conjunction with legal grounds 49 and 53) apparently intended to rule that an even, linear reduction effort is desirable or even 'necessary'. The State challenged this ruling. Although Urgenda has read the judgment of the Court of Appeal differently on this point (it refers to the previous paragraph and to it Statement of Defence, paragraphs 248 to 259), it will now deal with this complaint by the State.

54. The State claimed (Written Explanation 6.3) that it has never indicated that it endorses a linear reduction pathway; and also (Written Explanation 6.7) that the normative ruling of the Court of Appeal that the duty of care of the State would imply that it would have to opt for a linear reduction pathway has no basis in the previously discussed treaties and European legislation, nor in national legislation. Both claims are false.

55. The PBL report to which the Court of Appeal refers in legal ground 47 (Exhibit 77 on the part of the State) mentions in fact in two places (p. 7/8 and p. 61) that a gradual energy transition is the starting point for Dutch policy.

> *'For climate policy, it is not only a matter of low level of emissions by 2050. The total burden of greenhouse gases on the atmosphere for the rest of the century (for CO2 referred to as the carbon budget), and therefore also for the coming years, will determine the temperature increase and its effects. The Energy Agenda is based on a gradual transition to a low-carbon economy. At the request of the ministries, the quantitative reduction in 2030 has therefore been derived from a simple principle: the emission value in 2030 as a point on a straight line between 2014 and 2050.'* (p. 7/8).
>
> '*A linear pathway could be chosen as a policy translation of what is referred to as a gradual transition, which is also advocated by the Dutch Central Bank (2016), and which forms the starting point for Dutch policy as formulated in*

the Energy Agenda.' (p. 61)

56. In view of these references, Urgenda has looked up the Energy Agenda[26] (from 2016, i.e. after the judgment of the District Court). It is worth citing more extensively:

> *'European policy provides the framework conditions that national ambitions must meet as a minimum. In addition, European policy focuses on a linear transition pathway towards 2050 for the EU as a whole in order to pursue a gradual transition. Figure 4 shows that current European and national policy in the Netherlands does not lead to a gradual transition, but on the contrary requires a sharp acceleration in the rate after 2030. This is already the case for an 80% reduction by 2050, and will be even more so if the ambition is increased to 95%* (p. 29)
> (…)
> *The acceleration of the rate, however, also implies a shorter period in which the Dutch energy supply has to change. In addition, natural replacement moments may remain unused, resulting in disinvestments or new investments in fossil capacity. In this way, the costs may end up being higher or the task may not be feasible in time. Shock effects may also occur (...). In its report 'Time for Transition', the Dutch Central Bank (DNB) notes that this can also affect financial institutions through the capital and loans they have outstanding. This means that an abrupt transition can also have an impact on the economy.* (p. 30)
> (…)
> *The Netherlands has an interest in a gradual and therefore timely transition. Additional policy is therefore (temporarily) advisable in order to prevent negative shock effects on the economy and also to take advantage of the economic opportunities offered by the energy transition. (...) The need for additional policy is primarily motivated by economic and technical motives and less by climate considerations. In addition, national policies aimed at reducing CO2 emissions have little impact on the climate. The additional policy must contribute to preventing an abrupt transition after 2030 (...).'* (p. 32) (emphasis added by counsel)

57. The above quote from the Energy Agenda strongly supports what Urgenda has said in the discussion above about the 'necessity' of the 25-40% emission reduction by 2020 (the 'braking distance' argument). After all, according to the Energy Agenda it is (actually) necessary, for social, financial and technical reasons, to start climate policy in good time and

[26] Ministry of Economic Affairs, *Energieagenda: Naar een CO_2-arme energievoorziening,* 7 December 2016, https://www.rijksoverheid.nl/documenten/rapporten/2016/12/07/ea.

therefore not to postpone emission reductions.

58. The State has therefore endorsed a gradual, linear approach as a starting point for Dutch emissions policy.

59. Urgenda points out that the cited passage from the Energy Agenda also notes that European policy is aimed at a *linear* transition towards 2050. Finally, Urgenda refers to the Effort Sharing Decision for non-ETS emissions, cited by the District Court in legal ground 2.62 and by the Court of Appeal in legal grounds 18 and 60. Article 3(2) of the Effort Sharing Decision provides (among other things):

> *'Subject to paragraphs 3, 4 and 5 of this Article and Article 5, each Member State must annually limit its greenhouse gas emissions in a linear manner in order to ensure, inter alia, through the use of the flexible instruments referred to in this Decision, that its emissions do not exceed its ceiling in 2020, as set out in Annex II.'*

Article 7 provides for corrective measures if a Member State fails to achieve the linear reduction.

60. If the State claims (as it does in Written Explanation 6.7) that a linear reduction pathway has no basis in the European regulations, then it therefore claims something that it knows or that it must realise in any case to be incorrect.

61. In short, the Court of Appeal was right to rule that the State has opted for a gradual, linear reduction pathway, and the Court of Appeal was right to base its ruling that the emission reduction required by Urgenda is in line with the duty of care of the State, partly on the fact that the reduction pathway and rate chosen by the State prescribes an emission reduction of 28% by 2020.

1.5 The 25-40% reduction percentage included in Box 13.7 of AR4 WG III was rightly used by the District Court and the Court of Appeal as the starting point and standard for assessing the adequacy and legitimacy of Dutch climate policy

62. As Urgenda pointed out in paragraph 27 of this Rejoinder, the District Court and Court of Appeal have ruled that the 25% reduction in Dutch emissions by the end of 2020 must be based on Box 13.7 in AR4, WG III, i.e. on the lower limit of the 25-40% reduction percentage by 2020

for Annex I countries included therein.

63. In cassation proceedings, the State complains that the Court of Appeal has thus given too much weight to Box 13.7 and, moreover, has given too much weight to the IPCC reports in general. Ground for cassation in Written Explanation 4 is devoted to this. It is the most important complaint of the State, which in fact features in all grounds for cassation in one way or another. Urgenda will now deal with this argument.

64. In this Written Explanation, the State made a great deal of effort to undermine the status and importance of Box 13.7 and even, to a lesser extent, to undermine the significance of the IPCC reports.

65. What the State conveniently does not take into account is the fact that the District Court and Court of Appeal have not opted for the 25% reduction percentage merely because it is stated in Box 13.7. If that had been the case, the State would have had a point: indeed, IPCC reports do not have the status of binding regulations, and Box 13.7 does not have the status of mandatory/legal regulation.

66. This does not alter the fact that if (as in the present case) the Court is asked to determine the minimum reduction effort that is required of the Dutch government as a 'necessary' contribution to the global reduction effort to keep warming well below 2 °C (as laid down in the Paris Agreement), the Court may attach significance to the relevant provisions in Box 13.7 with regard to the 450 ppm scenario (which after all represents the 2 °C target).

67. First of all, Box 13.7 is important simply because it is included in the IPCC reports. Urgenda refers to what it has already explained in detail about the way in which IPCC reports are produced.[27] What the State says about this in its Written Explanation is hardly more than a repetition of what Urgenda has already argued, and in any case does not detract from this.

68. In paragraph 25 of this Rejoinder, Urgenda has already explained the content of Box 13.7, which it will not repeat here. However, Urgenda emphasises that it is important to realise that in Box 13.7 the proposed phase-out rate differs per group of countries, and that the proposed phase-out rate has been chosen and calculated in such a way that, on the one hand, the differences in rate between them are 'fair' and, on the other, the

[27] See, for example, Summons, Chapter 3.2.3, 3.2.4, Defence on Appeal, paragraphs 3.1-3.12.

accumulated, joint phase-out rate is just enough to keep global emissions within the 2 °C-carbon budget.

69. Box 13.7 is therefore based on a double scientific basis. Firstly, a calculation of the gradual rate at which global emissions have to be phased out as a minimum in order to remain just within the 2 °C carbon budget. Secondly, a calculation of how the global rate is to be distributed fairly among the various groups of countries, based on the common understanding of fairness and responsibility. Calculated in this way, Annex I countries such as the Netherlands should reduce their emissions by 25-40% by 2020 compared to 1990, according to Box 13.7.

70. In view of this scientific substantiation of Box 13.7, and its inclusion in the IPCC reports (which are given special authority due to the way in which they are produced), the Court, when asked what the scope of the duty of care of the Dutch State is in terms of the Dutch pace of emission reductions, may assign significance to what is included in Box 13.7 in this respect.

71. In its Written Explanation, the State objected argued against this that Box 13.7 is included in the IPCC reports at an insignificant place (Written Explanation 4.1.3, 4.1.9, 4.1.15), is not repeated anywhere else in the IPCC reports (Written Explanation 4.1.3, 4.1.6), and that elsewhere in the IPCC reports a much wider range of emissions reduction is mentioned, namely a range of 10-40% (Written Explanation 4.1.4, 4.1.8).[28]

72. What the State particularly fails to recognise with this argument is that these supposed objections to Box 13.7 has *not* prevented the international (political) community of states from embracing and adopting the 25-40% reduction percentage proposed/calculated in Box 13.7 for Annex I countries by 2020, and from making it the cornerstone of international climate policy. And this was not an exception, but occurred at many of the annual COP decisions under the UNFCCC, as will be discussed below.

73. This means that the 25-40% range by 2020 has become the standard by which the adequacy or inadequacy of the climate policy of Annex I countries is measured (See, in particular, the Statement of Defence,

[28] To refute this last point (again; see the Statement of Defence paragraph 160/161, and the Defence on Appeal, paragraph 6.11): the passage in question is not about achieving the concentration level of 450 ppm, but about achieving a concentration level between 450 ppm and 550 ppm, and the 10-40% range mentioned there is therefore a combination of the ranges mentioned in Box 13.7 for 450 ppm and 550 ppm respectively. The statements of the State in 4.1.6 and 4.1.23 are nothing more than a conscious repetition of factual inaccuracies.

paragraphs 162 and 163). This shows that such a reduction effort on the part of Annex I countries is seen worldwide as 'fair' and necessary in order to be able to achieve that which has been agreed upon (Paris Agreement) and to keep it within reach (just barely). The global consensus that a 25-40% emission reduction by Annex I countries by 2020 is both necessary and appropriate/fair (in so far as there is a globally accepted sense of standards) may also be given meaning by the courts if they are asked to order the State to achieve an emission reduction of at least 25% by the end of 2020.

74. Urgenda has already explained in detail about the (departure from the) distinction between Annex I countries and non-Annex I countries invoked by the State (Written Explanation 4.1.19 - 4.1.21), and the backgrounds thereof, also before the Court of Appeal.[29] This distinction will only disappear in the period post-2020 (after the period in which Urgenda's reduction order was issued); and although the Annex I/non-Annex I country classification as such will cease to exist, the requirement in the UNFCCC and the principles and criteria that apply in this connection regarding the fair distribution of global reduction efforts will not end. This requirement entails that a country such as the Netherlands (with high historical emissions, high emissions per capita, very prosperous, high technological and organisational development) may be required to make a particularly large reduction effort. The State has also wrongfully disregarded this.

75. In Written Explanation 4, the State repeated that, from a scientific point of view, it is not necessary for the State to achieve an emission reduction of 25% by 2020 (Written Explanation 4.1.18, 4.1.27). This is a far too narrow view of the concept of 'necessity'. Urgenda has already made detailed submissions above about 'necessity', and it refers to these submissions. Just one further comment: although the emission reduction called for by Urgenda may not in itself solve the climate problem, it is a 'necessary' part of that solution. In that respect: even small steps must meet the requirements of the law (see Defence on Appeal, paragraphs 8.129 and 8.134, judgment of the District Court in legal ground 4.79, judgment of the Court of Appeal in legal grounds 61 and 62).

76. The fact that Urgenda's demand for a 25% reduction in emissions by 2020 will result in a temperature difference of only 0.00045 °C, as the State has repeatedly argued (Written Explanation 4.1.28), is mere rhetoric. If it makes a difference of 0.00045 °C to the global temperature when

[29] Statement of Defence, Chapter 2.5, Defence on Appeal, paragraphs 6.45-6.49, 6.85-6.90 and 6.91-6.103.

a small country like the Netherlands increases its emission reduction from 19% (estimate PBL) to 25% from 2018 to 2021, and this emission reduction can also contribute to other countries doing their share, then according to Urgenda it is difficult to maintain that the Dutch emission reduction that it is demanding is insignificant and of no importance. This 0.00045 °C is not at all insignificant when placed in the right perspective, but the State did not do so. The reduction effort that the Netherlands must make in order to achieve the 'futile' 0.00045 °C is just as 'futile' in relation to the urgent global effort that is needed to keep warming below 2 °C. Everything is in proportion to each other.

77. The State's submission that a 25-40% emission reduction may only be called 'necessary' if this is the case in the context of 'natural sciences' for the prevention of more than 2 °C warming, can only be understood as a defence related to causation, even though the State claims that it is not (Written Explanation 4.1.29). However, the requirement of *'condictio sine qua non'* (or 'but-for' test) is not suitable and would be inappropriate in cases such as the one under consideration (i.e. of cumulative causation) because the unacceptable consequence would be that the law would not offer any protection against deliberately contributing to exceptional risks on a planetary scale, as the Court of Appeal rightly stated in legal ground 64, and in terms strongly reminiscent of the opinion of the Advocate General regarding the *Kalimijnen* judgment.[30]

78. In Written Explanation 4 again, the State argued that the Court of Appeal wrongly attached importance to Box 13.7 in AR4, because in 2014 the much more recent report AR5 was published in which the reduction percentage of 25-40% was no longer mentioned (Written Explanation 4.2.1-4.2.4). According to the State, this would mean that Box 13.7 or at least the intended reduction percentage would have been overtaken by AR5.

79. With this argument, the State once again fails to recognise that IPCC reports cannot (and do not wish to) decide what countries should or should not do; they do not have the status of regulations, they are not 'prescriptive'. The fact that AR5 does not include reduction percentages for 2020, whereas AR4 did, does not mean that very different standards have suddenly come into force.

80. This is all the more true because, as Urgenda has already explained in detail in its Defence on Appeal[31], AR5 focused on 2030 and 2050 as the

[30] See Statement of Defence, Chapter 2.7 and references to the Defence on Appeal in footnote 86 to paragraph 173.
[31] Defence on Appeal, paragraphs 6.67 and 6.68.

relevant policy horizon, as the time to 2020 had become too short to be able to make any meaningful policy proposals, and, moreover, the period up to 2020 was already covered by AR4 (as can be seen from Box 13.7).

81. The fact is that in 2014, when AR5 was published, annual global emissions had remained significantly higher than those assumed in 2007 in AR4. This means that the remaining 2°C-carbon budget in 2014 had become *smaller* than the one calculated in AR4. In addition, global annual emissions were higher than those taken as the basis for calculations in AR4. Both facts in themselves, and certainly in combination, logically force emission reductions to be accelerated compared to the reduction pathway towards the 2 °C target set out in Box 13.7.

82. It is also a fact that the Paris Agreement determined that the temperature target should not be 2 °C, but 'well below 2 °C, with a target of 1.5 °C', which implies an even smaller available carbon budget. This fact, too, makes it necessary to speed up global emission reductions.

83. If all the signals indicate that an acceleration of emission reductions is necessary (rather than a slowing of the rate of emissions reduction), it is up to the State to explicitly state and substantiate (and thus demonstrate plausibly) that, compared to Box 13.7, it can now suffice with a slower reduction rate (and one that it meets) than that which was considered necessary for Annex I countries in Box 13.7. The State did not do this. It is not sufficient for the State to raise doubt with no argument other than that in AR5 (in which the short-term focus was on 2030 and no longer on 2020 as in AR4) no more reduction percentages for 2020 were included.

84. The opposite is in fact true: if AR5's insights had been substantially different from those of AR4, this would certainly have been stated in AR5, because it is customary in IPCC reports to look back at earlier reports, precisely to reflect on the progress of scientific insights on the one hand, and to reflect on the direction in which the climate system is moving on the other.[32]

[32] In Written Explanation 4.2.5, the State gave an extensive consideration to the question of whether AR5 contains a table that is indeed, for the sake of retrospection, comparable to Box 13.7 in AR4 and concluded that this is not the case. This being the case, Urgenda sees no reason to respond to the passage in question, although it believes that it contains quite a few inaccuracies. However, Urgenda would like to comment on one thing.
In the relevant passage, the State referred - through a reference to an article by L. Meyer - to an update that the authors of Box 13.7 (Höhne and Den Elzen) drew up in 2014, and argued that this update would show a much greater distribution of results than the 10-40% from the Executive Summary of Chapter 13, AR4. According to Urgenda, this is a somewhat misleading representation because it compares apples and oranges.

85. In addition, the parties to the UNFCCC did not see any reason in AR5 to abandon the range of 25-40% emission reduction by Annex I countries by 2020. On the contrary, even after the publication of AR5 in 2014, the annual COP Decisions still called on Annex I countries to increase their reduction efforts for the year 2020 and to bring them into line with this 25-40% range.[33]

86. In Written Explanation 4, however, the State argued that the latter is not the case.

87. Since Urgenda considers the global consensus of the international community that it is necessary and 'fair' that Annex I countries will have reduced their emissions by 25-40% by 2020 as an important support for its assertion that the State should achieve at least a 25% reduction, and that global consensus, according to Urgenda,[34] is particularly (but not exclusively!) evident from COP Decisions, Urgenda feels compelled to discuss

In the original study by Höhne and Den Elzen, the 25-40% range was seen as a good cross-section of the different approaches. But even then there were some studies that did not quite fall within that range, and in some cases did not fall within that range at all. The extremes were 12% reduction to 68% reduction by 2020 for Annex I countries. However, this does not change the fact that the 25-40% range constituted a good cross-section, i.e. a good average, of the results found.
In their update of 2014 (in particular Figure 4 which the State mentioned) Höhne and Den Elzen indeed find a greater spread of the results found, with a maximum of 10% and 80% emission reduction by 2020 for Annex I countries. The range of 25-40% seems to be a less good cross-section for the newly researched studies: for a better cross-section the reduction percentages have to be increased. This also corresponds with what Höhne and Den Elzen wrote in Figure 4: '*Many categories are in this [25-40%] range, but some allocate more (and some allocate significantly less) allowances.*' In other words, many studies still fall within the 25-40% range, but some recent studies allow Annex I countries to emit more than the studies underlying Box 13.7, and others substantially less.
Compared to the Box 13.7 studies (AR4 2007), the average of the studies from the update (2014) therefore shifts to higher rather than lower reduction percentages by 2020 for Annex I countries, and this is indeed an idea that comes to mind when looking at Figure 4.
Urgenda does not want to rely on a single study as much as possible, because in such a case the accusation of 'cherry-picking' can easily be made. For this reason, it relies heavily on the IPCC reports, which are based on a weighted and objective representation of the whole field of scientific studies. But if the State wishes to rely on this one study by Höhne and Den Elzen from 2014, then Urgenda's response is that this study contradicts rather than supports the State's own propositions; this study rather confirms that, according to the insights of 2014, Annex I countries should achieve larger reductions than the 25-40% from Box 13.7. from 2007.
It is also nonsense that the 2014 study by Höhne and Den Elzen has not been included in AR5, as the State argued. The tables which have been included as Figures 6.28 and 6.29 in AR5, WG III, Chapter 16, p. 460, and to which Urgenda also referred in its Defence on Appeal and its letter containing answers to the questions of the Court of Appeal of 28 May 2018, both mention in the caption this study by Höhne and Den Elzen from 2014 as a source. The study is also mentioned in the bibliography of that chapter. The tables in Figure 6.28 and Figure 6.29 show reduction percentages for 2030 and 2050 respectively.
The two (2007 and 2014) studies by Höhne and Den Elzen dealt with the 450 ppm scenario. The 10-40% in the Executive Summary of Chapter 13, AR4, with which the State wished to make a comparison, applies to reduction pathways that lead to a concentration target between 450 ppm and 550 ppm (and thus combines two reduction pathways from Box 13.7). It is therefore not possible to compare these reduction percentages with each other.

[33] See the overview in Defence on Appeal, paragraph 6.18, Statement of Defence, paragraphs 218-219, in particular footnote 99 and paragraph 97 of this Rejoinder.

[34] See, for example, judgment District Court, legal grounds 2.29-2.33 for recognition by UNEP, legal grounds 2.58-2.68, in which 25-40% is taken as the starting point in various EU policy documents, and legal grounds 2.71-2.78, from which it appears that the Netherlands, too, takes the ranges from Box 13.7 as the starting point for both 2020 and 2050.

this issue again.

88. First, a general preliminary remark. The State pointed out that any references in the COP Decisions to Box 13.7 or the reduction percentage of 25-40% appear only in the preambles to those COP Decisions (Written Explanation 3.3.7). This is not true in all cases, but above all it is not very relevant. The COP Decisions are not directly binding, so in technical legal terms it does not matter whether the reference to the 25-40% reduction percentage is in the preamble or in the operational part of a COP Decision. What matters is that these references show the importance that the contracting parties attached to the 25-40% rate as a frame of reference and a benchmark for the efforts that Annex I countries should make if global warming is to be kept below 2 °C.

89. The District Court cited (in legal ground 2.48 of its judgment) from the Bali Action Plan (COP Decision 1/CP.13) a passage in which, by means of a footnote, explicit reference is made to page 776 of Chapter 13 of AR4, which shows Box 13.7. Box 13.7 contains three reduction pathways (each one distinguishes different country groups, each of which is assigned its own reduction percentages) towards three different final targets, namely 450 ppm, 550 ppm and 650 ppm. Box 13.7 shows that with a target concentration of 450 ppm, Annex I countries should reduce their emissions by 25-40% by 2020. The other pages referred to in the footnote relate certain concentration levels to certain temperature increases. The State did not challenge this in itself (see Written Explanation 5.2.5).

90. As far as Urgenda is aware, this is the only time that a COP Decision has referred to a specific page in an IPCC report, which in itself illustrates the importance that the parties to the UNFCCC attached to Box 13.7.

91. The District Court rightly considered (legal ground 4.20) that the Bali Action Plan does not show a choice for a target concentration of 450 ppm. In the Cancún Agreement (COP Decision 1/CP.16), the contracting parties decide, after a reference to the Bali Action Plan, that global warming must remain below 2 °C. This temperature corresponds to a target concentration of 450 ppm, and according to Box 13.7, achieving this concentration level requires that Annex I countries reduce their emissions by 25-40% by 2020. Paragraph 37 of this COP Decision calls on developed countries to bring their reduction targets into line with AR4, which in this context can only be understood as a reference to Box 13.7, and the 25-40% reduction percentage included therein, which is directly linked, via the 450 ppm target concentration, to the 2°C target chosen by the same

COP Decision.

92. In COP Decision 5/CP.16 (to which the State refers in its Written Explanation 5.2.5), Annex I countries are called upon to base their *national* reduction targets on findings of the IPCC, which in the context of the Cancún Agreement can only be interpreted as a call to Annex I countries to base their national reduction targets on Box 13.7.

93. At the same climate summit in Cancún, Annex I countries, in their capacity as Parties to the Kyoto Protocol, also took a decision referring to AR4 and explicitly to the fact that in AR4 it was stated that Annex I countries should reduce their emissions by 25-40% by 2020 (the percentage is even explicitly mentioned here).

94. In Written Explanation 5.2.6-5.2.9, the State discusses a number of decisions taken during the various climate summits. In each of these decisions, reference is made to the 25-40% reduction percentage on which Urgenda also relies. This alone shows how much this reduction percentage had become the frame of reference for the emission reductions of Annex I countries.
Incidentally, Urgenda does not understand what the State is trying to achieve with Written Explanation 5.2.9. In it, the State wrote that Decision 1/CP. 19, paragraph 4c, calls on Annex I countries to bring their obligations into line with Decision 1/CMP.8, paragraph 7, and paragraph 5.2.8 of the Written Explanation shows that Decision 1/CMP.8, paragraph 7 calls on countries to bring their obligations into line with a level that is an 'aggregate' reduction percentage of Annex I countries of 25-40% by 2020.

95. In its argument, the State apparently considers it important to distinguish between COP Decisions taken by *all* the Parties to the UNFCCC (CP Decisions) and COP Decisions taken by *Annex I Parties* to the UNFCCC in their capacity as Parties to the Kyoto Protocol (CMP Decisions). Not only is this a new factual statement that has not been discussed before, but this distinction is also irrelevant now that the Dutch State is a State Party to both treaties and the Parties to the Kyoto Protocol are all Annex I countries, who are all also Parties to the UNFCCC. In what capacity these Prties call for the efforts of Annex I countries to be increased to 25-40% is, according to Urgenda, less relevant than the fact that they refer to this reduction percentage as an aspiration and target for the reduction policy of Annex I countries. In all cases, it is important that the international community stresses and emphasises the importance of this reduction

percentage for Annex I countries as a measure of the adequacy of their efforts.

96. The State repeatedly stresses that in the Doha Amendment, the Annex I countries have not agreed to reduce their emissions by 25-40%, but that in this amendment only a percentage of 20% for the EU and a percentage of at least 18% for Annex I countries as whole was agreed (Written Explanation 3.2.9, 5.2.12). What the State is not saying is that during the negotiations for the Doha Amendment, the EU had proposed to include a text for the article obliging Annex I countries to bring their Cancún pledges (their 2020 pledges) in line with the 25-40% reduction standard. The text of the proposal in question read as follows:

> '*Parties shall review these quantified emission and limitation commitments at the latest by 2015, with a view to strengthening these commitments in line with an overall reduction of emissions of such gases by Annex I Parties of at least 25-40% below 1990 levels in 2020.*'[35]

97. Contrary to what the State has argued (Written Explanation 5.2.9), the 25-40% reduction percentage is also specifically referred to in the COP Decisions published after AR5.[36] The specific references are shown, in great detail, in Urgenda's Defence on Appeal, paragraph 6.18. Both the 2014 COP decision in Lima (Exhibit 122, 1/CP.20, paragraph 18) and the 2015 COP decision in Paris (Exhibit 123, 1/CP.21, paragraph 105c) called upon the contraction parties to implement the decision 1/CP.19 paragraphs 3 and 4 from the Warsaw COP. These references to this specific decisions in the Warsaw COP was done in the context of the calls in the Lima and Paris COP for all countries to increase their pre-2020 target. The specific paragraphes from the Warsaw COP are exactly the above-mentioned decision to which the State refers in its Written Explanation 5.2.9, in which the Annex I countries are called upon to bring their reduction targets in line with the 25-40% reduction percentage. Both the COP Decision in Lima and the one in Paris were taken after the publication of AR5. The foregoing shows that these COP decisions did not merely refer in general to the previous COP, as the State argued, but to the specific paragraph in which Annex I counties were called upon to increase their targets in line with the 25-40% reduction percentage. We refer to

[35] The relevant EU proposal is available on the UNFCCC website https://unfccc.int/files/meetings/ad_hoc_working_groups/kp/application/pdf/awgkp_eu_infsubmission_2.pdf. The title above the proposed text refers to Article 3(1), which is the Article that the State describes under Written Explanation 3.2.9 indented text.

[36] The State did rightly note that in the Emissions Gap reports published after AR5 no explicit reference is made to the 25-40% percentage. Urgenda's assertion in its Statement of Defence, paragraphs 167 and 181, that the UNEP reports published after AR5 refer to the 25-40% norm, is therefore indeed incorrect.

Urgenda's Statement of Defence, paragraphs 218 and 219, and in particular footnote 99 there, particularly the final sentence of that footnote. It states that after the Paris Climate Summit, the subsequent COP Decisions no longer explicitly refer to the 25-40% reduction percentage, but always call on Annex I countries to increase their ambitions. In the context of the bigger picture and the ongoing discussion about increasing the efforts of Annex I countries, this can hardly be understood as anything other than a call to Annex I countries to bring their efforts in line with the 25-40% reduction percentage.

98. The (scientific) need for developed countries to reduce their emissions at a rate of at least 25-40% by 2020 was also underlined by the EU itself in its 'Cancún Pledge', which sets out the conditional proposal to reduce its emissions at a rate of 30% by 2020. The official text of this EU pledge is included in the UNFCCC document, which was, in fact, submitted by the State itself as Exhibit 40. Following the commitment to reduce at a rate of 20% by 2020, with the associated conditional commitment to reduce at a rate of 30%, the EU pledge continues as follows:

> '*The European Union and its 27 Member States wished to reconfirm their commitment to a negotiating process aimed at achieving the strategic objective of limiting the increase in global average temperature to below 2 °C above pre-industrial levels. Meeting that objective requires the level of global GHG emissions to peak by 2020 at the latest, to be reduced by at least 50 per cent compared with 1990 levels by 2050 and to continue to decline thereafter. To this end, and in accordance with the findings of the Intergovernmental Panel on Climate Change, developed countries as a group should reduce their GHG emissions to below 1990 levels through domestic and complementary international efforts by 25 to 40 per cent by 2020 and by 80 to 95 per cent by 2050.*'

99. The UNFCCC Secretariat published an update of this document (Exhibit 40) in 2014, including the most recent pledges.[37] Also in this document, the EU emphasises the scientific need for developed countries to reduce their emissions at a rate of 25-40% by 2020. As part of the 'pre-2020 workstream', the UNFCCC maintains an up-to-date overview of the Cancún Pledges on its website. This overview includes both the EU's 30% conditional reduction offer for 2020 and the EU's endorsement of the

[37] Document of 9 May 2014, number FCCC/SBSTA/2014/INF.6. Urgenda has previously referred to this update in the Document containing Answers to the Questions of the Court of Appeal and containing Exhibits on the part of Urgenda dated 28 May 2018, accompanying the answer to question 7.

scientific need to reduce at a rate of 25-40% to stay below 2 degrees.[38]

100. The relevance of the 25-40% reduction percentage is recognised by both the EU and the State in various documents. The Court mentions it, for example, in legal grounds 2.31, 2.58, 2.60, 2.62, 2.63, 2.71, 2.72, 2.73, 2.76, 2.78, 4.25, and 4.29. This factual conclusion was not contested by the State on appeal (see judgment of the Court of Appeal, legal ground 2).

101. From all this it is impossible to deduce that the 25-40% reduction percentage from AR4 is obsolete by now and that a much lower reduction percentage would suffice for the State.

102. The State also seems to want to argue (see Written Explanation 4.2.15) that if the objectives for 2030 and 2050 set out in AR5 can still be achieved, it no longer necessary and, therefore irrelevant, to achieve the 25-40% reduction percentage by 2020.

103. In the first place, it is unclear which objectives for 2030 and 2040 the State is referring to here. The emission scenarios to which the State refers frequently in other places (for greater details, see Statement of Appeal, paragraphs 5.17 to 5.21) only describe reduction pathways on a global scale from which the necessary effort for a country such as the Netherlands cannot be deduced. Urgenda explained this in detail earlier in its submission entitled 'Document containing Answers to the Questions of the Court of Appeal and containing Exhibits for the purposes of the Oral Arguments' dated 28 May 2018. In so far as the State refers to the reduction targets for 2030 and 2050 calculated by PBL[39], Urgenda observes that the State actually wishes to deviate from them because - as discussed above - reduction targets for PBL imply a reduction pathway that requires a reduction of 28% by 2020 in order to remain within the carbon budget on which the reduction order has been calculated. If the State wishes to reduce its emissions by less than 28%, it will immediately exceed the carbon budget it deems appropriate[40] and will therefore not act in

[38] Available on the UNFCCC website https://unfccc.int/topics/mitigation/workstreams/pre-2020-ambition/compilation-of-economy-wide-emission-reduction-targets-to-be-implemented-by-parties-included-in-annex-i-to-the-convention.
[39] Exhibit 77 by the State, as defined by the Court of Appeal in legal ground 47.
[40] Incidentally, Urgenda refers to its answer to question four in its Document containing Answers to the Questions of the Court of Appeal and containing Exhibits for the purposes of the Oral Arguments dated 28 May 2018. This document states that the method used by PBL to determine the reduction targets is based on the assumption that the Netherlands will only have to phase out its current high level of emissions per capita, while countries with low emissions per capita may hardly allow their emissions to increase if they have the same emissions per capita in some far-distant future, for example 2050, and from then on will have to go down to zero together. It is a method of distribution *(grandfathering*) which, in fact, says that poor countries

accordance with its duty of care. If the State declines to adopt the even lower emission reduction target of 25% (as Urgenda submits that it is required to), the conflict with the State's duty of care will only increase. For that reason alone, the State's defence fails.

104. In so far as the State would like to argue that, according to AR5, the 2 °C target can still be achieved even if emission reductions are postponed beyond 2020, it fails to recognise that 87% of the scenarios in AR5 that are still capable of limiting warming to 2 °C can only achieve this result if large-scale use of negative emissions is feasible and affordable in the second half of this century, which would reduce the urgency of achieving emission reductions in the short term. It is precisely this assumption that has been the subject of a great deal of criticism from the scientific community since the publication of AR5.[41] With reference to the report of the European Academies Science Advisory Council (EASAC) that Urgenda submitted as Exhibit 164, the Court of Appeal ruled (in legal ground 49), and rightly so, that these scenarios from AR5 paint an overly rosy picture of the reduction rate that should be followed, and that the 25-40% reduction percentage from AR4 is therefore still relevant.

105. In Written Explanation 4.2.8, the State complained that the Court has given more weight to one study (by the EASAC) than to the AR5 report, which indicates that several reduction pathways lead to the chosen climate target, although at least 13% of the reduction pathways in AR5 have not included the large-scale use of negative emissions.

106. As Urgenda pointed out in its Statement of Defence (paragraph 190), the EASAC report does not detract from what is stated in AR5, but rather confirms and clarifies what is reported by the IPCC in AR5, in terms that are also clear and comprehensible to non-scientists and, in particular, to politicians and policymakers. The State has failed to recognise this. The State has also failed to recognise that the EASAC is a partnership of the national academies of science of the EU Member States, and that reports by the EASAC are always - like the IPCC reports - an objective and balanced representation of the entire spectrum of scientific literature. In addition to the EASAC report, Urgenda has mentioned a large number of other scientific studies.[42] The AR5 reduction pathways that do not make use of (large-scale) negative emissions actually require very large

must not industrialise and must remain poor and rich countries may continue to emit high emissions for a long time to come, and is therefore completely unacceptable to developing countries.

[41] See Defence on Appeal, paragraphs 2.28-2.32 (especially the literature references in footnotes 13 and 14 there) and paragraphs 8.217-8.218.

[42] Idem.

emission reductions to be made in the shortest possible time, so if the State wishes to invoke the existence of these specific reduction pathways so as to avoid reducing at the rate that Urgenda indicates is necessary, it will shoot itself in the foot.

107. The most recent IPCC report SR15 of 8 October 2018 states[43] that scientific studies have calculated that negative emission scenarios for maintaining temperatures below 1.5 °C are largely based on the use of BECCS (biomass as an energy source to capture and store CO2 underground) and that these scenarios require 25-46% of the world's available agricultural land to be used for biomass crop production. It further states that this use of BECCS can have consequences for biodiversity and for the availability/depletion of freshwater supplies, and, moreover, that it may conflict with food production. In addition, there are doubts as to whether such a large scaling up is feasible in time. It should be noted that there are dozens of small-scale demonstration projects, but that there is only one large-scale project that captures one megaton of CO2 per year and that this is considerably less than is assumed in all reduction pathways. This does say something about the reality of scenarios that work with large-scale negative emissions, so even with further new insights, the ruling of the Court of Appeal has proved to be correct. The IPCC SR15 report also notes that there are no reduction pathways imaginable that will keep warming below 1.5 °C without negative emissions. This demonstrates once again the urgency of emission reductions, and the great risks and dangers of delay.

108. According to Urgenda, all complaints and arguments of the State that the reduction percentage of 25-40% for Annex I countries has lost all relevance and importance in the meantime and that the Court of Appeal should no longer have attributed any significance to it, are based on the above.

1.6 The State cannot hide behind the 26/27% that the EU plans to achieve by 2020

109. The State takes the view that the question of whether it pursues an adequate climate policy must be answered exclusively on the basis of the legally binding reduction obligations that apply to the State on the basis of treaties and European legislation (Written Explanation 1.10, 3.1.9-3.1.12, 3.2, 3.3, 5.2, 5.3). In view of this thesis, it is understandable that in Written Explanation 3.2, the State discussed in detail the international treaties

[43] IPCC, SR1.5, October 2018, Chapter 4.3.7.1, p. 343.

and European regulations that are relevant for its climate policy.

110. In so doing, however, the State failed to recognise the fact that in these proceedings the question does not arise as to whether the State complies with its formally legally binding international obligations.

> This question is, in fact, easy to answer, because it is simply the case that, due to major political differences and differences of opinion, international politics does not, or hardly, succeeds in making legally binding agreements on quantified national reduction commitments. The Kyoto Protocol did have such commitments, but they were totally inadequate and, moreover, the Kyoto Protocol has expired and the Doha Amendment has never entered into force. Neither the UNFCCC[44] nor the Paris Agreement (which applies to the period after 2020 beyond the period that the present claim covers) has firm, legally binding and enforceable quantified emission reduction commitments.

111. It is precisely the absence of firm, enforceable international agreements on quantified emission reductions (that are sufficient to keep warming below 2 °C) that has led Urgenda to raise the question in these proceedings as to what, measured by the standards of Dutch law, the duty of care of the Dutch State is in relation to national emission reductions: in this context, Urgenda has raised this question acknowledging the exceptionally large risks and dangers of climate change on the one hand[45] ('doing nothing is not an option, and doing too little is not an option either'), and the excessive emissions of the Netherlands[46] on the other hand.

112. In Urgenda's opinion, the State's detailed explanation (in Written Explanation 3.2) of the framework of applicable international law is therefore not particularly relevant to the present proceedings. Moreover, Urgenda itself has already discussed this international regime much earlier[47], not to argue that the framework contains hard, quantified reduction targets, but to point out the principles that are laid down in them which give direction and control to the debate as to what can and should be demanded

[44] It should be noted, however, that the 'soft law' of the Cancún Agreement and subsequent COP Decisions do lay down quantified reduction obligations for the Annex I countries, i.e. 25-40% standard for 2020 in tandem with the 80-95% standard by 2050.
[45] See, for example, Written Arguments of Urgenda, paragraphs 3-4, 11-34, Written Arguments of Urgenda on appeal, paragraphs 9-12, plus the discussion of slides and 43, Statement of Defence, paragraphs 8-10, 25-47, 55-76, 88-106 and Defence on Appeal, paragraphs 2.1-2.35, 3.17-74.
[46] See, for example, Written Arguments of Urgenda, paragraphs 7, 59-62, Written Arguments of Urgenda on appeal, paragraphs 4-5, 36-40, 46-47, 71-82, Defence on Appeal, paragraphs 6.44, 6.88 and the Summons, paragraph 345 et seq.
[47] See in particular Summons, Chapter 4.

of the State when it comes to emission reductions. These are also dealt with in the judgment of the District Court (in particular detail) and the judgment of the Court of Appeal.[48]

113. The main concern of the State seems to be the provision for the EU and its Member States in the UNFCCC, the Kyoto Protocol, the Doha Amendment and the Paris Agreement respectively, which is discussed in detail by the State (e.g. Written Explanation 3.2.6). In short, this provision entails that EU Member States may pool and exchange between themselves the individual obligations that would normally arise for them from these international agreements, as long as the total of their obligations does not diminish. In fact, they combine their national obligations into a single EU obligation. The original obligations that the UNFCCC, the Kyoto Protocol, the Doha Amendment and the Paris Agreement impose on the individual EU Member States are thus in fact taken on by the EU as a single EU obligation. If the EU complies with this combined obligation, the individual EU Member States will also be discharged. As a result, the responsibility of the individual EU Member States to ensure that the EU complies with this obligation is an internal EU matter (and the State considers that this should not be subject to judicial intervention - see Written Explanation 5.3.7).

114. The State places such weight on this mechanism because it hopes that if the EU indeed achieves the combined obligation (namely, an emission reduction of 26/27% by 2020[49]) and thus achieves an emission reduction within the range of 25-40% of Box 13.7, this will defeat Urgenda's claim (Written Explanation 3.1.10, 5.3.3, 5.3.6, 5.3.9). The State therefore argues that if the EU complies with the 25-40% reduction standard, the Netherlands should also be deemed to have complied with this standard, or at least to have done so in the context of the 'single combined obligation of the EU.

115. What the State fails to recognise, however, is that these proceedings are not about whether the EU is complying with its international treaty obligations. As such, there is no need to even consider the 'follow-up question' as to whether, if the EU achieves its combined target, the Dutch State is also discharged of its responsibility.

116. Perhaps to be more precise: the Dutch emission reduction of 25% by 2020, as demanded by Urgenda, is not based on any treaty obligation in

[48] District Court, legal grounds 2.34-2.68 and Court of Appeal, legal grounds 4-12, and 15-17.
[49] However, it remains to be seen whether the EU countries will indeed collectively achieve a 26/27% reduction by 2020 as the UK, which has a 35% reduction policy, is likely to leave the EU this year.

which the EU acts on behalf of its Member States (on the basis of which the State argues that 'if the EU collectively achieves the standard of 25%, then all Member States will be discharged'). For this reason alone, the State cannot rely on the 26/27% reduction percentage that it believes the EU will achieve by 2020.

117. The fact that, in the context of a limited number of specific treaty obligations, Dutch individual responsibility has been exchanged for EU responsibility, and that in those specific cases the Netherlands can benefit from the efforts of other EU Member States, does not mean that the State can also free ride on the efforts of other EU Member States outside that specific context. In so far as the State, in its argument, tries to elevate the exception to a general rule of law that also applies outside that specific context, it is doing so wrongfully.

118. Of a more fundamental nature: these proceedings deal exclusively with the question of what, according to the standards of Dutch law, is the extent of the duty of care and individual responsibility of the Dutch State with regard to Dutch emission reductions, and what (measured by those standards) should be the minimum required emission reduction for the Netherlands by 2020.[50]

119. The State cannot evade its own individual, national responsibility under Dutch law for Dutch emissions by pointing out that the United Kingdom, Germany and Denmark are already doing a great deal about British, German and Danish emissions respectively. After all, this does not release the State from its own national responsibility for properly reducing Dutch emissions.

120. This will be no different if the efforts of the United Kingdom (with the exception of Brexit), Germany and Denmark in particular mean that the average European reduction level by 2020 will exceed the 25% required by Urgenda of the Dutch government as a Dutch emission reduction. The efforts of those countries that do take their national responsibility to do what is necessary, even though they are not obliged to do so under treaty law, should serve as an example to the Dutch State and should not be an excuse for the State to sit back and relax itself. The United Kingdom, Germany and Denmark are not making such additional efforts to discharge the Netherlands from its obligations. The Netherlands is unjustifiably lowering the EU average.

[50] Defence on Appeal, paragraphs 6.42, 7.50-7.52, 8.34 et seq., 8.174 et seq., 8.297 et seq.

121. In addition, the obligation to which the EU has committed itself is a 20% reduction. As the Court of Appeal rightly states in legal ground 72, this is insufficient to stay below 2 °C. The Court of Appeal rightly distinguishes between the 20% target in EU policy, and the expected higher reduction of 26/27%, which is solely the result of non-EU mandated efforts by countries such as Denmark, Germany and the UK.[51] Therefore, the Netherlands cannot rely on the effort redistribution mechanism laid down in the above-mentioned treaties because the 26/27% reduction is not the result of such redistribution. If all countries had taken the position the Netherlands has taken, that the total reduction of the EU would not have been more than 20%. It is only because countries have than more than their EU obligations, that the reduction of all EU counties taken together rises to 26/27%.

122. Finally, it is reiterated that all emissions matter, and therefore all emission reductions matter, and that the global level of emissions is far above the reduction pathway which is necessary to keep warming below 2 °C. Also in this light, the efforts of the United Kingdom, Germany and Denmark are no excuse for the Netherlands to take a step back.

> In so doing, Urgenda also hopes to answer the question as to whether it still has an interest in its claim in the light of the presumed reduction of 26/27% by EU countries jointly (as put by the President of the Civil Chamber of the Supreme Court at the oral hearing). The answer to this question is in the affirmative. Urgenda has an interest in its claim as long as the Netherlands is still below the minimum of 25-40 % that is deemed necessary for Annex I countries (whereas according to the usual criteria the Netherlands should be at the top of that range) and thus does less than its duty of care requires, and thus bears co-responsibility for the fact that global emissions lag far behind the reduction pathway that they should follow. The order requested by Urgenda is intended to put an end to the unlawful conduct of the State. This is no different if countries such as the United Kingdom, Germany and Denmark are 'overperformers'. Free-rider behaviour, as shown by the State, undermines the efforts of these countries, which, with their higher ambitions, want to create the conditions for other countries to do their fair share as well.[52] Their higher ambitions do not change the fact that the world as a whole is still doing too little and that this is partly due to the fact that the Netherlands is doing too little. In other words, the fact that the consequences of the State's unlawful conduct may be compensated to some extent by the fact that other EU countries do comply with their duty of care

[51] Defence on Appeal, paragraph 7.70.
[52] The scientific basis follows from the literature and the IPCC, as Urgenda explained above in paragraph 38.

does not detract from the interest in the order. In Bleeker's words (see Statement of Defence paragraph 322): '*the procedural interest requirement is not about whether the order is effective in the sense that it can prevent damage, but about whether the order can prevent or end the unlawful act.'* Incidentally, it has not been disputed by the State that Urgenda has a sufficient interest within the meaning of Article 3:303 Dutch Civil Code (DCC).[53]

1.7 For the EU and also for the Netherlands, an emission reduction of at least 30% is necessary by 2020, and an EU reduction of 26/27% is not sufficient

123. In addition, if Annex I countries (as a group) have to achieve an emission reduction of 25-40% by 2020 in order to keep warming below 2 °C, a fair distribution of this joint group effort between them means that the EU has to achieve *at least* a 30% reduction (and that is really the minimum). This is expanded upon in the following:

124. In its 'Document containing Answers to the Questions of the Court of Appeal and containing Exhibits for the purposes of the Oral Arguments' dated 28 May 2018, Urgenda has already specifically addressed the question of what constitutes a 'fair' and 'equitable' further distribution of the 25-40% reduction effort allocated to Annex I countries 'as a group' in Box 13.7 as part of the global reduction pathway that is 'necessary' to keep warming below 2 °C. We refer to the answer to question four, in particular paragraphs 47 and 48, and more specifically footnote 25. In this footnote it is stated that within the Annex I countries, the EU should typically do more than the average of the Annex I countries. The State did not contest this either on appeal or in cassation.

125. From the PBL report,[54] to which reference is made in footnote 25, Urgenda would now like to cite the following passages (the report is in English but has a Dutch section entitled 'Report in brief' and a Dutch section entitled 'Summary').

> *'In 2007, EU countries agreed to reduce greenhouse gas emissions by 30% by 2020 as a contribution to a general and comprehensive climate agreement for the period after 2012. The condition is that other industrialised Annex I countries commit themselves to comparable reduction efforts. This report describes different conceptual approaches to similar efforts (...). This has been*

[53] Statement of Defence, Chapter 3, in particular paragraph 318.
[54] M.G.J. Den Elzen, N. Höhne, J. Van Vliet, C. Ellerman, *Exploring comparable post-2012 reduction efforts for Annex I countries*, PBL Report 5001020019/2008, December 2008. Den Elzen and Höhne are the authors of Box 13.7 from AR4 WG III.

done for three scenarios of the total Annex I reduction target, namely a reduction of 20%, 30% and 40% of the greenhouse gas emissions of all Annex I countries below 1990 levels by 2020 (...) Finally, it has been established that it is only possible to achieve the 2 °C target if the EU achieves a reduction of at least 30%, the other Annex I countries make comparable efforts, and if sufficient support is given to developing countries to reduce their emissions by 25-30% compared to their emissions in the baseline scenario.'
(Report in brief, p. 7) (emphasis added by counsel)

'An EU reduction of at least 30% combined with comparable efforts of other Annex I countries and sufficient emission reductions in developing countries (15-30%) compared to the baseline scenario is necessary to achieve the climate targets of 2 °C. (...) An EU reduction of at least 30% below 1990 level by 2020, combined with comparable efforts for the other Annex I countries with emission reductions, as calculated according to this study, would reduce the final Annex I emissions at a rate of between 20% and 30% below 1990 levels by 2020. This is at the lower limit of the 25-40% reduction for Annex I that is under consideration (...), but may still be consistent with the EU's long-term climate objective of limiting global temperature increase to 2 °C above pre-industrial levels.'
(Summary, p. 13) (emphasis added by counsel)

126. The cited passages make it clear that if all Annex I countries make a comparable effort, even with an EU reduction of 30% by 2020, the 25-40% range allocated to Annex I countries will hardly be achieved, which according to Box 13.7 is 'necessary' in order to keep warming below 2°C, because only a range of 20-30% emissions reduction will be achieved.

127. The conclusion is that for an adequate climate policy, an EU reduction of 30% by 2020 is a minimum requirement. An EU emission reduction of 26/27% is therefore insufficient and lags behind the reduction pathway necessary to keep warming below 2 °C.

128. Moreover, the fact that the EU itself believes that an EU emission reduction of 30% by 2020 is indeed a minimum requirement has already been extensively established by the District Court.

129. We refer to what the District Court has established in this respect (legal ground 2.58 '*... a 30% reduction by 2020 deemed necessary on scientific grounds...*'; legal grounds 2.59, 2.60 final sentence, 2.61, 2.62, 2.63; in legal ground 2.64, a communication from the European Commission is cited in which implicit reference is made to the reduction pathway for

Annex I countries in Box 13.7, which indicates '*the reduction required by the IPPC for the group of developed countries.')*

130. All these facts established by the District Court were not disputed on appeal (see Judgment of the Court of Appeal in legal ground 2) and are not disputed in cassation either.

131. It is therefore established in cassation that an EU emission reduction of 26/27% by 2020 is not sufficient to keep warming below 2 °C.

132. Since the facts described above, the 2 °C target has been further tightened in the Paris Agreement. This tightening implies a smaller carbon budget, which in turn implies the need for even faster and steeper emission reductions than those proposed by the IPCC in Box 13.7.

133. In short: apart from the fact that if the State (as in this case) is called to account on its own national responsibility according to Dutch law for the rate of its emission reductions, it cannot hide behind the much higher reduction percentages that the EU achieves thanks to the extra efforts of other countries; it is also the case that the EU as a whole does not pursue an adequate reduction policy and has always acknowledged this itself.

134. The State cannot, of course, successfully argue that it does not need to do more than it does because the EU already does not do enough.

1.8 The Dutch acceptance of the need for a 30% reduction by 2020

135. It follows from the above that if Annex I countries 'as a group' have to reduce their emissions by 25-40% by 2020 in order to keep warming below 2 °C, it is necessary for the EU as a whole to reduce its emissions by at least 30%, because according to the common criteria of 'fairness' and 'equity', the EU countries must in any case do more than the average of the Annex I countries.

136. Moreover, the Court of Appeal was right to consider (legal ground 60) that, within the EU, the Netherlands (in turn) is regarded as one of the countries that must make the greatest reduction efforts (and that it is therefore not obvious that the Netherlands could suffice with a reduction percentage that is well below the 25-40% range for Annex I countries).

137. In view of all this, a Dutch emission reduction of less than 30% by 2020 is difficult to square and seems incompatible State's duty of care to

pursue a credible climate policy that is actually aimed at limiting global warming to 2 °C.

> By limiting its claim to the lower end of the 25-40% range that applies to the group of Annex I countries (and by refraining from further differentiation focused on Dutch responsibility), Urgenda has limited its claim to the absolute minimum that may be demanded of the State. The fact that, according to several commentators, the Court of Appeal hinted in its judgment (legal grounds 73 and 75) that 25% was still too little, would - if their perception is correct - only support Urgenda's assertion that 25% in this case really is the absolute minimum that must actually be achieved.

138. Indeed, in 2007 the then Dutch government had already set a Dutch emission reduction target of 30% by 2020 in the 'Clean and Efficient' work programme. This objective is also reflected in other policy documents. These facts have been established by the District Court and the Court of Appeal: see in particular District Court, legal grounds 2.71-2.73 and Court of Appeal, legal grounds 2, 19, 28, 52, 66 and 72, which show (each time) that the Dutch government considered an emission reduction of 30% to be necessary and acknowledged that the emission reductions offered by the developed countries up to that point (including the 20% reduction offered by the EU) were not sufficient.

139. Urgenda views this, as the District Court and Court of Appeal do likewise, as a recognition by the State that for an adequate, credible Dutch climate policy aimed at limiting global warming to 2 °C, a Dutch emission reduction of at least 30% by 2020 is 'necessary' and therefore in line with the duty of care of the State.

140. The State now objects (Written Explanation 5.3.11) that it is free to change its policy, all the more so '*if that policy, as in this case, had not been laid down in law or regulation or even in the coalition agreement, but had only been included in a single policy document, namely the 'Clean and Efficient' work programme.'*

141. What the State is claiming here is absolutely not true. The 30% reduction target for 2020 was indeed included in the coalition agreement.

142. On 7 February 2007, the coalition agreement entitled 'Working together, living together'[55] of the Balkenende IV government was concluded. Under the heading '*Development of markets for sustainable products'*, the

[55] www.rijksbegroting.nl/rijksbegrotingsarchief/regeerakkoorden/regeerakkoord_2007.pdf.

following is mentioned:

> *2. Our ambition is for the Netherlands to take major steps in the forthcoming government's term of office in the transition to one of the most sustainable and efficient energy services in Europe by 2020:*
> *a. The aim is to achieve energy savings of 2% per year, to increase the share of renewable energy to 20% by 2020 and to reduce greenhouse gas emissions, preferably at European level, by 30% by 2020 compared to 1990 levels. A cost-effective mix of measures to reduce CO2 emissions will be sought. Joint efforts are being sought at European level as a follow-up to the Kyoto Protocol.'*
> (emphasis added by counsel)

143. In a debate in the House of Representatives, the then member of parliament/spokesman of the Christian Democratic Alliance (CDA) confirmed that the Dutch target of 30% is unconditional and does not depend on the EU raising the target from 20% to 30%. See the report of the Standing Committee on Housing, Spatial Planning and the Environment and the Ministry of Economic Affairs of 3 March 2008:[56]

> *'Ms Spies (CDA)*
> *This ambition is great. The Dutch objectives are not in dispute for the CDA. The government has not brought this up for discussion either in the light of the European Commission's proposal.*
> *(...)*
> *The coalition agreement is clear: the Netherlands aims for -30%.*
> *(...)*
> *However, I cannot ignore the fact that this package is not yet enough to tackle climate change. The Heads of Government themselves have indicated that there must be a global follow-up to Kyoto and that, if there is one, the EU will be prepared to achieve a target of -30%. In our opinion, such an ambition is too far away, and we do not think it is wise to do so. Apart from the fact that we in the Netherlands have formulated objectives that go further than the present package, our concern is that we must make every effort to achieve this global follow-up to Kyoto in Copenhagen by the end of 2009. In Bali, the EU scored points, which creates obligations. If you've promised the world -30% and you only provide a framework for -20%, how credible are you on the global battlefield? How do we convince China, India, developing countries of the sincere ambitions expressed in Bali and that we would like to go as low as -30%?'*

[56] *Parliamentary Papers II*, 2007/2008, 31209, no. 25, p. 6.

144. Contrary to what the State argued, the 30% reduction target is also found in numerous government documents. Urgenda mentions a few, such as the letters of 29 April 2009[57], 30 November 2009[58] and 29 April 2010[59] in which the Minister of Housing, Spatial Planning and the Environment confirmed the 30% reduction target for 2020 to the House of Representatives. In each of these letters, the Minister stated:

> '*When it took office, this government formulated ambitious targets for climate policy: a 30% reduction in greenhouse gases by 2020 compared to 1990, a 20% reduction in renewable energy by 2020 and an annual average of 2% energy efficiency in the period 2011 to 2020.*'

145. Apart from the fact that the State thus gives a certain misrepresentation of the facts, it fails to recognise in its remark that, because of the discretion to which it is entitled, it is free to change its policy at any time, the point that is really at stake here.

146. The main point is that all the documents cited show that, at the State's own discretion, the Dutch State's own duty of care meant that it had to achieve a Dutch emission reduction of at least 30% by 2020, even if the EU were to decide to take on a lower and therefore insufficient emission reduction.

147. If, at a later date, the State then wishes to pursue a policy that is not in line with its own duty of care, as recognised by it, the question arises as to whether this is based on other, improved insights in the field of climate science that show that a significantly lower emission reduction will suffice. The District Court (legal ground 4.70) and the Court of Appeal (legal ground 52) have established (which is uncontested in cassation) that such insights in climate science do not exist.

148. As a result, the question arises as to the subject-matter of these proceedings, and which is **the essence of these proceedings**, namely whether the State may conduct a climate policy that is not in line with its recognised duty of care, and - within that framework - the sub-question whether in relation to the exceptional dangers and risks of climate change also recognised by it, there may be sufficiently important interests on the part of the State that can justify the failure of that duty of care and that stand in

[57] *Parliamentary Papers II* 2008/2009, 31209, no. 77.
[58] *Parliamentary Papers II* 2009/2010, 31209, no. 105.
[59] *Parliamentary Papers II* 2009/2010, 31209, no. 117.

the way of the reduction order.[60] According to Urgenda, the District Court and the Court of Appeal have answered both questions in the negative, rightly and on legally sound grounds.[61]

149. This led both the District Court (legal grounds 4.93 and 4.99) and the Court of Appeal (legal ground 76) subsequently to the final judgment that the State acts unlawfully[62] if it does not achieve a Dutch emission reduction of at least 25% by the end of 2020 at the latest. Building on that judgment, the District Court granted the 25% reduction order requested by Urgenda, and the Court of Appeal upheld that order.

[60] For example, in accordance with Article 6:168 DCC, which the State, however, has not invoked (justifiably because it has not been able to invoke such important interests: see judgment District Court, legal ground 4.99).
[61] With regard to (the absence of) important interests in not taking any measures, see also legal ground 4.67-4.73 of the Judgment District Court and legal grounds 66 -67 of the Judgment of the Court of Appeal.
[62] According to the District Court, this was on account of violation of the standard of due care (which must be observed in society), according to the Court of Appeal in any case also on account of violation of Articles 2 and 8 of the ECHR.

2 EFFECTIVE LEGAL PROTECTION AGAINST (THE EFFECTS OF) CLIMATE CHANGE UNDER THE ECHR

2.1 Three central misconceptions on the part of the State

2.1.1 *The undesirability of human rights protection: a joint international approach becomes impossible and there are more urgent problems for which the law does not provide a solution*

150. In Written Explanation 8.1.4-8.1.5 and Written Arguments 3.4-3.5, the State argued that an extension of the scope of positive obligations is *undesirable*: '*if in each country the court decides independently what the country in question should do, it becomes impossible for countries to arrive at a common approach, since the scope for cooperation and compromise is then removed.*'

151. With this opening statement, the State exposes the legal and ethical deficit in its argument. After all, the fundamental principle in this and other national climate issues is that international cooperation, although necessary, is clearly not sufficient and that national states are therefore, and must be, accountable for their own actions in order to mitigate the dangers and risks of climate change as far as possible.[63] That is why the former UN Special Rapporteur on Human Rights, John Knox, who was incorrectly and incompletely described in Written Explanation 9.2.5, wrote the following about the *complementary* nature of the obligation of international cooperation:

> '*[..] in addition to employing a human rights perspective to examine how individual states should address climate change at the national level, based on the obligation of each State to protect against the effects of climate change within its own jurisdiction [..].*'[64]

Knox also emphasises that states have a human rights obligation, based on their territorial responsibility, to increase their reduction contributions under the Paris Agreement, because the contributions promised are far

[63] The assertion put forward by Arts and Scheltema in their preliminary advice for the Dutch Lawyers Association (NJV) is striking:
'*2. While international action is crucial, states should not hide behind the lack of international consensus on the content of climate action and the division of roles in its implementation. Indeed, according to the Paris Agreement [Article 4(2) and (3)], national mitigating measures are required to have "as high a level of ambition as possible"* .' See K. Arts and M. Scheltema, *territorialiteit te boven - Klimaatverandering en mensenrechten*, in "De grenzen voorbij - De actualiteit van territorialiteit en jurisdictie", *Handelingen NJV*, 149th Volume/2019, Wolters Kluwer 2019, p. 127.

[64] J.H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Do A/Supreme Court/31/52, presented to the Human Rights Council 31st session, agenda item 3 (1 February 2016), p. 12, at the top.

from sufficient:

> '*76. [..] Therefore, even if they meet their current commitments, states will not satisfy their human rights obligations.*
>
> *77. From a human rights perspective, then, it is necessary not only to implement the current intended contributions, but also to strengthen those contributions to meet the target set out in article 2 of the Paris Agreement.*'

In short, if it is clear that international commitments fall short, they cannot justify states rejecting effective human rights protection on the basis of these insufficient commitments. As explained in more detail below in paragraph 160 and following, in response to the Written Explanation, the State's view is not in accordance with current law.

152. The State's argument does not hold water either. It is implausible that states would no longer accept their responsibility to achieve international cooperation if national courts were to conclude that national law requires more. On the contrary, it is obvious that as national pressure increases, states will use their international leverage to increase the contributions of other states (see also paragraph 156 below). The UK, Germany and Denmark are making a significantly greater policy efforts than the agreed (treaty-based) minimum, based on national political considerations which set ambitious long-term policy goals (which are also well known). There is no evidence that this set high level of national ambition has undermined their international negotiating position. It is difficult to see how an increase in the Dutch national policy effort, simply because it is ordered by the courts, would suddenly undermine the Dutch negotiating position.

153. Moreover, it is not that the court in this case has 'independently' determined what is right by law for the Netherlands: after all, the points of departure of the Court of Appeal - that are completely ignored by the State in the Written Explanation - are (i) that the State would have to reduce by as much as 28% by the end of 2020 in order to achieve a credible reduction pathway or its own objectives in 2030 and 2050, without prematurely exhausting the carbon budget, and (ii) that the State itself has subscribed for a long period of time to the 25-40 range, and even subscribed to 30% as the necessary reduction by 2020. It is precisely in this essential context that the Court of Appeal used the actual necessity, supported by

AR4 and confirmed in various COP decisions, of a 25-40% reduction by 2020 in order to specify the positive obligations of the State.[65]

154. As Urgenda emphasised in its oral arguments, the seriousness and uniqueness of dangerous climate change, the territorial control of the State over the emissions from its territory and the viewpoints mentioned above mean that any comparisons with poverty alleviation, hunger, lack of educational opportunities and also the sought-after parallel with defence interests fail. The statements and publications of the United Nations, among others, cited in the Statement of Defence and oral arguments make it clear that the danger of climate change cannot be equated with such other important interests and threats. Protection against dangerous climate change is fundamental to the enjoyment of diverse human rights. All other interests mentioned by the State will be deeply affected by climate change. The State devalues the seriousness and uniqueness of the climate problem by stating that '*not all (urgent) societal challenges can indeed be addressed through positive human rights obligations*' (Written Explanation 9.2.9).

2.1.2 *Urgenda requires more than the minimum level of protection under human rights*

155. In Written Explanation 8.1.3-8.1.6 and Written Arguments 3.3-3.6, the State argued that the protection under the ECHR '*is not intended as an instrument to require contracting parties to take the lead*', which the State alleges to be Urgenda's core claim. According to the State, Urgenda asks for more of the State than can be demanded according to the minimum standards of the ECHR.

156. The State is thus placing the debate in a fundamentally incorrect frame. After all, the District Court and Court of Appeal have based the reduction order on the real threat of a dangerous climate change for which the Netherlands bears partial responsibility and they have demanded that the State does, at least, the absolute minimum to fulfil that responsibility. The District Court and the Court of Appeal explicitly did not demand more from the State than the absolute minimum, the bottom of the 25-

[65] For more information about the great importance of this, see: J.M. Emaus, 'Subsidiariteit, preventie en voorzorg. Een verklaring van het arrest in de Klimaatzaak aan de hand van drie fundamentele beginselen in het recht onder het EVRM', *AV&S* 2019/11, vol. 2., p. 64: '*The approach chosen by the Court of Appeal of The Hague in this way appears to be closely in line with the so-called rule-of-law approach adopted by the ECtHR in the context of the protection of the environment according to Pedersen*" (see ibid. further source references) and earlier M.A. Loth and R.A.J. Van Gestel, Urgenda: roekeloze rechtspraak of rechtsvinding 3.0', *NJB* 2015/1849, citation given in Written Explanation by the State 162-163.

40% range, of which the Court ruled in multiple grounds, partially ignored by the State, that this is the minimum that the State itself subscribed to as actually necessary in order to arrive at a credible reduction pathway.[66] The fact that the minimum reduction efforts for states may differ, assuming 'common but differentiated responsibilities', does not mean that they are no longer minimum reduction efforts. The fact that normative principles and differences in actual feasibility lead to differentiation in the minimum reduction efforts does not alter the fact that each of these efforts is at least necessary to prevent dangerous climate change. This also applies to the Netherlands which, regardless of the distribution criterion used in the UNFCCC (see Written Arguments of Urgenda, paragraphs 37-38), should lead the way together with other industrial countries. If the State takes responsibility for its contribution to global emissions and, together with other states that also assume their responsibilities, encourages other countries to make greater efforts to reduce them, this underlines Urgenda's interest in the reduction order and its effectiveness. It does not, however, mean that the State is required to do more than the minimum required of it by law, taking into account the global nature of the climate problem and its inherent distribution issue for the allocation of responsibility to individual states.

2.1.3 *Urgenda's argument is aimed at broadening the protection under the ECHR in relation to current law*

157. The State (in Written Explanation 9.2) characterises Urgenda's evolving interpretation of the ECHR (as set out in Chapter 4 of its Statement of Defence) as an argument that '*the protection under the ECHR should be extended compared to the current requirements'*. That is incorrect. After all, Urgenda's argument is precisely aimed at showing that, in view of the living instrument doctrine, the rapidly growing role of human rights protection in the context of climate change and the current case law of the European Court of Human Rights (ECtHR), the Court of Appeal's approach based on Articles 2 and 8 of the ECHR is legally correct in the current state of Strasbourg case law. Urgenda emphasised in Chapter 4 of its Statement of Defence and again in its oral arguments that the Court of Appeal's approach fits with an interpretation and application of the existing case law of the ECtHR, tailored to the nature and seriousness of climate change, taking into account, if necessary, specificities in Dutch law,

[66] See e.g. D.J.G. Sanderink, 'Positieve verplichtingen als redders van het klimaat', *TvCR* 2019/1.

such as the right to collective action and the binding Aarhus Convention in the Netherlands.[67]

158. As explained in more detail below, in its response to Urgenda's argument, the State essentially limits itself to a rather one-sided exegesis of fragments of ECtHR judgments in other cases about substantially different risks, without actually addressing the question of whether the State has positive mitigation obligations under Articles 2 and 8 of the ECHR, since it is established that the current residents will already be affected in their interests protected by the ECHR. In order to answer this question, the existing case law serves as a guideline, but this case law must be explained and applied in the present 'preventive action', in the light of the nature and seriousness of dangerous climate change and the broader international, normative development of thinking on the relationship between human rights and climate change.

159. Urgenda will first discuss this, in accordance with the structure of its Statement of Defence, not because the existing varied ECtHR case law leaves room for uncertainty about other environmental risks, but because, in its view, this broader perspective leads to a legally correct approach that does not get bogged down in case-specific peculiarities in earlier ECtHR rulings about other risks. This discussion is somewhat longer than is perhaps usually the case with a rejoinder in cassation. The great importance of the case justifies this and if the State had not blocked the opinion of the United Nations High Commissioner for Human Rights (see also paragraph 168 below), part of this would probably already have been discussed in that Opinion. In addition, this was also discussed at length in the Statement of Defence, which the State received six weeks before the Written Explanation.

2.2 What does the State argue as an alternative to an evolving interpretation of the ECHR that is integrated in international law?

160. The State's Written Explanation 9.2.4-9.2.9 highlight a very limited number of the sources cited by Urgenda in p. 124-139 of the Statement of Defence. In so doing, the State ignored the structure and development of these sources which, as has been set out in Statement of Defence paragraph 352 and following, has started already in 1992. The State did not consider the important fact that by signing the Geneva Pledge for Human Rights in Climate Action, the Netherlands has committed itself to the

[67] For more information about the great importance of this in the finding of law of the ECtHR, see paragraphs 176 et seq below.

fundamental significance of human rights for the protection of citizens against the consequences of climate change (Statement of Defence, paragraph 355).[68]

161. In its Statement of Defence, Urgenda gave a brief outline of the development of thinking about human rights and climate change over past decades. As already emphasised in the Statement of Defence, the overview publications referred to above each contain a more detailed description. It is true that these sources often refer to the human rights obligation for international cooperation, the provision of information to the public, adaptation as a human rights obligation to be implemented territorially and 'the problem' of the partial responsibility of individual states for a global problem. However, the sources cited do show that, particularly in recent years, there is a growing conviction that states can only provide effective human rights protection through timely and adequate mitigation and that they are therefore legally bound to do so.

162. The State wrongfully singled out Urgenda's reliance on the preamble to the Paris Agreement from the range of sources (reports, resolutions, etc.) on which its argument is based. Paragraph 11 of the preamble to the Paris Agreement is seen in literature as an important point in the normative development, which is summarised in the Statement of Defence, paragraph 352 and following. In Written Explanation 9.2.4-9.2.5, the State argued that paragraph 11 is not relevant because it is only part of the preamble and only deals with the protection of human rights when states take climate measures. In doing so, the State is misrepresenting the facts. Of course, the preamble as such does not aim to be a source of independent human rights obligations in the field of climate change. It is clear that at the time of the conclusion of the Paris Agreement (and also in many other declarations and resolutions in the UN context, see Statement of Defence, paragraph 352), states were aware of the interrelationship between climate change measures and human rights and, moreover, embraced this interdependence. This undoubtably shows that the pressing need for more far-reaching mitigation measures which was emphasised in - and at the time of conclusion of - the Paris Agreement, in any case (whether or not on the basis of the principle of a systematic interpretation under Article 31(3)(c) of the Vienna Convention), was also intended to colour *existing* human rights obligations under the UN Convention.

[68] On the importance of this, see for example the Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the parties to the United Nations Framework Convention on Climate Change Understanding Human Rights and Climate Change, p. 12, available at https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.

163. It has been stressed in the literature that paragraph 11 of the preamble to the Paris Agreement is 'revolutionary' because it is the first time that such a provision has been included in a climate convention and is also special because the terminology ('should') indicates a 'soft obligation' (and thus not merely as an encouragement, as is often the case in a preamble).[69] Although the paragraph refers to 'respective obligations' (thus existing obligations) and embedding in the operational provisions was blocked by some influential industrialised states, it is clear that, in the light of the Paris Agreement as a whole, the preamble has a broader meaning and helps to ensure that State Parties are deemed to bring their mitigation ambitions (nationally defined contributions) into line with their human rights obligations. The same applies, of course, to the call made in the Paris Agreement for states to increase their ambitions for 2020. For example, Klein et al. write[70]:

> '*parties are expected to take human rights implications into consideration when deciding the level of ambition of their contributions to the global response to climate change.*'

See also Quirico, which underlines that paragraph 11 of the preamble confirms the existence of a strong link between human rights and mitigation objectives:

> '*the comprehensive text of the preamble to the Paris Agreement, referring to a State obligation to "respect, promote and consider" human rights in climate policies, supports an inclusive interpretation*'

> '*combining the UNFCCC and human rights regimes would be consistent with the principle of systemic integration between human rights and climate change regulation, according to Article 31 of the 1969 Vienna Convention on the Law of Treaties.*'[71]

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[69] Knox describes it in such a way that the paragraph refers to 'increased openness within the climate regime to concerns and arguments based on human rights,' see: J.H. Knox, *The Paris Agreement as a Human Rights Treaty* in Akande et al. eds. *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford: Oxford University Press 2018).

[70] *The Paris Agreement on Climate Change: Analysis and Commentary*. Edited by D. Klein, M.P. Carazo, M. Doelle, J. Bulmer and A. Higham, Oxford: Oxford University Press, 2017, p. 116. See also A. Savaresi, 'The Paris Agreement: a new beginning?', *Journal of Energy & Natural Resources Law* 2016, 34:1, p. 16-26, p. 25 and P. Galvão Ferreira, *Did the Paris Agreement Fail to Incorporate Human Rights in Operative Provisions? Not if you consider the 2016 SDGs*. (Waterloo, ON, CA: Centre for International Governance Innovation, 2016), p. 17. See also E. Hey and F. Violi, *The Hard Work of Regime Interaction: Climate Change and Human Rights*, in: E. Hey et al. (eds.). Communications from the Royal Netherlands Society of International Law (KNVIR) 145. Climate Change Options and Duties under International Law, The Hague: Asser Press 2018, p. 17, 22-23.

[71] O. Quirico, 'Climate change and state responsibility for human rights violations: causation and imputation', *Netherlands International Law Review* 2018, 65 (2), p. 185-215, p. 188 and 209.

See also Mayer:

> '*although the preamble does not create any self-standing human-rights related obligations, its parties-to-be must recognize an obligation to comply with their respective human-rights obligations when carrying out climate-change-related actions under the Agreement.*'[72]

> '*It also follows from the "principle of harmonization" identified by the working group of the ILC on the fragmentation of international law that mutual accommodation should be sought between norms arising from the human rights regime and norms arising from the climate change regime.*'[73]

More reluctant authors, such as Lewis, also point to the increased potential for a human rights approach to climate change and its consequences, as expressed in paragraph 11:

> *'the reference to existing obligations leaves open the possibility that other international law might be applied to the challenge of climate change, and creates the potential for a human rights-based approach to make a meaningful contribution.*'[74]

In short, although the significance of paragraph 11 of the preamble to the Paris Agreement should not be overemphasised, it is nevertheless an important marker in a long-term development that has accelerated since Paris.

164. In connection with this development, the State incorrectly argued in Written Explanation 9.2.5 (without substantiation or reference to the source) that the '*Office of the UN High Commission for Human Rights (OHCHR) does not assume that an extension of (the content of) existing individual human rights is reasonable'*, and that this Office only sees room for obligations to provide information, consultation and international cooperation.

165. The current UN Special Rapporteur on Human Rights, David Boyd, unambiguously stated on 25 October 2018 in an Irish climate case that

[72] B. Mayer, 'Human Rights in the Paris Agreement', *CL* 2016/6, p.109-117, p.114. S. Atapattu, 'Climate Change, Human Rights, and COP 21: One Step Forward and Two Steps Back or Vice Versa?', *Georgetown Journal of International Affairs* 17(2), 2016, p. 47-55.
[73] *Ibid*, p. 114.
[74] B. Lewis, *Environmental Human Rights and Climate Change* (Singapore: Springer 2018), paragraph 154.

States have urgent mitigation obligations under their existing positive obligation to protect the right to life.

> '*Does the Government of Ireland have positive human rights obligations to mitigate climate change? The conclusion reached is that climate change clearly and adversely impacts the right to life, a right which the Government of Ireland is legally obligated to respect, protect and fulfill. Therefore, the Government of Ireland has positive human rights obligations to mitigate climate change by rapidly reducing its greenhouse gas emissions*.'[75]

> '*58. There is no doubt that climate change is already violating the right to life and other human rights today. In the future, these violations will expand in terms of geographic scope, severity, and the number of people affected unless effective measures are implemented in the short term to reduce greenhouse gas emissions and protect natural carbon sinks.*

> *59. The Government of Ireland has clear, positive, and enforceable obligations to protect against the infringement of human rights by climate change. It must reduce emissions as rapidly as possible, applying the maximum available resources. This conclusion follows from the nature of Ireland's obligations under international human rights law and international environmental law.*'[76] (emphasis added by counsel)

Boyd refers, among other things, to the '*Key messages on human rights and climate change'* of the OHCHR of 2015[77], as amended from time to time. In it, the first key message is expressed:

> '*1. To mitigate climate change and to prevent its negative human rights impacts: States have an obligation to respect, protect, fulfil and promote all human rights for all persons without discrimination. Failure to take affirmative measures to prevent human rights harms caused by climate change, including foreseeable long-term harms, breaches this obligation. [..] Therefore, States must act to limit anthropogenic emissions of greenhouse gases (e.g. mitigate climate change), including through regulatory measures, in order to prevent to the greatest extent possible the current and future*

[75] D.R. Boyd, Statement on the human rights and obligations related to climate change with a particular focus on the right to life (25 October 2018), p. 2 (emphasis added). Available at: https://www.ohchr.org/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf. (the statement has been submitted in the *Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney General* case).
[76] Ibid, p. 13 (emphasis added by counsel).
[77] OHCHR, 'Key Messages on Human Rights and Climate Change', available at http://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf, p. 1 (emphasis added).

negative human rights impacts of climate change.'

'*3. [..] The obligations of States in the context of climate change and other environmental harms extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur.*' (emphasis added by counsel)

Of the many other publications of the OHCHR, the publication entitled '*Understanding Human Rights and Climate Change*' from 2015 in particular contains the opinion that urgent mitigation is one of the human rights obligations of States.[78] This opinion is not open to misunderstanding and is supported by a series of the OHCHR's own earlier publications.

166. Urgenda points out that the UN Human Rights Council has already recognised that urgent mitigation measures fall under the human rights obligations of individual States. See, for example, HRC Resolution 32/33 (July 2016), operational provisions 1 and 2 in conjunction with paragraphs 10-11 and 29 of the preamble. [79] Also illustrative is the UNEP report entitled 'Climate Change and Human Rights' from 2015 which, based on the sources available at the time, recognises that states may have human rights obligations to mitigate.[80] Furthermore, a recent statement by the UN Economic, Social and Cultural Rights Committee of 8 October 2018 is also worth mentioning:

'*6. This Committee has already noted that a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation. The nationally determined contributions (NDCs) that have been announced until now are insufficient to meet what scientists tell us is required to avoid the most severe impacts of climate change. In order to act consistently with their human rights obligations, the NDCs*

[78] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the parties to the United Nations Framework Convention on Climate Change 'Understanding Human Rights and Climate Change', p. 6-8, 12-14 (right to life).
[79] UN Human Rights Council, *Human rights and climate change:resolution* / adopted by the Human Rights Council, 18 July 2016, A/Supreme Court/RES/32/33, available at: https://www.refworld.org/docid/57e3d46f4.html. The wording in the second paragraph corresponds to the text of previous resolutions, starting with Resolution 26/27 (July 2014).
[80] UNEP, *Climate Change and Human Rights*, p. 15-27, 31-32, 42-43 (2015). Available at http://wedocs.unep.org/bitstream/handle/20.500.11822/9934/Climate-Change-Human-Rights.pdf?sequence=1&isAllowed=y.

should be revised to better reflect the « highest possible ambition » referred to in the Paris Agreement (article 4.3).'[81]

167. The sources presented by Boyd in nos. 6-21 and following of his *amicus letter* in the Irish Climate Case (which are to a large extent cited in the Statement of Defence) show that a human rights based approach to urgent mitigation obligations with respect to territorial emissions has gradually developed since 1992, although there are also critics in the literature. Boyd's predecessor John Knox, mentioned in Written Explanation 9.2.5, is also clear about the primary human rights obligation of States to reduce their territorial emissions in his report published in 2016[82], as emphasised in paragraph 151 above. A later publication by Knox from 2018, in which he writes about the Paris Agreement also points to this:

'*Almost every State in the world has presented an intended nationally determined contribution, but even if fully implemented, they will not put the world on a path that avoids disastrous consequences for human rights. UNEP has determined that full implementation of the intended contributions would lead to emission levels in 2030 that will likely cause a global average temperature increase of well over 2°C, and quite possibly over 3°C. Therefore, even if they meet their current commitments, States will not satisfy their human rights obligations*.'[83] (emphasis added by counsel)

And in his 'Twitter message' of 9 October 2018 about the judgment of the Court of Appeal of The Hague:

'*The Urgenda decision is a big deal for the application of human rights law to climate change. It provides a clear, well-reasoned precedent for other such suits in Europe and beyond.*'[84]

168. It is therefore not very fortunate that in Written Explanation 9.2.6, the State explained the quote from the open letter of Michelle Bachelet, the UN High Commissioner for Human Rights (in paragraph 354 of the Statement of Defence) in the sense that it does not regard mitigation obligations as a human rights obligation. This is obviously the case, if only

[81] Statement of the Committee on Economic, Social and Cultural Rights (8 October 2018) (https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E).
[82] J.H. Knox, *The Paris Agreement as a Human Rights Treaty* in Akande et al. eds. *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford: Oxford University Press 2018). Available at SSRN https://ssrn.com/abstract=3192106.
[83] J.H. Knox, *The Paris Agreement as a Human Rights Treaty* in Akande et al. eds. *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford: Oxford University Press 2018), no. 20. Available at SSRN https://ssrn.com/abstract=3192106.
[84] Twitter message of 9 October 2018 by John Knox, UN Special Rapporteur on Human Rights and the Environment, as also included under footnote 17 of annotation J. Spier, 'There is no future without addressing climate change', Journal of Energy & Natural Resources Law, 37:2, p. 181-204 (2019).

because the ‘obligation' in the second sentence refers back to the 'human rights obligation' in the first sentence in the quotation; in doing so, it does not have environmental interests as such in mind, but the concrete threat to life for large groups of individuals. In the letter, the High Commissioner therefore calls for 'ambitious, urgent, human rights-based climate action'. The State's interpretation of this letter is therefore clearly incorrect. Moreover, the position of the High Commissioner is already clear with her request to be allowed to act as *amicus curiae* in cassation. If the State had not, after three weeks of silence from the time of this request, opposed the submission of a legal opinion by both parties as proposed by Urgenda, it could have informed the Supreme Court itself about this.

169. In short, in the light of the international normative developments since 1992 regarding human rights and climate change (despite some dissenting opinions), there is indeed a growing legal conviction that States have positive obligations under the global and regional human rights treaties that are binding on them and that can be enforced in order to achieve mitigation. This is in the full knowledge that individual States cannot prevent dangerous climate change on their own, but since enforceable international reduction commitments fail, States must take their territorial responsibility and have a human rights obligation to reduce greenhouse gas emissions as a matter of the utmost urgency. There is also significant support for this in the commentary on the judgment of the Court of Appeal, some of which appeared after the Statement of Defence:

170. - **Spier**[85]:

> '*The Court's interpretation of arts 2 and 8 of the Convention is in line with the case law of the ECtHR, albeit in unrelated cases; some of these cases are also quoted by the Court. It is not unthinkable that the ECtHR will shy away from applying its case law to climate change, but it will not be easy to explain, let alone justify such a choice.*'

And in his critical discussion of the preliminary advice to the Dutch Jurists Association (NJV) by Arts and Scheltema, Spier states:

> *'Still, I think, with the preliminary advisers, that a human rights approach certainly offers opportunities.'*
>
> '*At any event, the view that excessive emissions are a violation of human rights, in my view, is rapidly gaining ground.'*

[85] J. Spier, ‘There is no future without addressing climate change’, *Journal of Energy & Natural Resources Law* 2019, 37:2, p. 181-204, DOI: 10.1080/02646811.2019.1565197.

> *'If the preliminary advisers really wish to argue that States, for example, have no obligation to limit emissions, but to take all kinds of relatively trivial measures once the misery has arisen, then this is an unattractive view. The idea that we should take for granted that the world - and most individual countries - will be faced with disasters of an unprecedented magnitude, but that the right does have something to offer in order to counter some of the effects, condemns itself.'*[86]

Spier rightly points out that the preliminary advice he discussed is ambiguous, because it advocates a human rights approach, including mitigation, in various places. Spier cites from the conclusion of the preliminary advice:

> *'After analysing a number of climate issues that are now pending against governments and companies and decisions taken in these areas, we have come to the conclusion that, as is increasingly the case in these areas, a connection must be sought with human rights. After all, climate change has a clear impact on human rights, not only in the future but also now. We have supported the view that human rights law is therefore a clear additional legal basis for action, both with regard to states and to companies.'*

> '[...] *we have set out and substantiated the (human rights) obligations to take on (...) mitigation (...) obligations in the previous sections of this preliminary advice [for States].'*[87]

Spier rightly points out that, in this light, the position of the preliminary advisers that there are no positive mitigation obligations for States - and that it is rather *companies* that have human rights mitigation obligations - is absurd. In this respect, the preliminary advice is not based on an analysis of the normative development outlined above and in the Statement of Defence, and it completely disregards the systemic responsibility of the State. Only the State can ensure a transition that prevents disruptions and serious market disturbances.

Others, too, have expressed a positive opinion on the human rights approach adopted by the Court of Appeal:

- **Verschuuren**:

[86] J. Spier, 'Het preadvies van K. Article & M. Scheltema', *NJB* 2019/1265, p. 1606-1608.
[87] Ibid, p. 1608.

'*Climate change impacts enjoyment of human rights: courts have to intervene.*'[88]

'*On the contrary, testing government actions against human rights belongs to the power of courts*'[89]

- **Sanderink:**

'*[...] under these circumstances, the Court of Appeal ruled in grounds 71 to 76, in my opinion correctly that the State is acting in violation of its positive obligations under Article 2 and Article 8 ECHR by omitting to limit greenhouse gas emissions by at least 25% by the end of 2020 (or having them reduced).*'[90]

- **Emaus**:

'The considerations of the Court of Appeal with respect to the obligations arising from Articles 2 and 8 of the ECHR are closely related to the considerations of the ECtHR, which has formulated (relatively) concrete standards by prescribing concrete (prevention) obligations in the context of environment-related matters. Like the ECtHR, the Court of Appeal of The Hague has left to the State the choice of the way in which the emission reduction is to be achieved. According to the Court of Appeal, based on the precautionary principle, the alleged uncertainties cannot release the State from its obligations to take further measures.

In its concrete assessment of the claimed emission reduction, the Court of Appeal referred extensively to treaties and international agreements, which seems to be closely in line with the so-called rule-of-law approach by the ECtHR, which, according to Pedersen, makes the ECtHR's case law in environment-related matters less controversial than is sometimes argued. The ECtHR attaches importance to the observance by State Parties of national laws and policies and its rulings appear to be explicitly in line with developments that are already taking place in the State Parties.'

- **Gillaerts & Nuninga**:

'*In this context, this means that where there is a duty to protect human rights, those whose human rights are in danger of being compromised may demand compliance with that duty. The same reasoning applies in itself to*

[88] J. Verschuuren, Urgenda Climate Change Judgment Survives Appeal in the Netherlands, IUCN (24 October 2018). Available at www.iucn.org/news/worldcommission-environmental-law/201810/urgenda-climate-change-judgment-survives-appealnetherlands.
[89] Ibid.
[90] D.G.J. Sanderink, annotation to: The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2591, *JB* 2019/10 and D.G.J. Sanderink, 'Positieve verplichtingen als redders van het klimaat', *TvCR* 2019/1, p. 68.

obligations arising from unwritten law, but a major advantage of these proceedings is that it is in any event clear that in this case it is also the respondent (the State) which has the (human rights) obligation.'[91]

'*On the basis of positive obligations for the government with regard to the threatened human rights in question, courts may persuade governments to take legal action within the framework of their policy margin, limited by all kinds of international commitments or obligations and the available scientific knowledge.*'[92]

- **Bleeker**:

'Secondly, human rights are an excellent basis for the courts to intervene in government policy. After all, human rights are intended to protect citizens from their government. The discretion of the governing power and legislature does not go so far as to set human rights aside. That, too, is part of the rule of law.'[93]

'*Climate change has become a human rights issue.'*[94]

- **Hey & Violi** focus on the ongoing developments, in which the national courts play an important role:

'*These cases also show that national courts engage in conceptual interaction, by employing human rights to normatively determine both climate change threats and the positive obligations of states in the specific context of national adaptation and mitigation policies.*'[95]

'*The extension of positive human rights obligations beyond the territory of the state of origin of environmental harm potentially opens the door for climate change litigation*.'[96]

'*In terms of interaction between human rights and climate change regimes, that narrative or understanding has evolved to include the special position of vulnerable groups and communities, the notion that human rights may be violated as a result of climate change action, both mitigation and adaptation and procedural environmental rights*.'[97]

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[91] P. Gillaerts & W.Th. Nuninga, 'Private law and prevention: Urgenda on appeal', *AV&S* 2019/9, p. 48.
[92] Ibid.
[93] T.R. Bleeker, 'Nederlands klimaatbeleid in strijd met het ECHR', *NTBR* 2018/39, paragraph 3.3.
[94] Ibid, p. 5.
[95] E. Hey and F. Violi, *The Hard Work of Regime Interaction: Climate Change and Human Rights*, in: E. Hey et al. (eds.). Communications from the Royal Netherlands Society of International Law (KNVIR) 145. Climate Change Options and Duties under International Law, The Hague: Asser Press 2018, p. 21.
[96] Ibid, p. 22.
[97] Ibid, p. 23.

- **Leijten** is more cautious, and especially points out that the Court of Appeal could have given a broader reasoning:

  '*However, any questions raised by a human rights perspective are crucial to making the protection of human rights in climate issues more effective. There is no doubt that these rights are at issue here, and that the courts also have a role to play in the relationship between the two.*'[98]

171. The position of the State in Written Explanation 9.2.4 (indented text) - that in the interpretation of treaty obligations only directly applicable international law can be meaningful - is incorrect. This does not consider the obvious fact that the finding of law under the ECHR should reflect normative and social developments, just as it should under Dutch national law, even if these have not yet resulted in directly effective treaty law. Moreover, by doing so, the State once again disregards the risk-based approach followed by the Court of Appeal, which finds a solid basis in the existing ECtHR case law.

172. Urgenda feels it is important to discuss this in more detail here, particularly in view of the international importance of the human rights approach of the Court of Appeal.

173. In recent decades, [99] the ECtHR when deciding on new question of law under the Convention, has increasingly focused on various sources of international law, ranging from treaty and customary law to a wide range of authoritative non-binding instruments. It has often done so in order to avoid a legal protection vacuum. Particular importance is attached to ratified treaties, but also to non-binding treaties[100], the views of one or more State Parties[101], preambles[102], declarations of the International Law Commission[103], non-binding resolutions of international and regional

[98] A.E.M. Leijten, 'De Urgenda-zaak als mensenrechtelijke proeftuin?', *AV&S* 2019/10.
[99] See, for example, O'Boyle 'A European Respect for the Opinions of Mankind?' in Carla M. Buckley, Alice Donald, Philip Leach (eds.) *Towards Convergence in International Human Rights Law* (Brill 2017) 567, 583.
[100] ECtHR 9 March 2004, *Glass v. United Kingdom,* no 61827/00, paragraph 75; ECtHR 12 November 2008, *Demir and Baykara v. Turkey,* no 34503/97, paragraphs 58, 75, 77; ECtHR 12 June 1979, *Marckx v. Belgium,* no 6833/74, paragraph 41.
[101] ECtHR 12 November 2008, *Demir and Baykara v. Turkey,* no 34503/97, paragraph 84.
[102] See, for example, ECtHR 4 December 2008, *S and Marper v. United Kingdom,* nos. 30562/04 and 30566/04, paragraphs 95, 103.
[103] As noted and cited in M. Milanovic, 'Jurisdiction and Responsibility, Trends in the Jurisprudence of the Strasbourg Court' in: A. van Aaken, I. Motoc (eds.) *European Convention on Human Rights and General International Law* (OUP 2018) 97, 106-7. ECtHR 20 November 2014, *Jaloud v. The Netherlands,* no 47708/08, paragraphs 97-98, 151; ECtHR 13 December 2012, *El-Masri v. Macedonia*, no 39630/09, paragraphs 96-97; ECtHR 3 April 2012, *Kotov v. Russia,* no 54522/00, paragraph 30-32; ECtHR 2 May 2007, *Behrami and Behrami v. France* and *Saramati v. France, Norway and Germany,* nos 71412/01 and 78166/01, paragraphs 28-31, 121, 122; ECtHR 21 November 2001, *Al-Adsani v. United Kingdom,* no 35763/97, paragraphs 23-24.

bodies[104], soft law standards and interpretations of regional institutions[105], experts and political bodies.[106]

174. In *Demir*, the ECtHR explicitly rejected the suggestion that only binding treaties are relevant for the interpretation of the ECHR:

> '*The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.*
>
> *In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.*'[107]

175. In a recent study on soft law in the case law of the ECtHR, Nussberger concluded:

> *'the dichotomy between hard law and soft law gives way to what is called 'normative relativity' and the Court seems to dilute the differences between rules coming from different sources in developing its evolutive jurisprudence.' However unsurprisingly it also concludes that the Court 'nevertheless takes hard law more seriously than soft law. State consent matters and still makes a difference.*'[108]

[104] ECtHR 12 November 2008, *Demir and Baykara v. Turkey,* no 34503/97, paragraph 74-75, see also ECtHR 27 July 2004, *Sidabras and Dziautas v. Lithuania,* no 55480/00 and 59330/00, paragraph 47; ECtHR 11 January 2006, *Sørensen and Rasmussen v. Denmark,* nos. 52562/99 and 52620/99, paragraphs 73-75.
[105] See for example ECtHR 9 June 2009, *Opuz v. Turkey,* no 33401/02, paragraphs 74-79; EctHR 1 July 2010, *Davydov v. Ukraine,* no 17674/02 and 39081/02, paragraphs 101-108.
[106] ECtHR 4 December 2003, *MC v. Bulgaria,* no 39272/98, paragraphs 163-166; ECtHR 30 June 1993, *Sigurður A. Sigurjónsson v. Iceland,* no 16130/90, paragraph 35.
[107] ECtHR 12 November 2008, *Demir and Baykara v. Turkey,* no 34503/97, paragraph 85-86.
[108] A. Nussberger, 'Hard Law or Soft Law-Does it Matter? Distinction Between Different Sources of lnternational Law in the Jurisprudence of the ECtHR' in: A. Van Aaken, I. Motoc (eds.) *European Convention on Human Rights and General International Law* (OUP 2018) 41, 42 (emphasis added by counsel).

176. The ECtHR has given explicit meaning to a wide range of international instruments, particularly in cases concerning human rights and the environment. In *Tătar v. Romania*, the ECtHR based its principled adoption of the precautionary principle on various soft law instruments (the Stockholm Declaration of 1972, the Rio Declaration of 1992), the Aarhus Convention, the 1997 International Court of Justice ruling in *Gabcikovo-Nagymaros*[109], and various EU instruments and case law of the Court of Justice.[110] In *Öneryildiz v. Turkey*, the ECtHR referred to two treaties that had not been signed or ratified by the majority of states,[111] and various non-binding EU instruments.[112] In *Taskin v. Turkey*, the ECtHR referred again to 'relevant texts on the right to a healthy environment', including the above-mentioned Rio Declaration, the Aarhus Convention (not signed/ratified by Turkey) and a recommendation of the European Parliament.[113] In *Demir et al. /Turkey*, the ECtHR ruled with reference to *Taskin* as follows:

> *'the Court built on its case-law concerning Article 8 of the Convention in matters of environmental protection (an aspect regarded as forming part of the individual's private life) largely on the basis of principles enshrined in the Aarhus Convention*.'[114]

In addition, it is worth mentioning, for example, the case law of the ECtHR in relation to international humanitarian law[115], immunity[116] and a new development such as data protection.[117]

177. The Inter-American Court of Human Rights (IACtHR) also refers extensively to sources of international environmental law in interpreting the scope of human rights protection and the jurisdiction of the Court. See, for example, the Advisory Opinion, also discussed by Urgenda in the Statement of Defence. In the context of determining its jurisdiction in

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109 ICJ 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, I.C.J. Reports 1997, p. 38 (paragraph 53), p. 65 (paragraph 113).
110 ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01, paragraph 19 et seq.
111 ECtHR 12 November 2008, Demir and Baykara v. Turkey, no 34503/97, paragraph 82; ECtHR 30 November 2004, *Öneryıldız v. Turkey,* no 48939/99, paragraphs 59, 71.
112 ECtHR 30 November 2004, *Öneryıldız v. Turkey,* no 48939/99, paragraphs 59, 60-61, 71, 90, 93.
113 ECtHR 30 March 2005, *Taskin v. Turkey,* no. 46117/99, paragraphs 99-100.
114 ECtHR 12 November 2008, *Demir and Baykara v. Turkey,* no 34503/97, paragraph 83.
115 See, for example, ECtHR 16 September 2014, *Hassan v United Kingdom,* no 29750/09, paragraphs 77, 94-95, 100,
102-103; Larissa van den Herik, Helen Duffy, 'Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches' in Carla M. Buckley, Alice Donald, Philip Leach (eds.) *Towards Convergence in International Human Rights Law* (Brill 2017) 367, 385; Duffy, Trials 7 Tribulations: Co applicability of Human Rights and IHL in an Age of Adjudication, in Bohrer, Dill and Duffy, Applicable law in Armed Conflict, CUP 2019.
116 ECtHR 21 November 2001, *Al-Adsani v. United Kingdom,* no 35763/97, paragraphs 22, 24, 54-56; ECtHR 14 January 2014, *Jones v. United Kingdom,* nos. 34356/06 and 40528/06, paragraphs 70-106.
117 ECtHR 2 September 2010, *Uzun v. Germany,* no 35623/05, paragraphs 46, 52; ECtHR 4 December 2008, *S and Marper v. United Kingdom,* no 30562/04 and 30566/04, paragraph 103.

relation to cross-border environmental damage, the IACtHR has considered in general terms the importance of integrating international law in environmental matters (in which connection the climate problem is frequently cited):

> *'In order to analyse the possibility of extraterritorial exercise of the jurisdiction in the context of compliance with environmental obligations, it is necessary to analyse the obligations derived from the American Convention in light of the obligations of the States in that matter.'* (…) *'it is possible to conclude that the obligation to prevent environmental transboundary damage is an obligation recognized by international environmental law, by virtue of which States can be held responsible for significant damage caused to persons located outside their territory as a result of activities originating in their territory or under their authority or effective control.'*[118]

As regards the scope of protection against cross-border environmental damage, the IACtHR considers as follows:

> *'In environmental law, the principle of prevention is applicable with respect to activities that are carried out in the territory or under the jurisdiction of a State that cause damage to the environment of another State, or in respect of damage that may occur in areas they are not part of the territory of any particular State, such as the high seas.'* (…) *'The American Convention obliges States to take action to prevent possible violations of human rights (supra paragraph 118). In this sense, although the principle of environmental prevention was enshrined in the framework of inter-State relations, the obligations it imposes are similar to the general duty to prevent human rights violations. Therefore, the Court reiterates that the prevention obligation applies to damages that may occur within or outside the territory of the State of origin (supra paragraph 103).'*[119]

178. This establishes that the exclusion of international law that is not directly applicable for the interpretation of existing ECHR obligations – on an *a priori* basis - is not at all supported by the case law of the Strasbourg Court.

179. In Written Explanation 9.2.8-9.2.9, the State again puts forward the pure causality defence, based on the implicit assertion that the ECHR would require that the unlawful actions of the Netherlands could be directly

[118] IACtHR 15 November 2017, Advisory Opinion no. OC-23/18, Ser A (No 23), paragraphs 80 and 103. The advisory opinion is only available in Spanish on this website: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf.
[119] IACtHR 15 November 2017, Advisory Opinion no. OC-23/18, Ser A (No 23), paragraphs 131 and 133.

causally related to '*individual human rights violations'*. In this respect, Urgenda's submissions in paragraphs 486-490 of the Statement of Defence also apply: in the case of multiple, cumulative causes, this direct causal connection demanded by the State cannot be demanded without thereby placing the unlawful conduct that leads to violations of human rights outside the scope of any form of human rights protection. This submission cannot be accepted, given the fact that it has been established that countries such as the Netherlands are co-contributor to, and share responsibility for, the consequences of climate change, which in themselves clearly affect the interests protected by Articles 2 and 8 of the ECHR. The sources cited above point to an internationally developed legal conviction that individual states do have a positive obligation to mitigate on the basis of 'common but differentiated responsibilities', because all emissions contribute to the global dangers of climate change[120], which will affect the Netherlands to an increasing extent. In contrast to the authors cited in Written Explanation 9.2.8, there are many other sources, which have been cited above.

2.3 Interpretation of the ECHR in the light of the national context

180. In all of the above, the State completely disregarded the fact that the Dutch courts must interpret the ECHR in the light of its national context, and that this in itself does not mean that it goes beyond the minimum protection required by the Convention.[121] In this respect, it is important that the role of a national court is different from that of the ECtHR, which in its rulings also repeatedly emphasises its subsidiary role. This different role and position is evidenced by the fact that, among other things, the ECtHR has explicitly incorporated the judgment of national courts in its opinion on several occasions.[122]

181. In addition, a national court may go beyond the minimum protection provided for in the ECHR. As Urgenda explained in Chapter 3 of its Statement of Defence (see in particular paragraph 307), if there were any doubt about the interpretation of Articles 2 and 8 ECHR under the current law, there is every reason to endorse the judgment of the Court of Appeal

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[120] See J. Spier, 'There is no future without addressing climate change', *Journal of Energy & Natural Resources Law* 2019, p. 202-203.

[121] T. Barkhuysen and M.L. Van Emmerik, 'Zorgplichten volgens de Hoge Raad en het Europees Hof voor de Rechten van de Mens: van Lindenbaum/Cohen via Kelderluik en Öneryildiz naar Urgenda?', *Rechtsgeleerd Magazijn Themis* 2019/1, p. 53-54.

[122] See Statement of Defence, paragraphs 498-502. The discussion of the State in Written Explanation 8.3.14 of the ECtHR judgment of 14 February 2012, *Hardy and Maile v. United Kingdom*, 31965/07, *EHRC* 2012/103, is illustrative. It follows from that discussion (point iii) that the ECtHR took into account the opinion of the national court and reached its opinion '*against this background*'.

in the light of the Aarhus Convention and the right of access to the courts provided for therein, the 'social' fundamental right of Article 21 of the Constitution[123], activated and operationalised by the ECHR precisely because of this, and the right to collective action provided for in Article 3:305a DCC.

2.4 A solid basis in the existing ECtHR case law

182. In essence, by means of a too limited and isolated discussion of various ECtHR judgments, the State argued that the Court of Appeal gave an incorrect opinion. In doing so, however, the State disregards the casuistic ('*case by case*') nature of the ECtHR case law. This is all the more cogent in this case, since the ECtHR has no collective action procedure similar to Article 3:305a DCC (which is the basis for this case). As a consequence of this the ECtHR is usually asked by a concrete complainant to adjudicate on an alleged violation of *its individual* rights as protected by the ECHR. It goes without saying that Urgenda's collective action and the nature, uniqueness and scope of the risk underlying that claim are materially different from such cases. To that extent, the judgments of the ECtHR discussed by the State, and the way in which the State isolates and discusses elements of this case law (Written Explanation 8.1-8.3) are of limited importance, since this does not alter the fact that the ruling of the Court of Appeal has a solid basis in the existing case law of the ECtHR.

183. The State therefore wrongly argued that the Court of Appeal '*[has] gone much further than follows from the case law of the ECtHR on the scope of positive obligations'* (Written Explanation 8.1.8). The State bases this assertion on too narrow an interpretation of a number of elements that are found in some judgments of the ECtHR. In the following, Urgenda shows for each element that the interpretation as held out by the State is already too limited, and therefore incorrect, based on the existing case law which relate to substantially different risks. Prior to this, Urgenda points out that isolating the various elements as the State does disregards the fact that (i) these elements are explicitly related, (ii) the ECHR (and thus also the case law of the ECtHR with respect to these various elements) is evolving in nature, aimed at providing actual and effective legal protection by national courts and (iii) the existing case law of the ECtHR concerns other cases and substantially different risks. In relation to this last point, for example, the ECtHR does not know a collective action procedure, and

[123] On the growing significance of Article 21 of the Constitution in the light of Articles 2 and 8 of the ECHR, including F. Fleurke, Comments on article 21 of the Constitution in: E.M.H. Hirsch Ballin and G. Leenknegt (eds.), Artikelsgewijs commentaar op de Grondwet, web edition 2019 (www.Nederlandrechtstaat.nl).

the dangers of climate change as such have not yet been put before the court.

2.4.1 Element I: General framework - insufficient distinction between the content of the positive obligation and the measures to be taken to comply with that positive obligation

184. As regards the question of *whether* there is a positive obligation, there may be a certain overlap between Articles 2 and 8 of the ECHR in environment-related situations. However, it is important to note that, the two articles differ in essential respects.[124]

185. With regard to this question, the Court of Appeal has ruled that the State has a positive obligation under Articles 2 and 8 of the ECHR to take adequate mitigation measures in order to provide the required protection against the consequences of dangerous climate change.[125] However, these mitigation measures need to be further specified in order to provide the actual and efficient legal protection required by the ECHR.[126] In this respect, in his preliminary advice Spier wrote the following in the chapter entitled '*THE URGENT NEED TO CONCRETISE OBLIGATIONS*':

> '*Strikingly, most players - countries, enterprises (...) and many others - apparently did not and still do not* want to know *their legal obligations (...). Over the years, I have come to understand that* legal *strategies to come to grips with climate change such as injunctive relief will only work if we are able and willing to discern the legal obligations of major players*.'[127] (emphasis added by counsel)

The Court of Appeal has acknowledged that further concretisation is required in order to provide the required effective legal protection. The Court of Appeal has thereby determined that the absolute minimum

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[124] Statement of Defence, paragraph 382. For example, with regard to Article 8 of the ECHR, the additional requirement applies that the (imminent) impairment must be sufficiently serious (see also Statement of Defence, paragraph 385).

[125] See, for example, Statement of Defence, paragraphs 306, 410, 457, 465, 496, 515 and 520.

[126] See also P. Lefranc, 'Het Urgenda-vonnis/-arrest is (g)een politieke uitspraak (bis)', *NJB* 2019/474, pp. 602-603: '*In my opinion, the Court of Appeal could only assess the violation of Articles 2 and 8 of the ECHR invoked by the Urgenda Foundation by fulfilling in a concrete manner the duty of care that it imposes on the Dutch State on the basis of the objectives and principles of the Climate Convention and the TFEU.*' Similarly, see D.G.J. Sanderink, 'Positieve verplichtingen als redders van het klimaat', *TvCR* 2019/1, p. 68-69; E.R. De Jong, 'Urgenda en de beoordeling van macro-argumenten', *MvV* 2019, p. 140, which links the required concretisation to the precautionary principle (more about this in Chapter 2.4.4 below).

[127] J. Spier, *Private law as a Crowbar for Coming to Grips with Climate Change?*, in E. Hey et al. (eds.), Communications from the Royal Netherlands Society of International Law (KNVIR) 145. Climate Change Options and Duties under International Law, The Hague: Asser Press 2019, p. 32.

obligation is a reduction of 25% by 2020.[128] The Court of Appeal has thus further specified the positive obligation of the State to the extent that there is a positive obligation to reduce CO2 by 25% by 2020 (see also Written Explanation 8.1.1 and Written Arguments by the State, paragraphs 1.9 and 3.1).

186. One question that can be distinguished from this is *what measures* need to be taken in order to comply with these positive obligations. The State is wrong to imply that with regards to this question. the requirements under Articles 2 and 8 of the ECHR are. In doing so the State argues in favour of an excessively high standard for the measures to be taken on the basis of a positive obligation based on Article 2 ECHR. For example, the State argued first of all that budgetary consequences would also play a role with regard to Article 2 ECHR (see, for example, Written Explanation 8.1.6, 8.4.1 and 12.1.1). This argument would *de facto* enable a State, on the basis of cost considerations, to refrain from intervening in the event of a threatened violation of the fundamental right to life protected by Article 2 ECHR, even if (i) the State is aware of this imminent violation and (ii) the measures to be taken could reasonably have been expected of it. This is not right, given the crucial importance of Article 2 ECHR. Secondly[129], the State advocates too great a degree of restraint in the measures to be taken under Article 2 ECHR (see Written Explanation 8.1.6, 8.2.4). It substantiates this in Written Explanation 8.1.6 with a mere reference to an isolated sentence from the *Osman* judgment of 1998, but fails to provide the relevant context of this sentence. In short, the case concerned a teacher who developed an obsession with one of his students and who injured the student and killed the student's father. The ECtHR was asked whether there had been a violation of the State's positive obligations under Article 2 ECHR. The ECtHR ultimately ruled against the claimant because the required knowledge on the part of the state authorities had not been established. In the context of this body of facts, the ECtHR ruled, among other things:

> '*In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to*

[128] See, for example, Statement of Defence, paragraphs 608-609 and Written Arguments of Urgenda, paragraphs 90-92 and 99-100.
[129] See also Statement of Defence, paragraphs 514-518.

take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or willful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, mutatis mutandis, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.'[130]

187. In order to establish a violation of the State's positive obligation under Article 2 ECHR, it is therefore sufficient that the state authorities have not done everything that could reasonably be expected of them, particularly in view of the fundamental nature of the right to life.[131] The ECtHR reaffirmed this in 2004 when, in the case of *Öneryildiz v. Turkey*, it referred to the obligation of the State to take '*all appropriate steps to safeguard life for the purpose of Article 2*'.[132]

188. The State noted in Written Explanation 8.3.6 that the ECHR does not provide for a right to environmental protection as such. While this statement is correct,[133] Urgenda would like to emphasise that the ECtHR, in view of its evolving interpretation of the ECHR as a living instrument, has on several occasions in recent years determined cases related to environmental protection on the basis of Article 2 and/or Article 8 ECHR.[134] Urgenda also refers to the judgment in *Di Sarno et al. v. Italy.*[135] That case concerned a waste crisis, in which it was alleged that the Italian authorities had violated the rights of complainants under Articles 2 and 8 ECHR due to a lack of management of waste processing. The ECtHR

[130] ECtHR 28 October 1998, *Osman v. United Kingdom*, no. 23452/94, paragraph 116. On this judgment, see also Reply, paragraph 359 et seq.
[131] Incidentally, the State acknowledged this also in Written Explanation 8.2.11.
[132] ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, paragraph 89.
[133] In a similar sense, see Statement of Defence, paragraph 383.
[134] See, for example, Statement of Defence, paragraphs 384-385 (with extensive reference); see also the case law discussed by the State in Written Explanation 8.2-8.3.
[135] ECtHR 10 January 2012, *Di Sarno et al. v. Italy*, no. 30765/08.

considered that the 'waste crisis' had an impact on the area where the complainants lived (paragraph 108) and that waste processing 'without a doubt' is a dangerous activity (paragraph 110). The ECtHR continued:

> '*That being so, the State was under a positive obligation to take reasonable and adequate steps to protect the right of the people concerned to respect for their homes and their private life and, more generally, to live in a safe and healthy environment (see Tătar, cited above, § 107).*'[136]

2.4.2 Element II: Real and immediate danger

189. In legal ground 42, the Court of Appeal acknowledged that a '*real and immediate (imminent) danger'* is required, as a minimum threshold, in order to grant Urgenda's claim. The Court of Appeal ruled that the risks that the negative consequences of climate change have on the interests to be protected by the State pursuant to Articles 2 and 8 ECHR are so urgent that this requirement has been met. Urgenda has explained why that judgment is correct and not incomprehensible.[137] The *latent risks* of climate change outlined by Urgenda are also of great importance in this respect.[138] Urgenda has also pointed out that these are scientific facts that are in the public domain and are considered to be generally known facts.[139] The State has not disputed that.

190. Urgenda explained in detail what the requirement of a real and immediate danger (which appears in a number of ECtHR judgments) means in the light of that case law.[140] However, the State has incorrectly tried to raise this threshold in three ways. Firstly, in Written Explanation 8.2.10, the State argued that, except in cases of actual death, '*the imminent threat*' of death is a necessary condition for a positive obligation under Article 2 ECHR (see also Written Explanation 8.1.2, 8.2.4 and 8.3.6). This assertion is incorrect and does not in any way follow from the *Kolyadenko v Russia* judgment cited by the State in Written Explanation 8.2.10.[141] Partly on the basis of ECtHR case law, Urgenda has explained that such an '*imminent threat'* is not required by Article 2 ECHR, nor by Article 8 ECHR (see Statement of Defence, paragraphs 387-388 with references). It is striking that exactly the same erroneous assertion by the State has

[136] ECtHR 10 January 2012, *Di Sarno et al. v. Italy*, no. 30765/08, paragraph 110.
[137] Statement of Defence, paragraph 393 et seq., but also paragraph 89 et seq.
[138] Statement of Defence, paragraph 106. See also Statement of Defence, paragraphs 4, 42, 93, 97, 526 and 578 and Written Arguments of Urgenda, paragraphs 17 et seq.
[139] Statement of Defence, paragraph 89. See also Statement of Defence, paragraph 413.
[140] Statement of Defence, Chapter 4.5.
[141] ECtHR 28 February 2012, *Kolyadenko et al. v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05.

already been *explicitly* rejected by the Administrative Jurisdiction Division (ABRvS) in the gas extraction case.[142] Urgenda cited the relevant part of the judgment (Statement of Defence, paragraph 393), but the State did not respond to it. Secondly, in Written Explanation 9.4.14, the State tried to establish that '*short, or at least relatively short, periods of time'* would be required. However, such a requirement has *not* been laid down by the ECtHR (we note that the State did not refer to a source for this proposition), nor can such a requirement be inferred from the case law.[143] Thirdly, in Written Explanation 9.4.15, the State argued that in *Taskin et al. v. Turkey*[144] there would be no basis for '*the argument that the requirement of immediacy can also take up a (very) long period of time'*. Urgenda cannot follow that reasoning. After all, it has in fact pointed out that 'the requirement of immediacy', as the State calls it, has no independent meaning (Statement of Defence, paragraph 391). Moreover, the State's assertion is based on an incorrect interpretation of the *Taskin* judgment.[145]

191. The State's assertion in Written Explanation 9.1.4 that '*the nature, duration and seriousness'* of an infringement would be relevant to the adoption of a positive obligation under '*Article 2 and/or Article 8 ECHR'* comes totally unexpected. Moreover, this assertion is incorrect, at least with regard to Article 2 ECHR. Urgenda points out that the State does not lay down this alleged 'requirement' with regard to Article 2 ECHR, nor does it elaborate on it in any other way. In the event of an imminent impairment of the interest protected under Article 8 ECHR, Urgenda acknowledges there is indeed an additional condition (of '*minimum level of severity'*), as the Court of Appeal has also explicitly ruled in legal ground 41.[146] In any event, to the extent that the 'nature, duration and seriousness' would be an important factor, then against the background of the nature and the almost all-encompassing risks that dangerous climate

[142] ABRvS 18 November 2015, ECLI:NL:RVS:2015:3578, *AB* 2016/82, legal ground 39.3.
[143] Statement of Defence, Chapter 4.5.
[144] ECtHR 10 November 2004, *Taskin v. Turkey*, no. 46117/99.
[145] It follows from the judgment that Turkey primarily took the position that Article 8 ECHR would not apply (paragraphs 107-109), partly because: '*In their opinion, the risk referred to by the applicants was hypothetical, since it might materialise only in twenty to fifty years. This was not a serious and imminent risk'* (paragraph 107). In the alternative, Turkey took the view that there had been no infringement of Article 8 of the ECHR (paragraph 110). The ECtHR first examined the question of whether Article 8 ECHR was applicable (paragraphs 111-114) and ruled that Article 8 ECHR was indeed applicable. In the context of this question of applicability - and therefore also in response to the State's argument that Article 8 ECHR would not apply because the risk might materialise only in 20 - 50 years' time - the ECtHR ruled in paragraph 113 (which Urgenda cited in its Statement of Defence, paragraph 388), in short (i) that Article 8 ECHR also applies in the case of environmental pollution that *may* have a negative impact, (ii) this *also* applies if the dangerous effects to which the persons concerned are *likely* to be exposed follow from an impact assessment, and (iii) a different assessment would mean that the positive obligations of a state under Article 8 ECHR 'would be set at naught'.
[146] See also Statement of Defence, paragraph 385.

change entails (as Urgenda has outlined[147] in detail and as the Court of Appeal has also partly established in, among other things, legal grounds 44 and 45), this factor supports the adoption of a positive obligation on the basis of Articles 2 and 8 ECHR, as the Court of Appeal has established.

192. In Written Explanation 12.2.8, the State further argued that '*the risks of climate change for the inhabitants of the Netherlands have not yet manifested*'. However, this argument is of no use to the State. Firstly, the State should have taken this factual position before the courts of fact, which it did not sufficiently do. In its Statement of Defence, Urgenda pointed out that (i) it has repeatedly argued before the courts of fact that climate change is *already* causing increased mortality in the Netherlands and (ii) that the State has *not* disputed this assertion before the courts of fact.[148] Urgenda emphasises that the State *does not* dispute this in cassation either.[149] The fact that the negative effects of climate change will only increase in the near future does not detract at all from the above, including with respect to the finding of the Court of Appeal that without the necessary mitigation measures climate change *will* 'lead' to hundreds of thousands of victims in Western Europe, including the Netherlands in the second half of this century. Secondly, the State failed to recognise that the CO2 emitted so far is already in the atmosphere and therefore already affects the climate. To this extent, 'the damage has partly already been done', even though, given the delay in the climate system, these emissions have not yet fully achieved their full warming effect, with far-reaching negative consequences for the rights protected under Articles 2 and 8 ECHR.[150]

2.4.3 Element III: Further specification not required

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147 On the nature and risks, see, for example, Statement of Defence, Chapters 1.1, 1.3.7, 4.5.2 and 5.3 and Written Arguments of Urgenda, paragraphs 11-34.

148 See Statement of Defence, paragraph 396, with reference to, among other things, Summons, paragraph 38 in combination with 39 and 126, Defence on Appeal, paragraph 8.272 and 11.3.

149 In Written Explanation 12.1.4, the State (only) argued that the judgment of the Court of Appeal did not state in any way that the Court of Appeal has established that the consequences of climate change are already resulting in fatalities in the Netherlands. Since the opinion of the Court of Appeal that there is a real (and immediate) danger is already supported by the large-scale, urgent and latent risks of an *imminent* violation of the interests protected by Articles 2 and 8 ECHR, however, the Court of Appeal did not have to establish this either. Moreover, this does not alter the fact that in view of the arguments between the parties (put forward by Urgenda and not disputed by the State before the courts of fact) *it has been established* that climate change is *already* resulting in fatalities in the Netherlands. In Written Explanation 9.4.7 (indented text), the State responded in that context to an argument put forward by Urgenda in paragraph 137 of its reply. That response has no factual basis. Contrary to what the State argued, Urgenda does not in any way '*suggest*' that these scenarios by the Royal Netherlands Meteorological Institute (KNMI) would imply that the consequences are already occurring. On the other hand, with regard to the consequences which already occur, Urgenda did oppose this in, among other things, Summons, paragraph 38 in combination with 39 and 126 and Defence on Appeal, paragraphs 8.272 and 11.3. However, the State did not respond to these arguments (not before the court of facts, nor in cassation).

150 See also Statement of Defence, paragraphs 106, 397-398 and 526.

193. Once again, the State tried to undermine the legal protection offered by the ECHR by arguing that it was necessary to specify which particular individuals will be affected by dangerous climate change, at which specific moment, and on account of which specific aspect of such climate change. The State referred to '*individuals*', '*specific individuals*' (Written Explanation 8.2.4, 8.2.7, 8.4.1, 9.4.2 and 9.4.3) and '*specific (groups of) individuals*' (Written Explanation 9.5.6 and 13.3), among others. Urgenda has already explained in detail in its Statement of Defence that a further specification is not required on the basis of the case law of the ECtHR. After all, it follows from the case law of the ECtHR that the rights protected by the ECHR *can* also offer protection to a broader group of individuals (an undetermined collective) and even to society as a whole (Statement of Defence, Chapter 4.6).

194. The State tried to eliminate these examples from the ECtHR case law in Written Explanation 9.4.6. For example, in relation to the *Gorovenky and Bugara v. Ukraine*[151] judgment which Urgenda cites in its Statement of Defence, paragraph 403, the State argued that it is general and does not say anything about the specific interpretation of the precision required by the ECtHR. However, the State ignored the fact that the *State* is the one who must substantiate its assertion that a further specification by the Court was required, which it fails to do. On the other hand, Urgenda pointed out that it is clear from the case law of the ECtHR that the ECtHR does not impose such a requirement, at least not in all cases. In this respect, it would like to repeat a part of what the ECtHR held in the relevant *Gorovenky and Bugara v. Ukraine* case, because it so aptly reflects the inaccuracy of the State's argument: [152]

> *'Nonetheless, the Court reiterates that Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (...). It may apply in situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act (see Osman and Paul and Audrey Edwards, both cited above), and in cases raising the obligation to afford general protection to society (see Maiorano and Others v. Italy, no. 28634/06, § 107, 15 December 2009). In the latter circumstances such positive obligation covers a wide range of sectors (see Ciechońska v. Poland, no. 19776/04, §§ 62-63, 14 June 2011) and, in principle, will arise in the context of any activity,*

[151] ECtHR 12 January 2012, *Gorovenky and Bugara v. Ukraine*, no. 36146/05 and 42418/05.
[152] ECtHR 12 January 2012, *Gorovenky and Bugara v. Ukraine*, no. 36146/05 and 42418/05, paragraph 32.

whether public or not, in which the right to life may be at stake (see Öneryıldız v. Turkey [GC], no. 48939/99, § 71, ECHR 2004-XII.'

195. Surely this can only be interpreted as a recognition by the ECtHR that a positive obligation under Article 2 ECHR *can* extend to the protection of an undetermined collective (indeed, even to society as a whole ('*general protection to society*')). This interpretation is further confirmed by the fact that the recent overview of the case law on Article 2 ECHR also explicitly mentions this (as cited by Urgenda in Statement of Defence, paragraph 402, to which the State did not respond).

196. In this context, in Written Explanation 9.2.8 the State referred (somewhat indirectly) to the preliminary advice by Hey & Violi, in which it is noted that human rights '*are typically conceived as norms that protect interests vested in individuals'* and '*the effects of climate change are likely to have collective dimensions (...) which international human right courts and court-like bodies generally have difficulties accommodating.'*[153] However, this does not detract from the above. For both quotations, this preliminary advice refers to an article by Francioni[154] from 2010. In the meantime, however, a trend has become apparent in the case law of the ECtHR, namely: that in view of the evolving interpretation of the ECHR by the Court, in certain circumstances, it has interpreted Convention Articles to offer broader protection than only to specific individuals or persons. It is clear from this case law that the scope of the protection depends on the size of the group of persons whose rights under Articles 2 and 8 ECHR are at stake. For example, in the *Öneryildiz v. Turkey*[155] case, the scope of protection was '*a number of persons*' living near the landfill site where the explosion took place, while in *Cordella and others v. Italy,* the scope of protection was '*the entire population, living in the areas at risk*'.[156] The *Gorovenky case* discussed above (and explicitly included in the overview of the case law on Article 2 ECHR) shows that this obligation may extend to the provision of '*general protection to society*' in *a wide range of sectors*, if circumstances so require. The judgment of the Court of Appeal therefore fits in with the evolving interpretation

[153] E. Hey and F. Violi, *The Hard Work of Regime Interaction: Climate Change and Human Rights*, in: E. Hey et al. (eds.). Communications from the Royal Netherlands Society of International Law (KNVIR) 145. Climate Change Options and Duties under International Law, The Hague: Asser Press 2018, p. 8.

[154] F. Francioni, *International Human Rights in an Environmental Horizon*, in European Journal of International Law, 2010 (Vol. 21-1), p. 41-55.

[155] ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, paragraph 101, and see also footnote 266 of the Statement of Defence.

[156] ECtHR 24 January 2019, *Cordella and others v. Italy*, nos. 54414/13 and 54264/15. Quote taken from the press release issued by the ECtHR on 24 January 2019 on this case (ECHR 029/2019), p. 4. For more details, see also Statement of Defence, paragraph 405.

by the ECtHR. Further, in view of the large-scale and existential danger posed by dangerous climate change, the Court of Appeal's approach is neither incorrect nor incomprehensible.[157]

197. The mere fact that complainants are faced with a dangerous situation that affects (or may affect) the entire population of a country or region does not necessarily prevent the ECtHR from providing the required effective and efficient legal protection against an imminent violation of human rights protected by the ECHR.[158] The fact that the negative consequences of a dangerous climate change have an impact on a very large area (such as the whole of the Netherlands) does not, therefore, preclude an invocation of human rights violations. The ECtHR judgment in *Okyay et al. v. Turkey* is also illustrative in this respect.[159] The complainants in this case lived 250 km away from three old coal-fired power plants that caused a lot of pollution. Turkey argued that the complainants could not prove that they were thereby exposed to a '*serious, specific and imminent*' danger, but that they were *only* '*concerned about their country's environmental problems and wished to live in a healthy environment*' (paragraph 61). However, the ECtHR pointed to an expert report, which showed that the dangerous emissions from these coal-fired power plants '*might extend'* to an area of 2,350 kilometres. The ECtHR continued:

> *'That distance covers the area in which the applicants live and brings into play their right to the protection of their physical integrity, <u>despite the fact that the risk which they run is not as serious, specific and imminent</u> as that run by those living in the immediate vicinity of the plants*.'[160]

198. The State's analysis of different foreign proceedings in Written Explanation 9.4.11 and 9.4.12 does not detract from the above. After all, on the basis of a few separate quotations from a few foreign proceedings, it cannot be assumed that a Dutch court of appeal, in Dutch proceedings and with due observance of Dutch procedural law has given an incorrect ruling. This is certainly not the case when no further information about the legal system in question is given nor on the positions that were taken by the parties in the proceedings. The relevance of these rulings to the present proceedings is also limited. For example, the judgment of the High Court in the first instance in the British Plan B Earth case (Written

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157 Statement of Defence, paragraphs 27 (footnote 14), 35-47, 51, 91-106 and 469; Written Arguments of Urgenda, paragraphs 11-34.
158 See the judgments discussed above, but also e.g. ECtHR 12 July 2005, *Okyay et al. v. Turkey*, no. 36220/97.
159 ECtHR 12 July 2005, *Okyay et al. v. Turkey*, no. 36220/97. Although these proceedings involved a violation of Article 6 ECHR, the judgment of the ECtHR is equally relevant to the present dispute.
160 ECtHR 12 July 2005, *Okyay et al. v. Turkey*, no. 36220/97, paragraph 66 (emphasis added by counsel).

Explanation 9.4.11) is hardly substantiated and from the reasoning given, it appears that it is ambiguous whether the court in question rejects the State's positive obligations under Articles 2 and 8 ECHR as such.[161] Moreover, it appears from the quotation that the claimants in those proceedings acknowledged that '*there is no interference with any identifiable victim's rights*', but that they apparently (only) claimed that such rights had been violated, without specifying *'any interference to which that decision gives rise (...)'*[162]. The situation is therefore fundamentally different from that in this case: what is at stake in this case is *not* an abstract interest, but rather '*the combined very specific interests of many people*', which interests are also specified by Urgenda.[163] The Swiss case (Written Explanation 9.4.12) is not relevant either, as it concerns the *admissibility requirements* of a particular action under Swiss law, which are not relevant to the present proceedings. For example, on appeal it was found that the claim made there was an *actio popularis* which was '*inadmissible'* under Swiss law.[164]

199. The State also argued that Articles 2 and 8 ECHR always require the existence of '*direct and specific (and imminent) impairment of those rights, in which connection the circumstances of the specific (alleged) infringement are relevant, such as the nature, duration and seriousness of the infringement and the physical or psychological effects in the individual case*' (Written Explanation 9.1.4; see also Written Explanation 9.4, passim). In its Statement of Defence (Chapters 4.2-4.3), Urgenda has already extensively outlined why there is no support for the State's suggestion that the ECHR requires the identification, with mathematical precision, of the nature, location and timing of imminent individual rights infringements. Once it has been established that the rights enshrined in the ECHR will be seriously infringed, and if those consequences can be defined, clarified and predicted in general terms, it is not possible to further demand that a collective danger be made more specific at the individual level. In view of the very nature of this collective danger, this would result in a form of denial of justice in principle. Urgenda has already

[161] The summary reasoning of the inadmissibility decision on appeal also leaves room for a human rights approach (but, in the case as put forward by the claimants, finds too much room for a *margin of appreciation* for the legislator who, unlike in the Netherlands, had already enacted a climate act).

[162] All quotations originate from paragraph 49 of the judgment of the Court of Appeal discussed by the State in Written Explanation 9.4.11.

[163] Statement of Defence, paragraph 409. See also Statement of Defence, paragraphs 438 and 442 and Written Arguments of Urgenda, paragraph 79.

[164] See the unofficial translation of the judgment at https://klimaseniorinnen.ch/wp-content/uploads/2019/02/Judgment-FAC-2018-11-28-KlimaSeniorinnen-English.pdf, legal grounds 3.3 and 7.1-7.4.3 and 9. In footnote 171, the State referred to the American case *Juliana et al*. The State did not substantiate this reference at all. It is therefore not clear to Urgenda what point the State tried to make in this respect, also because the case does not relate to the ECtHR. The pages to which the State refers seem to relate to certain admissibility criteria under American law (see in this respect what has been noted above), in which respect the court *rejected* the US appeal (see page 54).

explained in detail why such a collective danger is fundamentally different from a general environmental interest (or a '*general right to a clean and quiet environment'* (Written Explanation 9.4.4)), the latter which is not protected as such by the ECHR (see, for example, Statement of Defence, paragraphs 332 and 409). Moreover, Urgenda has extensively discussed the concrete dangers, and in particular the danger of sea level rise, to which a large part of the Dutch population is likely to be exposed before the end of this century, in its Written Arguments (paragraphs 11-34: 'The consequences of climate change for the Netherlands'). On this basis, therefore, there is no question of a '*(very) long period*' until the realisation of these dangers (as the State claims in Written Explanation 9.4.15). It is difficult to see how these consequences, as outlined by Urgenda, could be described in a more concrete and immediate manner. Nor is it clear why, in view of the established threat and the concrete nature of these dangers at the collective level, the ECHR would require a further, individualised form of concretisation in this area.

2.4.4 Element IV: Precautionary principle

200. In its Written Explanation, the State made further submissions about the precautionary principle (Written Explanations 8.3.11-8.3.12, 9.4.10 and 9.5). Before Urgenda elaborates on these arguments, it would like to reiterate that both of these complaints lack any factual basis. Contrary to ground for cassation 2.5, the Court of Appeal did *not* rule that (in short) the precautionary principle meant that it was not necessary to satisfy the requirement of real and immediate danger (Statement of Defence, paragraph 419). Further, contrary to ground for cassation 8.6, the Court of Appeal did *not* use the precautionary principle as an independent basis for the obligations arising from Articles 2 and 8 ECHR (Statement of Defence, paragraph 571). To that extent, the State's further submissions on the precautionary principle are of no avail to it. Nevertheless, Urgenda makes the following comments (superfluously) in this respect.

201. Urgenda has explained the nature and background of the precautionary principle, and its rationale (Statement of Defence, paragraphs 414-417). Urgenda has explained the Court of Appeal's ruling on this question (Statement of Defence, paragraph 418) and has pointed out that the complaints of the State (therefore) lack any factual basis (Statement of Defence, paragraphs 419 and 517).

202. The State did not respond to that. Instead, the State argued (i) that there is such a lack of consensus on the precautionary principle that it seems '*too*

early' to assume that the precautionary principle is relevant in light of Articles 2 and 8 ECHR (Written Explanation 9.5.2) and (ii) that, in short, the *Tătar v. Romania*[165] judgment cannot constitute a basis for assuming an independent obligation, based on the precautionary principle, such as that referred to by the Court of Appeal in legal ground 73 (Written Explanation 9.5.3-9.5.6).[166]

203. By arguing that the precautionary principle is possibly irrelevant in the context of the ECHR, the State disregards the fact that the ECtHR in the *Tătar v. Romania* in fact emphasised the importance of the precautionary principle, as the Council of Europe explicitly stated in its *Manual on Human Rights and the Environment*.[167] Urgenda also points out the following point made by Peeters (to which the State refers in Written Explanation 9.5.3):

> '4. *With this judgment, the precautionary principle, as an environmental principle, has already penetrated the case law of the ECtHR, at least with regard to environmental issues, without any codification in the ECHR. The ECtHR cites many documents and developments in support of the use of the precautionary principle. The Court of Justice refers to the Maastricht Treaty, which added the precautionary principle to the EC Treaty, now laid down in Article 174, but - unlike the Rio Declaration - without a definition of the principle. The Court of Justice states that, with the Maastricht Treaty, the principle of a philosophical standard has evolved into a legal standard (see paragraph 69(h)).*'[168]

According to Barkhuysen and Van Emmerik, in its judgment in *Tătar v. Romania*, the ECtHR explicitly derives the precautionary principle from the right to privacy, as guaranteed by Article 8 ECHR.[169]

204. The Court of Appeal emphasised the importance of the precautionary principle by referring to relevant national and international standards that

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165 ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01.

166 In Written Explanation 8.3.11, the State further argued that it would follow from *Tătar v. Romania* that the mere lack of (complete) scientific certainty '*in the event of a threat of serious and irreversible environmental damage*' should not always prevent a breach of Article 8 ECHR (see also Written Explanation 9.5.3). By doing so, the State is giving too limited an interpretation to that judgment, since it has not ruled that this would only relate to 'serious and irreversible' environmental damage.

167 See Council of Europe, Manual on Human Rights and the Environment 2012, p. 50: '*24. In this respect it is notable that the Court emphasised the importance of the precautionary principle (which had been established for the first time by the Rio Declaration), whose purpose was to secure a high level of protection for the health and safety of consumers and the environment in all the activities of the Community*.' (emphasis added by counsel)

168 M. Peeters, annotation to ECtHR 27 January 2009, 67021/01, EHCR 2009/40 (*Tătar v. Romania*).

169 T. Barkhuysen & M.L. Van Emmerik, *AB* 2009, 285, annotation to ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01.

contain that principle, highlighting the solid foundation of the principle. For example, the Court of Appeal quotes Principle 15 from the Rio Declaration of 1992, but also the 'precautionary passage' from the judgment of the International Court of Justice in *Gabcikovo-Nagymaros*. In addition, the Court of Appeal refers to the codification in the EC Treaty and the use by the EU Court of Justice of the precautionary principle.[170] The precautionary principle is therefore very important in Articles 2 and 8 ECHR.[171]

205. Urgenda would also like to point out that in national case law there is an increasing tendency to apply the precautionary principle as a standard, either explicitly or implicitly, through the application of the due care requirement and the requirement of sound substantiation.[172]

206. With regard to the second argument of the State (discussed in paragraph 202 above), the Court of Appeal *did not* apply the precautionary principle as an independent basis (and therefore did not do so on the basis of the *Tătar v. Romania*[173] judgment). In the judgment under appeal, the Court of Appeal used the precautionary principle, as one of the legal principles that according to Emaus[174] underlie the ECHR system, as a further basis (among others) for concretising the State's obligations under Articles 2 and 8 ECHR in this specific case (Statement of Defence, paragraph 418). After an extensive discussion of literature and case law on the precautionary principle, Emaus thus rightly wrote the following about the way in which the Court of Appeal applied the precautionary principle:

> '*In the* Climate case, *if we apply the definition of Shelton, there is (potentially) widespread damage among many and a (in the words of the Court of Appeal) "real threat of danger against which action must be taken". In that light, it is not surprising that the precautionary principle is part of the reasoning of the Court of Appeal of The Hague for its decision. (...) According to the Court of Appeal, it follows from the precautionary principle that the uncertainties do not release the State from its obligations to take further measures. Indeed, on the basis of the precautionary principle, measures should be chosen that are "as safe as possible", according to the Court of*

[170] ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01, paragraph 69-70.
[171] See also Statement of Defence, Chapter 4.8 (with extensive literature references), as well as J.M. Emaus, 'Subsidiariteit, preventie en voorzorg', *AV&S* 2019/11, p. 61-64.
[172] T. Barkhuysen & F. Onrust, *De betekenis van het precautionary principle voor de Nederlandse (milieu)rechtspraktijk*, in: M.N. Boeve & R. Uylenburg (eds.), Kansen in het Omgevingsrecht, Amsterdam: Europa Law Publishing 2010, p. 70; ABRvS 28 January 1999, *M en R* 1999/65; ABRvS 29 January 2003, *AB* 2003/252; ABRvS 28 July 2004, *AB* 2005/4.
[173] ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01.
[174] J.M. Emaus, 'Subsidiariteit, preventie en voorzorg', *AV&S* 2019/11, p. 56.

Appeal.'[175]

207. In view of the nature and uniqueness of the dangers of climate change, the Court of Appeal, as the State disregarded, has quite rightly given weight to the precautionary principle and (i) left residual uncertainties with regards causality at the expense of the State, (ii) did not impose a specification requirement that would prejudice effective legal protection against the certain dangers for the current generation of residents, and (iii) considered such a real and immediate danger to be present that the State has a positive obligation to prevent it, by taking concrete short-term mitigation measures that guarantee that the State actually offers protection.

2.4.5 Element V: Knowledge requirement

208. Although the State did not state this in so many words, it seems to suggest that the knowledge requirement is not met.[176] This suggestion cannot be taken seriously, particularly given Urgenda's submissions in Statement of Defence, Chapter 4.7. Moreover, the State tried to mislead the Supreme Court with regard to '*the necessary knowledge of a real and immediate danger to life*', in Written Explanation 8.2.4, in its discussion of the *Smaltini v. Italy* case. This submission was misleading because the claim in that case was fundamentally different to the present case.[177] The ECtHR therefore explicitly noted in that case (at paragraph 49) that it did not concern an alleged violation of the positive obligation to protect rights protected by Article 2 ECHR, contrary to the cases of *Öneryildiz*[178], *Budayeva*[179] *and Kolyadenko*[180] cases which are relevant in the present case. The ECtHR then ruled in paragraph 50:

> *'Sous cet angle, à la différence des affaires citées ci-dessus, le grief, tel que formulé par la requérante, ne met pas en cause le volet substantiel de l'article 2 de la Convention.*'

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175 J.M. Emaus, 'Subsidiariteit, preventie en voorzorg', *AV&S* 2019/11, p. 63 (emphasis added by counsel).
176 In this context, see Written Explanation 9.4.2, 9.4.3, 9.4.5 and 8.2.4.
177 In short, the case concerned a woman who had brought proceedings against a manager of a factory near her home, accusing the factory of causing her leukaemia through its emissions. However, on the basis of an expert report, the (national) court hearing the case ruled that the causal link had not been established. The woman then went to the ECtHR, arguing that there had been a violation of Article 2 ECHR, because in her opinion the causal link had been established.
178 ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, see for example Statement of Defence, paragraphs 39, 384, 387, 413 and 512.
179 ECtHR 20 March 2008, *Budayeva et al. v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, see for example Statement of Defence, paragraphs 382, 384, 386, 391, 403, 510 and 512.
180 ECtHR 28 February 2012, *Kolyadenko et al. v Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, see for example Statement of Defence, paragraphs 387 and 391.

209. In this case, the knowledge element in fact reinforces the existence of a positive obligation of the state to mitigate. This is the case because the State knowledge of: the specific dangers and risks of climate change; the fact that that all emissions contribute to climate change; the responsibility of the Netherlands; and that if the Netherlands does not take its responsibility, other countries will not do so either.

2.5 The intergenerational and extraterritorial dimension of the ECHR in a collective action

210. Urgenda observes that the State did not oppose its argumentation as set in paragraph vi, 101 and following and Chapter 4.10 of the Statement of Defence, that intergenerational interests ought to be embedded in the interpretation and application of Articles 1, 2 and 8 ECHR, especially in light of Article 3:305a DCC in conjunction with the Aarhus Convention (which precisely also serves to protect the interests of future generations). In doing so, the State apparently implicitly returns to its reference in the first instance on this matter. This is important, because extensive international literature and case law explicitly recognise that intergenerational interests need to be legally protected, either in a human rights approach or in an approach based on national liability law. Integrating the interests of future generations provides a full picture of the most existential threats to the Netherlands, particularly in connection with rising sea levels. As explained again in the oral arguments in cassation, the risks are indeed *apocalyptic*, as the State argued in Written Explanation 1.7, with which it makes the inappropriate suggestion that Urgenda exaggerates, while it endorses Urgenda's arguments. When looking at the scientific consensus, it is true that while the most serious direct consequences of insufficient reduction for the Netherlands (such as a rise in sea level that can no longer be combatted) in this century and for the current generation of Dutch people are still a *risk* that is highly dependent on tipping points, the certainty of this for future generations is growing very strongly.

211. In Written Explanation 9.3, however, the State does argue that the ECHR does not allow the taking into account of the *extraterritorial* effects of the Dutch emissions. According to the State the only relevant connection would be "*between emissions in the Netherlands and the impact on specific human rights in Western Europe',* but according to the State the ECHR does not give weight to such impacts in other parties to the convention. Urgenda refers to its submissions on this, in particular in Chapters 3.6 and 4.9 of the Statement of Defence. Urgenda observes that, also in this context, the State (i) disregards the fact that the Court of Appeal,

of course, envisages the dangers for the current generation of Dutch residents, (ii) ignores the essential dimension of Dutch right to collective action in Article 3:305a DCC (in which extraterritorial interests can and must be accommodated) and, apart from that, (iii) has insufficient regard for the broader international development of law in this context. See, for example, Buruma, who recognises the deficit of a purely national, territorial approach, but sees a role for the national courts in this respect[181]:

> *'In view of the problems of climate change and refugee care, I cannot deny that territorial sovereignty no longer seems to be the best way of calling states to account for their obligations. However, if we assume erga omnes obligations, this means that compliance with agreements relating to common concerns - certainly with a view to burden-sharing - requires authoritative decisions to be taken that take precedence over political, national interest considerations. In view of this, it is not surprising, in the absence of international enforcement bodies, that (national) courts should be given a special role in this respect.'*

The sources mentioned in Written Explanation 9.3.11 refer to the approach not taken by the Court of Appeal to an obligation to take measures in conjunction with other ECHR states. Moreover, in so far as the sources dispute that the interpretation and application of human rights to a global problem such as climate change may be entirely abstracted from the consequences of failure to take the necessary national mitigation measures, these are refuted by the sources already cited in the Statement of Defence. Urgenda will briefly discuss the substantial defence put forward in Written Explanation 9.3.9-9.3.10. In it, the State discussed the Advisory Opinion of the IACtHR.

212. In the place cited above, the State wrongly argued that the Advisory Opinion has no meaning because it was based on the right to a healthy living environment provided for in Article 11 of the San Salvador Protocol and because it requires a monocausal or causal link with a human rights violation abroad.

213. The first argument is incorrect, because the IACtHR has precisely explained the concept of jurisdiction and, in doing so, has given a new interpretation of 'effective control'. The fact that the explanation in a general sense relates to the concept of jurisdiction also follows from the question put by Colombia. It is '*a request made by the State of Colombia concerning state obligations in relation to the environment in the context*

[181] Y. Buruma, 'Buiten de geografische grenzen', *NJB* 2019/1264, p. 1602.

of the protection and guarantee of the rights to life and to personal integrity recognised in Articles 4 and 5 of the American Convention, in relation to Articles 1(1) and 2 of said treaty.' The conclusion of the text in Spanish contains no reference to the San Salvador Protocol.

214. The second point made by the State is that, according to the Advisory Opinion, a direct causal link would also be necessary (as in the case of classic environmental issues) and that, according to the State, this is not the case. In so doing, the State ignored (i) the two sources cited by Urgenda, which argue that the Advisory Opinion also applies to the issue of climate change and (ii) the fact that the Advisory Opinion in paragraphs 47, 49, 54, 126, 134 (and the footnotes to paragraph 67) deals very emphatically and in principle with climate change and the texts relevant to it, so that it is far from obvious that the IACtHR would implement such a strict (mono) causality approach. In Written Explanation 9.3.10, the State did not indicate in which cases the IACtHR would impose a (similar) causality requirement.

215. With regard to the international cooperation obligation, the State noted that although it exists, it cannot be extended to an obligation to take reduction measures by an individual State, partly with a view to the interests of foreigners. In support of this argument, reference is made to two ECtHR rulings in which multiple Member States had contributed to an infringement of a right protected by the ECHR but those Member States were only held responsible for their share of the actions that had led to the infringement. In doing so, the State overlooks the fact that it is precisely the global problem of climate change that calls for an evolving interpretation of concepts and obligations, and the Court of Appeal has not relied on the concept of State Parties to the ECHR ‘acting in concert’.

3 CONTENT OF POSITIVE OBLIGATION; MARGIN OF APPRECIATION/DISCRETION, PROPORTIONALITY AND FAIR BALANCE HAVE BEEN RESPECTED

3.1 Mitigation measures and other measures

216. In Written Explanation 11, the State argued that the Court of Appeal wrongly based an emission reduction order requiring mitigation on the positive obligations arising from Articles 2 and 8 ECHR. The State based this argument (see Written Explanation 11.2), among other things, on the assertion that a 25% emission reduction by 2020 has[182] *'no (relevant) effect'* on the risks to which Dutch residents are exposed.

217. This reasoning not only fails to recognise that *any* additional emission reduction has a certain causal effect[183], but also that Urgenda's interest (undisputed in the ground for cassation[184]) in ending the unlawful climate policy of the State is broader than just the (scientific) question of causality raised by the State.[185] Moreover, the above reasoning fundamentally ignores the fact that dangerous climate change is caused by cumulative, collaborative causation. As Urgenda has explained in detail in its Statement of Defence[186], the latter means that the 'relevant effects' of *any* reduction effort, when viewed purely in isolation, can be dismissed as insignificant.

218. However, reduction efforts do not take place in a vacuum. The actual necessity and the relevant effects of the emission reduction order issued by the Court of Appeal therefore lie in no small measure in the behavioural, (geo)political (empirical) fact that the effective combating of climate change at an international level requires that States individually fulfil their partial responsibility. After all, the State can only make a credible contribution to this international decision-making process if it *does not* hide behind the (narrowly interpreted) 'causally limited role' of its own emission reductions. Against this background, it cannot be accepted that this 'causally limited role' would prevent the adoption of positive emission reduction commitments under Articles 2 and 8 ECHR. This would also mean that, as Spier says, '*we should take for granted any avoidable*

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182 Written Explanation 11.2.
183 See also Written Arguments of Urgenda, paragraph 58.
184 See Statement of Defence, Chapter 3.4.
185 T.R. Bleeker, 'Voldoende belang in collectieve acties: driemaal artikel 3:303 BW', *NTBR* 2018/20, p. 148-149. See also Statement of Defence, paragraph 322-323.
186 See Statement of Defence, Chapter 2.7.

disaster (and more likely, apocalyptic events) because the contribution of the vast majority of players is limited.'[187]

219. In Written Explanation 11.3, the State argued that the Court of Appeal, in the context of review for compliance with Articles 2 and 8 ECHR, did not sufficiently consider the possibility that the positive obligations arising from the above-mentioned provisions can be fulfilled by taking adaptation measures.

220. However, Written Explanation 11.3 does not dispute the essence of the considerations of the Court of Appeal in legal ground 59. The essence is that mitigation and adaptation are 'complementary strategies', from which it already follows logically that adaptation measures can never be successfully submitted to justify a lack of mitigation action. For this reason it is also difficult to see why the assertion that adaptation measures are '*appropriate measures'* to meet the obligations arising from Articles 2 and 8 ECHR (as argued in Written Explanation 11.3.7) could in any way detract from the actual necessity established by the Court of Appeal to also come up with adequate mitigation measures by 2020. The view that States '*have no obligation to limit emissions, but to take all kinds of relatively trivial measures once the misery has arisen'* is therefore rightly rejected in the literature.[188]

221. The same error of reasoning also renders invalid Written Explanation 11.4, in which climate financing - without contesting its highly complementary nature[189] - was submitted in order to undermine the Court of Appeal's judgment focused on necessary mitigation measures. However, as explained above, it is difficult to see how taking measures that are purely complementary to mitigation could alter the correctness of that judgment.

3.2 Margin of appreciation / discretion

222. In Written Explanation 12, the State argues that the Court of Appeal has wrongfully rejected its reliance on a broad margin of appreciation. This argument cannot be accepted for several reasons.

223. Firstly, as recognised by the State in Written Explanation 12.1.8, the margin of appreciation doctrine (as developed by the ECtHR) as such is not intended to regulate the internal constitutional relations of the different

[187] J. Spier, Het preadvies van K. Article & M. Scheltema, *NJB* 7-6-2019/22, p. 1609.
[188] J. Spier, Het preadvies van K. Article & M. Scheltema, *NJB* 2019/22, p. 1608.
[189] For example, see Written Explanation 11.4.4.

Member States. This means that the ECtHR case law cited by the State referring to the margin of appreciation[190] cannot simply be transposed to the relationship between the legislature and the executive on the one hand and the national court on the other. The fact that in practice the Dutch courts regularly grant a certain degree of discretion to the legislature and executive does not change this.[191] Urgenda further refers to its Statement of Defence and the differences emphasised there with many other jurisdictions in Europe, as shown in the WODC report which it discussed in that context. This will not be discussed by Urgenda any further now.

224. Much more important, after all, is the fact that the Court of Appeal, in its opinion that an emission reduction of at least 25% should be achieved by 2020, has indeed respected a margin of appreciation and discretion on the part of the State. The State's argument that this is not the case is based on the incorrect assertion that the Court of Appeal has merely allowed discretion with regard to the choice of reduction measures to be taken (the '*choice of means*') and therefore not with regard to the adoption of the State's reduction obligation (and in particular with regard to the reduction pathway and rate) as such (see for example Written Explanation 12.2.1, 12.2.6-12.2.7, 12.2.11).

225. This argument of the State lacks any factual basis and is based on an unacceptably limited interpretation of the layered reasoning of the Court of Appeal. As explained in detail in the Statement of Defence[192], the 25% reduction order imposed is itself an expression of judicial restraint. In view of the many different reduction pathways that have been discussed in these proceedings, the Court of Appeal has ruled that a reduction of 25% by 2020 is at least necessary for the State to be able to credibly maintain its commitment to the 2℃ objective, in which respect the Court of Appeal takes into account as a primary consideration that this policy already fails to limit the warming to 1.5 ℃. Therefore, the Court of Appeal has not ruled that the State '*may not choose a different reduction pathway than that advocated by Urgenda in these proceedings*' (Written Explanation 12.2.14), but only that all sufficiently real and credible reduction pathways are achieved through a minimum reduction of 25% by the end of 2020. NB: this is emphatically not about the mere '*desirability*' of reducing emission as early as possible (Written Explanation 12.2.16), but about a factual conclusion that the Court of Appeal bases on the reports of UNEP as cited in legal grounds 2.29-2.31 of the judgment of the

[190] For example, *Greenpeace et al. v. Germany*, see Written Explanation 12.2.7.
[191] See also Statement of Defence, paragraph 501, as well as the many sources cited above.
[192] Statement of Defence, paragraph 128 et seq. See also Statement of Defence, Chapter 6.2.3 and Chapter 7 (in particular paragraphs 575 et seq. and 603-604).

District Court, as well as on the findings of PBL in the report (Exhibit 77). This also applies to the 'even distribution' of the reduction effort emphasised by the Court of Appeal.

226. In setting this lower limit of 25%, the Court of Appeal also paid particular attention to the fact that, until 2011, the State *itself* assumed its own 30% reduction target in order to remain on '*a credible trajectory*'[193] and that, while ongoing advances in climate science called for more reduction efforts, the State revised its reduction targets downwards without any relevant substantiation. The fact that historically the reduction ambitions of the State have been proven to be unreliable has of course also been taken into account by the Court of Appeal in its opinion that the alternative, disproportionately forward-looking reduction scenarios of the State lacks the above-mentioned credibility (for an example of such a scenario, see, the State's Written Explanation 12.2.9, in which reference is made to reduction pathways that assume a significant '*acceleration* of the reduction effort in the period after 2020').

227. The question facing the judges in this case is therefore not whether the 2°C objective 'could be met'[194] if the State's emission reductions have not yet reached an adequate level by 2020, but rather whether the State's alternative reduction pathways are sufficiently realistic, given the State's historical procrastination behaviour and the increasingly far-reaching nature of the measures required if an acceleration is to be initiated after 2020. The Court of Appeal has rightly and not incomprehensibly ruled that these alternative reduction pathways are in reality insufficiently realistic and credible, and that a 25% reduction in emissions by 2020 is the minimum requirement.

228. In this respect, the Court of Appeal also took into account the State's own commitment to a reduction target of at least 25-40% by 2020. The repeated endorsement in national and international and national context confirm the necessity of that target. As various commentators on the rulings in this case have emphasised,[195] the State's own commitment to this target already has had the effect of restricting its remaining discretionary power. This power is further more restricted by such commitment

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193 See the quote from the Dutch Minister of Housing, Spatial Planning and the Environment in legal ground 52 of the judgment of the Court of Appeal.

194 See the reference to paragraph 5.27 of the Statement of Appeal in Written Explanation 12.2.10. See also Written Explanation 12.2.19: '(...) even *at a (initially) slower rate of reduction, there [are] still 'options' [left] in order to achieve the final target, although these will become more limited*'.'

195 For example, see M.A. Loth, 'De Rechtbank Den Haag heeft gesproken…', *AV&S* 2015/24.

because Dutch climate policy '*is in no way enshrined in law and therefore lacks democratic legitimacy'* (as Urgenda submitted in oral arguments).[196]

229. In addition, the Court of Appeal has taken into account the scientific necessity of reducing emissions *as quickly as possible*, as evidenced by its correct consideration that '*every megaton of CO2 released into the atmosphere in the short term contributes to the rise in temperature'* (legal ground 47, see 179 above). It follows from this (as well as the notion of the carbon budget still available related to the above consideration) that a later acceleration of emission reductions to a certain level of reduction has by no means the same effect as an immediate reduction of emissions. The State's argument that '*such an acceleration will achieve the same effect as if part of the reduction effort had already taken place before 2020'* (Written Explanation 12.2.9) is therefore manifestly incorrect, as Urgenda has already demonstrated in detail in its Statement of Defence.[197]

230. On the basis of all this, the Court of Appeal rightly and adequately argued that an emission reduction of 25% by 2020 constitutes the absolute minimum limit of any credible and acceptable reduction pathway, and therefore also the lower limit of a discretion of the State in this respect.[198] Sanderink wrote the following about this:

> '*In my opinion, it is difficult to see why actions (measures) that reduce emissions by at least 25% by the end of 2020 cannot reasonably be required of the State. (...) The Court of Appeal (like the District Court) has limited the order to a 25% reduction. As a result, the order is limited to the lower limit of what according to experts is at least necessary to avert the real and immediate danger of infringement of the interests protected by Articles 2 and 8 (...) ECHR. By assuming a 2 °C objective (instead of 1.5 °C) in its assessment, the Court of Appeal applies the absolute lower limit of what is objectively necessary here as well. In my opinion, the 'margin of appreciation' of the State cannot go so far that it is free to refrain from taking measures which, according to the most recent scientific knowledge, are at least necessary to protect the interests protected by Article 2 and Article 8 ECHR.'*[199]

231. The issue of cost-effectiveness raised by the State in Written Explanation 12.2.17 (as well as again, with the same references, in Written

[196] Written Arguments of Urgenda, paragraph 68.
[197] Statement of Defence, Chapter 1.3.6.
[198] See Statement of Defence, paragraph 520.
[199] Sanderink, 'Positieve verplichtingen als redders van het klimaat', *TvCR* 2019/1, p. 68-69.

Explanation 13) cannot affect the above for different reasons. First of all, the purely cost-oriented policy approach of the State as mentioned above disregards the fact that in this case, as the Court of Appeal has acknowledged (and as also pointed out by a question of the President of the Civil Division of the Supreme Court during the oral arguments), the unacceptability and acceptability of the *risks* of further procrastination behaviour by the State is an important issue. In view of the seriousness of the consequences of dangerous climate change for the Netherlands, there is are no grounds on which to base to proposition that considerations of cost effectiveness could justify taking a reduction pathway that even further increases these risks.

232. Moreover, it is also incorrect that delaying reduction efforts leads to more cost-effective measures. The Court of Appeal has expressly rejected the State's argument, and this rejection is comprehensible and adequately substantiated. Urgenda has already explained this in detail in the appeal.[200] The State seemed to recognise this as well, since in Written Explanation 1.11 it noted that the reduction time required by Urgenda is *'not necessarily'* more cost-effective. The State's arguments that would indicate the opposite merely show that reduction efforts will involve costs before 2020 (which is not disputed), but do not compare them with reduction pathways that will necessarily have to accelerate sharply after 2020. The reports to which the State refers, in no way, indicate that such reduction pathways would be more cost-effective, partly in view of the costs of the additional risks they entail.

233. This is not surprising: Urgenda has already extensively explained the cost ineffectiveness of delayed mitigation efforts and substantiated it with reports from UNEP and the IPCC.[201] The State did not address this issue at all in its appeal plea.[202]

3.3 Proportionality and fair balance

234. In Written Explanation 13.1, the State argued that the Court of Appeal wrongly failed to perform a (known) proportionality test and a (known) fair balance test. However, in its Statement of Defence (see Chapter 6.2.2), Urgenda extensively and undisputedly stated that the fair balance test is only relevant in the context of Article 8 ECHR and that, given the

[200] Defence on Appeal, paragraphs 6.25-6.35; 6.51-6.73; 6.102; 7.33; 7.42; 8.202-8.220.
[201] See, for example, Defence on Appeal, paragraphs 627-6.31. See also Statement of Defence, paragraph 530.
[202] See Statement of Defence, paragraph 530, in which Urgenda has already observed that the PBL report discussed by the State in paragraph 4.59 of its appeal plea (referred to again in this context in Written Explanation 12.2.17) does not in any way address the cost-effectiveness of reduction efforts for 2020.

independently supporting nature of the basis of Article 2 ECHR, the State therefore has no interest in its complaints about the alleged failure of the Court of Appeal to (explicitly) carry out a fair balance test. As was also discussed during the hearing, Article 2 ECHR imposes a different test for non-compliance, namely whether the measures are 'impossible or disproportionate' for the State to comply with.

235. In addition, as already explained above and in Chapter 6.2.3 of the Statement of Defence, the Court of Appeal did *manifestly* perform a proportionality test. As explained in detail above, contrary to the argument of the State in Written Explanation 13.2, the Court of Appeal has recognised that the importance of granting the emission reduction order demanded by Urgenda goes beyond the 'extremely minor' causal effect of it as stated by the State. In its proportionality test, the Court of Appeal therefore rightly and not incomprehensibly ruled that the seriousness of the risks of dangerous climate change and the importance of the State assuming its share responsibility make a reduction of 25% by 2020 a minimum requirement.

236. In doing so, the Court of Appeal also took into account the fact that reduction efforts involve social costs. In legal ground 71, the Court of Appeal explicitly ruled (rightly and not incomprehensibly) that *postponing* the reduction efforts until after 2020 will necessarily lead to '*considerably more far-reaching measures'*, with all the disproportionate social costs and disruption that this entails.[203] The example of the State in Written Explanation 13.2 is a striking illustration of the correctness of this consideration by the Court of Appeal: the costs of closing coal-fired power plants would have been considerably lower if the State had already followed its own climate ambitions and taken measures over the past decade.

237. Insofar as Written Explanation 13 argued that the Court of Appeal did not carry out a proportionality test, it therefore fails because it has no factual basis, for the reasons outlined. For the rest, Urgenda refers to its Statement of Defence.

[203] See, for example, Statement of Defence, paragraph 249 et seq.

4 INADMISSIBLE ORDER TO ENACT LEGISLATION

238. The State's ground for cassation 9 (with all of its subsections) is premised on the allegation that the Court of Appeal has issued a (disguised) order to enact legislation (Written Explanation 14.1 and following) The passages from several publications reproduced in Written Explanation 14.3.14 also deal almost exclusively with the question of whether the reduction order issued by the District Court and the Court of Appeal concerns an order to enact legislation that is not permitted under Dutch constitutional law. According to the State, the fact that the reduction order invites political considerations supports the view that it is an order to enact legislation (Written arguments of the State, paragraph 5.13).

4.1 The Court has rightly ruled that the State did not sufficiently argue that the reduction order in fact amounts to an inadmissible order to enact legislation

239. In Statement of Defence, paragraph 593 and following, Urgenda explained that, as the Court of Appeal has ruled, the State has not demonstrated that the claimed CO2 reduction may only be achieved by legislative measures. The State's Written Explanation 14.3.4-14.3.8 attempts to mask the deficiency in its arguments, by pointing to arguments which it has made in a substantially different context in its Statement of Appeal (related to cost-efficiency). In that context, it was mainly a question of substantiating the point of view that there was a '*political question'* (both in ground 28 and in the appeal plea). In its appeal, the State did not put forward any known ground to the effect that legislation is (to a large extent) necessary to comply with the reduction order.

240. From the first instance proceedings, Urgenda has referred to non-legislative measures that the State can take to achieve the reduction order on the basis of the Dutch Environmental Act (*Wet algemene bepalingen omgevingsrecht*, or Wabo) and the State's influence on the energy supply, including by providing subsidies.[204] In its reply, the State argued that Urgenda's claims '*require the enactment and/or amendment of formal and/or substantive legislation'*, but did not substantiate or explain this argument at any point.[205] In its Reply at first instance, Urgenda referred to the Energy Agreement, which was explicitly used by the State as an

[204] See the Initiating Summons of Urgenda, paragraphs 294-295, 296-300 and 301-307.
[205] Statement of Defence on the part of the State, paragraph 12.5.

alternative to legislation.[206] Urgenda added a number of other examples of non-legislative measures, such as: the withdrawal of CO2 rights from the market; agreements between the government and individual energy companies; the closure of coal-fired power plants by transferring the power plants to a single company ('bad-bank' construction)[207]; and the tightening of environmental regulations.[208] Following Urgenda's Reply, the State did not come back to this point; in the Rejoinder, the State did not raise any objections against these examples. On the contrary, in its oral arguments in the first instance, the State '*confirmed to'* the court '*that it is still possible for the Netherlands to meet the target of 30% by 2020*' (legal ground 4.70 of the judgment of the District Court, undisputed on appeal).

241. In its Statement of Appeal, the State then shifted the debate by arguing that its essential concern is that the reduction order intervenes too much in political/administrative considerations. This is the essence of ground 28. When the State elsewhere refers in passing to the doctrine of the order to enact legislation, this is based on the (incorrect) assumption that the District Court ordered the State to establish adequate legislation and regulations (Statement of Appeal, paragraph 14.173). In its Defence on Appeal, Urgenda explained that there is no such need for legislation.[209] In doing so, Urgenda indicated that the execution of the order is entirely at the discretion of the State,[210] but Urgenda once again put forward the non-legislative measures mentioned above, and others such as: the possibility of agreements with industry to reduce energy consumption; subsidising renewable energy; ending subsidises for coal-fired power plants for the co-firing of biomass; and the influence that the Minister can exert without taking any legal measures, including (but not limited to).

242. Contrary to what it has suggested in Written Explanation 14.3.6, the State has not addressed this issue in any detail. The State also did not give a concrete answer to the question posed by the Court of Appeal prior to the

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206 Reply, paragraphs 89, 90 and 561. The fact that the State explicitly considered the Energy Agreement as an alternative to the legislative instruments can be seen, for example, in the letter from Minister Kamp to the Dutch House of Representatives dated 20 December 2013 (Exhibit 54), in which the Minister wrote that the Netherlands has opted for an 'alternative approach' for the implementation of the European Energy Directive (2012/27/EU).

207 Whereas Written Explanation 14.3.7, conclusion, and Written Arguments of the State, paragraph 6.5 argued that state aid and competition law would oppose this, it concerns an inadmissible new point of law, for which the State did not provide any sources to a corresponding (known) argument before the courts of fact. Moreover, competition law in this area is in full development.

208 Reply, paragraphs 92 and 564. The examples of Urgenda were taken from the letter from the Minister of Economic Affairs of July 2014 (Exhibit 56) in which he himself mentions these measures as an alternative to legislation.

209 Defence on Appeal, paragraph 4.21-30.

210 Defence on Appeal, p. 52, footnote 37.

oral arguments as to what measures the State will take in response to the statement of its own Secretary for Infrastructure and the Environment that a 25% reduction in 2020 is expected to be achieved '*with the achievement of the objectives of the Energy Agreement of 14% renewable energy and 100 PJ energy savings in 2020'*. In Written Arguments on Appeal, paragraphs 2.19 and following (and all other sources cited in Written Explanation, footnote 319), the State's position is *exclusively* that the reduction order has not respected the political/administrative discretion.[211]

243. Against this background, it is certainly understandable why the Court of Appeal reached the opinion that the State has failed to adequately refute the argument that there are many ways in which to comply with the order and achieve the result intended without having to enact formal or substantive legislation. The State's response to certain of the suggested measures has include: that they are cost-inefficient; they will only have a limited effect on emissions; they will interfere with the primacy of the democratically legitimised legislator; or they are simply very politically sensitive. But nowhere - and this is what ground for cassation 9 is all about - has the State contested Urgenda's arguments, with reasons, that compliance with the reduction order is (to a large extent) impossible without enacting legislation and that therefore constitutes a (substantive) order to enact legislation. In Written Explanation 14.38 the State blames Urgenda for failing to make a specific calculation of all the available non-legislative measures. This is however wrong. It was up to the State to develop sufficiently substantiated arguments and to put forward manifest grounds that the reduction order amounts to a (substantive) order to enact legislation. The State failed to do this. It was therefore sufficient for the Court of Appeal to refer to the 'climate agreement' (that the State closed with business and civil society) as an *example* of a measure which, at least to a large extent, does not require legislation. In reality, there is still a great deal that can be done without legislative measures, as illustrated by Urgenda's 40 Point Plan,[212] which was mentioned in oral arguments.

244. Given this state of affairs, ground for cassation 9 fails. This is *a fortiori* the case because, as Urgenda stated in its oral arguments, the scope that the Supreme Court wanted to leave to the legislator in the past by refusing an order to enact legislation is, at the very least, not in line with the Treaty obligations under Articles 2 and 8 ECHR. The State has not expressed a reservation with regard to the ECHR to the effect that legal

[211] The Climate Act referred to in Written Explanation 14.3.6, conclusion, has not been invoked either to substantiate an argument that this is a (substantive) order to enact legislation.
[212] See https://www.urgenda.nl/themas/klimaat-en-energie/40-puntenplan/.

protection under the ECHR ends when treaty rights can only be respected by means of legislation. It is unacceptable for a State Party to be able to prevent effective legal protection under the ECHR by setting up its national constitution in a certain way. In any case, this means that the State must not be allowed to rely too easily on the prohibition of an order to legislate. This is all the more the case if the mere passing of time since the judgement from the District Court, has created the situation in which (part of the) reduction order can only be achieved through legislation. This is even regardless of the fact that, as both the District Court (legal ground 4.101) and the Court of Appeal (legal ground 68, third sentence) ruled, even if the execution of the order is only possible through legislation, this does not make it an "order to enact legislation" as defined by the Supreme Courts in its previous case law, now that the reduction order itself does not prescribe the content of such legislation. Urgenda will now discuss a number of supplementary points in more detail.

4.2 On the interests of third parties other than parties to the proceedings

245. The State derives a number of arguments from case law as to why an "order to enact legislation" is not admissible.[213] One of those arguments is that such an order affects not only the parties to the proceedings, but also third parties. According to the State, the order actually means that '*Urgenda is thus forcing the whole of society to follow its desired rate of emission reduction, without careful democratic decision-making being able to take* place'.[214] In doing so, the State disregards the fact that Urgenda does not impose a political opinion, but seeks legal protection for its supporters, which two courts of justice have now offered.

246. Urgenda would once again like to point out (something that the State completely ignored in its Written Explanation, and in particular in Part C) the fact that '*after all discussion and criticism of general interest actions and collective actions in respect of politically sensitive themes'*, the Dutch legislator also allowed collective actions in this area, and thus '*accepted that the government does not exclusively determine what the general interest requires and how it should be represented'*.[215] The fact that parts of society may critique the existence of collective action under Dutch Law does not mean that it cannot be used..[216] By accepting collective action, initially in case law and later through codification, a private law instrument was created that aims to represent the interests of parties other than

[213] Written Explanation and Written Arguments of the State, paragraph 14.2.11 and 6.1. respectively.
[214] Written Arguments of the State, paragraph 6.4.
[215] Statement of Defence, paragraph 301.
[216] Statement of Defence, paragraph 300.

the parties to the proceedings, precisely because it abstracts from the specific circumstances that affect individuals among those represented by the interest group. De Jong recently put this into words (following the Statement of Defence) as follows:

> '*At the heart of the idea of this public life and liability law is the fact that a civil action, whether intended or not, can bring about change(s) in the way in which both private and public actors deal with social issues and issues of public interest. In other words, a specific action may have all kinds of cross-party macro-effects. Macro-effects refers to the effects of a judicial decision on parties not involved in the proceedings (i.e. third parties).*'[217]

247. The general nature of the interest that Urgenda (on behalf of its supporters) protects does not, of course, make the reduction order issued in this case an order to enact legislation. All orders to enact legislation affect third parties not involved in the proceedings, but not every judicial decision that has (potential) effects on third parties becomes an order to enact legislation. In the case law of the Supreme Court, the fact that the interests of third parties are affected is merely a supporting argument why orders to enact legislation are not allowed (which, as stated above, raises the question of whether this also applies in full when higher treaty law is at stake).

4.3 The implementation of the reduction order

248. The State took the view, for the first time in cassation, that the implementation of the reduction order '*simply cannot be done without legislation*', so that the reduction order would *in fact* be an order to enact legislation.[218] In its Statement of Defence, Urgenda explained at length that the judgment of the Court of Appeal is not in conflict with the *Waterpakt* doctrine, given the wide range of options that the State has (or at least had) at its disposal to comply with the reduction order.[219] The State pointed out that, in its view, the measures that will have the greatest effect in the short term (namely, the closure of coal-fired power plants, the introduction of a CO2 bottom price and the introduction of a kilometre charge) will *not* be possible without the introduction of legislation or the

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[217] E.R. De Jong, 'Urgenda en de beoordeling van macro-argumenten', *MvV* 2019/4, p. 133.
[218] See for example Written Arguments of the State, paragraph 6.5.
[219] Statement of Defence, paragraphs 592-598. In addition, Urgenda also refers to the possibility for the State to decide not to distribute any more free emission allowances, which requires a decision but no legislation. In view of the legislative proposal for the prohibition of coal in electricity production, this perspective of forced closure should also make it relatively inexpensive to buy out coal-fired power plants (without the need for legislation) in compliance with the Urgenda judgment.

amendment of existing legislation.[220] This would be especially the case given the increasing proximity of the end of 2020.

249. By doing so, the State tried to shift the debate to very far-reaching measures with the greatest impact in the short term. However, as emphasised in Statement of Defence, paragraph 593 and in the oral arguments, the relevant assessment date lies in the past. If, by the end of 2020, it turns out that the State is no longer able to comply with the reduction order, or can only do so by means of legislation or disproportionately far-reaching measures (which is not the case) then this is an issue that is legally irrelevant to these proceedings and to the reduction order that has been imposed. After all, the State has repeatedly assured us that it can achieve 25% and even 30% by 2020.[221] Even if the likelihood that legislative measures will be necessary to comply with the reduction order has now *increased*, this does not detract from the neutral and open-ended nature of the reduction order. It is impossible for a neutral admissible reduction order (which does not in any way prescribe to the State what measures it can and/or must take to comply with it) to turn into an unlawful "order to enact legislation", solely because the State's own delay means that compliance with the order requires (in the State's opinion) far-reaching and/or controversial legislation.

4.4 Political question / inadmissible steps in political and administrative discretion

250. The State's arguments that are generally related to the *trias politica*, or in particular to the *Waterpakt* prohibition of an order to enact legislation, can ultimately be traced back to the constitutional criticism that in this case the court should not be able to rule on what belongs exclusively to the domain of politics and the legislature. It is also against this background that the State referred to the American 'political question' doctrine. This argument as to non-justiciability is inappropriate and unacceptable, if only because of the resulting 'legal protection vacuum' and the fundamental denial of human rights protection under the ECHR to which Urgenda has referred earlier.[222] The position of the State irrevocably leads to the conclusion that, in the words of Jaap Spier, '*politicians*

[220] Written Arguments of the State, paragraph 6.5.
[221] See Written Arguments of Urgenda on appeal, paragraph 89, legal ground 4.70 of the judgment of the District Court and the report of the hearing in first instance on 14 April 2015.
[222] Statement of Defence, paragraph 366.

are allowed to ruin the planet and to ignore the interests of the youth and of future generations.'[223]

251. Moreover, the importance and relevance of the political question doctrine should not be overestimated. In *State of Connecticut, et al. v American Electric Power Company Inc. et al*., the United States Court of Appeals for the Second Circuit ruled, precisely in the context of climate change, that:

> '[c]*ertainly, the political implications of any decision involving possible limits on carbon emissions are important in the context of global warming, but not every case with political overtones is non-justiciable. It is error to equate a political question with a political case.* See Baker*, 369 U.S. at 217 ("The doctrine … is one of 'political questions,' not one of 'political cases.'"). Given the checks and balances among the three branches of our government, the judiciary can no more usurp executive and legislative prerogatives than it can decline to decide matters within its jurisdiction simply because such matters may have political ramifications.*'[224]

252. The mostly public law authors listed by the State in Written Explanation 14.3.14 which expressed critique, did so mostly in response to the District Court rendered in 2015. In the three years leading up to the judgment of the Court of Appeal, the public debate changed significantly. This was also as a consequence of the judgment of the District Court. This has lead, in the legal literature and beyond, to a very significant support base for the judicial action in this case. This change is for instance evident in the article by Oztürk and Van Der Veen, who are cited by the State in its favour. Initially they expressed reservations with regards to the judgement of the District Cour. However, after the judgment of the Court of Appeal, the stated:

> '*The State probably has no interest in such a remedy. […] As long as the State has more than one opportunity to remove the unlawfulness of its actions, an order to take measures will not easily conflict with the Waterpakt judgment.*'[225]

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[223] J. Spier, 'There is no future without addressing climate change', *Journal of Energy and Natural Resources Law*, 37:2, p. . 195, in which the quote is followed by: '*tough luck for them; they will get used to the "new normal*'".'

[224] Connecticut v. American Electric Power Co., 05-5104-cv, 05-5119-cv, under II.B.3, "The Third *Baker* Factor", p. 35. See Summons by Urgenda paragraphs 405-421, Reply, paragraphs 597-599) and Exhibit 51. The ruling can be viewed online at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2009/20090921_docket-05-5104-cv-05-5119-cv_opinion.pdf. See also the ruling submitted by Urgenda as Exhibit 159.

[225] Court of Appeal of The Hague 9 October 2018, ECLI:NL:GHDHA:2018:2591, *O&A* 2018/51, with commentary from T.G. Oztürk and G.A. Van Der Veen.

This quote makes clear that the annotation cited by the State at 159 of the Written Statement becomes without any meaning.

Besselink's view has already been addressed by Urgenda in its Statement of Defence, paragraph 602 and following. Besselink 'lacks' both the procedural dimension, which Oztürk and Van Der Veen do have in mind, and the essential perspective of legal protection (see Statement of Defence, paragraph 603). Despite the fact that according to Besselink the method of review by the Court of Appeal was constitutionally more legitimate, he clearly still has difficulty with the reduction order. However, he does not speak out clearly against it either. Moreover, his vision is largely based on his view on 'reflexivity', which was convincingly contested by Fleuren[226]. Mr Bergkamp in his capacity as lawyer, who was cited in Written Explanation 14.3.14, is an advocate of the fossil industry which undermines the authority of his opinion. De Jong (cited on p. 160, top of the page) endorses the decisions of the District Court and Court of Appeal, as evidenced by his recent publication in *Maandblad voor Vermogensrecht*.[227] The other constitutional law scholars cited by the State, also by and large merely commented on the judgement of the District Court, whereas Besselink stated that the review by the Court of Appeal was constitutionally more legitimate. In also barely reflect on the perspective of the need for effective legal protection. This perspective has been described in detail by Bauw and others, in the light of the development in private and procedural law in the past century. The criticisms cited by the State are one-sided in this respect and do not reflect an empirical understanding of the seriousness and uniqueness of climate change.

Urgenda also points out that the State's representation of the recently published publications is incomplete. The following may be noted:

- M.A. Loth:

> '*Partly in view of the margin of uncertainty surrounding the predictions - in which the precautionary principle prescribes to remain on the safe side of that margin - the decisions of the District Court and Court of Appeal are completely comprehensible. In essence, both the District Court and Court of Appeal have decided that the time has come to turn the tide.*'[228]

[226] J.W.A. Fleuren, Urgenda en niet(?)-rechtstreeks werkend internationaal (klimaat) recht, *NJB* 2019/475.
[227] E.R. de Jong, 'Urgenda en de beoordeling van macro-argumenten', *MvV* 2019, p. 133-141.
[228] M.A. Loth, 'De Rechtbank Den Haag heeft gesproken…', *AV&S* 2015/25, p. 153.

- P. Gillaerts and W.T. Nuninga:

'The Urgenda judgment teaches us that a basis in human rights is extremely suitable for a preventive claim. 'On the basis of positive obligations for the government with regard to the threatened human rights in question, courts may persuade governments to take legal action within the framework of their discretion, limited by all kinds of international commitments or obligations and the available scientific knowledge.'[229]

- J.W.A. Fleuren:

'Incidentally, I agree with Besselink (p. 3081) that the political bodies are better equipped than the courts to decide on the indicated CO2 reduction. But that is not the point. A court which reprimands the government is of the opinion that the government (itself) could and should have done better. The point is that if public bodies fail to comply with legally relevant standards and agreements, they must be able to be reprimanded by the courts.'[230]

- J. Verschuuren:

'Climate change impacts enjoyment of human rights: courts have to intervene.'[231]

'On the contrary, testing government actions against human rights belongs to the power of courts.'[232]

'The court only identified the outcome that policies should pursue, leaving it to the Dutch Government and Parliament to devise policy interventions to achieve this outcome. Thus, the court arguably avoided interference with policymaking by emphasizing that 'the State retains complete freedom to determine how it will comply with the order'. Given the fact that the scientific knowledge on which the order is based is widely accepted and has furthermore been used as a basis for domestic law and policymaking by the Dutch government, it seems that the Court of Appeal struck the right balance between testing government actions against the ECHR and not

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229 P. Gillaerts and W.T. Nuninga, 'Privaatrecht en preventie: Urgenda in hoger beroep', *AV&S* 2019/9, p. 48.
230 J.W.A. Fleuren, '*Urgenda* en niet(?)-rechtstreeks werkend internationaal (klimaat)recht', *NJB* 2018/9, p. 605.
231 J. Verschuuren, Urgenda Climate Change Judgment Survives Appeal in the Netherlands, IUCN (24 October 2018). Available at www.iucn.org/news/worldcommission-environmental-law/201810/urgenda-climate-change-judgment-survives-appealnetherlands.
232 Ibid.

interfering with policymaking too much.'[233]

- D.G.J. Sanderink:

'*[...] under these circumstances, the Court of Appeal ruled in grounds 71 to 76, in my opinion correctly, that the State is acting in violation of its positive obligations under Article 2 and Article 8 ECHR by failing to limit greenhouse gas emissions by at least 25% by the end of 2020 (or having them reduced).*'[234]

According to **Spier**, the political dimension of climate issues creates legal challenges. However, these are not insurmountable:

'*After all, the very core of the law of any decent society is that man-made devastation must be avoided. It is not difficult to discern legal bases for such a stance: the no-harm rule (in the international context), a series of human rights and in quite a few instances constitutional law, the hard core of tort and environmental law. In this view, the hard core cannot be set aside by ill-considered or insufficient legal instruments that are on a collision course with nature. These judges cannot avoid rejecting arguments submitted by the relevant States that further reaching reductions of GHG emissions are too expensive, will eliminate jobs, disturb the level playing field, and similar messages, or, the soft version: we can safely bet on technology. Admittedly, it is quite a step to rebut such defences; that requires courage. It is true that this may affect government funding available for healthcare, education and other vital services, albeit that the relevant government may opt, for instance, to increase taxes. Those who harp on this inconvenient truth overlook an even more inconvenient reality: taking a sit-and-wait position only makes things worse and will, in turn, come at an even higher cost for all kinds of vital services.*'[235]

See also Spier in his recent *Netherlands Law Journal (NJB)* review of the preliminary advice for the Dutch Lawyers Association (NJV) by Arts and Scheltema, as explained above in paragraph 170 and following.

Urgenda also refers to **Drion** in the *NJB*, which was also published after

[233] J. Verschuuren, *The State of the Netherlands v Urgenda Foundation*: The Hague Court of Appeal upholds judgment requiring the Netherlands to further reduce its greenhouse gas emissions. RECIEL. 2019;28:94–98. https://doi.org/10.1111/reel.12280.

[234] D.G.J. Sanderink, annotation to: Court of Appeal of The Hague 9 October 2018, ECLI:NL:GHDHA:2018:2591, *JB* 2019/10. and D.G.J. Sanderink, 'Positieve verplichtingen als redders van het klimaat', *TvCR* 2019/1, p. 68.

[235] J. Spier, 'There is no future without addressing climate change', *Journal of Energy and Natural Resources Law*, 37:2, p. 194-5.

the Statement of Defence:

> '*From this point of view, the judges of the District Court and Court of Appeal in the Urgenda case have understood their contemporary tasks well. They have not turned a blind eye to real and urgent problems. They did not send away the alarmed individuals and groups with some legal excuse, which it could have been done quite easily, and they caught hold of the failure of the larger links between the national state and politics and held them to account. On 24 May 2019, the oral arguments before the Supreme Court were shown via streaming. The judgment will be delivered this year. The approach is modern and energetic; hopefully the content will be just as beautiful - and responsible and security-orientated.*'[236]

253. The above illustrates that support in the legal literature for the judgments of the courts in this case has only increased and that the international reception also indicates that the seriousness and uniqueness of climate change calls for a role for the court in society that is in line with this. And it should, again, be emphasised that the reduction order is really not that ground-breaking when one considers that it is the only measure that can actually contributes to legal protection in these circumstances. Any alternative is toothless (such as a declaratory judgment or a greatly exaggerated final decision that the State is neglecting its duty of care); and runs great risk of being ignored by the State, just as it did with the judgment of the District Court. Moreover, the order is in line with the State's own policy, abandoned without justification in 2011, and the necessary pathway to a (minimum) reduction of 85-90% by 2050. Urgenda will not repeat this, but does point to the quote of Van Gestel and Loth in Written Explanation p. 162-163, which hits the nail on the head.

5 RELIANCE BY URGENDA ON ARTICLE 6:162 DUTCH CIVIL CODE (DCC)

254. Urgenda can be brief about this ground of the State. It completely fails to recognise the fact that if the Supreme Court sees an obstacle to the State's positive obligations under the ECtHR, the question fully rearises as to whether the duty of care arising from Article 6:162 DCC supports the reduction order. This is also the case with regards to the other claims of Urgenda which were rejected by the District Court on the basis of a lack of interest. The State has wrongfully equates both basis of the claim of Urgenda entirely. The basis of the claim which finds is source in the duty of case from 6:162 DCC is not the same as the claim arising from the duty

[236] C.E. Drion, 'De onveilige mens in een expanderende wereld', *NJB* 2019/1263.

under the ECHR. There are substantial differences, even though much the same points of view may play a role in the implementation of the general obligations of the State. The State is mistaken to assume that Urgenda only defends the exact reasoning of the District Court (see for example in Written Explanation 15.19) and thus abandoned its positions with regards to the claims by Urgenda that were not accepted by the District Court. Such a limitation cannot be found in Chapter 5 of the Statement of Defence (Urgenda also referred to its arguments in the first instance and on appeal, and summarised all this in a concise way in paragraphs 463-493).

6 THE REDUCTION ORDER: OBLIGATION OF RESULT OR BEST EFFORTS OBLIGATION?

255. In the oral arguments before the Supreme Court, the Procurator General's Office of the Supreme Court asked Urgenda whether the State's legal duty or duty of care (as stated by Urgenda) to achieve at least a 25-40% emission reduction by 2020 should be regarded as an obligation of result or a best efforts obligation. Urgenda wants to use this Rejoinder to go deeper into that question than it was able to on the occasion of the oral arguments.

256. First of all, Urgenda would like to point out that there is a scientific causal link between the total amount of CO2 emitted into the atmosphere on the one hand, and the degree of warming resulting from it on the other hand. If warming is to be limited to a certain temperature, it implies that the corresponding carbon budget must not be exceeded. Urgenda is of the opinion that, by its very nature, this is an obligation of result and not a best efforts obligation.

> In the Paris Agreement, the contracting parties agreed that warming should be limited to well below 2 °C. What is happening here, then, is that the standard has been formulated somewhat vaguely and, in any case, not with great precision, which means that the size of the corresponding carbon budget cannot be calculated with great precision now either. It should also be noted that there are still scientific uncertainties about climate sensitivity, i.e. climate science knows more or less precisely, but not with great precision, what the rate of warming will be at a concentration of, for example, 450 ppm or 550 ppm. Both 'uncertainties' mean that the contour of the available carbon budget cannot be drawn with a sharp line, but only with a somewhat blurry line. The fact that the limit cannot be determined with great precision in advance, and that there is therefore some uncertainty,

> does not alter the fact that by its very nature the limit must not be exceeded, because exceeding the limit means that the critical temperature limit will be exceeded, which will only become apparent after the event. So here too, as with many aspects of the climate problem, 'uncertainty is not our friend, and time is not our side'.

257. This Rejoinder has already explained in detail that it is necessary to phase out global emissions to zero at such a rate that the available carbon budget is not exceeded. In this respect it was also explained that it is not important in itself whether this point of zero emissions will be reached in 2050 or in 2070, because it concerns the total amount of CO2 emitted until the moment of zero emissions has been reached. In other words, it is about the reduction pathway that the emissions follow towards the moment of zero emissions.

258. It is therefore possible to set out a reduction pathway that, on the one hand, provides for a gradual phasing out of all emissions to zero emissions and, at the same time, is calculated in such a way that, if the reduction order is followed, the total amount of CO2 emitted remains just within the critical carbon budget of the chosen temperature target.

259. As a result, it is necessary to actually follow the markers that mark the reduction pathway that has been set out. In this Rejoinder, the risks and dangers of postponing emission reductions have already been discussed in great detail, in particular by reference to the metaphor of the car that starts braking too late and uses the braking distance available to it at such a rate that it is simply no longer able to fulfil its 'obligation of result' to stop before the red traffic light.

260. In order to achieve the 2°C target, a reduction pathway has been set out that for Annex I countries is marked with a marker in 2020: at that point the speed of emissions from Annex I countries must already be reduced by 25-40% compared to 1990.

261. According to Urgenda, whether the achievement of that intermediate target is *by its nature* an obligation of result is of less importance in these proceedings than the question of whether the achievement of that target should be regarded as a result obligation *in this specific case*. The District Court and the Court of Appeal have formulated the target as an obligation of result in the operative parts of their respective judgments, in the light of a set of viewpoints in the specific case.

262. In this Rejoinder, Urgenda made it clear that the remaining carbon budget for the 2 °C target is already so small that all efforts to the global level will be needed in order to stay within that budget. It is therefore important to actually achieve the 25-40% emission reduction by 2020, because exceeding this intermediate target will have to be offset by significantly higher reductions at a later date. And further, it is highly questionable whether such an extent of additional braking power would even still be available from a technological, financial and societal point of view.

263. In addition, the Court of Appeal has found that many (87%) of the reduction pathways in the AR5 database that achieve the 2°C target require large-scale negative emissions to be feasible in the second half of this century. In the absence of such large-scale negative emissions in the second half of this century, the need and urgency to achieve major emission reductions in the shortest possible time will only increase. The most recent IPCC report shows that there are now serious doubts in the scientific literature as to whether negative emissions will indeed become available on the scale assumed in the relevant studies. As a result, both the importance and the urgency of achieving the intermediate target of 25-40% by 2020 have been demonstrated.

264. In addition, in the present case, the 25-40% range in itself offers some room to manoeuvre regarding the pace of phasing out. This Rejoinder shows that the EU's reduction obligations are typically above the average of the group of Annex I countries and that an emission reduction of at least 30% for the EU (and therefore also for the State) must be considered more appropriate than an emission reduction of 25%. Further, this Rejoinder shows that the EU and the State themselves have recognised this for a long time. The Court has therefore already allowed the State the maximum degree of flexibility by ordering it to reduce its emissions by only 25%.

265. Another way of formulating the above could be that the State has a ‘best efforts’ obligation to realise a reduction of 25-40%, whereby the required effort must be such that, at least, the result of a 25% reduction is achieved. This means that there is a strict result obligation in respect of the 25% reduction order.

266. At the same time, Urgenda acknowledges that no one is required to do the impossible. Thus, no one can be held to achieve a result that is impossible to achieve or can only be achieved at a clearly disproportionate cost. The point here is that, in both courts of fact, the question has been

discussed at length as to what concrete and major objections the State could have against the reduction order, in the light of the interests served by the reduction order. Such major objections have not been proven and the State has not been able to specify anything. The State has indeed (rightly) (see judgment, legal ground 4.99) not invoked Article 6:168 DCC, which is designed to permit a party not to comply with a court order if there are compelling public interests that would warrant this.

267. In addition, from the outset, both after the judgment of the District Court and after the judgment of the Court of Appeal, the State has publicly declared that it can comply with, and will comply with, the judgment. An obligation of result in a specific case does not suddenly become a 'best efforts' obligation simply because until recently the State has not given (and does not want to give) any effect to its prior commitments to comply with the judgments[237] and, as a result of this, compliance with the order has become difficult. That would be to reward behaviour that is not acceptable under any circumstances, particularly on the part of the State, in a country governed by the rule of law.

268. Urgenda therefore concludes that the obligation to achieve an emission reduction of at least 25% in 2020 in the specific case of the Dutch State must be regarded as an obligation of result. The State can comply with this obligation because it has always made this known itself and, moreover, in the course of the proceedings, as the Court of Appeal has established, there is no evidence at all to suggest that compliance with this obligation places a disproportionate burden on the State or that compelling reasons of public interest are opposed to such compliance.

269. Should the State fail to comply with the order, and should it still have good reasons to do so, then an enforcement dispute (if it comes to that) is the appropriate procedure to raise and weigh those reasons. The mere (and as yet theoretical) possibility that this situation could arise is not a reason to reduce what should be regarded as an obligation of result in the present case to a 'best efforts' obligation.

270. There are even fewer reasons for reducing it to a 'best efforts' obligation, as there would then be no objective criteria for determining whether the State has made 'sufficient' efforts. Urgenda's firm conviction is that it would in fact be tantamount to giving the State a blank cheque. Urgenda would like to recall Prof. Backes' criticism of the pending legislative

[237] Hester Van Santen and Erik Van Der Walle, *Hoe 'Urgenda' een levensgroot probleem werd*, *NRC Handelsblad* 19 December 2018.

proposal for a Climate Act: under the proposal, intermediate targets are formulated as a ‘best efforts’ obligation or an 'aim', but it already clear that the intention is to make it relatively simple for the State to miss these intermediate targets. This not only makes it clear that Urgenda has an undiminished strong interest in the requested reduction order, but also that the reduction order must take the form of an obligation of result and not a ‘best efforts’ obligation.

271. The reduction order, considered and imposed as an obligation of result, does have a hard an unrelenting side. The State however did not raise this as an objection to the order being made, even though the order itself has been the subject of the debate Moreover, Urgenda considers that in the event that compliance with the order would arise as an issues, a possible separate enforcement proceeding would be the right forum to possibly soften the undesirable/unacceptable sharp edges of this reduction order. However, the enforcement phase and its assessment framework are not the subject of these proceedings. This applies in particular to the question whether a penalty payment could be imposed on the State. Urgenda still assumes that the State, as it has always stated, will comply with the judgment of the Court of Appeal, which is still possible.

272. The alternative is no reduction order or a reduction order that is not enforceable because it is formulated as a ‘best efforts’ obligation. This would not do any justice to the interests that are served and protected by the requested reduction order, while these interests should have a pre-eminent right to legal protection.

Freerk Vermeulen

Lawyer at the Supreme Court

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