Supreme Court of the Netherlands
Case number: 19/00135
Court session: 12 April 2019

INFORMAL TRANSLATION
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STATEMENT OF DEFENCE*

In the case of

Urgenda Foudation, with its registered office in Amsterdam
Respondent in cassation,
hereinafter: '**Urgenda**'
counsel at the Supreme Court: F.E. Vermeulen
counsel[1]: F.E. Vermeulen and J.M. van den Berg.

versus

The State of the Netherlands (Ministry of Economic Affairs and Climate),
hereinafter: '**the State**',
Appellant in cassation,
counsel at the Supreme Court: K. Teuben, M.W. Scheltema and J.W.H. van Wijk

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* Statement in defence of the appeal in cassation submitted by the State.
[1] Mrs. J.M.B. Cramwinckel, A.CH.H. Franken, P.B. Fritschy, R.J. van Galen, M.E. Kingma, T.R. van der Lee, J.K.G. Meijer, F.H. Oosterloo and J.M. Wassenberg.

Contents

READING GUIDE

i. Urgenda sets out its position in this Statement of Defence. Urgenda wishes to make a number of preliminary comments by way of introduction and to explain its choice to submit a substantive Statement of Defence.

ii. This case is of such urgency and social significance that Urgenda considers it of great importance to have the Supreme Court take note of the most important assertions and arguments of both parties before the planned oral arguments of 24 May. Urgenda hopes this will facilitate the best possible preparation for the hearing. The decision to submit a substantive Statement of Defence is also prompted by the great importance of placing this case in broader perspective, considering the technically formulated arguments in the State's appeal in cassation. The statement also addresses issues that have been decided by the District Court, but not by the Court of Appeal. Urgenda considers it fair to introduce this extension of the legal dispute at the earliest possible stage, namely with this Statement of Defence, rather than by means of a later written explanation. For this reason, Urgenda has informed the State as early as January that it would submit a substantive Statement of Defence.

iii. In **Chapter 1**, Urgenda first places this case in the appropriate, broad perspective of climate litigation in an era of increasingly alarming global warming. To this end, Urgenda will introduce its Statement of Defence with an extensive overview of both the background and the core themes of this case. This overview is based on the detailed factual findings of the District Court and Court of Appeal, against the background of objective factual data in the case file.

iv. In **Chapter 2**, Urgenda discusses the reduction obligation set by the Court of Appeal of at least 25% by the end of 2020 against the background of the relevant international law and climate science instruments and insights.

v. In **Chapter 3**, Urgenda discusses the importance of the right to collective action in this case.

vi. In **Chapter 4**, Urgenda discusses Articles 2 and 8 of the European Convention on Human Rights (ECHR), which were accepted by the

Court of Appeal as grounds for the reduction order requested by Urgenda. This chapter emphasises the need for effective forms of legal protection against the effects of dangerous climate change. The last two parts of this chapter extend the legal dispute by drawing attention to the extraterritorial and intergenerational aspects of this case, which the Court of Appeal has left unanswered.

vii. In **Chapter 5**, Urgenda discusses the alternative second legal basis of Section 6:162 of the Dutch Civil Code (hereinafter referred to as: DCC), which was accepted as ground for the reduction order by the District Court, on which the Court of Appeal did not rule. Partly in view of the fact that the State has emphasised the importance of achieving finality in this case as soon as possible, Urgenda argues that, if necessary, the Supreme Court can also decide on this legal basis for the reduction order. The relevant facts have been sufficiently established by the judgments of the District Court and the Court of Appeal.

viii. In **Chapter 6**, Urgenda addresses, among other things, the State's reliance on a 'margin of appreciation' in this case.

ix. In **Chapter 7**, Urgenda concludes this Statement of Defence explaining why the reduction order granted by the District Court and Court of Appeal is compatible with the Dutch constitutional structure.

1 INTRODUCTION

1.1 Why this legal action?

1. The dispute between Urgenda Foundation and the State, which is now under review by the Supreme Court, has already attracted a great deal of national and international attention. The judgment dated 24 June 2015 of the Hague District Court has produced robust national and international commentary in the (specialised) legal literature as well as in the general media and press. The case now features in various manuals discussing the legal aspects of climate change. Therefore, the judgment of the Hague Court of Appeal dated 9 October 2018 was eagerly awaited both nationally as well as internationally. Despite the fact that this judgment is recent, it is already evident that the judgment of the Court of Appeal is of national and international significance.

2. What is particularly striking about the two decisions is the fact that both courts have issued an order to the government to reduce the annual Dutch greenhouse gas emissions by 25% by the end of 2020, which is very far-reaching, although neither decision defines how the government ought to comply with the order. Both decisions thus raise the question of whether or not the courts have overstepped their boundaries, infringing on the area reserved for the legislature.

3. In the Netherlands, a large proportion of the reactions seem to come from practitioners of constitutional law and administrative law, who are predominantly critical in this respect. Comments from practitioners of civil law are much more positive. What is striking is that almost all commentators agree with the social outcome of both judgments, namely that the courts have recognised that the State is doing (far) too little to combat climate change, despite the repeated objectives of previous governments, and that the State must act urgently to combat climate change. In terms of content, therefore, everyone seems to be in agreement with both courts. Even the critics generally state that the courts may have been entitled to note that the State is lagging in its obligations, but should not have imposed a concrete reduction order on the State.

4. The outcome of both judgments was also received with great approval internationally (and certainly also with admiration). It is becoming increasingly clear, not only to climate scientists and policy makers, but

also to the general public, that climate change is a real threat; that climate change has already begun and is having a major impact; and that climate change – if it is not slowed down and stopped in time– will change the different climate zones of the planet and the existing relationship and balance between them, with potentially devastating consequences worldwide for current ecosystems, as well as for the human societies that depend on the products of those ecosystems and have been designed and structured accordingly.

5. There is now a global consensus – first agreed on by almost the entire international community in the Cancun Agreement in 2010, and then reinforced by the Paris Agreement in December 2015, even at treaty level - that, in view of the risks of 'dangerous' climate change, global warming must remain 'well below' 2 °C compared to pre-industrial times, with a target of 1.5 °C. To achieve this, global emissions of greenhouse gases, particularly CO2, must be phased out completely as soon as possible.

6. Scientific literature has already developed 'phasing out pathways' that global emissions would have to follow in order to keep global warming below the above-mentioned target temperatures by 2100 within the limits of what is still considered technologically, economically and socially attainable. The reality, however, is that even after 25 years of international political discussion on emission reductions, global emissions are still following a pathway leading to nearly 4° C warming by the year 2100, with further warming thereafter. According to current scientific knowledge, such large and rapid warming far exceeds the adaptive capacity of our planetary ecosystems and will have catastrophic consequences, including for human communities.

7. The current pathway of global emissions is not an unavoidable one. All literature on the climate problem notes that it is political unwillingness and impotence that have so far frustrated an adequate approach to greenhouse gas emissions and thus an adequate approach to the climate problem. However, as a result of this political inertia, we have now reached a point where the temperature targets for the year 2100, which were agreed in the Paris Agreement to prevent 'unacceptably dangerous climate change,' are at risk of becoming technically, economically and socially unattainable in the short term. Substantial emission reductions are necessary and, above all, urgent if these climate risks are to be prevented or at least kept under control.

8. Urgent, because a climate policy that focuses exclusively on a high reduction percentage over a longer period of time (e.g., a 49% reduction in 2030, or a 95% reduction in 2050) is not enough. As Urgenda will make clear in this introduction, the time spent reaching zero emissions is more important, and indeed the only relevant criterion. Indeed, all CO2 emitted between now and when the final target is met contributes to the total atmospheric load and the rate of warming, and thus, can have irreversible consequences for the adaptive capacity of the Earth's ecosystems.

9. The urgency of the climate problem was expressed at the end of 2018 by UN Secretary General António Guterres, with reference to the IPCC SR15 Special Report, which was published the day before the judgment of the Hague Court of Appeal:

> '*First, the direct existential threat of climate change. We have reached a pivotal moment. If we do not change course in the next two years, we risk runaway climate change.*'[2]
>
> '*Each day brings further evidence of the mounting existential threat of climate change to the planet. Every day that we fail to act is a day that we step a little closer towards a fate that none of us wants -- a fate that will resonate through generations in the damage done to humankind and to life on Earth.*'[3]
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> '*Climate change is the single most important issue we face. (...) The IPCC's Special Report tells us that we still have time to limit temperature rise. But that time is running out.*'[4]

10. This brings Urgenda to what it regards as the essence of this legal action and the factual and normative basis of the requested reduction order against the State. The essence is that climate change is such a large, urgent and dangerous problem directly threatening the existence of countless people, including Dutch residents, so that 'doing nothing'

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[2] António Guterres, address to the General Assembly, 25 September 2018, SG/SM/19239-GA/12063, published on https://www.un.org/press/en/2018/sgsm19239.doc.htm.

[3] António Guterres, Remarks at High-Level Event on Climate Change, 26 November 2018 published on https://www.un.org/sg/en/content/sg/speeches/2018-09-26/remarks-high-level-event-climate-change.

[4] António Guterres, Remarks at the opening of COP 24 (Katowice), 3 December 2018, published on https://www.un.org/sg/en/content/sg/speeches/2018-12-03/remarks-opening-cop24.

against these dangers and risks is not an option for the Dutch government. 'Doing too little' is not an option either, at least not an option that is acceptable under Dutch law.

11. Urgenda started this legal action in 2013, because it believes that the State is 'doing (far) too little'. This claim has not since been proved unfounded: on 18 November 2016, for example, the Netherlands Environmental Assessment Agency published a report entitled '*What does the Paris Accord mean for the Netherlands' long-term climate policy*'[5], in which it analysed what kind of policy would be needed to achieve the temperature target laid down in the Paris Agreement. The report concluded that '*Such a policy goes far beyond the current policies of the countries concerned*.'

12. The purpose of these proceedings was, and still is, that the State is ordered by the courts to reduce Dutch annual emissions by at least 25% compared to 1990 levels before the start of 2021 in the face of the particular dangers and risks of insufficiently mitigated climate change. Such an emission reduction is generally considered to be the minimum necessary and appropriate for the effort that may be required of a country like the Netherlands, both on the basis of scientific insights and on the basis of fundamental criteria of responsibility and fairness, as well as on the basis of internationally agreed principles. In order to protect the interests of Dutch residents (whom Urgenda primarily, but not exclusively, represents), Urgenda calls the State to be held accountable for this responsibility.

13. With regard to the State's objection that it is not the courts, but exclusively politics that has the power to decide what an adequate Dutch climate policy is (a view that amounts to the government's climate policy being exempted from any judicial review), the Court of Appeal – according to Urgenda– has rightly considered (see legal ground 69 of the judgment) that the interests at stake here affect the right to life and the right to family life. These interests are so essential that they are protected by Articles 2 and 8 of the ECHR and therefore take precedence over the Dutch regulations dividing tasks between the judiciary, legislative, and executive branches in the Netherlands. Moreover, as explained in more detail in Chapter 7, there is no question of an impermissible

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5 See notice on appeal, paragraph 3.84 (which also refers to Exhibit 126 of Urgenda), p. 46.

encroachment on the discretion of the State.

14. In other countries too, the notion of political bodies that 'do nothing' or 'do too little' to combat the dangers and risks of climate change is no longer accepted by the judiciary. This says something about the nature and extent of the climate problem. Urgenda already referred to a decision by the U.S. Supreme Court in *Massachusetts v. EPA* in her statements before the District Court and the Court of Appeal.[6] A few months after the Urgenda judgment, the Lahore High Court in Pakistan ruled that the non-implementation of the National Climate Change Policy led to a violation of the fundamental rights of Pakistani citizens.[7] In April 2018, the Colombian Supreme Court ruled that climate change threatens the fundamental rights of both current and future generations and that the Colombian government had done too little to protect those rights, amongst others by taking insufficient measures to prevent deforestation of the Amazon region.[8]

15. In this context, Urgenda also considers it relevant to mention that the judgments of the District Court and the Court of Appeal and the reasoning and considerations of these Dutch courts are (already) cited and followed by courts in other legal cultures and other legal systems. On appeal, Urgenda already referred to decisions by United States and New Zealand courts in which the District Court decision was quoted and in which the legal reasoning resembled the reasoning of the District Court..[9] Recently, a decision of an Australian court of appeal, in which the permit application for the construction of a new coal mine was rejected due to its impact on global CO2 emissions, also extensively quoted from both the judgment of the District Court and the judgment of the Court of Appeal.[10] The developments that have taken place in particular since the Urgenda judgment of the District Court have not gone unnoticed by the United Nations Environment Programme (UNEP), which recently published the

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6 Summons, paragraph 394 and notice on appeal, paragraphs 8.134 et seq.

7 *Leghari v. Republic of Pakistan* (2015) W.P. No. 25501/2015, consulted on: https://elaw.org/PK_AshgarLeghari_v_Pakistan_2015.

8 Corte Suprema Colombia, decisión STC4360-2018, 5 April 2018. Published on: http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/.

9 United States District Court of Oregon 8 April 2016, 06:15-cv-01517-TV (Juliana/USA), submitted as Exhibit 142 and High Court of New Zealand Wellington Registry 2 November 2017, CIV 2015-485-919 [2017] NZHC 733, submitted as Exhibit 160.

10 Land and Environment Court New South Wales, [2019] NSWLEC 7 (Gloucester Resources Limited v Minister for Planning).

report '*The status of climate change litigation: a global review*,'[11] which extensively analyses the Urgenda judgment.[12] This resonance in other countries and at the UN level says something about the persuasiveness of both Dutch decisions, and also shows how much their outcome is considered to be both appropriate and socially desirable.

16. If the political branches of government fail to do what is necessary, and if further delay is irresponsible and contrary to the values and interests protected by law, it is up to the judiciary, as the third branch of government, to ensure the enjoyment and exercise of those rights and the protection of those interests, and to ensure that they are enforced. That is what the District Court and the Court of Appeal saw as their responsibility and task in the present case, as they both explained, when they issued the reduction order against the State. As a result, these courts have provided effective legal protection. Aware of the enormous seriousness of the risks and consequences of climate change and the extreme urgency of timely mitigation, they have recognised decades of empty words, political inertia, and the enormous delay of the Netherlands compared to its peers in the European Union.

1.2 District Court and Court of Appeal: the same outcome via a different route - and yet not

17. Both the District Court and the Court of Appeal have reached the final conclusion that the State should be ordered, by the end of 2020 at the latest, to reduce (the volume of) Dutch annual greenhouse gas emissions by at least 25% compared to 1990 levels. Both instances base this order on the conclusion that the State is acting unlawfully by pursuing a reduction of less than 25% by the end of 2020. The District Court based the unlawfulness on an infringement of the unwritten standards of due care, which it interpreted on the basis of criteria derived from case law on hazardous negligence, the objectives and principles of international climate policy, and international normative developments. The Court of Appeal based the unlawfulness on a violation of written law (Articles 2 and 8 ECHR).

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[11] United Nations Environment Programme, 'The Status of Climate Change Litigation – A Global Review' (May 2017), consulted on: https://www.unenvironment.org/resources/publication/status-climate-change-litigation-global-review

[12] Columbia University's Sabin Center in the United States maintains a database of climate cases that are still pending in several countries around the world: http://climatecasechart.com/search-non-us/.

18. The District Court and Court of Appeal therefore use different interpretations of the unlawfulness standard to reach the same conclusion and issue the same order for the State to reduce the Dutch annual emissions by at least 25% before 2021. Urgenda would like to make a few comments on this.

19. Section 6:162 DCC lays down the legal obligation that (also) the State must act in accordance with the unwritten standards of due care which may be expected of it, in light of its role and powers in the Dutch state under the rule of law. Article 2 ECHR describes the State's legal obligation –in the form of a positive obligation– to protect the right to life of the people under its jurisdiction. Similarly, Article 8 ECHR lays down the legal obligation – also in the form of a positive obligation– to respect people's personal privacy and, in particular, their home.

20. It is clear that the cited legal provisions do not imply that the State acts with sufficient care and adequately protects the right to life and the privacy and home of its residents if it achieves a 25% emission reduction before 2021; however, it is apparent that the State acts in violation of those provisions and the legal obligations contained therein in the event that it reduces Dutch annual emissions by less than 25%. Why is the limit 25% and not 30% or 15%?

21. The point here is that the legal provisions cited are 'open' legal standards that must first be specified before they can be used by the court as a suitable yardstick against which the legitimacy of, in this case, Dutch climate policy can be measured. In other words: the legal provisions cited contain a 'duty of care' but do not yet contain a concrete, operational 'standard of care'; they contain a legal obligation, but not a clear objective standard with which it can be 'measured' whether this legal obligation has been fulfilled in the specific case in question.

22. This is why it is striking that although the District Court (relying on the hazardous negligence doctrine and the objectives and principles of international climate policy) and the Court of Appeal (interpreting Articles 2 and 8 ECHR) apply 'open' legal standards, both have set the 'standard of care' for the State at least 25% emission reduction before 2021. This is indeed no coincidence, and this alone shows that this reduction percentage is not based on an arbitrary or individual 'political' choice by the two courts, but on a generally accepted and widely

supported standard that already existed before these proceedings.

23. The District Court and Court of Appeal have found the factual and normative need for precisely this standard, i.e. a reduction percentage of 25% before 2021, in the AR4 report of the IPCC from 2007 (more on this later), in the Cancun Agreement from 2010 (also more on this later) and in numerous documents, legal instruments, policy documents of both the EU and the Netherlands afterwards; as well as in all COP Decisions agreed by the parties to the United Nations Framework Convention on Climate Change (hereinafter referred to as: UNFCCC) since 2010 (also more on this later). Urgenda would also like to point out that all these sources refer to a reduction percentage of 25-40%, i.e. a range of which 25% is the lower limit. According to all the sources of information on which this standard is based, an emission reduction of 25% therefore really is the absolute minimum.[13]

24. The consequence of the above is that although the District Court and the Court of Appeal formally and legally base their reduction orders on different legal standards, the underlying substantive standard of care on which they base their reduction orders, , is exactly the same and is derived from the same sources. From a material point of view, therefore, the rulings of the District Court and Court of Appeal are much closer to each other than the difference in their legal bases might suggest.

[13] In essence, the District Court has ruled that if 25% is the lower limit of the range of 'due care that befits the State', anything in excess of 25% is not legally necessary and that it is therefore up to the political branches of the Dutch government and not to the courts to decide whether the State will do more than the minimum requirement. Because Urgenda did not appeal the rejection of a more ambitious emission reduction target, which it had requested before the District Court, the Court of Appeal could not decide on a reduction percentage higher than 25% (see Judgment Court of Appeal, legal ground 3.9 in conjunction with legal ground 75).

1.3 The facts

1.3.1 Urgenda statements on the facts regarding climate change and its implications (risks, dangers)

25. Urgenda is convinced that the reduction order it requested was awarded by the District Court and the Court of Appeal because these courts have made the (great) effort to really understand the facts and details that make the climate problem such a unique problem, and have allowed themselves to be convinced by those facts that doing nothing or doing too little is not an option, and that the Dutch government has been doing far too little for many years now and that it is almost too late.

26. That is why Urgenda considers it important to discuss the factual aspects of the climate problem again in cassation, because it is these unique facts that provide justification for issuing the exceptional reduction order claimed by Urgenda. In short: according to Urgenda, the admissibility of the far-reaching reduction order issued by the District Court and Court of Appeal cannot be properly assessed without taking note of the facts underlying the reduction order.

27. For the established facts, Urgenda refers to the exemplary presentation thereof by the District Court and Court of Appeal, as well as to the further explanation and further background in its procedural documents before the District Court and Court of Appeal.[14] The purpose of the following is to place and interpret the most important factual presumptions once again in a broad and fundamental perspective. By doing so, Urgenda hopes that, in the given time span for this case, the Advocate General and the justices in question will gain incisive insight into what the District Court and Court of Appeal have established as courts of fact. In addition, the risks and imminent consequences of climate change identified by the District Court and Court of Appeal are only a tip of the iceberg.

28. This does not alter the fact that the statutory division of tasks between the District Court, the Court of Appeal and the Supreme Court will also have

[14] Judgment District Court, legal grounds 2.8-2.78, Judgment Court of Appeal, legal grounds 2-26, summons, paragraphs 1-42, 78-147; reply, Chapters 2, 4 and 10; written arguments in first instance Urgenda (counsel Cox), paragraphs 6-20, 25-93, 192-210; notice on appeal, Chapters 2, 3 and 4; answer to questions by Court of Appeal and supplementary exhibits for oral arguments dated 28 May 2018; written arguments on appeal, paragraphs 9-12 with accompanying slides, 36-43.

to be respected in this case. Where the State, with a range of allegations that the judgment is defective in its reasoning, challenges factual findings and assessments of the Court of Appeal, in this case the restrictions for the review in cassation apply in full. The State has already had the proceedings before the District Court and Court of Appeal; this appeal in cassation is not a third fact-finding instance and therefore can only concern itself with questions of (the interpretation of) law. On the other hand, the facts established by the District Court and Court of Appeal to a large extent also determine the law. Although the State does not contest important climate science principles in cassation, the importance of climate-scientific evidence of climate change by anthropogenic causes has not diminished in cassation either. On the contrary: in the current political constellation, there remains a dire need to clearly and loudly hail the fundamental importance of the results of scientific climate research. After all, for a large part of the national and international public, this issue is also about the importance of science in society and politics.

29. In view of the importance that Urgenda has attached to the facts from the outset as the justification for its claim, it is noteworthy that there is hardly any dispute between the parties about the facts.[15] There is a reason for this.

30. From the outset, Urgenda has relied primarily on the reports of the Intergovernmental Panel for Climate Change (IPCC), as well as other authoritative sources, in particular the Emissions Gap reports of the UNEP, for the facts it had stated about climate change and their interpretation and implications. The IPCC is an organisation established in 1988 as a joint initiative of UNEP and the World Meteorological Organisation (WMO) in response to signals from the scientific community that the world was heading for severe climate change and the need to realise structured global scientific research into climate change. IPCC membership is open to countries that are members of the United Nations or WMO.[16]

31. In particular, the *Assessment Reports* (ARs) issued by the IPCC about

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[15] However, discussion between the parties does exist about the necessity of a reduction pathway whereby a 25% reduction compared to 1990 levels must be achieved by 2020, the extent to which this reduction pathway follows from AR4 and whether it follows from AR5 that this reduction pathway is outdated. See cassation complaint 4 of the State and Urgenda's response below.

[16] See about the IPCC judgment District Court, legal grounds 2.8-2.21; judgment Court of Appeal, legal grounds 4 and 12.

once every seven years (such as AR4 in 2007 and AR5 in 2013/2014) should be seen as a periodically repeated recording and review of the (still evolving) scientific knowledge about the climate problem that mankind has at that time; a reflection of the current state of the collected climate science. In paragraphs 3.1 to 3.12 of its notice on appeal, Urgenda discussed the production of these IPCC reports in more detail. Urgenda refers thereto.

32. In summary, these reports summarise and weigh the published peer-reviewed scientific literature on: the physical and chemical effects of climate change and the planet's climate system (Working Group I); the impact of climate change on ecosystems and human systems and adaptability (Working Group II); and how and to what extent climate change can and should be mitigated if policymakers sought to prevent certain consequences of climate change that are expected by science (Working Group III).[17] In addition to these three subreports, there is also a fourth subreport, the *Synthesis Report* (SYR), which is mainly a summary report. Each of these four sub-reports has a *Summary for Policy Makers* (SPM), which is intended to provide a concise summary of the sub-report in question, in terms that are also understandable to non-scientists. The main purpose of the SPM is to make the scientific information that is relevant to political decision-making available to politicians and policymakers.[18]

33. Each section of each subreport has to go through a joint approval process by scientists and government representatives in some form, and it is particularly relevant that the SPM has to go through an 'Approval' process. The 'Approval' process means that each SPM has been the subject of detailed, line-by-line discussion and agreement at that level in joint (global) meetings of climate scientists and government representatives. This means that the governments of the countries that are party to the UNFCCC commit themselves to the findings, insights and conclusions in the SPM through the 'Approval' process and accept these word for word as the factual basis for their political decisions. The Dutch government has therefore also committed itself politically to the findings and conclusions of the IPCC in AR4 and AR5 and to the corresponding SPMs, word for word.[19]

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17 Judgment District Court, legal grounds 2.10-2.11.
18 Notice on appeal, paragraph 3.6.
19 Notice on appeal, paragraphs 3.8-3.11.

34. Urgenda has also relied on reports and publications from the Netherlands Environmental Assessment Agency (PBL) and the Royal Netherlands Meteorological Institute (KNMI), which could be seen as the Dutch counterparts of the IPCC/UNEP and the WMO, respectively. The PBL and the KNMI are scientific knowledge institutions established by, but independent from, the government and whose task and mandate is to advise the government on the policy areas they cover. It should be noted that PBL and KNMI scientists also make important contributions to the work of the IPCC and UNEP, for example in managing the EDGAR database, which contains a large body of emission data. Also worth mentioning is the Global Carbon Project (GCP), another global partnership of scientists that also processes a lager amount of emission data. The UNEP Emissions Gap reports mainly use GCP data.

1.3.2 The mechanism of climate change - how greenhouse gas emissions can cause a dangerous climate change: a case of cumulative causation

35. What exactly are the facts that make the climate problem such a major and urgent problem?

36. People use energy on a very large scale, for example in coal-fired power stations, gas turbines, car and airplane engines, in order to generate heat and energy, to increase their prosperity and well-being, and to power machines and equipment that enable them to increase their labour productivity. Therefore, a demonstrable direct and strong link exists between the level of prosperity and energy consumption, which explains why developing countries want to industrialise in order to combat their great poverty, just as developed countries began to do so two centuries ago.

37. Since the beginning of the industrial revolution, the energy needed for industrialisation has mainly been produced by burning fossil fuels (coal, oil, gas). Other technologies to generate energy are well known, but are much less developed due to the abundant and cheap availability of fossil fuels and are not yet available on the scale required to meet global energy needs.

38. The current extremely large-scale burning of fossil fuels releases CO2 as

a by-product, which is emitted into the atmosphere. The vast majority of global CO2 emissions over the past two centuries (historical emissions) come from developed countries which, however, represent a minority of the world's population. In recent decades, countries with very large populations such as China, India, Indonesia and Brazil have also started to industrialise. As a result, global CO2 emissions have increased rapidly and significantly. Moreover, in developed countries, per capita emissions are still generally considerably higher than per capita emissions in these emerging countries.

39. Roughly half of all CO2 emitted remains in the atmosphere for centuries,[20] if not many thousands of years, and therefore –on the time scales that are relevant for humans– never leaves. With each new emission of CO2, the amount of CO2 in the atmosphere increases further, because each new emission adds to what has already been emitted, resulting in the accumulation of CO2 in the atmosphere. This accumulation of CO2 ultimately changes the 'functioning' of the atmosphere.

40. CO2 is a greenhouse gas: it retains heat. The more CO2 that is released into the atmosphere or the higher the CO2 concentration, the stronger the greenhouse effect of our atmosphere becomes and the more the Earth warms up.[21]

41. Consequentially: until on balance no more CO2 emissions take place into

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[20] To explain: CO2 is stored both in the atmosphere and in the biosphere (the land masses and in this context especially, in forests and plants) as well as in the oceans. Atmosphere, biosphere and oceans are interconnected (in terms of exchanging and storing CO2) via the atmosphere and they behave as communicating vessels, so that they are in a certain fixed state of equilibrium to which they also return in the event of a disturbance in one of the 'vessels'. Because of this process of communicating vessels, about 50% of each additional emission of CO2 into the atmosphere is absorbed by the oceans (causing them to acidify) and by the biosphere (forests) in a process that takes several decades. The remaining 50% of CO2 remains in the atmosphere for millennia because CO2 is a chemically stable substance that does not break down in the atmosphere. See also Urgenda's answer to questions of the Court of Appeal and supplementary exhibits dated 28 May 2018, paragraph 65 with reference to Exhibit 163 of Urgenda.

[21] For the sake of completeness: there are also other non-CO2 greenhouse gases such as methane. On short time scales their warming effect is usually much stronger than that of CO2, but all these other greenhouse gases are not chemically stable and degrade strongly in a number of decades; they do not remain in the atmosphere for centuries. The warming they cause is, ultimately, temporary. They give, as it were, an extra but temporary peak of warming over and above the warming caused by CO2. The warming caused by CO2 is permanent, at least on timescales that are relevant to humanity. The non-CO2 greenhouse gases therefore contribute to climate change, but unlike CO2, their warming effect is temporary. See judgment Court of Appeal legal ground 3.3. However, non-CO2 greenhouse gases can contribute to the activation of certain planetary tipping points, as a result of which greenhouse gases are released from the biosphere itself. This can lead to a self-reinforcing process in which the temperature reaches unprecedented levels in a very short period of time and over which mankind no longer has any control. See also below in paragraph Error: Reference source not found.

the atmosphere, global warming will continue to increase, with the exception of large-scale so-called negative emissions which, as the Court of Appeal has established, are not realistic under the current state of technology.[22]

42. It is only when all emissions cease that the Earth's temperature will stabilise at the new level then reached, which, with the current state of technology, will then remain at this level for many millennia, and may never fall again.[23] However, the rest of the Earth's climate system will continue to change over a long period of time in a process of adaptation to the new temperature equilibrium. For example, sea level rise will continue for hundreds of years to come, as will the melting of ice sheets. This delayed reaction of the climate system as a whole to a changing CO2 concentration in the atmosphere is called the inertia of the climate system. This means that the current concentration of CO2 and also the current warming of about 1.1 ºC not only have effects that are already clearly visible, but will also have serious other effects that are not yet visible, but will mainly impact future generations.

43. Indeed, all the CO2 that has already been emitted since the Industrial Revolution to the present day has already warmed up the Earth. Today, global warming is about 1.1 ºC compared to pre-industrial times.[24]

44. Global warming seems to be accelerating at the moment.[25] Of the 18 warmest years measured since global measurements began in about 1850, 17 have occurred in this century. The other took place in 1998, which at the time was considered to be an extremely warm El Niño year[26], but is now in 9th place. The six warmest years in history all took place after 2010. The year 2018 was a relatively cool (because of a, albeit weak, La Niña) year[27], but is in 4th place and was therefore considerably warmer

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22 More on this later. The Court of Appeal has established that the possibility of removing CO2 from the atmosphere in the future using certain techniques is very uncertain and that the climate scenarios based on such techniques have a low level of feasibility under the current state of technology (legal ground 49).

23 The temperature will rise even further at some point. Because the oceans do not heat up as fast as the atmosphere and the Earth's surface, for the time being they act as a cooling element in a heated planet, so that the warming of the atmosphere is somewhat limited until the oceans have also reached their new temperature.

24 Exhibit 105: WMO (World Meteorological Organization) Statement on the State of the Global Climate 2016.

25 Judgment Court of Appeal, legal ground 44, second bullet. See also notice on appeal, paragraph 2.14 and the third sheet (NASA graph) used by Urgenda in its oral arguments before the Court of Appeal.

26 El Niño causes warming of the seawater along the equator in the eastern Pacific Ocean. This has effects on the weather in large parts of the world.

27 The counterpart of El Niño with relatively cold water.

than 1998. The Earth is currently warming up with 0.2 ºC per decade. The sea level rise is also accelerating, from about 0.6 mm/year at the beginning of the previous century to 3.3 mm/year now; an acceleration by a factor of 5 in less than a century, which is still increasing.[28]

45. Global annual emissions have also increased in recent decades.[29] This means that the world is adding CO2 and other greenhouse gases to the atmosphere at an ever-increasing rate (i.e. acceleration). In 2014, 2015 and 2016, global emissions stabilised and this decade-long trend was reversed, raising hope that the world had embarked on the pathway to reducing and phasing out emissions. In 2017, however, emissions increased again by 1.1%[30], and projections show that in 2018, emissions will again increase by more than 2% compared to 2017.[31]

46. The above shows that a direct link exists between CO2 emissions on the one hand and global warming on the other. Any new sizeable emissions of CO2 will lead to further irreversible global warming to an extent commensurate with the volume emitted.[32] Every emission therefore matters, and every reduction in emissions also matters.

47. As said, the Earth will continue to warm up as long as CO2 emissions to the atmosphere continue to occur. There is therefore only a limited 'budget' of CO2 that can be emitted if the warming is not to exceed, for example, 2 ºC. If warming has to be limited to 1.5 ºC, the budget of CO2 that can still be emitted is even considerably smaller. This budget is known as the carbon budget. The concept of a carbon budget and its implications have been strongly emphasised in the latest IPCC report AR5 from 2013/2014, and in particular in the summarising AR5 *Synthesis Report*.[33] Urgenda will return to the carbon budget and its implications in more detail later.

1.3.3 Preventing dangerous climate change

48. The UNFCCC concluded in 1992, to which 195 (almost all) countries in

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28 See the sixth sheet (Hansen et al.) used by Urgenda in its oral arguments before the Court of Appeal.
29 Judgment Court of Appeal, legal ground 44, sixth bullet.
30 UNEP, 'The Emissions Gap Report 2018', p. 5.
31 Prognoses Global Carbon Budget 2018, Earth Syst. Sci. Data, 10, 2141–2194, 2018. See also C. Speksnijder, 'Wereldwijde uitstoot CO2 dit jaar weer toegenomen', *Volkskrant* 5 December 2018.
32 This is therefore identical to the causality problem that played a role in the *Kalimijnen* judgment: the new salt discharge added extra salt load/concentration to the existing concentration.
33 Exhibit 104.

the world are parties, aims - as set out in Article 2 - to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system; and to achieve this objective within a time frame sufficient to allow ecosystems to adapt naturally, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. The UNFCCC itself, as concluded in 1992, does not therefore lay down a quantitative standard (e.g., a maximum concentration level or a temperature limit) to define and specify what is meant by 'dangerous' climate change.

49. The IPCC *Assessment Reports* (particularly the subreports of Working Group II) naturally also focus on the impact that climate change can have on ecosystems and social systems. Since the third IPCC report was published in 2001 (TAR = *Third Assessment Report*), this impact assessment has been carried out on the basis of five so-called 'Reasons For Concern' (RFCs). This provides politicians and policymakers with the best available knowledge and information they need to make decisions, balancing all the pros and cons, from which point the consequences of climate change become (unacceptably) dangerous.

50. Politicians and policymakers of the countries party to the UNFCCC meet every year at a climate summit (the annual 'Conference of Parties' or COPs) and take decisions ('COP Decisions') on joint international climate policy.

51. In particular, in the COP Decision[34] agreed upon at the 2010 Cancun Climate Summit (Mexico), following the information contained in the

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[34] A COP Decision (more about this in Chapter 2) is a decision of the Conference of Parties, i.e. a (unanimous) decision of the contracting parties in a meeting (a 'climate summit'). On the legal status of a COP Decision: '*Because most international institutions cannot make legally binding decisions, or at least not "binding" in the traditional legal sense, other instruments, belonging to the category of so-called "soft law", are frequently used. These include COPs decisions (...). It is currently argued in the literature that such decisions are indeed legally relevant and could be regarded as evolving international administrative law. (...)*
COPs decisions are often made on the basis of consensus, often also when the rules of procedure provide for the possibility of making decisions though (certain forms of) majority. Although COP decisions are not legally binding in almost all cases, they can have a direct impact on the obligations of parties to the Convention.' Goote and Hey, Internationaal milieurecht, Chapter 19 in: Handboek Internationaal Recht, T.MC. Asser Institute, 2007, The Hague.
About COPs at MEAs (Multilateral Environmental Agreements) also: '*As with soft law, these regulations are not strictly speaking a formal source of international law, which in this case would be the constitutive treaty. They remain, nevertheless, a very important technique for the development of international standards. In international environmental law, these regulations mainly take the form of decisions adopted by the COPs (or CMPs) on various subjects (...).*' Dupuy and Vinuales, International Environmental law, Cambridge Univ. Press, 2015, p. 36.

2007 AR4 report on the increase in risks and dangers of climate change proportionate with the increase in global warming, the contracting parties agreed to limit global warming to 2 ºC, and to further consider the need to limit global warming to 1.5 ºC.[35] In 2010, therefore, the UNFCCC parties agreed on a quantitative norm/standard specifying what should be understood by 'dangerous' climate change. This is also the standard against which the actions of the State must be assessed.

52. The District Court has reproduced this decision in the Cancun Agreement in legal ground 2.49 of the judgment. In later COP Decisions - by means of reference to the Cancun Agreement - this temperature target was repeated time and again by the UNFCCC parties.[36]

53. Following the findings in AR5 from 2013/2014 (in particular on the basis of the RFCs), the Paris Agreement –a legally binding convention– was subsequently agreed upon in December 2015 (building on the Cancun Agreement and subsequent COP Decisions). Whereas in 1992 it was agreed in Article 2 of the UNFCCC that 'dangerous' climate change must be prevented, in December 2015, parties fleshed out this provision agreeing in Article 2 of the Paris Agreement that warming must remain 'well below' 2 ºC and that efforts must be made to limit warming to 1.5 ºC.[37]

54. Urgenda points out that this agreed temperature target concerns not only the degree of warming (well below 2 ºC or 1.5 ºC) but also the pace of this warming. Warming should not reach the level of 'well below' 2 ºC until 2100. The reason for this –see Article 2 of the UNFCCC– is that the rate of warming must not exceed the capacity of the planet's ecosystems to adapt, bearing in mind the importance of these ecosystems for the livelihoods of human societies. This is particularly the case for food production, which is mentioned in Article 2 as an indicator of dangerous climate change.

1.3.4 Tipping points

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35 Exhibit 31 to the summons.
36 Judgment Court of Appeal, legal ground 11; Exhibits 107 and 119 to 123 notice on appeal.
37 Exhibit 106: Paris Agreement. The UN Climate Convention is a framework convention, as can be seen from its full name: United Nations Framework Convention on Climate Change (hereinafter referred to as: UNFCCC). The Kyoto Protocol is an earlier convention agreed upon within the framework of the UNFCCC.

55. Moreover, as the Court of Appeal established in legal ground 44, the accumulation of CO2 in the atmosphere can lead to the climate change process reaching a tipping point. Such a tipping point causes the climate to find itself in a different equilibrium situation, which can lead to abrupt climate change that neither man nor nature can properly adjust to. The risk of such tipping points increases 'at a steepening rate' when the temperature rises between 1 °C and 2 °C (see judgment, legal ground 44, with reference to AR5 p. 72).

56. Urgenda has extensively discussed these tipping points before the District Court and Court of Appeal.[38] Whereas at the time of the summons and the statement of reply it was still thought that the chance of most tipping points arising in the near future was relatively small, the current state of knowledge is that important tipping points can also occur at a warming between 1.5 °C and 2 °C. For the oral arguments before the Court of Appeal, Urgenda has submitted a report by the Earth League and Future Earth, consisting of a group of leading scientists (Exhibit 151). During the oral arguments, Urgenda presented a slide with a figure from the report that makes it clear that a warming of between 1.5 °C and 2 °C can already lead to five tipping points. Even with the current warming, the survival of coral reefs is under severe pressure. With a warming of 2 °C, it is likely to disappear for the most part. The four other tipping points are all related to the melting of ice. This is a process that is particularly important for the Netherlands because of the rising sea level.

57. For the COP24 in Katowice at the end of 2018, Earth League and Future Earth published a new report: *10 New Insights in Climate Science 2018*.[39] A few quotes from that report:

'*Key facts:*
• Changes have been observed in major Earth systems: a weakening of the Atlantic overturning circulation, mass mortality of the world's coral reefs, and ice loss from the West Antarctic ice sheet has tripled in 25 years
• With continued warming, these and other systems can reach points where they rapidly collapse or a major, largely unstoppable

[38] Summons, paragraph 382; reply, paragraphs 150-153, 434, 517; notice on appeal, paragraphs 3.67-3.74.
[39] Future Earth and the Earth League, '10 New Insights in Climate Science 2018', available online: https://briefs.futureearth.org/wp-content/uploads/2018/12/10-New-Insights-in-Climate-Science-2018-online.pdf.

transformation is initiated
• The world at 2 °C warming and beyond is unsafe territory with a risk of crossing a planetary threshold towards a 'Hothouse Earth'

In recent years, the risks associated with single, in principle well-known climate processes and their interaction have been corrected upwards as science makes new data or methodologies available. Some tipping elements are currently approaching a critical threshold or have already crossed it.

For example, a weakening of the Atlantic overturning circulation, often referred to as the Gulf stream system, has been expected from model simulations. Recent studies confirm that it has slowed down by 15% since the middle of the 20th century and is at its weakest in over a thousand years. This is already having observed effects, such as extreme weather in Europe, and further weakening is expected to strongly affect European weather as well as exacerbating sea-level rise at the east coast of North America.

A collapse of the West Antarctic ice sheet is now a significant risk that would result in about 3 meters of sea-level rise. Ice losses there have tripled over the last 25 years. Episodes of ocean melting increase the risk of ice sheet collapse, there is strong evidence for this having already begun in the Amundsen Sea sector.

Emerging scientific evidence shows how much tipping elements are linked to each other. For example, freshwater input into the North Atlantic from Greenland ice sheet melting can affect the ocean circulation and cause changes in rainfall from the West African monsoon, with substantial consequences for livelihoods. Interacting tipping elements in the Earth System could potentially lead to tipping cascades and catapult the planet into a new state.

There might be a planetary threshold, beyond which no intermediate warming levels can be stabilized. While its exact location is uncertain, it can be as low as 2 °C of warming. Beyond this threshold, temperatures could rise as high as 4-5 °C, with 10-60 meters of long-term sea-level rise, and various other hazards to humanity and nature, locking Earth into a 'Hothouse' state for tens to hundreds of millennia. This is a state that best corresponds to the Earth as it was 15-17 million years ago when

no human roamed this planet.' (underlining added, counsel)

58. The European Commission also warns against a 'hothouse Earth':

'*Without stepping up international climate action, global average temperature increase could reach 2 °C soon after 2060 and continue rising afterwards. Such unconstrained climate change has the potential to turn the Earth into a 'hothouse', making large-scale irreversible climate impacts more likely. [..] Irreversible loss of the Greenland ice sheet could be triggered at around 1.5 °C to 2 °C of global warming. This would eventually lead to up to 7 meters of sea level rise affecting directly coastal areas around the world including low-lying lands and islands in Europe. The rapid loss of Arctic sea ice during summer is already happening today, with negative impacts on biodiversity in the Nordic region and the livelihood of the local population.*' (underlining added, counsel)

59. These quotes underline the urgency of the climate problem, which has only increased with today's knowledge, and the absolute necessity to keep warming (far) below 2° C.

1.3.5 The carbon budget

60. In AR5 –first in the *Synthesis Report* that was published in 2014– the carbon budget was introduced as a concept that can help clarify a number of aspects of the climate problem. This concept has since become accepted in scientific literature. Urgenda wants to use the carbon budget concept to clarify a number of issues that are relevant to the present dispute.
As said, most of the CO2 emitted remains in the atmosphere for centuries, if not thousands of years. It therefore accumulates. The more greenhouse gases that are emitted, the higher the concentration in the atmosphere. When the concentration rises, the temperature rises accordingly.

61. This implies that if, because of the risks and dangers of climate change, it is decided that warming must be limited to a certain temperature ('the target temperature'), Earth can only accommodate a maximum concentration of CO2. This concentration is measured in parts per million (ppm). The remaining maximum amount of CO2 that can still be emitted

in order to stay below a certain target temperature is also known as the carbon budget. Therefore, each target temperature also has its own associated carbon budget; the higher the target temperature, the greater the associated carbon budget. If, for example, the warming in 2100 has to be limited to 2 °C, then a larger amount of carbon can be emitted and the carbon budget is larger than if the warming in 2100 has to be limited to well below 2 °C or even 1.5 °C.[40]

62. A sharp reduction in global emissions in the shortest possible time from now on not only slows down the rate of warming, but also the rate at which the carbon budget for a 2 °C warming is used. This will allow more time to make the transition to a society where CO2 and other greenhouse gases are no longer emitted. This is called the transition to a fossil-free society. This transition is a process that will require a great deal of effort and cannot take place from one day to the next. This is called the social inertia of the climate problem.

63. The conclusion is that if we make rapid and substantial reductions now, this will reduce the very fast pace at which we are exhausting the carbon budget.

64. This implies that the volume of global annual emissions should be reduced each year, and at such a rate that global annual emissions are zero before the available carbon budget is used up. In other words, from their current level, global emissions must follow a pathway or trajectory downwards that is sufficiently steep that global emissions have been reduced to zero before the carbon budget is exhausted. This requires an almost complete replacement of the current global energy supply, and therefore a very large, global, social transition.

65. The time for this social transition has already become so short –because so little has been done to reduce emissions over the past 20 years– that the timely phase-out of all emissions has now become a very difficult task in order to prevent dangerous climate change.[41]

66. As a result, the scientific literature increasingly takes into account that

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[40] Judgment Court of Appeal, legal ground 3.5.

[41] Judgment Court of Appeal, legal ground 44, in particular the eighth bullet; notice on appeal, paragraph 6.35 with reference to AR5, notice on appeal, paragraphs 1.27, 2.25, 6.67, 6.82, 7.43 and the references therein. These facts have not been disputed by the State.

more CO2 will be emitted than the available carbon budget for a warming of 2 ºC, let alone the carbon budget for a warming of 1.5 ºC.[42] Thus, research has been done into the question of whether it would be possible to remove CO2 from the atmosphere once it has been emitted. These are known as CDR techniques: Carbon Dioxide Removal. A temporary overrun of the carbon budget could then be reversed and, if the overrun does not take too long, it might not necessarily have irreversible consequences. Emission scenarios in which this possibility is investigated are referred to as 'overshoot' scenarios.[43]

67. Most overshoot scenarios use BECCS (also known as BE-CCS). Forests and plants absorb and store a certain amount of CO2 from the atmosphere. The idea is that, in the future, forests and plants (instead of coal or gas) should be used at a large scale to fire power stations. The CO2 emitted by the power plant during combustion would then have to be captured and stored underground (CCS or 'Carbon Capture and Storage'). The forests that are used in this way for bio-energy (BE) have to be replanted, whereby the new plants again absorb CO2 from the atmosphere before also serving as fuel for the power plant. Hence the abbreviation BECCS for Bio Energy Carbon Capture and Storage.

68. BECCS (and also CCS) is currently still a long way away. On paper it sounds wonderful and promising: energy generation that goes hand in hand with 'negative emissions', i.e. that extracts CO2 from the atmosphere instead of, as is currently the case, adding CO2 to the atmosphere. However, the scientific literature warns that there are major obstacles to this and all other forms of negative emissions that are currently being considered. They are all expensive can give rise to additional risks, some are extremely energy-intensive, and could increase competition with food production and biodiversity. In the scientific literature, therefore, there are serious doubts as to whether these techniques will become available on the scale necessary to correct an overshoot.[44] Scale is the big problem here. The greater the overshoot, the

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42 Notice on appeal, paragraphs 2.26-2.28 and the references therein.

43 In legal ground 2.32, the District Court adopted a figure from the UNEP *Emissions Gap Report 2014* in which examples of two different overshoot scenarios with associated negative emissions (the tinted area below the zero line) are depicted.

44 See, for example: European Academies Science Advisory Council, 'Negative emissions technologies. What role in meeting the Paris targets', February 2018, included in Exhibit 164, Smith et al., 'Biophysical and Economic limits to negative CO2 emissions', Nature Climate Change 6, 42-50 (2016), included in Exhibit 106, Fuss et al. Betting on negative emissions in: Nature Climate Change, Vol 4, 850-853 (Oct 2014); Vaughan et al. Expert assessment concludes negative emissions may not deliver', in: Environmental

less realistic it is that it can be reversed (in time). The Court of Appeal has therefore rightly concluded that the possibility of removing CO2 from the atmosphere in the future using these techniques is highly uncertain and that the climate scenarios based on such techniques have a low level of feasibility at the current state of technology (legal ground 49).[45]

69. The IPCC's AR5 report uses four representative scenarios (Representative Concentration Pathways; RCP) to investigate how global emissions could develop in the future; which 'pathway' global emissions could follow. Each of the four RCP scenarios is 'Representative' of a set of scenarios (from the scientific literature and included in the IPCC database) that share a common 'pathway' of emissions to 2100 leading to the same 'Concentration' of greenhouse gases in the atmosphere in 2100 as the end point - and thus all lead to the same temperature in 2100.

70. The RCP 8.5 scenario assumes that there will be little or no climate policy. This scenario assumes that poor countries (which currently have hardly any emissions) will also develop industrially and emit (much) more. This scenario leads to a warming of more than 4 ºC by the year 2100. Before the District Court, Urgenda submitted the World Bank's '*Turn Down the Heat*' report into the proceedings.[46] The report attempts to describe a world in which the global temperature has risen by 4 ºC by 2100. A warming of 4 ºC may not seem like much, but the effect of such warming is devastating. If the Earth warms up by 4 ºC, the changes will be so great that it will no longer be able to provide living conditions for a world population of nine billion, but only for considerably less.[47] Without significant reductions in greenhouse gas emissions (in particular CO2), there is a risk of global warming of 4 ºC in 2100.

71. The RCP 2.6 scenario is the only one of the four IPCC AR5 scenarios in which warming in 2100 is not only limited to 2 ºC but has actually been brought to a halt because on balance there are no longer any emissions

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Research Letters 11 (2016) 095003; PBL report 'Implications of long-term scenarios for medium-term targets (2050)', November 2015, Chapter 4 of which deals with the problems associated with negative emissions; PBL report 'Differences in estimates between carbon budgets reviewed', February 2016, Chapter 1 'Carbon budget is very limited', paragraph 1.1 'Rapid change of the economy', paragraph 1.2 'With negative emissions'; Rogelj et al. Paris Agreement climate proposals need a boost to keep warming well below 2 °C' in: Nature Vol.534 631-639 (June 2016).

45 The State also acknowledges that there is uncertainty about the possibility of realising negative emissions (cassation complaint 4.6 under ii).

46 Exhibit 18 to the summons.

47 An Earth that is 5-7 ºC colder is an ice age during which large parts of the planet are covered with ice. Similarly, an Earth that is 4 ºC warmer will differ to that on which we live.

('on balance' here means that any remaining emissions will be offset by negative emissions). In the three other scenarios (each representing an even greater number of scenarios within the IPCC database consisting of more than 1,000 scenarios) the warming in 2100 is therefore greater than 2 ºC and the warming will continue to increase even further after 2100.

72. The RCP 2.6 scenario is based on the theoretical situation in which reductions will start worldwide as soon as possible and all countries participate and cooperate intensively to ensure that reductions will take place as cost-effectively as possible: this requires, however, that a single global price is set for CO2 emissions. In this theoretical RCP 2.6 scenario, the concentration of greenhouse gases in the year 2100 is 450 ppm which, according to the IPCC reports, gives a more than 66% chance that the warming in the year 2100 will be limited to 2 ºC. The RCP 2.6 scenario therefore assumes a level of global cooperation and a level of global effort that is still far removed from reality.

73. Another problem exists with the reality of the RCP 2.6 scenario. The RCP 2.6 scenario is representative of all 116 scenarios studied by the IPCC that result in a warming of maximum 2 °C by 2100.[48] The vast majority of these scenarios (101 scenarios or 87%) can only achieve this result through large-scale use of BECCS or by including other negative emissions in the calculations. As explained above, it is questionable whether such negative emissions will actually prove possible. The scientific literature warns that the hope for future NETs (negative emissions technologies) should certainly not be a reason not to realise drastic emission reductions as soon as possible.[49]

74. As if the RCP 2.6 pathway is not difficult enough, the Paris Agreement now stipulates, at treaty level, that warming must remain 'well below' 2 °C, with a target of 1.5 °C. This implies –also according to the State– that the concentration of greenhouse gases in the atmosphere may not exceed 430 ppm by 2100. This means an even smaller carbon budget and the need for even faster emission reductions.

75. In reality, global emissions follow a 'pathway' that is far removed from

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[48] Exhibit 108: Smith et al., 'Biophysical and Economic limits to negative CO2 emissions', Nature Climate Change, Vol 6, 42-50 (2016), p. 43. Van Vuuren, who is also associated with the PBL, is one of the co-authors. Van Vuuren is also co-author of the PBL reports mentioned in footnote 44 above.

[49] Ibid, p. 48.

RCP 2.6. Since 2010, UNEP has published an Emissions Gap report every year. Assuming the need for global emissions to follow a decreasing 'pathway' in accordance with the curve of RCP 2.6, the Emissions Gap reports map out each year which pathway global emissions actually follow, and how large the gap is between the necessary 'pathway' of RCP 2.6 and the 'pathway' that is actually followed. From this, the reality appears to be that global emissions have for years been following a 'pathway' that runs close to (just below) the 'pathway' of RCP 8.5, which leads to more than 4 °C warming in 2100. So year on year we emit considerably more than we should if we want to reach the 2 °C target, and the carbon budget is being exhausted faster.

1.3.6 The carbon budget and Urgenda's claim

76. The above shows that the central matter is how much is emitted cumulatively over the years. A climate policy that focuses exclusively on a high reduction percentage in a year far in the future (e.g., a 95% reduction in 2050) is comfortably far away for the current generation of politicians, and is above all non-binding, for as long as it can be said that the goal is attainable. But this ignores the fact that this target of a 95% reduction in 2050 can only be realised if one adheres to a specific emissions 'pathway' between now and 2050. This 'pathway' implies that even the current generation of politicians will have to meet intermediate targets in order to ensure that current emissions also follow the right 'pathway' to remain within the available carbon budget and thus keep the 2 °C temperature target within reach.

> For example, suppose that all countries continue to emit at their current levels in the coming decades, but a revolutionary new way of generating energy is invented in 2049, which will be implemented worldwide within one year, so that by 2050 a 95% reduction compared to 1990 will be achieved. This means that the goal of a 95% reduction in 2050 has been achieved, but - because in the intervening years too much CO2 has been emitted, some of which will remain in the atmosphere for millennia - a dangerous climate change will not be prevented.

77. In Exhibit 77 of the State,[50] submitted for the oral arguments on 28 May 2018 at the Court of Appeal, and cited by the Court of Appeal in legal ground 47, the PBL expressed it as follows:

> *'Not only a very low level of emissions in 2050 is important for climate policy. The total burden of greenhouse gases on the atmosphere in the rest of the century (referred to as the carbon budget for CO2), and therefore also in the coming years, will determine the temperature increase and its effects. (...) The available "carbon budget" therefore illustrates that not only a certain reduction at a certain point in time (such as 2050) is important, but also the pathway towards it. A substantial reduction in emissions in 2030 will reduce the carbon budget much less than the continuation of current policy.'*[51]
>
> *'Realisation of the climate targets in the Paris Agreement is not so much about low emission levels in 2050, but also, and above all, about low cumulative emissions. Short-term emission reductions are therefore also very important: every additional Mton of CO2 released into the atmosphere in the short term contributes to the rise in temperature (see text box 1.1 in the introduction).'*[52]

78. Urgenda would like to use two figures to illustrate the great importance and urgency of realising urgent and deep cuts in emissions. The first figure was submitted by Urgenda in oral arguments on 28 May 2018.

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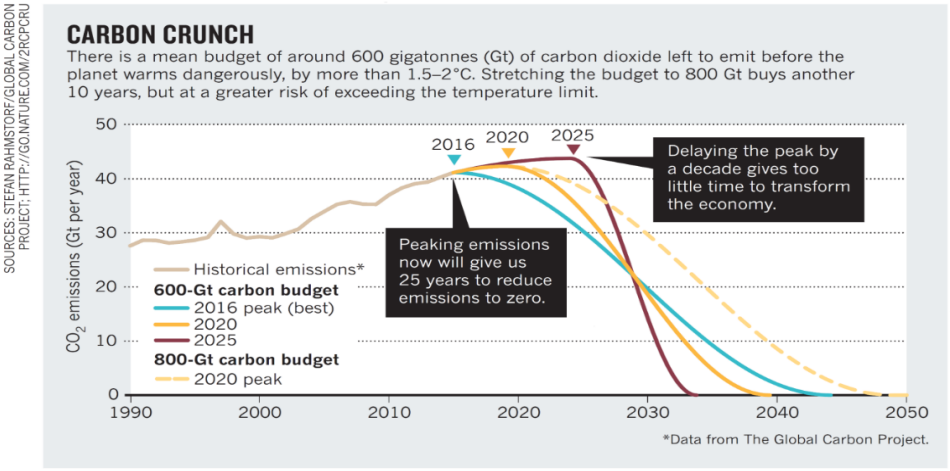
[50] Exhibit State 77, PBL, 'Verkenning van klimaatdoelen, van lange termijn beelden naar korte termijn actie', pp. 7 and 8, Policy Letter dated 9 October 2017.
[51] Exhibit State 77, pp. 7-8 (underlining added, counsel).
[52] Exhibit State 77, p. 60 (underlining added, counsel).



79. The beige line shows how high the annual global CO2 emissions (expressed in Gigaton per year) have been between 1990 and 2016. The area below this emission line (i.e. the area between that line and the x-axis) visualises the magnitude of the total (added) emission between 1990 and 2016. If this size has to be limited to a certain carbon budget, the emission line will have to touch the x-axis (= zero emissions) at some point, at such a time that the area below the emission line does not exceed the available carbon budget. If the area is larger, this will have to be compensated by negative emissions, so that the emission line will have to dive below the x-axis (see the figure in legal ground 2.32 of the judgment of the District Court).

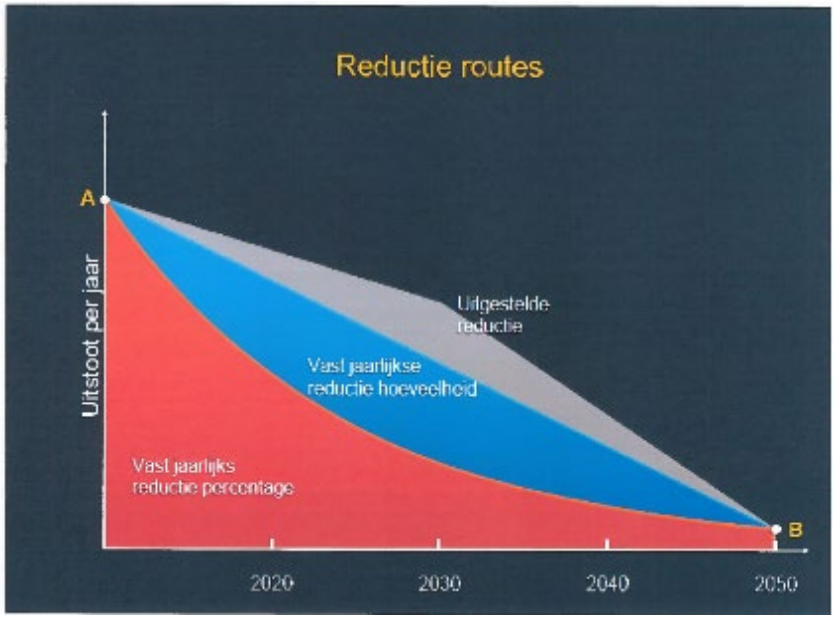
80. The figure effectively shows the effects of postponing emission reductions.
    * The blue line shows that if emission reductions start in 2016, in order to remain within the carbon budget, emissions can be reduced fairly gradually to zero (the line is not very steep) and that the point of zero emissions must be reached by about 2045.
    * If the reductions are postponed (yellow line) until 2020, with the same carbon budget and therefore the same area below the emission line, the phasing out will have to take place much faster (steeper downward trend) and the point of zero emissions will have to be reached as early as 2037.
    * If the emission reductions to 2020 are not accelerated (the yellow dotted line), the zero emissions point will not be reached until 2050

(the emission level in 2020 is higher than the emission level in 2016, so it will take longer for zero emissions to be reached if the rate of phasing out remains the same). In this case, the area below this emission line will be much larger, which means that the carbon budget will be exceeded.

* If emission reductions are further postponed until 2025 (the red line), extremely rapid and drastic reductions will be needed to remain within the carbon budget and zero emissions will have to be achieved as early as 2035. The question arises whether at some point such rapid, steep emission reductions will still be technologically, financially and socially feasible. Postponement therefore carries a high risk of failing to meet the climate target (as the Court of Appeal rightly points out in paragraph 47).

82. If a government does not want to start reducing emissions in 2016, even though it is reasonably possible, but postpones reductions, this will result in a disproportionate burden on the following governments, which will have to achieve the necessary emission reductions by 2025. Not only are problems being passed on to future governments/generations, but these problems are being disproportionately exacerbated . At some point it becomes very doubtful whether this is still 'just and fair' and reflects sufficient 'care' towards those future governments/generations.

83. The following figure, used in the oral arguments before the District Court and included by the District Court in paragraph 4.32 of its judgment and to which the Court of Appeal also refers in paragraph 44, final sentence, approaches the same problem from a different perspective.



84. The figure also shows three different 'pathways' of emission reductions. The numbers are less important than the principles illustrated. The 'pathways' all start from the same point A, e.g., an annual emission of 100 tonnes in 2010, and all three end in the same point B, e.g., (as in the graph) an annual emission that was reduced by 95% in 2050, but could also be an annual emission that was reduced by 49% in 2030.
   * Suppose that each year the emission level of the previous year is reduced by 5%. In other words, there is a constant percentage of emission reductions. This leads to a hollow, concave line, and the red area represents the total amount of CO2 emitted between point A and point B.
   * An alternative is to reduce annual emissions by the same amount each year, for example by 10 tonnes. This leads to a straight line between A and B, and the red and blue areas together represent the total amount of CO2 emitted between points A and B. This is already considerably more than in the previous variant. There is also something else that deserves attention. If the annual emission at point A is 100 tonnes, and the annual emission is reduced by 10 tonnes each year, then an emission reduction of 10% is necessary in the first year. In the penultimate year, the annual emission is 20 tonnes, and if the annual emissions have to be reduced by 10 tonnes again, then an emission reduction of 50% is necessary in that year. The conclusion must be that, even if emissions are to be reduced uniformly and linearly, the greatest efforts will have to be made by future

governments/generations.

* The third alternative is to postpone emission reductions until, for example, 2030. The graph shows that in this case steeper, faster and more sustained emission reductions will be needed after 2030 than in the other two variants. In addition, the total emissions between point A and point B (the red, blue and grey areas added together) are higher than in the other two variants.

The graph convincingly illustrates that achieving a 95% reduction in emissions by 2050 is not sufficient to prevent dangerous climate change. The 'pathway' that emissions follow over time is much more important than a high reduction percentage in a future year. The central matter is the total, cumulative amount of emissions that will be emitted, not so much the reduction percentage in the distant future.

85. Finally, a very simple calculation example. Every tonne of CO2 emitted gives the same degree of warming, and it does not matter where or when that tonne of CO2 is emitted. The idea might therefore arise (and the State raises this in cassation complaint 6.3) that it does not matter whether an emission reduction of 10 tonnes of CO2 is achieved in 2019 or in 2028. This interpretation is deeply wrong. If the emission reduction of 10 tonnes of CO2 is achieved in 2019, this means that year after year, for nine years, the annual emission will be 10 tonnes lower than if the emission reduction is only achieved in 2029. Postponement until 2028 will therefore lead to 90 tonnes (9 years x 10 tonnes) of additional total emissions, with all the consequences that this entails for the rate at which the carbon budget is exhausted, and thus also for the time at which zero emissions must be achieved.

86. The 'pathway' is therefore more important than the point in time at which the emissions are zero. That is why the PBL (at the government's request)[53] has set out a linear pathway towards a 95% reduction by 2050, based on an emission reduction of 28% compared to 1990 levels by 2020 and a reduction of 49% by 2030. For the same reason, the EU-Effort

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[53] See the PBL Policy Letter (Exhibit 77 of the State), p. 8:
'*The Energy Agenda is based on a gradual transition to a low-carbon economy. At the request of the ministries, the quantitative reduction per functionality in 2030 has therefore been derived with a simple starting point: the emission value in 2030 as a point on a straight line between 2014 and 2050. For the total emissions in the Netherlands, such a linear pathway to an 80 or 95% reduction in 2050 would result in an emission reduction of 43 and 49 percent respectively by 2030 compared to 1990. This represents a considerable extra challenge compared to the policy currently adopted and planned (NEV 2016), which is expected to reduce emissions by 16-32% by 2030.*'

Sharing Decision also has a binding linear pathway, whereby an overrun in a given year must be compensated by an underrun in the following year.

87. An example of such a linear 'pathway' is that of Annex I countries (i.e. the developed countries listed in Annex I to the UNFCCC), such as the Netherlands, must achieve a reduction of 25-40% compared to 1990 by 2020, followed by an 80-95% reduction in 2050 in order to stay below a warming of 2 °C. The Netherlands will have to make a significant contribution to the reduction in its emissions by 2020. These two objectives are linked to each other because they mark how the 'pathway' runs. This 'pathway' can perhaps best be understood as the minimum contribution required from Annex I countries such as the Netherlands in order to achieve the RCP 2.6 scenario. A significantly smaller reduction in emissions in the Netherlands than 25% in 2020 must therefore be offset by reductions in excess of 80-95% in 2050 and will in fact require negative emissions.

1.3.7 The consequences of climate change for the current generation of Dutch residents are so concrete, real and large that Urgenda, on behalf of this group, can invoke the legal protection of Articles 2 and 8 of the ECHR.

88. In cassation, the State adopts the view that, for the reliance on Articles 2 and 8 of the ECHR to be successful, it must be sufficiently clear which persons or groups of persons are threatened and that the threat to life (Article 2 of the ECHR) and to family life and one's own home (Article 8 of the ECHR) is real and concrete. The question of whether the requirements for the applicability of Articles 2 and 8 of the ECHR should be interpreted as strictly and restrictively as argued by the State is answered in detail in Chapter 4.

89. At this point, Urgenda would like to comment on the finding of the Court of Appeal that the requirements set by the State have in fact been met. As the Court of Appeal has rightly established, the dangers and risks of climate change are so concrete, real and significant –and for the current generation of Dutch citizens as well– that they justify reliance on the ECHR and the order imposed on the State. Below, Urgenda once again sets out its claims, which that have been adopted by the Court of Appeal. It should be borne in mind that these are also scientific facts available in

the public domain and that are considered to be common knowledge.

90. As the current generation of Dutch residents also includes those who were born very recently, for example in 2015, and who can be expected to be alive in the year 2100, the question raised is whether uninhibited climate change will pose such dangers and risks to the Dutch territory in this century alone that the personal safety and/or privacy and/or the homes of Dutch residents will be concretely and realistically threatened.

91. Urgenda points out, first of all, that it has already extensively discussed the dangers and risks of climate change in its summons dated 20 November 2013. See (in general and/or for Europe) paragraphs 117 and 118 (pp. 42 to 48) and 132 to 134 (pp. 53 to 58). Urgenda has explained that these (global) dangers are of such nature and magnitude that they also affect the Netherlands. After all, the Netherlands is not an isolated island where the climate and social consequences of climate change stop at the border, nor can the Netherlands evade what is happening in the rest of the world; rather, the opposite is the case.

92. In the same summons, Urgenda discussed the specific consequences for the Netherlands in paragraphs 38, 39 and 41, and 126-128. Footnote 10 to paragraph 38 states that the 2003 heat wave across Western European caused 1400-2200 deaths in the Netherlands alone and that such heat waves will increase in both frequency and intensity in Europe (these data can also be found on the RIVM website, under the heading 'Heat'). There is also a report included indicating that in July 2006, the heat caused 1000 more deaths in the Netherlands than would have occurred at average temperatures).

93. Especially in paragraph 125 and 135 of its statement of reply (Chapter 4), Urgenda discussed not only the general dangers and risks of climate change, but also the (at times current) hazards and risks specific to the Dutch territory. The consequences outlined in the statement of reply are of such nature, seriousness and extent that they fall within the scope of Articles 2 and 8 of the ECHR and 'trigger' those articles. Also, in paragraph 137 of its reply, Urgenda used KNMI scenarios to highlight the 'disruptive' consequences of extreme weather. And to illustrate that the Netherlands cannot avoid the consequences of climate change elsewhere, Urgenda also points out paragraph 163, which references a letter from the State Secretary for Infrastructure and the Environment dated 17 June

2014 to the Lower House in which the State Secretary, acting on behalf of the government in response to AR5, writes, among other things, that climate change may impact food and energy security in the Netherlands. Finally, in paragraph 460 (with reference to the IEA-NL 2014 report), Urgenda referred to the flood risks for the Dutch territory (24% of which is below sea level, 60% is vulnerable to sea level rise or flooding of the three major rivers).

94. In paragraphs 3.52 to 3.74 of its notice on appeal, Urgenda further discussed extensively the (global) dangers and risks of climate change on the basis of the IPCC's AR5 report, which was at the time the most up to date representation of the state of affairs. In AR5, the risks and dangers are estimated to be greater than in AR4 (2007), and they are already starting to manifest themselves at a lower level of warming than was estimated in AR4. The main risks are summarised in the *Summary for Policymakers* of WGII. The seriousness of the risks is shown in the quote below.[54] Reference is made to the aforementioned RFCs.[55]

> '*The key risks that follow, all of which are identified with high confidence, span sectors and regions. Each of these risks contributes to one or more RFC's:*
> *i) Risk of death, injury, ill-health, or disrupted livelihoods in low-lying coastal zones and small island developing states and other small islands, due to storm surges, coastal flooding, and sea level rise. [RFC 1-5]*
> *ii) Risk of severe ill-health and disrupted livelihoods for large urban populations due to inland flooding in some regions. [RFC 2 and 3]*
> *iii) Systemic risks due to extreme weather events leading to breakdown of infrastructure networks and critical services such as electricity, water supply, and health and emergency services. [RFC 2-4]*
> *iv) Risk of mortality and morbidity during periods of extreme heat, particularly for vulnerable urban populations and those working outdoors in urban or rural areas. [RFC 2 and 3]*
> *v) Risk of food insecurity and the breakdown of food systems linked to warming, drought, flooding, and precipitation variability and extremes, particularly for poorer populations in urban and rural*

[54] Also integrally adopted in notice on appeal, paragraph 3.59.
[55] See notice on appeal, paragraphs 3.53-3.74.

settings. [RFC 2-4]
vi) Risk of loss of rural livelihoods and income due to insufficient access to drinking and irrigation water and reduced agricultural productivity, particularly for farmers and pastoralists with minimal capital in semi-arid regions.42 [RFC 2 and 3]
vii) Risk of loss of marine and coastal ecosystems, biodiversity, and the ecosystem goods, functions, and services they provide for coastal livelihoods, especially for fishing communities in the tropics and the Arctic. [RFC 1, 2, and 4]
viii) Risk of loss of terrestrial and inland water ecosystems, biodiversity, and the ecosystem, goods, functions, and services they provide for livelihoods. [RFC 1, 3, and 4].'

95. This also has consequences for the Netherlands, of course. The risks identified by the IPPC in AR5, which occur at a global scale, such as food shortages due to declining harvests, water shortages, forced migration as a result of extreme weather events, violent conflicts, declining labour productivity and the extinction of animal species, are also present in the Netherlands.[56]

96. Furthermore, the arguments put forward by Urgenda in paragraphs 8.227 to 8.235 of the notice on appeal are of specific importance for the Dutch context. Therein, Urgenda argues with reference to AR5, among other things, that global average temperature may already (or nearly) have reached the point where a sea level rise of 15 metres has become unavoidable, which of course has major consequences for the habitability of the Netherlands since it is impossible to build dykes that can cope with that. Urgenda also discusses the dangers and risks of extreme weather and in particular heat waves and heat stress (as Urgenda did in its summons). In doing so, Urgenda refers, among other things, to (in paragraph 8.235 with footnote 149 and reference to Exhibit 135) a publication by Houghton (a British atmospheric chemist who was chair and co-chair of the first three IPCC reports). The publication asserts that the 2003 heat wave in Western Europe claimed tens of thousands of victims, including fatalities in the Netherlands. However, in 'Business-As-Usual' scenarios (as appear to be standard in recent decades) such a hot summer will have become a normal summer by 2050, and even a cool summer in 2100. One can easily predict the consequences this will have for mortality rates due

[56] Notice on appeal, paragraph 3.58 with reference to table 2.3 on pp. 70-71 AR5 SYR.

to heat stress before the end of this century, also in the Netherlands.

97. As far as the risks and dangers of sea level rise are concerned, it is important to note what Urgenda presented with several slides, during the hearing before the Court of Appeal - see also pp. 5 and 6 of the official report of that hearing. Slides 4, 5 and 6 illustrate how current global warming is already resulting in a very significant melting of the global ice sheets, and accelerating the rate of sea level rise from 0.6 mm per year between 1900 and 1930 to about 3.3 mm per year today: a fivefold increase in a century, indicating that the rate of acceleration is increasing. Slides 7 and 8 concern a KNMI news item titled '*Extreme sea level rise in the 21st century*', which reported that based on the most recent insights, a sea level rise of 2.5-3 metres this century is not impossible in the 'worst case' scenario, and that the previously mentioned extreme Veerman scenario (which is less than 10 years old) can no longer be described as extreme in this context. The report also stated that: '*In response to the new IPCC report, the KNMI will make interim adjustments to its sea level scenarios, because we can no longer rule out the possibility that unrestrained climate change will lead to uncontrollable sea level rises that will pose an impossible task for Dutch coastal defences*.' (underlining added, counsel)

98. None of this has been challenged by the State.

99. Worth mentioning in this context – but of a later date than the contested judgment and therefore presented here as a repetition and confirmation of the above– is the text on the website of the Delta Commissioner for the Delta Programme 2019. Section 2.1 of the Delta Programme includes a 'signal sea level rise' framework that outlines the consequences of sea level rise for the safety and habitability of the Dutch territory, calling for ambitious measures to be taken before the end of the century (e.g., the multiplication of sand nourishment). In addition, '*This initial study also shows that while the sea level may rise faster than is currently assumed if the Paris climate agreements are complied with, the preferred strategies will at least provide a sufficient basis for keeping the Delta habitable and liveable until 2050. In the event of an extreme rise in sea level, fundamental choices about the protection and design of our Delta seem inevitable. This illustrates the great importance of meeting the Paris climate agreement for the Netherlands and other deltas and coastal regions around the world.*'

100. To avoid misunderstandings, Urgenda would like to point out that a sea level rise of 3 metres in this century alone obviously poses a serious threat to the personal safety of the current generation of Dutch citizens and the habitability of the Dutch territory. The fact that the impact of this threat can possibly be averted by increasing and strengthening the dykes and other coastguard measures does not mean that the threat to life, family life and people's homes does not exist. The threat is real, immediate and concrete, even if the impact and adverse consequences of the threat can be forestalled by coastal protection measures. Urgenda also points out that the KNMI news report also illustrates why, as the Court of Appeal has rightly established, adaptation is not an alternative to mitigation: it is like trying to empty the ocean with a thimble.

101. On the subject of adaptation as the Court of Appeal has rightly stated, to the fact that the State is responsible for implementing adaptation measures does not detract from its obligation to take emission reduction measures. According to the State itself, adaptation and mitigation are complementary strategies[57] Indeed, the limits of adaptation are one of the most important factors in establishing the temperature target of well below 2 °C. See, for example, the quotation below, which is also included in the notice on appeal (paragraph 3.18) from the report of the Structured Expert Dialogue (SED), part of the UNFCCC, and the most important substantive preparation for the final determination of the temperature target in the Paris Agreement:

> Message 5
> '***The 2 °C limit should be seen as a defence line***
> *Limiting global warming to below 2 °C would significantly reduce the projected high and very high risks of climate impacts corresponding to 4 °C of warming, which is where we are headed under a "business as usual" scenario. It would also allow a significantly greater potential for adaptation to reduce risks. However, many systems and people with limited adaptive capacity, notably the poor or otherwise disadvantaged, will still be at very high risk, and some risks, such as those from extreme weather events, will also remain high. Adaptation could reduce some risks (e.g. risks to food production could be reduced to "medium") but the risks to crop yields and water availability are unevenly distributed. Moreover, the risks of global aggregated impacts and large-scale*

[57] Statement of appeal, paragraph 13.38.

singular events will become moderate. The 'guardrail' concept, in which up to 2 °C of warming is considered safe, is inadequate and would therefore be better seen as an upper limit, a defence line that needs to be stringently defended, while less warming would be preferable.'
(underlining added, counsel)

102. The SED report shows that when the IPCC determined the RFCs, the possibilities and limits for adaptation were also taken into account: '*Another expert added that all RFC take into account autonomous adaptation as well as limits to adaptation in the case of RFC1, RFC3 and RFC5, independent of the development pathway.*'[58]

103. All this leads to the following conclusions. As mentioned, at no time has the State disputed the dangers and risks that climate change poses for the Dutch territory during this century, which Urgenda has put forward and reiterated in its summons, statement of reply, statement of notice on appeal and oral arguments. These dangers and risks are thus established facts between the parties in these legal proceedings. Under these circumstances, the Court of Appeal could suffice with a brief overview in paragraph 44 of the risks and dangers– known to and established between the parties– that were present. Urgenda points out that the Court of Appeal - despite the State's plea that the reasoning of the judgment is flawed - does indeed explicitly mention such dangers and risks: floods caused by sea level rise, heat stress caused by more intensive and long periods of heat, droughts, severe flooding as a result of excessive rainfall, and disruption of food production. In the light of the entire case file, this is (more than) sufficiently specific according to Urgenda.

104. The fact that the Court of Appeal subsequently recognized in paragraph 45 that there is a real threat of dangerous climate change, which could imply that the current generation of residents will be confronted with loss of life and/or disruption of family life, is in any case understandable and well-founded in the light of the procedural documents and the scope of the debate between the parties.

105. Urgenda would like to add one final, but not insignificant, comment to all of this.

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[58] UNFCCC, Report on the structured expert dialogue on the 2013-2015 review, 2015, Exhibit 109. This quote is also reflected in notice on appeal, paragraph 3.69.

106. The fact that there is already an immediate and concrete imminent danger is also due to the fact that *current* action (whether or not to reduce emissions) *irreversibly determines* whether or not the internationally unacceptable dangers and risks of more than 2° C warming will occur, even if these dangers do not immediately manifest themselves in their full extent, but only at a later moment in time. In this context, it is important to recall the two inertias previously mentioned. Although inertia in the climate system partly masks the direct effects of current emissions, this does not mean that there are no such effects (in the form of a change in the heat retention properties of the atmosphere and thus –with a delay– inevitable global warming). Though we do not want to exacerbate the damage that we are currently beginning to suffer because of climate change (which is a result of past activity but is only now manifesting itself), social inertia makes it inevitable that we will nonetheless increase this damage considerably, as we will not be able to stop emitting CO2 overnight. Every new emission inevitably and irreversibly leads to further warming and thus, an increase in dangers, risks and damage. These inertias in the climate and social system, certainly in their combined effect, largely mask the fact that there is already an immediate and concrete threat, and that substantial emission reductions are urgent if the agreed temperature target of 'well below 2 °C' is still to be attained. The IPCC's climate science findings –which have also been accepted by the international community as a basis for international climate policy– unambiguously and clearly demonstrate that these dangers and risks are indeed extremely large and substantial emission reductions are urgent.

1.3.8 Why Articles 2 and 8 of the ECHR are also relevant to the State's responsibility and duty of care, the dangers and risks caused by dangerous climate change outside the Dutch territory, and why these extraterritorial consequences (also) provide a legal basis for the reduction order

107. Articles 2 and 8 of the ECHR contain a positive obligation: the State must ensure the enjoyment of these rights, which goes beyond the State's obligation to refrain from infringing on these rights. These articles contain a positive obligation to intervene in cases where the enjoyment or the exercise of these rights is threatened.

108. As Urgenda pointed out above, the positive obligation imposed by Articles 2 and 8 of the ECHR on the State has traditionally been limited

to the national territory (and to other situations in which the State has effective jurisdiction) is in itself a logical limitation. It is only in those situations that the State must be deemed to have sufficient de facto power and control to be able to guarantee the protection required by Articles 2 and 8 of the ECHR. Where a State does not have the power to protect (and therefore cannot guarantee) the safety of individuals, it should not be held responsible or liable.

109. However, this does not mean that the State may remain indifferent or face no responsibility for violations of the interests protected by Articles 2 and 8 of the ECHR outside its territory in the specific case –which arises here– where its own national activities make a (relatively) excessive contribution to violations of Articles 2 and 8 elsewhere.

110. On the basis of the no harm doctrine (which is customary law under international law) and the duty of care of Section 6:162 DCC, which (also) extends beyond the Netherlands' national borders (see, for example, the Supreme Court *Kalimijnen* decision), the State also bears responsibility and liability for the consequences that activities from its territory have outside its own territory, even if this is not a responsibility in the far-reaching form of a positive obligation.

111. The extent of this extraterritorial duty of care – how far must the State go in implementing mitigation measures domestically in order to protect extraterritorial interests– is partly determined by the seriousness of these extraterritorial consequences (for example: violation of Articles 2 and 8 of the ECHR).

112. In order to determine the extent of the duty of care that the Dutch State has in relation to these extraterritorial interests in the specific case of climate change (i.e. how far the government should go in limiting Dutch emissions), international climate policy is particularly relevant. This policy is formed and embedded in the UNFCCC, the Paris Agreement, COP Decisions and, more generally, the scientific, political and societal consensus on this issue. After all, these elements are expressions – whether in a legal form or not- of a broad, if not universally supported, sense of what a state should do in light of its current contribution to the climate problem, its historical responsibility and its financial and technical possibilities (these criteria are codified e in the UNFCCC).

113. This international consensus and the international agreements on what the Dutch government should do are particularly important now that 'dangerous' climate change requires the State to combat a global problem that must be adequately tackled ('doing nothing' or 'doing too little' is not an acceptable option), though no individual country has the key to solving the entire problem It is therefore necessary for each country to assume its partial responsibility. To paraphrase the words of the District Court in legal ground 4.55: the extent of the duty of care/responsibility of the Dutch government is (partly) determined by the international partial responsibility that the Dutch government has, together with other countries, for solving a global problem,.

1.4 Necessity for an urgent reduction by the Netherlands in the global community

114. In cassation, the State (again) insists that the emission reduction required by Urgenda is in fact not 'necessary'. Slightly camouflaged, this again involves a causality defence on the part of the State.

115. It is clear why it is necessary for each country to assume and live up to its partial responsibility: if a country decides to relinquish its share of the partial responsibility without having convincing and legitimate arguments for doing so, there is no reason whatsoever why other countries should and should still want to assume their partial responsibility. In that case, no country will do enough, with the unacceptable consequence of dangerous climate change. In order to deal adequately with the common global problem being experienced, it is therefore necessary that a national partial responsibility exists for that problem. National partial responsibility, for which the national government can also be held accountable, is also what the Paris Agreement (or at least the accompanying COP Decision) calls for and to which the State has committed itself.

116. The fact that a national partial contribution does not single-handedly cause global warming –since no causal connection can be established between Dutch emissions and the extraterritorial global damage, and, consequently, Dutch emission reductions alone cannot prevent extraterritorial global damage– does not preclude the assumption of partial liability for such extraterritorial damage. Faced with the problems posed by climate change for the global community and (liability) law,

partial liability in situations such as this is a societal necessity. As the Court of Appeal has rightly considered, the absence of partial liability in this situation leads to the absence of an effective remedy against the global problem of climate change.[59] (which is an almost verbatim echo of the then Advocate General in his opinion to the *Kalimijnen* judgment).[60]

117. By way of contrast: in situations such as these, clinging to the causality requirement is excessively formalistic in an area where old doctrine is neither intended nor fit (see the partially dissenting opinion of justice Zupančič in Tatar[61]) for problems such as those under discussion here, in which the law and the courts are asked to provide an interpretation of existing law that is of service to the public interest of society as a whole.

118. The need for partial responsibility in cases of cumulative causation (as is the case with climate change) is evident because it is based on fundamental notions of justice; there is good reason that 'free rider' behaviour is seen as morally reprehensible and as a major societal problem. The need for partial responsibility in order to be able to solve these kinds of problems at all is also supported by the insights that psychology y and economics (game theory) provide in this context about the behaviour of people and organisations. The willingness of an actor to make efforts and sacrifices is greater if all others (and especially comparable 'peers') also participate to a similar extent. What has been decided in the *Kalimijnen* judgment about partial responsibility and partial liability in situations of cumulative causation is therefore the legal confirmation of these commonly held values and these insights from the behavioural sciences. The *Kalimijnen* judgment thus holds a rule of liability law which applies within the Dutch legal order.[62] Urgenda will return to this later in Chapter 5.

1.4.1 Scope of the duty of care

119. The consensus on the precise scope of each country's partial

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59 Judgment Court of Appeal, legal ground 64.

60 Opinion Advocate General Franx before HR 23 September 1988, ECLI:NL:PHR:1988:AD5713, paragraph 8.7: '*After all, this requirement could lead to the unacceptable consequence that no salt discharger would be liable in a case (represented in a figure for the sake of clarity) in which 10 salt dischargers would each have an equal share in the total salt load and the damage would also occur if the salt load was half as small.*'

61 EHRM 27 January 2009, ECLI:CE:ECHR:2009:0127JUD006702101, *RvdW* 2009/990.

62 Incidentally, and not surprisingly in view of the underlying fundamental notions and principles outlined above, a similar liability regime applies in many neighbouring countries.

responsibility for combating climate change is not yet sufficiently clear, at least not yet in its entirety. The Paris Agreement therefore provides a structure of ongoing international dialogue, in which countries are required to provide regular information on the extent of their national efforts from 2020 onwards and in which all countries are required to justify the extent of their efforts on the basis of the criteria (Common But Differentiated Responsibilities) laid down in the UN Framework Convention on Climate Change (in particular Article 3). However, this consensus was sufficiently clear with regard to the efforts that Annex I countries are required to make in the period up to 2020: in order to keep the 2 °C target within reach, they must reduce their national emissions by 25-40% by 2020 compared to their national emissions in 1990 and, in tandem with this, by 80-95% by 2050 (although it should be noted that the 2°C-target has since been tightened to 'well below 2 °C with a target of 1.5 °C').

120. This consensus is reflected in the above-mentioned Cancun Agreement and in all the COP Decisions agreed by the parties to the UNFCCC since 2010. Urgenda will discuss this in more detail in its response to cassation complaint 4.

121. To conclude and summarise: the scope of the responsibility and duty of care regarding the climate issue that rests on the Dutch government by virtue of Articles 2 and 8 of the ECHR, are determined by its positive obligations (also defined by Article 21 Netherlands Constitution) towards the current residents of the Dutch territory and, additionally, by its partial responsibility for the violation of the same human rights outside the Dutch territory. This partial responsibility exists because the infringement of the interests protected by Articles 2 and 8 of the ECHR is partly caused by activities within the Dutch territory over which the government has actual control.

122. This partial responsibility for the violation of universal human rights therefore also limits the 'margin of appreciation' of the Dutch government, because the scope of the duty of care that the government must observe in view of this partial responsibility must be compatible with the relevant international frameworks (according to the District Court in legal ground 4.55).

1.5 The Trias Politica and the discretionary power of the State

123. This brings Urgenda to the complaint raised in the introduction: that the District Court and Court of Appeal have ventured into the political arena. As the District Court and Court of Appeal have rightly ruled, Urgenda argues that the discretionary power of the State does not allow it to fail to reduce greenhouse gases to a level which, according to the most recent scientific knowledge, is minimally necessary to prevent dangerous climate change and all its consequences, and thus, to prevent violation of the interests protected by Articles 2 and 8 of the ECHR.

124. In cassation, too, the State argues that a 25% reduction by 2020 was a decision reserved for the political branch. By doing so, the State fails to recognise that the fact that a court decision may have (major) political implications, does not mean that the question before the court is a political one reserved for the political branch alone. The rule of law requires both that the exercise of government authority must be based on the law, and that the law also determines the boundaries within which the government can exercise its executive powers. The primacy of law in a state under the rule of law means that the political bodies of the State like the judiciary, are also bound by the law. The task of the court is to ensure that the law is observed. Moreover, treaties that have direct effect, such as the ECHR, take precedence over Dutch law, as the Court of Appeal has correctly ruled.[63]

> The aforementioned UNEP report on climate change litigation therefore concludes with respect to the separation of powers aspect of the Urgenda case:
>
> '*This aspect of the Urgenda decision is not surprising: generally speaking, the adjudication of disputes concerning constitutional or human rights falls squarely within the powers of the judicial branch. Indeed, there are other climate change cases involving the protection of constitutional and human rights where courts have exercised jurisdiction over rights-related disputes without even discussing the separation of powers doctrine, presumably because there is no dispute that such disputes fall within the courts' domain. These cases include Leghari v. Federation of Pakistan, In re Court*

[63] Judgment Court of Appeal, paragraph 69.

on its own motion v. State of Himachal Pradesh and others, and Gbemre v. Shell Petroleum Development Company of Nigeria Ltd.'
(underlining added, counsel)

125. In doing so, the Court of Appeal has fully respected the discretionary power of the State. The State retains the power to choose the measures it takes to achieve the target of at least a 25% reduction by 2020. Furthermore, the court order only concerns a reduction percentage at the level of the absolute minimum, based on scientific evidence, fundamental notions of responsibility and justice, internationally agreed principles and foundations, which have also been recognised by the State itself, as is further detailed in the defence against cassation complaint 9 below.

2 REDUCTION OBLIGATION OF AT LEAST 25% BY THE END OF 2020 (CASSATION COMPLAINTS 4-7)

2.1 Introduction

126. The common thread running through the appeal in cassation by the State is that a Dutch emission reduction of 25-40% by 2020 is not actually necessary for the international community to still be able to achieve the 2 °C target. The State argues that this actual necessity, derived from AR4 and confirmed in successive COPs, and the 25-40% reduction target based thereon in 2020, lacks any legal or binding force.

127. The State has submitted an exceptionally large number of complaints about this in pp. 13 to 40 of the appeal in cassation. Most of these complaints claim that the judgment is defective in its reasoning. These complaints are largely based on factual findings of the Court of Appeal, against the background of similar or closely related factual findings by the District Court. However, the Supreme Court is not a third instance court which makes is own determination of the facts. In cassation the question is whether the Court of Appeal's findings on the facts are incomprehensible and whether, against the background of the debate in appeal, the Court of Appeal has ignored essential assertions by the State. It must be noted that in view of the extensive debate between the parties, the time pressure in the case and the necessary comprehensibility of the decision for the wider public, the Court of Appeal was allowed to limit itself to the essential points of dispute.

128. Cassation complaints 4-7 separate the layered reasoning of the Court of Appeal in paragraphs 44-53. Urgenda considers it of great importance that the logical coherence and structure of the reasoning of the Court of Appeal is taken into account, and must be understood in that context. In each of the cassation complaints mentioned above, the State isolates a few individual elements from the considerations of the Court of Appeal and then formulates rebuttals hat do not do justice to the intention and meaning of the Court. ’s consideration within the greater coherence of its reasoning. This threatens to obscure the bigger picture.

129. For a discussion of cassation complaints 4-7 it is necessary to first summarise the reasoning of the Court of Appeal and to place it in its context.

130. In legal ground 47, the Court of Appeal points out, referencing a report by the PBL submitted by the State as Exhibit 77, that in order to achieve Paris' climate targets the crux of the issue is not achieving a low level of emissions in 2050, but also and above all, achieving low cumulative emissions (the total emissions must be low). Therefore, in order to limit total emissions over a certain period of time, it is essential to start reducing annual emissions as early as possible.[64]

131. In paragraph 47, the Court of Appeal also notes that in 2017 the annual emissions of the Netherlands will have fallen by 13% compared to 1990 and that between 2017 and 2030 a significant effort will have to be made to reach 49% by 2030 (which is the State's climate target, see legal ground 46); a far greater effort than the limited effort the Netherlands has made so far.

> This principle in the judgment of the Court of Appeal is of great importance. A calculation may clarify this.
> A 13% reduction in 27 years (between 1990 and 2017) amounts to an average reduction of 0.5% per year. To reach 49% in 2030, a reduction of 36% has to be achieved in 13 years (between 2017 and 2030), which corresponds to an average of 2.75% per year. This is more than a five-fold increase in efforts to date. Suppose that further emission reductions are nevertheless postponed until 2023. In that case, the required reduction of 36% must be achieved in seven years, which corresponds to an average reduction of 5.14% per year. The emission reductions will then have to follow an even steeper pathway downwards and therefore require a much greater technological and financial effort. In the calculation example, a delay of another six years will lead to an almost doubling of the effort required after 2023 and a tenfold increase of the effort so far. The question is whether such an effort is still technologically, financially and socially feasible, especially now that the State argues in its appeal in cassation that there is already little support for the emission reduction that Urgenda demands of it.
> In any case, any delay would lead to a reduction in the current

[64] Or, as Urgenda put it earlier in this statement of defence: it is not about achieving a 95% reduction in emissions by 2050, but about the 'pathway' of phasing out emissions to zero that must be such that the total emissions from that 'pathway' remain within the carbon budget. Urgenda refers to the figures it has included in paragraph 1.3.6 above and the accompanying explanation.

government's level of effort, at the expense of a disproportionately higher and soon unattainable level of effort for future governments and future generations. The question is whether this is 'fair' or reflects 'due care'.
Even if, despite such a postponement, the 49% would still be achievable by 2030, it is still clear that this postponement will mean that total emissions will be higher in 2030 than they would be without the postponement. For this, Urgenda refers to the carbon crunch figure in paragraph 1.3.6 above. This shows that postponing reductions not only forces steeper reductions at a later date, but also that the year of zero emissions shifts closer to the present, if we still want to stay within the same carbon budget. After all, postponement of reductions leads to faster exhaustion of the carbon budget. If the reductions are postponed, the 49% will have to be achieved by 2028/2029 and not by 2030 if the total emissions are not to increase.
In legal ground 47, the Court of Appeal therefore rightly states that postponing reductions leads to greater risks for the climate.

132. Still in legal ground 47, the Court of Appeal then concludes that if the reduction effort required to achieve a 49% reduction by 2030 were to be evenly distributed between now and 2030, the State would have to achieve a significantly higher reduction than 20% by 2020. The Court of Appeal then finds that the government has indeed opted for an even distribution regarding the reduction effort required to achieve a 95% reduction by 2050.According to this standard, a 49% reduction must be achieved by 2030, which has subsequently been elevated as the climate target of the government. Applying the same standard to 2020 would mean, according to the Court of Appeal, that a reduction of 28% would have to be achieved by 2020.

133. In legal ground 48, the Court of Appeal establishes at what rate, according to the IPCC in AR4 and after analysing various reduction scenarios, Annex I countries should reduce their annual emissions in order to remain below a concentration of 450 ppm and thus keep the 2 °C target within reach, i.e. a pace that requires a 25% to 40% reduction in 2020 compared to 1990.

134. In legal ground 49, the Court of Appeal then rejects the State's defence that, according to AR5, there are multiple reduction pathways (i.e. pathways with deferred reductions) with which the 2 °C target can still be

achieved. The Court of Appeal considers that 87% of the scenarios used in AR5 are based on negative emissions and that their feasibility is very uncertain. Moreover, since AR5 focuses on reduction targets for 2030, the Court of Appeal sees no reason in AR5 to assume that the AR4 reduction scenario, i.e. 25-40% in 2020, would have become obsolete by now. Thus, the Court of Appeal insists on the need to follow this scenario in order to achieve the 2°C target.

135. In legal ground 50, the Court of Appeal notes that even in the 450 ppm scenario there is a real chance that the 2 °C target will not be achieved. The Court even notes that the concentration of ppm should remain below 430 ppm, as this follows from the Paris Agreement, which declared that global temperature should remain well below 2 °C. The Court of Appeal thus stresses once again the great need for urgent mitigation measures. Therefore, the 450 ppm scenario and the resulting need to reduce CO2 emissions by 25-40% by 2020 are not overly pessimistic assumptions when determining the duty of care of the State.

136. In legal ground 51, the Court of Appeal establishes that the State has long been aware of the 25-40% reduction target as the necessary rate of emissions reduction by Annex I countries in order to achieve the 2 °C target. Relatedly, almost all COPs refer to this standard and Annex I countries have been called upon to bring their reduction targets in line with it. While, this does not mean that a legal standard with direct effect has been adopted, the Court of Appeal does see it as a confirmation that the 25-40% reduction by 2020 is necessary in order to achieve the 2 °C target.

137. Finally, in legal ground 52, the Court of Appeal points to various essential circumstances that make it necessary *a fortiori* to achieve a reduction of at least 25-40% in line with the State's own (linearly derived) reduction targets, which, according to AR4 and recent scientific evidence and successive COPs, are deemed necessary. The Court of Appeal establishes that until 2011, the Netherlands itself assumed the need to achieve an emission reduction of up to 30% by 2020 and that the State claimed this was necessary in order to remain on a credible pathway to keep the 2 °C target within reach. additional climate science evidence to support a later downward adjustment of that target has not been provided, while –as the Court of Appeal establishes– postponement of (interim) reductions leads to greater total emissions and thus, contributes

to further warming. In particular, according to the Court of Appeal, the State has not substantiated why a reduction of only 20% at the EU level should now be considered credible –for example by outlining a scenario on how the 2 °C target can still be achieved– partly in light of the fact that the EU also considered a reduction of 30% by 2020 as necessary to prevent dangerous climate change.

138. In view of all this, the Court of Appeal concludes in legal ground 53 that a reduction of 25% by the end of 2020 is in line with the State's duty of care.

139. As stated above, cassation complaints 4-7 ignore the logical structure of the above reasoning by wrongly viewing the various elements in isolation.

140. Cassation complaint 4 for example, isolates the meaning that the Court of Appeal has attributed in legal grounds 48-49 to AR4 and its rejection of the State's reliance on AR5. In essence, this concerns an interpretation and assessment of the documents in the proceedings, which is reserved for the Court of Appeal as a court of fact. The State has had two fact-finding instances to convince the court that AR4 does not support the notion that an emission reduction of at least 25-40% by 2020 is necessary. The State has failed to do so and is now attempting to convince the Court for the third time in cassation, which is not what the cassation procedure is for.

141. The ruling of the Court of Appeal based on AR4 is closely in line with its considerations in legal ground 47. The Court of Appeal has already considered, on several different bases, the extent to which a reduction in the short term is urgently needed. The Court found that if the State's reduction targets are taken as a starting point in 2050 and 2030, an even distribution of the reduction effort would mean that the State would (have to) set its sights on a considerably higher level for 2020 (28%). This ruling is also contested in isolation by the State in cassation complaint 6. Urgenda will explain below why the State's complaints fail.

142. The same applies to cassation complaint 5, which is directed against the various findings of the Court of Appeal in paragraphs 50-52, which are again contested separately and disregard the intrinsic connection with paragraphs 47-51.

143. Following on cassation complaints 4 and 5, cassation complaint 7 puts forward complaints against paragraph 60. In it, the Court of Appeal ruled that what applies to the Annex I countries as a whole should also apply to the Netherlands at the very least. According to the Court of Appeal, the State has not substantiated why a lower emission reduction percentage would apply to the State than to Annex I countries as a whole. Urgenda will explain below why this complaint also misses the mark.

144. The above representation of the conclusions of the Court of Appeal contested by cassation complaints 4-7 shows that the Court of Appeal did not adopt a simplistic approach, but provided a carefully structured reasoning, with several independently supporting and mutually reinforcing elements. This means, first, that it is wrong –and an obstacle to a clear and streamlined debate– that the appeal in cassation disputes the various findings in isolation. Second, it means that, even if the Supreme Court were to accept one or more complaints from the appeal in cassation, these complaints need not yet lead to cassation, because the ruling of the Court of Appeal is independently supported by other grounds.

145. In view of this, and in order to avoid fragmentation and repetition of its arguments, Urgenda sees reason to first consider the background and establishment of the aforementioned 25-40% reduction standard. The Court of Appeal has established relevant facts about this in legal grounds 5-12, 15 and 48- 51. The reasoning of the Court of Appeal must be seen in the light of the District Court's detailed factual findings, which - in view of paragraph 2 of the ruling - also serve as a starting point in cassation. Urgenda makes reference thereto. The following serves as a further background and explanation. Urgenda also expressly points out that, as the Court of Appeal considers and the State fails to recognise, the duty of care to reduce emissions by at least 25% by 2020 has both factual-causal and normative dimensions. Urgenda will now first discuss the international normative dimension.

2.2 Background and the establishment of the 25-40% reduction standard

146. The curves/graph lines of emission pathways, such as the RCP 2.6 scenarios referred to in paragraphs 70 et seq. above, visualise how quickly global emissions must be phased out –within the limits of what is

considered technologically, financially and socially feasible– in order to remain within the carbon budget of the chosen target temperature/target concentration. Thus, pathways visualise a distribution over time of the global carbon budget. The necessity of phasing out of emissions thus leads to an issue of temporal distribution.

147. Not every country has to phase out its national emissions at the same rate. It is generally accepted, for example, that developing countries that want to industrialise in order to combat poverty should be allowed to increase their emissions for some time. After all, they have hardly any significant emissions per capita, bear no responsibility whatsoever for what has been accumulated in the atmosphere since the Industrial Revolution as a result of the emissions of developed countries, and are technologically and financially incapable of industrialising in a fossil-free manner. In the case of developed countries, the opposite is true. This involves another distributional issue, namely what is a fair distribution of the annual global emission capacity among countries.[65]

148. What constitutes a fair distribution, based on the total reduction required, is essentially determined by normative choices. A number of criteria and principles have been agreed at the UNFCCC with the aim of achieving a fair distribution. Based on these criteria and principles, a distinction was made in 1992 between the rich, industrialised and developed countries that should take the lead in combating climate change, listed in Annex I on the one hand, and the remaining countries, non-Annex I countries, on the other (cf. ruling, legal grounds 5-9).

149. When, in 2007, the IPCC published the AR4 report referred to in legal ground 12, the parties to the UNFCCC had agreed in Article 2 of the UNFCCC (1992) that 'dangerous' climate change should be prevented, but had not yet agreed on what concentration of greenhouse gases or degree of warming should be regarded as 'dangerous'.

150. In view thereof, the IPCC AR4 report includes Table 13.7, adopted and discussed by the District Court in legal grounds 2.15 and 2.16, and again referred to by the Court of Appeal in legal grounds 12 and 48. Table 13.7 shows three concentration levels (450 ppm CO2-eq, 550 ppm CO2-eq

[65] For a more detailed explanation: see Urgenda's (sent in advance to the court of appeal and the State on 13 May 2018) answer to the questions from the Court of Appeal and supplementary exhibits for oral arguments on 28 May 2018, in particular paragraphs 13 to 24.

and 650 ppm CO2-eq) that the international community could choose as a target of international climate policy and thus, as a quantification of what should be understood by 'dangerous' climate change.[66] (After the above explanation, it will be clear that each concentration level corresponds to a certain carbon budget, and that the carbon budget for a target concentration of 450 ppm is smaller than the budget for a target concentration of 650 ppm). For each target concentration in Table 13.7, the IPCC has proposed a corresponding 'pathway' of emissions reduction, which is also differentiated: different reduction percentages are assigned to different regions/country groups.

151. Table 13.7, for example, proposes that Annex I countries should achieve an emission reduction of 25-40% in 2020, followed by an 80-95% reduction in 2050; and that the regions of Latin America, the Middle East, East Asia and Central Asia of non-Annex I countries should achieve a substantial deviation from 'Business-As-Usual' (emission growth) scenarios by 2020. Meanwhile, all non-Annex I countries should achieve such a substantial deviation by 2050. For a target concentration of 550 ppm (corresponding to a larger carbon budget), Annex I countries would have to reduce their emissions less quickly: according to Table 13.7, an emission reduction of 10-30% in 2020 followed by 40-90% in 2050 would then be necessary.

152. At the 2007 Bali climate summit, the parties to the UNFCCC agreed (in COP Decision 1/CP.13, which was later called the Bali Action Plan) that deep cuts in global emissions are required to achieve the Convention's objective of preventing dangerous climate change. In the COP Decision (see the status of COP decisions in a general sense, and the involvement of the Netherlands in this, paragraph 201 below), parties referred to Table 13.7 and related passages from AR4 discussed above (and quoted and discussed by the District Court in paragraphs 2.15 and 2.16), without, however, opting for a target concentration from said Table 13.7. See paragraphs 11 and 51 of the ruling and paragraphs 2.48 and 4.20 of the judgment, also in connection with paragraph 2 of the ruling.

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[66] As already mentioned in Chapter 1: the concentration level determines the degree of warming. The concentration levels of 450 ppm, 550 ppm and 650 ppm in Table 13.7 (which, incidentally, give concentration levels of CO_2-eq, i.e. of all greenhouse gases and not only of CO2 - see also the addition by the District Court in legal ground 2.15) therefore represent different temperatures. These corresponding temperatures can be read from Table 3.10 of AR4, which the District Court has adopted and discussed in legal grounds 2.13 and 2.14.

153. At the 2010 climate summit in Cancun, the parties to the UNFCCC agreed (in a COP Decision that was later called the Cancun Agreement), referencing the Bali Action Plan and AR4, that warming in relation to the pre-industrial level must remain below 2 °C and that urgent action is needed to achieve this long-term goal. The decision also stated that it is necessary to consider –on the basis of the best available science– further tightening of the target to 1.5 °C. See also legal grounds 11. 50 and 51 Court of Appeal and the judgment of the District Court, legal ground 2.49. This means that in 2010, at the level of a COP Decision, parties set a quantitative standard that specifies where the boundary of 'dangerous climate change' lies, which must be prevented in accordance with Article 2 of the UNFCCC.

154. While recognising that Annex I countries must take the lead and making reference to AR4, the Cancun Agreement (see the judgment of the District Court, legal grounds 2.50, 4.23 and 4.24) also pointed out that Annex I countries must have reduced their emissions by 25-40% by 2020 compared to 1990 levels. In 2010, at the level of a COP Decision (in which the Netherlands actively participated), consensus was reached that the group of Annex I countries, to which the Netherlands belongs, should reduce their emissions by 25-40% by 2020 compared to 1990 levels.

155. The Cancun Agreement therefore sets both the global temperature target of 2 °C and the 25-40% reduction percentage that Annex I countries must achieve by 2020 in order to reach that target (and a target concentration of 450 ppm). Both of these targets are based on AR4, including, in particular, Table 13.7 therein. The temperature target of 2 °C (and a target concentration of 450 ppm) of AR4 is based on scientific evidence on the increase in the hazards and risks of climate change as the temperature rises. The reductions to be achieved collectively by all Annex I and non-Annex I countries are derived from this. The relative reduction percentage for Annex I countries in AR4 is based on a scientific inventory and analysis of the existing views and approaches regarding a fair distribution of the reduction efforts among countries themselves (for the latter, see again the judgment of the District Court legal ground 2.15, footnote (a) under Table 13.7 , and legal ground 2.16).

156. The Cancun Agreement, as the Court of Appeal explains in legal ground 51, confirms the actual necessity of a 25-40% reduction by 2020 and, as

recognized by the District Court's judgment, embodies the political, normative choice of the international community to adopt the evidence and objectives provided by (climate) science and to elevate them to the level of international climate policy standards in the implementation of Article 2 of the UNFCCC. This normative, political choice is partly 'driven' by the principles agreed in Article 3 of the UNFCCC.[67]

157. After the 2010 Cancun Agreement, the international community subsequently –often by referral– repeated this reduction standard of 25-40% in 2020 for Annex I countries over and over again, as the Court of Appeal concludes in legal ground 51, in all subsequent COP Decisions,[68] i.e. COP Decisions after AR5. UNEP has also started to use this 25-40% reduction standard in its Emissions Gap reports, as established by the District Court in legal ground 2.31, which has not been contested by the State on appeal and, based on the ruling by the Court of Appeal legal ground 2, serves as the starting point on appeal.[69]
The 2 °C target, the corresponding maximum concentration level of 450 ppm, and the resulting reduction standard of 25-40% for Annex I countries as the standard for international climate policy, were subsequently also accepted and adopted as standard by the EU.[70] As the Court of Appeal stated in legal ground 52, the State has (initially) recognised this standard for Annex I countries and even deduced from it that a reduction of at least 30% by 2020 was necessary for the Netherlands in order to realistically achieve the 2 °C target.[71] The standard as such was even recognised[72] by the State in its letter of 11 December 2012 to Urgenda which, although downplaying its binding nature, referred to the 80-95% reduction percentage in 2050, which is actually linked (because it is part of the same 'pathway') to the 25-40% reduction percentage in 2020. After the 2010 Cancun Agreement, climate science has also started to focus on scenarios that could keep global warming below 2 °C. Whereas AR4 only had six scenarios in which attaining 2 °C was studied, AR5 had over 116.

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67 See Judgment Court of Appeal, legal grounds 5-9 and in particular legal ground 7; more detailed judgment of the District Court, legal grounds2.35-2.40 and 2.38 in particular. See also Urgenda's notice on appeal, paragraphs 6.42., 6.43 and in particular paragraph 6.44.

68 See judgment Court of Appeal, legal ground 51. See, with reference to even more and later COP Decisions, Urgenda's defence an appeal, paragraphs. 6.18.

69 See judgment Court of Appeal, legal ground 13, notice on appeal, paragraph 6.19.

70 Notice on appeal, paragraph 6.20.

71 Notice on appeal paragraphs 6.21 and 6.22.

72 Judgment District Court, legal ground 2.7; judgment Court of Appeal, legal ground 2.

158. All this demonstrates the extent to which the Cancun Agreement, apart from the question of the legal binding nature of a COP Decision, has set the generally accepted standard for climate policy at the international, European and national political levels, recognising the need for a 25-40% reduction in emissions by 2020. The Agreement has also determined the direction of scientific research, i.e.: global warming must remain below 2°C, requiring Annex I countries to reduce their emissions by 25-40% by 2020 compared to 1990 levels.

2.3 Cassation complaint 4 The IPCC reports

159. In cassation complaint 4, the State nevertheless contests that a Dutch emission reduction of 25-40% by 2020 is 'necessary'. The State puts forward several arguments in this respect.

2.4 Cassation complaint 4.1

160. In cassation complaint 4.1, the State argues that the reduction percentage of 25-40% appears only once in in AR4, namely in Table 13.7 of the AR4 WGIII report, while in two places elsewhere in the same report a reduction percentage of 10-40% is mentioned. This is essentially a repetition of the State's argument in its statement of appeal paragraphs 12.30-12.35. The Court of Appeal rightly disregarded these assertions by the State, which were contested by Urgenda. The Court of Appeal, which is the last court instance to determine the facts, provided an not incomprehensible assessment of the evidence presented before the Court. Urgenda will elaborate on this below.

161. The State tries to suggest a discrepancy or arbitrariness in AR4 that does not exist in reality, as Urgenda also pointed out on appeal.[73] The two other passages in the report to which the State refers do indeed mention a reduction percentage with a range of 10-40%, but do so in the context of a target concentration of 450-550 ppm, which is less strict than the 450 ppm target established in the Cancun Agreement. This less stringent concentration level translates into a lower bottom value (10% instead of 25%) of the range of necessary reductions. If 550 ppm is good enough, a minimum 10% reduction will suffice by 2020; if 450 ppm is to be achieved, the reduction must be a maximum of 40%. These are exactly

[73] Notice on appeal, paragraph 6.11.

the same percentages shown in Table 13.7, but combined for the two target concentrations of 450 ppm and 550 ppm from that table. There is therefore no question of discrepancy, but rather of consistency. Indeed, in this light and against the background of Urgenda's broader argument before the District Court and Court of Appeal, the explanation and assessment given by the Court of Appeal to Table 13.7 of the AR4 WGIII report is not incomprehensible and is adequately substantiated.

162. This is all the more true because it is not just about what percentages are mentioned in AR4 (or AR5). After all, the Court of Appeal, as the State ignores in cassation complaint 4.1, has embedded its reference to AR4 in a much broader reasoning, in which it is essential:
- that in 2010, the international community agreed in the Cancun Agreement (a COP Decision) to opt for a target temperature of 2°C;
- that, according to climate science, this corresponds to a concentration level of 450 ppm;
- that the international community subsequently agreed –on the basis of the IPCC's analysis that this would be in line with the most common concept of justice/equity– that Annex I countries should achieve a reduction of 25-40% by 2020;
- that this standard has subsequently been accepted and adopted at all political levels and has been confirmed time and time again;
- that in 2015, the Paris Agreement (i.e. at treaty level) agreed that the target temperature should be even stricter: well below 2 °C with a target of 1.5 °C;
- that this implies that by 2100 the concentration level must be below 430 ppm (which the State has acknowledged, see statement of appeal, paragraph 5.18), implying a further reduction in the carbon budget and thus meaning that emissions must be phased out at an even faster and steeper rate.

163. In this way, the Court of Appeal has held that what is stated in the IPCC reports is not exclusively decisive. As argued by Urgenda, the purpose of the IPCC reports is to provide the best possible and best available scientific knowledge as a basis for normative choices. Similarly and as the Court of Appeal explained, successive COPs in fact confirm the necessity of a 25-40% reduction as shown by AR4. As a result, and in the light of what has been explained by Urgenda above, the Court of Appeal was not obliged to elaborate on the State's reliance on L. Meyer’s

article.[74]

2.5 Cassation complaint 4.2

164. In cassation complaint 4.2, the State argues that the 25-40% reduction obligation in 2020 for Annex I countries has since become obsolete, because the division of Annex I/non-Annex I countries no longer applies as a result of economic developments since 1990 and has therefore been abandoned altogether in the Paris Agreement. The State presented this argument on appeal in ground for appeal 6 (statement of appeal, paragraph 12.25). Urgenda has presented an extensive defence against this in its notice on appeal, paragraphs 6.45-6.49, 6.85-6.90 and 6.91-6.103. In turn, the ruling of the Court of Appeal in paragraph 49 is not incomprehensible and also adequately substantiated. This is further clarified below.

165. As Urgenda explained on appeal, it is accurate to say that this strict division between Annex I and non-Annex I countries has been abandoned (is absent) in the Paris Agreement. However, the Paris Agreement deals with the reduction obligations of countries from 2020 onwards. For the period up to and including 2020, which is the period covered by the legal action at hand, that division and the resulting reduction standard established in the Cancun Agreement are still relevant.[75] See for example (ruling, paragraphs 11 and 51) the Doha amendment of the COP Decision in 2012 in Doha, which was intended to provide a guiding framework for international climate policy in the period between 2012 (the expiriration date of the Kyoto Protocol) and 2020 (the date on which the Paris Agreement enters into force) and in which Annex I countries are called upon to increase their reduction targets to at least 25-40% by 2020. This supports the Cancun Agreement's conclusions on the need for Annex I countries to reduce their emissions by 25-40% by 2020 and calls on countries to increase their reduction targets to at least 25-40% by 2020 (ruling Court of Appeal, paragraph 11, sixth bullet).[76]

166. As mentioned above, the UNFCCC (in particular under Article 3, but also

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[74] See more extensively: written arguments of Urgenda on appeal paragraphs 13-35, including a reaction to the article of L. Meyer published in a legal medium to which the State refers in cassation complaint paragraph 4.1.

[75] Notice on appeal, paragraph 6.86.

[76] As regards the relationship between the Cancun Agreement and the Doha Amendment, see also Urgenda answer to questions of court of appeal and submission of exhibits dated 28 May 2018 paragraph 64.

in the preamble) contains a number of principles and criteria designed to differentiate between countries according to their degree of responsibility in tackling climate change. The division between Annex I/non-Annex I countries was established in 1992 on the basis of these criteria. Due to economic developments, this division no longer meets the criteria first adopted by the UNFCCC. Nonetheless, these criteria as such are and will continue to be in full force, as Urgenda has extensively argued .[77] Based on these criteria, the Netherlands is one of the countries with the greatest responsibility to act and thus, should lead the way in combating climate change.[78] The criteria dictating that the Netherlands should achieve one of the higher reduction percentages are still in force and, in this sense, the 25-40% reduction percentage by 2020 is still relevant.

167. This is also evident from the fact that all COP Decisions after the Paris Agreement and all subsequent UNEP Emissions Gap reports, still and with increasing urgency, call on the Annex I countries to increase their efforts and to meet and even improve ('enhance') the 25-40% target, because otherwise the objective of the Paris Agreement ('well below' 2 °C with the aim of reaching 1.5 °C) will be almost unattainable at the time this Agreement enters into force.[79] Therefore, the State's position is unacceptable. The fact that other countries must now reduce more does not mean, while risks have only increased, that Annex I countries should do less now. On the contrary, as Urgenda stated in its notice on appeal paragraph 6.95, one need only consider what it means for the global carbon budget that countries such as China (1.7 billion inhabitants) and India (1.3 billion inhabitants) are also starting to emit (although their emissions per capita are still (much) lower than those of the Netherlands), to realise that the Netherlands urgently needs to reduce its emissions to a more adequate level.

168. Against this background, the ruling of the Court of Appeal did not require further reasoning in order to be comprehensible. The Court of Appeal did not have to deal separately with the further (detailed) assertions relied upon in cassation complaint 4.2. The State misinterprets the ruling of the Court of Appeal in paragraph 15, while the complaint at the end of

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77 Notice on appeal, paragraphs 6.49. 6.91-6.96, 6.99-6.103.

78 Notice on appeal, paragraphs 6.87 and 6.88. See also the report of the hearing dated 28 May 2018. p. 13, in which the State, in response to questions from the court of appeal, confirms that (even) within the group of highly industrialised, wealthy EU member states, the Netherlands is allocated the highest obligation to act.

79 Notice on appeal, paragraphs 6.99 and 6.18, and even more forcefully, written arguments of Urgenda on appeal, paras 95-103.

cassation complaint 4.2 also misses the mark.

2.6 Cassation complaint 4.3

169. In cassation complaint 4.3, the State argues that the reduction standard of 25-40% refers only to the reduction that the Annex I countries together, as a group, must achieve and does not apply to individual countries. This cassation complaint alleges that the judgment is defective in its reasoning. This complaint is misplaced.

170. As Urgenda pointed out above regarding the Court of Appeal's reliance on Table 13.7 of AR4 (and as established by the District Court in legal grounds 2.15 and 2.16), the reduction standard is composed of a range of reduction efforts, which in turn results from the aggregation of different approaches and views on justice and equity. In other words: each Annex I country will have to achieve an emission reduction that is somewhere within that range.[80] Even if, as the State argues, this range does not set a hard boundary for an individual country's reduction effort, the reduction effort for that country must follow the criteria of the UNFCCC and existing concepts of justice and equity, and the 25-40% range remains the leading and guiding principle in this respect. Based on the 25-40% range for Annex I countries, the EU has decided, as the Court of Appeal points out in legal ground 52, that a 30% reduction by 2020 would be an appropriate effort for the EU in order to achieve the 2°C target.[81] In that paragraph, the Court of Appeal also points out that the Dutch government had also found a 30% reduction by 2020 to be necessary for a realistic climate policy aimed at achieving the 2 °C target.[82] At the oral hearing on 28 May 2018, and in response to questions from the Court of Appeal, the State confirmed that the Netherlands is also allocated the highest reduction efforts[83] within the EU, as the Court of Appeal rightly established in legal ground 60.

171. Essentially, the position of the State is that it may do less than the agreed range and that the other Annex I countries will simply have to 'run a little faster'. This is called 'free-rider' behaviour and, in the light of the aforementioned principles of the UNFCCC, it is not an acceptable

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80 Notice on appeal, paragraph 6.98.
81 Notice on appeal, paragraph 6.20 and the further references therein.
82 Notice on appeal, paragraph 6.21 and the further references therein.
83 See report of the hearing dated 28 May 2018. p. 13.

position. Moreover, as the State itself explains (in cassation complaint 4.3(iv)), Annex I countries are not a homogeneous group; there are no agreements or links that could justify any expectation that other Annex I countries would be prepared to compensate for the Netherlands' failure to meet the agreed standard. If each country adopts the position that the 25-40% standard only applies to 'the others' but not to itself, the standard loses all meaning.[84] The State's claim that its delay is acceptable, since it only matters whether Annex I countries will meet the standard 'as a group', loses all plausibility when one considers that the reduction effort of Annex I countries 'as a group' will fall far short of the 25-40% that is deemed necessary in 2020.[85]

172. Cassation complaint 4.3 otherwise fails due to lack of interest. The relevant consideration of the Court of Appeal can be found in legal ground 60, which the State contests in cassation complaint 7 . Urgenda refers to its defence against that complaint.

2.7 Cassation complaint 4.4

173. In cassation complaint 4.4, the State argues that cassation complaint 4.3 is all the more compelling since a Dutch emission reduction of 25-40% is not necessary to achieve the global 2 °C target. According to the State, the Dutch share in global emissions is negligible, so a Dutch emission reduction has no significant effect and therefore is not actually necessary. This theme recurs repeatedly, including in cassation complaint 8.2. Although the complaint has no independent significance and already fails because it follows the flawed cassation complaint 4.3, Urgenda nevertheless addresses it because the incorrectness of the State's argument cannot be emphasised enough. The ruling of the Court of Appeal is by no means incomprehensible and is supported by a number of points of view which are not disputed by the cassation complaint. Urgenda also refers to the ruling of the Court of Appeal, legal grounds 61-62 and 64 and to its assertions before the District Court and Court of Appeal.[86]

174. In essence, this (again) concerns a causality defence since it argues that

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[84] Notice on appeal, paragraph 6.97.
[85] Notice on appeal, paragraph 6.96.
[86] Notice on appeal, paragraphs 6.1-6.18, 6.23, 6.25-6.32, 6.33-6.41, 6.42-6.44, 7.23 and 6.51-6.49, 8.97-8.133, 8.134-8.137, 8.173-8.185.

causality is lacking. This is inherent to the problem at issue here, namely the problem of cumulative, collaborative cause. As a result, the State's argument applies not only to Dutch emission reductions, but also to any other country. It is therefore essential in this problem of cumulative, collaborative cause that each country assumes a partial responsibility for solving the common, global problem.

175. In other words, in order to be able to tackle and combat the global climate problem adequately, it is in fact necessary for each country to accept its partial responsibility. And given the fact that Annex I countries, such as the Netherlands, have been determined to have partial responsibility for reducing their national emissions by 25-40% by 2020 compared to 1990, the solution to the global climate problem does in fact require, contrary to what the State argues, that the Netherlands actually achieves this reduction.

176. If the Netherlands were to fail to achieve such an emission reduction and thus to abandon its partial responsibility without having compelling and legitimate arguments, there is no longer any reason why other countries should continue to assume their partial responsibility. As a result, an adequate solution of the global, common problem of climate change will be out of reach.

177. The actual need to accept partial responsibility in cases of cumulative causation is also based on fundamental notions of justice; 'free rider' behaviour is considered 'improper' and socially (very) undesirable because it undermines social cohesion. This is supported by the insights provided by psychological and economic science (game theory) about the behaviour of people and organisations in this context; the willingness to make efforts and make sacrifices is greater if all others (and especially comparable peers) also participate to a similar extent.

178. Therefore, Urgenda invoked the decision of the Supreme Court in the *Kalimijnen* decision on partial responsibility and liability in situations of cumulative causation as the legal basis of this general sense of values and in support of the insights from behavioural sciences. The actual need for partial responsibility has been translated into legal responsibility and liability for the failure to assume one's own, individual, partial responsibility for the solution of a common problem.

2.8 Cassation complaint 4.5

179. In cassation complaint 4.5, the State argues that the 25-40% reduction percentage for Annex I countries is outdated because it is based on Table 13.7 in AR4 (2007), while the AR5 report was published in 2013/2014, with more up-to-date and substantially broader basis of knowledge, where these percentages are no longer mentioned.

180. This cassation complaint fails because it ignores that the Court of Appeal, in its layered justification, has deemed the 25-40% reduction by 2020 resulting from AR4 to be the standard in successive COPs in the light of the principles of the UNFCCC. Although superfluous, Urgenda nevertheless discusses the complaints raised by cassation complaint 4.5., whereby it should be noted that this cassation complaint also disputes the Court of Appeal's interpretation and assessment of procedural documents, of which the review in cassation is very limited.

181. It has been established, as the Court of Appeal concluded in legal grounds 51 and 11, that even after the publication of the AR5 report in 2013/2014, parties to the UNFCCC continued in every COP Decision to refer to and call for a 25-40% reduction percentage for Annex I countries, as laid down in the Cancun Agreement, to be achieved and strengthened. As the State did not provide further reasoning for its assertion that the AR5 report does not contain these percentages, the Court of Appeal could rightly qualify this assertion as irrelevant. It should also be assumed that the AR5 report did not give the international community any reason to drop the 25-40% reduction percentage. On the contrary, the calls to achieve this percentage in any case, as is evident from the COP Decisions and UNEP Emissions Gap reports published after the AR5 report, have only become more urgent.[87] For these reasons alone, the cassation complaint fails.

182. Moreover, it is factually incorrect that a reference similar to Table 13.7 in AR4 does not appear in the AR5 report. Urgenda has pointed this out on appeal.[88] What is and remains important is that AR5 has not led to the

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[87] Notice on appeal, paragraphs 6.18 and 6.19, see also judgment Court of Appeal, paragraph 11.

[88] Notice on appeal, paragraph 6.98 and in particular in the accompanying footnote 53; and again, in Urgenda's answers to questions by court of appeal and submission of exhibits dated 28 May 2018, no. 39 with the accompanying footnote 5.
The Summary For Policymakers (SPM) of the AR5 WGIII report (which word for word has gone through the 'Approval' process) states and explains why the intended reduction percentages of AR5 are not

abandonment of the 25-40% reduction for Annex I countries in 2020 from AR4, but that, even after AR5, COP Decisions and UNEP Emissions Gap reports have increasingly and urgently called for this level of effort to be maintained and further strengthened. Urgenda once again reiterates that, as it stated in its notice on appeal paragraph 6.95, the *increase* in emissions from non-Annex I countries cannot legally lead to a *decrease* in the necessary reduction for Annex I countries.

183. Nor does the State submit any complaints in cassation to the effect that the 25-40% reduction percentage in AR5 would be outdated, let alone explain what would be appropriate for Annex I countries according to AR5. The assertions quoted in (i) to (vii) do not address this, but contain general assertions that aim to create the impression that the correctness of the ruling of the Court of Appeal must be questioned, although the Court of Appeal could easily disregard those assertions as non-conclusive, because they fail to detract from the significance of AR4 (reconfirmed by successive COPs) given thereto by the Court of Appeal. Insofar as the State wishes to argue (cassation complaint 4.5(vii), p. 21) that its prolonged inaction, even after the court judgment, which has made it more difficult to meet the standard for 2020, must now be rewarded by letting go of this standard, the Court of Appeal has rejected this defence on good grounds (legal ground 65). Urgenda also reiterates that postponing reduction efforts leads to a faster exhaustion of the carbon budget and thus, to delaying and exacerbating the problem.

2.9 Cassation complaint 4.6

184. Cassation complaint 4.6 follows on from cassation complaint 4.5. Urgenda therefore refers to its defence against cassation complaint 4.5. In cassation complaint 4.6, the State mainly contests the ruling of the Court of Appeal in legal ground 49, namely that AR5 offers no reason to

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comparable with AR4. See AR5. WGIII, Summary for Policymakers, SPM 4.1, 'Mitigation pathways and measures in the context of sustainable development', p. 10, footnote 16. This is also repeated in AR5, Synthesis Report, Summary for Policymakers, p, 20, footnote 16 (see also the report of the hearing of 28 May 2018, p. 16). The differences between AR4 and AR5 can be explained as follows.
Where AR4 calculated (see in particular Table 3.10 included in paragraph 2.13 of the judgment of the District Court, last column) a global emission reduction of 50-85% of CO_2 emissions in 2050 compared to 2000, AR5 does not only calculate CO_2 but all greenhouse gases (CO_2-eq); it does not use 2000 as the reference year but 2010; the warming in 2100 is used as the relevant target temperature and not, as in AR4, the final warming, which, as a result of the inertia of the climate system, will not be achieved until many decades later. In addition –and this is particularly important for the necessary reduction percentages– many of the scenarios in AR5 accommodate a (very) large-scale use of negative emissions in the second half of this century, which means that the need for rapid, substantial emission reductions in the short term is/appears to be less important.

assume that AR4 is outdated, is apparently –but wrongly– based on the fact that uncertain, negative emissions were taken into account in AR5. This ruling is based on the fact that the State has not sufficiently (with substantiation) contradicted Urgenda's assertions. The Court of Appeal's ruling is factual and not incomprehensible. The complaint fails.

185. Firstly, Urgenda points to the contradiction that the State first states in cassation complaint 4.5 (that a reference similar to Table 13.7 from AR4 is missing in AR5) and then in cassation complaint 4.6 (that there are differences between the reduction percentages of AR4 and AR5). The State fails to indicate which reduction percentages from AR5 it refers to. The differences between the reduction percentages mentioned in AR4 and AR5 were already discussed by Urgenda when discussing cassation complaint 4.5. Urgenda therefore refers again to AR5, WGIII, Summary for Policymakers, SPM 4.1, '*Mitigation pathways and measures in the context of sustainable development*', pages 10 et seq. and in particular footnote 16.

186. As Urgenda argued before the District Court and Court of Appeal, only six scenarios were available in AR4 that could keep warming below 2 °C. In AR5 there were many more (116), but the vast majority of these (87%) assumed that negative emissions would be used on a very large scale, on a much larger scale than in AR4. That large scale is the big problem here.

187. The AR5 report itself pointed out that the feasibility of such a large-scale use of negative emissions was highly uncertain due to other objections, and that it was risky to rely on their availability, as Urgenda also pointed out on appeal.[89] In the scientific literature published after AR5, the criticism of such large-scale use of negative emissions has become even stronger.[90]

188. Nor is it the case that, contrary to the State's assertion, the IPCC's expression that an emission pathway leads to a 'likely' probability that the warming will remain below 2 °C has any connection whatsoever with the availability of the negative emissions included in these emission pathways. The opposite is true. The probability indicator used by the

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[89] Notice on appeal, paragraph 6.36 with a detailed quote from AR5, Synthesis Report, Summary for Policymakers; also paragraph 6.35 with a detailed quote from AR5, WGIII, Summary for Policymakers.

[90] Notice on appeal, paragraph 2.38 with a selection from the scientific literature in footnote 13; notice on appeal, paragraph 2.31 and footnote 14 there.

IPCC only refers to the probability that the temperature will remain below a certain level in the event that a particular emission pathway is followed. The probability indicator therefore says nothing about the feasibility of that emission pathway and therefore the probability that the pathway can actually be followed. In other words, the IPCC describes emission pathways that, if followed, result in a concentration of 450 ppm in 2100, which in turn presents a 'likely' (66%) chance that the temperature in that year will remain below 2 °C. This does not say anything about the probability that the emission pathway is available.

189. This is evident from, among other things, the UNEP reports. The quotation, as included in legal ground 2.30 of the District Court decision, is repeated here:

> '*although later-action scenarios might reach the same temperature targets as their least-cost counterparts, later-action scenarios pose greater risks of climate impacts for four reasons. First delaying action allows more greenhouse gases to build-up in the atmosphere in the near term, thereby increasing the risk that later emission reductions will be unable to compensate for this build up. Second, the risk of overshooting climate targets for both atmospheric concentrations of greenhouse gases and global temperature increase is higher with later-action scenarios. Third, the near-term rate of temperature is higher, which implies greater near-term climate impacts. Lastly, when action is delayed, options to achieve stringent levels of climate protection are increasingly lost*.'

The Court of Appeal refers to these UNEP quotes in legal grounds 13 and 47.

190. The fact that the probability indicator that the IPCC links to its emission scenarios, says nothing about the feasibility of including negative emissions in those scenarios is also explained in an accessible manner by the report of the European Academies Science Advisory Council, from which the Court of Appeal quotes. This report states:

> '*the inclusion of CDR* [Court of Appeal: removal of CO2 from the atmosphere] *in scenarios is merely a projection of what would happen if such technologies existed. It does not imply that such technologies would either be available, or would work at the levels assumed in the scenario calculations. As such, it is easy to misinterpret these scenarios as including*

some judgment on the likelihood of such technologies being available in the future.' (legal ground 49)

Therefore, contrary to what the State suggests, the report does not detract from what is stated in AR5, but rather confirms and clarifies what the IPCC reports in AR5, in terms that are also clear and comprehensible to non-scientists and, in particular, to politicians and policymakers. In this light, the ruling of the Court of Appeal is not incomprehensible.

191. All of this has not been contradicted or insufficiently contradicted by the State. Though the State argued that CCS is an existing technique in its statement of appeal (paragraphs 14.141 and 14.142) with reference to the *Energy Report* (its Exhibit 61), the report dates from January 2016 and is not a scientific report. The information provided by Urgenda, which is more recent and scientifically supported, does not show that the existence of the technology as such should be questioned, but instead, that very large objections and limitations persist to such a large-scale application of negative emissions, as is assumed and discounted in many AR5 scenarios. Not for nothing did Urgenda, at the hearing on 28 May 2018, quote from the 2018 PBL report *Negative emissions, background study: technical potential, realistic potential and costs for the Netherlands*, which shows that due to these restrictions, the storage of greenhouse gases is currently stagnating.[91] These findings demand an immediate increase in emission reductions, because it is uncertain whether an overshoot can be reversed within this century, with all its consequences.

192. Under these circumstances, the Court of Appeal could rightly and not incomprehensibly conclude that there is no reason to assume that the reduction percentages of AR4 have now been made redundant by the AR5 report. Urgenda points out, superfluously, according to the current state of knowledge, that the developments following the Court of Appeal's decision also confirm that large-scale negative emissions cannot be expected. Both the IPCC SR15 Special Report, published the day before the Court of Appeal issued its decision, as well as the UNEP Emissions Gap report of November 2018, confirm this. Chapter 3 of the UNEP report, p. 18, left column, refers to new emission scenarios that have already been studied in the scientific literature after the AR5 report:

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[91] Report of hearing dated 28 May 2018. p. 17. See also notice on appeal, paragraphs 2.27, 2.28, 2.31 and 8.215 to 8.220.

'*In particular, recent scenario's often set a lower maximum potential for carbon dioxide removal (CDR), which results in deeper emissions reductions over the next decades to stay within the same overall carbon budget (see section 3.5.1)*' with accompanying footnote 2: '*For more information, see the Summary for Policymakers of the IPCC Special Report on Global Warming of 1.5°C.*'

2.10 Cassation complaint 4.7

193. In cassation complaint 4.7, the State apparently wants to argue that if the 25-40% reduction target is not achieved by 2020, it will be necessary to take even more far-reaching emission reduction measures after 2020, and that it is therefore no longer necessary to achieve the 25-40% reduction target by 2020. This complaint fails.

194. Apart from the fact that this is circular or absurd reasoning, the State (once again) ignores the fact that the issue at hand is about the 'pathway' that the emissions must follow to zero emissions; that postponement of emissions will lead to faster exhaustion of the available carbon budget; that, at a later stage, considerably faster and steeper emission reductions are needed; and that all available sources show that the 'emission gap' – i.e. the gap between the global level of emissions we should be emitting according to the 'pathway' of the RCP 2.6 scenarios to 2 °C (which, moreover, have 'discounted' negative emissions on a very questionable scale) on the one hand, and the actual level of emissions on the other hand– is already so large that postponing emission reductions once again is unacceptable.

2.11 Cassation complaint 4.8

195. In cassation complaint 4.8, the State essentially argues that the standards included in the IPCC reports (such as reduction targets or reduction pathways) have no meaning whatsoever unless they are included as legal standards with direct effect, or at least as legal standards in international agreements, decisions by international organisations, or European legislation.

196. Insofar as the State argues that the IPCC reports do not have any factual significance in assessing whether the State is obliged to reduce its

emissions by 25-40%, this argument fails. The Court of Appeal was free to give the IPCC reports evidentiary value. Although the Court of Appeal has not considered that the IPPC reports have binding (normative) force, contrary to the presupposition of cassation complaint 4.8, , the Court has attributed evidentiary value to the existence of an actual necessity for a reduction of 25-40%. The successive COP decisions referred to in paragraph 51 affirm the actual necessity and are, in this sense, normative (although, according to the Court of Appeal in paragraph 51, no legal standard with direct effect results therefrom, which does not affect their indirect effect via Section 6:162 DCC and Articles 2 and 8 under the ECHR).

197. As Urgenda pointed out earlier in this introduction, both the standards of due care in Section 6:162 DCC and Articles 2 and 8 of the ECHR refer to 'open' legal norms. Although they contain a duty of care, they themselves do not contain a standard of care through which this legal obligation is immediately concretised or quantified in such a way to simply measure whether or not the legal obligation is being fulfilled in the case in question. This criterion must be determined on a case-by-case basis by the Dutch court, tailored to the circumstances of the case.

198. According to most opinions and approaches to justice and 'equity,' the 25-40% reduction rate for Annex I countries in 2020 has been proposed in AR4 as a standard that– compatible with scientific evidence– was seen as an appropriate and necessary contribution by Annex I countries to the global fight against the particularly high risks and dangers of climate change.

199. Because this (scientifically supported) observation that a reduction percentage of 25-40% is widely regarded as necessary and fair for the countries concerned, this reduction percentage lends itself to being used as a standard which –if necessary, as the Court of Appeal has done in conjunction with other points of view– can give substance to the open legal standards of Section 6:162 DCC and Articles 2 and 8 of the ECHR.

200. But there is much more: the international community adopted the reduction standard proposed in AR4 in the 2010 Cancun Agreement and repeated and affirmed it in (almost) every COP Decision thereafter. It seems that the State does not want to recognize its importance. Although it is true, as the State argues, that COP Decisions are not directly binding

decisions/provisions, the State wrongly argues that these COP Decisions have no legal weight or meaning whatsoever for the fulfilment/concretisation of the State's legal obligations with regard to the fight against climate change.

201. In paragraph 2.18 of its notice on appeal and in particular, in the accompanying footnote 8, Urgenda has already discussed extensively the legal significance and importance of COP Decisions. Urgenda sees reason to repeat the relevant passages from the handbooks here:

> '*Because most international institutions cannot make legally binding decisions, or at least not "binding" in the traditional legal sense, other instruments, belonging to the category of so-called "soft law," are frequently used. These include decisions of COPs, of (...). It is currently argued in the literature that such decisions are indeed legally relevant and could be regarded as evolving international administrative law. (...) Decisions in COPs are often taken on the basis of consensus, often also when the rules of procedure provide for the possibility of taking decisions by (certain forms of) majority. Although COP decisions are not legally binding in almost all cases, they can have a direct impact on the obligations of parties to the Convention.*'[92]

202. See in this context also N.J. Schrijver:

> '*It is generally assumed that such international findings of law also include decisions of international organisations and their treaty bodies, including the Conference of Parties (COP), unilateral legal acts of States and normative declarations by authoritative bodies (soft law).*'[93]

203. Regarding COPs at MEAs (Multilateral Environmental Agreements) also:

> '*As with soft law, these regulations are not strictly speaking a formal source of international law, which in this case would be the constitutive treaty. They remain, nevertheless, a very important technique for the development of international standards. In international environmental law, these*

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[92] Goote and Hey, International environmental law, Ch. 19 in: *Handboek International Recht*, T.M.C. Asser Instituut, 2007, The Hague.

[93] N.J. Schrijver, 'De reflexwerking van het internationale recht in de klimaatzaak van Urgenda', *Milieu en Recht 2016/41. no. 5.*

regulations mainly take the form of decisions adopted by the COPs (or CMPs) on various subjects (...).'[94]

204. Urgenda would now like to add the following quote to these passages:

'*3. Decisions of the parties*

(..)
In the UN climate regime, the COP and CMP have adopted decisions containing a vast array of regulatory detail, which flesh out the FCCC and Kyoto Protocol, respectively, and make them operational. Through this decision-making practice, the climate regime's plenary bodies have come closer to exercising something akin to a "legislative" function. Typically adopted by consensus, decisions take immediate effect for all parties precisely because, unlike new treaties or amendments, they do not require subsequent ratification or approval by parties. In principle, therefore, they enable speedier, more responsive standard-setting, and avoid the differentiation of treaty commitment among parties that can result from supplemental agreements. Ordinarily, plenary body decisions are not legally binding, unless the governing treaty gives the plenary body authority to adopt a binding decision on a particular subject. Nevertheless, even non-binding decisions are sometimes phrased in mandatory terms, using language normally reserved for binding law ("shall"). In many respects, these treaty-based standards resemble regulations or guidelines adopted pursuant to national legislation. And, indeed, they are often treated by states in ways not dissimilar to binding international law – they are negotiated with considerable care and tend to be implemented domestically as carefully as binding international law. (...) The outcome of the 2015 Paris conference represents a continuation of the varied standard setting practice under the FCCC.'[95]

(FCCC stands for UN-FCCC or the United Nations Framework Convention on Climate Change).

205. The State's argument (in cassation complaint 4.8) that a standard – whether it appears in an IPCC report or in a COP Decision such as the Cancun Agreement and subsequent COP Decisions– has no legal

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[94] Dupuy and Vinuales, International Environmental law, Cambridge Univ. Press, 2015. p. 36.
[95] Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani: International Climate Change Law, Oxford University Exhibit State 2017. pp. 90-91 (underlining added, counsel).

significance as long as that standard has not been adopted and incorporated into the written legal rules of the Dutch legal order (which includes directly applicable provisions of international law), ignores the fact that the Dutch legal order also has unwritten legal rules and unwritten legal obligations. This is stated in Section 6:162 DCC, by which the legislator has authorised[96] the judiciary to 'find law' in those unwritten rules of law and unwritten legal obligations, as befitting to the Dutch sense of justice. Also, what the open legal standards of Articles 2 and 8 of the ECHR require in terms of the State's duty of care must be (partly) based on that sense of justice and tailored to the case at hand, to be interpreted and concretised by the court. Therefore, there is convergence between the legal obligations of Section 6:162 DCC and those of Articles 2 and 8 of the ECHR with regard to establishing the required 'standard of care'.

206. In determining this sense of justice and the appropriate 'standard of care' demanded from the State in this case, the District Court and Court of Appeal could factor in (among other things) the principles and wording of the UNFCCC, the standards included in the IPCC reports, and the Cancun Agreement and other COP Decisions. All these normative international elements were established with the active cooperation of the Dutch government (as a contracting party), they all obtained the approval of the Dutch government (in some cases word for word), and have been incorporated by the Dutch government in national policy documents as well as in EU policy instruments with the approval of the Netherlands.

207. Therefore, the national implementation and 'operationalisation' of the open legal standards of Section 6.162 DCC and Articles 2 and 8 of the ECHR by the District Court and Court of Appeal through the adoption and application of the international 25-40% reduction standard only reflects (reflex effect) the international frameworks to which the Netherlands has long committed itself, to which the Netherlands has actively cooperated and which have had the approval of the Dutch government for years.

208. Certainly in a case like the present one, in which Dutch climate policy does not stand alone 'in splendid isolation' as a purely national matter, but should also, and perhaps above all, be seen as shared risk management in

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[96] Notice on appeal, paragraph 8.66.

the context of a global effort –and as such must fit within the generally accepted international frameworks–, it is appropriate for these international frameworks to give direction and substance to the open legal obligations incumbent upon the State under Dutch law (Section 6:162 DCC and Articles 2 and 8 of the ECHR), to be specified in more detail.

209. Contrary to what the State suggests in cassation complaint 4.8, this does not give legal force to these international frameworks as if they had binding force and/or direct effect, which they do not have. On the contrary, precisely because these international frameworks do not have the same binding force and/or direct effect as international legal standards in this case, they do not simply dictate that the State must have achieved a reduction of 25-40% before 2021, but, on the contrary, leave room for a different, lower reduction percentage if the State can provide sufficiently compelling reasons and arguments for this. Whether these reasons are sufficiently substantial must then be balanced against the values and interests protected by the 25-40% standard, i.e. together with the international community –on the basis of internationally shared and agreed standards and principles of responsibility– combating the risks and dangers of global climate change that, if left unchecked, will be catastrophic on a global scale.

210. The really compelling point in this case, which the State is constantly trying to obfuscate, is that the State has not been able to invoke good and compelling reasons, either before the District Court or before the Court of Appeal or in cassation, that could justify a lower reduction percentage than the 25-40%, which is generally accepted (even by the State itself, as an appropriate reduction standard for Annex I countries like the Netherlands. This is all the more pressing since the Netherlands, even within the group of Annex I countries and according to all other criteria, must be seen as a country with an above-average responsibility[97] for the climate problem and should therefore –according to the principles of the UNFCCC– be at the forefront of action. The State's opposition to the reduction order in the present case seems to be based purely on political unwillingness, which may have been fuelled by ideological bias – ideology unfortunately plays an important role in the climate debate– or by short-term thinking, both of which are reasons often cited in the literature as the drivers of the political inertia hindering effective tackling

[97] See written arguments of Urgenda on appeal, paragraphs 71-92.

of the climate problem). The District Court and Court of Appeal were right not to give significant weight thereto.

211. Urgenda has already argued all this in detail before: see in particular the notice on appeal, paragraphs 8.63 to 8.76; and the transcript of the oral arguments of Urgenda on appeal, paragraphs 52 to 64.

212. Urgenda concludes that the State's fourth cassation complaint failed in all its arguments.

2.12 Cassation complaint 5 - Reduction obligation of at least 25% in line with the State's duty of care

2.13 Cassation complaint 5.1

213. Cassation complaint 5.1 does not contain an independent complaint, and only asserts that if cassation complaints 4.1-4.8 succeed, legal ground 53 of the Court of Appeal decision cannot be upheld. Since cassation complaints 4.1-4.8 fail, cassation complaint 5.1 also fails.

2.14 Cassation complaint 5.2

214. In cassation complaint 5.2, the State argues that, contrary to what the Court of Appeal assumed in legal grounds 12 and 50, AR4 nowhere states that the 450 ppm scenario (only) gives more than a 50% chance of keeping the temperature below 2 °C. However, as the Court of Appeal considered in legal ground 12, according to AR5 this chance is greater than 66%. Therefore, the State argues that the Court of Appeal has not based its ruling on the most recent evidence.

215. This complaint fails because the ruling of the Court of Appeal in legal ground 50 is superfluous, partly because its conclusion that the State has a duty of care to reduce at least 25% by 2020 is independently supported by all other grounds in legal grounds 47-53. An important aspect of this can be found in legal ground 51 of the Court of Appeal's ruling, which states that the actual necessity of a 25-40% reduction as shown in AR4 is affirmed by successive COP decisions. Urgenda refers in this context to its defence against cassation complaint 4. Moreover, the fact that it is not overly pessimistic –as the Court of Appeal considers– to assume the 450 ppm scenario is entirely correct in view of the Court of Appeal's justified

observation in the same paragraph that the temperature target of the Paris Agreement (well below 2 °C with a target of 1.5 °C) implies that a 430 ppm scenario should actually be used (which in turn implies a smaller carbon budget and therefore the need for faster and steeper emission reductions).

216. Furthermore, the claim that AR4 does not mention anywhere that the 450 ppm scenario has a more than 50% chance of keeping the temperature below 2 °C is not based on fact. Although the 50% percentage is not explicitly mentioned, the Court of Appeal, like the District Court, was able to deduce this percentage from IPCC data, which the District Court presented in its judgment. Under legal ground 2.14, the District Court describes the IPCC AR4 report based on a 'best estimate' assumption of the climate sensitivity, which shows that (...) a temperature increase of no more than 2 °C can only be achieved if the concentration of greenhouse gases in the atmosphere stabilises at about 450 ppm:

> '*limiting temperature increases to 2°C above pre-industrial levels can only be reached at the lowest end of the concentration interval found in the scenarios of category I (i.e. about 450 ppmv CO2-eq using "best estimate" assumptions).*'

This 'best estimate' lies at the midpoint of the climate sensitivity range and can be interpreted as a 50-50, or 50% chance of staying below 2°C warming. This is also confirmed by the fact that in relation to meeting the 2 °C target, the European Commission (as cited by the District Court in legal ground 2.60) has stated that: '*If the concentration stabilises in the longer term at a level of about 450 ppm CO2-eq, the chance of achieving this target is 50%.*'

Furthermore, no discrepancy exists between the 'more than 50% chance' according to AR4 and 'more than 66% chance' according to AR5 of staying below 2 °C. Urgenda reiterates that, even during the discussion of the fourth cassation complaint, it pointed out that the calculations of AR4 and AR5 are not easily compared, and that the AR5 report also points this out twice.[98]
AR4 calculates the final temperature at a concentration of 450 ppm.

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[98] See AR5. WGIII, Summary for Policymakers, SPM 4.1, 'Mitigation pathways and measures in the context of sustainable development', p. 10, footnote 16. This is also repeated in AR5, Synthesis Report, Summary for Policymakers, p, 20, footnote 16 (see also the report of the hearing of 28 May 2018, p. 16).

AR5 calculates the temperature in 2100 at a concentration of 450 ppm in 2100.
According to AR5, if the CO2 concentration in 2100 is 450 ppm, there is a greater chance than 66% that the warming will be less than 2 °C in 2100. According to AR4, there is therefore a greater chance than 50% that the warming will ultimately (taking into account the inertia of the climate system) remain below 2 °C. This is entirely consistent with each other. The State wrongly tries to question the reliability of AR4 and the reduction percentages based thereon by arguing an alleged discrepancy with AR5, which in reality does not exist.

2.15 Cassation complaint 5.3

217. In view of the above defence in response to cassation complaint 5.2, cassation complaint 5.3 no longer requires separate discussion.

2.16 Cassation complaint 5.4

218. Contrary to what the State argues in this cassation complaint, after the AR5 report, COP Decisions also made reference to and maintained the 25-40% standard from the Cancun Agreement.[99] In the light of Urgenda's assertions on this subject, the ruling of the Court of Appeal is not incomprehensible and is adequately substantiated.

219. It should be borne in mind that recognition of the actual necessity in the Cancun Agreement (and later COPs), as referred to in legal ground 51, has an independent function in the reasoning of the Court of Appeal. It is not the case that the release of AR5 automatically deprives the Cancun Agreement and all subsequent COP Decisions of all meaning, simply because AR5 no longer contains the same 25-40% reduction percentage that was stated in AR4 and on which the Cancun Agreement was based.

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[99] See Urgenda's notice on appeal, paragraph 6.18, last two bullets. The following should also be noted. In 2013 in Warsaw, the COP Decision called to raise the ambition for the period up to 2020 and that Annex I countries align their reduction targets with a reduction of 25-40% for 2020 (1/CP.19, paragraphs 3 and 4, in particular paragraph 4.(c)) (Exhibit 121). In 2014 in Lima, the COP Decision called on countries to implement the Warsaw decision calling on Annex I countries to increase their reduction targets to 25-40% by 2020. The decision refers for the first time to the need for all countries to use their 'highest possible' mitigation efforts to increase reductions by 2020 (1/CP.20, paragraph 18) (Exhibit 122). In 2015 in Paris, the COP Decision reiterated the call from Lima and again called for the implementation of the Warsaw decision calling on Annex I countries to increase their reduction targets to 25-40% by 2020 (1/CP.21, par 105(c)) (Exhibit 107). The COP Decisions after Paris no longer specifically referred to the 25-40% reduction standard, but repeatedly called for increased ambition by 2020 by all parties (Exhibit 143; see also judgment Court of Appeal legal ground 11, last two bullets).

220. As noted above, AR5 does indeed contain suggestions for reduction percentages as Table 13.7 did in AR4, not for 2020 but for 2030. Moreover, they are not comparable for the reasons already discussed at length.

221. The fact that AR5 is silent about 2020 can also be explained by the fact that AR5 was particularly intended[100] as input for the new climate convention, which was planned for the Paris COP in 2015 and would apply from 2020 onwards. That convention would, of course, have 2030 instead of 2020 as the horizon for short-term climate policy. Because of the passage of time since AR4, the year 2020 was no longer a relevant point of attention for AR5.

222. Moreover, international climate policy up to 2020 was already covered by AR4 (and the Cancun Agreement and the Doha Amendment). The findings of AR5 did not give any reason to undermine previous policy; rather, these findings forced a strengthening ('enhancement') of these agreements. The latter is particularly evident[101] from COP Decision 1/CP.21 from 2015 (Paris) in which not only the text of the Paris Agreement was agreed upon, but where relatively much attention was given to strengthening the reduction efforts (agreed and established on the basis of AR4) up to 2020. Otherwise the objectives of the Paris Agreement risked becoming unfeasible before the treaty would have entered into force). The call to increase the ambition effort prior to 2020 was reaffirmed at every COP after Paris.[102] The fact that since 2015 this call has been directed not only at Annex I countries, but at all countries, did not give the Court of Appeal reasons to conclude that the reduction – which was previously considered necessary for Annex I countries– had become less necessary. On the contrary, the urgency is increasing every year, and now everyone is expected to do their utmost.

223. In this context, Urgenda refers to the most recent COP Decision 1/CP.24 published at the climate summit held in Katowice (Poland) from 3 to 14 December 2018. Chapter III, paragraph 14 thereof: '*Stresses the urgency of enhanced ambition in order to ensure the highest possible mitigation and adaptation efforts by all Parties*' and under the heading 'Pre-2020'

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100 Notice on appeal paragraphs 3.75 to 3.82.
101 Notice on appeal, paragraphs 3.8-3.82.
102 See Judgment Court of Appeal, legal ground 11. last two bullets.

(paragraph19): '*Underscores the urgent need for the entry into force of the Doha Amendment (...).*' The reference to the Doha Amendment is particularly relevant, because (see paragraph 165 above) the Amendment is a guiding framework for international climate policy between the expiration of the Kyoto Protocol in 2012 and the entry into force of the Paris Agreement in 2020. The Doha Amendment calls on Annex I countries to increase their reduction targets to at least 25-40% by 2020 (see also ruling Court of Appeal, legal ground 11. sixth bullet). In short, the COP Decision of December 2018 also called upon Annex I countries to reduce their emissions by at least 25-40% by 2020.

224. Therefore, by no means did the Cancun Agreement (with its 25-40% reduction percentage for Annex I countries) become obsolete following the publication of AR5. The State wishes to use the fact that AR5 makes no reference to a reduction target for 2020 to draw a conclusion that neither exists nor was intended in the first place.

225. In view of what Urgenda has already argued on earlier occasions (particularly in response to cassation complaint 4), cassation complaint 5.4 requires little further discussion. Urgenda has already discussed in detail the weight assigned to COP Decisions in particular, as well as the standards proposed in IPCC reports and their 'reflex effect' of giving substance to 'open' legal standards under the Dutch legal order, such as Section 6:162 DCC and Articles 2 and 8 of the ECHR.[103]

226. In addition to that, and insofar it is required, Urgenda ads the following: The text of the 1/CMP.6 Cancun Agreement can be summarised as stating (see judgment of District Court legal ground 2.50 for the literal text): (The meeting) recognizes that AR4 indicates that achieving the lowest levels of warming assessed by the IPCC and the corresponding potential damage limitation would require Annex I countries as a group to limit their emissions in a range of 25-40% below 1990 levels by 2020. This passage should be read in direct connection with the choice made by the parties, also in the Cancun Agreement (District Court's ruling legal ground 2.49), to limit warming to 2 °C, which (according to Box 13.7 in AR4) corresponds to a concentration of 450 ppm of CO2 (which was indeed the lowest level assessed by the IPCC in AR4). When read

[103] N.J. Schrijver, 'De reflexwerking van het internationale recht in de klimaatzaak van Urgenda', *Milieu en Recht* 2016/41. no. 5.

together, this can only be understood as an acknowledgment by the international community in the Cancun Agreements that, given the common choice to limit warming to 2 °C , it is (factually) required and – in the words of the Court of Appeal– necessary for Annex I countries to achieve the 25-40% emission reduction by 2020 in order to achieve this target. According to the Cancun Agreement, Annex I countries 'must' reduce their emissions by 25-40%. It is true that a COP Decision does not have the binding force of a treaty text. However, this does not mean that it has no binding force at all. Urgenda has already discussed this in detail (among other things) in its discussion of cassation complaint 4.8. Moreover, it may be relevant for the interpretation of 'open' Dutch legal standards. Much has been said about this as well, and Urgenda (again) refers to its notice on appeal, paragraphs 8.69 to 8.77.

227. Urgenda therefore notes that all relevant documents (see in particular the UNEP Emissions Gap reports) show that the global phase-out of emissions lags far behind the 'pathway' that global emissions must follow in order to achieve the 2 °C target, let alone the 'well below 2 °C' target, and even less the 1.5 °C target.

228. Finally, the State's assertion that it complies with its international obligations, illustrates first and foremost that the agreed international 'hard' obligations are not sufficient to achieve the agreed objectives of Article 2 under the UNFCCC and Article 2 of the Paris Agreement (which, incidentally, as far as the EU objective is concerned, has been recognised from the outset within the EU, but was seen as a negotiating strategy, see District Court's ruling, legal ground 2.61 and legal ground 2.62(3) in conjunction with (6)). Moreover, the most recent data show that the State certainly does not comply with all its EU obligations.[104]

2.17 Cassation complaint 5.5

229. In cassation complaint 5.5, the State contests the ruling of the Court of Appeal in legal ground 52. The State argues that the Court of Appeal wrongly concluded from the 12 October 2009 letter from the Minister for Housing, Spatial Planning and the Environment, cited in legal ground 52, that the provisions in the letter were related to the national reduction

[104] P. Hammingh (ed.), 'Kortetermijnraming voor emissies en energie in 2020, zijn de doelen uit de Urgenda zaak en het energieakkoord binnen bereiken?' 25 January 2019, PBL, p. 6: 'Doel voor hernieuwbare energie in 2020 niet binnen bereik.'

target of the Dutch State. In cassation complaint 5.5, the State argues that this letter should be given a different interpretation than the Court of Appeal–according to the State– gave thereto in legal ground 52. However, the interpretation and assessment by the Court of Appeal of this letter is factual and not incomprehensible.

230. With this complaint, the State takes the Court of Appeal's analysis out of context.

231. In legal ground 2.71, the District Court quoted from a policy document of the then Dutch government, which shows a national climate target of a 30% reduction by 2020 compared to 1990 levels. The Court of Appeal refers to this in legal ground 19. In legal ground 2.72, the District Court quoted from another policy document by the then Dutch government showing that that government understood that warming should not exceed 2 °C and that, to this end, it is important that industrialised countries take the lead by committing themselves to jointly reducing their emissions by 30% in comparison to 1990 levels. The same policy document shows that the then Minister of Housing, Spatial Planning and the Environment called on the rich industrialised countries during the climate summit in Bali to reduce their greenhouse gas emissions between 25 and 40% by 2020. In legal ground 2.73, the District Court then quoted from the aforementioned 12 October 2009 letter from the Minister of Housing, Spatial Planning and the Environment (which was cited by the Court of Appeal in legal ground 19 and again in ground 51). Based on the letter, it seems that the then government held that a 25-40% reduction by 2020 was necessary to remain on a credible pathway in order to keep the 2 °C target within reach. In legal ground 17, the Court of Appeal also referred to the European Council's target of a 30% reduction in EU greenhouse gas emissions by 2020 compared to 1990.

232. Without having to refer (again) to all these documents, the Court of Appeal could, in the light of the procedural documents and the debate between the parties, refer to the 12 October 2009 letter from the Minister of Housing, Spatial Planning and the Environment in legal ground 52 as the reason why until 2011, the Netherlands already had a national reduction target of 30% by 2020. This is not affected by the qualification that the State has only now attempted to give to this letter in cassation complaint 5.5, since the letter in question does not stand alone but must be understood in the context of the other documents cited by the Court of

Appeal and also earlier by the District Court showing that the Dutch government itself had previously assumed that the Dutch climate target should lie (well) within the range of 25-40%.

233. In this context, the State also uses the argument that it would be free to adjust its reduction target downwards on the basis of more recent scientific evidence, such as those provided by AR5. The point is, of course –as discussed above– that AR5 does not provide any reason for adjusting the reduction targets downwards. On the contrary, the tightening of the temperature target in 2015 through the Paris Agreement, the most recent[105] scientific insights into the feasibility of large-scale negative emissions, and the fact that the emission reductions actually achieved fall far short of the 'pathway' required to achieve even the 2 °C target (as reflected annually by the UNEP Emissions Gap reports), all support an increase in reduction efforts, and certainly not the opposite.[106]

234. Moreover, as already stated, Dutch climate policy is not a purely national matter in isolation from the rest of the world. In order to tackle the global climate problem effectively, it is necessary for the State to take its individual responsibility when incorporating national climate policy within the agreed international frameworks and agreements. International cooperation depends on the expectation that other countries will also assume their responsibilities and provide a fair share of the joint effort. If a country like the Netherlands, which –as it is generally accepted– has a major responsibility, believes it can walk away from its responsibilities without compelling reasons, this will erode the trust and willingness of other countries to play their part.

235. Postponing emission reductions means that the current high rate of exhaustion of the carbon budget will not be slowed down. The implication is that, in order to remain within the carbon budget, future governments or future generations will be burdened with a disproportionately heavier, if not impossible, task in order to remain within the carbon budget. The State's claim(pp. 29/56 and 30/56) that postponement of emission reductions cannot do any harm because the delay can be compensated through a later acceleration of emission reductions is gratuitous and wishful thinking.

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[105] See Exhibit 164, submitted by Urgenda in its answer to the questions of the court of appeal and submission of supplementary exhibits for oral arguments dated 28 May 2018.

[106] See also what is explained above about the most recent COP Decision (of Katowice).

236. The State also refers to the economic crisis as an excuse for postponing the necessary Dutch emission reductions. The State has not demonstrated why, as a result of the crisis, meeting the 25-40% standard would place a disproportionately heavy burden on it. Moreover, the economic crisis has not only affected the Netherlands, but also other countries. Urgenda therefore points out that neighbouring countries such as the United Kingdom, Germany and Denmark, which have also been affected by the economic crisis, have managed to achieve significantly higher reduction rates than the Dutch State.[107] Rather, the economic crisis has led to a decline in Dutch industrial activities and, as a result, a reduction in Dutch emissions. Therefore, the fact that Dutch emissions are now rising again[108] is solely due to the fact that the Netherlands does not pursue a climate policy aimed at achieving an emission reduction of at least 25% by 2020. This means that Dutch emissions can develop relatively autonomously, depending on economic factors rather than an ambitious climate policy.

2.18 Cassation complaint 5.6

237. In cassation complaint 5.6, the State appears to be particularly keen to free ride on the reduction efforts made by other countries. In essence, the State argues that it does not matter what Dutch emission reductions will be in 2020, because with an EU emission reduction of 20% by 2020 it will still be possible, along with the efforts of other countries outside the EU, to achieve the 2 °C target.

238. With this argument, the State fails to recognise that what is at stake in these proceedings is the question of the State's own national responsibility for combating the global climate problem. The State cannot shake off its own individual responsibility by pointing out that other countries are making more effort than it is, and that the global problem could therefore still be solved.

239. It is of course true in itself that if other countries (within or outside the EU) decide to take just a few extra steps to compensate for the laxness of

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[107] See reply, paragraphs 585-589, which discusses in detail a 2013 PBL report and the comparison between the Netherlands and the three countries mentioned above.

[108] See sheet 2 of Urgenda's oral arguments on appeal; also Urgenda's written arguments on appeal, paragraphs 36 - 40.

the Dutch emission reductions, the 2 °C target is still achievable.

240. But that would mean that the Netherlands would avoid the – as agreed in the Cancun Agreement– equitable and 'fair' distribution of the efforts to be made jointly by the international community in the period up to and including 2020 in order to combat the common, global, and particularly high-risk problem of climate change. Such global cooperation can only succeed if all or at least the majority of the parties to the agreement feel that everyone is doing its bit properly and to the best of their ability, that there is a distribution of efforts that is fair and 'equitable', and that there is no 'free rider behaviour'.

241. In light of the fact that, according to all current criteria, the Netherlands – even when compared to other Annex I countries– is one of the countries expected to make the greatest efforts, a Dutch emission reduction of less than 25% by 2020 is inadequate, not 'proper' and therefore not acceptable.[109] This is without prejudice to the fact that if all other countries (within or outside the EU) do just a little more, the 2 °C target might still be achievable.

242. On the basis of the State's comments (p. 31) on the ETS Directive, Urgenda would like to make the following comments.

243. According to the preamble to the ETS Directive, the EU has opted for an emission reduction of 20% by 2020 and, conditionally, of30% . In legal ground 52, the Court of Appeal derived from this –and rightly so in the light of the other procedural documents cited by the District Court– that according to the EU itself, an emission reduction of 30% is actually necessary by 2020 and that the EU has opted for an emission reduction of 20% solely for political and strategic reasons. This is also demonstrated by the fact that the EU made an offer in the Cancun Pledges to reduce emissions by 30% by 2020 if other countries were to follow. This offer was reaffirmed by the EU in 2014, following the release of AR5.[110] The EU has therefore decided to do less than it considers necessary. Given the

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[109] See written arguments of Urgenda on appeal, paragraphs 75 - 92 and in particular paragraph 89.

[110] See Urgenda's answer to the questions of the court of appeal dated 28 May 2018, paragraph 64. In the document referred thereto dated 9 May 2014, the EU repeats its offer to reduce by 30% by 2020 if other countries follow: '*the European Union reiterated its conditional offer to move to a 30 per cent emission reduction by 2020 compared with 1990 levels, provided that other developed countries commit themselves to comparable emission reductions and that developing countries contribute adequately according to their responsibilities and respective capabilities.*'

EU's recognition of the necessity for an EU emission reduction of 30% by 2020, and given the realisation that even within the EU the State is one of the Member States expected to make the greatest effort,[111] the conclusion must be that a Dutch reduction effort of less than 25% by 2020 is too low and thus, unacceptable under Dutch law. The finding of the Court of Appeal in legal ground 52 is therefore correct and comprehensible.

244. The fact that the implemented EU reduction target of 20% by 2020 is lower than the 30% reduction that the EU itself believes to be necessary means *a fortiori* that the State cannot hide its own inadequate emission reductions behind the EU's (also inadequate) reduction efforts.

245. Urgenda reiterates that, according to UNEP Emissions Gap reports, global emissions are far from following the 'pathway' they should be taking to reach the 2°C target and the gap is widening. In paragraph 52, the Court of Appeal (partly in that light) in legal ground 52 rightly considered that the State was unable to provide a climate science basis to show that a Dutch emission reduction of less than 25% by 2020 is also feasible in a global effort to achieve the 2 °C target, and the same applies for the EU target of 20%.

246. The fact that, according to the EU's own judgment, an EU reduction target of 20% by 2020 is insufficient to achieve the 2 °C target, and that the Court of Appeal refers and lends significance thereto in its ruling on the legitimacy of Dutch climate policy, does not mean nor implies) that the Court of Appeal has thereby issued an unauthorised ruling on the legitimacy of EU climate policy by Dutch standards. This is all the more true since, as has been repeatedly emphasised above, the reasoning of the Court of Appeal is based on several points of view that also specifically concern the position (and conduct) of the State.

2.19 Cassation complaint 5.7

247. Cassation complaint 5.7 does not contain an independent complaint.

2.20 Cassation complaint 6 The importance of reduction as early as possible.

[111] See judgment Court of Appeal, legal ground 60, last two sentences - not contested in cassation; see also report.

248. Cassation complaint 6 is directed against legal grounds 47, 49 and 53.

249. In assessing this cassation complaint it should be emphasised that, contrary to what the State suggests, the contested considerations of the Court of Appeal do not in any way constitute an independent 'opinion on desirability'. The rulings of the Court of Appeal in legal grounds 47-53 are based on a scientific and international political consensus –as expressed in AR4 and successive COPs– that a postponement of reduction efforts would lead to a disproportionate burden on the available carbon budget and, therefore, to a disproportionately larger and soon unattainable level of effort for future governments or future generations. It is painful and telling that the State wishes to disqualify this scientific consensus (according to cassation complaint 6.3; middle of p. 35) as a 'climate technocracy'. The fact is that, as the Court of Appeal has established in legal grounds 47 et seq., there is strong scientific evidence of the urgent necessity to achieve a significant emissions reduction as soon as possible, precisely because of the unrealistic catch-up that would otherwise have to take place in the future –given the current state of knowledge– and in which any subsequent efforts will be accompanied by disproportionate social pain and disruption.

250. In this connection, the Court of Appeal has rightly given weight to the fact that this scientifically unfounded, wishful thinking for the future (which is currently rearing its head again in the appeal in cassation as a criticism of 'climate technocracy') has in recent years consistently led to unsubstantiated delay by the State (see legal ground 52, also in conjunction with legal ground 72). Against this background, the Court of Appeal has rightly found that the fact that the State is (again) committing itself to reduction pathways that require an (scientifically unjustifiable) intensification of the reduction efforts in the future lacks credibility. Partly in light of this lack of credibility based on the State's historical behaviour and the foreseeable disproportionate burden of such a catch-up in the future, the Court of Appeal has rightly and not incomprehensibly ruled that a linear, even distribution of the reduction effort is of great importance in order to achieve the 2 °C target. As Urgenda has shown above with a calculation example showing that postponement leads to a reduction in the current government's level of effort, at the expense of a disproportionately higher level of effort in the future, the State's argument will soon become unattainable for future governments and future

generations.

251. That said, cassation complaint 6 fails, because the conclusion of the Court of Appeal in legal ground 53 is already independently supported by the reasoning of the Court of Appeal in legal grounds 49 to 52. Below, Urgenda discusses the parts of this cassation complaint as briefly as possible.

2.21 Cassation complaint 6.1

252. In cassation complaint 6.1, the State argues that the Court of Appeal's ruling in legal ground 47 that a linear, even distribution of the reduction effort is necessary in order to achieve the 2 °C target is incomprehensible and insufficiently substantiated. This is not the case.

253. With this argument, the State completely ignores the risks and dangers associated with postponement, which the Court of Appeal has summarised and which Urgenda has illustrated above by means of a calculation example. Even with an even distribution of the effort, achieving a 49% reduction by 2030 requires a great deal of effort right now and there is an unacceptably high risk that said reduction will no longer be realistically achievable. In addition, because total emissions will increase as a result of delayed action, the 2 °C target will also be endangered. Moreover, delay imposes an unacceptable and disproportionate burden on future governments and generations. The State has not presented any scenario to show that all these objections and risks can be adequately addressed. The fact that the Dutch target of 49% by 2030 is in line with the Paris Agreement in itself –as the State argues– has no meaning whatsoever if the achievement of that target becomes unrealistic as a result of postponement.

254. The Court of Appeal has therefore rightly given great importance to an even distribution of the necessary reduction efforts and thus, to achieving intermediate targets that are in line with such an even distribution. This is something other than concluding in this context that a 'necessity' exists, which the Court of Appeal has in any case not done, so that the cassation complaint lacks a factual basis. This is all the more true if the consideration of the Court of Appeal, contrary to what the State argues, is read in direct connection with legal grounds 49 to 52.

2.22 Cassation complaint 6.2

255. Cassation complaint 6.2 argues that the Court of Appeal wrongly held that there is a necessity to distribute the required reduction efforts in an even manner. The Court of Appeal has not concluded this, for which reason cassation complaint 6.2 fails in the absence of any factual basis. The Court of Appeal considered that a reduction of at least 25% by 2020 is necessary, taking into account the lack of credibility of the non-linear reduction pathways advocated by the State.

2.23 Cassation complaint 6.3

256. If the Court of Appeal did not assume that an even distribution of the reduction effort is 'necessary', then the Court of Appeal (according to the State) has shown insufficient respect and restraint towards the 'wide margin of appreciation' and/or policy freedom, allowing the State to choose at its own discretion, –from the various reduction pathways with which the 2 °C objective remains within reach– a 'pathway' with delayed reductions.

257. In this context, Urgenda refers to its refutation of cassation complaint 8, in which it elaborates on the 'margin of appreciation' which the State invokes in response to Urgenda's claim under Articles 2 and 8 of the ECHR. Moreover, by means of cassation complaint 6.3, the State does not refute, or at least not sufficiently nor substantively, the major objections to the delay of reductions in order to be able to achieve the 2 °C target. The Court of Appeal has clearly and specifically substantiated the objections to postponing reductions. These objections to postponement are so large that they cannot be dismissed without a sufficiently well-founded refutation on the grounds of the policy freedom that the State is entitled to. The ruling of the Court of Appeal is not incorrect or incomprehensible and is also adequately substantiated.

258. In this cassation complaint, the State also argues that it has to take into account additional interests than just 'climate' arguments. In view of the potentially catastrophic consequences of unbridled climate change, the State may also be required to explain, specify and substantiate which other pressing State interests undermine the major climate risks and other objections associated with delaying emissions reduction. No such explanation is given, nor does the cassation complaint refer to such

assertions before the District Court or Court of Appeal. Moreover, some of the general, unspecific objections to urgent emission reductions (e.g. high costs, public support) raised by the State will only be exacerbated by postponement, because delay will increase the reduction efforts that are (later) required, making them more drastic, more difficult and more costly. The Court of Appeal has, according to legal grounds 47, 52 and 71, recognised this, which means that the Court of Appeal was entitled to attach *a fortiori* significance to the fact that a linear derivative of the State's own reduction targets by 2030 and 2050 would result in a reduction of 28% by the end of 2020.

259. In this cassation complaint (which corresponds verbatim to a passage in cassation complaint 5.5), the State also argues that postponing emission reductions followed by accelerating the reductions in the period after 2020 logically leads to the emission of fewer greenhouse gases in the period after 2020 than without this acceleration, and that the same effect is thus achieved as when emission reductions are started immediately and without delay, because the moment of emission does not matter. That is pertinently incorrect. The calculation in Chapter 1[112] shows that this assertion as well as the State's related allegation that the ruling is defective in its reasoning cannot be accepted. If the reduction in annual emissions is achieved in 2019, a total of 90 Mton less will be emitted between 2019 and 2028 (9 years x 10 Mton) than if the reduction is not achieved until 2028. This obviously has direct consequences for the rate at which the carbon budget is depleted. As far as cassation complaint 6.3 argues otherwise, it fails.

2.24 Cassation complaint 6.4

260. Cassation complaint 6.4 is a follow-on complaint and does not contain an independent claim.

2.25 Cassation complaint 7 No justification for the Netherlands undershooting the range of 25-40%.

261. The State argues in cassation complaint 7 that the Court of Appeal in legal ground 60 has rejected its argument that the emission reduction percentage of 25-40% in 2020 is intended for Annex I countries as a

[112] In this context, see also the calculation example in paragraph 85 above.

group/as a whole, and that this percentage cannot be understood as the emission reduction that an individual Annex I country like the Netherlands would have to achieve. This cassation complaint fails.

2.26 Cassation complaint 7.1

262. Cassation complaint 7.1 does not contain an independent complaint.

2.27 Cassation complaint 7.2

263. Urgenda starts by noting that if all Annex I countries achieve an individual reduction of 10%, the group as a whole will not succeed in achieving an emission reduction of 25-40%. Group performance and individual performance are of course closely related. If the group of Annex I countries as a whole has to achieve an emission reduction of 25-40%, then it is logical and obvious to assume that each Annex I country must individually also achieve a reduction of 25-40%.

264. Given this assumption, it may indeed be expected of the State, as the Court of Appeal considered in legal ground 60, to explain why it should be subject to a lower reduction percentage. This is all the more true given that in the case of the Netherlands, a lower reduction percentage is not at all obvious. After all, within the EU (a group consisting of Annex I countries only), the Effort Sharing Decision divides the total EU reduction effort among the individual member states and imposes one of the greatest efforts on the Netherlands. In view of this, the Court of Appeal has rightly and not incomprehensibly found that what applies to the Annex I group as a whole should at least also apply to the Netherlands. The State's claim that it need not substantiate why a lower percentage should apply to the Netherlands, but that instead Urgenda should explain why a Dutch reduction of 25-40% is actually necessary for the realisation of the 2 °C objective (essentially a complaint about which party bears the burden to sufficiently substantiate their assertion), also fails for this reason. Cassation complaint 7.2 fails.

2.28 Cassation complaints 7.3 and 7.4

265. In cassation complaint 7.3, the State argues that the question should be whether a reduction of 25-40% by the Netherlands (or any other percentage) by 2020 is in fact necessary to achieve the 2 °C target.

266. The State criticises the Court of Appeal for failing to recognise this. According to the State, the Court of Appeal has wrongly issued a factual assessment of necessity (for keeping the 2 °C target within reach)to achieve the 25-40% reduction percentage by Annex I countries as a group,. The State argues that the Court of Appeal derives an individual reduction target for the Netherlands on the basis of a normative (distribution) criterion,which is obtained from the reference to the Effort Sharing Decision. The State considers the ruling on this point to be internally contradictory and incomprehensible.

267. Building on this (in cassation complaint 7.4), the State argues that GDP per capita is used as a distribution criterion for the fair distribution of reduction efforts that the Effort Sharing Decision intends to provide, but that this criterion should not be used to answer the question of whether it is actually necessary for the Netherlands to achieve an emission reduction of 25-40% by 2020 in order to keep the 2 °C target within reach. The State further argues that other normative criteria (distribution formulas) for this could be conceivable, whereby the State refers to 'emissions per capita', which is mentioned both in the UNFCCC as a relevant distribution formula, and is used by the PBL.

268. To the extent that the above argument is based on the reading in the Court of Appeal's findings of a sharp distinction between actual necessity on the one hand and normative allocation on the other hand, this argument fails due to a lack of a factual basis. After all, this distinction can in no way be read in legal ground 60 of the Court of Appeal's decision.

269. The fact that global warming must remain below 2 °C is a normative choice made by the world community on the basis of hard scientific evidence that higher global warming will have extremely serious consequences. It is an actual necessity that the concentration does not exceed 450 ppm. It is an actual necessity that total emissions do not exceed the carbon budget corresponding to the 2 °C target. The fact that, in order to ensure a fair distribution of the carbon budget, Annex I countries must phase out their emissions so quickly that a reduction of 25-40% is achieved by 2020 and that other countries may do so more slowly in order to collectively remain within the global carbon budget, is a normative choice within the actual obligatory limits of the carbon budget. The fact that Annex I countries must actually achieve this

normative phase-out rate is an actual necessity, because otherwise the carbon budget will be exceeded (after all, it must be assumed by law that other states will meet their obligations). It can also be seen as a normative necessity because an agreement has been made to phase out national emissions at that specific rate.

270. The State's assertion that the only criterion for (the extent of) its individual reduction obligation could be whether this reduction is actually necessary to keep the 2 °C target within reach is in fact a causality defence. This also becomes crystal clear in cassation complaint 7.6.

271. By asserting that the extent of its reduction effort is determined solely on the basis of the actual necessity of the reduction effort, the State fails to recognise, however, that the allocation of responsibility and liability and duty of care can and may also take place for reasons of (distributive) equity and justice. This is particularly true in situations of multiple causation, where the causality criterion is not the correct or, at the very least, a less suitable criterion for determining responsibility and duty of care. In the *Kalimijnen* decision –the case sharing several similarities with the present one– the State put forward the same causality defence that it is now trying to smuggle in under the guise of 'actual necessity', which was rejected by the Supreme Court at the time because it would – in the words of the then Advocate General– lead to an unacceptable result. In legal ground 64, the Court of Appeal has used virtually the same wording for the present dispute.

272. In the light of this last conclusion by the Court of Appeal, the actual necessity for the 25% reduction by 2020 demanded by Urgenda from the State lies, moreover, in the fact that if even the Netherlands, as a wealthy industrialised country, does not take its share of responsibility and does not do its agreed share of at least 25%, many other countries will (certainly) no longer do so. As a result, this would make the 2 °C objective definitively out of reach. In order to keep the 2 °C target within reach, it is therefore actually necessary for each country to do its agreed share, and it is therefore actually necessary for the State to have reduced its share by at least 25% by 2020.

273. Cassation complaints 7.3 and 7.4 fail on the above grounds.

274. Nevertheless, Urgenda would like to comment on the State's complaint

(cassation complaint 7.4) that the Court of Appeal considered the distribution formula of the Effort Sharing Decision to be (partly) a reason for its decision that the State should achieve at least a 25% reduction, while other distribution formulas are also conceivable for a normative distribution of efforts. The State cites the size of the emissions per capita as an example.

275. The complaint fails. The State has no interest in this complaint, because the most widely used criteria for a normative distribution of reduction efforts, as referred to in Article 3 of the UNFCCC (see legal grounds 7, 8 and 9 of the contested ruling), are: historical responsibility, the level of emissions and emissions per capita, financial possibilities (= prosperity) and social possibilities (= technological and organisational possibilities).For each application of these criteria, the result is that the Netherlands has a very large responsibility, and therefore a large obligation to act. Urgenda discussed this aspect of Dutch responsibility in detail during the oral argument,[113] and that (substantiated) argument was replicated in in legal ground 26 of Court of Appeal's ruling.

276. The State argues that legal ground 26 is incomprehensible, because the Netherlands is in 28th place in terms of emissions per capita, and not in 10th place, and that this is also apparent from the data submitted by the State.

277. This complaint also fails in the absence of a factual basis. Like Urgenda, the Court of Appeal first looked at the countries with the largest emissions in absolute terms. After all, for an effective climate policy, it is important to determine which countries have the highest emissions in absolute terms. But for a fair comparison of these countries and for a fair distribution of their responsibility, it is important to look at what their emissions are per capita. Then, the Netherlands turns out to be number 34 of the countries with the highest emissions in absolute terms, and out of those countries with high absolute emissions, to be number 10 when ranked by highest emissions per capita.[114] The approach proposed by

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[113] Written arguments of Urgenda on appeal, par. 71 - 89.

[114] It appears that small, poor and low-developed countries (such as island states) in particular have surprisingly high emissions per capita as a result of poor and 'dirty' technology; but in absolute terms their emissions are completely irrelevant. These countries are not yet relevant to tackling climate change adequately and effectively, and they 'pollute' the statistics in particular. An approach similar Urgenda's, and one that is also followed, is to look only at the emissions per capita of countries with more than 10 million inhabitants. The Netherlands also ranked 10th under this approach in 2016.

Urgenda and followed by the Court of Appeal thus outlines a balanced assessment framework for the State's responsibility in the global fight against climate change.

2.29 Cassation complaint 7.5

278. In cassation complaint 7.5, the State argues that the Court of Appeal has failed to recognise that it is entitled to a 'wide margin of appreciation' to make agreements with other countries on a mutual distribution of reduction efforts, especially if the agreed distribution ensures that the 2 °C objective remains within reach.

279. The State thus fails to recognise that such agreements do not currently exist, that the Paris Agreement is based on the idea that such top-down agreements will not be feasible for the time being, and that global efforts in terms of the phase-out rate of emissions are lagging far behind the rate that is necessary. This, combined with the fact that the Netherlands is one of the countries with the greatest responsibility for combating dangerous climate change; that it is precisely the Dutch reduction efforts that are lagging far behind what has been agreed, are far behind what comparable EU/Annex I countries are doing, and are far behind the level of reduction that the State itself previously considered necessary in order to remain on a credible pathway towards achieving the 2 °C target; and all this –set against the background of the unprecedented dangers and risks of climate change– means that the State's reliance on its 'wide margin of appreciation' must be rejected (see cassation complaint 8).

280. Urgenda also refers to its defence against cassation complaint 8.

2.30 Cassation complaint 7.6

281. Cassation complaint 7.6 makes clear that the State, with its criterion of 'actual necessity', means the causality requirement. Urgenda has already discussed and refuted this in cassation complaints 7.3 and 7.4.

2.31 Cassation complaint 7.7

282. In legal ground 62, the Court of Appeal considered that although climate change is a problem on a global scale and that the State cannot solve this problem on its own, this does not release the State from its obligation to

take measures from its territory to the best of its ability that, together with the efforts of other states, offer protection against the dangers of serious climate change.

283. Again, the State's complaint is that the Court of Appeal has adopted a normative approach in order to translate the collective commitment of the group of Annex I countries as a whole, to achieve an emission reduction of 25-40% by 2020, into an obligation of the State as an individual country. The State's complaint is that (only) the criterion of 'actual necessity' should have been used by the Court of Appeal. The arguments put forward by Urgenda in the discussion of cassation complaints 7.1-7.6 also lead to the rejection of cassation complaint 7.7.

3 RIGHT OF COLLECTIVE ACTION (CASSATION COMPLAINTS 3.2-3.4)

3.1 Introduction

284. Urgenda has brought this case on the basis of Section 3:305a DCC. It has also filed its claims on behalf of 885 individual persons. In its collective claims, the District Court declared Urgenda had standing 'in full extent': for all its bases, for the interests of the current residents of the Netherlands, the current generation abroad, and the interests of future generations in the Netherlands and abroad. By granting the collective claim, the District Court has left open whether the claims of the individual 885 principals were admissible: their claims were rejected by the District Court for procedural reasons, due to lack of consequence.

285. It is worth bearing in mind that, as the District Court ruled,[115] the State '*does not dispute that Urgenda is admissible, in the light of the interests which it represents under its articles of association, when, on behalf of the current generations of Dutch citizens, it challenges greenhouse gas emissions from Netherlands territory.*' The State did contest that Urgenda could represent foreigners and, referring to the decision by the District Court, it contested whether Urgenda could also represent the interests of future Dutch generations. On appeal, the State presented only a single ground for appeal to contest that Urgenda could represent individuals and future generations outside the Netherlands.[116] On appeal, the State did not submit any ground for appeal against the District Court's ruling that Urgenda has standing insofar as it invokes Articles 2 and 8 of ECHR for the current generation of Dutch citizens.

286. In cassation, the State argues that Urgenda was inadmissible insofar as it invoked Articles 2 and 8 of the ECHR (cassation complaints 3.2-3.4) for the current generation of Dutch citizens.[117] This is therefore at odds both

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115 Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7145, legal ground 4.5.

116 Legal ground 34 (explanation ground for appeal 1 in the principal appeal), legal ground 35, first sentence ('*It is not disputed that Urgenda, insofar as it acts on behalf of the current generation of Dutch citizens against the emission of greenhouses on Dutch territory, is admissible in its claim.*'). The State therefore withdrew its reference on appeal.

117 After the State did nothing for three years to comply with the judgment declared provisionally enforceable, the State now wants to derail the case by arguing that Urgenda is inadmissible. While the State raises this as a derived argument of its interpretation of Articles 2 and 8 of the ECHR, it knows that the court will first rule on an admissibility issue and only then handle the content of the case.

with its defence at first instance and its complaints on appeal.[118] The State has argued that this is a 'political question' and that Urgenda is therefore inadmissible. The State no longer takes this position in cassation, just as the State no longer defends that Article 34 of the ECHR stands in the way of Urgenda invoking Articles 2 and 8 of the ECHR, or that Urgenda has no interest within the meaning of Section 3:303 DCC. Urgenda will return to this later.

287. What the State says in cassation complaints 3.2-3.4, it has not argued before the District Court and Court of Appeal. The State acknowledges this in complaint 3.5, because the Court of Appeal would have had to establish this *ex officio* since the issue of admissibility is a matter which the judiciary must decide upon regardless of whether or not this matter is contested between parties (a matter of "public order"). In paragraph 3.5.1. below, it is explained that the issues of admissibility raised by the State do not touch upon public order. Moreover, cassation complaints 3.2-3.4 are largely based on assertions of a factual nature, which the State should have invoked before the District Court and Court of Appeal. According to cassation complaint 3.3, a factual debate should take place on which interests of which persons are affected and how, and cassation complaint 3.4 concerns the actual contribution to effective/efficient legal protection. The State now also argues that the negative effects of climate change have a different impact on the individuals represented by Urgenda.

288. The aforementioned reasons are sufficient to declare the cassation complaints unfounded. The debate in this case should not be about issues of admissibility. However, in its initial document, the State launched a frontal attack on every legal protection of citizens against the consequences of climate change that can be attributed to the State. After all, what the State is arguing is that Urgenda and other NGOs should not seek collective protection knowing that individual protection is illusory. That is why Urgenda will below discuss the need for collective legal protection and the essential role that the right of collective action plays in the Dutch administration of justice.

289. The Court of Appeal has left open whether Urgenda can represent the

[118] What cassation complaint 3.5 says about this is unworthy of the State. The 'detailed explanation' to which footnote 10 refers, does not concern a principal ground for appeal and does not dispute that Urgenda is admissible insofar as it represents the current generation of Dutch citizens. Nor has the State argued this in its appeal plea. On the contrary, the written arguments of the State on appeal, paragraphs 3.12 and 3.13 indicate recognition of Urgenda's admissibility.

future generation of Dutch citizens and the current and future generation of foreigners. It may be expected that the Supreme Court will also answer these questions. These questions may impact differently Urgenda's claims, and they are important in terms of both substantive and procedural law. Below, Urgenda will discuss a number of aspects in the context of the admissibility issue, anticipating that the State will maintain its defence presented on appeal. The substantive law aspects are dealt with in paragraphs 4.9 and 4.10 below.

290. Insofar as Urgenda represents the current generation of Dutch citizens, its admissibility in the claims under Section 6:162 DCC is a given.

3.2 Right to collective action and effective legal protection

291. The importance of the Dutch right to collective action in this case has been emphasised in several of the numerous comments regarding the ruling of the District Court and the ruling by the Court of Appeal.[119] This has not gone unnoticed abroad either.[120] Over the past few decades, the legislator and the judiciary have cleared the way for the right to collective action, starting from the general interest action and the group action in environmental matters. The Supreme Court has embraced the right to collective action in a wide variety of idealistic and commercial cases in order to ensure effective and efficient legal protection and thus, access to justice. As a result, the Netherlands has distinguished itself from other countries that do not have a general right to collective action such as Section 3:305a DCC.

292. By accepting the right to collective action, the State has, within the preconditions of Section 3:305a DCC, given the judiciary a fundamental legal protection remedy for the acts and omissions of the legislature and executive power. Section 3:305a DCC is thus an essential element in the constitutional legal order and in the balance between the state powers. Collective action is an instrument of private law, but with the influence it gives to the judiciary, it touches the heart of the organisation of the state. Comments on the judgment and ruling in this case from a constitutional perspective lose sight of this or oppose it on grounds of *de lege ferenda*.

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[119] See e.g. E. Bauw, 'De bakens verzet (!?) - De civiele rechter in milieuzaken tegen de overheid', *TO 2018, no. 4*, pp. 160 et seq.; T.R. Bleeker, 'Nederlands klimaatbeleid in strijd met het EVRM', *NTBR* 2018/39, p. 290 et seq.; T.R. Bleeker, 'Voldoende belang in collectieve acties: drie maal artikel 3:303 BW' *NTBR* 2018/20, pp. 139 et seq.

[120] P. Lefranc, 'Het Urgenda-vonnis/-arrest is (g)een politieke uitspraak (bis)', *NJB 2019/474*, p. 596.

293. The result of collective actions has faced resistance from constitutionally-minded authors on more than one occasion. In his advisory opinion on the SGP case, Advocate General Langemeijer briefly reflected on the well-known objections and subsequently concluded that '*there's little point in dwelling long on those objections*'. It was sufficient to point out that case law has long recognised that an interest group may bring an action in defence of a general interest assumed by a group of persons, provided that certain conditions are met. In the more than three decades since the judgment of the Supreme Court 27 June 1986, NJ 1987/743 (*De Nieuwe Meer*), the Supreme Court and the legislator have jointly developed a broad measure of collective legal protection, including the protection of human rights, also from an international perspective.

294. The story is well known. Urgenda explains a number of points.

295. Since the 1980s, the importance of efficient and effective legal protection has been *Leitmotiv*. In *De Nieuwe Meer*, the Supreme Court ruled:[121]

> '*In the first place, the interests that are involved in an action such as the one in question –essentially aimed at obtaining a prohibition on further damage to the environment– lend themselves to bundling' as a result of the legal action of the environmental associations; on the contrary, in the absence of the possibility of such a bundling, efficient legal protection against the immediate damage to these interests – which generally involve large groups of citizens, while the consequences of a possible damage are often difficult to foresee for each of these citizens– could not be hindered to a considerable extent.* (…)' (legal ground 3.2)

296. The need to bundle and collect, precisely because the consequences for individual citizens are 'often difficult to foresee', was highlighted in *Kuunders*,[122]where the Supreme Court accepted as a matter of principle the legal protection in environmental cases based on Section 6:162 DCC in a general interest action, without individual/concrete interests of member of the interest group being shown. In *Kuunders*, the emphasis was on efficient legal protection, after the Supreme Court in *VEA v.*

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[121] Supreme Court 27 June 1986, ECLI:NL:HR:AO8410, *NJ* 1987/743. See about this N. Frenk, Kollektieve akties in het Privaatrecht (Recht en Praktijk, no. 81), Kluwer: Deventer, 1994, pp. 85-86.

[122] Supreme Court18 December 1992, ECLI:NL:HR:1992:ZC0808, *NJ* 1994/139 (*Kuunders*), with commentary from C.J.H. Brunner and M. Scheltema.

Staat[123] had placed the emphasis on effective legal protection.[124]

297. Considering the established case law at the time of the legislative proposal on collective action enshrined in Section 3:305a DCC, it was a given that large-scale group actions and general interest actions should also represent the interests of citizens (legal subjects under private law). It was a given that collective legal protection is, by definition, necessary in environmental cases in the absence of effective and efficient individual legal protection. It was also a given that interest groups could – preventively and reactively– invoke the fundamental and human rights of citizens and the legal protection of (currently) Section 6:162 DCC.

298. With the introduction of the right of collective action of Section 3:305a DCC, the legislator made the fundamental choice to codify the established case law:

> '*This will concern interests in which a number of people, whether or not clearly defined, require protection. It is not necessary for all these persons to have their own legal action and for the collective claim to bundle these potential actions. After all, in many cases an organisation will represent interests "which, as a rule, affect large groups of citizens, while the consequences of any infringement for each of these citizens are often difficult to foresee"; see Supreme Court 27 June 1986, NJ 1987, 743 (De Nieuwe Meer). In a case such as this, citizens often do not have standing, due to lack of interest. However, as a result of the organisation's efforts, the diffuse interests of many citizens, i.e. interests in respect of which it is not clear in advance who will be harmed if they are affected, are bundled.*'
>
> '*The interests that lend themselves to bundling in a collective action may concern property interests, but also more idealistic interests. The action can be used to represent interests that directly affect people, or that people have assumed on the basis of a certain conviction. In the case of more idealistic interests, it is irrelevant that not every member of society gives equal importance to these interests. It is even possible that the interests that the proceedings wish to represent may clash with the ideas and opinions of other groups in society. This in itself does not stand in the way of collective action. It should be borne in mind, however, that admissibility does not yet*

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123 Supreme Court 11 December 1987, ECLI:NL:HR:1987:AC2270, *NJ* 1990/73.
124 Cf. also, slightly later, Supreme Court 17 January 1997, ECLI:NL:HR:1997:ZC2250, *NJ* 1998/656.

say anything about the allowability of the claim. (...)'[125]

299. In the memorandum of reply, the Minister also addressed the question of how the rule that an action can only be filed in case of a sufficient interest (Section 3:303 DCC) relates to the possibility of representing such diffuse interests by means of collective action.[126]

> '*One usually speaks of diffuse interests if, when an interest is affected, the consequences for each individual are difficult to foresee. By bundling diffuse interests in a collective action, it is possible to bring the infringement of a concrete interest in its entirety before the courts. For example, concrete damage to the environment is usually a clear given, but the consequences for individuals are often difficult to demonstrate. It is therefore not the interest that is diffuse, but the consequences of its infringement. It is precisely through bundling that it can be assessed whether this interest is sufficient within the meaning of Section 3:303 DCC.*
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> *(...) Often the consequences will only manifest themselves in the future. However, it is clear that individuals may be affected by the infringement, although it is not yet known who and to what extent. The interests of these others can then be defended by means of collective action.'* (underlining added, counsel)

In response to criticism in the literature and in the advice of the Central Council for Environmental Hygiene, the Minister remarked that the interests of a clearly defined group of others need not be at issue. It may also concern an indeterminate, very large group of people.[127]

300. According to Urgenda, this legislative history is of great importance for this case. In the passages cited above, the legislator has set out all the lines that automatically lead to the admissibility of Urgenda's collective action in this case. In summary:

i) The diffuse nature of the consequences for citizens of an imminent or already initiated environmental degradation is not only not an impediment, but rather a compelling reason to provide collective legal

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[125] *Parliamentary Papers II* 1991/92, 22 486, no. 3, pp. 21-22.
[126] *Parliamentary Papers II* 1992/93, 22 486, no. 5, p. 8 - 9 pp. 8 - 9 (underlining added, counsel). See also the Memorandum following the final report, *Parliamentary Papers II* 1992/93, 22 486, no. 8, pp. 4-5.
[127] *Parliamentary Papers II* 1991/92, 22 486, no. 3, p. 22.

protection. The interests of an indeterminate (not clearly defined), very large group of people can be represented in a collective action.

ii) A collective action is permissible even if the individual members of the interest group are unable to bring any actions due to lack of interest. The decisive factor is whether the collective action contributes to effective and/or efficient legal protection.

iii) The fact that part of (the related group within) society rejects the collective action does not prevent that collective action from being permissible and that protection must be offered in substantive law.[128]

iv) In a collective action, it is possible to represent an imminent infringement in the future, even if it is not known who will be affected, and to what extent, in the future.

301. At the time the legislative proposal was discussed, it was clear that interest groups could invoke the protection of fundamental and human rights before the civil courts. After all the discussion and criticism[129] of general interests and group actions on politically sensitive issues, the legislator also allowed collective action in this area. The legislator has accepted that the government does not exclusively determine what the general interest requires and how it should be represented.[130] The legislator did not take heed of the criticism in the literature in the 1980s and early 1990s that the right to collective action is incompatible with the government's task of defending the general interest.[131] After research of the Dutch and American right to collective action, Geelhoed rightly pointed out that the European objection that the representation of general interests is an exclusive task of the government, has been set aside in the Netherlands.[132] It points out that the government, too, has on more than one occasion demonstrated that it can violate environmental standards, so

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[128] Also in this vein Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756, *NJ* 2011/473, (*Stichting Baas in Eigen Huis v. Plazacasa*).

[129] See e.g. J.M.H.F. Teunissen, Het burgerlijk kleed van de Staat, Zwolle 1996, p. 298; Supreme Court 11 December 1987, ECLI:NL:HR:1987:AC2270, *NJ* 1990/73 (*VEA v. Staat*), with commentary from M. Scheltema en W.H. Heemskerk; Supreme Court 18 December 1992, ECLI:NL:HR:1992:ZC0808, *NJ* 1994/139 (*Kuunders*), with commentary from C.J.H. Brunner and M. Scheltema; R.J.P. Schutgens, 'Urgenda en de Trias. Enkele Staatsrechtelijke kanttekeningen bij het geruchtmakende klimaatvonnis van de Haagse rechter', *NJB 2015, 1675*, pars. 3 (footnote 27).

[130] C.J.J.C. van Nispen, De kinderjaren van de collective action, in: Verdediging van collectieve belangen via de rechter, Zwolle: Tjeenk Willink, 1988, pp. 4-5.

[131] See inter alia J.H. Nieuwenhuis, 'Op gespannen voet', *NJB* 1998/1, p. 15.

[132] See M. Geelhoed, 'Privaatrechtelijke handhaving door Milieuorganisaties', *Milieu & Recht* 2015/63, p. 331.

that private law enforcement is necessary and that environmental organisations exercise an unmistakable control function in a state under the rule of law.

302. Following codification of the general right to collective action in Section 3:305a DCC, the Supreme Court has issued a long series of rulings clearing the way for collective action. An important ruling, also for this case, is the SGP ruling, which was decided against the State.[133] The District Court had declared Clara Wichmann et al. inadmissible in regards to the rejection of the action filed by the SGP's female followers. The Supreme Court allowed the interest group to invoke the discrimination prohibitions in human rights treaties. The Supreme Court did not require that they personalise or concretise the violation of the right to equal treatment against the interests invoked by the State:

> '*The requirement of similarity means that the interests for which the legal action is brought are suitable for bundling, so that efficient and effective legal protection can be promoted for the benefit of interested parties (Cf. Supreme Court 26 February 2010, no. 08/00693, LJN BK5756). The court of appeal has ruled –which was not contested in cassation– that Clara Wichmann et al. also represent, pursuant to their articles, the interests under which they bring this action, i.e. the general interest of all citizens in the Netherlands in enforcing the fundamental right to equal treatment by means of State action against discrimination on the basis of sex. Since Clara Wichmann et al. wish with their claims to enforce that fundamental right, the requirement of similarity set by Section 3:305a has been met, insofar as is relevant to this case. Precisely because of the general nature of the interests of all citizens in the Netherlands, whom Clara Wichmann et al. seek to represent with their claims, the above cannot be prejudiced by the circumstance that the specific group of women who might want to seek candidacy for the SGP, does not want the action of Clara Wichmann et al.*'[134]

303. This ruling again confirms that the Dutch courts have a duty to offer collective legal protection, even if this intervenes in the political system. It is not compatible with this ruling that, as the State wishes, a

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[133] Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388 (*Staat en SGP v. Clara Wichmann et al.*).

[134] Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388 (*Staat en SGP v. Clara Wichmann et al.*), ground 4.3.2 (underlining added, counsel).

concretisation and/or personalisation of the interests affected should be required when an interest group invokes Articles 2 and 8 of the ECHR. If an interest group can represent the legal interest of all citizens to be exempt from discrimination, then under Dutch law interest groups can *a fortiori* seek collective protection from an immediate infringement of the fundamental right to (family) life. This therefore also applies if no individual, group or regional precision can be given, but it is certain with a sufficient degree of probability that persons presented by the interest group will be affected in their interests protected by Articles 2 and 8 under the ECHR.[135]

304. The SGP ruling further clearly illustrates that a concretisation/personalisation or other delineation of the individual citizens is also not required with a view to the weighing of interests, which in the SGP case concerned the freedom of religion. In the past, it has sometimes been concluded that the nature of the claim and the anonymity of the individual interests involved in it may in a concrete situation resist collective action.[136] Unlike the present case, however, this concerned an intrinsically concrete interest, in which an interest group intended to ensure the anonymity of persons who were immediately involved and identifiable. These are essentially different cases in which legal protection of individuals was possible and in which collective action prevented a balancing of interests that was tailored to the persons directly involved.

305. The Class Action (Financial Settlement) Act[137], which was adopted by the Senate without a substantive debate on 19 March 2019, does not change the foregoing. On the contrary, in the case of 'idealistic actions', the demands made on interest groups are less strict than in the case of actions driven by financial interests. The idea is that idealistic interests should also enjoy effective legal protection, which would be undermined by 'too restrictive' conditions of admissibility.[138]

306. In chapter 4 below it is further explained that the Court of Appeal has established that the State's failure to take adequate mitigation measures harms the current residents of the Netherlands in their interests protected

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135 See further paragraph 4.6 below.
136 See Supreme Court 5 October 1984, ECLI:NL:HR:1984:AC8436, *NJ* 1985/445 and also see N. Frenk, Kollektieve akties in het privaatrecht (Recht en Praktijk, no. 81), Deventer: Kluwer, 1994, pp. 98-102.
137 *Parliamentary Papers II, 2016-2017, 34 608, no. 2.*
138 *Parliamentary Papers II* 2016/2017, 34 608, no. 3, p. 29.

by Articles 2 and 8 of the ECHR. To that extent, the Supreme Court is not being asked anything that is not already contained in the case law and legislative history summarised above. In chapter 4 below it is also explained that what the Court of Appeal has considered with respect to Articles 2 and 8 of the ECHR, fits in with an interpretation of these provisions as a living instrument in the light of international treaties, decisions, instruments of interpretation and soft law of international law organisations, as well asthe urgency of mitigation, which has rapidly increased in a very short time.

307. This applies both to the best possible assessment of what the ECtHR itself would decide in the specific context of climate change in 2019 and to what, bearing in mind the subsidiarity principle under Article 53 of the ECHR and the role of the court as primary court under the ECHR, under Dutch law is in any case a correct interpretation of Articles 2 and 8 of the ECHR.[139]

308. At this point, Urgenda points out that the Dutch right to collective action has in the past already *de facto* led to an interpretation and/or application of substantive law geared to collectives. This has been done under the flag of a need for effective and efficient legal protection. It is established case law that in a collective action (group action) an abstraction is made from the concrete circumstances that concern individuals who are also part of an interest group. This abstraction is made, for example, if a claimant involved in a collective action would be blamed for a breach of standards,[140] where this would not happen in an individual case. Another somewhat arbitrary example concerns the interruption of the limitation period by an extrajudicial declaration or legal claim by an interest group, in which the Supreme Court, for the sake of effective and efficient legal protection, has shifted the boundaries of substantive law.[141] Some authors

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[139] Cf. Prof. T. Barkhuysen en M.L. van Emmerik, *Rechtsgeleerd Magazijn Themis* 2019/1, p. 53: '*Third, it can be noted that the application of Articles 2 and 8 of the ECHR has the potential to lead to a wider liability from unlawful governmental acts (Section 6:162 DCC). The Netherlands may by virtue of Article 53 of the ECHR go even further than Strasbourg' when it comes to liability for unlawful governmental acts caused by the violation of the ECHR, since the ECHR guarantees (including positive obligations) as interpreted by the ECtHR contain minimum standards.*'

[140] See inter alia HR 27 November 2015, ECLI:NL:HR:2015:3399, *NJ* 2016/245 (*ABN AMRO v. Stichting Belangenbehartiging gedupeerde Van den Berg*). We see the same for other collective procedural powers, such as the *Peeters v. Gatzen* claim, see most recently Supreme Court 8 September 2017, ECLI:NL:HR:2017:2269, *NJ* 2017/351 (*BNP Paribas v. Rosbeek qq*).

[141] Supreme Court 28 March 2014, *JOR* 2014/196 (*Deloitte v. VEB*); Supreme Court 19 May 2017, ECLI:NL:HR:2017:936, *NJ* 2018/305. This has been modified in the Class Action (Financial Settlement) Act.

overlook this in their comments on the judgment and ruling.[142]

3.3 International influences on the right to collective action

309. On appeal, the State has defended that, as the District Court considered, Article 34 of the ECHR blocks a 3:305a entity's reliance on treaty law before the Dutch courts. This decision of the District Court was incorrect and the State therefore, in cassation, rightly does not contest the contrary ruling of the Court of Appeal. Article 34 of the ECHR only regulates access to the Strasbourg Court and is not a 'follow-on article'.[143] Nor does the State argue in cassation that the exclusion of the right of complaint in a pure *actio popularis* under Article 34 of the ECHR, in which the interest group has no *victum status*, gives reason for a limited interpretation of Section 3:305a DCC in cases where an appeal is made to rights guaranteed by the ECHR.[144]

310. It is therefore established in cassation that Article 34 of the ECHR does not impose any restriction, including indirectly, on the right of interest groups to bring an action before the Dutch courts regarding reliance on treaty rights.

311. The case law of the ECtHR in which a pure *actio popularis* right of complaint to the ECtHR is denied, is intended to regulate access to the Strasbourg Court. The ECtHR already has its hands full with cases involving concrete/individual victims of human rights violations. The case law of the ECtHR reflects extensively on the question of admissibility in Strasbourg, but not so often on the question to what extent the national court, who is the primary court under the ECHR, may ensure collective legal protection under Articles 2 and 8 of the ECHR, or if it is even obliged to do so under circumstances by virtue of Article 6 and/or 13 of the ECHR. However, it is clear that the ECtHR recognises the need for collective legal protection in environmental matters. See e.g. *Gorraiz Lizarraga v. Spain*[145]:

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142 See inter alia R.J.P. Schutgens, 'Urgenda en de Trias. Enkele Staatsrechtelijke kanttekeningen bij het geruchtmakende klimaatvonnis van de Haagse rechter', *NJB* 2015/1675, paragraph 3. His suggestion that in collective actions it is advisable to 'stay close to the written law' is not supported by the law and is at odds with three decades of established Supreme Court case law.

143 See E.R. de Jong, 'Rechterlijke risicoregulering en het ECHR: over drempels om de civiele rechter als risicoreguleerder te laten optreden', *NTM-NJCM bulletin 2018, 16*, pp. 227 et seq.

144 P. Lefranc, 'Het Urgenda-vonnis/-arrest is (g)een politieke uitspraak (bis)', *NJB 2019/474*, p. 596.

145 ECtHR 27 April 2004, *Gorraiz Lizarraga v. Spain*, no. 62543/00, paragraph 38.

> *'Admittedly, the applicants were not parties to the impugned proceedings in their own name, but through the intermediary of the association which they had set up with a view to defending their interests. However, like the other provisions of the Convention, the term 'victim' in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society. And indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of 'victim'. Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.'*

Illustrative is that in the Strasbourg continuation of the SGP case, the ECtHR apparently had no problem with Clara Wichmann et al., on the basis of Section 3:305a DCC, demanding compliance with the right to equal treatment for all Dutch citizens from the Dutch court.

312. Incidentally, there is no question of a pure *actio popularis* in this case. Urgenda does not represent a solely idealistic interest in compliance by the State with the legal obligations arising from Articles 2 and 8 of the ECHR and Section 6:162 DCC. Urgenda also represents the interests of persons who are harmed or threatened to be harmed in their interests. The = Court of Appeal has established that Urgenda has standing insofar as it represents the current generation of residents who face the serious risk that they will be confronted with loss of life and/or disruption of family life. This is different from, as the *Practical guide on admissibility criteria* of the ECtHR explains, , a '*complaint in abstracto alleging a violation of the Convention*' or '*an actio popularis for the interpretation of the rights*'.[146] The ECtHR allows a victim status for interest groups under Article 34 of the ECHR insofar as they represent persons for whom there is a sufficiently real threat that their treaty rights will be violated.

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[146] ECtHR, *Practical guide on admissibility criteria*, 2018, p. 13.

313. This need not be answered in this appeal in cassation. What matters is that the ECtHR has an eye for collective legal protection under the ECHR in national procedural law and that the question of whether an interest group has the right to lodge a complaint with the ECtHR is not in itself relevant to the interpretation of treaty provisions (here: Articles 1, 2 and 8 ECHR).

314. Another international perspective is the Aarhus Convention.[147] Article 1 of this Convention formulates the objective:

> '*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*'

Article 9(3) aims to ensure access to civil justice:

> '*In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*'

315. If under Dutch law there is access to justice for an action to prevent or remedy environmental damage (with application of Dutch law, including supranational law), then the Aarhus Convention explicitly keeps this access open.[148] In view of the *locus standi* to be granted to NGOs under Article 9(2) of the Convention, 'members of the public', also in view of

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[147] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Treaty Series 2001/73.

[148] R. Hallo and F.A. de Lange, 'Actualiteiten milieuaansprakelijkheid - De EU-richtlijn milieuaansprakelijkheid en de rol van milieuorganisaties',*TMA 2004-4*, p. 121. In a general sense, see inter alia United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation guide, p. 197: '*Paragraph 3 creates a further class of cases where citizens can appeal to administrative or judicial bodies. It follows on the eighteenth preambular paragraph of the Convention and paragraph 26 of the Sofia Guidelines to provide standing to certain members of the public to enforce environmental law directly or indirectly. In direct citizen enforcement, citizens are given standing to go to court or other review bodies to enforce the law rather than simply to redress personal harm.*' This was already provided for in the so-called Sophia Guidelines from 1995 https://www.unece.org/fileadmin/DAM/env/documents/1995/cep/ece.cep.24e.pdf paragraphs 25-26.

Article 2(5) Convention, are interest groups that represent environmental interests. Article 9(4) of the Convention provides an obligation to provide *'adequate and effective remedies'*. To the extent that these provisions would not have direct effect because they leave (too much) discretionary power, the court should in any case interpret its national law as far as possible in line with the objective of the Aarhus Convention or the right of access to justice in environmental matters, as the case may be.[149] The WOCD report prepared by Wiggers-Rust also points to this.[150]

> '*As far as environmental protection is concerned, (national) provisions restricting the scope for action of environmental organisations, whether formally or materially, are thus in the spotlight of the Aarhus Convention. The Convention's objective is to protect the environment in the broadest sense, for the benefit of all, including future generations. The interests of future generations are regarded as part of the public interest. General interest actions are of great importance for environmental law. The scope that the criteria to be established for such actions under the Åarhus Convention should provide could be at odds with the importance of avoiding the abuse of procedural law in case of collective redress, in particular in the case of actions for damages.*'

316. The implementation of the Aarhus Convention in Union law and the need for collective actions for access to justice (in environmental matters), which the Union has also stressed, confirms its great importance for the interpretation and application of Section 3:305a DCC.[151]

317. It follows that Dutch courts (and the legislator) have no room to impose such restrictions to the right of collective action as enshrined in Section 3:305a DCC, compromising the right of effective access to justice in environmental matters. In other words, the Aarhus Convention provides a

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[149] Cf. ECJ 8 March 2011 ECLI:EU:C:2011:125, *AB* 2011/213 point 52 and the note by Backes (critical in terms of direct effect). See Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as well as, inter alia, Commission Communication on access to justice in environmental matters (2017/C 275/01), pp. 19 et seq. and, for example, Commission Recommendations of 11 June 2013 (2013/396/EU), recital (23). See also the easy access to a court of NGOs ensured under Directive 2004/335/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (in particular Articles 12 and 13; this case does not fall within the material scope of this Directive).

[150] L.F. Wiggers-Rust, 'Collectieve acties'. Een interne rechtsvergelijking tussen privaatrecht en bestuursrecht, Cahier 2014-11, p. 45.

[151] See inter alia the Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3 and L.F. Wiggers-Rust, 'Collectieve acties'. L.F. Wiggers-Rust, 'Collectieve acties'. Een interne rechtsvergelijking tussen privaatrecht en bestuursrecht, Cahier 2014-11, pp. 35 et seq.

treaty-based foundation for collective legal protection, which, both in the application of Articles 2 and 8 of the ECHR and in the application of Section 6:162 DCC, is aimed at mitigating a serious danger to (at least) the current generation of Dutch residents, without it being necessary to point out who, where, when or how their interests are affected in the event that the State breaches the duty of care.

3.4 Right to collective action and the interest of Urgenda

318. As mentioned above, it is established for this cassation that Urgenda has a sufficient interest within the meaning of Section 3:303 DCC in its action. This applies in any event insofar as it represents the interests of the current generation of Dutch citizens. After all, the Court of Appeal took this as its starting point and thus disregarded the State's defence. In none of the nine cassation complaints does the State contest that Urgenda has a sufficient interest within the meaning of Section 3:303 DCC.

319. The Court of Appeal has established the following as court of fact:

> '*After all, it is without a doubt plausible that the current generation of Dutch nationals, in*
> *particular but not limited to the younger individuals in this group, will have to deal with the adverse*
> *effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately*
> *reduced*.' (legal ground 37)
>
> ' *The Court furthermore deems that Urgenda has sufficient interest in its claim. Contrary to what the*
> *State argued in its oral arguments, Urgenda's interest was made sufficiently clear in its extensively*
> *explicated assertions that there is a real threat of dangerous climate change, not only today but*
> *certainly also in the near future. There is no need for Urgenda to prove these assertions in advance in*
> *order to commence proceedings, if that was the State's intention of its argument*..' (legal ground 38)
>
> '*As is evident from the above, the Court believes that it is appropriate to speak of a real threat of*

dangerous climate change, resulting in the serious risk that the current generation of citizens will be
confronted with loss of life and/or a disruption of family life.' (legal ground 45)

'*In order to give an order it suffices (in brief) that there is a real risk of the danger for which measures*
have to be taken. It has been established that this is the case.' (legal ground 64)

320. The appeal in cassation by the State does not contest these findings of fact. Insofar as the appeal in cassation challenges it, it argues that the Court of Appeal misinterpreted and misapplied Articles 1, 2 and 8 of the ECHR. While cassation complaint 2 does contain a single allegation that the ruling is defective in its reasoning, this is also limited by the State's opinion on Article 1 of the ECHR. The final decisions of the Court of Appeal have independent significance. They underline that Urgenda has an interest in its collective action and in the reduction order it requests. This applies all the more to the extent that Urgenda bases its claim on Section 6:162 DCC, since the grievances about these factual final Court of Appeal decisions, as argued by the State, have solely been placed in the context of the ECHR. It should be borne in mind that Urgenda's interest in its claim does not depend on the basis thereof. The decisions of the Court of Appeal are relevant for both bases of the claim.

321. Urgenda's interest has been explained again in Chapter 1 above. Here, Urgenda discusses the significance of this presupposition for the case.

322. As the legislative history quoted in paragraph 298 above shows, a close connection exists between the admissibility issue and the question of whether an interest group has a sufficient interest. After all, '*it is precisely through bundling that it can be tested whether this interest is sufficient within the meaning of Section 3:303 DCC*'.[152] Thus, the interest requirement not only retains its significance in collective actions, but is also fleshed out in accordance with the requested collective legal protection. As Bleeker[153] analysed, the question of a sufficient interest in

[152] *Parliamentary documents II* 1992-93, 22 486, no. 5, pp. 8-9. See also the Memorandum following the final report, *Parliamentary Papers II* 1992/93, 22 486, no. 8, pp. 4-5.
[153] T.R. Bleeker, 'Voldoende belang in collectieve acties: drie maal artikel 3:303 BW', *NTBR 2018/20,* pp. 148-149.

Section 3:303 DCC ideally lends itself to a balancing of the interests presented by the interest group. He points out that Urgenda's (procedural) interest in the requested reduction order should not, as the State argued before the District Court and Court of Appeal, be viewed in a purely causal perspective. The importance of this case is broader:

> '*The Dutch government has repeatedly pointed out that the Netherlands accounts for only a small proportion of global emissions, and that the effectiveness of the advanced emission reduction is virtually nil. Does this as yet lead to the conclusion that Urgenda has insufficient procedural interest? No, because 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 conduct. Urgenda does not argue that the State is acting unlawfully because the Dutch emissions cause damage; the climate policy itself is unlawful. So even if the emission reduction order cannot reverse the climate risk, Urgenda has sufficient procedural interest because it can end the unlawful conduct.*'

323. This is the crux of the issue, which Urgenda will return to below. The findings of the Court of Appeal not only mean that Urgenda has an interest in bringing an action, but they also provide a crucial anchor point in the testing by the Court of Appeal against Articles 2 and 8 of the ECHR. To a large extent, they also make it possible for the Supreme Court to give a final ruling to the effect that the duty of care of Section 6:162 DCC invoked by Urgenda supports the reduction order issued by the Court of Appeal.

324. Below, Urgenda briefly discusses the point of cassation complaint 3, insofar as they concern the Urgenda's standing. Cassation complaint 3.1 does not deal with this, but with the substantive law scope of Articles 2 and 8 under the ECHR. This will be discussed in Chapter 4 below.

3.5 Defence against complaints of inadmissibility (cassation complaints 3.2-3.4)

3.5.1 Admissibility for the current generation of Dutch people has been settled

325. It has already been mentioned above that the State has not, on appeal, challenged the admissibility of Urgenda's claim based on Articles 2 and 8

of the ECHR insofar as it represents the current generation of Dutch citizens. The ruling of the Court of Appeal in legal ground 37, first sentence, that this is not in dispute, is correct, because the State has not, to the knowledge of Urgenda and the Court of Appeal, raised the inadmissibility of Urgenda. The State therefore relies on its argument that the admissibility issue of Section 3:305a DCC is a matter of public order. This argument fails.

326. The admissibility issues in Section 3:305a DCC cannot be equated with the issues of inadmissibility that have been accepted in case law as a matter of public order.[154] It may be expected of the State to present a proper defence and to not diametrically change its position for the first time in cassation, insofar as Urgenda represents the current generation of Dutch residents. It has been established that, as the Court of Appeal has considered and the State does not contest in cassation, Urgenda has a sufficient interest in bringing its action. The judicial system is therefore not, to put it mildly, being burdened with this case without reason.[155] The question then is: other than the grounds for appeal of the State, what public interest should be protected ex officio with the application of Section 3:305a DCC as a legal basis?

327. No such reasons exist –nor does the State give them– nor are there any known cases in which the provisions of Section 3:305a DCC, outside the grounds for appeal, have been applied by the Court of Appeal. Urgenda responds with some comments. First of all, it is obvious that in any case, the admissibility requirements set out in cassation complaints 3.2-3.4 are to be assessed within the context of the parties' arguments.[156] If the State does not wish to conduct proceedings with the 'general environmental interest' referred to in cassation complaint 3.2 at stake, it is up to the State to invoke this. The same applies to the requirement of similar interests (suitability for bundling). It should be borne in mind that defendants in collective actions increasingly refrain from the defence that the interests are not sufficiently similar, because they may need the finality that a decision in a collective action can bring. The contribution to effective and efficient legal protection invoked in cassation complaint 3.4, too, is that public order is not at issue, especially if it is established that the claimant

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154 Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2018/181.

155 Cf. Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2018/181 and Snijders/Wendels, *Civiel appel* (BBP no. 2) 2009/80.

156 H.E. Ras & A. Hammerstein, *De grenzen van de rechtsstrijd in hoger beroep in burgerlijke zaken* (Serie Burgerlijk Proces & Praktijk IV), Deventer: Kluwer 2017/57.

has a sufficient interest. The requirements of Section 3:305a DCC, which are relevant in cassation, cannot be equated with cases in which access to the Dutch (regular) courts is denied or in which the absolute division of powers is at issue.[157]

328. The fact that there may be an ex officio duty for the courts to enforce some of the rules in the current and proposed new legal regime of the right of collective action[158] does not mean that all the rules are a matter of public policy. In any case, this will have to concern the formal statutory conditions (existence of a legal entity as referred to in Section 3:305a DCC) and those conditions that immediately serve the interests of third parties, the followers of the interest group, and that are intended to guarantee that their interests are properly represented. In any case, the requirements invoked by the State in cassation complaints 3.2-3.4 are not a matter of public order. As stated above, the fact that part of the statutory following may reject the action is not an obstacle to admissibility. If there is a situation in which they can evade the effect of the decision, Section 3:305a(5) DCC offers a remedy. If the situation is different, as in this case, then it can be assumed that the defendant has put forward a defence to that effect, all the more so since the legislator has accepted that the provision of (5) is not available if the nature of the claim opposes this.

3.5.2 Further defence against cassation complaints 3.2-3.4

329. The cassation complaints fail due to **lack of interest**. The cassation complaints only concern Articles 2 and 8 of the ECHR, but the duty of care accepted by the Court of Appeal, as explained below in Chapter 5, has an independent basis in Section 6:162 DCC. Urgenda has standing under this claim.

330. According to cassation complaint 3.2, Urgenda should not have been declared inadmissible in its claim, because it pursues an interest that does not fall within the scope of Article 2 and/or Article 8 of the ECHR.

331. The cassation complaint fails, because Dutch law provides that an interest group can represent large, undefined groups before the civil court,

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[157] Cf. the overview at Ras/Hammerstein, *De grenzen van de rechtsstrijd in hoger beroep in burgerlijke zaken* (Serie Burgerlijk Proces & Praktijk IV), Deventer: Kluwer 2017/57-58.

[158] See *Parliamentary Papers II 1991-1992*, 22 486, np. 3, p. 29 and *Parliamentary Papers II* 2016-2017, 34 608, no. 3, pp. 29 and 39.

whereby it is not certain whose interests will be affected in the future, and in what way. It is precisely this variety of interests that forces the acceptance of a collective action, because this is the only way to offer legal protection. All this is particularly true when it comes to the consequences of greenhouse gas emissions.[159]

332. The cassation complaint lacks factual basis, because the Court of Appeal has not (exclusively) considered that Urgenda represents a solely general environmental interest. As the Court of Appeal has considered in paragraph 319 above, Urgenda has standing because it represents a very concrete interest of persons belonging to the current generation of residents in the Netherlands. The Court of Appeal has established that there is a '*serious risk that the current generation of residents will be confronted with a loss of life and/or disruption of family life.'* This is not a general environmental interest. This does not alter the fact that, as in the SGP case, Dutch society as a whole has an interest in the State's compliance with its treaty obligations and duty of care. Insofar as the cassation complaint builds on cassation complaints 1 and 2, Urgenda refers to Chapter 4 below.

333. The cassation complaint also fails to recognise that the issue of admissibility is separate from the substantive assessment of the case.[160]

334. Cassation complaint 3.3 argues that the suitability of the (similar) interests for bundling in cases such as the present one where a collective action based on Article 2 and/or Article 8 of the ECHR is brought, required for the application of Article 3:305a DCC, means that it is necessary to state which interests protected by Article 2 and/or Article 8 of the ECHR are affected, in which way and in respect to which (group of) persons.[161] Urgenda understands that the complaint is based on the requirement of similarity of interests. From the perspective of the contribution to an effective and/or efficient legal protection, the State's

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159 See also Chapter 1 above.

160 See *Parliamentary Papers II* 1991/1992, 22 486, no. 3, p. 22.

161 See also GS Vermogensrecht, Section 3:305a DCC, note 8; Asser/Rensen 2-iii 2017, no. 197. See for an example of a group action Supreme Court 11 December 1987, ECLI:NL:HR:1987:AC2270, *NJ* 1990/73; Supreme Court 10 November 1989, ECLI:NL:HR:1989:AC1692, *NJ* 1990/113; Supreme Court 05 June 2009, ECLI:NL:HR:2009:BH2815, *NJ* 2012/182, Supreme Court 5 June 2009, ECLI:NL:HR:2009:BH2811, *NJ* 2012/183, Supreme Court 5 June 2009, ECLI:NL:HR:2009:BH2822, *NJ* 2012/184. See for an example of a general interest actions Supreme Court 27 June 1986, ECLI:NL:HR:1986:AD3741, *NJ* 1987/743; Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756, *NJ* 2011/473.

reliance on the absence of similar interests is further substantiated in cassation complaint 3.4. Insofar as the cassation complaints build on cassation complaints 1 and 2, they add nothing and suffer from the same defects as cassation complaint 3.2.

335. The State's argument that the interests (at the level of the rights protected by Article 2 and/or 8 ECHR) are insufficiently similar and that there is therefore no contribution to an effective and/or efficient legal protection, is incorrect.[162] The Court of Appeal has indeed considered, as the cassation complaint assumes, that all residents have an interest in the reduction measures to be taken by the State. Moreover, this case, by definition, involves sufficiently similar interests because everyone in the Netherlands is or will be confronted with the consequences of the State's failure to take sufficient mitigation measures in time. The fact that the consequences for the current generation of Dutch residents can and will work out differently does not detract from the fact that they, also for the application of Articles 2 and 8 of the ECHR, have a sufficiently similar interest in the reduction order requested.

336. As stated, a collective action offers the only form of effective legal protection, because individual interests –even if an individual appeal can be made to Articles 2 and 8 of the ECHR– will not carry sufficient weight to justify a general measure such as a reduction order. As explained in detail below, cassation complaint 3.4 also rests on the State's central misconception that Articles 2 and 8 of the ECHR, under current law, only allow reliance on them if there are consequences for climate change that are sufficiently identifiable for a delineated area intended for human habitation with respect to persons over whom the Dutch State has jurisdiction (within the meaning of Article 1 of the ECHR). Also in view of the precautionary principle[163], the ECHR rights do not only offer protection against direct, concrete damage, but there need not be a person or group of persons identifiable in advance or a regional fixation, as the State would like.[164] Moreover, the (concrete) harmful effects of climate

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[162] Moreover, it changes a factual and not incomprehensible opinion of the court of appeal, cf. opinion of A-G Langemeijer before Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388 (*Staat en SGP v. Clara Wichmann et al.*).

[163] See E.C. Geijselaar & E.R. de Jong, 'Overheidsfalen en het ECHR bij ernstige bedreigingen voor de fysieke veiligheid', *NTBR* 2016, 6, paragraph 4.3.

[164] See T.R. Bleeker, 'Nederlands klimaatbeleid in strijd met het EVRM' *NTBR* 2018, 39, paragraph 4.3. See also R.J.N. Schlössels and D.G.J. Sanderink, notes to: ABRvS 18 November 2015, ECLI:NL:RVS:2015:3578, *JB* 2015/218; D.G.J. Sanderink, het ECHR en het materiële omgevingsrecht (thesis Nijmegen), Deventer: Wolters Kluwer 2015.

policy should not be the focus point for the assessment of climate-related legal standards and obligations.

3.6 Urgenda's right to bring an action for future generations of non-residents

337. The Court of Appeal has left open whether Urgenda, in this collective action, can also represent the interests of the present generation outside the Netherlands and the interests of future generations. Now that the State is striving for finality in this appeal in cassation, it is obvious that the Supreme Court should rule on these questions if and insofar as the threat to the interests of the current generation of Dutch residents, that the Court of Appeal considers sufficient, would not justify the reduction order.

338. Urgenda will not discuss this at length. A long discourse on the intergenerational and extraterritorial aspects of the right of collective action could obscure the extreme urgency of mitigation measures for the current generation of Dutch residents.

339. Urgenda holds that the interests of future generations can and should play a role in this collective action. There is no doubt that Urgenda meets the requirements of Section 3:305a DCC, also regarding the interests of future generations. As the District Court has rightly held, the interest of a sustainable society pursued by Urgenda also serves the interests of future generations. There is every reason for the court to take their interests into account. After all, they cannot do this themselves, because the future generation of residents does not yet exist. Furthermore, by the time that they exist, they will be deprived of effective legal protection with regard to current emissions, because global warming and its consequences will be a *fait accompli*.

340. Future generations are not represented democratically. The political orientation, which is focused on the current electorate and limited by terms of government, takes limited account of the interests of future generations in the Netherlands in the event of scarcity. On the one hand, it is assumed that future generations of Dutch residents will exist and, on the other hand, it is certain that they will be severely affected by the effects of climate change, which are a direct consequence of

anthropogenic greenhouse gas emissions.[165]

341. The requirement for an interest group to represent the interests of (other) people is compatible with this, at least because Urgenda can and does represent the current generation of Dutch residents who are concerned about the interests of future generations.[166]

342. The question of whether the interests of (the current generation of) non-residents can be defended in a Dutch collective action is as such irrelevant. This is possible, and this has already been (implicitly) decided on several occasions in collective actions with a (partly) international following.[167]

343. However, it would be unmanageable if everyone in the world, through a Section 3:305a DCC entity, were to ask the Dutch courts for legal protection against the Dutch State for the already visible consequences of climate change, such as the effects of melting glaciers and land ice on Greenland and (Western) Antarctica and the slowing down of gulf streams.

344. On the other hand, it is just as seriously problematic if no attention was given to the immediate and extremely serious effects of climate change outside the Netherlands, which are partly attributable to Dutch greenhouse gas emissions. The question then is: what is the appropriate middle ground at which point proceedings against governments in climate cases remain manageable?

345. It would seem logical to demand a sufficient degree of proximity to the Netherlands by a substantial part of the interests represented in a Section 3:305a DCC action, which can and must play a role in the considerations of the court. This primarily concerns the interests of the current generation of Dutch residents, just as the Court of Appeal has discussed. Just as this current generation of Dutch residents has an interest that is partly determined –and coloured– by the interests of future generations, which it cares about, this also applies to extraterritorial interests. In doing

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[165] It is also important to note that, as the court of appeal considered undisputed in ground 3.3, *'the climate system reacts slowly to emitted greenhouse gases*', as a result of which '*the greenhouse gases emitted today will not reach their full warming effect until 30 to 40 years from now*'.

[166] See more about this paragraph 446 below.

[167] See e.g.: Supreme Court 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 (*World Online*, with many foreign investors).

so, it is right, as the Court of Appeal has done by pointing to the expected victims in Western Europe, to attach special significance to the scientifically established consequences for the area in which the Netherlands lies. Moreover, it is reasonable that when assessing what may be legally expected of the State in the eyes of its citizens, significance should also be given to the global effects of (partly) Dutch greenhouse gas emissions, which can be both direct and indirect. The very serious geopolitical instability, food and water scarcity and migration movements predicted by science when the temperature rises above 1.5/2 °C are examples of a direct threat to the values protected by Articles 2 and 8 of the ECHR and Section 6:162 DCC.

346. This approach ensures that the court balances interests in a way that is consistent with the nature of the climate problem and takes into account the interests affected by it. This approach avoids that the Dutch judicial system will in the future be burdened by climate proceedings that are insufficiently linked to the Dutch legal system. This means that complex questions of a private international law nature,[168] the protective scope of the rule in question and questions of relativity, and the required interest in the measure requested, do not need to be answered in the context of this appeal in cassation.

347. Chapter 4 below elaborates on the above, mainly from the perspective of Articles 2 and 8 of the ECHR, whereby the argumentation is also or even *a fortiori* relevant to Urgenda's claims based on Section 6:162 DCC.

[168] Among other things, the question of whether emissions from Dutch territory should be 'fragmented' in accordance with the ECJ 7 March 1995, C-68/93 (Shevill) to the lex loci delicti applicable on the basis of Article 7 Rome II and the question of whether there will still be a sufficient number of similar interests involved.

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

4.1 Introduction

348. Below, Urgenda will discuss the matter that (in particular) relates to cassation complaints 1, 2 and 3 of the State's appeal in cassation.

349. The State acknowledges that the representation of the legal framework of Articles 2 and 8 of the ECHR by the Court of Appeal is largely correct, but argues that the Court of Appeal erred in law in a number of respects.[169] In essence, the State's complaints relate to the requirement of a real and immediate risk[170] of infringement of the rights guaranteed by Articles 2 and 8 of the ECHR. According to the State, the infringement must relate to specific consequences for specific and concretely identifiable (groups of) persons within its jurisdiction, at least within a demarcated area intended for human habitation within the Netherlands.[171] Building on this, the State puts forward arguments about the knowledge requirement[172] and the precautionary principle.[173] The arguments about the fair balance and the margin of appreciation and/or the proportionality test are discussed below in chapter 6.

350. Urgenda focuses on the legal complaints about Articles 2 and 8 of the ECHR, in connection with Article 1 under the ECHR. It is not obvious that the Supreme Court will dismiss this case on the basis of the State's allegations that the judgment is defective in its reasoning, whereby the State alleges a lack of specification, personalisation and a geographical/temporal specification of the consequences of climate change for the current generation of Dutch citizens in the Court of Appeal judgment. Nevertheless, Urgenda will, where it deems it appropriate, also deal with these claims alleging that the judgment is defective in its reasoning. Urgenda chooses to 'tackle' the relevant questions raised by the appeal in cassation and to put forward its defence on the basis of a thematic discussion. It doing so it will not indicate for and every aspect of the lengthy cassation grounds why they lack a factual basis or interest, why the Court of Appeal did not err in law, and why the allegations of the

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169 Cassation complaint 1.
170 Cassation complaints 1.1, 2, 2.1, 2.3 - 2.5, 8.1 and 8.2.2, see par. 4.5 below.
171 Cassation complaints 1.1, 2.1, 2.2, 2.3, 2.6, 3.3, 3.4, 8.2.2, 8.3.8 and 8.4, see par. 4.6 below.
172 Cassation complaint 2.3, see par. 4.7 below.
173 Cassation complaints 2.5, 8.2.1 and 8.6, see par. 4.8 below.

judgment's defective reasoning should be denied on the basis of the comprehensibility of the factual findings by the Court of Appeal. Urgenda things such a lengthy and technical analysis of the cassation ground holds insufficient added value and is would also not benefit the national and international public with an interested in this case.

351. Instead Urgenda will explain below why the approach of the Court of Appeal based on Articles 2 and 8 of the ECHR is correct. It does so **primarily** from the perspective of an evolving interpretation of the ECHR as a living instrument in relation to (the effects of) climate change, which is needed in the light of a variety of developments. **Secondly**, Urgenda will explain that, even if the existing case law and literature on substantially different (environmental) risks are used as a basis, the ruling of the Court of Appeal has a solid foundation. In this respect, Urgenda will also discuss the frameworks of the margin of appreciation particularly emphasised in cassation complaints 1.3, 6.3, 7.5 and 8. In these interwoven and accompanying perspectives, the premise is that, as the Court of Appeal has understandably ruled, there is a real threat that the current generation of Dutch citizens will be affected in their interests protected by Articles 2 and 8 ECHR. This is the case, as already explained in Chapter 1. Next - **in third and fourth place** - Urgenda discusses two issues left unanswered by the Court of Appeal: the extraterritorial[174] and the intergenerational context[175] in the application of Articles 2 and 8 of the ECHR. Urgenda limits itself to the ECHR. For its invocation of other treaty provisions and Article 21 of the Constitution, it refers to its assertions put forward before the District Court and the Court of Appeal.[176]

4.2 Brief outline of the rapidly evolving role of human rights protection against climate change (and its consequences)

352. The role of human rights in the context of (combating) climate change has a long history. The notion that the right to sustainable development is an 'inalienable human right' is already present in the legislative history of

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174 For more information, see par. 4.9 below.
175 For more information, see par. below.
176 For Article 21 Constitution, see: Summons, par. 5.2.1; Reply, par. 312; Notice on appeal, par. 8.82. and 8.186. For the UNFCCC, see Summons Chapter 4.3; Reply, Chapter 6.6; Notice on appeal par. 8.143-8.152. For general principles of international law, see: Summons Chapter 4.2; Reply, Chapter 6.5; Notice on appeal, par. 8.153-8.159. See par. 218 of the Originating Summons for Urgenda's broader invocation of human rights conventions, including the ICCPR referred to in par. 548 Reply.

the UNFCCC, dating from 1992.[177] And although this notion was not included as such in the UNFCCC at the insistence of the US, the link between human rights and (the prevention of) climate change (and its consequences) has since become more and more emphatic and prominent in thinking about (internationally coordinated) approaches to climate change.[178] This development was inter alia established in a UN report by Special Rapporteur John H. Knox '*on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*', which describes in detail the ever-increasing emphasis on human rights in the context of climate change.[179] Since 2008-2009, this has increasingly been expressed in the '*Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* (A/HRC/10/61)'[180], in various COPs[181] and in successive statements by the UN Human Rights Council[182] and the UN High Commissioner for Human Rights.[183]

353. As far as international instruments to prevent climate change are concerned, this development is highlighted by the Paris Agreement concluded in 2015. The preamble to that Convention explicitly states that '*Parties should, when taking action to address climate change, promote and consider their respective obligations on human rights (...)*'. The fact that climate change cannot be considered separately from human rights, which consequently are and may be affected in many ways, has thus

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177 UN Climate Convention, *Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Fourth Session, Held at Geneva From 9 to 20 December 1991* (29 January 1992), UN Doc.A/AC.237/15. See also the *2030 Agenda for Sustainable Development* ('*Sustainable Development Goals*'), under 10 (https://sustainabledevelopment.un.org/post2015/transformingourworld) and the *UN Declaration on the Right to Development* (https://www.un.org/documents/ga/res/41/a41r128.htm).

178 For a brief overview, see: S. Duyck, S. Jodoin and A. Johl (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, 2019, p. 4-6. A Google search on 'climate change' and 'human rights' provides access to a large number of sources, often on the websites of UN organisations and (other) NGOs.

179 *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox, A/HRC/31/52, 1 February 2016, chapter 2.

180 Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc.

181 See, for example, Decisions 1/CP.16 and 1/CMP.6.

182 See, for example, Resolutions 7/23, 10/4, 18/22, 26/27, 29/15, 32/33, 35/20. Resolution 32/33, 18 July 2016, point 2 reads: 'Emphasizes *the urgent importance of continuing to address, as they relate to States' human rights obligations, the adverse consequences of climate change for all*'.

183 See, for example, the statement by Mary Robinson, former UN High Commissioner for Human Rights, that '*climate change is the greatest human rights challenge of the twenty-first century*' (UNHRC '*Summary Report of the Office of the United Nations Commissioner for Human Rights on the Outcome of the Full-Day Discussion on Specific Themes Relating to Human Rights and Climate Change*', 1 May 2015, 29th session A/HRC/29/19, par. 77).

become a matter of common concern, including at the level of international law. In other words, it is '*now "beyond debate" that the adverse effects of climate change will, in their severity, threaten a range of human rights, including the rights to life, health, food, and housing*'.[184]

354. This normative development of a rights-based approach[185] to the protection of human rights has rapidly gained strength and support following the Paris Agreement, driven by a new scientific consensus on the even more serious risks of climate change. One example is an open letter dated 21 November 2018 entitled *'On integrating human rights in climate action'* by the current UN High Commissioner for Human Rights, Michelle Bachelet, in which the importance of 'effective remedies' and mitigation as a human rights obligation is emphasised:

> '*States have a human rights obligation to ensure that those affected by climate change, particularly those in vulnerable situations, have access to effective remedies and the necessary means of adaptation to enjoy lives of human dignity. They also have an obligation to strengthen their mitigation commitments in order to prevent the worst impacts of climate change. To achieve these objectives, States must work individually and collectively to regulate greenhouse gas emissions, to mobilize adequate resources for climate change mitigation and adaptation, and to ensure the meaningful participation of all persons on climate action*.'[186]

355. In this context, the Netherlands has also committed itself to the fundamental significance of human rights in protecting citizens from climate change and its consequences. The Netherlands was a member of the UN Human Rights Committee, which regularly expressed its views

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[184] D. Bodansky, J. Brunnée and L. Rajamani, *International Climate Change Law*, Oxford: Oxford University Press, 2017, p. 296. See also Center for International Environmental Law and The Global Initiative for Economic, Social and Cultural Rights, *States' Human Rights Obligations in the Context of Climate Change: Synthesis Note on the Concluding Observations and Recommendation on Climate Change Adopted by UN Human Rights Treaty Bodies*, 2017, p. 1-2 (see: https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5b33ca878a922d6804edf544/1530120860720/HRTBs-synthesis-report.pdf).

[185] See for example Office of the United Nations Commissioner for Human Rights, *Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures* (see https://hrbaportal.org/wp-content/files/InfoNoteHRBA1.pdf). See also Office of the United Nations Commissioner for Human Rights, *Key Messages on Human Rights and Climate Change* (2015), no. 4 (see: https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf); Office of the United Nations Commissioner for Human Rights, *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/HRC/32/23, 6 May 2016, p. 14-16. This rights-based approach also implies that in this context there are *holders of rights* (as well as holders of obligations) who are confronted with an imminent violation of these rights (and who can therefore become their 'victim').

[186] M. Bachelet, Open Letter from the United Nations High Commissioner for Human Rights on integrating human rights in climate action, 21 November 2018, p. 2.

on this issue in convincing terms. In 2016, the Netherlands signed the (non-binding) *Geneva Pledge for Human Rights in Climate Action*.[187].[188] It states:

> '*We, the undersigned, note that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights, and recognize that while these implications affect individuals and communities around the world, the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability*.'

The Netherlands therefore advocated for human rights protection against the impact of climate change. In the coming years, the State will probably want to hold other countries to account for human rights and (among other things) to encourage greater emissions reduction. Urgenda would welcome that. However, the NIMBY[189] arguments that the State put forward in cassation complaints 1-3 will have stripped the State of all moral authority to do so. A state that denies human rights protection against climate change and its consequences across the board in its own country cannot in good will hold other countries to account based on the same human rights.

356. After all, the State argued in cassation that ECHR does not provide collective protection against its own failure to reduce the Dutch contribution to CO2 emissions. As the Court of Appeal[190] has established, it is highly likely that the current generation of Dutch citizens will face serious consequences of climate change during their lifetime. According to the State, this statement has been formulated 'too generally' to allow human rights protection against this risk. This assertion is based on the premise that, even in the case of collective action (permitted by national law) aimed at preventing the adverse effects of climate change on residents (as referred to by the Court of Appeal), Articles 2 and 8 of the ECHR always require the possibility to determine with a sufficient degree of precision which (groups of) residents are at risk of being confronted

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187 For more information, see above and this link: https://www.mrfcj.org/resources/geneva-pledge-human-rights/.

188 For a list of the signatories as of 1 November 2016, including the Netherlands, see http://climaterights.org/our-work/unfccc/geneva-pledge/

189 Not In My Back Yard.

190 Judgment Court of Appeal, legal ground 37.

with which of the above-mentioned adverse effects, when and in what manner.

357. However, as will be explained below, this premise must be rejected under current law. The State assumes such a strict interpretation of (the conditions of application of) Articles 2 and 8 of the ECHR that with regard to the rights included therein a legal protection vacuum would clearly arise. This interpretation is incompatible with (an evolving interpretation of) the text, purpose and purport of these convention provisions in the light of (i) international normative developments in the field of human rights and climate change and (ii) the international scientific consensus on the absolute necessity of taking maximum mitigation measures now in view of a unique, and intrinsically collective, threat to people's interests posed by climate change.

4.3 Evolving interpretation of ECHR for effective legal protection against the serious consequences of climate change

358. One of the most important principles when interpreting (the human rights provisions of) the ECHR is that this convention, as the ECtHR puts it, '*cannot be interpreted in a vacuum*':

> '*The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (...). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.*'[191]

359. In order to arrive at a correct interpretation of (specific provisions of) the ECHR, the ECtHR should therefore, under certain circumstances, intervene (which, moreover, the ECtHR actually does in such situations)[192] in a meticulous analysis of various other sources of international law. This means that the question to what extent the ECHR provisions provide protection against acts or omissions contributing to the achievement of climate change can only be answered by taking into account, inter alia, the many other instruments of international law which have been created in that context. As will be explained in more detail below, in addition to the UNFCCC, of course, and the many instruments set up at the various subsequent COPs, this should in any case include

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191 ECtHR 21 November 2001, *Al-Adsani v. United Kingdom*, no. 35763/97, par. 55.
192 See for example ECtHR 12 November 2008, *Demir and Baykara v. Turkey*, no. 34503/97, par. 147-151.

explicit reference to the Aarhus Convention and the Paris Agreement. In Boyle's words:

> '*Any consideration of human rights in an environmental context has to take into account the development of specifically environmental rights in other treaties, and it may be necessary to interpret and apply human rights treaties with that in mind.*'[193]

360. In addition, as an even more fundamental principle in the interpretation of the ECHR, a convention is a 'living instrument', which must be constantly interpreted in the light of changing attitudes and circumstances. The rationale behind this principle is deeply focused on the actual effectiveness of the ECHR's protection provisions: if the ECHR were not interpreted in the light of present-day conditions (in the broadest sense of the term), the convention would lose its practical usefulness in the face of a wide range of new situations and new developments. Such a result is incompatible with the aim of the ECHR, which is after all pre-eminently aimed at effective protection of human rights. As the ECtHR formulates it:

> '*(...) it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions.*'[194]

361. The fact that, according to the settled case-law of the Court in Strasbourg, the ECHR has always sought to be a practical and effective human rights instrument is of crucial importance to the present case. After all, climate change is by its very nature not only an exceptionally extensive and far-reaching threat, but its adverse effects are also occurring at an ever-increasing extent and intensity. It is for this reason that the ECHR (and its interpretation) must 'move' along at an accelerated pace with the now much more serious threat of climate change, in order to be able to effectively safeguard the rights it contains, now and in the future, as a living instrument. This is also in line with the Council of Europe's comments in its '*Manual on Human Rights and the Environment*' on the relationship between the ECHR and instruments of international law:

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[193] A. Boyle, 'Human Rights and the Environment: Where Next?' *The European Journal of International Law* 2012, Vol. 23/3, p. 621.
[194] ECtHR 4 February 2005, *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, par. 121.

> '*(...) the Court has emphasised that the effective enjoyment of the rights which are encompassed in the Convention depends notably on a sound, quiet and healthy environment conducive to well-being. The subject matter of the cases examined by the Court shows that a range of environmental factors may have an impact on individual convention rights, such as noise levels from airports, industrial pollution, or town planning.*
>
> *As environmental concerns have become more important nationally and internationally since 1950, the case-law of the Court has increasingly reflected the idea that human rights law and environmental law are mutually reinforcing. Notably, the Court is not bound by its previous decisions, and in carrying out its task of interpreting the Convention, the Court adopts an evolutive approach. Therefore, the interpretation of the rights and freedoms is not fixed but can take account of the social context and changes in society.*'[195]

362. The Inter-American Court of Human Rights has also very recently embraced such an 'evolving' interpretation of the American Convention on Human Rights, when it, '*through an evolutive and systemic interpretation of the [American Convention on Human Rights], (...) effectively made environmental law part of the body of the human rights law of the American region.*'[196]

363. Such an interpretation of the ECHR is all the more appropriate in view of the fact that the actual enjoyment of (many of) the rights protected by the ECHR can only exist and can only continue to exist in the absence of the consequences that climate change now threatens to bring with it. As Judge Weeramantry in the *Gabčíkovo-Nagymaros* case before the International Court of Justice in 1997 said:

> '*The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a* sine qua non *for numerous human rights such as the right to health and the right to life itself.*'[197]

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[195] *Manual on Human Rights and the Environment,* Council of Europe Publishing, 2012, p. 30-31 (underlining added, counsel).

[196] M. Feria-Tinta and S. C. Milnes, 'The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights', *Yearbook of International Environmental Law* 2018, Vol. 0, No. 0, p. 17.

[197] ICJ 25 September 1997, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Vice-President Weeramantry, 88, 91.

364. Therefore, if the rights contained in the ECHR did not also extend to the right to take measures to prevent *de facto* infringements of those rights which are likely to cause climate change, (many of) the rights protected by the ECHR would, in a very real sense, only be conditional. In turn, these rights can only be 'practically and effectively' protected by the ECHR to the extent that they have not been affected or destroyed by climate change impacts. Therefore, the paradoxical conclusion that a human rights instrument aimed at practical and effective protection would not extend to acts or omissions that contribute to the most serious and comprehensive threat cannot be accepted.

365. The State seems to endorse the above –in a general sense and in itself– as well. The State does not claim– at least not in so many words– that the adverse effects of climate change would in principle escape the scope of the ECHR. Nevertheless, if one considers the assertions and arguments of the State correctly, this is exactly the result of what the State argues in cassation. The State argues that, in short, it is always necessary to determine in a concrete and individual manner the specific consequences in which specific residents will be affected. According to the State, Articles 2 and 8 of the ECHR are therefore not intended to protect the interests of residents who, collectively will be affected by the adverse effects of climate change, despite that fact that this threat can be established with a sufficient degree of probability In the view of the State, that would be contrary to the above-mentioned requirements for specification in force under the ECHR. According to the State's reasoning, this also means that to the extent that a Section 3:305 DCC entity (which is competent to bring legal proceedings under national law), such as Urgenda, seeks legal protection for such interests on the basis of Articles 2 and 8 of the ECHR, it is unable to succeed for this reason in its attempt.

366. This argument of the State is not supported by the law and cannot be accepted. As mentioned before, the State's argument is based on such a strict interpretation of (the conditions of application of) Articles 2 and 8 of the ECHR that a legal protection vacuum would actually arise with respect to the rights included therein. After all, this interpretation implies that, in view of the fact that there is a very high probability that residents will be affected by the adverse effects of climate change (as the Hague Court also found in fact and which is undisputed in cassation)[198], but that

[198] Judgment Court of Appeal, legal ground 37.

these adverse effects simply do not allow themselves to be specified at an individual level, neither individuals nor an interest group (which is competent to bring legal proceedings under national law), such as Urgenda, can rely on Articles 2 and 8 of the ECHR. The unacceptable result would therefore be that uncertainty about where and how the above-mentioned adverse effects, which are expected to occur with a very high probability, will materialise precisely –an uncertainty that follows simply from the fact that '*adverse effects of global warming are often projections about future impacts*'–[199], leads to a fundamental denial of legal protection under the ECHR.[200] Moreover, this constitutes (from an ECHR perspective) a fundamentally unacceptable erosion of the effective legal protection in the Netherlands under the right to collective action in Section 3:305a DCC. For this reason alone, such an interpretation of Articles 2 and 8 of the ECHR cannot be followed. In this connection, Urgenda also points out the following.

367. First, it is already clear from the text of the ECHR, and in particular from Article 13, that the substantive protection provisions of the ECHR must always be safeguarded by the existence of an 'effective remedy.' Such remedy makes it possible for those protection provisions to be effectively enforced in the courts. It follows from a 'good faith' interpretation of the ordinary meaning of the relevant text of the ECHR (within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties, hereinafter: Vienna Convention) that an interpretation of Articles 2 and 8 of ECHR that does not effectively safeguard these provisions, as defended by the State and as described above, is not legally acceptable.[201]

368. Second, such an interpretation of Articles 2 and 8 of the ECHR is also contrary to the subject matter and aim of the ECHR. As explained above, the aim of the ECHR is to provide 'practical and effective' protection of the rights contained therein.[202] This also follows from the preamble to the

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199 Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, 15 January 2009, par. 70 (underlining added, counsel).

200 In this context, it is about mitigation, since only mitigation (and not adaptation) can provide fundamental protection against the threat of climate change. See Notice on appeal by Urgenda, par. 7.106: '*As long as emissions have not been phased out by mitigation measures, warming will continue and reach levels where no further adaptation will help*.' Cf. in this context also Notice on appeal by Urgenda, par. 6.48: '*The "Common but Differentiated Responsibilities and Respective Capabilities" responsibilities mentioned in the UNFCCC relate first and foremost to mitigation because, as the District Court has rightly ruled, mitigation is the only way to put an end to the otherwise increasing rate of global warming and the ensuing dangers and risks for ecosystems and human societies.*'

201 See also par. 4.6. Cf. ECtHR 27 April 2004, *Gorraiz Lizarraga et al. v. Spain*, no. 62543/00, par. 38.

202 ECtHR 4 February 2005, *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, par. 121.

ECHR, which explicitly refers to the fact that the Universal Declaration of Human Rights strives for a '*universal and effective recognition and observance*' of the rights contained therein.[203] Accepting a legal protection vacuum, as described above, is not compatible with this.

369. Third, under Article 31(3)(c) of the Vienna Convention, the ECHR must also be interpreted in the light of other relevant rules of international law to which the ECHR contracting parties are also parties. This also resonates in the consideration of the ECtHR cited above, stating that *'the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.*'[204] As a result of this principle of integration under international law, in addition to the UN Convention on Climate Change and the many instruments set up at the various subsequent COPs, the Aarhus Convention and the Paris Agreement, among other things, must be included in the interpretation of Articles 2 and 8 of the ECHR and the conditions for their application.

370. In line with this, the following has been noted in the literature, with reference to '*the interpretative principle of systemic integration enshrined in Article 31.3(c) of the Vienna Convention on the Law of Treaties*':

> '*By forging an explicit link with human rights instruments, the Paris Agreement's preamble engenders an expectation that parties will take into account their human rights obligations when they adopt measures to tackle climate change.*'[205]

371. This integration of international law naturally also works in the other direction: the explicit reference to human rights in the Paris Agreement also colours the already existing obligations under the ECHR, whether or not on the basis of Article 31(3)(c) of the Vienna Convention. The international (political) consensus that a 25-40% reduction in Annex 1 countries by 2020 is necessary, following from (AR4 and) consecutive COPs and the Paris Agreement, further confirms that states need to increase their reduction efforts in order to still have a realistic prospect of achieving the 2030 targets.[206]

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[203] ECHR, preamble (underlining added, counsel).
[204] ECHR 21 November 2001, *Al-Adsani v. United Kingdom*, no. 35763/97, par. 55.
[205] Asia Pacific Forum of National Human Rights Institutions, *Amicus Brief - Human Rights and Climate Change*, May 2017, p. 11.
[206] Cf. for example the above-mentioned A. Boyle, 'Human Rights and the Environment: Where Next?', *The European Journal of International Law* 2012, Vol. 23/3, p. 621. See also: UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on*

372. There is an interaction between human rights and the obligation of states to reach effective international agreements to combat climate change.[207] The United Nations Human Rights Committee recently formulated this point in the context of Article 6 of the ICCPR (the right to life):

> '*Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under environmental law.*'[208]

As explained in more detail in par. 4.9 below, the (positive) obligation to achieve common reduction targets and commitments at international level obviously has no effect on the territorial responsibility of states.

373. After all, these are various treaty obligations under Article 31(3)(c) of the Vienna Convention, which must, as far as possible, be interpreted as 'parts of some coherent and meaningful whole'.[209] This is another reason why it is unacceptable that, while the Paris Agreement –as a preliminary culmination of the instruments of international law resulting from the UNFCCC– explicitly links the obligation to combat climate change to the 'respective obligations on human rights' of the contracting parties, the ECHR could nevertheless be interpreted in a way that would result in the legal protection vacuum described above with regard to the human rights contained therein.[210]

374. The Aarhus Convention, concluded in 1998, should also be included in the ECHR's interpretation, as mentioned above. Article 1 of this Convention ensures 'access to justice in environmental matters'.[211] The

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the right to life, 30 October 2018, CCPR/C/GC/36, p. 14-15: '*Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant.'* Compare also Sanderink, who in his doctoral thesis points out the relevance of the exceeding of national and international safety standards and other standards for the application of Article 8 ECHR, see D.G.J. Sanderink, *Het EVRM en het materiële omgevingsrecht (Staat en Recht nr. 22)*, Deventer: Wolters Kluwer 2015, par. 2.5.3 (in particular p. 51 - 52).

207 This obligation applies not only to the ECHR, but also, for example, to Articles 2(1) and 23 of the ICCPR.

208 UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, CCPR/C/GC/36, p. 14-15. See also https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/UNFCCC.aspx.

209 International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, par. 414.

210 In this context, see also N.J. Schrijver, '*De reflexwerking van het internationale recht in de klimaatzaak van Urgenda*', *Milieu en Recht* 2016/41, no. 5: '*It is generally assumed that such international finding of law nowadays includes decisions by international organisations and their treaty bodies, including the Conference of Parties (COP), unilateral legal acts of states and normative declarations by authoritative bodies* (soft law).'

211 See also par. 314 above.

central notion of the Aarhus Convention can also be found in the Rio Declaration on Environment and Development (drawn up as long ago as 1992), of which Principle 10 states that '*effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*'.[212]

375. Thus, the need for 'access to justice' in the context of climate change is in any case applicable law since the Aarhus Convention.[213] This legal fact should also play an important role in the interpretation of the ECHR, in particular in regard to the (effective) legal protection under the ECHR. This is also confirmed by the fact that, as Boyle puts it:

> '*the essential elements of the [Aarhus] Convention - access to information, public participation in environmental decision-making, and access to justice - have all been incorporated into European human rights law through the jurisprudence of the ECtHR. In substance, the Aarhus Convention rights are also ECHR rights, enforceable in national law and through the Strasbourg court like any other human rights.*'[214]

376. The case law of the ECtHR indeed shows that the ECtHR explicitly includes the importance of 'access to justice' in determining the scope and the conditions of application of the (procedural) rights under the ECHR.[215] Therefore, the standards under international law of the Aarhus Convention, aimed at ensuring 'access to justice' in a climate context, are in fact reflected in the application and interpretation of the ECHR by the ECtHR, in accordance with Article 31(3)(c) of the Vienna Convention and/or the principle of harmonious interpretation of the ECtHR itself. Moreover, as explained above, the ECtHR has shown that it is aware of the need for a collective form of legal protection.[216]

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[212] See also Office of the United Nations Commissioner for Human Rights, *Key Messages on Human Rights and Climate Change* (2015), no. 3 (see: https://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf; Office of the United Nations Commissioner for Human Rights, *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc. A/HRC/32/23, 6 May 2016, p. 12.

[213] Cf. R. Hallo and F.A. De Lange, 'De EU-richtlijn milieuaansprakelijkheid en de rol van milieuorganisaties', *TMA* 2004/4, p. 121.

[214] A. Boyle, 'Human Rights and the Environment: Where Next?', *The European Journal of International Law* 2012, Vol. 23/3 p. 623, with reference to, inter alia, ECHR 10 November 2004, *Taskin v. Turkey* , no. 46117/99; ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99.

[215] Cf. for example ECtHR 10 November 2004, *Taskin v. Turkey*, no. 46117/99, par. 206-207: '*the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process*'. See also ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01.

[216] ECtHR 27 April 2004, *Gorraiz Lizarraga et al. v. Spain*, no. 62543/00, par. 38.

377. The above leads to the **interim conclusion** that the ECHR cannot be interpreted in a way that results in the legal protection vacuum that the interpretation of (the conditions of application of) Articles 2 and 8 under the ECHR that the State advocates. The consequences of climate change, which by their nature are latent and to some extent unpredictable, should not prevent the availability of an effective remedy against acts or omissions that contribute to the serious consequences of climate change, especially in the case of a right to collective action such as that provided for in Section 3:305a DCC.

378. Urgenda will explain this in more detail. To this end, it will first consider the nature and scope of Articles 2 and 8 of the ECHR and the resulting positive obligations for the State. Urgenda will then discuss the various sub-themes of cassation complaints 1-3.

4.4 Articles 2 and 8 of the ECHR; positive obligations

379. The Court of Appeal based its decision on Articles 2 and 8 of the ECHR. Both of these provisions bear the operative part of the judgment independently.

380. Article 2 of the ECHR protects the right to life. This is one of the most valuable and fundamental human rights. Life and the right to life form the basis for the exercise of all other human rights.[217] The fundamental importance of Article 2 of the ECHR is also reflected in Article 15 of the ECHR. In this article, states are given the possibility to exclude certain ECHR rights (temporarily and under certain conditions) from application in times of war or other emergency situations. However, Article 15(2) ECHR mentions that (even) in these exceptional circumstances, 'no' derogation from Art. 2 ECHR is permitted.[218]

381. Article 8 of the ECHR protects four fundamental rights that are closely related to privacy, individual and relational freedom and human dignity, including private and domestic life.[219] Over the years, the ECtHR has granted a wide scope of application to Article 8 of the ECHR.[220] Article 8has also been frequently applied in environment-related situations. This

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[217] See inter alia S. Mirgaux, Note A to Article 2 ECHR, SDU Commentary ECHR, The Hague: 2013.
[218] Except in the case of death as a result of lawful acts of war (see Article 15(2) ECHR).
[219] C.J. Forder, Note A to Article 8 ECHR, SDU Commentary ECHR, The Hague: 2013.
[220] ECtHR's *Guide on Article 8 of the European Convention, of Human Rights*, version of 31 August 2018, par. 2.

requires an activity/circumstance that has a (sufficiently serious) adverse influence on the home or the family or the private life of citizens.[221] Unlike Article 2, the protection under Article 8 is not absolute, with Article 8(2) providing a possible justification for an infringement.

382. Articles 2 and 8 of the ECHR impose not only negative obligations, but also positive obligations on a state. On this basis, under certain circumstances, active state intervention is required to protect the interests that safeguard these human rights. As the Court of Appeal rightly ruled in the grounds of appeal 41, this also concerns obligations –duty of care– to carry out concrete actions to prevent any future infringement of these interests. In environment-related situations there may be a certain overlap between the protection under Article 2 and Article 8 of the ECHR. Both treaty provisions are regularly applied jointly by the ECHR, regardless of how much they differ in essential respects.[222]

383. Articles 2 and Article 8 of the ECHR do not as such contain an absolute right to a clean environment nor protect general environmental interests, contrary to other human rights conventions.[223] The ECHR is an anthropocentric convention aimed at the protection of individuals. From this perspective, the ECtHR has in recent years, also in view of the function of the ECHR as a living instrument,[224] considered several times cases in which the protection against (environmental) risks was an issue under Article 2 and/or Article 8 of the ECHR.

384. Since the *L.C.B. v. United Kingdom* case,[225] ECtHR has assumed the existence (and violation) of positive obligations under Article 2 of the ECHR in a variety of situations, including in environment-related matters, which the Court of Appeal refers to in the judgment of the lower court.[226] For example, the ECtHR has accepted positive obligations in the

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[221] See about this in detail C.J. Forder, Note C.5.1.1 - C.5.1.3 to Article 8 ECHR, SDU Commentary to ECHR, The Hague: 2013.

[222] See for example ECtHR 19 February 1998, *Guerra et al. v. Italy*, nos. 116/1996/735/932, ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99 and ECtHR 20 March 2008, *Budayeva et al. v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

[223] Cf. Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, Article 11; International Covenant on Economic, Social and Cultural Rights, Article 12.

[224] For more information, see par. 360 above.

[225] ECtHR 9 June 1998, *L.C.B. v. United Kingdom*, no. 23413/94, par. 36 (underlining added, counsel).

[226] S. Mirgaux, Note C.7.4.2 to Article 2 ECHR, SDU Commentary ECHR, The Hague: 2013, p. 60 with references to ECtHR case law. The situations vary widely: insufficient investigation of the disappearance and murder of a journalist, domestic violence known to the authorities with a fatal outcome, human trafficking, safety of children in and around the school, safety on board a ship, construction site or on the road.

event of serious threats to life from industrial activities, as in the *Öneryildiz v. Turkey* case[227] regarding the operation of a waste disposal facility in a slum. As the Court of Appeal ruled in legal ground 43, this obligation certainly applies in the case of industrial activities that are by their nature dangerous. Moreover, Article 2 of the ECHR applies even when nature is the primary threat to life. The *Budayeva et al. v. Russia* case[228] illustrates this, whereby the insufficient action of national authorities against annual mudslides resulted in a violation of the positive obligations resulting from Article 2 of the ECHR.

385. Also with regard to Article 8 of the ECHR, the Court in Strasbourg has frequently ruled in environment-related cases that there was a (violation of a) positive obligation to ensure adequate protection of the right to private and family life.[229] As the Court of Appeal ruled in legal ground 41, in the event of an imminent infringement of an interest protected under Article 8 of the ECHR, it is required that a 'minimum level of severity' will be exceeded upon its actual commencement.[230] The ECtHR has adopted violations in areas such as[231] environmental pollution and/or nuisance caused by emissions from a waste processing plant,[232] gold mining in a gold mine using sodium cyanide leaching,[233] air pollution by a steel plant[234] and environmental pollution by sodium cyanide and heavy metals caused by the operation of a gold mine.[235]

386. As the Court of Appeal ruled in the legal ground 42, positive obligations arising from Articles 2 and 8 of the ECHR to prevent future infringements according to the ECHR must in principle[236] be interpreted in a way that does not impose an 'impossible or disproportionate burden' on the government.

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227 ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99.
228 ECtHR 20 March 2008, *Budayeva et al v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.
229 See among other things ECtHR 26 March 1985, *X and Y v. The Netherlands,* no 8978/80; ECtHR 12 November 2013, *Söderman v. Sweden*, no. 5786/08).
230 *Manual on Human Rights and the Environment,* Council of Europe Publishing, 2012 (p. 45 - 46).
231 For a more detailed list, see e.g. C.J. Forder, Note C.5.1.3 to Article 8 ECHR, SDU Commentary ECHR, The Hague: 2013.
232 ECtHR 9 December 1994, *López Ostra v. Spain*, no. 16798/90.
233 ECtHR 10 November 2004, *Taskin v. Turkey*, no. 46117/99.
234 ECtHR 9 June 2005, *Fadeyeva v. Russia*, no. 55723/00.
235 ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01.
236 ECtHR 20 March 2008, *Budayeva et al. v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, par. 135 ('*In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given (...)*', underlining added, counsel). In the same sense, see ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, par. 107.

4.5 'Real and imminent risk'\

4.5.1 Background

387. It follows from the ECtHR case law that the protection under Article 2 of the ECHR is, under certain circumstances, also offered in the case of dangerous activities that may result in death; there is therefore no need (yet) for actual deaths.[237] In *Öneryildiz v. Turkey*[238], for example, the ECtHR ruled that the positive obligation of Article 2 of the ECHR: '*(...) must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake (...)*.'

388. Article 8 of the ECHR could also apply in situations where a particular activity could affect a protected interest in the future, without having actually occurred.[239] A case in point is *Taşkin et al. v. Turkey*.[240] The Turkish State defended itself at the ECtHR, inter alia, by asserting that: '*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*.'[241] Nevertheless, the ECtHR concluded that there was a violation of Article 8 of the ECHR. Among other things, the ECtHR ruled in this regard:

> '*113. The Court points out that Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (...). The same is true where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment in such a way as to establish a sufficiently close link with private life and family life for the purpose of*

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237 De Jong, '*Rechterlijke risicoregulering en het ECHR: over drempels om de civiele rechter als risicoreguleerder te laten optreden*', *NTM/NJCM-bull*, 2018/16, p. 4 with reference to ECtHR 24 July 2014, *Brincat et al. v. Malta*, nos. 60908/11, 62110/11, 62129/11, 62312/11 en 62338/11; ECtHR 28 October 1998, *Osman v. UK*, no 23452/94. See also ECtHR 28 February 2012, *Kolyadenko et al. v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05. See also Administrative Jurisdiction Division 18 November 2015, *AB* 2016/82, legal ground 39.2, in which the Administrative Jurisdiction Division ruled that a positive obligation deriving from Article 2 ECHR exists for all activities '*which may endanger the right to life*'.

238 ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, par. 71 (underlining added, counsel).

239 See inter alia ECtHR 14 February 2012, *Hardy and Maile v. United Kingdom*, no. 31965/07; ECtHR 10 November 2004, *Taskin v. Turkey*, no. 46117/99; ECtHR 27 January 2009, *Tătar v. Romania,* no. 67021/01 and ECtHR 7 April 2009, *Brânduşe v. Romania*, no. 6586/03, par. 65.

240 ECtHR 10 November 2004, *Taskin v. Turkey*, no. 46117/99 (for more detail, see Reply, par. 333).

241 ECtHR 10 November 2004, *Taskin v. Turkey*, no. 46117/99, par. 107 (underlining added, counsel).

> *Article 8 of the Convention. If this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 would be set at naught.*'
> [242]

389. In order to determine when a state is obliged to act on the basis of a positive obligation under Article 2 or 8 of the ECHR, the ECtHR refers in some statements to the required presence of a 'real and imminent risk' for the violation of an interest protected by Article 2 or 8. In his doctoral thesis, Sanderink makes the following remarks about this requirement:

> '*It ensures that the government is not obliged to take concrete action and thus use its financial and/or other resources to prevent any future infringement, however hypothetical that infringement may be.*'[243]

390. In the light of the precautionary principle, the requirement of a 'real and imminent risk' is certainly not intended to justify a failure to provide adequate and effective protection of ECHR rights on the sole ground that the circumstance in question is likely to lead to damage to an interest protected by the ECHR only in the future.

391. It is not possible to say in general when there is a 'real and immediate risk', as this depends very much on the circumstances of the case.[244] The interpretation and application of this criterion cannot be considered separately from the principle that ECHR rights should not become illusory.[245] After an extensive analysis of relevant ECtHR case law,[246] Sanderink concludes that, in practice, the ECtHR does not attach any independent significance to the requirement of an 'imminent risk' in addition to the requirement of a 'real risk'. Thus, in practice the ECtHR de facto limits the assessment of the 'real and imminent risk' to the question of whether a danger is real, if the realisation of the danger in the

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242 ECtHR 10 November 2004, *Taskin v. Turkey*, no. 46117/99, par. 113 (underlining added, counsel).
243 D.G.J. Sanderink, *Het EVRM en het materiële omgevingsrecht (Staat en Recht nr. 22)*, Deventer: Wolters Kluwer 2015, p. 157 (underlining added, counsel).
244 D.G.J. Sanderink, *Het EVRM en het materiële omgevingsrecht (Staat en Recht no. 22)*, Deventer: Wolters Kluwer 2015, p. 159 - 160.
245 Compare e.g. ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, par. 69.
246 The cases in question are the ECtHR cases, 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99; ECtHR 28 February 2012, *Kolyadenko et al. v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05; ECtHR 20 March 2008, *Budayeva et al. v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 and ECtHR 18 June 2013, *Banel v. Lithuania,* no. 14326/1.

circumstances of the case is not improbable.[247] Sanderink concludes:

> '*The requirement of the real and imminent risk therefore does not seem to be a demanding requirement, on the contrary.*'[248]

4.5.2 The State's complaints fail

392. The State's complaints about (the application of) the requirement of 'real and imminent' risk are unfounded.[249] The Court of Appeal's ruling that there is indeed a 'real and imminent' risk for the current generation of Dutch citizens fits seamlessly into an interpretation of Articles 2 and 8 of the ECHR that focuses on the special nature of the risk of climate change, which is based on robust scientific evidence.

393. In legal ground 42 of its judgment, the Court of Appeal recognised that a 'real and imminent risk' (as a lower limit) is required, resulting in cassation complaint 1.1 lacking any factual basis. The State's assertion referring to a real and imminent risk of infringement of rights safeguarded by Article 2 and/or Article 8 of the ECHR of specific persons is incorrect. The fact that the ECtHR does not impose such a requirement is set out in more detail below in par. 4.6. The Administrative Jurisdiction Division of the Council of State already rejected the State's position in its ruling on gas extraction in Groningen in 2015:[250]

> '*39.3. The Minister (...) argues that Article 2 of the ECHR only applies if there is an immediate risk to life. According to his defence, the Minister understands imminent risk to life to mean a situation of actual and immediate danger for specific persons. In the cited consideration, the Court does not read such a strict limitation. In that consideration, the ECtHR stresses that Article 2 also applies in situations where there is a clear risk to life of persons (...).*'

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[247] D.G.J. Sanderink, *Het EVRM en het materiële omgevingsrecht (Staat en Recht no. 22)*, Deventer: Wolters Kluwer 2015, p. 141 - 148.

[248] D.G.J. Sanderink, *Het EVRM en het materiële omgevingsrecht (Staat en Recht no. 22)*, Deventer: Wolters Kluwer 2015, p. 147 - 148.

[249] See cassation complaints 1.1, 2, 2.1, 2.3 - 2.5. This is also discussed in cassation complaints 8.1 and 8.2.2, see Chapter 6 below.

[250] Administrative Jurisdiction Division 18 November 2015, ECLI:NL:RVS:2015:3578, *AB* 2016/82 (underlining added, counsel). For the record, Urgenda notes that a requirement of a (high) location-specific risk, as discussed in this case, does not apply to the risks of climate change given its comprehensive nature, or at least, that the risks of climate change affect the Netherlands as a whole in the foreseeable future.

394. The Court of Appeal has ruled that the adverse effects of climate change pose a real (and imminent) risk to the rights of Dutch residents as protected by Articles 2 and 8 of the ECHR. The Court of Appeal was also able to reach that conclusion in view of its factual conclusion:
   i) in legal ground 37: it is 'absolutely plausible' that the current generation of Dutch citizens will have to deal with the adverse effects of climate change during their lifetime if the emission of greenhouse gases is not reduced (this ruling was not disputed in cassation);
   ii) in legal ground 44: the adverse effects (referred to in legal ground 37) also include fatalities (in the Netherlands), since an inadequate climate policy in the second half of this century 'will' lead to hundreds of thousands of victims in Western Europe (alone), the area in which the Netherlands is situated, and therefore also in the Netherlands;[251]
   iii) in legal ground 45: there is (thus) a real threat of dangerous climate change, which creates a serious risk that the current generation of residents will be confronted with loss of life and/or disruption of family life; and
   iv) in legal ground 64: that it has been 'established' that there is a real threat of danger.

395. The ruling of the Court of Appeal is factual and, also in view of what Urgenda explained in Chapter 1, certainly not incomprehensible, also in view of Urgenda's (justified) assertion that an inadequate climate policy in the second half of this century 'will' lead to hundreds of thousands of casualties in Western Europe, including in the Netherlands (legal ground 44, third bullet point), which the State has not contested.

396. The Court of Appeal has already been able to arrive to this ruling because climate change is already leading to increased mortality in the Netherlands. Urgenda has repeatedly stated this before the District Court and Court of Appeal and the State has not disputed this (in a clearly apparent manner).[252] For example, in the first instance, with reference to the National Heat Plan drawn up by the Ministry of Health, Welfare and Sport in 2007, Urgenda drew attention to the relationship between

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[251] See also par. 345 above.

[252] See Notice on appeal by Urgenda, par. 8.272, 8.295 and par. 11.3 with reference to Exhibits 135 and 136. See also Summons, par. 38, 39 and 126. The State's factual assertion in section 8.3.3 of the initiation of proceedings that the risks of climate change are not yet realised in the Netherlands has not been taken up by the State before the District Court and Court of Appeal (in a clearly apparent manner).

climate change, heat periods and deaths. Urgenda also pointed out that climate change leads to heat periods, which have already led to several hundred deaths in the Netherlands in 2003 and 2006.[253] On appeal, Urgenda also pointed out that '*there is already additional mortality in the Netherlands as a result of climate change*'[254] and that Exhibits 135 and 136 submitted by it '*show that climate change, also in the Netherlands, is already leading to an increase in mortality*'.[255]

397. The nature of the concrete threat, which is explained in detail in Chapter 1, is also very important in this respect. The climate system reacts with delay to greenhouse gas emissions, so it takes decades for emitted greenhouse gases to reach their full warming effect in the atmosphere and on land.[256] On the one hand, this means that the additional mortality that is already occurring in the Netherlands as a result of climate change is the result of the CO2 emissions emitted up to about 1980.[257] On the other hand, this also means that the emissions emitted since then already contribute (irreversibly) and will continue to contribute to the greenhouse effect. However, these emissions have not yet reached their (irreversible) full warming effect, let alone that the risks inherent in these greenhouse gas emissions have materialised (to their full extent).There is, after all, also a slowing down of the warming of the earth and of the reaction to it by the climate system, e.g. the rise of the sea level. Therefore, current CO2 emissions, which have also increased compared to the end of the last century,[258] will only have their full warming effect after 2050 and will have a disastrous effect on the earth, Western Europe and (thus) on the Netherlands. Moreover, because each emission is deducted from the remaining carbon budget, the greater the emissions are now, the less there will be for the future and in turn, the more far-reaching reduction measures will have to be (discussed in more detail in Chapters 1 and 2 above).

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253 Summons, par. 38 in conjunction with 39 and 126. The State did not dispute this, in fact: it cited the National Heat Plan as an example of adaptation measures, see par. 7.23 Statement of Defence and 6.27 Rejoinder.

254 Notice on appeal, par. 8.272.

255 Notice on appeal, par. 11.3.

256 For more information see, for example, Summons, par. 11 - 14, 23, Reply, par. 153 (with references), 511 - 512 and Notice on appeal by Urgenda, par. 1.8, 8.226 - 8.227. The Court of Appeal refers to a term of 30 to 40 years, see legal ground 3.3.

257 Summons, par. 13, 23, Reply, par. 153 (with references), 511 - 512 and Notice on appeal by Urgenda, par. 1.8, 8.226 - 8.227. The Court of Appeal refers to a term of 30 to 40 years, see legal ground 3.3.

258 Summons, par. 338, Reply, par. 85 and 96 and written arguments put forward by Urgenda in the first instance, par. 39.

398. In the first instance and on appeal, Urgenda expressly pointed out the creeping and dormant nature of the damage resulting from CO2 emissions. On the one hand, damage results from the delay inherent in this type of emission pathway and on the other hand, as a result of the fact that the greenhouse effect becomes stronger as more CO2 is released into the atmosphere (as the Court of Appeal correctly stated in legal ground 3.3).[259] Moreover, the accumulation of CO2 in the atmosphere can lead to tipping points in the climate process, which can lead to abrupt climate change, which neither man nor nature can properly prepare for. The Court of Appeal has correctly ruled that the risk of such tipping points 'at a steepening rate' increases with a temperature increase of between 1 and 2 °C (legal ground 44, 4th bullet).

399. The very serious consequences of dangerous climate change over the course of this century were discussed in detail in Chapter 1. Those consequences have been presented to the Court of Appeal. In this light, it is certainly not incomprehensible that there is a real and imminent risk of an infringement of the rights of Dutch residents protected by Articles 2 and 8 of the ECHR.

400. The other complaints from the State fail because of this. These complaints lack a factual basis[260] and/or are based on too strict a standard,[261] since in view of the notion of the ECHR to provide effective legal protection, the Court of Appeal was not obliged to further specify. Furthermore, it follows from the ECtHR case law discussed above that it is not required that the consequences of climate change will materialise in the short term, as the State asserts in paragraph 2.5 of the initiation of the proceedings. Moreover, it follows from the reasoning of the Court of Appeal, as set out in par. 394 above, that the Court has determined more concretely than the State makes it appear, which consequences its residents will face.[262]

4.6 Further specification of (groups of) persons within the jurisdiction of the State is not required

4.6.1 Background

[259] See, for example, Summons, par. 11 -12, Reply, par. 153 (with references), 511-512 and Notice on appeal by Urgenda, par. 1.8, 8.226-8.227.
[260] Cassation complaint 1.1, 2.1 and 2.5.
[261] Cassation complaint 2.1, 2.3, 2.4 and 2.5.
[262] Cassation complaint 2.3 last sentence.

401. The State presupposes that a positive obligation under Articles 2 and 8 of the ECHR requires that there is a specific threat to one or more clearly identifiable (groups of) persons who are located (in a part that is suitable for human habitation) within the jurisdiction of the State.[263] The State's complaints based on this fail because they are fundamentally at odds with the particular nature of the risk of climate change and with a consequent and evolving interpretation of Articles 2 and 8 of the ECHR. Urgenda has already discussed this in detail. Below, Urgenda will discuss the basis for the current case law of the ECtHR.

402. It already follows from the current case law of the ECtHR that under certain circumstances, on the basis of Articles 2 and 8 of the ECHR, a State may also be obliged to offer protection to a broader group of individuals (an undetermined collective) and even to society as a whole. For example, the ECtHR itself writes in its recent case law overview on Article 2 of the ECHR:

> '*The Court has also applied the aforementioned principles to cases giving rise to an obligation to afford general protection to society in certain specific contexts (...)*'[264]

403. One of the cases in which the ECtHR has adopted a duty of protection towards society as a whole under Article 2 of the ECHR is in the *Gorovenky and Bugara v. Ukraine* case.[265] In that case, the ECtHR held:

> *'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*

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[263] Cassation complaint 1.1, 2.1 - 2.3, 2.6, 3.3 and 3.4. This is also discussed in cassation complaints 8.1, 8.2.2, 8.3.8 and 8.4, see Chapter 6 below.

[264] *Guide on Article 2 of the European Convention on Human Rights*, version of 31 December 2018, par. 20 with extensive case law reference (underlining added, counsel).

[265] ECtHR 12 January 2012, *Gorovenky and Bugara v. Ukraine*, no. 36146/05 and 42418/05, par. 32 (underlining added, counsel).

> *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, 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.*'

404. This 'wide range of sectors' in which there may be a positive obligation to protect an undetermined collective of individuals (such as society) also includes environment-related issues with the risk of climate change and its consequences. As the ECtHR has already ruled on much less far-reaching risks, the adoption of a positive obligation does not require a specific individualisation of the persons concerned, nor does such a requirement relate to the premise that the ECHR should provide effective, rather than theoretical, protection.[266]

405. In the *Cordella et al. v. Italy*[267] case of 24 January 2019, where the ECtHR took into account in its assessment of Article 8 of the ECHR not only the interests of the applicants, but of the entire population living in the areas at risk, is also illustrative:

> '*For these reasons, the Court considered that the persistence of a situation of environmental pollution endangered the health of the applicants and, more generally, that of the entire population living in the areas at risk (...).*'

4.6.2 The State's complaints are unfounded

406. Cassation complaints 1.1, 2.1, 2.2 and 2.3 argue in varying terms that the Court of Appeal failed to recognise that a real threat of dangerous climate change is required on the territory of the State. Those complaints fail because the Court of Appeal did not fail to recognise them. After all, the Court of Appeal ruled in legal ground 37, undisputed in cassation, that the current generation of Dutch citizens will have to deal with the negative consequences of climate change. This is further confirmed by the Court of Appeal's referral back in legal ground 44 to the facts and circumstances 'partly mentioned above', including the Court's conclusion in legal ground 37.

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[266] Cf. ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, par. 90 ('number of persons').

[267] ECtHR 24 January 2019, *Cordella et al. v. Italy,* nos. 54414/13 and 54264/15. Only a French translation of the judgment is currently available. The above-mentioned quote is taken from a press release issued by the ECtHR on 24 January 2019 concerning this case (ECtHR 029/2019), p. 4 (underlining added, counsel). See also ECtHR 17 November 2015, *Özel et al. v. Turkey*, nos. 14350/05, 15245/05 and 16051/05, par. 170.

407. The Court of Appeal's reference in legal ground 44 third bullet to the number of victims in Western Europe does not mean that the Court of Appeal has failed to recognise the scope of Article 1 of the ECHR (for more details, see par. 4.9 below). After all, the Netherlands is part of Western Europe and thus, the Court of Appeal ruled that there is (also) a sufficient (real and imminent) risk for the Netherlands and Dutch residents, as is also shown by the Court of Appeal's subsequent conclusion in legal ground 45. This ruling is factual and not incomprehensible (see also par. 396 above).[268]

408. In essence, cassation complaints 1.1, 2.3, 2.6 and 3.1 argue that the Court of Appeal was obliged to determine (even) more concretely which consequences would occur, when and for whom exactly. These complaints fail because they are based on too strict a standard. It is clear that under (at least) Article 2 of the ECHR, but also Article 8 of the ECHR, there may be a positive obligation to protect a broad group of individuals and even society as a whole (see par. 402 above). The Court of Appeal could therefore come to the ruling that Articles 2 and 8 of the ECHR also offer protection for situations like the present one, in a manner that is correct an not in-comprehensible.

409. Contrary to what the State asserts, the Court of Appeal did not protect a general environmental interest, but the interest of concrete, existing persons in respect of whom the State has jurisdiction. This is, therefore, not an abstract interest, but the interests of a large number of people, all of whom have very specific interests in common. With this, the size of the group of interested parties is indeed large and there will be large variations within that group. However, this does not at all detract from the fact established by the Court of Appeal that there is a real threat that existing persons, as a result of the State's omission, will have their rights protected under Articles 2 and 8 of the ECHR infringed upon. The State's complaint in cassation complaint 2.6 that the interests are not congruent fails because of this (for more details, see also Chapter 3 above).

410. There is therefore no legal basis for a (further) personal, temporal and regional specification as well as a concretisation of the way in which and when the established risks for the current generation of Dutch citizens

[268] See also Notice on appeal, par. 8.272, 8.295 and par. 11.3. See also Summons, par. 38, 39 and 126.

will occur, nor is there any need or necessity for it. All this in the light of science, which holds that for the current generation of Dutch citizens – without an urgent mitigation policy in place– there is a real threat that the values that Articles 2 and 8 of ECHR aim to protect will be seriously affected, as early as this century.

411. Should there be any doubt about this, there is, at the very least, every reason for the Supreme Court (as the primary court under the ECHR) to interpret and apply Articles 2 and 8 of the ECHR in an evolving way and in line with the nature of the risk of climate change, which also takes into account the provisions set out in Chapter 3.

4.7 The required knowledge

412. In cassation complaint 2.3, the State argued, in short, that the Court of Appeal had failed to recognise that a positive obligation based on Articles 2 and 8 of the ECHR could (only) exist if the State knew, or ought to have known, or at least had well-founded suspicions, of the (sufficiently) precise consequences of climate change in an area that was designated habitable for human beings, with regard to the (individual) persons over which the State has jurisdiction. This assertion builds on the other complaints and therefore fails in the event of the failure of those other complaints (see par. 4.5, 4.6 and 4.9 about this).

413. Needless to say, Urgenda notes that the ECtHR implicitly or explicitly establishes the knowledge requirement (ECtHR speaks of 'knew or ought to have known').[269]. In the case of an implicit conclusion, the ECtHR arrives to the opinion that the (required) knowledge has been met based on the nature of the activity. For example, in the *Öneryildiz v. Turkey* case,[270] the ECtHR ruled that operating a waste disposal facility in a slum is dangerous by its very nature and that its operation, or consent to its operation, implies knowledge of the dangers involved.[271] In case of an explicit determination, the ECtHR bases the assessment that the State had, or should have had, knowledge of the dangers on various sources, including the results of scientific research, expert information, documents

[269] ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, par. 101.
[270] ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, par. 65 and 71.
[271] E.C. Gijselaar & E.R. De Jong, 'Overheidsfalen en het ECHR bij ernstige bedreigingen voor de fysieke veiligheid', *NTBR* 2016/6, par. 3.3.

from international organisations and decisions by national courts.[272] This knowledge requirement has been met in the present case,[273] since the major risks of climate change and its consequences for the rights protected by Articles 2 and 8 of the ECHR are facts of general knowledge, or at least there is a broad (scientific) consensus on them (as evidenced by, among other things, the large number of climate conferences, scientific sources and literature discussed in the judgment in legal grounds 3.5-3.7 and 11-19, for example).

4.8 Complaints about the precautionary principle

4.8.1 The precautionary principle

414. Trouwborst begins the summary of his doctoral thesis '*Precautionary Rights and Duties of States*' with the remark that the precautionary principle has developed into one of the most important general principles of international environmental law.[274] In fact, the application of the precautionary principle is so widespread that it is part of customary international law and is therefore legally binding on states.[275]

415. The precautionary principle is not a definite concept and has many forms and definitions.[276] In short, the precautionary principle has two key elements.[277] The negative element of the precautionary principle prescribes which behaviour should not be used in situations of uncertain risk. For example, this negative element prevents a State from failing to take precautionary measures to manage an uncertain risk on the grounds that there are scientific uncertainties about the harmfulness of its conduct. An elaboration of this negative element can be found, for example, in Principle 15 of the Rio de Janeiro Declaration on Environment and

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272 E.C. Gijselaar & E.R. De Jong, 'Overheidsfalen en het ECHR bij ernstige bedreigingen voor de fysieke veiligheid', *NTBR* 2016/6, par. 3.3 with the references listed there.

273 See also par. 396 above, with reference to, inter alia, Notice on appeal by Urgenda, par. 8.272, 8.295 and par. 11.3 and Summons, par. 38, 39 and 126.

274 A. Trouwborst, *Precautionary Rights and Duties of States*, (doctoral thesis), Utrecht 2006, p. 354.

275 See for example A. Trouwborst, *Precautionary Rights and Duties of States, (doctoral thesis)*, Utrecht 2006, p. 354 and T. Barkhuysen & F. Onrust, 'De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieu)rechtspraktijk', in: M.N. Boeve & R. Uylenburg (red.), *Kansen in het Omgevingsrecht*, Amsterdam: Europa Law Publishing 2010, p. 51.

276 See, for example, the contribution of Brans and Winterink, 'Onzekerheid en aansprakelijkheid voor schade door klimaatverandering. Welke rol speelt het voorzorgsbeginsel?' in the preliminary advice *Naar aansprakelijkheid voor (de gevolgen van) klimaatverandering*, *VMR* 2012-1, p. 119.

277 E. de Jong, *Voorzorgverplichtingen, over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's*, (doctoral thesis), Utrecht 2016, p. 68.

Development.[278] The positive element of the precautionary principle indicates what behaviour is required in situations of uncertain risk. Based on this element, scientific uncertainty about threats, combined with suspicions of the existence of a risk, is a reason for pro-activity and thus (precautionary) action.[279] The required pro-activity means that action must be taken before damage occurs or may occur and before a causal link between an effect and a danger has been established scientifically.[280]

416. The rationale for the precautionary principle also lies in the (growing) awareness of the serious and (practically) irreversible nature of many environmental consequences and the uncertainty that cannot be overcome by research. The precautionary principle therefore aims to ensure that preventive measures to prevent environmental damage are taken at an early stage, even before the risk has been scientifically proven.[281]

417. The precautionary principle also plays a role in the ECHR and has been applied as such by the ECtHR. The ECtHR first (explicitly) mentioned the precautionary principle in the *Tătar v. Romania*[282] case, in the context of a violation of Article 8 of the ECHR.[283] This means that the precautionary principle also applies as a principle of law in the context of human rights violations under the ECHR.[284]

4.8.2 The State's Complaints fail

418. With regard to the precautionary principle, the Court of Appeal found in its ruling that the State:

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278 E. de Jong, *Voorzorgverplichtingen, over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's*, (doctoral thesis), Utrecht 2016, p. 68. Principle 15 of the Rio de Janeiro Declaration on Environment and Development states: '*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*' (underlining added, counsel).

279 E. de Jong, *Voorzorgverplichtingen, over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's*, (doctoral thesis), Utrecht 2016, p. 69.

280 E. de Jong, *Voorzorgverplichtingen, over aansprakelijkheidsrechtelijke normstelling voor onzekere risico's*, (doctoral thesis), Utrecht 2016, p. 69 with references.

281 T. Barkhuysen & F. Onrust, 'De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieu)rechtspraktijk', in: M.N. Boeve & R. Uylenburg (red.), *Kansen in het Omgevingsrecht*, Amsterdam: Europa Law Publishing 2010, p. 48.

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

283 T. Barkhuysen & F. Onrust, 'De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieu)rechtspraktijk', in: M.N. Boeve & R. Uylenburg (red.), *Kansen in het Omgevingsrecht*, Amsterdam: Europa Law Publishing 2010, p. 62-63; T. Barkhuysen and M.L. Van Emmerik, *Het EVRM en het Nederlands bestuursrecht*, Deventer: Kluwer 2011, p. 88.

284 E.C. Gijselaar & E.R. de Jong, 'Overheidsfalen en het ECHR bij ernstige bedreigingen voor de fysieke veiligheid', *NTBR* 2016/6, par. 3.4.

v) is not entitled, on the basis of the precautionary principle, to refrain from taking further measures on the basis of the absence of '*full scientific certainty as to the effectiveness of the ordered reduction scenario*' (legal ground 63). In doing so, the Court of Appeal correctly applied the negative element of the precautionary principle (see also par. 415 above);

vi) is obliged (also) on the basis of the precautionary principle to choose measures that are safe, or at least as safe as possible, in order to prevent dangerous climate change, which violates the human rights protected by the ECHR (legal ground 67 in conjunction with 73). In doing so, the Court of Appeal has correctly applied the positive element of the precautionary principle (see also par. 415 above), in conjunction with the positive obligations for the State required under Articles 2 and 8 of the ECHR (see par. 4.4 above).

419. The complaints submitted by the State with regard to the precautionary principle fail.[285] Contrary to the principle in cassation complaint 2.5, the Court of Appeal did not, after all, rule that in view of the precautionary principle, it is not necessary that an imminent threat exists. After all, as it has been explained in par. 4.5.2 above, the Court of Appeal ruled that there is a real and imminent threat of violation of the rights of Dutch residents protected by Articles 2 and 8 of the ECHR. The appeal in cassation further contains follow-on complaints about a (supposed) requirement for further concretisation of risks and/or (groups of) individuals, which fails on the basis of what has been discussed above in par. 4.6 and 4.9.

4.9 Article 1 ECHR and extraterritorial context

4.9.1 Introduction

420. Cassation complaints 1, 2 and 3.1 further complain in many variants and from varying perspectives about the fact that the Court of Appeal misinterpreted Article 2 and/or 8 of the ECHR in light of Article 1 of the ECHR. The State essentially argued that Article 1 of the ECHR only obliges the State to safeguard the rights of its residents. According to the State, Articles 2 and 8 of the ECHR can create positive obligations only

[285] See cassation complaints 2.5, 8.2.1 and 8.6. For cassation complaints 8.2.1 and 8.6, see also Chapter 6 below.

to the extent that the real threat of dangerous climate change occurs specifically within the territory of the State, at least with regard to persons within the jurisdiction of the State within the meaning of Article 1 of the ECHR.

421. The Court of Appeal established that there is already, but certainly in the (near) future, a real threat of dangerous climate change and that the current generation of Dutch residents will be affected by the serious consequences of climate change due to anthropogenic causes referred to in legal grounds 37, 38, 44, 3rd and 4th bullet and 64, among others. The Court of Appeal specified that, as undisputedly stated by Urgenda, it is certain that an inadequate climate policy in the second half of this century will lead to hundreds of thousands of victims in Western Europe (alone).

422. Thus, the Court of Appeal ruled that these victims (could) also occur in the Netherlands and that the current generation of Dutch residents will be affected in their interests protected by Articles 2 and 8 of the ECHR. This ruling is factual and not incomprehensible. It is based on scientific evidence, as explained in Chapter 1 above. As far as grounds 1, 2 and 3.1 are based on the fact that the Court of Appeal has given an extraterritorial application to Article 2 and 8 of the ECHR, they fail because they lack a factual basis.

423. Below, Urgenda will –no doubt superfluously– discuss the question of whether and, if so, what legal significance can and should be attached to the intrinsically global effects of greenhouse gas emissions and a failure to mitigate those emissions. As already argued in Chapter 3 above in relation to the issue of admissibility, Urgenda believes that this is significant in the application of Articles 2 and 8 of the ECHR in the context of climate change. In an evolving interpretation of the ECHR as a living instrument, there is sufficient reason to provide effective legal protection against dangerous climate change.

4.9.2 Existing ECtHR case law on other cases

424. The concept of jurisdiction in Article 1 of the ECHR has traditionally been territorial in nature, with very limited room for exceptions.[286] It is

[286] See for example ECtHR, *Guide on Article 1 of the European Convention on Human Rights*, 31 December 2018, p. 7.

clear from the *traveaux preparatoirs* that the wording 'residing in their territories' has been replaced by 'within their jurisdiction' on the grounds that the earlier wording was considered too restrictive.[287] What matters is whether the State exercises jurisdiction, and in the appropriate context, this is (also) the case outside its own territory.

425. The line that has developed in the ECtHR case law makes it clear that there is increasing scope for a broader interpretation of the concept of jurisdiction.[288] In the *Soering v. United Kingdom* case in 1989, the ECtHR emphasised the primary territorial character of Article 1.[289]

> '*Article 1(...) sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.*'

426. Nowadays, however, the ECtHR has accepted several exceptions to the principle that jurisdiction is in principle territorial.[290] In fact, the importance of these exceptions is such that in July 2018, the ECtHR published another factsheet on the subject, covering a number of ECtHR rulings dealing with such exceptions.[291]

427. For example, exceptions to the principle that jurisdiction is in principle territorial occur in the case of military operations outside the State's own territory, as long as the State in question directly or indirectly exercises effective control over that territory.[292]

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[287] Council of Europe Staff, *Collected Edition of the Traveaux Preparatoires of the European Convention on Human Rights*, Vol. III, p. 260.

[288] ECtHR, *Guide on Article 1 of the European Convention on Human Rights*, 31 December 2018.

[289] ECtHR 7 July 1989, *Soering v. United Kingdom,* no. 14038/88, *NJ* 1990, 158, with commentary from Alkema, par 86.

[290] See ECtHR 19 October 2012, *Catan et al. v. Moldova and Russia,* nos. 43370/04, 8252/05 en 28454/06, par 104-105, where the state of the case law is summarised.

[291] ECtHR, fact sheet of July 2018 about *Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights*.

[292] The ECtHR also assumed, for example, jurisdiction of states in disputes over the Turkish occupation of northern Cyprus, events in the United Kingdom prisons in Iraq and other cases where Iraqis died as a result of soldiers from the United Kingdom, a case where a Turkish helicopter in Iran resulted in several deaths, French interference with a Cambodian ship and the actions of the Italian police when exercising border control in the Mediterranean Sea. See ECtHR 18 December 1996, *Loizidou v. Turkey,* no 15318/89; ECtHR 2 March 2010, *Al Sadoon v. United Kingdom,* no 61498/08*;* ECtHR 7 July 2011, *Al-Skeini v. United Kingdom,* no 55721/07*;* ECtHR 28 June 2007, *Pad and Others v. Turkey,* no 60167/00; ECtHR 29 March

428. However, even outside such cases of effective control, the exception may occur and, according to the ECtHR, there may be positive obligations for a State that (also) extend beyond its own territory. This was how, in 2006, the ECtHR ruled in the case of *Nikolaus and Jurgen Treska v. Albania and Italy*:[293]

> '*Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to applicants the rights guaranteed by the Convention (...).*'

429. Another category of exceptions relates to acts or omissions within the territory of a State but whose effects, contrary to the Convention, are (also) expected to take place outside the territory of the states bound by the Convention. This is the case, for example, with deportation or extradition decisions.[294] In *Cyprus v. Turkey*[295], the Court found that the expected effects of the State's acts or omissions outside its own territory can also play a role in Article 1 ECHR. Among other things, the ECtHR ruled that '*the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory*'. This was reaffirmed in 2015, when the ECtHR ruled in the *Chiragov et al. v. Armenia*[296] case:

> '*167. While a State's jurisdictional competence is primarily territorial, the concept of jurisdiction within the meaning of Article 1 of the Convention is not restricted to the national territory of the High Contracting Parties, and the State's responsibility can be involved because of acts and omissions of their authorities producing effects outside their own territory*.'

430. Therefore, although the starting point is (still) that the concept of jurisdiction in Article 1 ECHR is territorial in nature, it follows from the ECtHR case law outlined above that (it is quite possible that) the ECtHR

2010, *Medvedyev v. France,* no 3349/03; ECtHR 23 February 2012, *Hirsi Jamaa et al. v. Italy,* no 22765/09.

293 ECtHR 29 June 2006, *Nikolaus and Jurgen Treska v. Albania and Italy*, admissibility decision no. 26937/04, p. 12 (underlining added, counsel).

294 See inter alia ECtHR 2 May 2017, *Vasiliciuc v. Moldova*, no. 15944/11, par. 23 - 24; ECtHR 21 April 2009, *Stephens v. Malta*, no 11956/07, par. 51-54.

295 ECtHR 10 May 2001, *Cyprus v. Turkey,* no 25781/94, par. 52 (underlining added, counsel).

296 ECtHR 16 June 2015, *Chiragov et al. v. Armenia,* no. 13216/05, par. 167 (underlining added, counsel).

will take into account the inherently transboundary effects of climate change when determining the positive obligations of the State with respect to emissions from its territory, which(also) threaten its own residents.

4.9.3 International normative developments with impact on the interpretation of Article 1 of the ECHR

431. The interpretation of the concept of jurisdiction in the ECHR cannot be considered separately from international developments. As follows from its own case law, the ECtHR must take into account the development of international law, in particular regarding new areas of protection.[297] The following normative developments can be drawn from this.

i: Shift from locus victim to locus dangerous activities; non-discriminatory access to justice

432. Of great importance is a recent advisory opinion[298] by the Inter-American Court of Human Rights ('IACtHR'), which allows for a so-called diagonal application of human rights in environment-related situations through a broader interpretation of the principle of effective control. Colombia asked the IACtHR to comment on a number of questions. In response to a particular question, the IACtHR was required to explain the concept of jurisdiction, arguing that there may also be jurisdiction when a state has effective control over the act that causes the infringement of human rights. The IACtHR rules:

> '*[a]s regards transboundary harms, a person is under the jurisdiction of the State of origin if there is a causal relationship between the event that occurred in its territory and the affectation of the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights*.'[299]

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[297] S. Duyck, S. Jodoin and A. Johl (eds.), *The Routledge Handbook of Human Rights and Climate Governance*, Routledge, 2019, p. 319 with reference to: ECtHR 21 November 2001, *Al-Adsani v. United Kingdom,* par. 55*;* ECtHR 12 November 2008*, Demir and Baykara v. Turkey,* par. 147-151.

[298] IACtHR 15 November 2017, Advisory Opinion no. OC-23/18, Ser A (No 23). The advisory opinion is only available in Spanish on this website: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf. An official summary in English is available at: http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf.

[299] IACtHR 15 November 2017Advisory Opinion no. OC-23/18, Ser A (No 23), para 104 (h), translation taken from: M. Feria-Tinta and S.C. Milnes, 'The Rise of Environmental Law in International Dispute Resolution:

433. As Feria-Tinta and Milnes point out, the relevance of this argument for the issue of climate change is obvious:

> '*The Advisory Opinion does not address climate change, but some of the IACtHR's observations on states' duties (see above) are clearly pertinent to the ultimate example of transboundary pollution. Moreover, the court's reasoning could be used to support an argument that a state's contribution to the accumulation of greenhouse gases in the atmosphere should result in state responsibility and accountability under the ACHR to victims living in other states - for example, persons whose lands have become submerged or uncultivable due to rising sea levels.*'[300]

434. The literature rightly refers to the advisory opinion as a landmark.[301] Voigt refers to it as the '*potentially most significant decision in this series of high-profile international jurisdiction rulings which acknowledge legal consequences for environmental harm*'. Voigt notes that the comments on the opinion show that the extensive interpretation by the IACtHR of the concept of jurisdiction in the context of transboundary environmental damage caused by infrastructural projects, oil extraction, maritime transport and the construction of ports, can also be applied in the context of CO2 emissions and the consequences of climate change:

> '*Moreover, although the IACtHR in its AO does not address climate change, commentators have noted that some of the Court's observations on states' duties 'are clearly pertinent to this ultimate example of transboundary harm. Moreover the Court's reasoning on the 'jurisdiction' issue could be used to support an argument that a State's contribution to the accumulation of greenhouse gases in the atmosphere should result in State responsibility and accountability under the ACHR to victims living in other States, e.g. persons whose lands have become submerged or uncultivable due to rising sea levels.*'

435. This advisory opinion does not stand alone, but fits in with a broader

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The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights', *Yearbook of International Environmental Law* 2018*,* Vol. 27, p. 75.

300 M. Feria-Tinta and S.C. Milnes, 'The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights', *Yearbook of International Environmental Law* 2018*,* Vol. 27, p. 75.

301 C. Voigt, *International Judicial Practice on the Environment: Questions of Legitimacy*, Cambridge: Cambridge University Press 2019, p. 16.

development in the Inter-American human rights system, where the concept of jurisdiction is broadly interpreted. Reference may be had to cases such as *Coard et al v. United States; Armoando Alejandre Jr., Carlos Costa, Mario de la Pena and Pablo Morales v. Cuba,* and *Molina (Ecuador v. Colombia)*, in which the Court assumed jurisdiction in different factual contexts.[302] In the ICCPR, too, this term is not exclusively interpreted on a territorial basis. See for example the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory by the International Court of Justice:

> '*while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions*.'[303]

436. The advisory opinion of the IACtHR is groundbreaking, and in view of the fundamental extraterritorial effects of environmental damage, breaks with the classic notion that human rights are only created for a strict territorial protection of residents of a state against the exercise of state authority in violation of human rights. The IACtHR is, alongside the institutions under the Council of Europe Convention (Commission and ECtHR), one of the most influential human rights institutions in the world. A projection of what the ECtHR would decide in this respect should reflect on this decision.

437. Boyle places the issue in the light of the prohibition of discrimination. According to Boyle, states have the possibility of assuming jurisdiction in the most literal sense of the word, by providing access to the legal system for extraterritorial claims. This principle is already enshrined, for example, in the Aarhus Convention, which obliges states to grant both residents and non-residents access to the legal system without discrimination. It is from this principle that Boyle approaches the issue of human rights and environmental issues:

> '*Moreover, where it is possible to take effective measures to prevent or*

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[302] IAComHR 29 September 1999, *Coard et al v. United States,* Report no 109/99, Case 10.951; IAComHR 29 September 1999, *Armando Alejandre Jr, Carlos Costa, Mario De La Pena, and Pablo Morales v. Cuba I Report*, no 86/99, Case 11.589.)

[303] IGH 9 July 2004, Advisory Opinion Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, par 109.

mitigate transboundary harm to human rights then the argument that the state has no obligation to do so merely because the harm is extra-territorial is not a compelling one. On the contrary, the non-discrimination principle requires the polluting state to treat extra-territorial nuisances no differently from domestic nuisances.'[304]

Extrapolating this line of thought to the issue of climate change raises the question of where to draw a line.

438. This demarcation issue is surmountable. IACtHR's advisory opinion is consistent with the positive obligations accepted by ECHR, which are precisely aimed at activities on the territory of the state that result in human rights violations and over which the state exercises effective control. This is not about complicated demarcation issues to determine when there is or is not effective control (such as in war situations). As explained below, there is no question of an endless stretching of the ECHR. Urgenda does not believe that positive obligations *erga omnes* (towards all) exist, but that in an action with the interests of residents at its core, the harmful effects of CO2 emissions outside the Netherlands should also be taken into account.

ii: International cooperation obligation on mitigation as a consequence of positive obligation

439. It has been argued in the literature that the inherently global nature of CO2 emissions and climate change would force us to abandon a national/territorial human rights orientation.[305] According authors like John Knox, the key to solving this global problem lies in international cooperation.[306] As follows from Article 2(1) of the ICCPR and Article 55 of the UN Charter, states have an obligation to cooperate.[307] This provides an extraterritorial approach to human rights obligations:

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[304] A. Boyle, 'Human Rights and the Environment: Where Next?', *The European Journal of International Law* 2012, Vol. 23/3, p. 639-640.

[305] J.H. Knox, 'Climate Change and Human Rights Law', *Virginia Journal of International Law* 2009, Vol. 50:1, p.211-213 and J.H. Knox, Human Rights Principles and Climate Change, in C.P. Carlarne, K. R. Gray, and R. Tarasofsky (eds), *Oxford Handbook of International Climate Change Law,* Oxford: Oxford University Press 2016.

[306] J.H. Knox, 'Climate Change and Human Rights Law', *Virginia Journal of International Law* 2009, Vol. 50:1, p.212.

[307] J.H. Knox, 'Climate Change and Human Rights Law', *Virginia Journal of International Law* 2009, Vol. 50:1, p. 211-213, which also points to a ruling of the International Court of Justice in another context, namely genocide ('The universal character both of the condemnation of genocide and the co-operation required in order to liberate mankind from such an odious scourage').

> '*human rights law provides the standard that the negotiations should strive to meet: to protect against the adverse effects of climate change on human rights. To that end, the agreements must provide both for the reduction of greenhouse gases to levels that will not interfere with the human rights of those vulnerable to climate change, and for adaptation to unavoidable changes that would otherwise harm their human rights.*'[308]

The idea is then, on the one hand, that states are obliged, by virtue of their human rights obligations, to conclude international cooperation agreements aimed at reducing CO2 emissions so that climate change no longer leads to human rights violations. As Knox puts it: '*states have a duty to try to influence the international community to reduce global greenhouse gas emissions*'.[309] On the other hand, based on the general principle of good faith in carrying out treaty obligations, states should, at the very least, not obstruct other states in the fulfilment of their human rights obligations through their contributions to global emissions.[310]

440. This approach is correct but, considered in isolation, too one-sided and without obligation, and the State rightly did not defend it in the appeal in cassation. After all, the State does not oppose the application of Articles 2 and 8 of the ECHR when it comes to the protection of the current generation of persons who fall within the jurisdiction of the State against emissions from the Dutch territory. Urgenda has explained above that the national/territorial approach of the Court of Appeal finds broad support in the international development of law. As the Court of Appeal aptly expressed in its ruling, there is a dire necessity for citizens to be able to hold their states accountable for their contribution to global emissions, otherwise effective legal protection will be absent.

441. However, this is without prejudice to the fact that human rights, such as Articles 2 and 8 of the ECHR, can also create an additional obligation for effective international cooperation to respect an international consensus on the necessary reduction of emissions. The reasoning of the Court of

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308 J.H. Knox, 'Climate Change and Human Rights Law', *Virginia Journal of International Law* 2009, Vol. 50:1, p. 212.

309 J.H. Knox, 'Climate Change and Human Rights Law', *Virginia Journal of International Law* 2009, Vol. 50:1, p. 37.

310 J.H. Knox, Human Rights Principles and Climate Change, in C.P. Carlarne, K. R. Gray, and R. Tarasofsky (eds.), *Oxford Handbook of International Climate Change Law,* Oxford: Oxford University Press 2016.

Appeal in legal grounds 46- 53 (as well as legal ground 5 et seq. and 54 et seq.) also fits in with this approach. The international/political recognition by the Court of Appeal of the necessity, as an Annex 1 country, to reduce emissions by 25-40% by the end of 2020 compared to 1990 levels, is not only an international commitment endorsed by the State in its national relations, but also a commitment that sheds light on what is legal in the relations between the State and its citizens as an external source. In law, this commitment also has as its starting point the positive obligation of the State towards its citizens.[311] This makes it even more interesting that the Court of Appeal has taken advantage of this international consensus on the reduction of emissions required by 2020 in order to give concrete form to the standards of Articles 2 and 8 of the ECHR. In this respect, it could be termed a 'dual consequential effect', starting from and ending with the positive obligations for the State resulting from Articles 2 and 8 of the ECHR.

4.9.4 Conclusion

442. As explained above, Urgenda acknowledges that in a collective action such as this, in view of Articles 2 and 8 of the ECHR, there must be a real threat to the interests of Dutch residents. However, partly in view of the above, there are various ways in which the inherently extraterritorial, global nature of the dangers of climate change can be given shape in the application of Articles 2 and 8 of the ECHR. First, the Netherlands' commitment, aimed at contributing to global mitigation, has normatively logical repercussions for the implementation of the duty of care arising from Articles 2 and 8 of the ECHR (and Section 6:162 DCC). Second, in view of the international developments described above, it is logical that when applying Articles 2 and 8 of the ECHR (and Section 6:162 DCC), the essential transboundary effects of CO2 emissions from Dutch soil should not be ignored. This involves a complex of –very real– direct and more indirect effects of global warming outside the Netherlands, which are likely to have a direct and disastrous impact on the population of the Netherlands as early as the second half of this century. Urgenda has already pointed out the very real effects of the scarcity of many goods that will arise and of the geopolitical instability and (partly as a result of this) migration consequences, all on a scale that will affect the citizens of

311 Cf. J.H. Knox, 'Climate Change and Human Rights Law', *Virginia Journal of International Law* 2009, Vol. 50:1, p. 38: '*[A state's] duties to its own people may obligate it to commit to reductions in its own emissions, as part of its effort to obtain such a global agreement*.' (underlining added, counsel).

the Netherlands in the core of their interests protected by Articles 2 and 8 of the ECHR (and Section 6:162 DCC). Thus, the extraterritorial effects of emissions have a natural place in both the fair balance test under the ECHR and (certainly) in the assessment under Section 6:162 DCC, the core of which remains the direct threat to the current generation of Dutch citizens already accepted by the Court of Appeal.

4.10 Future generations

4.10.1 Abstraction of intergenerational interests is unacceptable; various routes to compatibility

443. It has been explained above that the Court of Appeal was able to accept a sufficient interest in the form of an imminent risk to the current generation of Dutch residents. This is the basis for Urgenda's defence as set out above. The Court of Appeal left open whether Urgenda can also represent the protection of the interests of future generations. As briefly explained in Chapter 3 above, Urgenda argues this is the case in both in the application of Articles 2 and 8 of the ECHR and of Section 6:162 DCC.

444. As cited there, it is seriously problematic if the assessment of a case regarding climate change and the related responsibility of the State requires or allows abstraction from the specific impact it will have on later generations in the near future. Urgenda is well aware that resolving this question entails a fundamental jurisdictional, factual and normative delimitation problem. However, the existence of delimitation problems should not justify the failure to resist climate change caused by anthropogenic greenhouse gas emissions, namely the latency of the damage that depends on a diminishing carbon budget and the fact that in an uncertain future, whether or not through tipping points, key limits to a temperature increase should be achieved.

445. The interests of future generations can, by various means, be addressed in an action under Section 3:305a DCC. In the current state of international legal development, it could be presumed that it has already been established with a sufficient degree of probability that the current generation of Dutch residents will be affected by serious consequences of climate change, in a manner protected by Articles 2 and 8 of the ECHR and Section 6:162 DCC. For these reasons it would be reasonable and

justified if, based on a controlled and evolving interpretation[312] of Article 1 of the ECHR, national courts are allowed to take into account the interests of future generations; that interests of future generations have importance in application of a fair balance test; that these interests also carry great weight in the determination of a sufficient interest in the requested reduction order; and that the interests of future generations are also given importance in addressing the question whether the court steps outside of its judicial duty, into to domain of politics.

446. In any case, the interests of future generations already qualify for legal protection as the interests of the current generation of residents. After all, the possible existence and well-being of future generations is a clear and concrete interest of (part of) the current generation of residents, who want to be able to have and raise their (future) children in a liveable world. Therefore, the interests of future generations, even if these future generations cannot already be regarded as holders of rights themselves, apply in any case as an interest of the current generation of residents that qualifies for legal protection.

4.10.2 International support for the involvement of intergenerational interests

447. Allowing the interests of future generations to play a role in the context of human rights is not a new development. For example, the International Court of Justice ruled in 1996 on the threat and use of nuclear weapons that:

> '*the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations. (...) it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.*'[313]

448. Although the International Court of Justice has in that opinion stressed the unique characteristics of nuclear weapons, the 'ability to cause damage to generations to come' and 'destructive capacity' of climate

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312 See paragraph 4.9 above.
313 ICJ, *Legality of the Threat or Use of Nuclear Weapons (General List No. 95)*, paragraphs 35-36.

change, as earlier discussed at length by Urgenda,[314] is also undisputed. Moreover, climate change has certain unique characteristics that make it all the more imperative to take account of the interests of future generations. After all, it concerns a latent 'dormant damage': climate damage is already considerably greater than can be observed today.[315] This is due to the fact that it takes 30 to 50 years for emitted greenhouse gases to reach their full warming effect in the atmosphere and on land. This dormant damage not only means that the total extent of climate damage cannot (yet) be determined, but also that the damage, once it is visible, is potentially irreparable. Because of these characteristics, the 'ability to cause damage to generations to come' is a key element of climate change.

449. There is more international support for the involvement of intergenerational interests. The Aarhus Convention[316] mentions this in its preamble:

> '*Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.*'

450. The Rio Declaration and the Vienna Declaration contain similar words: '*[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.*'[317] The preamble of the recent Paris Agreement also includes:

> '*Acknowledging that climate change is a common concern of human kind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on (…) intergenerational equity.*'[318]

451. Who exactly will be part of those next generations is not so important.

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314 See Chapter 1 above.
315 Urgenda summons, paragraph 13. See more detailed Chapter 1 above.
316 Convention on access to information, public participation in decision-making and access to justice in environmental matters, Aarhus, 25/06/98 (underlining added, counsel).
317 See the third principle of the *Rio Declaration on Environment and Development* and paragraph 11 of the *Vienna Declaration and Programme of Action*.
318 According to the preamble of the Paris Climate Agreement, 2015, (underlining added, counsel).

What matters more is that future generations will arise and that they will be confronted with the negative consequences of climate change.[319] For example, Lewis writes:

> '*[y]et, the fact that the identities of future persons are currently unknown and are subject to change does not alter the fact that current actions will determine the quality of life they enjoy. Further, the non-identity problem does not address the morally intuitive sense that there is something wrong with knowingly acting in a way which will result in a poorer quality of life for persons in the future.*'[320]

4.10.3 Intergenerational interest in the context of Section 3:305a DCC

452. Intergenerational interest is expressed in this case in two ways. First, Urgenda complies with the requirements of Section 3:305a DCC with regard to future generations . Urgenda pursues the interest of a sustainable society. As the District Court has rightly concluded, this concept has an intergenerational dimension.[321] Articles 2 and 8 of the ECHR aim to protect this interest, which must also include the interest of future generations. According to Loth, this opinion is in line with an '*international trend, starting with the decision of the Philippine Supreme Court that plaintiffs have standing to represent their yet unborn posterity'*.[322]

4.10.4 Intergenerational interest in the context of the ECHR

453. Second, intergenerational interests must play a role in determining jurisdiction under the ECHR. As explained in paragraph 4.9.2 above, the strict territoriality approach to human rights is no longer sacrosanct. Under special circumstances, the ECtHR has abandoned territorial boundaries by accepting that the ECHR also applies in situations where persons are outside their territory, but under the effective control of the

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[319] For example B. Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice', *Netherlands Quarterly of Human Rights* 2016, Vol. 34/3, p. 214: '*what matters is the knowledge that future people will exist, and that it makes little difference that their identities are presently unknown*' and J. Feinberg, 'The Rights of Animals and Unborn Generations' in Ernest Partridge (ed.), *Responsibilities to Future Generations: Environmental Ethics* (Prometheus 1981), p. 139: *'[t]he identity of the owners of these interests is now necessarily obscure, but their interest-ownership is crystal clear, and that is all that is necessary to certify the coherence of present talk about their rights.*'

[320] B. Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice', *Netherlands Quarterly of Human Rights* 2016, Vol. 34/3, p. 214.

[321] Judgment District Court, legal ground 4.8.

[322] Prof. M.A. Loth, 'De Rechtbank Den Haag heeft gesproken…', *AV&S* 2015/24 , issue 5, p. 154.

State party to the convention. Furthermore, the ECtHR has also accepted that the positive obligation of a State arising from the ECHR also depends, or may depend, on what the consequences of its actions or omissions are outside its own territory.

454. According to Urgenda, such a material conception of jurisdiction also applies to future generations: the guiding principle is not (only) who is on the territory of the State, but on which persons the acts or omissions of the State have or will (almost certainly) have an impact. Specifically, with regard to the climate policy pursued by the State, this is particularly true for future generations.

455. A recent ruling of principle by the Colombian Supreme Court,[323] which has ruled that future generations may be the holders of subjective rights, is illustrative in this respect:

> '*(...) the fundamental rights to life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed*.'

And:

> '*[t]he environmental rights of future generations are based on (i) the ethical duty of the solidarity of the species and (ii) on the intrinsic value of nature*.'

The Colombian Supreme Court then assumes a commitment by the Colombian state to take action on climate change as soon as possible, based on the principle of 'intergenerational equity'. In short, this principle requires that the Earth's benefits and burdens be shared fairly and equitably among its inhabitants, present and future.[324]

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[323] De la Corte Suprema de Justicia, Sala de Casacion Civil, M.P. Luis Armando Tolosa Villabona, 5 April 2018, STC4360-2018, p. 13 (see http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/; Urgenda only has an unofficial translation of this ruling and the quotations are taken therefrom).

[324] E.B. Weiss, *Intergenerational Equity*, Entry, in Max Planck Encyclopedia of Public International Law 287-294 (Rüdiger Wolfrum ed., Oxford: Oxford University Press 2012), p. 287.

456. In the context of climate change, this principle of intergenerational equity for future generations is relevant in at least two ways. They will have to bear the burden of increased CO2 emissions, while (largely) not being responsible for those emissions. But future generations will not be able to reap the benefits of these emissions, or at least to a limited and indirect extent. After all, our generation has already done so. As Australian judge (Preston CJ) recently considered in appeal proceedings (*Gloucester Resources Limited v Minister for Planning*):

> '*There is also inequity in the distribution between current and future generations. The economic and social benefits of the Project will last only for the life of the Project (less than two decades), but the environmental, social and economic burdens of the Project will endure not only for the life of the Project but some will continue for long after. (...) the Project will emit greenhouse gases and contribute to climate change, the consequences of which will burden future generations. The benefits of the Project are therefore distributed to the current generation but the burdens are distributed to the current as well as future generations (inter-generational inequity).*'[325]

457. It has already been pointed out above that the actual enjoyment of (many of) the rights enshrined in the ECHR can only exist and be maintained by virtue of the absence of the consequences that climate change now threatens to bring with it. As the District Court has rightly concluded, because the State has failed in its obligation to mitigate, it is also causing damage to future generations.[326] The current climate policy, which is considered insufficient, will in all probability lead to a serious deterioration in the circumstances in which they can enjoy their human rights, such as those of Articles 2 and 8 of the ECHR. By mitigating more, the State can influence these circumstances. This is another reason why, according to Urgenda, the State is obliged to refrain from a mitigation policy that is in conflict with the obligations arising from the ECHR. Whether the consequences of its climate policy are felt by current generations (in the short term) or future generations (in the long term) should not be relevant in this context, since according to Urgenda, (i) it is established that they will both have to deal with these consequences and (ii) the interests of future generations are (also) in the interest of the

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325 Gloucester Resources Limited / Minister for Planning [2019] NSWLEC 7, paragraphs 415-416.
326 Judgment District Court, legal ground 4.35.

current generation of residents that qualifies for legal protection.

458. The above is equally relevant to the basis of Urgenda's claim under Section 6:162 DCC and found by the District Court to be substantiated.

5 DUTY OF CARE (SECTION 6:162 DCC)

5.1 Introduction

459. In Chapter 1, Urgenda has already briefly discussed the basis of Section 6:162 DCC, which the District Court has used to support the requested reduction order. As Urgenda pointed out in Chapter 1, the District Court and the Court of Appeal applied the same standard, based on different factual and normative points of view, in different ways, which results in the Court ordering the State to reduce Dutch CO2 emissions by at least 25% by 2021. Both for Section 6:162 DCC and for Articles 2 and 8 ECHR, this standard results in a duty of care or a positive obligation to offer protection, in this concrete way, against the serious consequences of dangerous climate change.

460. As explained above, the basis found by the Court of Appeal in Articles 2 and 8 of the ECHR is founded on a solid reasoning that will be maintained in cassation. However, the outcome reached by the Court of Appeal is equally supported by the approach of the District Court based on Section 6:162 DCC, as endorsed and supplemented by Urgenda on appeal, and as the Supreme Court may, if necessary, ex officio supplement on the basis of Section 25 of the Dutch Code of Civil Procedure in favour of Urgenda as Respondent in cassation. This means that, where cassation complaints 4-9 fail, cassation complaints 1-3 also fail for lack of interest. This interest defence only becomes relevant 'from a cassation point of view' if the Supreme Court were to rule that the decision of the Court of Appeal based on Articles 2 and 8 of the ECHR would be lacking in some respect.

461. The basis for the duty of care invoked by Urgenda has been described as groundbreaking in some comments on the District Court's judgment. Urgenda does not agree. In its view, the District Court's approach constitutes an analogous application of the Kelderluik criteria. On the one hand, takes into account the particular nature of the overall risk of dangerous climate change caused by cumulative global emissions. On the other hand, provides a basis for international recognition as the standard of the need for a CO2 reduction of at least 25-40% by 2021. To elaborate the basis for the claim, Urgenda refers to the judgment of the Court, as well as to its assertions in the first instance and in appeal.

462. The District Court (Judgment, legal ground 4.91) and the Court of Appeal (Ruling, legal ground 64) have rightly ruled that the duty of care assumed by them provides effective legal protection for the current generation of residents of the Netherlands. A climate policy that focuses exclusively on a high reduction percentage in a year far away (e.g. a 95% reduction in 2050) is comfortably far away for today's generation of politicians, and above all, without obligation as long as politicians can claim that this objective has not yet become unattainable. But this ignores the fact that the target of a 95% reduction in 2050 is only adequate for a specific 'pathway' that emissions will have to follow between now and 2050. Deviating from this pathway is unnecessary, has irreversible, harmful consequences and thus, creates disproportionate costs and risks. An even sharing of the reduction effort, on the other hand, results in a reduction target of 28% by 2020 (Ruling, legal ground 47), which is significantly higher than what the State is prepared to do of its own accord.

5.2 Positive obligation - duty of care

463. The risk of climate change cannot simply be compared with more general life risks such as unsafe traffic, diseases or other personal or physical insecurity. In principle, these risks can be managed individually to a greater or lesser extent. Individually one can at least influence the outcome. Moreover, it is the government's practice to take measures to reduce these risks to individually manageable proportions. This includes traffic regulations, weather warnings, vaccination programmes and various forms of enforcement. To the extent that individual citizens find the assessment made by the government with its scarce resources to be incorrect or insufficiently protective, citizens are also able, in addition to democratic means, to take individual measures that can bring their own situation or risk as much in line with the desired risk profile as possible. We can decide not to fly, not to consume genetically modified products, or to take all kinds of other precautionary measures that offer protection. Climate risk, on the other hand, is beyond the control of the individual citizen.

464. At the same time, climate risk is a general risk that can only be managed by governments, not by the average person or one with special capabilities. The government is the only one that can oversee and take decisions on 'economy-wide emission reductions' at the desired level, and allocate and, where necessary, compensate for the consequences of these

decisions. The State bears systemic responsibility for this (Judgment, legal ground 4.87), which the State acknowledges. Only the State can set rules and share the burden. Individual citizens are completely dependent on it for their personal, individual living conditions. Given the individually unmanageable nature of climate risk, on the one hand, and the total dependence on government alone, on the other, citizens have a real and immediate interest in ensuring that the government does not take unreasonable risks.

465. The State has a duty of care –a positive obligation– to prevent dangerous climate change, the consequences of which, as explained in Chapter 1 and discussed in more detail in the defence against cassation complaint 8, can no longer be avoided by adaptation. Although adaptation measures can mitigate the impacts of climate change, the State has not been able to present such adaptation measures as a realistic alternative to the mitigation requirement to the District Court and the Court of Appeal (Ruling, legal ground 59).

466. As the District Court and the Court of Appeal have correctly established, the State's duty of care can therefore only be to implement the internationally recognised target to reduce CO2 emissions by at least 25% compared to 1990 by the end of 2020. In Chapter 1, the main arguments of Urgenda, which have been accepted by the District Court and the Court of Appeal, are once again set out below. This international recognition and the participation of the Netherlands in it follows from, among other things (Ruling, legal ground 5 to 11, the following is only short form):

a. the UNFCCC (1992), which aims to protect the ecosystems of the planet and humanity and to promote sustainable development for the protection of present and future generations;

b. the COP in Cancun (2010), organised under the auspices of the UNFCCC, which, on the basis of the scientific findings of the IPCC reports (including AR4), recognised the long-term objective of limiting warming to not more than 2 °C, with a possible further tightening to 1.5 °C. Annex I countries must continue to take the lead, and reduce their emissions by 25-40% by 2020 compared to 1990 levels;

c. the Paris Agreement (2015) recognising the long-term target of less than 1.5 C, based on the new scientific findings from the IPCC reports (e.g. AR5);

d. the acceptance and recognition by the EU of the 2 °C target, the corresponding maximum concentration level of 450 ppm, and the derived 25-40% reduction standard for Annex I countries as a standard for international climate policy.[327] The State also (initially) recognised this standard for Annex I countries (Ruling, legal ground 52) and even deduced from this that a reduction of at least 30% by 2020 was necessary for the Netherlands to realistically achieve the 2 °C target.[328] As mentioned above, the standard as such was even recognised[329] by the State in its letter of 11 December 2012 to Urgenda. Although the letter put into perspective its binding nature, it insisted at the same time on the 80-95% reduction percentage in 2050 that is actually linked (because it is part of the same 'pathway') to the 25%-40% reduction percentage by 2020;

e. the criteria most frequently used and also referred to in Article 3 of the UNFCCC for a normative sharing of reduction efforts include (Ruling, legal grounds 7, 8 and 9): historical responsibility, the level of emissions and of emissions per capita, financial possibilities (prosperity) and social possibilities (technological and organisational possibilities). For each application of these criteria, the outcome is that the Netherlands has a very large responsibility and therefore a large obligation to make an effort (Ruling, legal ground 26);[330]

f. the COP decision of 21 December 2015, in which all parties to the UNFCCC unanimously stressed the need for rapid reductions and specifically, an increase in ambitions for 2020.[331] This call is repeated in every COP decision that follows, also in the COP decisions after AR5.[332] Authoritative reports and international organisations are therefore increasingly pressing for immediate action (Ruling, legal grounds 13, 4);[333]

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327 Notice on appeal, par. 6.20.
328 Notice on appeal, par. 6.21 and 6.22.
329 Judgment District Court, legal ground 2.7 and judgment Court of Appeal, legal ground 2.
330 Urgenda's written arguments on appeal, par. 71 to 89.
331 Notice on appeal, par. 8.205.
332 See Notice on appeal, par 3.82.
333 See Notice on appeal, par. 8.204 and judgment District Court, legal ground 4.71.

g. the growing necessity of early reductions in order to stay within the limited available carbon budget.[334] Global CO2 emissions are not decreasing, but increasing (Judgment, legal grounds 4.15, 4.30; Ruling, legal ground 44). Year after year, emissions are significantly higher than they should be in order to reach the 2 °C target, and the carbon budget is being used up more quickly. All relevant documents (see in particular the UNEP Emissions Gap reports) show that the global phase-out of emissions falls far short of the 'pathway' that global emissions must follow in order to achieve the 2 °C target, let alone the 'well below the 2 °C target', and even less the 1.5 °C target. As explained above, the emission pathway curves/graphs such as the RCP 2.6 scenarios mentioned above illustrate how quickly global emissions must be phased out –within the limits of what is considered technologically, financially and socially feasible– in order to remain within the carbon budget of the chosen target temperature / target concentration. These curves/graphs show a temporal urgency on a very short term. Postponing reduction will lead to an unnecessary and disproportionate increase in risks and costs. On the one hand, the remaining carbon budget will have been used up earlier and the certain and uncertain consequences of higher CO2 emissions will also occur sooner.[335]On the other hand, the costs of accelerated reduction due to additional efforts will increase considerably in the shorter term (Judgment, legal ground 4.71).[336] Although the effects of climate change will only occur in the second half of this century and beyond, the extent to which they occur will depend on how we act in the next 10 years;

h. certain forms of mitigation, such as CCS technology, are hypothetical, at least at the required scale, and do not constitute the ideal solution for responsible risk management (Judgment, legal ground 4.72; Ruling, legal ground 59).[337] The IPCC reports and the literature explicitly warn against delaying rapid reductions, hoping that new mitigation techniques and even negative emissions will be possible in the future;[338]

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334 See Notice on appeal, par. 8.198 et seq.
335 See Notice on appeal, par. 8.200.
336 See Notice on appeal, par. 8.203.
337 See Notice on appeal, par. 8.215.
338 See Notice on appeal, par. 8.216-8.217.

i. moreover, reductions by the Netherlands within the ETS sector are indeed effective now that the alleged waterbed effect is not actually happening as a result of a surplus of rights, and these rights will be annulled in the near future (Judgment, legal ground 4.81; Ruling, legal ground 55, see also Chapter 6 below).[339] It is also unlikely that mitigation will lead to 'carbon leakage' as companies relocate their production abroad (Ruling, legal ground 57).According to the State, this phenomenon does not appear to occur in the case of their own increased target of 49% for 2030 (Ruling, legal ground 58).

467. The obligation to reduce emissions by at least 25% by the end of 2020 does not result so much from the fact that this international recognition leads to 'binding' treaty provisions as referred to in Article 94 of the Constitution, but from the fact that compliance with this internationally recognised necessity *is currently the only measure that best protects citizens against the real and immense consequences of climate change.* Due to the special nature of the climate risk and the special position of the State, this internationally recognised necessity has a factual consequential effect through the duty of care (cf. Ruling, legal ground 51).

468. Urgenda briefly explains the basis for its claim, based on Section 6:162 DCC, to the axis of the Kelderluik criteria, taking into account the special nature of the overall risk of dangerous climate change caused by cumulative global emissions.

5.3 Severity and extent of (the consequences of) climate change

469. The severity and extent of the consequences are not in dispute. The State also recognises that the effects of climate risk far outweigh the normal, general life risks. There is no doubt that there is a very real and imminent risk of climate change in the sense that if adequate measures are not taken in proper time, a temperature increase of more than 1.5 to 2 °C, or more, will occur. Such warming will lead to major damage to ecology, demographics, welfare and prosperity worldwide, and certainly in the Netherlands as well, in light of the impacts of, among other things, heat, rising seawater levels, drought or floods. In particular, the State acknowledges that global emissions are still rising, that the probability of

[339] See Notice on appeal, par 8.255 et seq. and judgment District Court legal ground 55.

staying below 1.5 °C has now become extremely low and that limiting warming to 2 °C requires a considerable effort that goes much further than is currently the case (judgment Court of Appeal, legal ground 1 to 3 and 44). As explained in Chapter 1, without drastic measures, we are currently heading for a 4 ºC warming by 2100. When planet Earth is 4 ºC warmer, it will have a different appearance than the ice age (5-7 ºC colder), in which where large parts of the planet were covered with ice. It will also have a different appearance than the planet we live on today. It is undisputed that the climate risk will be realised with certainty unless special measures are taken. The climate risk is not the same as the risk of a nuclear war: equally devastating, but not immediately imminent (cf. judgment Court of Appeal, legal ground 44-45).

470. However, in view of the minimum contribution of the Netherlands to global CO2 emissions, the State is of the opinion that a reduction of 25% by the end of 2020 cannot be demanded as an effective and adequate measure (cf. judgement Court of Appeal, legal ground 30). All the more so as, according to the State, such measures are subject to very high social costs. Such an ineffective measure would be contrary to the discretion enjoyed by public authorities. By arguing this, the State is once again postponing the measures previously deemed necessary, and is now focusing its efforts on 2030 or beyond. All three arguments do not hold. On the contrary, on closer inspection, they rather point to the need to achieve the 25% CO2 reduction by the end of 2020.

471. Measures can also be regarded as effective and adequate even if the consequences are uncertain. This depends on the nature of these and the available alternatives. As was determined in the Kelderluik judgement of the Supreme Court, the *'probability of not being attentive'* and '*the probability that accidents will occur as a result',* which together comprise the *'degree of uncertainty'*, merely form one viewpoint in this respect in addition to the seriousness of the possible consequences and the onerousness of taking precautionary measures.[340]

472. The State's argues that the emission reduction Urgenda requests cannot be demanded because it is not 'effective' in combating the climate risks for which Urgenda is seeking legal protection. This is an attempt (once again) to draw a conclusion based on the alleged lack of significant

[340] Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079, *NJ* 1966/136 (*Kelderluik*).

climate damage caused by Dutch emissions, which would provide no basis for the reduction order.

473. In this context, Urgenda would like to point out that under Dutch law, the existence of damage is not a constitutive element for the existence of an unlawful act. It is relevant to note that the State has also argued in an international context that damage will not be a constituent element of 'unlawful acts'. See *Handboek Internationaal Recht*, Chapter 10, Horbach and Lefeber, p. 5 and in particular footnote 10 there, in which reference is made to the comments of the Netherlands on Part I of the draft articles on state liability, as accepted by the International Law Commission at first reading in 1980. The comment from the Netherlands was:

> '*The Netherlands Government also agrees with the Commision's [sic.] decision not to make damage a constituent element of a wrongful act. This decision ensues, indeed, from the structure of the draft; whether or not damage is required is a matter of primarily rules. The Commission's decision is also correct from another point of view; s State could have a legitimate interest in the fulfilment of an international obligation which has been reached in a specific case even though it has suffered no damage. (...) Moreover, it should be pointed out that the omission of the element of damage is consonant with draft article 19, which recognises that the breach of an obligation resting upon a State can affect the interests of the international community as a whole*.'

The last sentence is particularly relevant in this case: the State thus endorses the fact that it is important for the international community as a whole that an Annex I country, in accordance with its obligations under Articles 2, 3 and 4 of the UNFCCC, contributes its individual share in the interest of the international community to prevent dangerous climate change. In turn, failure to comply with this obligation may constitute an unlawful act, even if Dutch emissions by themselves do not probably cause any (significant) climate damage.

5.4 Onerousness of taking precautionary measures

474. Urgenda has clearly and comprehensively explained before the District Court and Court of Appeal, that a 25% reduction by the end of 2020 is not problematic, let alone disproportionate, in the face of the enormous

risk of climate change and the responsibility that the Netherlands must take in this regard:

a. until 2011, the State pursued a climate policy aimed at a 30% reduction by 2020. This reduction effort first deemed necessary was relaxed by the State, because the Rutte I government (VVD/CDA with the backbench support of the PVV) did not 'believe' in climate change for political-ideological reasons, without any scientific insight or economic justification (Judgment, legal ground 4.70);[341]

b. the EU has set a conditional reduction target of 30% for 2020 as early as 2012 in the context of the Doha Amendment. At the court hearing on 14 April 2015, the State confirmed that it is possible for the Netherlands to meet the EU target of 30% by 2020;[342]

c. a number of neighbouring countries, including Germany, Denmark and the United Kingdom, have been pursuing climate policies for many years with the aim of achieving reductions of 40%, 40% and 35% respectively by 2020;[343]

d. the State has not provided any specific data, either at first instance (Judgment, legal ground 4.86) or on appeal, showing that achieving a 25% reduction by 2020 would lead to disproportionately high costs, or would otherwise not be cost-effective.[344] Achieving its own target of a 49% reduction by 2030 requires a very substantial additional effort, with a reduction of 28% by 2020 based on an even distribution of that effort and emissions.

475. Both the District Court and the Court of Appeal have therefore rightly concluded that the State has not sufficiently demonstrated why the requested reduction of 25% of CO2 emissions by 2020 compared to 1990 level is problematic as a cost item or as a loss of future opportunities. The obligation to state reasons for the onerousness of taking precautionary measures explicitly rests with the government.[345]

476. If, in the meantime, it has become more expensive or more difficult to

[341] See Notice on appeal, par. 8.208 and Judgment District Court, legal ground 4.70.
[342] See Judgment District Court, legal ground 4.70.
[343] See Notice on appeal, par. 8.258 and Judgment District Court, legal ground 4.70.
[344] See Notice on appeal, par. 8.209.
[345] Supreme Court 4 April 2014,ECLI:NL:HR:2014:831, *NJ* 2014/368, with commentary from Hartlief.

take such measures by 2020 in view of the time remaining, this should not be taken into account. Since the provisionally enforceable judgment of the District Court, the State has a legal obligation to take these measures. The fact that the State has insufficiently complied with it should not be a circumstance or a defence in its favour.

5.5 Risk of degree of uncertainty

477. Given the immense consequences of climate change recognised by the State and the lack of concern regarding the measures to be taken in the form of a 25% CO2 reduction by 2020, it is obvious when formulating a standard of conduct that the degree of certainty with regard to the effectiveness of precautionary measures should not be subject to too strict requirements.

478. The standard of conduct appropriate for this balancing test is based on tried and tested empirical rules or shared values that are considered so important that their validity is less dependent on the more individual circumstances of the case. Such standards apply in principle to everyone, and in all cases. These are fundamental values such as compliance with agreements, access to justice to enforce compliance, or certain traffic or safety standards. Being able to rely on compliance with these standards is essential, if we are to live together on a planet with scares resources and a living environment that is inextricably linked. This is the case, whether it concerns reliability, enforcement, transport or the remaining carbon budget.

479. Adequate enforcement of such standards is very important. If more states believe that their mutual distribution does not apply to them, the risk that climate change impacts will actually materialise increases rapidly. This has implications for the compliance that can otherwise be expected to result from such standards. Where failing road management[346] or unlawful decision-making[347] justifies a standard of conduct that is virtually the same in the interests of safety and welfare or borders on a guarantee standard, it is logical that, in regard to the enormous consequences of climate change, the climate standard for the State is

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[346] Supreme Court 17 December 2010, ECLI:NL:HR:2010:BN6236, *NJ* 2012/155, with commentary from Hartlief (*Wilnis*).

[347] Supreme Court 26 September 1986, ECLI:NL:HR:1986:AC9505, *NJ* 1987/ 253 (*State v. Hoffmann-La Roche*).

more likely to fall into the category of 'red light' than that of 'maximum of 130 km per hour' (cf. Judgment, legal ground 4.52 et seq.).

480. As explained in detail in Chapter 1, the consequences of climate change include special risks as a 'dormant injury picture'. The climate damage that is currently immanent is greater than is currently being experienced. The effects of greenhouse gas emissions only occur from 30 to 50 years of age, up to a period of hundreds of years thereafter. Moreover, climate change consists of all kinds of tipping points, which can result in abrupt climate change that neither man nor nature can adjust to (Judgment Court of Appeal, legal ground 44). These tipping points are partly known, partly suspected, largely probably unknown. However, it has already been established that the risks of the already known tipping points increase 'at a steepening rate' with a temperature increase of only 1 to 2 ºC.[348] The exact consequences of a tipping point and the moment at which it occurs are unknown, and cannot be known until after it has occurred. If this is the case, the consequences are irreversible and potentially disastrous. And while the worst effects of climate change may only occur in the second half of this century and beyond, the degree of risk of their occurrence, particularly with regard to the tipping points, is determined by how we act over the next 10 years. This is another reason why there is an imminent risk requiring action as soon as possible, such as a CO2 reduction of at least 25% compared to 1990 levels by 2020 (see Judgment Court of Appeal, legal ground 63).

481. Responsible partial risk management takes into account the asymmetric irreversibility of climate policy. When there is significant reduction, this may decrease in the future. Rapid mitigation gives extra time for the great transition to a global economy based on alternative energy sources. This extra time is important not only because of the necessary technological developments, but also because of the social inertia described in Chapter 1. If, on the other hand, there is not a significant reduction, we will not be able to make up for it by doing more later on. Mitigation can be adjusted over time if the costs and consequences so dictate. Climate change, on the other hand, and its consequences, are irreversible over time scales of more than centuries and thus, limit the possibilities for learning and adapting by doing. For policy makers, this asymmetry in irreversibility, together with the urgency, should be a strong reason to apply the

[348] Judgment Court of Appeal, legal ground 44, with reference to AR5 p. 72.

precautionary principle, whereby significant short-term efforts can easily be relaxed at a later date if warranted.[349]

482. In the past, the government repeatedly confirmed the relevance and need for action, including by 2020, but then reconsidered its position for reasons unrelated to the understanding of the severity and dangers of climate change or the urgency of reducing emissions. And if a firm promise to reduce yesterday's CO2 emissions is not fulfilled several times without proper justification (Judgment Court of Appeal, legal ground 19-26, 52, 72), but is exchanged for an uncertain promise to reduce tomorrow's CO2 emissions, if only because the possibilities for mitigation or adaptation included in that promise are still highly uncertain (judgment Court of Appeal, legal ground 59), then there will come a time when the need will become (as far as possible) even more real and immediate (cf. judgment Court of Appeal, legal ground 46-53). According to current scientific evidence, the risks and costs of measures to reduce or limit the climatic impact of the CO2 emitted will increase exponentially (see judgment Court of Appeal, legal ground 47).

483. By not reducing CO2 emissions by 25% by 2020 compared to 1990 levels, the State deliberately fails to take the most minimum measures that are internationally recognised as necessary. At the same time, the State is evading what is considered internationally to be the most reasonable and, for the time being, the only achievable burden-sharing arrangement (cf. judgment Court of Appeal, legal ground 4-18). By failing to comply with this agreement, which has been complied with by its European peers, the State increases the risk that what is still open as a unique, peaceful route to risk management will no longer be available in the future. Every form of delay will lead to an increase in the probability of exceeding the temperature limit and in turn, in the costs of minimising this increased probability.(See judgment Court of Appeal, legal ground 14). In this respect, the climate risk is not only a real risk, but also an immediate risk in the sense that the odds that we will be able to avert it in a timely fashion are reduced with every day that we wait to mitigateCO2 emissions.

484. Whoever ultimately causes the consequences is then a question that is as irrelevant as it is individually indeterminable. Which non-compliance has

[349] See Notice on appeal, par. 4.71.

triggered lawlessness, road safety or permanent climate change? Due to the evolving nature of the risk and the multiple contributing sources, it is impossible to answer this question. This also applies to the risk of climate change.

485. Therefore, the interest in the court order Urgenda requested does not depend on a well-defined, specific harmful consequence of whether or not the minimum reduction of 25% by 2020 is complied with, as the State argues and as has already been disputed above. Damage is not required to request a court order anyway. Nor is it required that the imminent unlawful act will lead to damage. In the case of a court order request, it is sufficient that the standard of conduct in question is considered so important that its application is less dependent on the more individual adverse consequences, such as copyright protection, a restraining order or the protection of personality rights. Or when it comes to the effective legal protection of the current generation of people living in the Netherlands against a climate policy that focuses exclusively on a high reduction percentage in a distant year (e.g., a 95% reduction in 2050).Such a reduction is comfortably far away for the current generation of politicians and, above all, non-binding, as long as they may claim that this target is not yet unattainable. However, this does not offer an adequate reduction path if unnecessary and disproportionate risks with irreversible consequences are taken, as has been explicitly and repeatedly unanimously established in an international context and based on scientific evidence.[350]

486. In such cases, there is only one answer to the question of imputation of damage: the damage is most likely caused by the cumulative effect of all the contributions. Either because the greater the CO2 emissions, the greater the CO2 concentration in the atmosphere, the greater the global warming, and the greater the global damage.[351] Or because the global damage proves to be caused by 'less than all'.[352] In both cases, fairness requires that the free rider cannot evade liability. This rule has previously been applied by the Supreme Court in the field of environmental liability,

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[350] In the same sense, see: T.R. Bleeker, *Aansprakelijkheid voor klimaatschade: een driekoppige draak, NTBR* 2018/2.

[351] See Notice on appeal, par. 8,109.

[352] Gilead I., Green M.D., Koch A.B. *Proportional Liability: Analytical and Comparative Perspectives*, ECTIL, 2013, General Report, no. 52. See also: Supreme Court 17 January 1997, ECLI:NL:HR:1997:ZC2247, *NJ* 1997/230; Supreme Court 31 January 2003, ECLI:NL:HR:2003:AF1301, *NJ* 2003/346, with commentary from JBMV.

namely in the *Kalimijnen* judgment.[353]

487. As Urgenda has explained before the District Court and the Court of Appeal, the growers' claim against the French Mines de Potasse d'Alsace SA (MDPA) case also involved a relatively small contribution to environmental degradation for which the growers ultimately paid the price. That price consisted not only of a reduction yield, but above all, of the costs associated with the construction and maintenance of desalination equipment.[354] There was no sine qua non link between these costs and the relatively small but not negligible additional salt load resulting from MDPA's unlawful discharge. Like the State, the MDPA invoked this and stated that these costs had been incurred because of the already high salinity due to natural causes: salty sole and salty seepage. The Supreme Court disagreed and considered sufficient that these measures were not taken separately from the salt discharges, but also with a view to the total salt load, whereby the Supreme Court assumes that the District Court and the Court of Appeal ruled that MDPA was only liable for a proportional share in these costs.[355] The Supreme Court ruled that a division according to the degree of causation (probability) was reasonable.

488. In this case, the District Court rightly referred to the *Kalimijnen* judgment (judgment, legal ground 4.79). The reasonableness of such an obligation to contribute is substantiated by the District Court in the same legal ground. The District Court rightly refers to this case 'by analogy', because –unlike in the *Kalimijnen* judgment– the greatest damage is still regarded as a threat in this case. The District Court held that the requirement of 'with a view to' has been met. To this end, the District Court points to the fact that:

a. *'every anthropogenic greenhouse gas emission, however small, contributes to an increase in the level of CO2 in the atmosphere and thus to a dangerous climate change;'*

b. *'The Netherlands (...) has taken the lead in taking mitigation measures precisely with a view to achieving a fair burden-sharing*

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353 Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713, *NJ* 1989/743, legal ground 3.5.1.
354 J.H. Nieuwenhuis, annotation to: Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713, *NJ* 1989/743.
355 Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713, *NJ* 1989/743, legal ground 3.5.1.

and in that respect has committed itself to making a more than proportionate contribution to the reduction;'

c. *'Dutch emissions per capita are among the highest in the world.'*

489. Point a is unmistakably correct in the sense that 'every anthropogenic greenhouse gas emission, however small', contributes to 'dangerous climate change'. Every tonne of CO2 contributes equally to global warming, regardless of where and when it is emitted. As discussed above, the State wrongly puts into perspective the meaning and significance of an early, even sharing of the reduction effort in terms of the 2 °C target (judgment Court of Appeal, legal ground 47). The State fails to recognise that such a limit only gives a chance of 50%-66% that warming will remain below the level in question and that much lower quantities of emissions will not surpass the temperature limit. Every emission increases the risk of dangerous climate change. In addition, the State cannot prevent all further emissions from the territory of the Netherlands from one day to the next when the carbon budget limit has been used up. The complete phase-out of all emissions takes many years, if not decades. Every day that reduction is postponed, the necessary pace of reduction increases at a later date, and thus the risk of not being able to stay within the carbon budget. Moreover, the State's assertion ignores the risk of tipping points, which was discussed earlier.

490. Points b and c are also relevant and reasonable. Climate change raises the question of proper burden-sharing (judgment Court of First Instance, legal grounds 4.57, 4.76; judgement Court of Appeal, legal ground 26). This is inherent to the problem of 'the tragedy of the commons' and multiple, cumulative causation. The Netherlands has emitted a lot since the industrial revolution and still does so given its high per capita emissions. With these high emissions, the Netherlands has made a major contribution to the current warming of approximately 1 °C and the consequences thereof. At the same time, the burning of fossil fuels has contributed greatly to the prosperity of the Netherlands. The increased responsibility for the consequences so far, combined with the welfare associated with causing them, form the basis for the higher responsibility accepted by the State to take the lead in taking reduction measures towards the future. Given the high level of current emissions, the Netherlands will contribute more to the consequences of climate change for some time to come than, for example, countries that have historically

emitted less and have also been able to enjoy fewer benefits from those emissions. The State's choice not to reduce emissions by at least 25% by 2020 will give some people a certain advantage, while others will be worse off in view of the risk-increasing consequences. This dimension plays a role geographically, between population groups, as well as over time. It is precisely this second group whose rights are under real and immediate threat as a result of the State's choice. It is tempting, however, that the benefits already enjoyed, and still to be enjoyed in the short term, appear to be more certain than the risks with which others are being saddled. This form of cognitive dissonance fails to recognise that, when it comes to proportional sharing, the enjoyment of advantage is precisely the argument for also bearing the associated burden.[356] This in order to ensure that not just a few people benefit from the advantages, only to discover once others experience the disadvantages, a proportional burden sharing is no longer possible. According to current scientific insights, this will be the case if the government fails to comply with the agreed reduction by 2020. The burdens and benefits are not evenly distributed as we speak.

5.6 Discretionary power

491. All in all, the State's defence is actually sufficient for a more general invocation of discretion. However, discretion does not mean that the risk may exceed a certain level.[357] The government's discretion is relative. The government's discretion decreases as the risk becomes more urgent.[358]

492. Also, there is no reason why the court should be cautious in this respect and should, for example, await or respect any other outcome of the climate debate currently taking place in the Netherlands. This debate should actually take place within the scope of the international commitments entered into by the Netherlands. That turns out to be difficult as it is. The Dutch climate policy and debate illustrate how tempting it is to solve one's own inability to achieve a proportional response within the international context by stretching one's own space, at the expense of the –in terms of legal protection– most vulnerable people. Although the internationally shared need for CO2 reduction is the

356 T. Honoré: *Responsibility and fault*, 1999.
357 G. Snijders, *Overheidsprivaatrecht, bijzonder deel*, 2016, no. 33a.
358 Supreme Court 9 November 2001, ECLI:NL:HR:2001:AD5302, *NJ* 2002/446.

only reasonable, peaceful route to a proportional burden-sharing (cf. judgment Court of Appeal, legal grounds 27-29, 67-69), this reduction is not enforceable and can therefore only be achieved by everyone adhering to it. In the interest of Dutch citizens in particular, it is urgent that the Dutch courts guarantee that the Netherlands does not behave as a free rider, and that the Dutch climate debate can only take place within the already agreed upon scope.

493. This approach fits in with the role that the Dutch courts have in our system of government, and at the same time respects the discretion to which the State is entitled, and which the State has given substance through international agreements. Therefore, this approach is an effective way to help the State and the courts, as the State's body, to define 'economy-wide emission reductions' nationally and internationally. Such an order is proportional and consistent with the rights for which Urgenda requests protection: it does not extend beyond the obligation of the State.[359]

[359] W.Th. Nuninga, *Recht, plicht, bevel, verbod*, *NTBR* 2018/21, no. 3.

6 MARGIN OF APPRECIATION

494. Urgenda puts forward a defence against cassation complaints 1.2-1.3, 6.3, 7.5 and cassation complaint 8 below. These complaints are partly thematically related to the State's reliance on a margin of appreciation (1.2, 6.3, 7.5, 8.3, 8.8) and a fair balance or proportionality test (1.3, 8.4). Urgenda will first discuss these complaints below.[360]

495. Urgenda then discusses the State's rejected reliance on the alleged ineffectiveness of the reduction order (8.2, 8.2.1), on adaptation as an alternative to mitigation (8.2, 8.2.2), on climate financing for developing countries (8.2, 8.2.3) and on the waterbed effect (8.5). Under the heading 'other complaints', Urgenda discusses complaints relating to the precautionary principle (8.6), relativity (8.7), reduction in the EU context (8.9) and the 1.5 ºC target (8.10).

6.1 Margin of appreciation, fair balance and discretion were not failed to be recognised (cassation complaints 1.2, 1.3, 2.3, 6.3, 7.5, 8.3, 8.4, 8.8)

496. The State repeatedly argued from different perspectives that the Court of Appeal has failed to recognise the margin of appreciation.[361] Those complaints fail. The Court of Appeal clearly acknowledged that the State is entitled to a margin of appreciation, but –not incomprehensibly– the Court of Appeal has ruled that this discretion does not go as far as the State is currently trying to establish (more about this in par. 6.2.3 below). The Court of Appeal has taken account of the fact that the State has a margin of discretion and appreciation on all the themes it addresses (reduction pathway and pace, adaptation as a pseudo-alternative for mitigation, the precise degree of reduction by the end of 2020, its effectiveness in a global and European perspective, etc.). The integral reasoning of the Court of Appeal is precisely aimed at justifying the fact that, based on the existing legal standards and the internationally recognised necessity of a CO2 reduction of at least 25% by the end of 2020, the years of structural negligence by the State have reached an absolute lower limit. Therefore, the Court of Appeal could and should offer legal protection, without impermissibly interfering with the

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[360] Cassation complaint 8.1 merely builds on cassation complaints 1-7 and therefore has no independent meaning.

[361] Cassation complaints 1.2, 1.3, 2.3, 6.3, 8.3-8.4 and 8.8.

discretion of the State, whereby the Court left the State complete freedom with regard to the choice of measures to be taken.

497. In the appeal on cassation, the State relies on the margin of appreciation, as it follows from ECtHR , arguing that the Court of Appeal did not respect it in its application of Articles 2 and 8 of the ECHR. That is why Urgenda first of all discusses the exact meaning of this in the national context below. Next, Urgenda considers it useful to take a closer look at ECtHR case law on the margin of appreciation in the context of Articles 2 and 8 of the ECHR. Urgenda will then discuss the judgment of the Court of Appeal in more detail. Following on from this, Urgenda will examine the complaints in the appeal on cassation, which relate to the margin of appreciation which, according to the State, the Court of Appeal disregarded.

6.1.1 Margin of appreciation in national relations?

498. On the basis of the margin of appreciation doctrine, the ECtHR allows national authorities a margin of discretion with regard to some of the ECHR's provisions. The doctrine is not an established right of national authorities, but a policy under which the ECtHR justifies its choice for a certain testing frequency.[362] The ECtHR has introduced the margin of appreciation doctrine in order to take into account –in the international context in which the ECtHR operates– the special nature of the ECtHR as a supranational court when assessing the reasonableness of fundamental rights restrictions.[363] Since *Handyside v. United Kingdom,*[364] the ECtHR has stressed that the margin of appreciation is inextricably linked to –and has its origins in– the subsidiarity principle: the premise that national courts are the primary courts under the Convention as opposed to the ECtHR, and that national authorities are better-placed (i.e. in a better position to assess) than the ECtHR.[365]

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362 T. Barkhuysen & M.L. van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht. De betekenis van het ECHR en het EU-Grondrechtenhandvest (Mastermonografieën staats- en bestuursrecht)*, Deventer: Wolters Kluwer 2017, p. 26. See also E. Bjorge, *Domestic Application of the ECHR, Courts as Faithful Trustees,* Oxford: Oxford University Press 2015, p. 178.

363 J.H. Gerards, *ECHR - algemene beginselen*, SDU Uitgevers, The Hague: 2011, p. 183. See also J.H. Gerards and J.W.A. Fleuren, *Implementatie van het ECHR en de uitspraken van het ECtHR in de nationale rechtspraak, een rechtsvergelijkend onderzoek*, 2013 WODC, p. 81-82 (with extensive source references). See also *Manual on Human Rights and the Environment,* Council of Europe Publishing, 2012, p. 31.

364 ECtHR 7 December 1976, *Handyside v. United Kingdom,* no 5493/72, par. 48-49.

365 Compare E. Bjorge, *Domestic Application of the ECHR, Courts as Faithful Trustees,* Oxford: Oxford University Press 2015, p. 180-181.

499. The fact that the ECtHR, as a supranational court, applies the margin of appreciation doctrine in certain situations does not necessarily mean that the national court is also obliged to apply that margin of appreciation (in the same way). The justifications available to the ECtHR for applying the margin of appreciation doctrine do not apply (in the same way) to the national courts.[366] On the contrary, the primary responsibility for effectively ensuring the ECHR actually rests with the Member States. After exhausting all domestic remedies, the ECtHR then only tests for reasonableness when assessing whether treaty rights are sufficiently guaranteed. If national courts were to apply the same margin of appreciation as the ECtHR, national courts would first test for reasonableness and subsequently the ECtHR would also test for reasonableness, thus creating an undesirable 'double test of reasonableness'.[367] This is undesirable because it undermines the effective and efficient legal protection envisioned by the ECtHR.

500. The ECtHR has also explicitly confirmed that national courts are (thus) not obliged to apply the margin of appreciation (in the same way) in the *A et al. v. United Kingdom* case[368]:

> '*The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level.*'

501. This is not the case in many ECHR countries. For example, a comparative law study of the legal systems of Germany, France and the United Kingdom showed, among other things, that none of these

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366 For more information, see, for example, the detailed discussion by J.H. Gerards in *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in National case-law*, Intersentia Publishing, Cambridge: 2014, p. 27 - 32, T. Barkhuysen, 'Het ECHR als integraal onderdeel van het Nederlandse materiële bestuursrecht', in: T. Barkhuysen et al. (eds.), *De betekenis van het ECHR voor het materiële bestuursrecht* (VAR preliminary advice), The Hague: Boom Juridische uitgevers 2004, p. 97-98, J.G.C. Schokkenbroek, 'Algemene verkenningen naar de taken van de Straatburgse en de nationale organen', in: A.E. Alkema et al., *40 jaar Europese Conventie voor de rechten van de mens en de Nederlandse rechtsorde* (Constitutional law conference 1990), Leiden: Stichting NJCM-Boekerij, p. 80 and A.J. Nieuwenhuis, 'Van proportionaliteit en appreciatiemarge: de noodzakelijkheidstoets in de jurisprudentie van het ECtHR', in: A.J. Nieuwenhuis, B.J. Schueler & C.M. Zoethout (eds.), *Proportionaliteit in het publiekrecht,* Deventer: Kluwer 2005, p. 56-58 and Gerards & Fleuren, *Implementatie van het ECHR en de uitspraken van het ECtHR in de nationale rechtspraak, een rechtsvergelijkend onderzoek*, 2013 WODC, p. 46.

367 N. Jak and J. Vermont, 'De Nederlandse rechter en de margin of appreciation de rol van de margin of appreciation in de interne horizontale relatie tussen de rechter, de wetgever en het bestuur', *NTM/NJCM-bull* 2007, vol. 32, p. 4.

368 ECtHR 19 February 2009, *A. et al. v. United Kingdom*, no. 3455/05, par. 184.

countries *'has adopted into its domestic application of the ECHR the margin of appreciation as applied by the European Court*'.[369] In line with this, Dutch literature shows that national courts are not obliged to follow the ECtHR in its application of the margin of appreciation doctrine.[370] Nevertheless, Dutch courts do this regularly, which has led to critical reactions in the literature.[371] For example, Gerards and Fleuren write:[372]

> '*Especially in the Netherlands, this [margin of appreciation] doctrine is regularly invoked, although often in an incorrect way. If the ECtHR leaves a wide margin of appreciation to the State in a certain type of situation, the Dutch court usually deduces from this that this margin of appreciation accrues to the legislator without further ado. For this reason, the court is almost always cautious in such cases. The fact that the doctrine was not developed for use by the national courts, but is a mechanism for the ECtHR to position itself towards all the national authorities, is not or hardly recognised.'*

Thus, simply because the ECtHR tests for reasonableness does not automatically mean that the national court must do so (in the same way).

502. According to cassation complaints 1.2, 6.3, 7.5 and 8.3, the State (already) wrongly assumed that the margin of appreciation that the ECtHR would leave to the State in the present situation should be filled in by the (national) court in the same (strict) manner and thus, that the Court of Appeal failed to recognise the margin of appreciation. To that extent, these complaints and the other complaints associated with the

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369 See E. Bjorge, *Domestic Application of the ECHR, Courts as Faithful Trustees,* Oxford: Oxford University Press 2015, p. 27.

370 See, for example, Advocate General Vlas in his opinion on 9 September 2016, ECLI:NL:PHR:2016:898, par. 2.6, with references.

371 See also, among others, N. Jak and J. Vermont, 'De Nederlandse rechter en de margin of appreciation de rol van de margin of appreciation in de interne horizontale relatie tussen de rechter, de wetgever en het bestuur', *NTM/NJCM-bull* 2007, vol. 32, p. 4 with references; J.H. Gerards and J.W.A. Fleuren in *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in National case-law*, Intersentia Publishing, Cambridge: 2014, p. 249, I.G.C. Schokkenbroek, 'Algemene verkenningen naar de taken van de Straatburgse en de nationale organen', in: A.E. Alkema et al., *40 jaar Europese Conventie voor de rechten van de mens en de Nederlandse rechtsorde* (Constitutional law conference 1990), Leiden: Stichting NJCM-Boekerij, p. 80 and T. Barkhuysen, 'Het ECHR als integraal onderdeel van het Nederlandse materiële bestuursrecht', in: T. Barkhuysen et al. (eds.), *De betekenis van het ECHR voor het materiële bestuursrecht* (VAR preliminary advice), The Hague: Boom Juridische uitgevers 2004, p. 97-98.
See also, with regard to the review of Acts of Parliament (which does not apply in this case), for example, P. Wattel, 'Het ECHR is te belangrijk in Nederland', *NJB* 2016/945, p. 1; T. Barkhuysen, 'De rechter en het Europese maaiveld', *NJB* 2013/2010, p. 1 and F. Vlemminx, 'Constitutionele creativiteit en rechterlijke zelfbeperking', *NJB* 2014/867.

372 J.H. Gerards and J.W.A. Fleuren, *Implementatie van het ECHR en de uitspraken van het ECtHR in de nationale rechtspraak, een rechtsvergelijkend onderzoek*, 2013 WODC, p. 46.

appeal in cassation are based on a legally incorrect principle, and they have already failed for that reason. For the sake of completeness, Urgenda discusses the margin of appreciation in ECtHR case law below.

6.2 Margin of appreciation in the ECtHR case law

503. It is clear from the judgment of the Court of Appeal that the Court has indeed granted the State (sufficient) margin of appreciation, even if, in the national context, the margin of appreciation doctrine applied by the ECtHR would be followed.

504. The ECtHR applies this margin of appreciation in particular in situations where it is necessary to assess whether a breach of a particular ECHR Article is justified in the light of the justifications set out in paragraph 2 of that Article, as in the case of Article 8. The margin of appreciation thus plays a particular role in the restrictive clauses of Articles 8 to 11 of the ECHR, which contain abstract terms and require a balancing of interests (the same applies, incidentally, to the proportionality and fair balance test, which will be discussed below).[373] In principle, Articles 2, 3 and 4 of the ECHR lack a margin of appreciation, given the fundamental nature of the human rights they protect.[374]

505. In a number of cases, the ECtHR has left a margin of appreciation to States with regard to violations of positive obligations under Article 2 of the ECHR,[375] but Gerards, among others, rightly points out that there are also many rulings in which the ECtHR leaves 'no margin of appreciation at all' (even) in the case of positive obligations under Article 2 of the ECHR:[376]

> *'This is particularly the case for the absolute wording of the provisions of Articles 2 and 3 ECHR. Since no restrictions have been allowed (or only to a very limited extent, as in Article 2 ECHR), it makes no sense for the Court of Justice either to grant the State a certain margin of appreciation in*

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[373] J.G.C. Schokkenbroek, 'Methoden van interpretatie en toetsing: Een overzicht van beginselen toegepast in de Straatburgse jurisprudentie', *ECHR R&C* (section 2.1) 2000, p. 20.

[374] J.G.C. Schokkenbroek, 'Methoden van interpretatie en toetsing: Een overzicht van beginselen toegepast in de Straatburgse jurisprudentie', *ECHR R&C* (section 2.1) 2000, p. 21; N. Jak & J. Vermont, 'De Nederlandse rechter en de margin of appreciation', NJCM-Bulletin, vol. 32 (2007), no. 2, p. 127.

[375] For example, ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99, par. 107 and ECtHR 20 March 2008, *Budayeva et al. v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, par. 135.

[376] J.H. Gerards, 'ECHR, algemene beginselen', The Hague, SDU Uitgevers: 2011, p. 255.

determining the reasonableness of such restrictions. This strictness is also reflected in the positive obligations which the Court of Justice derived from those provisions. While it is true that the Court of Justice has sometimes recognised that these are best efforts rather than result obligations, it has seldom explicitly granted a margin of appreciation to States in the fulfilment of these obligations. In a more general sense, it can even be said that the Court places high demands on the efforts that a State must make in the context of Articles 2 and 3.'

506. With regard to the positive obligations under Article 8 of the ECHR, the ECtHR may leave States a margin of appreciation in assessing whether the State has taken reasonable and appropriate measures to protect the interests of citizens protected by Article 8(1) under the ECHR. In the *López Ostra v. Spain* case,[377] the ECtHR ruled on this matter:

'*Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analysed in terms of a positive duty on the State — to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Art. 8—, as the applicant wishes in her case, or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Art. 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (...).*'

507. From this it follows that the standard that applies when answering the question whether a State has violated its positive obligations under Article 8 of the ECHR, is comparable to the standard that applies when answering the question whether a State violation of an interest protected by Article 8(1) of the ECHR is justified on the basis of Article 8(2) of the ECHR. This requires, among other things, that the violation is necessary in a democratic society. This criterion includes a proportionality

[377] ECtHR 9 December 1994, *López Ostra v. Spain*, no 16798/90, par. 51.

assessment, evaluating whether a State has struck a fair balance between the rights of those affected (or threatened) and society as a whole. The ECtHR can therefore leave States with a certain margin of appreciation in this assessment.[378]

508. The scope of the margin of appreciation that the ECtHR leaves to the States Parties is not fixed in advance, but is context-dependent. For example, in the case of *S. and Marper v. United Kingdom,*[379] the ECtHR considered the following:

> '*(...) The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (...). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (...). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (...).*'

509. ECtHR case law shows that when States do not comply with their own procedural and substantive (environmental) standards, the ECtHR gives them a more limited margin of appreciation when balancing interests.[380] In line with this, Sanderink concludes, with reference to a long list of ECtHR rulings,[381] that in order to specify the scope of ECHR provisions, it is of great importance whether '*national (safety) standards or international (safety) standards (e.g. drawn up by the World Health Organisation) are exceeded*'. [382]

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[378] J.H. Gerards, *ECHR - algemene beginselen*, SDU Uitgevers, The Hague: 2011, p. 143.
[379] ECtHR 4 December 2008, *S and Marper v. United Kingdom*, nos. 30562/04 and 30566/04, par. 102 (underlining added, counsel).
[380] See, for example, ECtHR 16 November 2004, *Moreno Gómez v. Spain*, no. 4143/02 and ECtHR 9 November 2010, *Dees v. Hungary*, no 2345/06. See also Reply, par. 382 et seq. with bibliographical references.
[381] Namely: ECtHR 16 November 2004, *Moreno Gómez v. Spain*, par. 59-60 (case number 4143/02); ECtHR 9 June 2005, *Fadeyeva v. Russia*, par. 87-88 (case number 55723/00); ECtHR 27 January 2009, *Tătar v. Romania*, par. 95 (case number 67021/01); ECtHR 20 May 2010, *Oluić v. Croatia*, par. 52-62 (case number 61260/08); ECtHR 10 February 2011, *Dubetska et al. v. Ukraine*, par. 111, 114-115 and 118-119 (case number 30499/03); ECtHR 21 July 2011, *Grimkovskaya v. Ukraine*, par. 61-62 (case number 38182/03); ECtHR 24 April 2014, *Udovičić v. Croatia*, par. 141-149 (case number 27310/09).
[382] D.G.J. Sanderink, *Het ECHR en het materiële omgevingsrecht (State and Law no. 22)*, Deventer: Wolters Kluwer 2015, p. 51.

510. The extent to which States are granted a margin of appreciation for their positive obligations is related to the choice of measures put in place to prevent or terminate a particular infringement of protected ECHR rights.[383] For example, the ECtHR ruled in the case of *Budayeva et al. v. Russia:*

> '*As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. (...)*'[384]

511. Although the ECtHR thus leaves the Contracting States (in Article 8 of the ECHR) a margin of appreciation with regard to the choice of measures to be taken, Barkhuysen and Van Emmerik[385] conclude, after an analysis of the relevant case law of the ECtHR on the duty of care of States under ECHR:

> *'From the case law cited above, the basic rule can be derived that the government must take all measures that can reasonably be demanded, also in view of the powers to which it is entitled, to prevent a real and direct (life or health) threat of which it is or should be aware, from materialising.'*

512. As a result, the ECtHR ruled on several occasions that, although States are entitled to a wide margin of appreciation in a particular area, there is (nevertheless) an unauthorised violation of ECHR-protected rights in that particular case, as was explicitly ruled in *Öneryildiz v. Turkey,*[386] *Fadeyeva v. Russia*[387] and *Budayeva et al. v. Russia*.[388]

6.2.1 Proportionality and fair balance test in the application of Article 8 of the ECHR

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383 See also the contribution of Brans and Winterink, 'Onzekerheid en aansprakelijkheid voor schade door klimaatverandering. Welke rol speelt het voorzorgsbeginsel?' in the preliminary advice *Naar aansprakelijkheid voor (de gevolgen van) klimaatverandering*, *VMR* 2012-1, p. 129. See also Administrative Jurisdiction Division 18 November 2015, ECLI:NL:RVS:2015:3578, *AB* 2016/82, legal ground 39.2.

384 ECtHR 20 March 2008, *Budayeva et al v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, par. 134. See also ECtHR 9 June 2005, *Fadeyeva v. Russia*, no 55723/00, par. 124.

385 T. Barkhuysen and M.L. Van Emmerick, '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. 50.

386 ECtHR 30 November 2004, *Öneryildiz v. Turkey*, no. 48939/99.

387 ECtHR 9 June 2005, *Fadeyeva v. Russia*, no. 55723/00.

388 ECtHR 20 March 2008, *Budayeva et al v. Russia,* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

513. The State repeatedly invokes the requirement of a (measurable) proportionality and/or fair balance test.[389] The ECtHR has applied this test in cases concerning Article 8 of the ECHR. A breach of Article 8can be justified if the criteria set out in Article 8(2) are met, including the criterion that the breach must be necessary in a democratic society. When assessing whether this criterion is met, a proportionality assessment is important, as is whether the State has struck a fair balance between the rights of those affected or threatened and society as a whole.

514. This proportionality assessment and/or fair balance test does not apply to the application of Article 2 of the ECHR, as the State itself seems to recognise.[390] A proportionality test and/or a fair balance test do(es) not seem logical in the case of a violation of Article 2 in view of the fundamental character of that treaty right.[391] Article 2 of the ECHR also does not contain any possibility of justifying a breach in accordance with Article 8(2) of the ECHR. Thus, the question of whether such a breach is 'necessary', with the corresponding proportionality and fair balance test, is not relevant either.[392]Furthermore, as the Court of Appeal recognised in legal ground 42, no 'impossible or disproportionate burden' can be demanded from the State and also the measures to be demanded pursuant to Article 2 of the ECHR must be 'reasonable'. As Urgenda will explain in more detail below, the Court of Appeal did not fail to recognise these criteria.

6.2.2 The special significance of Article 2 of the ECHR; no interest in complaints about Article 8 of the ECHR

515. The Court of Appeal established that the consequences of climate change caused by the emission of greenhouse gases are already resulting in fatalities in the Netherlands. Moreover, the Court of Appeal has taken into account the even more serious consequences that the current generation of Dutch citizens will face this century, if mitigation measures are not taken with a high degree of urgency. For more information, see in

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389 Cassation complaints 1.2, 2.3, 8.3.5 and 8.4.
390 Cassation complaints 1.2, 8.4.
391 See, for example, par. 6.2.2 below with references.
392 It is significant, for example, that the words 'fair balance' do not appear in the ECtHR case law overview on Article 2 of the ECHR (as opposed to 18 times in the ECtHR case law overview on Article 8). See *Guide on Article 2 of the European Convention on Human Rights*, version of 31 December 2018 and the *Guide on Article 8 of the European Convention, of Human Rights*, version of 31 August 2018.

particular Chapter 1. These findings have led the Court of Appeal in legal ground 45 to base their analysis under Articles 2 and 8 of the ECHR on the real threat that the current generation of residents will be confronted with loss of life. The Court of Appeal has made these findings against the assertions of Urgenda, which the Court of Appeal considered to be insufficiently substantiated and contested by the State.[393]

516. This constitutes a violation of the fundamental right to life protected by Article 2 of the ECHR. In case of such a violation, a margin of appreciation is completely absent. In this context, Urgenda refers –in addition to all of the above– to the recent opinion of Advocate General Vlas in the (second) Srebrenica case.[394] It is true that this case relates to a completely different set of facts, a different type of risk and a different position of the State, but the general consideration of Advocate General Vlas with regard to the positive obligations of a State resulting from Article 2 of the ECHR is instructive for the present case. Vlas concluded[395]:

> *'From what I have discussed above with regard to the obligations of the State under the ECHR, it follows in my opinion that in the event that the State knows or can know that (as a result of actions of third parties) there is a real risk of death or of inhuman treatment of certain persons or groups of persons over whom the State has jurisdiction or for whom the State has a duty of care within the meaning of Section 6:162 DCC, the State is bound to take all measures within reason in order to eliminate this risk as much as possible. This duty also exists in war situations, in which peacekeeping forces deployed by the State are present.'*

517. What this passage illustrates is that once it has been established, as in this case, that there is a 'real and imminent risk' (known to the State and for persons within the jurisdiction of the State), the State is reasonably obliged to take all measures to remove that danger as much as possible. Apart from the restrictions referred to above (no impossible or disproportionate burden; concrete and reasonable measures), no margin of appreciation remains. The State also cannot invoke the fair balance test or a proportionality assessment with a view to the interests (economic and other) served by the State's failure to do so.

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393 See Notice on appeal, par. 8.272, 8.295 and 11.3. See also summons, par. 38, 39 and 126.
394 Opinion by Advocate General Vlas dated 1 February 2019, ECLI:NL:PHR:2019:95.
395 Opinion by Advocate General Vlas dated 1 February 2019, ECLI:NL:PHR:2019:95, par. 5.24.

518. Since the Court of Appeal's finding that there has been a violation of Article 2 of the ECHR can carry the operative part independently, the State has no interest in what it argues about the margin of appreciation and a proportionality and/or fair balance test in the application of Article 8 of the ECHR. Cassation complaints 1.2, 1.3, 6.3, 7.5, 8.3, 8.4 and 8.8 fail(s) for this reason alone.

6.2.3 Margin of appreciation and fair balance test in the judgment of the Court of Appeal (in particular cassation complaints 1.2, 1.3, 8.3, 8.4)[396]

519. In addition, the State's complaints about the margin of appreciation also fail, since the Court of Appeal did not fail to recognise the margin of appreciation within the State's discretion. In legal ground 42, the Court of Appeal argued that the State has a 'wide margin of appreciation' with regard to the choice of measures to be taken.

520. Contrary to the State's presumption in cassation complaints 1.3, 6.3 and 8.3, the Court of Appeal did in fact recognised that the State is entitled to a certain degree of discretion, also in regard to the moment at which and the pace at which, the required reduction must take place. From legal ground 45 to the conclusion in legal ground 74, the Court reasons that the State's invocation of a margin of appreciation fails, which is precisely aimed at justifying that in this case, in view of the special nature and seriousness of the risk of climate change, the absolute minimum limit – and therefore also the limit of the State's discretion– has been reached. As recognised by the District Court and the Court of Appeal and in view of the State's pattern of conduct in the past, the international consensus (that has long been known to the State) about the minimum necessary reduction by the end of 2020 and the absence of a credible alternative reduction path both justify the Court upholding the State's commitment made in the past. These factors limit the discretion of the State and, given the particularly serious nature of the risk of climate change, mean that the State is in breach of its positive obligation by not taking the minimum necessary mitigation measures.

521. The reasoning of the Court of Appeal, which takes into account the margin of appreciation, starts with its finding that there is a real threat of

[396] Cassation complaints 6.3 and 7.5 have already been discussed above.

dangerous climate change. As a result, there is a serious risk that the current generation of residents will face loss of life and/or disruption of their family life. This means that, except as to the choice of which measures to implement, the margin of appreciation is strict and, in any case, not as broad as the State claims. Against this background, the Court of Appeal has justified in a comprehensible and sufficiently reasoned manner that and why a margin of appreciation does not stand in the way of the reduction order.

i) there is (broad) consensus (also between the state and Urgenda) that the global temperature increase should be kept well below 2 ºC, while climate science has now recognised that a safe temperature increase should not even exceed 1.5 ºC (all this relative to the pre-industrial level) (Judgment Court of Appeal, legal ground 44, 7th bullet in conjunction with legal ground 50);
ii) it is essential that the reduction effort is deployed as early as possible: the Netherlands has made limited efforts so far and a very substantial effort will be required to reach 49% by 2030; this mainly concerns the need for low cumulative emissions. As a linear derivative of its own targets, the State should reduce its emissions by 28% by the end of 2020 (Judgment Court of Appeal, legal ground 47);
iii) as the State has long known (Judgment Court of Appeal, legal ground 51), an emission reduction of 25-40% by 2020 (Judgment Court of Appeal, legal ground 49 and 50) is actually necessary for the achievement of the 2 ºC target –which is a minimum requirement– as has been confirmed by successive COPs (Judgment Court of Appeal, legal ground 51). Moreover, in October 2009, the State itself wrote that a 25-40% reduction in 2020 was necessary in order to '*maintain a credible course to keep the 2 degrees target within reach*' (Judgment Court of Appeal, legal ground 52) and the State set its own reduction target of 30% by 2020 (Judgment Court of Appeal, legal ground 19, 52 and 66) until 2011. On this year, the State reduced this policy target to 20% by 2020 in the EU context, without scientific justification and despite the fact that more and more was becoming known about the serious consequences of greenhouse gas emissions for global warming (Judgment Court of Appeal, legal ground 72);
iv) the necessary reduction of 25-40% means there is only a 50% chance of limiting warming to 2 °C and that an even greater reduction

would be required to limit warming to 1.5 °C (Judgment Court of Appeal, legal ground 50);

v) moreover, reaching these tipping points can lead to an even worse situation than is currently being taken into account. The precautionary principle implies that the State must provide adequate protection against this by achieving the (minimum) required CO2 reduction of 25% by 2020 (Judgment Court of Appeal, legal ground 63 in conjunction with legal ground 53);

vi) in order to (be able to) actually and effectively protect the rights protected by Articles 2 and 8 of the ECHR, the minimum necessary lower limit implies that the State must have achieved at least a 25% CO2 reduction by the end of 2020 (Judgment Court of Appeal, legal ground 53 in conjunction with the above). The margin of appreciation / margin of discretion to which the State is entitled does not make this otherwise (Judgment Court of Appeal, legal ground 53, 74);

vii) the State is (however) free how it decides to achieve that (minimum necessary). With regard to the measures to be taken, the State therefore has a (wide) margin of discretion (Judgment Court of Appeal, legal grounds 42, 67 and 74);

viii) although adaptation can mitigate the negative effects of climate change, the State has not made it plausible that the '*potentially disastrous consequences of excessive global warming can be adequately prevented by this*' (Judgment Court of Appeal, legal ground 59). This is all the more true in view of the risk of tipping points against which adaptation measures do not offer sufficient protection (see Judgment Court of Appeal, legal ground 44, fourth bullet point).

522. Furthermore, the Court of Appeal (Judgment Court of Appeal, legal ground 54 et seq.) addressed in a reasoned manner the other assertions of the State, which are allegedly relevant to the margin of appreciation, and against which the appeal in cassation objected in vain. The Court of Appeal further ruled that there is no question of an impossible or disproportionate burden on the State (judgment Court of Appeal, legal ground 42), also in view of the fact that the State had been aware of the seriousness and dangers of the climate problem for some time (judgment Court of Appeal, legal ground 66) and nevertheless has done too little so far (judgment Court of Appeal, legal ground 71). It is true that the CO2 reduction, which is a minimum requirement by 2020 in order to offer

sufficient effective and actual protection of the interests protected by Articles 2 and 8 of the ECHR, will require (financial) sacrifices. However, according to the Court of Appeal, this does not make the decision disproportionate in view of the interests at stake and the major risks involved, including '*the risk of irreversible damage to the global ecosystems and the habitability of our planet*' (Judgment Court of Appeal, legal ground 67).

523. The Court of Appeal's ruling does not show that a margin of appreciation/policy and/or discretion has not been recognised. Its ruling is factual and its reasoning is comprehensible and, in any case, sufficiently substantiated. In addition, Urgenda would like to reiterate that the Supreme Court did not see any reason in earlier socially controversial cases to penetratingly review a test, linked to an assessment of the facts, of a degree of discretion in cassation. The judgment of the Supreme Court in *NFE et al. v. State* may serve as an example.[397] Although the Supreme Court, possibly in the footsteps of Advocate General Vlas, does not mention the margin of appreciation, it is clear that the actual application of the fair balance test was left to the court of fact to a very large extent.

524. The Court of Appeal also included the proportionality and fair balance test (with regard to Article 8 of the ECHR) in its ruling (see above). The State's complaints fail on these grounds.[398] This also applies to cassation complaint 2.3, in which the State argues that the Court of Appeal should have specified who exactly will suffer which negative climate change impacts, because otherwise the fair balance test could not be carried out. As explained above, the Court of Appeal was not obliged to determine in more concrete terms who would (or will) experience exactly which specific negative climate change effect, partly because this would jeopardise the effective and actual legal protection that the ECHR aims to provide (compare Judgment Court of Appeal, legal ground 64). It also follows from the ECtHR case law that the ECHR also offers protection, or at least can offer protection, to a certain collective of existing persons, such as society as a whole (see section 3.3 above) or the current generation of Dutch citizens (compare Judgment Court of Appeal, legal grounds 37 and 45). In such a case, a fair balance weighing the interests

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397 Supreme Court 16 December 2016, ECLI:NL:HR:2016:2888, *NJ* 2017/132.
398 Cassation complaints 1.2, 2.3, 8.3.5 and 8.4.

of an affected individual against society as a whole is not possible nor required. In any case, the proportionality test conducted by the Court of Appeal will suffice, including its finding that no unreasonable measure is required from the State and that there is no question of an impossible or disproportionate burden.

6.2.4 Further defence against cassation complaints 1.2, 1.3. 8.3, 8.4, 8.8

525. In the light of the above, it is clear that cassation complaints 1.2 and 1.3 fail. This also applies to the general complaint in cassation complaint 8.3. Contrary to what is argued in cassation complaint 8.3.1, the Court of Appeal has indeed provided (sufficient) insight into its reasoning as to why the margin of appreciation does not stand in the way of the award of the reduction order. Cassation complaint 8.3.2 fails, because this cassation complaint builds on the - failing - cassation complaints 4-7.

526. As explained in detail above, contrary to what is stated in cassation complaint 8.3.3, the Court of Appeal has indeed considered a margin of appreciation that may exist with respect to the moment and pace at which measures are taken against an infringement of the rights protected by Articles 2 and 8 of the ECHR. This cassation complaint fails insofar as it invokes the State's assertion that the risks of climate change for the inhabitants of the Netherlands are not yet occurring. As Urgenda has argued with reasons, and the State did not contradict (or did so without reason), the climate change impacts that are relevant for Articles 2 and 8 of the ECHR are already occurring now, while the very serious dangers of climate change in this century are the immediate consequence of current emissions. The Court of Appeal rejected the State's assertion that there is a sufficiently realistic alternative reduction pathway that meets the precautionary principle in order to achieve the 2 °C target.

527. In cassation complaint 8.3.4, the State argued primarily that it was up to it to draw conclusions from scientific reports such as those of the IPCC. If the State means that it has at its disposal the factual conclusions that are attached to scientific insights, then this is a statement that is both remarkable and legally incorrect. Based on Urgenda's assertions, the court is free to draw conclusions from scientific reports and to value them as scientific evidence. Moreover, in legal ground 49 the Court of Appeal has given detailed reasons why the alternative reduction paths set out in AR5 are based on premises that, according to the current state of science

and the limited possibilities that exist in practice, are not realistic or are insufficiently realistic. This is not something that, as a result of a margin of appreciation, is exclusively for the State to judge. This would mean that any debate on the realism of alternative reduction scenarios would not be possible in law. This is wrong and unacceptable. To the extent that the complaint is based on cassation complaints 4.1-4.8, Urgenda refers to its defence against those cassation complaints.

528. Cassation complaint 8.3.5 fails due to the multi-layered reasoning of the Court of Appeal as described above. As stated above, this focuses on the need for a 25-40% reduction by the end of 2020, in order to maintain a realistic prospect of achieving the (at least) 95% target by 2050. This consideration is based, among other things, on the fundamental principle that a disproportionate burden on the carbon budget today creates an unacceptably high risk that mitigation measures will not be sufficient in the future. This main consideration is accompanied by a series of facts, including the past pattern of the State's behaviour of continuing to postpone real measures, despite expressing high ambitions. All of this, despite the fact that the State itself has stated that a reduction of 25-40% is necessary in order to 'remain on a credible path in order to keep the 2 °C target within reach' and yet, without scientific substantiation, has adjusted its ambitions downwards.

529. In accordance with Urgenda's primary defence, the Court thus rejected the State's appeal to the cost-effectiveness of alternative reduction scenarios. Contrary to what cassation complaint 8.3.5, last sentence, states, the ruling of the Court of Appeal is not incomprehensible. What the Court of Appeal is considering in legal ground 71 is merely a confirmation that, in light of the disproportionate future social costs, the reduction order is necessary. Therefore, in accordance with Urgenda's alternative defence, the Court of Appeal was correct to take into account the foreseeable disproportionate costs that will have to be incurred in order to achieve a (therefore completely unrealistic) reduction of (at least) 95% by 2050, in the absence of the required reduction in the short term.

530. Incidentally, the State does not specify what the 'very high (social and other) costs' consist of, and to what extent these costs were (not) caused by the fact that, even after the courts judgment, the State did not take the necessary measures with the required urgency. A proper response by the State could have been expected, especially in light of the extensively

substantiated challenge by Urgenda[399]. Unlike the reference to Plta appeal par. 4.59 suggests, the State did not address Urgenda's quite comprehensive defence in an appeal plea. In essence, that substantiation and well-documented defence included robust scientific evidence indicating that waiting for a reduction did not only create an unacceptable risk of failure, but was also (much more)likely to be less cost effective.[400] It is crucial in this respect that, as Urgenda has explained in detail in its appeal, postponement of mitigation efforts leads to a sharp increase in future costs; future delayed mitigation efforts will have to be more drastic (and therefore, more disruptive) in order to still achieve the desired reduction. As mentioned above, Urgenda has supported this cost ineffectiveness of delayed mitigation efforts on appeal by citing UNEP and IPCC reports.[401]In addition, Urgenda specifically pointed out that the IPCC also concluded that the above cost ineffectiveness applies at the level of individual countries.[402] Viewed in that light, it would have been up to the State to provide further substantiation for its statements, which were incompatible with Urgenda's defence. However, it failed to do so.

531. In the light of the above, the Court of Appeal has by no means erred in law with regard to any discretion and/or margin of appreciation to which the State is entitled, and its ruling is sufficiently and comprehensibly substantiated.

532. Cassation complaint 8.3.6 complains about a purely conclusive partial consideration by the Court of Appeal. In legal ground 46 to 74, the Court of Appeal rejected the State's reliance on any discretion to which it is entitled. This finding was not only given in legal ground 67 and/or 69.

533. Cassation complaint 8.3.7 isolates the word 'desirable' in legal ground 47 and argues that an assessment of desirability (in order to reduce emissions at an early stage) is part of the State's prerogative. However, this is not what the Court of Appeal has ruled, as is evidenced by the following sentence alone, from which it follows that, whatever the scope of its entire ruling, postponement of reduction leads to unacceptably higher climate risks.

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399 Notice on appeal, par. 6.25-6.35; 6.51-6.73; 6.102; 7.33; 7.42; 8.202-8.220.
400 Notice on appeal, par. 6.29-6.32; 6.51-6.73; 8.202-8.220.
401 See, for example, Notice on appeal, par. 6.27-6.31.
402 Notice on appeal, par. 6.31.

534. Cassation complaint 8.3.8 fails, because cassation complaint 2 fails. Moreover, given the enormous extent of the risk that the Dutch population (as determined by the Court of Appeal), it can be concluded that the Court did not refuse the reduction order based on a degree of discretion / margin of appreciation to which the State is entitled.

535. Cassation complaint 8.4 (and 1.2), as explained above, complains in vain that the Court of Appeal did not apply a fair balance test / proportionality test. This test does not apply under Article 2 of the ECHR, and therefore the cassation complaint fails due to lack of relevance. As far as Article 8 of the ECHR is concerned, the Court of Appeal did, in the light of the debate before the District Court and Court of Appeal, take into account the State's assertions about the extremely minor effect of a further reduction in the Netherlands by 2020. At the same time, the Court of Appeal did not need to further discuss the State's cost-effectiveness argument. The repeated complaint in cassation complaint 8.3.8 fails on the grounds already discussed.

6.3 Effectiveness: are (additional) mitigation measures taken by the Netherlands pointless? (cassation complaint 8.2.1)

536. The (in)effectiveness argument invoked in cassation complaint 8.4 is also addressed in cassation complaint 8.2.1. The State argues that based on Article 2 and/or 8 under the ECHR, the State is (also) not obliged to take measures that, when considered in isolation, cannot combat (or at least limit) the risk of climate change and global warming. Elaborating on this, the cassation complaint contains complaints about legal ground 63 (precautionary principle) and legal ground 64 (rejection of reliance on a lack of a causal link).

537. The cassation complaint has already failed because it does not contain any known complaint about the primary ground in legal ground 62, which rejects the State's defence as set out in legal ground 61. In it, the Court of Appeal concluded that the fact that this is a problem on a global scale and that the State cannot solve this problem on its own 'does not relieve the State of its obligation to take measures from its territory to the best of its ability that, together with the efforts of other States, offer protection against the dangers of severe climate change'. Against the background of Urgenda's defence that Section 6:162 DCC and Articles 2 and 8 of the ECHR must be interpreted and applied taking into account the global

nature of the risk created by cumulative causation, the ruling in legal ground 62 provides independent and sufficient ground to reject the States defence in legal ground 61. This is not the case for legal ground 63 (on the precautionary principle) and neither for the considerations in legal ground 64, which are of a complementary nature. To the extent that the cassation complaint is based on the fact that a 25% reduction by 2020, or an associated additional reduction compared to the status quo, does not make an effective contribution, the State failed to consider the broader aim of ensuring that, at the very least and a through a timely and sufficient reduction, it remains on a credible pathway to achieving a 95% reduction by 2050. For the record, Urgenda makes the following comments.

538. The Court of Appeal has interpreted and applied Articles 2 and 8 of the ECHR, which are fully in line with an evolving interpretation of the ECHR, tailored to the nature of the risk of climate change. Urgenda refers to Chapter 4 above and will not repeat it now. There is no precedent in the ECtHR caselaw establishing that in order to assess whether a positive obligation rests on a Contracting State, that State should have full control over the risk, which is also caused from its territory. Such an approach would also result in an unacceptable legal protection gap. This was recognised by the Court of Appeal in legal ground 64, and the complaint in cassation complaint 8.2.1 against the judgment of the Court contained therein fails. The legally correct approach of the Court of Appeal is consistent with national procedural and liability law. In this respect, in addition to the *Kalimijnen* judgment[403] partial liability for cumulative environmental damage, which is frequently cited before the District Court and Court of Appeal, it is also worth mentioning a ruling such as *Ziggo et al. v. Stichting Brein*.[404] In it, the Supreme Court challenged the Court of Appeal's approach on the ineffectiveness of a DNS blocking / IP filter for the website 'The Pirate Bay', which had been based on the fact that Brein had not brought an action against all internet service providers (that offer access to the website).

539. Urgenda recalls that the importance of the reduction claimed does not lie solely in the causal contribution to global CO2 emissions reduction that can directly result from it. As discussed above, it can and must be

[403] Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713, *NJ* 1989/743.
[404] Supreme Court 29 June 2018, ECLI:NL:HR:2018:1046, *NJ* 2018/293.

assumed that other States will fulfil their obligations. Thus, the causal contribution of a credible, long-term, effective reduction by the Netherlands is indeed relevant from a causal perspective. As has been said, a very important indirect effect is that the Netherlands, as an Annex 1 country, is or will become credible and, together with States that have already fulfilled or will fulfil their obligations, will create leverage in order to be able to force other underperforming States to actually and realistically increase their ambitions. Conversely, there is a real chance that if the Netherlands, with all its prosperity, does not take significant steps towards a credible reduction scenario, t other, less developed, countries will not step up their efforts.

6.4 Adaptation as an alternative? (cassation complaint 8.2.2)

540. Partly in connection with the (in)effectiveness argument, the State argued in cassation complaint 8.2.2 that the Court of Appeal failed to sufficiently consider adaptation measures, which the State could take to protect the values under Articles 2 and 8 of the ECHR.

541. The complaint fails based on the Court's factual and not incomprehensible ruling in legal ground 59, which asserts that the State has not made it plausible or shown that adaptation can adequately prevent the potentially disastrous consequences of unfettered global warming. For this reason, the adoption of adaptation measures, which is certainly up to the State as well, cannot diminish its obligation to reduce CO2 emissions more quickly than it intends to do. The cassation complaint does not contain any (knowable) allegation that the judgment is defective in its reasoning, which would demonstrate why the Court of Appeal’s ruling would be incomprehensible or insufficiently substantiated. For this, of course, the State’s bare and general reference on appeal is not sufficient, which is why the cassation complaint fails. For the record, Urgenda makes the following comments.

542. The Court of Appeal’s finding that adaptation, in the light of Articles 2 and 8 of the ECHR, is not a realistic/acceptable alternative is widely supported by the well-founded documented assertions of Urgenda in Chapters 2.2 ('mitigation versus adaptation') and 10.5 ('adaptation is not a substitute for mitigation') of its Reply, as well as in paragraphs 3.69-3.70, its discussion of grounds for appeal 17 and 18 in paragraphs 7.103-7.116 and further paragraphs 8.222-8.236 of its notice on appeal.

543. In short, it follows from Urgenda's arguments before the District Court and Court of Appeal that adaptation is not an alternative to preventing the consequences of climate change, but a necessary measure that must be taken, together with mitigation, to prevent major damage. In the words of the IPCC in AR5 (included in Urgenda's Reply): '*Even the most stringent mitigation efforts cannot avoid further impacts of climate change in the next few decades, which makes adaptation unavoidable.*'[405]

544. It is important that when determining the RFCs (the reasons for concern), which increase as the temperature rises, the IPCC has already taken into account the possibilities for adaptation: '*all RFC take into account autonomous adaptation as well as limits to adaptation in the case of RFC1, RFC3 and RFC5, independent of the development pathway*.'[406] This means that the risks outlined by the IPCC remain after adaptation measures have been taken.

545. Moreover, as Urgenda pointed out in Chapter 1.3.7 of this defence, the temperature target set in Paris takes into account the limits of adaptation possibilities. The 2 °C target has been tightened precisely because the impacts at higher temperatures cannot be prevented through adaptation measures alone.[407] Therefore, adaptation can (probably) still counteract the most serious impacts if temperature targets are met, but is increasingly difficult to do so if the targets are exceeded.

546. The State writes in cassation complaint 8.2.2 that it can fulfil its positive obligations under Articles 2 and 8 of the ECHR towards persons within its jurisdiction through the adaptation measures that it takes and will take. If the State remains on the current path more than 2 °C warming, it is not clear how the State envisions this. In AR5, the IPCC concluded that climate change impacts are also threatening rich countries like the Netherlands, which can afford many adaptation measures:

> '*(...) even societies with high adaptive capacity can be vulnerable to*

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405 IPCC WGII AR5 Chapter 1 p. 14 (Exhibit U76), cited in the Reply par. 512.

406 UNFCCC, Report on the structured expert dialogue on the 2013-2015 review, 2015, Exhibit 109. This quotation has also been included in Notice on appeal, par. 3.69.

407 UNFCCC, Report on the structured expert dialogue on the 2013-2015 review, 2015, Exhibit 109. The quotation in question has also been included in Notice on appeal, par. 3.69.

climate change, variability, and extremes.'[408]

and

'Synthesis of evidence across sectors and sub-regions confirm that there are limits to adaptation from physical, social, economic and technological factors [high confidence]?'[409]

547. To give a concrete example: last year, KNMI announced that it could no longer rule out the possibility that '*unrestrained climate change will lead to uncontrollable sea level rises that will pose an impossible task for Dutch coastal defences*'.[410] This is all the more true if higher warming leads to reaching a tipping point. According to the latest scientific findings, the tipping point leading to the irreversible loss of land ice in Greenland could ultimately lead to an increase of 7 metres, as stated in a report by the European Commission.[411] It goes without saying that no adaptation measure can protect the inhabitants of the Netherlands against such an increase.

548. Another example of a circumstance for which there are limited adaptation possibilities and which Urgenda pointed out in its Reply, is the distribution and quantity of freshwater that would remain available after further warming. In addition, this water will be all the more necessary for irrigation of agricultural land, especially in the event of increased warming. The IPPC expressed this as follows:

'*For example, projected climate change impacts in Europe indicate that increasing irrigation needs will be constrained by reduced runoff, demand from other sectors, and economic costs. As a consequence, by the 2050's farmers will be limited by their inability to use irrigation to prevent damage from heat waves to crops.*'[412]

Furthermore, through this cassation complaint, the State fails to recognise that the State's responsibility and duty of care do not stop at national borders, but that climate change is a global responsibility and a 'common

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408 IPCC WGII AR5 Chapter 1, p. 14 (Exhibit 76), quotation included in the Reply, par. 517.
409 IPCC WGII AR5 Chapter 23, p. 3 (Exhibit 93), quotation included in the Reply, par. 515.
410 Sheets submitted by Urgenda with their written arguments, see also p. 5 and 6 of the report.
411 See Chapter 1.3.4 and the quotation from the European Commission referred to therein (from: Brussels, 28.11.2018 COM(2018) 773 final). For more information on the tipping points, see also summons, par. 382, Reply, par. 150-153, 434, 517, Notice on appeal, par. 3.67-3.74, Exhibit 151.
412 IPCC WGII AR5, Chapter 16, p.23 (Exhibit 94), quotation included in the Reply par. 516.

concern for mankind'.[413] Urgenda believes that a different view is not compatible with the general Dutch sense of justice, the principles and objectives of the UNFCCC, the Paris Agreement and the international climate policy to which the State has committed.

6.5 Climate financing for developing countries (cassation complaint 8.2.3)

550. Contrary to what is argued in cassation complaint 8.2.3, the Court of Appeal did not need to consider separately the State's claim that the Netherlands provides knowledge and makes a (substantial) financial contribution to climate financing for developing countries, enabling these countries to take mitigation and adaptation measures. As far as adaptation measures are concerned, the Court of Appeal based its judgment on the imminent risks for the current generations of Dutch citizens. Without further justification, which is absent, it is not possible to see how these measures in the rest of the world could help to limit the risk Dutch residents face.

551. Support for mitigation by other countries cannot legally serve as a justification for failing to meet the legally required own mitigation efforts. By extension, cassation complaint 8.2.4 also fails.

552. The fact that providing climate finance cannot be a substitute for national mitigation measures follows directly from the UNFCCC. In the 'commitments' of Article 4, developed countries have committed themselves not only to take mitigation action on their own territory in such a way that they '*will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions*' (paragraph 2), but also to provide financing to developing countries: '*provide such financial resources, including for the transfer of technology, needed by the developing country* […]' (paragraph 3) and '*also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects*' (paragraph 4). By signing the UNFCCC, the State has therefore committed itself to take mitigation action on its own territory and to provide climate finance to developing countries. The obligation to provide climate finance has been reiterated

[413] See Notice on appeal, par. 8.166 and the references in it.

and strengthened in Article 9 of the Paris Agreement: '*The developed country Parties shall continue to implement their existing obligations under the Convention and therefore provide funding for both mitigation and adaptation, in support of developing country Parties.*'

553. Of course, compliance with one obligation does not mean that the State is no longer required to comply with the other obligation. The present proceedings concern only the State's mitigation obligations, not the climate financing obligation. Thus, the Court of Appeal was right not to involve the latter in its judgment.

6.6 The waterbed effect (cassation complaint 8.5)

554. In cassation complaint 8.5, the State complains about the rejection of its reliance on the 'waterbed effect'.

555. The State has paid extensive attention to the alleged waterbed effect, both before the District Court and the Court of Appeal. According to the State, a large part of the (possible) measures to reduce greenhouse gas emissions would be pointless as a result of the operation of the European Emission Trading System (hereafter referred to as the 'ETS'). This is a market instrument that regulates greenhouse gas emission rights in the European Union for certain sectors. The ETS covers industrial sectors and companies in the energy sector. In addition, the aviation sector has also been participating since 2012. The State has argued before the District Court and Court of Appeal that emission reductions in the Netherlands that fall within the ETS sector would automatically lead to an increase in emissions in other countries within the EU (the waterbed effect). As a result, despite the Netherlands' additional efforts, total European and therefore global emissions will remain at exactly the same level, which means that such measures cannot have any effect on the prevention of dangerous climate change.

556. As the Court of Appeal rightly ruled in legal ground 56, the Dutch State has its own responsibility to limit CO2 emissions as much as possible. The level of emissions of another Member State is the exclusive responsibility of that Member State's government. The level of emissions in another Member State does not affect the Netherlands' own, exclusive and individual responsibility for the level of emissions in the Netherlands. According to the Court of Appeal, the Dutch State has its

own legal obligation to do what is right, and is therefore not allowed to hide behind what others do or refrain from doing.

557. Nor can the state simply hide behind other Member States. The reality is that the ETS system does not lead to a waterbed effect at all. As explained by Urgenda before the District Court and Court of Appeal[414], European emissions are falling faster than the absolute maximum level set by the ETS. The European Environment Agency (EEA) found that ETS emissions had already reached the target level of 2020 by 2014:

> '*The cap on stationary installations to be achieved by 2020, set at 1818 Mt CO_2-eq., was already reached in 2014.*'[415]

558. The fact that emissions in the ETS sector are lower than the maximum allowed is due to additional measures taken by other Member States in the ETS sector. For example, the United Kingdom applies a minimum CO2 price and sets legal limits on the amount of CO2 that a fossil fuel installation can emit. In Germany, renewable energy is subsidised, among other things, which leads to lower electricity production by coal and gas-fired power stations and thus, to lower CO2 emissions in the ETS sector. Denmark, Finland, France, Ireland, Iceland, Norway and Sweden also apply additional policies to the ETS.[416]

559. Therefore, the assertion that a reduction within the ETS sector would lead to an increase in emissions of other European countries until the ceiling has been reached is demonstrably incorrect. Emissions are actually falling faster than the ceiling set by the ETS. Moreover, the reductions requested by Urgenda will directly contribute to that fall in emissions, because there is abundance and no scarcity of emission allowances.

560. The surplus of allowances issued but not used had already increased in 2013 to more than 2 billion unused allowances, more than the total emissions in that year.[417] It is absolutely unbelievable that the extra availability of emission allowances that would be released as a result of additional Dutch measures would lead to extra emissions anywhere

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414 Written arguments in the first instance put forward by Urgenda (Cox) par. 40-58; Notice on appeal, par. 7.59-7.70.
415 Exhibit 127: EEA Trends and projections in the EU ETS in 2016, p. 24.
416 Written arguments in the first instance put forward by Urgenda (Cox), par. 40-58, Notice on appeal, par. 7.70; Judgment District Court, legal ground 4.80; Judgment Court of Appeal, legal ground 56.
417 Notice on appeal, par. 7.64.

within the EU. In reality, these additional allowances are added to the already existing surplus of unused allowances without any impact on actual emissions in the ETS.

561. Urgenda has stated with good reason before the District Court and Court of Appeal that the waterbed effect will not occur in the coming decades. Unused allowances are placed in the Market Stability Reserve (MSR). These allowances are then unavailable in the market. Only when the surplus falls below a certain lower limit can a fixed number of allowances be released. Citing various reports,[418], Urgenda has shown that additional Dutch emission allowances cannot be released until around 2050 at the earliest. Therefore, it is certain that there will be no waterbed effect at least until 2050. The Court of Appeal has considered this in its judgment in legal ground 56.

562. In the notice on appeal, Urgenda also predicted that the waterbed effect would never occur at all, because the ETS would likely be 'repaired'. This means that policy measures would be taken to cancel the emission surplus. Shortly afterwards, with the entry into force of Directive 2018/410, this forecast was presented as Exhibit 156. This Directive allows Member States to withdraw emission allowances from the market in the event of closure of coal and gas-fired power stations and establishes an automatic mechanism for destroying emission allowances from the MSR. These allowances can no longer be used afterwards, and as a result, emission reductions in the Netherlands cannot lead to more emissions in other countries.

563. These changes mean that the waterbed effect can no longer occur, according to the State itself. For more information, see the letter to the House of Representatives from the Minister of Economic Affairs and Climate Policy dated 11 June 2018[419]:

> *'In addition, as from 2019, an amount of emission allowances will be kept out of the market and included in the market stability reserve (MSR). For the period between 2019 and 2023, the annual quantity of emission allowances included in the MSR will double (from 12% to 24%). From 2023 onwards, an annual quantity of allowances will*

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[418] Notice on appeal, par. 7.82-7.86.
[419] *Parliamentary Papers II* 2017–2018, 32 813, no. 191 (underlining added, counsel)

be destroyed in the MSR. This refers to the amount of allowances in the MSR minus the amount of allowances auctioned in the previous year. By 2023, this means that a quantity of probably more than one and a half billion emission allowances will be destroyed. This new step will significantly reduce the existing surplus of emission allowances.

The introduction of MSR and the destruction of allowances from MSR has the additional advantage that emission reductions through additional national emission reduction measures are not automatically undone at EU level by emissions from other emitters (the waterbed effect). Part of the emission allocation that is released will gradually be included in the MSR and destroyed.'

564. Nevertheless, in this appeal in cassation, the State complains about the dismissal of the Court of Appeal of its reliance on the waterbed effect. Urgenda pointed out this inconsistency earlier.[420] The State implements national policy in the ETS sector, aims for a higher reduction in 2030 than the EU has committed to, and concludes that the waterbed effect no longer occurs. However, in the case against Urgenda, the State (still) maintains that measures are pointless. Thus, these complaints fail immediately.

565. In cassation complaint 8.5.1, the State argued that the decision of the Court of Appeal in legal grounds 55 and 56 is wrong in law if this decision 'must be understood as meaning that Member States of the European Union can take measures that limit the number of ETS allowances allocated to companies on their territory'. The complaint lacks any factual basis.

566. The Court of Appeal only found that it cannot be assumed that other member states will take less far-reaching measures than the Netherlands (as a result of emission reductions in the Netherlands leading to higher emissions in other Member States). Subsequently, the Court established the fact that the Dutch reductions lag far behind other Member States such as Germany, the United Kingdom, Denmark, Sweden and France. The Court of Appeal did not consider that these countries would also withdraw emission allowances from the market.

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[420] Notice on appeal, par. 7.53- 7.58.

567. The State pointed out that it would not be possible to withdraw emission allowances from the market until Directive 2018/410 had been transposed if coal-fired power stations were to be closed down. That in itself is correct, but the Court of Appeal did not consider otherwise. The Court ruled that Member States can and do reduce more than the ceiling set by the ETS. The State's complaint fails.

568. In cassation complaint 8.5.2 the State argues that the Court of Appeal included in its assessment that no waterbed effect can occur as a result of the surplus of ETS allowances and the mitigating impact in the time of the MSR at least until 2050, to the extent that the Court of Appeal based its decision on this fact that the waterbed effect will not occur. According to the State, the ruling of the Court of Appeal is incomprehensible because the measures taken with Directive 2018/410 show that the waterbed effect exists; after all, these measures would not be necessary if there were no problem. In its complaint, the State also took into account the fact that the Court had attributed meaning to the mitigating impact of the MSR. According to the State, it is not possible to see how this mitigating impact could mean that the waterbed effect would no longer occur at all.

569. Here the State again reads something in the Court of Appeal's ruling that is not there. The Court of Appeal did not rule that the waterbed effect will no longer occur in its entirety, but that the waterbed effect will not occur until at least 2050. The Court of Appeal has taken this into account in its ruling on the State's defence with regard to the waterbed effect, which is supported by the conclusion that the Netherlands and other EU Member States have their own responsibility to limit CO2 emissions as much as possible and that the Netherlands lags far behind in comparison with other Member States. That is not incomprehensible. It is relevant for Urgenda's claim, which has a time horizon of 2020, that additional measures taken now by the State in the ETS sector will lead to a reduction in Dutch emissions (the only relevant criterion), and moreover, at least until 2050, will not (but in reality, never) lead to an increase in emissions elsewhere.

570. Even if legal ground 56 were to be read in such a way that the Court of Appeal would have (implicitly) ruled that the waterbed effect would not occur at all, this ruling is correct from a legal point of view. The State's

claims that because Directive 2018/410 has now solved the waterbed effect, the waterbed effect existed. Thus, the State acknowledged (again) that the waterbed effect will be counteracted by the measures in Directive 2018/410. It has been established that the Directive has entered into force and that it will be transposed into Dutch law, so that the waterbed effect – also according to the State itself– will no longer occur. Therefore, even if the Court of Appeal would have ruled that the waterbed effect would not occur at all, this ruling is legally correct and the State's complaint also fails.

6.7 Other complaints (cassation complaints 8.6-8.10)

571. In cassation complaint 8.6, the State assumed an incorrect reading of the Court of Appeal's ruling. Contrary to the State's assertion, in legal ground 63 the Court did not use the precautionary principle as an independent basis for the State's positive obligations under Articles 2 and 8 of the ECHR.

572. Cassation complaint 8.7 includes arguments against the dismissal by the Court of Appeal in legal ground 65 of the State's relativity defence. Contrary to what is argued in cassation complaint 8.7.1, the Court of Appeal found that the State is acting unlawfully. Contrary to cassation complaint 8.7.2, already argued, the Court of Appeal ruled that the State is acting unlawfully towards the supporters of Urgenda. The complaint, which is based on this correct reading of the judgment of the Court of Appeal, fails, because cassation complaints 2.3 and 2.6 fail. Here, the State once again assumed requirements of concretisation, personalisation and/or regional specification, which are not supported by the existing ECtHR case law. Furthermore, these requirements are certainly not legally correct in an evolving interpretation of the ECHR, taking into account Section 3:305a DCC and the Aarhus Convention. Urgenda refers to Chapter 3.

573. Cassation complaints 8.8 and 8.9 largely build on failing complaints, which have already been refuted above. Cassation complaint 8.8 also fails to recognise that the circumstances mentioned there could be taken into account by the Court of Appeal in its consideration that a discretion / margin of appreciation by the State does not preclude the reduction order. It goes without saying that the Court of Appeal could have taken into account the fact that the State was already aware of the seriousness of the

climate problem for some time and had focused its policy on a 30% reduction until 2011. As explained above in Chapter 4, a State's knowledge of the risk threatening the interests protected by Articles 2 and 8 of the ECHR is indeed relevant. Moreover, as stated above, it is fully in line with ECtHR case law that when assessing whether and which positive obligations exist, (deviations from) previous policy objectives (and the underlying views) should also be taken into account. The fact that the State had been aware of the seriousness of the climate problem for some time and had originally aimed its policy at a 30% reduction until 2011 is in line with this case law and thus, could also be taken into account by the Court. This also applies to the fact that, in accordance with the principles laid down in the UNFCCC and the Paris Agreement, the Netherlands has a higher responsibility for taking reduction measures. After all, it is on the basis of these principles that the IPCC shows in Table 13.7 that Annex I countries must reduce their emissions by 25-40% in order to limit warming to 2 °C. On this basis, Annex I countries themselves decided for the first time in Cancun that they were bound by these reduction percentages (see also District Court legal grounds 4.56-4.63 and 4.79).

574. Cassation complaint 8.10 contains a failing complaint, which assumes that the Court of Appeal did not consider a 1.5 ºC target. If that was the case, then the State has no interest in the complaint formulated about legal ground 73. However, the Court of Appeal did acknowledge that the scientific evidence was further strengthened during the appeal, and that the scientific consensus points at1.5 ºC as the target required to prevent dangerous climate change. Contrary to what cassation complaint argues, it is perfectly understandable that if the maximum global warming is substantially lower, with a correspondingly lower carbon budget (430 ppm), all the considerations of the Court of Appeal will *a fortiori* compel the State to do everything in its power (with the greatest possible urgency) to achieve the 25% reduction by the end of 2020 that is already necessary to achieve the 2 ºC target.

7 SEPARATION OF POWERS: LEGISLATIVE ORDER, POLITICAL QUESTION - THE NECESSITY AND EFFECTIVENESS OF THE REDUCTION ORDER (CASSATION COMPLAINT 9)

7.1 Introduction

575. Cassation complaint 9 is directed against the Court of Appeal's rejection of the State's argument that the reduction order amounts to an impermissible legislative order, or at least to an impermissible intervention in political decision-making. Urgenda has already handled this subject extensively in its summons in first instance (paragraphs 404-421, under 'policy freedom'), its reply (paragraphs 595-632, under 'Trias Politica') and its notice on appeal (in particular Chapter 9, 'The system of separation of powers: ground for appeal 28'). The arguments contained therein remain fully valid. Urgenda explicitly refers thereto. Urgenda will summarise its position below and, if necessary, supplement it with a view to the complaints contained in cassation complaint 9.

576. Urgenda must say that the issue of the separation of powers ("Trias Politica"), which according to the public statements of the government would become the core of the appeal to the Supreme Court, is largely disregarded in the appeal in cassation. While cassation complaints 6.3 and 8 point to a margin of appreciation arising from the ECHR, they are thus limited to Urgenda's claim based on Articles 2 and 8 of the ECHR. As explained above in Chapter 6, the margin of appreciation applied by the ECtHR relates to its own position vis-à-vis the authorities in the contracting states, which are better placed. To the extent that this margin of appreciation plays a role in the national relations between the judicial and political bodies, as well as in the scope of policy and/or discretion to be left to the latter, it has been explained above that the Court of Appeal has indeed recognised and respected this discretion.

577. The State did not see any reason to ask the Supreme Court to dispose of the case itself and reject Urgenda's claims, because the reduction order (on whatever basis) amounts to an impermissible legislative order, or at least to an impermissible interference in political decision-making. Cassation complaint 9.6 makes it clear that the complaints in cassation complaint 9 must also be regarded as independent of cassation complaints 1-8, but their scope does not go beyond claiming that the Court of

Appeal's affirmation of the reduction order issued by the District Court cannot be maintained. The operative part of the District Court's judgment remains unaffected. This State strategy can only be explained by a lack of conviction that the argument of cassation complaint 9 should in any case mean the end of this case. This lack of conviction is justified.

7.2 The synthesis of all the foregoing: the reduction order is necessary for effective legal protection

578. For the foregoing reasons, the conclusion must be that, in view of the extremely important interests at stake, there are no acceptable alternatives to a reduction order based on a concrete minimum percentage. The order to reduce CO2 emissions with an accurate minimum in the foreseeable future is exactly the judicial measure that reflects and addresses the core of the climate problem, namely the fundamental problem of the inertia (latency) of CO2 and the political/social inertia. The latter has led to grand ambitions (for a distant future and other governments) for decades now, but as the Court of Appeal has expressed, inter alia in legal grounds 3, 47, 52, have proved worthless to date. Declaratory and operative parts of judgments that merely encourage greater effort are therefore of no use at all, whereas a general order not specifying a minimum percentage) would be impermissibly vague. At the same time, the recent –albeit much too late– response of the State to the reduction order affirmed on appeal proves its effectiveness.

579. Critics, who believe that the courts in this case have gone too far by issuing a concrete reduction order, do not, or insufficiently, reflect on the absolute lack of legal protection, which would ultimately be the consequence of their (constitutional) objections. Critics do not, or rarely, reflect on the fact that the State postponing an adequate climate policy for many years and even adjusting its ambitions downwards without scientific support has further limited the kind of available measures necessary to achieve a 25% CO2 reduction by 2020 (cf. judgment of the Court of Appeal, legal ground 66). However, it would be unacceptable under the rule of law to reward the State's delaying behaviour since the time remaining for the State to comply with the reduction order has become shorter. As a result, some conceivable measures may no longer lead to a timely and sufficient reduction. After all, it has been established that the State has done virtually nothing to comply with the prior two decisions in the Urgenda case. The State has played *va banque* by

apparently speculating on an annulment on appeal. It must bear the consequences of this.

580. The government still declares that it will do justice to the (purport of the) judgments.[421] But even if, after 2020, it turns out that the State has actually made the maximum efforts, but nevertheless fails to have reached the absolute minimum of 25% reduction, the reduction order remains the pre-eminently effective –and proven effective– judicial measure. In view of the political and social special interests at stake, any weakening of this measure will result in the State doing less than its fair share, to postpone reductions once again and thus to impose a dangerously large burden on the carbon budget available to the Netherlands in the coming years. As a result, the Netherlands will not be able to realise its ambitions in the distant future, or will pay the price of serious social disruption.

581. Against this background, it is dangerous and naive that some constitutional scholars put forward the 'flood-gate argument'.[422] "Today the climate, tomorrow a collective action to force the State to honour its NATO commitment to spend 2% of the state budget on defence." This is how it has been reported by some media outlets. The comparison is completely misplaced. The risk of climate change is a scientific certainty. With the current state of knowledge, it must be assumed that without an enormous acceleration of reduction efforts in the coming decades and certainly this century, various very serious and disruptive consequences may occur. These could in turn lead to major geopolitical tensions. The extent to which these risks can have a long latency is certain, and the State, as the system manager, is in a position to mitigate these risks insofar as they are partly caused by the Netherlands. The State has also repeatedly endorsed the need for accelerated mitigation, but political inertia has so far stood in the way of this. In fact, in 2013, without scientific justification, the State revised its ambitions downwards, while the severity of climate change only increased (legal grounds 52, 72). This is a completely different situation from forcing the State to earmark a certain part of the national budget for a specific expenditure objective. In this example, without any particular threat except fora speculative and

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421 See, for example, the letter that the Minister of Economic Affairs and Climate sent to the Lower House on 25 January 2019 (*Parliamentary Papers II* 2018/19, 32 813, no. 267, available at https://zoek.officielebekendmakingen.nl/kst-32813-267.html).

422 Cf. L. Breebaart, 'Hoogleraar: Urgenda zadelt regering op met onmogelijke last', *Trouw* 9 October 2018, see https://www.trouw.nl/home/hoogleraar-urgenda-zadelt-regering-op-met-onmogelijke-last~ad785b24/

possibly generalized threat from outside (for which the State does not have any responsibility or duty of care), cannot be compared to the possible consequences of disruptive climate change.[423]

7.3 The position of the judiciary in the Dutch democratic state under the rule of law

582. The judgment of the Court of Appeal, as Urgenda has explained in detail before the fact-finding instances and to which it explicitly refers, is part of a long evolution in liability law.

583. Bauw has convincingly placed the decision in the Urgenda judgment in a historical perspective.[424] The *Kieft v. Otjes* ruling[425] should be seen as a first important step in that history. In it, the Supreme Court held that litigants could apply to the court also for a preventive injunction to prevent an imminent infringement of their rights, and not only for damages afterwards.[426] The *Guldemond v. Noordwijkerhout* judgment[427] followed shortly after, in which the Supreme Court considered that the civil court also has jurisdiction to rule on the unlawfulness of government actions. The third judgment frequently cited by Urgenda is the *Lindenbaum v. Cohen* judgment,[428] which was decided just over 100 years ago in a stalemate between social needs and a political *laissez-faire* ideology, in which legislators displayed the utmost inertia. These three judgments set in motion a modernisation of how courts perform their duties, which were strengthened by the adoption of the right to collective action of Section 3:305a DCC.As explained in detail in Chapter 3 above, the Dutch courts have embraced this right in order to ensure effective and efficient legal protection, and thus access to the court. The right to

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423 In this context, Urgenda refers again to a decisions by the U.S. Court of Appeals for the Second Circuit re *American Electric Power Company v Connecticut,* 582 F.3d 309, 332(2009) (Exhibit 49 to originating summons, see also notice on appeal paragraph 9.10): '*Certainly, 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 an error to equate a political question with a political case. (...) Given the checks and balances among the three branches of our government, the judiciary can no more usurp executive and legislated prerogatives than it can decline to decide on matters within its jurisdiction simply because such matters may have political ramifications.*'

424 E. Bauw, 'Oratie: Politieke processen. Over de rol van de civiele rechter in de democratische rechtstaat' Boom Juridisch: The Hague 2017. See also the written arguments of Urgenda on appeal, paragraph 124.

425 Supreme Court 13 November 1914, *NJ* 1915/98, W. 9810 (*Kieft v. Otjes*), with commentary from E.M. Meijers.

426 See the notice on appeal paragraph 8.36, written arguments of Urgenda on appeal paragraph 126 and Supreme Court 13 November 1914, *NJ* 1915/98, W. 9810 (*Kieft v. Otjes*), with commentary from E.M. Meijers.

427 Supreme Court 31 December 1915, *NJ* 1916/407 (*Guldemond v. Noordwijkerhout*).

428 Supreme Court 31 January 1919, ECLI:NL:HR:1919:AG1776, *NJ* 1919, p. 161 (*Lindenbaum v. Cohen*).

collective action, and the related changes in the position of the judiciary in our constitutional system, are now an integral part of the Dutch legal system. In that respect, the District Court and the Court of Appeal's decisions are not constitutionally groundbreaking.

584. Urgenda points to the parallels between the present case and the three historical decisions mentioned. The Court of Appeal's decision is also a ruling with political consequences, which has caused quite a stir both in the Netherlands and abroad. Critics also accused the Court of Appeal of having entered the political domain with its judgment. And just like in the three historical decisions above, society is confronted with a problem to which the legislator fails to formulate an answer. In this context it is all the more problematic that, as has been argued above in Chapter 4, the State's interpretation of Articles 2 and 8 of ECHR results in an unacceptable legal protection vacuum. The immunity of the State's climate policy from any judicial review is fundamentally at odds with the organisation of the Netherlands as a democratic state under the rule of law, in which courts oversee compliance with the law in general, but also by political governmental bodies.[429]

585. With regard to the position of the judiciary in our polity, Loth has argued that the decision of the court should not cause '*social nor legal surprise*', because '*a government that fails to take precautions to prevent a dangerous situation for its citizens and for future generations, needs correction by the court*'.[430] According to Loth, the court thus remains in its own domain, and does what is required of it: to provide legal protection. In another publication, Loth and Van Gestel argue that the Urgenda judgment is an example of a new, modern form of legal invention:

> '*In this context, it is the role of the court, on the basis of the available amalgam of legal sources, to develop a normative framework that incorporates national law into the European and international legal order, brings unity and consistency between the different layers, and provides cross-border legal protection for citizens*.'[431]

Such a holistic approach is also supported by Fleuren, who considers it

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429 Notice on appeal, paragraphs 9.35 and 9.30.
430 M.A. Loth, 'De Hague District Court heeft gesproken…', *AV&S* 2015/25, p. 153.
431 M.A. Loth & R.A.J. van Gestel, 'Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?', *NJB* 2015, p. 2604.

'*quite conceivable*' that '*the relevant international treaties, decisions, agreements and documents on the climate provide a directly operating standard for a minimum reduction in CO2 emissions to be achieved by the State*'.[432] On appeal, Urgenda has consistently stressed the great importance, also for the constitutional dimension of this case, of having a concrete international standard or recognition of a necessary reduction.[433]

586. Lefranc states that neither the judgment of the District Court nor the judgment of the Court of Appeal does more than '*settle the dispute between the parties involved*'.[434] Both are, in his opinion, decisions that apply *inter partes*. The fact that the scope of the decisions exceeds the interests of the parties is inherent in the nature of the parties: a foundation that represents the interests of a very large group of people, and the Dutch State. According to Lefranc, this does not change the fact that the decisions do have a political character. However, the separation of powers is fully respected:

> '*After all, it is difficult to argue that this ruling would violate the freedom of (Dutch) citizens. Unless perhaps the freedom of citizens who demand the freedom to hold a different opinion, contrary to the consensus in climate science and international climate policy.*'[435]

587. Boogaard has already written about the '*unbearable emptiness of the trias politica*'.[436] The separation of powers in our country is not strict: it is not a question of black or white, but a concept that requires interpretation. The constitutional position of the court as an autonomous creator of law in our country, as explained above and in detail in the appeal, has long been widely accepted.[437] The State's argument must therefore be relative: '*there is "too much" or "too autonomous" creation of law: too much*

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[432] J.W.A. Fleuren, '*Urgenda* en niet(?)-rechtstreeks werkend internationaal (klimaat)recht', *NJB* 2018/9, p. 605. As Fleuren emphasises, this approach is not new: '*Until a few years ago, the dominant line in Dutch case law was that a provision of a convention or of a decision of an international organisation either does or does not have direct effect, regardless of the case and context in which the provision is invoked. However, in its ruling of 10 October 2014, ECLI:NL:HR:2014:2928 (Rookverbod), the Supreme Court dealt with the issue and moved to a contextual approach, inspired by the case law of the ECJ on the direct effect of primary and secondary EU law. In this approach, it is quite possible that provisions that did not have direct effect in the past will now have direct effect in some contexts.*

[433] Notice on appeal, inter alia paragraphs 9.15 et seq.

[434] P. Lefranc, 'Het Urgenda-vonnis/-arrest is (g)een politieke uitspraak (bis)', *NJB* 2018/9, p. 603.

[435] P. Lefranc, 'Het Urgenda-vonnis/-arrest is (g)een politieke uitspraak (bis)', *NJB* 2018/9, p. 603.

[436] G. Boogaard, 'Urgenda en de rol van de rechter. Over de ondraaglijke leegheid van de trias politica', *AA* 2016, p. 26-33.

[437] See the written arguments of Urgenda on appeal, in particular regarding paragraphs 9.2-9.7 and 9.28-9.33.

administrative-political rationality has been added'.[438] Legislative, executive and judiciary powers may be fundamentally separate, but they also have a control function and keep each other in balance. Frequently heard statements in the spirit of 'the judgment endangers the separation of powers in force in the Netherlands' or 'the judgment is contrary to the separation of powers' are therefore empty. It will always have to be clarified why the Court of Appeal's judgment is not compatible with the separation of powers, or why the judgment disturbs the balance of power. In concrete terms, the State argues that the reduction order is an impermissible legislative order and that the Court of Appeal has entered into a political consideration reserved for the political body.

7.4 The reduction order is not an order to create legislation and does not impermissibly rule on a political question reserved for the political body (paragraphs 67-70 and operative part, cassation complaints 9.1-9.4).

The Urgenda judgment in light of the case law on legislative orders

588. In 21 March 2003 (*Waterpakt*), the Supreme Court held that Dutch law (in particular the exceptions in Section 3:296 DCC) stands in the way of the court issuing an order to the State to bring about legislation in a formal sense to remedy an unlawful situation.[439] This was affirmed by the Supreme Court on 1 October 2004 (*Stichting Faunabescherming*),[440] in which the Court found that the non-admissibility of a legislative order also applies to the adoption of provincial regulations. On 9 April 2010 (*Staat en SGP v. Clara Wichmann et al.*),[441] the Supreme Court subsequently held that the Court lacks the power to '*order the State to enact legislation in a formal sense*' (legal ground 4.6.2). In that case, there was no room for a court ordering specific measures, '*because the choice of such measures to be taken by the State requires a balancing of interests which coincides to such an extent with considerations of a political nature that it cannot be required of the court.*' (legal ground 4.6.2). The State invokes this in cassation complaint 9.4.

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438 G. Boogaard, 'Urgenda en de rol van de rechter. Over de ondraaglijke leegheid van de trias politica', *AA* 2016, p. 26-33.

439 Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462, *NJ* 2003/691 (*Waterpakt*).

440 Supreme Court 1 October 2004, ECLI:NL:HR:2004:AO8913, *NJ* 2004/679 (*Stichting Faunabescherming).*

441 Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388 (*Staat en SGP v. Clara Wichmann et al.).*

589. The Urgenda judgment must be clearly distinguished from these cases in at least three main respects: the Court of Appeal has not ordered the creation of legislation, the Court of Appeal has not ordered specific measures in accordance with Urgenda's claims, and the choice of measures to comply with the reduction order is left entirely to the State. There is no unacceptable interference with the State's policy freedom in the Court of Appeal's judgment. It should be noted that *Staat en SGP v. Clara Wichmann et al.* (legal ground 4.6.2) emphasised on the one hand, that the specificity of the requested type of measures came up against constitutional objections and on the other hand, that a general prohibition to allow an unlawful situation to continue to exist is inadmissibly vague. These requested measures are essentially different from Urgenda's requests, which are very concrete and leave the choice of the measures entirely up to the State, in contrast to a declaratory judgment as remedy.

590. Interference with the State's policy freedom is not an issue, if, as is currently the case here, the State is left with an almost unlimited freedom of choice with regard to the measures to be taken. This idea is also clearly present in the as the Supreme Court judgment of 7 March 2014 (*Staat v. Norma et al.*):

> '*The declaratory judgment also leaves the State full scope to provide for regulations that are in accordance with the aforementioned directive and statutory provisions, so that the State's freedom of policy is not affected by them.*'[442]

The reduction order –here too, a comparison with *State v. Norma et al.* is appropriate– does not (necessarily) result in the State having to repeal or amend existing legislation. The order does not require the demolition or modification of what has come about in a democratic manner. It requires conformity with an absolute minimum standard, based on various grounds by the Court of Appeal, to prevent dangerous climate change and to safeguard the rights of those who are at risk of being seriously affected by it.

591. Moreover, as Van der Hulle points out in his note under the judgment, the Urgenda decision must be distinguished from, for example, the decision

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[442] Supreme Court 7 March 2014, ECLI:NL:HR:2014:523, *NJ* 2016/184 (*Staat v. Norma et al.)*, ground 4.6.2.

of the Hague District Court of 4 July 2018 on the repeal of the Consultative Referendum Act:

> *'The court is not permitted to interfere with this decision-making process, and thus with the ongoing legislative process, by giving a substantive opinion on legislation in preparation (ground 4.12). The comparison made with the Urgenda judgment of the Hague District Court (...), in which the District Court ruled on the liability of the State for the reduction of greenhouse gas emissions, does not apply, not least because the District Court was not asked to assess the content of legislation in preparation (legal grounds 4.8 -4.14).'*[443]

In this case, Urgenda does not ask for legislation in preparation to be subject to a substantive assessment.

The specific complaints of the State

7.4.1 The State cannot de facto execute the order without legislation?

592. In cassation complaint 9.1, the State argues that the Court of Appeal has failed to recognise that, although Urgenda's claim does not explicitly aim at the creation of legislation, the State cannot in fact implement the requested reduction order without the creation of legislation. Thus, the Court of Appeal's grant of Urgenda's claim would amount to a substantive legislative order. Cassation complaint 9.2 is also based on the premise that the reduction order can only be implemented by 'also' creating legislation. In the extension thereof, cassation complaint 9.3 also contains an allegation that the judgment is defective in its reasoning.

593. All these complaints fail in light of the comprehensible and adequately substantiated finding by the Court of Appeal that the State has insufficiently contested that, as put forward by Urgenda, in 2018 the reduction order in could be achieved by measures other than legislation and that this was most certainly the case in 2015, when judgement of the District Court issued and more certainly at the time of the originating summons as well as when the State's was familiar with and subscribed to the 25-40% standard (cf. legal grounds 52, 66, 72)– Urgenda explicitly

[443] R. van der Hulle, notes to The Hague District Court 4 July 2018, ECLI:NL:RBDHA:2018:7888, *AB* 2018/399.

refers to paragraphs 4.21-4.30, 7.56 and 9.43-9.45 of its notice on appeal. Urgenda has explained in detail which means, other than legislation in a formal and material sense, are available to the State to intervene and achieve the required reduction. In doing so, it has given numerous examples, besides the Climate Agreement referred to by the Court of Appeal in legal ground 68. Contrary to what the State suggests in footnote 80, the State did not further contest this in its oral arguments on appeal. In response to Urgenda's extensive and documented claims, the State has not realistically argued that (to a large extent) legislation is unavoidable in order to comply with the reduction order by the end of 2020.

594. As a court of fact, the Court of Appeal was therefore able to comprehensibly find in legal ground 68 that the State did not sufficiently refute Urgenda's assertion pointing at multiple possibilities to achieve the result intended by the order without the creation of formal or substantive legislation. In addition, contrary to what the State suggests in cassation complaint 9.3, the Court of Appeal has not considered that the State's defence is based on the fact that the reduction could only be achieved through legislation. The Court of Appeal has found that, in view of Urgenda's substantiated assertions, there are (or at least were) so many possibilities available to the State that the reduction order does not have the intention or the foreseeable factual effect of bringing about legislation.

595. Özturk and Van der Veen commented on this: '*As long as the State has more than one means of remedying the unlawfulness of its actions, an order to take measures will not easily run counter to the Waterpakt judgment.*'[444] Also according to Van der Hulle and Van Heijningen: '*there must be serious doubts as to whether the order issued by the Hague District Court also includes a legislative order.*'[445] They note in that respect, as Urgenda has argued and stressed several times, that the State retains full freedom to determine how it will comply with the order, and thus, the District Court has explicitly refrained from issuing a legislative order. The Court of Appeal also considers the State's freedom of choice to comply with the judgment to be decisive, and rightly so.[446]

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444 G.A. van der Veen and T.G. Oztürk, notes to: The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2591, *O&A* 2018/51.

445 R. van der Hulle and L. van Heijningen, 'Het wetgevingsbevel vanuit Unierechtelijk perspectief: het debat heropend', *SEW* 2006/1, p. 17.

446 Judgment Court of Appeal, ground 68.

596. Even if, by now, it is more likely that legislative measures will be necessary to achieve the necessary reduction, this does not affect the admissibility of the order itself, which is neutral in terms of the way it is implemented.

7.4.2 Content of the legislation not prescribed

597. Cassation complaint 9.2 argues that the Court of Appeal has failed to recognise that the award of a legislative order is impermissible even if it does not prescribe the content of that legislation. The State has no interest in this complaint, since the Court of Appeal has already established that the State failed to refute that the reduction objective could be achieved even without the adoption of formal legislation, and that there is therefore no legislative order.

598. Moreover, the judgment of the Court of Appeal is correct in law. This case differs from the *Waterpakt* case in that the latter actually concerned a legislative order, and that order concerned the implementation of a specific directive. This case differs from *State and SGP v. Clara Wichmann et al.*, because unlike that case, here there are no specific measures requested from the State to comply with a CO2 reduction of the absolute minimum of 25% by 2020. Therefore, it is most definitely important that the order requested by Urgenda does not prescribe the contents of legislation.

7.4.3 impermissible involvement in considerations of a political nature?

599. In cassation complaint 9.4, the State argues that the Court of Appeal has failed to recognise that the Court cannot impose an order on the State if its implementation or the achievement of the result (i.e. a specific reduction of at least 25% by the end of 2020) requires a balancing of interests that amounts to considerations of a political nature. In this respect, Urgenda refers again to its position in the notice on appeal and as set out above: the absolute minimum 25% reduction has been selected in a way that is anything but arbitrary.[447] Simply because the court holds the State to the absolute minimum of a range that has been widely accepted

[447] Notice on appeal, paragraphs 9.15-9.20, see also Chapters 1 and 2 above. On this point, however, the State has put forward assertions in its oral arguments on appeal.

as a matter of fact and endorsed by the State itself in the past does not mean that the State's freedom of policy has been unacceptably interfered with. In doing so, the State is of course free to reduce more than what is required by law. Sanderink formulates this in his note to the judgment of the Court of Appeal as follows:

> '*Finally, the Court of Appeal, in my opinion, respects the policy freedom of the legislator and the administration and thus the separation of powers by leaving them completely free to choose the measures with which they want to achieve the necessary reduction (see legal grounds 67 and 68). It is important in this respect that (as argued in my contribution to the TvCR referred to above) the "margin of appreciation" of the State cannot, in my opinion, go so far that it is free to ignore (measures that lead to) a reduction in emissions that, according to the most recent scientific knowledge, is (are) at least necessary to protect the interests protected by Articles 2 and 8 ECHR.*'[448]

With regard to the same freedom of policy, Bleeker correctly points out that it does not go so far that human rights can be set aside.[449]

600. It should be added that the State's argument here too, as in cassation complaint 9.3, is not convincing in view of the complete freedom and the wide range of possible mitigation measures that are available to it. The State argues that '*considerations of a political nature are necessary for (at least some of) the additional measures that are conceivable in order to comply with the reduction order*'.[450] The fact that mitigation measures requiring considerations of a political nature are 'conceivable' does not in itself mean anything. Nowhere does the State substantiate the necessity of taking precisely this type of measures in order to comply with the reduction order. Moreover, as mentioned above, the *Staat en SGP v. Clara Wichmann et al.* judgment cited by the State must be clearly distinguished from the Urgenda case. In the aforementioned judgment, petitioners requested specific measures, and it was also clear that the unlawfulness could only be remedied by amending the law.[451] Precisely

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448 D.G.J. Sanderink, notes to: The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2591, *JB* 2019/10.

449 T.R. Bleeker, 'Nederlands klimaatbeleid in strijd met het EVRM', *NTBR* 2018/39, p. 292.

450 Cassation complaint 9.4 (underlining added, counsel).

451 See Boogaard, R.J.B. Schutgens, 'Geerten Boogaard, Het wetgevingsbevel. Over constitutionele verhoudingenen manieren om een wetgever tot regelgeving aan te zetten', *THEMIS* 2014-2, p. 104: '*At the same time, however, all parties involved agree that the only effective way to combat such discrimination would be to amend the law. It seems as if the objections to a court order, which are of a principle nature,*

in this respect, regarding the type of measures that can be taken to remedy the established unlawfulness, the Court of Appeal has (rightly) left the State complete freedom.

601. In cassation complaint 9.4, the State also argues that the accuracy of the reduction order is constitutionally problematic. As explained above, this type of order is fundamental to ensuring effective legal protection and is also in line with an international consensus on the actual minimum necessary reduction that must take place in order, given the limited available carbon budget, to maintain a real prospect of achieving the 2030 and 2050 reduction targets. The critics choose to ignore this.

602. For example, Besselink argues that the Court of Appeal may correctly applied the directly applicable provisions of Articles 2 and 8 of the ECHR in this case, but he wonders why '*the reduction order should really relate to a reduction of up to 25% and not another percentage, say 23%'*.[452] He also poses the question of whether it might not be the case that '*the parliament was better equipped to decide on these percentages, a parliament that is not hindered by procedural obstacles and is free to formulate much higher targets (as also appears from the most recent coalition agreement)?*'[453] Elzinga agrees with him on this point: '*Is it possible for the court to bind the political body to percentages? And why is a CO2 reduction of 25% acceptable, but a reduction of 23% or 20% is not?*'[454]

603. First, Urgenda points out that the minimum of 25% as set by the Court of Appeal was also the procedural maximum (paragraph 75). In the first instance, Urgenda argued for a reduction of 40% by the end of 2020, because it provides a greater (87%) chance of keeping warming below 2° C. Furthermore, a 40% reduction percentage is the only scenario that holds out the prospect of limiting warming to 1.5° C, which Urgenda, supported by scientific reports, deems necessary in order to maintain a reasonable chance of preventing climatological tipping points (paragraph 487 reply and paragraph 376 et seq. summons). The District Court did not

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suddenly no longer apply if the court with a "material legislative order" (just as effectively) severely restricts the legislator's freedom of choice.'

452 L. Besselink, 'De constitutioneel meer legitieme manier van toetsing: Urgenda voor het Hof Den Haag', *NJB* 2018/2154, p. 3.

453 L. Besselink, 'De constitutioneel meer legitieme manier van toetsing: Urgenda voor het Hof Den Haag', *NJB* 2018/2154, p. 3.

454 D.J. Elzinga, 'Urgenda-ruling gaat vrijwel zeker van tafel', Weblog Publiekrecht en politiek, available at http://www.publiekrechtenpolitiek.nl/urgenda-ruling-gaat-vrijwel-zeker-van-tafel/.

opt for this 'safer' limit. Although the District Court found that in 2011 the State had committed itself to a 30% reduction by 2020 and the State still considered such a reduction feasible, the District Court only ordered a 25% reduction by 2020 since it was at least necessary to avert the risk of dangerous climate change. Therefore, the District Court explicitly chose not to participate in the political assessment as to what the 'right' reduction percentage would be, but instead applied the absolute minimum supported by science. The Court of Appeal has endorsed this reduction with the full understanding that this minimum falls short of meeting the 1.5 ºC target.

604. Moreover, in a general sense, an objective expressed as a percentage can never be completely immune from criticism that it is arbitrary. With questions such as 'why not 23%? Why not 20%', one can cut reductions to 0. A (limited) margin of uncertainty is inherent in every limit. Every limit must be drawn somewhere, and in this case, the Court of Appeal has ruled and substantiated in detail why a reduction of less than 25% is unacceptably dangerous, in view of the dangers and risks of climate change. After all, the 25-40% reduction band by the end of 2020 has been widely regarded in climate science and in international, European and national politics since 2010 as the minimum to be pursued by Annex I countries such as the Netherlands. The scientific basis and the global consensus underlying this percentage have been explained in great detail by Urgenda. Whether parliament is 'better equipped to decide on these percentages' is something we do not know since, as explained above, climate policy has been inert. (paragraph 72). According to Fleuren, it is therefore not surprising that the court intervened:

> '*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 who criticises the government is of the opinion that the government could and should have done better itself. What matters is that if government bodies fail to comply with legally relevant standards and agreements, it should be possible for them to be corrected by the courts.*'[455]

7.4.4 Impermissible interference with margin of appreciation / discretion

[455] J.W.A. Fleuren, '*Urgenda* en niet(?)-rechtstreeks werkend internationaal (klimaat)recht', *NJB* 2018/9, p. 605.

of the State?

605. In cassation complaint 9.5, the State argues that '*In addition, in the case of a claim based on the violation of positive obligations of the State pursuant to Article 2 and/or Article 8 ECHR, the State is entitled to a wide margin of appreciation*'. With reference to cassation complaints 6.3 and 8.3.1-7, the cassation complaint claims that by granting the reduction order, the Court of Appeal did not leave the State discretion in this respect. In the cassation complaints referred to above, the State has argued, among other things, that the wide margin of appreciation in this case gives the State the discretion '*to choose a different rate of reduction or a different reduction path in order to achieve the two-degree objective*'.

606. As mentioned above, the State is misrepresenting the situation here. First, the margin of appreciation doctrine says nothing on the intensity of the review permitted by national courts.[456] In addition, the existence of a (wide) margin of appreciation, as argued above, is inappropriate in the case of a right as fundamental as that contained in Article 2 of the ECHR.[457] As Gerards pointed out, the ECtHR allows only very limited restrictions on absolutely formulated ECHR rights.[458] In addition, with regard to Article 8 of the ECHR, as explained above, the State has a limited margin of appreciation when it comes to non-compliance with environmental standards.[459] The State's argument boils down to the fact that its margin of appreciation here is so wide and far-reaching that (i) the rights contained in Articles 2 and 8 of the ECHR can be set aside and (ii) the absolute minimum reduction that, according to widely accepted scientific evidence, is still considered permissible in order to prevent dangerous climate change need not be achieved. In light of what has been discussed above, this position is unacceptable.

7.5 Conclusion

607. The State’s arguments in the ninth cassation complaint fail as a result of what has been explained above. The State's argument that the reduction order is in essence an impermissible legislative order is far from

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456 See paragraph above.
457 See paragraph above.
458 J.H. Gerards, 'EVRM, algemene beginselen', The Hague, SDU Uitgevers: 2011, p. 255.
459 See paragraph 6.2 above.

convincing. The reduction order granted by the Court of Appeal does not require the adoption of legislation. The State has also argued that mitigation measures requiring the adoption of legislation are conceivable (cassation complaint 9.3) and the making of political considerations (cassation complaints 9.3 and 9.4) are necessary. However, the State fails to effectively argue why precisely those measures are indispensable for achieving the reduction target.

608. The judgment of the Court of Appeal is in keeping with the long tradition of legal protection provided by the Dutch courts, which began over a century ago. The courts have recognised their position in the Dutch constitutional system and have not exceeded the limits of their powers in this scope. The discussion has largely concentrated on the rate at which the State must take mitigation measures. The parties agree on the general danger of climate change and the need to take mitigation measures. It should therefore come as no surprise that the Court of Appeal has now ordered the State to comply with the absolute minimum to which it is legally obliged to adhere. Moreover, as already argued by Urgenda and others, legislators are free to decide on which measures will meet the reduction policy.[460]

609. The Court of Appeal has proceeded carefully in this case. It has rightly held the State accountable to its human rights obligations and also gave it complete freedom to determine which mitigation measures must be taken. There is no alternative that offers effective legal protection. Urgenda believes that the judgment of the Court of Appeal, like the judgment of the District Court, fits into a tradition of judicial intervention when it comes to major dangers.

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[460] See notice on appeal paragraph 9.34, and M.A. Loth & R.A.J. van Gestel, 'Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?', *NJB* 2015, p. 2604.

CONCLUSION

In its statement of defence, Urgenda concludes that the appeal in cassation put forward on behalf of the State cannot lead to cassation because, on the complaints set out therein, the Court of Appeal in its contested ruling has not infringed the law, nor has it failed to comply with essential procedural requirements, with an order for costs as the Supreme Court considers appropriate.

Freerk Vermeulen

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