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Published in:
Journal of Energy and Natural Resources Law

DOI:
10.1080/02646811.2019.1584441

Publication date:
2019

Document Version
Peer reviewed version

Accepted Manuscript published by Taylor and Francis: Minnerop, P 2019, 'Integrating the 'duty of care' under the European Convention on Human Rights and the science and law of climate change: the decision of the Hague Court of Appeal in the Urgenda case ' Journal of Energy and Natural Resources Law. https://doi.org/10.1080/02646811.2019.1584441

Integrating the 'duty of care' under the European Convention on Human Rights and the science and law of climate change: the decision of the Hague Court of Appeal in the *Urgenda* case

Short Biography

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(Received 30 November 2018; final version received 14 February 2019)

Abstract

Does international law afford individual rights to enforce climate action of States and if so, is there a legally binding standard of climate protection that domestic courts can apply? The Gerechtshof Den Haag (Hague Court of Appeal) in the *Urgenda* decision of October 2018 has answered these questions in the positive. The Hague Court of Appeal thereby acknowledged the *existence* of a 'duty of care' in Dutch law based on the European Convention on Human Rights. A closer analysis of the judgment reveals that the concrete *content* of this duty of care is not derived from human rights, but from scientifically proven and internationally endorsed greenhouse gas emission reduction targets which are imperative to achieve the temperature goal of the Paris Agreement. This article analyses the judgment and examines whether it is consistent with the existing case law of the European Court of Human Rights. It demonstrates that the judgment forms part of a tidal wave of judicial enquiry into the accountability of governments for their climate action on the basis of human rights and that it is the virtue of human rights law to be conducive to resolving the accountability issue of governments for their climate action. More evidence is needed to substantiate that a new 'European Consensus' emerges that comprises not only agreement on an ambitious global temperature goal but translates this into individual rights to enforce climate protection.

Keywords: climate change, duty of care, human rights, positive action doctrine, UNFCCC, Paris Agreement, international environmental law, nationally determined contributions, European Consensus

Introduction

Despite the fact that climate litigation cases and the pertinent scholarly literature is constantly expanding[1] and litigation strategies are evolving,[2] the *Urgenda* decision of the Hague Court of Appeal of 9 October 2018 is to date a high watermark in approach and outcome.

The case concerns the claim of *Urgenda*, a Dutch citizens' environmental organisation with members from various domains in society, whose aim is to stimulate and accelerate the transition processes to a more sustainable society. The claimants asserted that the government of the Kingdom of the Netherlands (the Netherlands or the State) has acted unlawfully towards *Urgenda* because of its failure to commit to an emission reduction target so that the cumulative volume of Dutch greenhouse gas emissions would have been reduced by at least 25% compared to the base year of 1990 by the end of 2020.[3]

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[1] The Status of Climate Change Litigation. A Global Review (2017), UNEP, available at <{ HYPERLINK "http://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed" }=>, last accessed 1 February 2019; Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017); Meredith Wilensky, 'Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation' (2015) 26 Duke Environmental Law & Policy Forum 131; Jacqueline Peel and Hari M Osofsky, 'A Rights turn in Climate Change Litigation' (2018) 7 TEL 37; Sophie Marjanac and Lindene Patton, 'Extreme weather even attribution science and climate change litigation: an essential step in the causal chain?' (2018) 3 JERL 1; Michal Nachmany, Sam Frankhauser, Joana Setzer, 'Global trends in climate change legislation and litigation' Grantham Research Institute on Climate Change and the Environment, May 2017.

[2] For different litigation avenues and in particular the link between safeguarding human rights and development to achieve climate justice, see the report of the International Bar Association 'Achieving Justice and Human Rights in an Era of Climate Disruption', available at { HYPERLINK "http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx" }, page 3 and also chapter 3, last accessed 7 February 2019; Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841; Sabrina MacComrick, Rober L Glicksman, Samuel J Simmens, LeRoy Paddock, Daniel Kim, Brittany Whited, 'Strategies in and outcomes of climate change litigation in the United States' (2018) 8 Nature Climate Change 829; Michael B Gerrard and Joseph A MacDougald, 'An Introduction to Climate Change Liability Litigation and a View to the Future' (2013) 20 Connecticut Insurance Law Journal 153; Kim Bouwer, 'The Unsexy Future of Climate Change Litigation', (2018) 30 JEL 1.

[3] *The State of the Netherlands v Urgenda Foundation* 200.178.245/01, 9 October 2018, ECLI:NL:GHDHA:2018:2610, (unofficial English translation), paras 3.8; 27. The Dutch text of the judgment is the only authentic and formal text (ECLI-number: ECLI:NL:GHDHA:2018:2591).

With its ruling, the Gerechtshof Den Haag (Hague Court of Appeal) confirmed the decision of the Rechtbank Den Haag of 24 June 2015 (Hague District Court).[4]

In essence, the Hague Court of Appeal upheld the ruling that the State is under a 'duty of care' to limit the joint volume of Dutch annual greenhouse gas emissions (GHG emissions or emissions) so that this volume will have reduced by at least 25% by the end of 2020 compared to the level of the year 1990.[5] However, the Hague Court of Appeal based this decision on conceptually different reasoning from the Hague District Court in determining both the existence of that duty and the standard of care applicable.

Before turning to that in detail, it is worth considering briefly how this judgment has been discussed so far. The immediate debate demonstrates two main strands of reaction. First, there is a general positive reception of the outcome of the case, shared by many.[6] Secondly, opinions have differed particularly in relation to the competence of the judiciary under Dutch constitutional law but also under the European Convention on Human Rights (ECHR)[7] to issue such a ruling. It has been questioned whether the obligation to achieve a concrete minimum emission reduction target can be inferred from Article 2 or Article 8 ECHR. Concerns were raised that ordering a concrete target interferes with the margin of appreciation that the State

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[4] *Urgenda Foundation v The State of the Netherlands* (C/09/456689/HA ZA 13-1396, 24 June 2015, ECLI:NL:RBDHA:2015:7196 (unofficial English translation, only the Dutch text of the ruling is authoritative, ECLI:NL:RBDHA:2015:7145). For a discussion of the judgment see Roger Cox, 'A climate change litigation precedent: *Urgenda Foundation v The State of the Netherlands*' (2016) 34 JERL 143; Kars J de Graaf and Jan H Jans, 'The Urgenda decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change, (2015) 27 JEL 517; Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within comparative climate change litigation' (2016) 34 JERL 165; Jolene Lin,' The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands' (2015) 5 Climate Law 65; Eric Stein and Alex G Castermans, 'Case Comment – Urgenda v The State of the Netherlands: The "Reflex Effect" – Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care' (2017) 13 McGill Journal of Sustainable Development Law 304.

[5] Hague District Court, para 5.1, confirmed by Hague Court of Appeal, para 76.

[6] Ingrid Leijten, 'The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease' { HYPERLINK "http://leidenlawblog.nl/contributors/ingrid-leijten%3c" }; Jonathan Verschuuren, 'Urgenda Climate Change Judgment survives Appeal in the Netherlands' available at { HYPERLINK "https://blog.uvt.nl/environmentallaw/?p=354" } last accessed on 1 February 2019; Deepa Badrinarayana, 'A constitutional Right to International Legal Representation: The Case of Climate Change' (2018) 93 Tulane Law Review 47; see also https://www.theguardian.com/environment/2018/oct/09/dutch-appeals-court-upholds-landmark-climate-change-ruling.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS no. 5, 213 UNTS 221, I-2889, 47 Parties as of February 2019.

has under Articles 2 and 8 ECHR.[8] Closely related to that is the criticism that the Hague Court of Appeal acted outside its judicial powers, by intruding into the executive's sphere of political decision-making.[9]

This article proceeds in two main parts. The next part explains the ruling of the Hague Court of Appeal. This is followed by a second part, the analysis of the decision. The analysis makes three points.

First, the 'duty of care' established in Urgenda accords with the 'positive action doctrine' of the European Court of Human Rights (ECtHR) and does not violate the State's margin of appreciation or interfere with the separation of powers. Effective judicial review remains the ultimate marker to distinguish justiciable and non-justiciable policy issues in line with the ECtHR's jurisprudence. Reference to further case law will demonstrate that internationally, the Hague Court of Appeal is not the only court that is challenged to reconcile international human rights obligations and environmental commitments of States with the prevailing dependence of our economies on fossil fuel consumption.

The second and third points of the analysis are closely related and demonstrate that the judgment can be interpreted as an answer to two fundamental questions: Should governments be held accountable in domestic courts for the achievement of short-term, mid-term and long-term emission reduction goals?[10] If that question is answered positively, at what point in time does this accountability occur?

The conclusion draws the strings together and reflects briefly on how courts may contribute to 'good practice' in enhancing the protection of human rights *and* the environment in line with the recommendations of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean healthy and sustainable environment.

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[8] Ingrid Leijten (n 5).

[9] Johannes Fahner, 'Climate Change before the Courts: Urgenda Ruling Redraws the Boundary between Law and Politics' EJIL Talk, 16th November 2018, available at { HYPERLINK "http://www.ejiltalk.org/author/jfahner/" } last accessed on 1 February 2019.

[10] See for a discussion of the implications of new statutory duties in the UK Colin T Reid, 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts' (2012) 4 Public Law 749.

I. The decision of the Hague Court of Appeal

1. The proceedings and the reasoning of the District Court in summary

The State lodged its appeal on 23 September against the ruling of the Hague District Court.[11] It submitted the entire dispute to the Gerechtshof Den Haag (Hague Court of Appeal), based on 29 grounds. Urgenda contested the grounds of appeal and lodged a cross-appeal by submitting one ground of appeal, asserting that in contrast to the ruling of the Hague District Court it could rely on Articles 2 and 8 ECHR directly. Urgenda did not question the overall 25% target. In this situation, the Hague Court of Appeal re-assessed the dispute in its entirety, but decided that no more than a 25% reduction by 2020 could be awarded.

The Hague Court of Appeal upheld the judgment of the District Court and declared its judgment provisionally enforceable.[12] The State has lodged its appeal to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) within the two months deadline on 8th of January 2019.[13]

The Hague District Court had ruled that the ECHR was not directly applicable in this case to establish a duty of care and that the internationally agreed climate objectives did not have a direct effect in Dutch law, but noted they were useful in defining 'the framework for and the manner in which the State exercises its climate policy'.[14] The Hague District Court based its reasoning on tort law and applied the concept of the State acting negligently towards the claimants in accordance with the hazardous negligence jurisprudence of the Dutch Supreme Court.[15] By contrast, the Hague Court of Appeal used the ECHR as the direct basis for the existence of the duty of care, as will be explained further below.

The violation of a 'duty of care' is a tortious act under Dutch law, and such duties can be derived from law or unwritten rules of social conduct.[16] Just like the Hague District Court's

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[11] Kamerbrief over vonnis Urgenda/Staat available at www.rijksoverheid.nl/documenten/kamerstukken/2015/09/01/kabinetsreactie-vonnis-urgenda-staat-d-d-24-juni-jl

[12] On Friday, 16th of November 2018, the government announced its intention to appeal the judgment of the Hague Court of Appeal in which case the Supreme Court would decide. <{ HYPERLINK "https://www.urgenda.nl/en/dutch-government-fights-obligations-to-act-on-climate-change" }> (accessed 20/11/2018).

[13] Procesinleiding Vorderingsprocedure Hoge Raad (in Dutch only), 8 January 2019, available at { HYPERLINK "http://www.urgenda.nl/wp-content/uploads/20190108-procesinleiding-Staat-Urgenda-PRDF-2436693.pdf" } last accessed 14 January 2019.

[14] Hague District Court para 4.63.

[15] In the landmark *Kelderluik* decision, The Dutch Supreme Court developed four criteria that need to be considered in the evaluation of a dangerous situation , Hoge Raad 5 November 1965, ECLI:NL:HR:1965:AB7079, NJ 1966, 136; see Renée Huijsmans and Gerrit van Maanen (n 12) 388; Suryapratim Roy and Edwin Woerdman (n 4) 186.

[16] Book 6 Section 162(2) of the Dutch Civil Code prescribes: 'As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of

judgment, the decision of the Hague Court of Appeal also rested on the underlying rationale that a breach of the duty of care would constitute a tortious act of the State under Dutch Civil law, Book 6 section 162(2).[17] However, the reasoning behind the specific duty of care in this case was different in two main aspects. Firstly, the Hague Court of Appeal explained that Articles 2 and 8 ECHR are directly applicable in Dutch law. Secondly, to determine the concrete standard of the duty of care, the Court relied upon climate science and the internationally agreed temperature goal of limiting global warming to at least 2° C by the end of this century, in accordance with the IPCC reports and the global consensus as expressed in the Paris Agreement and the decisions of the Conference of Parties under the UNFCCC.[18]

2. Starting point: the science on climate change

In setting out the 'factual framework' established by the Hague District Court and not disputed by the parties,[19] the Hague Court of Appeal explained how the consumption of energy and particularly fossil fuels since the Industrial Revolution has contributed to global warming. The Court recognized a linear relation of emissions and global warming in saying that 'the greenhouse gas effect increases the more CO2 is emitted into the atmosphere', resulting in increasing global warming.[20] It pointed out that the full warming effect would only occur 30-40 years after the emission took place and noted that the general consensus of climate research is

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what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour'. See the Hague Court of Appeal, ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag, at para. 4.46. for a discussion of Dutch tort law see Renée Huijsmans and Gerrit van Maanen, Supervisors' Liability: The Dutch Fireworks Case: A Comparative Study between the Netherlands, the United Kingdom and Germany on State Liability in Case of Failure of Supervision' 16 Maastricht J. Eur. & Comp. L. 383, 386 (2009).

[17] Article 6:162 Definition of a 'tortious act'

- 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
- 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.
- 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

[18] Court of Appeal para 43 and the following passage on 'Dangerous climate change? Severity of the situation'.

[19] The Court explains however, that the Parties disagree in relation to the weighing of several of these facts and the conclusions that should be drawn from them. Court of Appeal para 2.

[20] Court of Appeal para 3.3.

that the global temperature increase in the year 2100 should not exceed 2° C and that more recently the evidence had emerged that a safe temperature rise should not exceed 1.5° C.[21] In response to the scientific knowledge, the global community had drawn up various treaties and agreements, in the UN, the EU and at State level, to reduce greenhouse gas emissions into the atmosphere. In addition to these mitigation measures, the Hague Court of Appeal recognised that adaptation measures were necessary to counter the consequences of severe climate change.[22] Against this background, the Hague Court of Appeal detailed the reduction goals of the government of the Netherlands.[23] The European Council had set the EU's reduction target for 2050 at 80-95%. There were, however, two interim targets to achieve, 20% reduction by 2020, and at least 40% in 2030. For the Netherlands, this entailed a reduction of 21% under the EU Emissions Trading System (EU ETS) sector by 2020 and 16% of the non-ETS sector.[24] At the hearing in the first instance, it had become evident that the government was on track to achieve a reduction of only 14-17% by 2020 in both sectors; and that in in the year 2017 only a reduction of 13% had been accomplished.[25]

3. International climate action and the history of Dutch reduction targets

The Court then assessed the claim that the State's emission reduction target should be higher against the background of the scientific evidence and of internationally agreed climate action.

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[21] Court of Appeal para 3.5; the judgment was released before the IPCC Special Report on the impacts of global warming of 1.5°C, where the IPCC outlined again the robust differences (robust means that at least two thirds of climate models show the same outcome) between risk scenarios between present-day and global warming of 1.5°C, and between 1.5°C and 2° C warming towards the end of this century, see chapter 1, pages 18-23. <{ HYPERLINK "http://www.ipcc.ch/pdf/special-reports/sr15/sr15_chapter1.pdf" }> last accessed 1 February 2019.

[22] The Paris Agreement consists of three main action pillars, mitigation (Article 4), adaptation (Article 7) and compensation (Article 8), 1/CP.21, UN FCCC/CP/2015/10/Add.1, UNTS chapter XXVII, 7.d, C.N.92.2016, 195 signatories and 184 Parties (29/11/2018), for the function of the Conference of Parties to provide guidance to implement these provision see Petra Minnerop, 'Taking the Paris Agreement Forward: Continuous Strategic Decision-making on Climate Action by the Meeting of the Parties' (2017) 21 UNYB, 124, 129.

[23] Court of Appeal para 3.7.

[24] The EU ETS refers to the European market for emissions trading, which includes all 28 EU member States and Iceland, Liechtenstein and Norway. It covers approximately 45% of the EU's internal greenhouse gas emissions and over 75% of international carbon trading, <https://ec.europa.eu/clima/sites/clima/files/factsheet_ets_en.pdf> last accessed 1 February 2019.

[25] District Court para 4.26, see also the Centraal Bureau voor the Statistiek report for 2017, available at <https://www.cbs.nl/en-gb/news/2018/19/greenhouse-gas-emissions-slightly-down-in-2017> last accessed 1 February 2019.

Starting with the UN Framework Convention on Climate Change (UNFCCC), including the decisions taken by the Conference of Parties (COP) thereunder[26] and the assessment reports of the Intergovernmental Panel on Climate Change (IPCC)[27] and the UNEP Emissions Gap Reports 2013 and 2017, the Paris Agreement and the EU's framework of climate action were considered. The decisions of the Conference of Parties, the supreme decision-making body of the UNFCCC, have since 2007 stipulated a minimum reduction of 25-40% by Annex I countries in order stay below the 2° C warming limit. These decisions of the Conference of Parties had been adopted in close consideration of the IPCC's AR 4 and AR5 which confirmed a higher minimum threshold for developed country parties despite their adaptation efforts and the potential of new technologies such as carbon extraction from the atmosphere. The Emissions Gap Report 2017 emphasises that even if States fully implemented their current pledges under the Paris Agreement, '80% of the carbon budget corresponding with the 2 C target will be used up by 2030. Starting from a 1.5°C target means that the carbon budget will be completely used up by then'.[28] After explaining the obligation of all Parties to the Paris Agreement to draw up nationally determined contributions (NDCs) the Court took account of the fact that Parties had already expressed their grave concerns that the current NDCs were not sufficient to achieve the upper limit of the temperature target.[29]

This was followed by an explanation of the situation in the Netherlands and its special role as an Annex I country under the UNFCCC. It is interesting to note that the Court of Appeal stressed the fact that up until 2011, the agreed Dutch emission reduction target under the UNFCCC was 30% by 2020. The Court specifically quoted a letter dated 12 October 2009, in which the Minister of Housing, Spatial Planning and the Environment stated: 'The total of emission reductions proposed by the developed countries so far is insufficient to achieve the 25-40% reduction in 2020, which is necessary to stay on a credible track to keep the 2° C objective

[26] The Court particularly mentions the decisions of the Conference of Parties adopted in Kyoto in 1997 (COP 3), Bali in 2007 (COP 13), Copenhagen in 2009 (COP 15), Cancun in 2010 (COP 16), Durban in 2011 (COP 17), Doha in 2012 (COP 18), Warsaw in 2013 (COP 19), Paris in 2015 (COP 21), Marrakech in 2016 (COP 22), Bonn in 2017 (COP 23), para 11.

[27] The Intergovernmental Panel on Climate Change, set up in 1988 through UNEP and the World Meteorological Organisation, provides the international community with information on scientific research in relation to causes and solution pathways of climate change.

[28] Court of Appeal para 14, UNEP Emissions Gap Report 2017, page 33,Published by the United Nations Environment Programme (UNEP), November 2017 available at <wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR_2017.pdf> last accessed 1 February 2019.

[29] Hague Court of Appeal para 15.

within reach.' Only after that, from 2011 onwards, the Dutch reduction target was adjusted to the lower EU wide target of 20% for 2020.[30]

In response to the Paris Agreement, the Netherlands Environmental Assessment Agency confirmed that more ambition and thus higher minimum thresholds as reduction targets were needed, and that in fact new IPCC guidelines had allowed the Netherlands to benefit from an upwardly adjusted emission baseline in 1990.[31] As a result of these adjustments, the State was already close to a 25% reduction, however, given the bandwidths of 20-25%, there remained an unacceptable margin of uncertainty,[32] especially in the light of the fact that CO2 equivalent emissions in 2017 dropped by only 1 % compared with 2016 and 17% compared to 1990.[33]

4. Admissibility of the claim and Article 34 ECHR

The Court started with the assessment of *Urgenda's* ground for appeal in the cross-appeal, thereby dealing with the procedural issues raised by the State.

The first question was whether Article 34 ECHR stood in the way of the Hague Court of Appeal hearing the claim. The Hague District Court had opined that *Urgenda* as legal person could not qualify as a 'victim' in accordance with Article 34 ECHR, and thus could not base its claim directly on an alleged violation of Articles 2 and 8 of the ECHR.[34] The Court of Appeal ruled that Article 34 ECHR concerned only access to the ECtHR, and not to national courts.[35] As such, it could not be invoked to prevent *Urgenda* relying on Articles 2 and 8 in the appeal proceedings.[36] The Court explained that Article 34 evidently allowed claims for groups of individuals and non-governmental organisations, if they claim a violation of their rights. Even if the ECtHR, however, excludes 'public interest action',[37] the Strasbourg court could not deny the

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[30] Hague Court of Appeal paras 19, 20.

[31] Hague Court of Appeal para 21.

[32] Hague Court of Appeal para 23.

[33] Centraal Bureau voor the Statistiek report for 2017, available at <www.cbs.nl/en-gb/news/2018/19/greenhouse-gas-emissions-slightly-down-in-2017> last accessed 1 February 2019.

[34] District Court para 4.45: '..the court considers that Urgenda itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR. After all, unlike with a natural person, a legal person's physical integrity cannot be violated nor can a legal person's privacy be interfered with..'.

[35] Article 34 ECHR reads: 'The Court may receive applications from any person, non-governmental organisation or groups of individuals claiming to be the victim of a violation by one of the Higher Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right'.

[36] ECLI:NL:GHDHA:2018:2610, Gerechtshof Den Haag, 09.10.2018, at para 35.

[37] The ECtHR does not allow complaints *in abstracto* and does not provide for *actio popularis* claims alleging that a provision of domestic law or domestic practice contravenes the Convention. Moreover,

access of claimants to Dutch courts. Book 3 section 305a of the Dutch Civil Code provides access to Dutch courts for class actions of interest groups.[38] A group of individuals within the jurisdiction of the Netherlands can thus claim a violation of its rights under the ECHR.[39] Since the Netherlands follows a strictly monist approach to International Law, the ECHR has direct effect in domestic law.[40]

The Court further decided that it was not required to consider the ground of appeal, as raised by the State, that Urgenda's claim was inadmissible in so far as it concerned the interest of future generations. It was sufficient that the admissibility of the claim raised in the interest of the present generation was undisputed.[41] The Court also noted that Urgenda had sufficient interest in the claim. With that, the Court addressed the State's argument that the proceedings might involve individuals who might not even want to be represented. However, this particular concern had been specifically acknowledged by the legislator, who in drafting the provision of Book 3 section 305a Dutch Civil Code made the decision that conflicting interests in society should not hinder the admissibility of a claim of one group of the society.[42]

5. The existence and the standard of the duty of care

The Hague Court of Appeal examined the asserted unlawfulness of the State's current reduction target in relation to Book 6 Section 162 of the Dutch Civil Code and Articles 2 and 8 ECHR. Starting points were Articles 2 and 8 ECHR, which have direct effect in Dutch law as mentioned above.[43] The Court stated that both provisions apply in environment-related situations that affect or threaten to affect the right to life and the right to family life.[44]

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claimants must be living persons and produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur, *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, no 47848/08, ECHR 2014-V para 101.

[38] Court of Appeal para 36; Book 3 section 305a para. 1 reads: 'A foundation or association with full legal capacity that, according to its articles of association, has the objections to protect specific interest, may bring to court a legal claim that intents to protect similar interests of other persons.'

[39] This implies that the court qualifies (without explicitly saying so), that Urgenda qualifies as a foundation or association that has full legal capacity and aims at protecting specific interest.

[40] This strict monist approach entails that rights provision are directly applicable in domestic courts. The benefit of this approach for human rights protection was already noted in 1950, see Hersch Lauterpacht, *International Law and Human Rights* (London 1950), 70.

[41] Hague Court of Appeal para 37.

[42] Hague Court of Appeal para 38, referring to Parliamentary Papers II, 1991/92, 22 486, no. 3, p. 22.

[43] Hague Court of Appeal para 36.

[44] Hague Court of Appeal para 40.

These provisions formed the basis for the government's duty of care: 'the government has both positive and negative obligations relating to the interests protected by these articles, including the positive obligations to take concrete actions to prevent a future violation of these interests (in short: a duty of care).'[45] The Court explained that the duty of care required that preventive action be taken if an interest that is protected is in danger of being affected, as a result of an act, activity or natural event. For interests that are solely protected under Article 8, the court referenced the case law of the ECtHR to underline that potential threats must exceed a minimum level of severity.[46] In considering the approach of the ECtHR in relation to the margin of appreciation that governments have, the Court of Appeal established that the duty of care should not place a disproportionate burden on the government.[47] The Court concluded at that point that the State had a 'positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR created the obligation to protect the right to home and private life. This applied to all activities, public and private, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous'.[48]

In a next step, the Court had to establish that a real imminent threat existed and this had to be followed by a definition of the concrete standard against which the actions of the State would be measured in order to determine compliance with its duty of care.

The Court stated that there existed a direct, linear link between anthropogenic emissions of greenhouse gases and global warming and noted that the full extent of the warming effect takes place with a 30-40 years delay after the time of emission. Global warming increases the severity of adverse climate impacts. Furthermore, the Court explicitly referred to the IPCC's AR5 in recognising the risk of reaching a tipping point, which may result in abrupt climate change.[49] This risk increased with a temperature rise of between 1 and 2° C. That a 'safe' temperature rise should not exceed 1.5°C was not disputed by the Parties. However, the emissions of CO2 in the Netherlands remained high, according to the Court, with CO2 still contributing 85% of all the country's greenhouse gas emissions. The Court concluded that this amounted to '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'.[50]

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[45] Hague Court of Appeal para 41.

[46] Hague Court of Appeal para 41.

[47] Hague Court of Appeal para 42.

[48] Hague Court of Appeal para 43.

[49] { HYPERLINK "https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter12_FINAL.pdf" }, at 1114. Hague Court of Appeal para 44

[50] Hague Court of Appeal para 45.

The Court then assessed whether the State was acting unlawfully by not reducing emissions further despite the real and imminent threats. To answer this, the court had to determine the standard that the 'duty of care' requires from the State, in other words, the concrete reduction target that the State should aim for.

The Court stated that in 2017, Dutch emissions had dropped by only 13%. Thus, in order to reach the target of 49% in 2030, a much greater effort would need to be made by the Netherlands than undertaken so far. The Court stressed the fact that greenhouse gas emissions linger in the atmosphere for a very long time and further contribute to global warming. This demonstrated that the State should achieve a higher reduction target already by 2020 to ensure an even distribution of reduction efforts. The Court substantiated this with the reference to the UNEP Emissions Gap Report 2013 and the report of the Netherlands Environmental Assessment Agency (PBL) of 9 October 2017.[51] If reductions were evenly distributed until 2050, with the aim to achieve at that point a reduction of 95%, this would entail a 28% reduction target in the short-term. This was confirmed by the government in answering the Court's questions.[52]

The Court then turned to the IPCC assessment reports AR4 and AR5 and concluded that an emission reduction of 25-40% in 2020 was required in these reports to meet the 2° C target.[53] The Court acknowledged that according to the AR5 multiple mitigation pathways existed, however, in accordance with the European Academy Science Advisory Council, it did not support (in the absence of further evidence) the State's argument that technologies such as carbon extraction from the atmosphere would in fact contribute substantively to achieving the 2° C target.[54]

The Court was satisfied that the State had known about the fact that a reduction target of 25%-40% by the end of 2020 would be necessary to achieve the 2° C target. The evidence for this had already been provided in the 4th Assessment Report of the IPCC in 2007. It is interesting that the Court in this context also refers to the decisions of Parties under the UNFCCC. Even though these decisions would not amount to a legally binding standard, they still confirmed that 25-40% reductions were necessary to prevent dangerous climate change. This was further underlined by the fact that the Netherlands had initially adopted a target of 30% reduction, based on the conviction that this had been the necessary benchmark to keep within the 2° C limit. The Court concluded that a reduction obligation of at least 25% by end 2020 was required to comply with the State's duty of care.

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[51] Hague Court of Appeal para 47.
[52] Hague Court of Appeal para 47.
[53] Hague Court of Appeal para 49.
[54] Hague Court of Appeal para 49.

At this point, then, the Court had come to two conclusions. Articles 2 and 8 ECHR were directly applicable in Dutch law and a duty of care followed from these provisions. The court determined the concrete standard for this duty of care on the basis of the available scientific evidence, and the internationally agreed temperature goal of the Paris Agreement.

6. The State's defences

The Court then turned to the State's defences. None of these were accepted by the Court. In particularly the argument that the State's participation in the EU ETS could stand in the way of adopting more stringent targets was not accepted. This is not surprising given the fact that Article 193 TFEU when read on its face explicitly allows greater ambition of EU Member States.[55] The argument that under the EU ETS a 'waterbed effect'[56] would occur did not convince the Court either. The waterbed effect means that the emission reduction achieved in the Netherlands will at the same time be consumed by surplus emissions in other EU Member States. The Court reasoned that it could not be presumed that other Member States would take less far-reaching measures than the Netherlands, especially since the Court was convinced on the basis of the evidence that the Netherlands was 'lagging behind'.[57] The risk of 'carbon leakage' as argued by the State was not recognised by the Court. 'Carbon leakage' refers to the potential loss of investment because companies could prefer to relocate to States with less strict emission obligations. The Court decided that this claim was not sufficiently substantiated,[58] especially since the same argument did not seem to prevent the State to commit for 2030 to a target of 49%, higher than the EU's target.[59]

The Court refused the argument that adaptation measures of the State would relieve the State of its obligation to reduce CO2 emission 'quicker than it has planned.'[60]

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[55] For a further discussion of the Judgment of the District Court in Urgenda and EU Climate Law see, Roy Suryapratim Roy, 'Distributive Choices in Urgenda and EU Climate Law' in: Martha Roggenkamp and Catherine Banet (eds.) *European Energy Law Report XI* (Intersentia 2017). Available at SSRN: **{** HYPERLINK "https://ssrn.com/abstract=3064346" **}**> last accessed 1 February 2019.

[56] This means that other countries emit more greenhouse gas while relying on the reduction achievements of another EU Member State and thus, negating the positive effect of the reductions: Pushing down GHG emissions in one place will cause them to pop up elsewhere, the term originates from effect in two-sided markets where regulations might have a positive regulatory effect in one place but prices will go up in other places instead.

[57] Hague Court of Appeal para 56.

[58]Hague Court of Appeal para 57.

[59] Hague Court of Appeal para 58.

[60] Hague Court of Appeal para 59.

The Court explained that the reduction requirement of 25-40 % that the Netherlands had to achieve under the UNFCCC as an Annex I country would apply to it individually, especially since the Netherlands had one of the highest per capita GDP of the Annex I countries.[61]

Concerning the claim that the Netherlands could not, on its own, solve the problem of global greenhouse gas emissions, the Court explicitly stated that 'this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change'.[62] In relation to the defence that there was a lack of a causal link, the Court held that because the case did not concern a claim for damages, 'causality only plays a limited role'.[63] Furthermore, the fact that other countries also contributed to climate change did not lead to failure of the claim for lack of causation, because this would deny claimants an effective legal remedy in a situation that involved a global problem.[64] The court supported this by a practical consideration which also demonstrated a good sense of humour, in adding that 'Urgenda does not have the option to summon all eligible states to appear in a Dutch court'.[65] In relation to the alleged shortage of time to achieve a higher reduction in emissions, the Court opined that the Hague District Court's ruling was now over three years old and also that the State had known for a long time about the severity of the situation and had even focused on a 30% reduction target by 2020 up until 2011. In addition to that, the Court in this context remarked that the Netherlands with relatively high per capita greenhouse gas emissions 'should assume its responsibility'.[66]

The Court rejected further the claim that a court order would conflict with the separation of powers and the role of courts in the constitution of the Netherlands. The Court held that it was 'obliged to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 ECHR'.[67] Moreover, the State still had discretion as to *how* to achieve the further reduction.

7. The conclusion of the Court of Appeal

This assessment of the Court is followed by a conclusion, in which the Court stated that the State 'fails to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end 2020.' This reduction should be considered a minimum,

[61] Hague Court of Appeal para 60.
[62] Hague Court of Appeal para 62.
[63] Hague Court of Appeal para 64.
[64] Hague Court of Appeal para 63, quote at para 64.
[65] Hague Court of Appeal para 64.
[66] Hague Court of Appeal para 66.
[67] Hague Court of Appeal para 69.

according to the Court, which also meant that the current margin of uncertainty of 19-27% was unacceptable when facing such serious consequences as identified by the Court.[68]

II. Human Rights, climate protection and the 'duty of care'

1. Interpretation of Article 2 and Article 8 ECHR in Climate Change law

Did the Court of Appeal go too far and interpret the rights of the ECHR in a more generous way than the ECtHR, thereby delivering a ruling that is unconvincing and perhaps even susceptible to being overturned by the Supreme Court of the Netherlands?[69] This question is indeed fundamental for the persuasiveness of the judgment and deserves closer examination.

The ECtHR in Strasbourg characterises the ECHR as a living instrument capable of adapting to new standards and particularly to an evolving European consensus that may advance the scope of the Convention.[70] The ECHR has also been qualified as a constitutional instrument for the harmonisation of human rights standards in Europe.[71]

In contrast to the African Charter on Human and Peoples' Rights[72] or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),[73] the ECHR does not provide for a right to a healthy environment. Nevertheless, the ECtHR has acknowledged in its jurisprudence that the existing rights under the ECHR, in particular Articles 2 and 8, may serve to protect the environment indirectly.[74]

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[68] Hague Court of Appeal para 73.

[69] For the criticism see above n 5.

[70] *Glor v. Switzerland,* no. 13444/04, para 75 ECHR 2009-III; *Lee v. UK* (GC), 25289/94, 18 January 2001, para 95; *Demir and Baykaya v. Turkey* (GC), 34503/97, 12 November 2008, paras 76-86.

[71] Kanstantsin Dzehtsiarou, 'What is Law for the European Court of Human Rights?' (2017) 49 Georgetown Journal of International Law, 89, 131; see also William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford 2015), part one.

[72] OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217, I-26363, 53 Parties as of February 2019. Article 24: All peoples shall have the right to a general satisfactory environment favourable to their development. Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

[73] OAS Treaty Series No. 69; ILM 156 (1089), 16 Parties as of February 2019, Article 11 Right to a Healthy Environment. 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

[74] *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII para 69: '..its approach to the interpretation of Article 2 is guided by the idea that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied in such a way as to make its safeguards practical and effective..', see also the Manual on Human Rights and the

Indeed, a 'greening' of existing human rights under the ECHR, and the effectiveness of this approach can be juxtaposed with the protection of the environment through explicit provisions in other regional and national human rights instruments.[75]

Before addressing the criticism mentioned in the Introduction and thereby turning to the question of the ECtHR's interpretation of Articles 2 and 8 in more detail, a further critique of the judgment should be considered briefly. This concerns the argument that the Court insufficiently differentiated between the two human rights provisions. Admittedly, the Court does not delve into too much detail at this point. However, the legal question before the Court was first and foremost whether the State is under a duty of care that obliges the State to adopt certain measures. Consequently, after stating that the right to life and the right to family life are at stake as a consequence of the severe risk posed by climate change, a further differentiation was not required to establish that the duty of care as such existed. It also worth noting that the ECtHR itself has decided, in cases where a positive obligation to safeguard the right to life exists, it is then not necessary to examine the complaint and the same facts under Article 8 separately.[76]

In returning to the interpretation of these rights provisions by the ECtHR, it should be remembered that as detailed above, the Hague Court of Appeal's decision can be interpreted as an assessment of two different issues in the context of Article 2 and 8 ECHR. First, the *existence* of a duty of care, which is based on both human rights provisions as directly applicable law. Here it becomes relevant whether the Court rightly assumed that Articles 2 and 8 demand preventive State action in the given context of climate change. Thus, only in identifying the existence of a duty of care can the question arise whether the Court's reasoning is in line with the interpretation of the substantive scope of Articles 2 and 8 by the ECtHR. For the definition of the concrete content of this duty of care, that is the standard against which compliance of the State is to be measured, the Court turns to a risk assessment in accordance with climate science and then examines reduction scenarios that would give effect to or impede the global temperature goal. The Court's reasoning in relation to the standard of the duty of care rests on the 'general consensus in the climate science community' that the global temperature should not exceed 2° C and that new insights over the past few years indicate that a safe temperature rise should not exceed 1.5° C.[77]

Environment, Article 2: 35 ff, Article 8: 44 ff. { HYPERLINK "http://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf" }, last accessed 12 February 2019.

[75] See for instance, Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613.

[76] *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII para 160.

[77] ECLI:NL:GHDHA:2018:2610, para 3.5.

In line with this reading of the judgment, any critique of the Hague Court of Appeal overstepping the line of interpretation of Articles 2 and 8 by the ECtHR must be narrowed down to the following question. Has the Court, in finding a legal basis in Articles 2 and 8 for the existence of a duty of care in a climate change case, overstepped the boundaries of the ECtHR's environmental case law?

A closer examination of the case law does not support that the *Urgenda* appeal decision is incompatible with the case law of the ECtHR, despite the fact that the ECtHR itself has not yet heard a climate case. The jurisprudence of the ECtHR under Article 2 rests on two main pillars, the first being the prohibition on States against intentionally and unlawfully take life.[78]

What matters more in the present scenario is the second pillar, the 'doctrine of positive obligations' of States to actively protect and safeguard the lives of persons under their jurisdiction.[79] At the same time, any State Party to the ECHR has a margin of appreciation in complying with its protective duties. The ECtHR acknowledges that national authorities are responsible for priority choices and allocating of resources, especially concerning complex issues of environmental and economic policies.[80] It follows that an obligation under Article 2 must not be interpreted so as to impose an impossible or disproportionate burden on the authorities.[81] Thus, the positive obligation of the State requires and allows the State to exercise its margin of appreciation so as to strike a fair balance between affected interests, be it other individuals or the economic wellbeing of the State.[82]

Two issues arise in this context. First, how does the ECtHR define the material scope of Article 2 and Article 8 as a basis for such a positive obligation, especially in environmental contexts? Secondly, how does the ECtHR apply the wide margin of appreciation that the State has, to adopt policy and legislative measures in complex environmental matters? Each of these issues will be addressed in turn.

A close examination of the scope of Articles 2 and 8 as interpreted by the ECtHR supports the reading that the State is under a positive obligation to adopt preventive measures to avert the risk of climate change. In defining and interpreting the positive obligations flowing from Article 2 ECHR, the ECtHR emphasised already in *Osman v the United Kingdom*, that a duty to protect the right to life can only exist if it is established that 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified

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[78] *L.C.B. v the United Kingdom*, 9 June 1998, ECHR 1998-III para 36.
[79] *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII para 71; *Budayeva and Others v. Russia*, no 15339/02, ECHR 2008-II para 128; also *Jaloud v The Netherlands*, no 47708/08, ECHR 2014-IV para 163.
[80] *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 128.
[81] *Osman v The United Kingdom*, no 87/1997/871/1083, (ECtHR, 28 October 1998) para 116.
[82] *López Ostra v Spain* no 16798/90, A/303-C, [1994] paras 51, 58. *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 122.

individual or individuals'.[83] This failure to perceive a risk to life must not be tantamount to gross negligence or wilful disregard of the duty to protect.[84] A violation of Article 2 can occur below the negligence threshold.[85] In a situation where the risk has not yet materialised, there must be, from a perspective *ex ante*, a real and imminent risk to life that the State knew or ought to have known.[86]

The substantive limb of the scope of Article 2 is complemented by a procedural limb. This includes for instance the obligation of States to investigate deaths that may have occurred in breach of the Convention.[87] States are under the obligation to effectively implement domestic laws which protect the right to life and to ensure the accountability of State authorities for deaths occurring under their responsibility.[88] The procedural limb also comprises the provision of information to the public on prevailing risks and the maintenance of a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.[89]

The Court has held consistently that with regard to dangerous industrial activities in an environmental context, special emphasis must be placed on the domestic regulation of the activity in question. This refers to the level of potential risk it entails, which must be governed by rules on licensing, installing, operating and supervising the activity. The State must also make it compulsory for all those concerned to take preventive measures to safeguard the lives of those who are endangered by the inherent risk.[90] In *Öneryıldız v Turkey* the Court specifically reasoned that among these measures, a special emphasis should be placed on the right to information, and underlined that this interpretation was supported by current developments in European standards.[91] The Court in *Öneryıldız* found a violation of Article 2 under the substantive and the procedural limb. Substantively, this was because after an expert report had

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[83] *Osman v The United Kingdom*, no 87/1997/871/1083, (ECtHR, 28 October 1998) para 116, see also *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no 19986/06 (ECtHR, 10 April 2012) para 36.

[84] *Osman v The United Kingdom*, no 87/1997/871/1083, (ECtHR, 28 October 1998) para 116.

[85] *Osman v The United Kingdom*, no 87/1997/871/1083, (ECtHR, 28 October 1998) para 116; *L.C.B. v. the United Kingdom*, no 23413/94, ECHR 1998-III, paras 36, 38; *A.A. and Others v. Turkey*, no 30015/96, (ECtHR, 27 July 2004), paras 44-45 (French only).

[86] Manual on Human Rights and the Environment, 35, available at www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf Manual, last accessed on 7 February 2019.

[87] *Mahmut Kaya v. Turkey*, no 22535/93, ECHR 2000-III page 153; *McCaughey and Others v The United Kingdom*, no 43098/09 ECHR 2013-IV paras 130, 144.

[88] *Anguelova v. Bulgaria*, no 38361/97, ECHR 2002-IV para 137, *Jasinskis v. Latvia*, no 45744/08 (ECtHR, 21 December 2010) para 72.

[89] *B. and Others v Croatia*, no 71593/11, (ECtHR, 18 June 2015) paras 72-74.

[90] *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII para 90.

[91] *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII para 90.

identified a risk of methane explosion for inhabitants who had illegally built their dwellings on a municipal rubbish tip, authorities knew or ought to have known that there was a real and immediate risk to life and thus, the State was obliged to take preventive operational measures to avert the risk materialising.[92] A violation of the procedural limb occurred because the operation of the justice system failed to secure the full accountability of authorities and thus did not provide adequate protection by law to safeguarding the right to life.[93]

The Court confirmed in *Budayeva and Others v. Russia* that positive obligations under Article 2 exist even in cases beyond human control, such as in the event of a natural disaster, where the State must provide the necessary legislative and administrative framework to maintain adequate defence and warning infrastructure.[94]

The scope of the right to family life in Article 8 has been defined broadly by the ECtHR.[95] Just as with the right to life, the right to family life contains negative and positive obligations. The scope of the right includes the quiet enjoyment of the home as a physical area. Not only does unauthorised entry into a person's home constitute a breach, but also interferences by noise, emissions, smells or similar forms of disruption.[96]

As to the negative obligation, the State must refrain from any arbitrary interference with private and family life. The positive obligation of a State is to ensure that the rights under Article 8 are respected and protected, by adopting legislative and regulatory frameworks to safeguard the right. This obligation includes the relationship between private individuals, the State must ensure that other private individuals cannot infringe a person's right.[97] The Court reasoned in *Lopez Ostra v Spain* that '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.'[98] The fact that Article 8 does not comprise a general right to nature preservation as such was again confirmed

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[92] *Öneryıldız v. Turkey* [GC], no. **{** HYPERLINK "https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2248939/99%22]}" \t "_blank" **}**, ECHR 2004-XII paras. 109, 110.

[93] *Öneryıldız v. Turkey* [GC], no. **{** HYPERLINK "https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2248939/99%22]}" \t "_blank" **}**, ECHR 2004-XII paras. 117, 118.

[94] *Budayeva and Others v Russia*, no 15339/02, ECHR 2008-II paras 129, 132.

[95] Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence, at 7.

[96] *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 96; *Deés v. Hungary*, no 2345/06 (ECtHR, 9 November 2010) para § 21; *Moreno Gómez v. Spain*, no 4143/02, ECHR 2004-X para 53.

[97] *Evans v the United Kingdom*,[GC] no 6339/05, ECHR 2007-I para 75.

[98] *López Ostra v Spain* no 16798/90, A/303-C, [1994] para 51.

in *Fadeyeva v Russia*.[99] The scope of Article 8 can only be affected if the environmental pollution manifests itself in an interference with the 'private sphere' [100] even if that does not pose a serious health threat.[101] The ECtHR further requires that a causal link must exist between the environmental pollution and the negative impact on the private or family life. These adverse effects must also attain a certain minimum level. The assessment of this level is relative and depends on all circumstances of the case, including intensity and duration of the nuisance and its mental or physical effects on individuals.[102]

Admittedly, the ECtHR so far has not subsumed climate change as a risk within Articles 2 and 8. To establish the positive obligation in accordance with the case law of the ECtHR, the risk must be such that the protected rights are at stake. Climate change is a common concern of humankind[103] and global warming beyond the temperature goal of the Paris Agreement poses a severe risk to humans according to scientific evidence.[104] These risks affect the right to family life, as severe weather events pose an immediate threat to many aspects of family and private life, in the form of heat waves, rising sea levels, increased flood risk and food shortages. The State must also have known of the risks of climate change, a matter that was not disputed in *Urgenda*. Thus, the risks of climate change are arguably within the scope of Article 2 and Article 8 and both provisions demand positive action by the State to minimise the risk of violation. The Hague Court of Appeal has translated these positive obligations that arise under the ECHR into the duty of care of the State.

The second and more complicated issue is, however, whether the Hague Court of Appeal thereby applied a narrower margin of appreciation than the ECtHR itself would have granted in

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[99] *Fadeyeva v. Russia* no. **{** HYPERLINK "https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2255723/00%22]}" \t "_blank" **}**, ECHR 2005-IV para 68; see also *Kyrtatos v. Greece*, no 41666/98, ECHR 2003-VI para 52; *Dubetska and Others v. Ukraine*, no 30499/03 (ECtHR, 10 February 2011) para 105.

[100] *Fadeyeva v. Russia*, no. **{** HYPERLINK "https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2255723/00%22]}" \t "_blank" **}**, ECHR 2005-IV para 68,

[101] *Taşkın and Others v. Turkey*, no 46117/99, ECHR 2004-X para 113.

[102] *Fadeyeva v. Russia,* no. 55723/00, ECHR 2005 IV para 69; *Hatton and Others v. the United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 96: '..seriously affected by noise or pollution..'.

[103] Preamble of the Paris Agreement, see above n21.

[104] Allen, M.R., O.P. Dube, W. Solecki, F. Aragón-Durand, W. Cramer, S. Humphreys, M. Kainuma, J. Kala, N. Mahowald, Y. Mulugetta, R. Perez, M.Wairiu, and K. Zickfeld, 2018: Framing and Context. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. In Press, chapter 1, 69.

relation to the State. The next section examines how the ECtHR balances the margin of appreciation with the obligation of States to comply with their positive obligations under Article 2 and 8 in environmental cases. It should be made clear at the outset that when national courts apply the Convention, they take account of the ECtHR's case law, and this includes interpretative tools such as the doctrine of the margin of appreciation, as the Hague Court of Appeal confirmed.[105] At the same time, the ECtHR acknowledges that national courts may define the scope of review in line with their own public-law concepts, 'such as irrationality, unlawfulness and patent unreasonableness'.[106] However, if an applicant has an arguable claim of a rights violation under the ECHR, the domestic regime must afford an effective remedy in accordance with Article 13 ECHR.[107] The objective of Article 13 ECHR is to enable individuals to obtain appropriate relief at national level 'before having to set in motion the international machinery of complaint before the Court'.[108] That means that the margin of appreciation at the domestic level is limited with a view to this provision. Accordingly, the ECtHR has not accepted the argument that the (wide) margin of appreciation that it accords the State could be used by a government to claim that a domestic court in reviewing the government's action acted unlawfully.[109]

How exactly is the margin of appreciation of States reconciled with the judicial powers of the ECtHR? First of all, the ECtHR draws no conceptual distinction in relation to the margin of appreciation it allows, whether an applicant claims that an interference with a right exists, or whether a standard for a positive obligation is at stake. It reasons that in both scenarios the State must strike a balance between competing interests.[110]

Indicative of a State's failure to strike such a balance in the environmental case law is a situation in which national authorities fail to comply with their own domestic regime.[111] One could perhaps argue that downgrading the national reduction targets amounts to a failure to comply with the domestic regime. The obvious argument against this would be that adopting a new target is not non-compliance with an existing regime but a change of the regime. Indeed,

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[105] See the Interlaken Declaration of 19.02.2010 of the High Level Conference on the Future of the European Court of Human Rights, B. Implementation of the Convention at the national level, available at { HYPERLINK "https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf" }; Dutch Court of Appeal, para. 42;

[106] *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 141.

[107] *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 138.

[108] *Öneryıldız v Turkey* [GC], no. 48939/99, ECHR 2004-XII para 145.

[109] *A and Others v The United Kingdom* [GC] no 3455/05, ECHR 2009-II para 184, para 190; but see Johannes Fahner, 'Climate Change before the Courts: Urgenda Ruling Redraws the Boundary between Law and Politics' EJIL Talk, 16th November 2018.

[110] *López Ostra v Spain* no 16798/90, A/303-C, [1994] para 51.

[111] *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 120; *López Ostra v Spain* no 16798/90, A/303-C, [1994] para 58.

the present case is different from, for example, the operation of an illegal waste treatment plant as in *Lopez*.

However, even in the absence of domestic irregularities as indicative factors, the ECtHR redefines and narrows the margin of appreciation in other cases, either because of the nature of the activity the State regulates, or the aims of the restriction. To illustrate this, if a case concerns a most intimate aspect of private life, such as sexual conduct, particularly serious reasons must exist before interferences by public authorities can be legitimate.[112]

A further factor that may narrow down the margin of appreciation is if a new 'European Consensus' emerges, that indicates that Parties to the ECHR adopt a common standard that advances the interpretation of the ECHR.[113] The ECtHR uses this concept in relation to the margin of appreciation[114] and adopts a comparative-analytical approach to establish the common ground or standard in the law and practice of the Parties to the Convention.[115] In the present scenario, an argument would need to be made for the fact that there is a growing European Consensus.

The most convincing argument against proceeding with the analysis on the basis of a narrower margin of appreciation as a result of an indicative factor or an emerging European Consensus is that an answer to the question whether the balance has been struck is even more convincing in the absence of any such initial assumption. Just like in *Hatton*, the question at this point thus reverts back to the ordinary margin of appreciation that is available to States in taking policy decisions in environmental contexts.[116]

It is argued here that the Hague Court of Appeal has not interfered with this margin, for the following reasons. The Hague Court used environmental standards, internationally and domestically endorsed, to exemplify what is the necessary minimum threshold to mitigate climate change that allows the prevention of scientifically proven risks which are not limited to, but will affect, the personal and substantive scope of Article 2 and Article 8 protected rights.[117]

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[112] *Dudgeon v The United Kingdom*, no 7525/76 (ECtHR, 22 October 1981) paras 52-56.
[113] https://www.coe.int/en/web/help/article-echr-case-law.
[114] *Lautsi v Italy* [GC] no 30814/06, ECHR 2011-III para 70.
[115] *Glor v Switzerland,* no. 13444/04, ECHR 2009-III para 75; *Vo v. France* (GC) no 53924/00, ECHR 2004-VIII para 84.
[116] *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 122.
[117] See for the risk of increasing heat-related morbidity and mortality in relation to different warming scenarios, See O. Hoegh-Guldberg, D. Jacob, M. Taylor, M. Bindi, S. Brown, I. Camilloni, A. Diedhiou, R. Djalante, K. Ebi, F. Engelbrecht, J. Guiot, Y. Hijioka, S. Mehrotra, A. Payne, S. I. Seneviratne, A. Thomas, R. Warren, G. Zhou, 2018, Impacts of 1.5ºC global warming on natural and human systems. In: Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [V.

The extent will depend on whether or not the long-term temperature goal of the Paris Agreement is achieved, with new evidence emerging that a temperature increase of 1.5°C would considerably reduce risks of extreme weather events compared to 2° C global warming.[118] On that basis, the Court sets a threshold below which the State is failing in its duty. This minimum threshold for the State's 2020 emission reduction target forms part of the 'what' that the State has to do and should not be re-interpreted as a concrete course of action in the sense of 'how' the State has to achieve these reductions in greenhouse gas emissions. How to achieve the further reductions remains within the discretion of the State. Conversely, the minimum threshold of 25% represents an essential part that qualifies the positive obligation of the State. It is not the fact that the State *is* emitting CO2 that amounts to a violation of Article 2 and 8, but that the State is emitting *above* a certain benchmark. The question for the Court was to establish how much the State could emit without violating human rights and this cannot not be answered without stipulating a concrete minimum target. Ordering this concrete benchmark in the area of climate change is similar to the requirement of providing an effective legislative framework in the area of natural disaster management and the control of hazardous activities; to afford a national warning mechanism or an effective system to enquire into the accountability of authorities in the event a known risk has materialised and could have been prevented as in *Öneryıldız*. Moreover, the Hague Court of Appeal has applied a scope of review that eludes the risk of breaching the right to an effective remedy under Article 13 of the ECHR as in *Hatton*.[119] In that case, the Grand Chamber of the ECtHR overturned the decision of the Chamber of the Court because it could not find a violation of the substantive scope of Article 8.[120] However, the ECtHR found that the domestic remedy had not been effective, because the national court had defined the matter of policy issues too broadly and failed to afford claimants effective judicial review. The right to provide effective access to a judicial remedy thus marks

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Masson-Delmotte, P. Zhai, H. O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B. R. Matthews, Y. Chen, X. Zhou, M. I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, T. Waterfield (eds.)]. In Press, para 3.4.13; also for food security and extreme weather events https://www.metoffice.gov.uk/binaries/content/assets/mohippo/pdf/k/5/climate_impacts_on_food_security_and_nutrition.pdf

[118] See O. Hoegh-Guldberg, D. Jacob, M. Taylor, M. Bindi, S. Brown, I. Camilloni, A. Diedhiou, R. Djalante, K. Ebi, F. Engelbrecht, J. Guiot, Y. Hijioka, S. Mehrotra, A. Payne, S. I. Seneviratne, A. Thomas, R. Warren, G. Zhou, 2018, Impacts of 1.5ºC global warming on natural and human systems. In: Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [V. Masson-Delmotte, P. Zhai, H. O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B. R. Matthews, Y. Chen, X. Zhou, M. I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, T. Waterfield (eds.)]. In Press, para 3.5.2.2, also summary in table 3.6.

[119] See above *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 129.

[120] *Hatton and Others v The United Kingdom* [GC] no 36022/97 ECHR 2003-VIII para 129.

the ultimate line for the separation of powers. Judicial self-restrained that defines the prerogative of the executive too broadly and declines to scrutinise policy decisions as such or even only because of their complexity, may risk violating the right to an effective remedy under Article 13 of the ECHR.

2. Is there potential for Consensus? References to some global climate cases

Are other cases indicating that European States have a similar approach to enforcing climate action of their governments, pointing perhaps to an evolving European Consensus in that respect? Would that consensus require adopting quantified emission reduction targets, or also stipulate operational enforcement procedures in domestic law? Answering these questions would go beyond the purpose of this article. Urgenda is to date the high watermark for the European case law, as mentioned in the introduction. The following will only give a short survey of the gist of a wider judicial enquiry into climate action of States based on human rights protection. So far, the decided cases tentatively allow a preliminary presumption to be drawn, that a mixed picture emerges in Europe; one which does not indicate the potential outcome of pending cases. These pending cases could of course shift the evidence to either side. Interestingly, there are a successful and pending human rights based climate lawsuits outside Europe which will also be referenced briefly, clearly not to proof or disproof a specific European Consensus but because they illustrate the scope of judicial responses globally which treat climate change as a human rights concern.

The virtue of human rights in climate change litigation is that they provide a cause of action against governments. Yet in a field of complex economic and environmental decision-making, courts may dismiss a lawsuit on the ground that it raises a non-justiciable political question.

In *Greenpeace Nordic and Nature Youth v. Ministry of Petroleum and Energy* the Oslo District Court ruled in January 2018 that a the licencing decision of the government did not violate Article 112 of the Norwegian Constitution.[121] The court explained that in order for the licensing decision to amount to a violation of Article 112, a relationship between the decision and the undesirable environmental impacts needed to be determined. In further specifying the environmental damage that might occur, the Court then opined that CO emissions abroad from exported oil and gas have no significance in the assessment of whether there is a violation of Article 112 of the Norwegian Constitution. This allowed the Court to conclude that the remaining environmental risk, consisting of the risk entailed in the drilling operation itself and Norwegian GHG emissions, was rather limited. In the light of this limited risk, the Court found that the Government has fulfilled its procedural duties under the Constitution. Greenpeace

[121] 16-166674TVI-OTIR/06, s 5.2.1; English version of the Judgment available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180205_16-166674TVI-OTIR06_press-release.pdf.

Nordic and Nature and Youth are appealing the decision of the District Court to the Norwegian Supreme Court.[122]

In *Plan B Earth v Secretary of State* in the UK, the UK High Court of Justice in July 2018 rejected the submission that it could be argued that the Secretary of State violated Articles 2 and 8 ECHR by not further tightening the emission reduction target of the Climate Change Act 2008.[123] In November 2018, the Swiss Federal Administrative Court dismissed a claim of the Climate Seniors Association and ruled that the government's climate change mitigation measures did not affect the association in any particular way beyond the impact on the general public and that a claim for the release of a court order could not be based on the ECHR.[124]

Pending cases demonstrate that litigation strategies are constantly evolving. Claimants in the case *VZW Klimatzaak v. Kingdom of Belgium* follow the human rights approach of *Urgenda*. The claim is brought against four Belgian regions and respective language issues were resolved by the Court de Cassation in April 2018.[125] Reference to *Urgenda* was also made recently by Greenpeace Germany and three German families whose livelihoods rely on organic farming before the Administrative Court in Berlin in a lawsuit against the German federal government. They assert that in accordance with the Special IPCC Report on Global Warming which was released in October 2018, it has become clear that global emissions must be reduced long before 2030 and at a higher reduction rate than previously assumed. The claimants rely on their rights under the German Basic Law (Grundgesetz) and on the application of the rights under the ECHR, which is applicable as federal law (not constitutional law) in Germany.[126]

Human rights and environmental standards may even merge at the domestic level into a new implied constitutional right to a healthy environment. The ruling of the High Court of Ireland in the case of the *Friends of the Irish Environment v Fingal County Council* gives an example of how increasing awareness for environmental protection led to the explicit recognition of an implied

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[122] http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180205_16-166674TVI-OTIR06_press-release.pdf

[123] *Plan B Earth v Secretary of State*, [2018] EWHC 1892 (Admin) no: CO/16/2018 para 49; appeal refused on 25 January 2019, C1/2018/1750.

[124] Bundesverwaltungsgericht, Judgment of 27 November 2018, A-2992/2017 (in German), at page 24; press release of 7 December 2018 in English available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181207_No.-A-29922017_press-release.

[125] For the timeline see (in French) { HYPERLINK "https://affaire-climat.be/fr/the-case" }: in English see http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf.

[126] Submission of claimants, Klageschrift in German, page 83, 84. http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181025_Not-Yet-Available_complaint.pdf

constitutional right.[127] Claimants aimed at overturning the planning permission for a new runway at Dublin Airport. This was not granted yet the Court stated: 'A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution'.[128] This case was similar to a lawsuit concerning the permission to build a third runway at the Vienna Airport which was also eventually lost in the Austrian Constitutional Court when the decision of the Federal Administrative Court was reversed. [129] In the Climate case Ireland which was launched in the aftermath of the Dublin Airport decision, *The Friends of the Irish Environment* obtained from the High Court leave to judicially review the Irish government's approval of its 2017 National Climate Mitigation Plan.[130]

A constitutional complaint to the German Federal Constitutional Court was lodged in November 2018 by a solar energy promotion association Germany (SFV) and the federation for environment and nature protection Germany (BUND). They argue that to protect the fundamental rights to life, health and property under the German Basic Law, the Federal Government and the Bundestag must systematically combat global warming, at a minimum, meeting the global warming limit of 1.5°C of the Paris Agreement.[131]

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[127] *Friends of the Irish Environment v Fingal County Council et al*, The High Court, Judgement of 21st November 2017, [2017] IEHC 695 No 201 JR, at page 292 para 264. The Supreme Court refused to hear an appeal in the case. https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/supreme-court-refuses-appeal-over-new-dublin-airport-runway-1.3563975.

[128] Friends of the Irish Environment v Fingal County Council et al, The High Court, Judgement of 21st November 2017, [2017] IEHC 695 No 201 JR, at page 292 para 264.

[129] Federal Constitutional Court of Austria, judgement of 29 June 2017, E875/2017; **{** HYPERLINK "https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_E_875-2017_Flughafen_dritte_Piste.pdf" **}** (in German); the case has been referred back to the Federal Administrative Court for a new decision that takes the ruling of the Constitutional Court into account.

[130] **{** HYPERLINK "http://www.friendsoftheirishenvironment.org/climate-case" **}**, last accessed 12 February 2019.

[131] Constitutional complaint because of insufficient German climate policy November 26, 2018 | Climate change, coal, energy transition, http://www.spiegel.de/wissenschaft/natur/umweltverbaende-verfassungsbeschwerde-wegen-klimaschutz-a-1240115.html.

In December 2018, four non-governmental organisations in France sent a formal letter to the French Prime Minister and 12 members of the French government, to start legal proceedings for an action for failure to act against the French government.[132]

The European Union and its climate action has also been challenged recently. In 2018, the case *Carvalho and Other v Parliament and Council of the European Union* was brought to the General Court of the European Union.[133] The claimants assert that the European Union is obliged to adapt more stringent GHG emission reduction targets than it currently has. The existing target of a 40% reduction of GHG emissions by 2030 set in the current legislative measures[134] threatens, it is argued, the fundamental rights of life, health, occupation and property as protected by the Charter of Fundamental Rights of the EU.

In the United States, the landmark case of *Juliana v United States* was filed in the U.S. District Court for Oregon in 2015 and has not yet been able to move to trial.[135] While the US government had failed with various attempts to prevent the case from going to trial, each time causing further delays, the expectation was that following the Supreme Court ruling of 30 July 2018, the facts of the case would be heard on 29 of October 2018. However, the Oregon Federal District Court stayed proceedings of the young plaintiffs on the 21 November 2018, to allow the government to pursue interlocutory appeal.[136] On 26 December 2018, the 9th U.S. Circuit Court of Appeal granted the government the permission to appeal the decision of the District Court allowing the case to move to trial.[137] In January 2019, the plaintiffs filed a motion to expedite the appeal and to set a schedule for the briefing and the oral argument[138], this was granted in part by the 9th Circuit Court.[139] In February 2019, the government filed its opening brief arguing that plaintiffs lacked standing and that the lawsuit would not be a controversy

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[132] Letter available in French at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181217_NA_na-1.pdf.

[133] Action brought on 23 May 2018 — *Carvalho and Others v Parliament and Council*, Case T-330/18 (2018/C 285/51), OJ C 285/34; 13 August 2018.

[134] Directive 2003/87/EC governing emissions from large power generation installations (ETS); regulation 2018/EU on emissions from industry, transport, buildings, agriculture, and etc. (ESR); and regulation 2018/EU on emissions from and removals by land use, land use change, and forestry (LULUCF).

[135] https://www.youthvgov.org/our-case/

[136] *Juliana v the United States of America*, No 6:15-cv-01517-AA order of 21 November 2018.

[137] D.C.No. 6:15-cv-01517-AA, Order of 26 December 2019.

[138] Motion under Circuit Rule 27-12 to expedite appeal and to set schedule for briefing and oral argument, Case No. 18-36082, ID 11139567, 2 January 2019, the Court granted the request to expedite briefing and set a schedule, however, it did not approve streamlined extensions of time and ordered that no written motions for extensions of time will approved absent extraordinary and compelling circumstances.

[139]D.C NO. 6:15-cv-01517-AA, Order of 7 January 2019.

within the meaning of Article III of the constitution. Furthermore, even if there existed a federal public trust doctrine, this would not cover the 'climate system' or atmosphere.[140]

Other courts have even recognised that the environment itself may qualify as a rights subject. The Supreme Court of Justice in Colombia decided on the *tutela*[141] of young plaintiffs in 2018 that the Colombian State had not effectively protected the Colombian Amazon from deforestation and thereby infringed the rights of present and future generations to life and a healthy environment. The Supreme Court even recognised the Colombian Amazon as an entity capable of being a subject of rights. That an ecosystem can be such an entity with rights of its own had already been decided in 2017. The Colombian Constitutional Court ruled that the *Atrato* River deserved protection *qua* its own rights. The Supreme Courte ordered the Presidency and the Ministries of Environment and Agriculture to create an 'intergenerational pact' for the life of the Colombian Amazon, in which the plaintiffs and affected community should participate actively.[142]

Already in 2005, the Federal High Court of Nigeria found that activities related to exploring and producing Crude Oil and other Petroleum Products can violate fundamental and human rights. The Court decided that the fundamental rights to life and dignity of human persons provided in section 33 (1) and 34 (1) of the Constitution of Federal Republic of Nigeria, and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights, included the right to a clean, poison-free, pollution-free and healthy environment.[143]

The Inter-American Court of Human Rights gave an advisory opinion in 2017 in response to a request of the Colombia to determine the obligations of States under the right to life in Article 4 and the right to humane treatment in Article 5 of the American Convention, in relation to the scope of application as defined in Article 1 para. 1 and Article 2.[144] The Court recognized an 'irrefutable relationship' between the protection of the environment and the realisation of human rights.[145] The Court noted that the right to a healthy environment was expressly recognised in Article 11 of the San Salvador Protocol and that this right should form part of the economic, social and cultural rights protected by Article 26 of the American Convention. Based

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[140] D.C NO. 6:15-cv-01517-AA, Opening Brief of 1 February 2019, at 13, 24 and 47, 54.

[141] A *tutela* is a legal remedy in Colombia to protect fundamental rights.

[142] English translation in parts available at **{** HYPERLINK "https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/" **}**; Full text available in Spanish at https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm.

[143] *Gbemre v Shell Petroleum Development Company Nigeria LtD*, Suit No: FHC/B/CS/53/05.

[144] American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969, OAS Treaty Series No 36; 1144 UNTS 123, I-17955, 23 Parties as of February 2019.

[145] https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm

on this, the Court determined concrete obligations from the duties to respect the rights to life and personal integrity in the context of environmental protection. In particular, the Court ruled that States are obligated to prevent significant environmental damage within and outside their territory and must take preventive action including carrying out environmental impact assessments, mitigating environmental damage and acting in line with the precautionary principle. Notably, the Court emphasised this obligation to take precautionary measures to protect the right to life in the event of 'possible serious and irreversible damage to the environment, even in the absence of scientific certainty.'[146] Protecting human rights in environmental context also requires States to ensure access to justice, in relation to the state obligations for the protection of the environment.

In Canada, *ENvironment JEUnesse* has filed an application for authorisation to bring a class action on behalf of all Quebec young people under the age of 35, seeking the judiciary to declare that the Canadian government violates the rights of young people as protected under the Canadian Charter of Rights and Freedoms and Quebec's Charter of Human Rights and Freedoms.[147]

In *Pandey v India*, a nine year old claimant filed a petition with the National Green Tribunal in India, claiming that the Public Trust Doctrine, India's obligations under the Paris Agreement and the existing environmental laws, in particular on environmental impact assessment, demand greater consideration of and action on climate change.[148]

Finally, a famous and successful claim was brought by *Ashgar Leghari*, a farmer from Pakistan. He claimed that the delay of the national and regional governments in implementing the 'National Climate Change Policy 2012' and the 'Framework for Implementation of Climate Change Policy (2014-2013) violated the fundamental rights of citizens: the right to life in Article 9, the right to human dignity Article 19A and right to property in Article 23 under the constitution of Pakistan. The Lahore High Court held in 2015, that the delay of the government violated the fundamental rights of the claimant and the citizens of Pakistan. According to the Court, the human right to life included the right to a healthy and clean environment.

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[146] Inter-American Court of Human Rights, Advisory Opinion of 15 November 2017, official summary issued by the Inter-American Court, page 4.

[147] Motion for Authorisation to institute a class action and obtain the status of representative (Art 574 C.C.P.), *ENvironment JEUnesses v Attorney General of Canada*, application of 26 of November 2018. Their claim concerns the right to life and security of the person, section 7 of the Canadian Charter and section 1 of the Quebec Charter, The right to live in a healthful environment in which biodiversity is preserved, section 46.1 of the Quebec Charter and the right to equality as intergeneration equity, under section 15 of the Canadian Charter and section 10 of the Quebec Charter.

[148] { HYPERLINK "http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-___-of-2017_petition-1.pdf" }, at 49 f.

The above summary demonstrates that the global nature of the climate challenge might contribute to the complexity of climate cases, however, it does also lend itself to remarkably comparative approaches of courts in an inter-jurisdictional discourse. Successful cases are indeed able to nurture the reasoning of other courts. The very recent order of the Australian Land and Environment Court in *Gloucester Resources Limited v Minster for Planning* gives an example of this. The Court dismissed the appeal of the mining company Gloucester Resources Limited against the decision of the Ministry which denied consent to develop the Rocky Hill Coal Project. The decision of the Court references the *Urgenda* decision of the Hague Court of Appeal and integrates the Hague court's responses to the defences of the State in rebutting similar arguments of the mining company in relation to the significance of emissions, causation and carbon leakage.[149]

3. Resolving the accountability issue through rights protection?

The commitment to a global temperature goal and internationally stipulated GHG emission reduction targets does not answer the question how these relate to domestic climate action and whether these targets can be enforced in national courts against governments. How become GHG emission reduction targets operational, and to whom should governments be accountable, to their citizens, their parliaments, or the international community as a whole?

Human rights obligations require positive action of States. For instance, the International Covenant on Civil and Political Rights (ICCPR) recognises the right to life, understood as 'the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation'.[150] It entails that States take protection measures, for instance to reduce infant mortality and to increase life expectancy.[151] Climate Change concretises the necessary actions of States under other Human rights instruments, such as the Convention on the Rights of the Child.[152] Given the requirement to actively protect human rights in the specific

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[149] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, 8 February 2019, available at { HYPERLINK "http://www.caselaw.nsw.gov.au/decision/5c59012ce4b02a5a800be47f" }, last accessed 11 February 2019. These related to the amount of GHG emissions (523), the lack of a causal link (para 524), carbon leakage (537) and the role of the Paris Agreement (para 539).

[150] UN Human Rights Committee (HRC), CCPR General Comment No 6: Article 6 (Right to Life), Adopted on 30 April 1982.

[151] UN Human Rights Committee (HRC), CCPR General Comment No 6: Article 6 (Right to Life), Adopted on 30 April 1982, para 5.

[152] 1577 UNTS I-27531, 20 November 1989, 196 Parties as of February 2019. See the Report of the Committee on the Rights of the Child on Belgium, CRC/C/BEL/CO/5-6, 1 February 2019 para 35(b): 'Develop a comprehensive national plan for reducing the level of greenhouse emissions to prevent dangerous climate impact,..'; Report on Japan. CRC/C/JPN/CO4-5 para 37(d): 'Ensure that climate mitigation policies are compatible with the Convention, including by reducing its emissions of greenhouse gases in line with its international commitments to avoid a level of climate change threatening the enjoyment of children's rights, particularly the right to health, food and adequate standard of living'.

context of climate change, human rights obligations may provide the legal basis for claims against States for inadequate climate protection and thus contribute to clarifying *one* accountability avenue.

Courts will have to address the challenge of making human rights operational to enforce climate accountability. This entails identifying the standard and timeframe to measure their governments' climate action.

In *Urgenda*, the Hague Court of Appeal used international environmental standards, which are stipulated by scientific evidence and endorsed by international agreements and Parties decisions thereunder to define the standard of the State's human rights obligation. The human rights obligation becomes operational and enforces the environmental standard. The role of short-term and mid-term targets is to act as indicators that the long-term target and hence the temperature goal for the end of this century can be met. Thus, based on the duty of care the government is accountable if it is at risk of not achieving the long-term target, either because of a lack of ambition in setting interim targets or as a result of not meeting such a target. This rationale entails that human rights will be conducive to resolving the question of how to hold governments to account for outcome duties in relation to Climate Change.[153]

How is the standard for this outcome duties defined, are the internationally framed reduction requirements the main driver, or the fact that the State itself used to embrace higher ambition up until 2011, or both? The above analysis has demonstrated that the Hague Court of Appeal takes account of the internationally stipulated reduction targets, however, it also acknowledges that up until 2011, the State had adopted a target of 30% because this was 'necessary to stay on a credible track to keep the 2° C objective within reach'.[154] The Netherlands subsequently lowered its ambition to 20% in accordance with the EU-wide target. Had *Urgenda* framed its claim differently, would current international law require a higher target?

The judgment is not clear at this point and admittedly, the Hague Court of Appeal did not have to answer this question, as it was bound by the claimants' submission. The conceptual difficulty in identifying a concrete and even higher emission reduction target at the international level which could then be applied in national law is the result of a paradox of climate change law: the existence of an internationally agreed long-term global temperature goal that is to be achieved with NDCs, a legal approach that manifests itself in Article 4 of the Paris Agreement. It effectively bases concrete international obligations on reductions and limitations of greenhouse

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[153] For a discussion how new 'outcome duties' under the Climate and Child Poverty Acts of the UK can enforced see Colin T Reid, 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts' (2012) 4 Public Law 749, 757.
[154] Dutch Court of Appeal para. 52.

gases on the self-perception of States. Moreover, while the international obligation to submit their most ambitious NDC is binding on States and emphasises their duty to prepare, communicate and maintain their contribution and pursue the related domestic mitigation measures, there is a good faith expectation but no legal obligation to achieve a certain result.[155] Thus, for a court applying an internationally agreed emission reduction target on the basis of a State's NDC, the dilemma is twofold: the international target based on States' NDCs remains rooted in the self-perception of the State with the risk that the State might make the claim that it has lost the capacity to act in line with the NDC, and not all NDCs may represent a clear outcome duty in from of a quantified emission reduction target. Nevertheless, taking the lead in setting economy-wide absolute emission reduction targets is one of the strong expectations that the Agreement sets forth for developed country Parties to the Paris Agreement.[156] These quantified targets establish subsequently the international benchmark for the submitting State. Thus, submitting such a quantified target creates international law on climate change and makes it at the same time operational. The next question is then whether or not a State continues to be bound by its own ambition, internationally and nationally. The Hague Court of Appeal has not allowed the Netherlands to adjust its national target downwardly, because of its human rights obligations which demand that the global temperature goal can realistically be achieved. The Court has attached significant importance to the self-perception that the State had until 2011 and not allowed the State to be less ambitious now. This accords with current international law: it is a normative expectation of the Paris Agreement, that a Party's 'successive national determined contributions will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition'.[157] The Agreement only provides for adjusting NDCs with a view to enhancing the level of ambition.[158] It would be difficult to argue that despite the wording of this provision, a situation may arise in which a Party to the Paris Agreement can claim that it lawfully replaced a nationally determined contribution subsequently with a less ambitious target.[159]

International law will determine the timeframe under which accountability occurs. The remaining carbon budget[160] under the Paris Agreement that allows a certain amount of GHG

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[155] Daniel Bodansky, Jutta Brunnee, Lavanya Rajamani (ed), *International Climate Change Law* (Oxford 2017), 231.

[156] Article 4 para 4 of the Agreement, see also Article 3 para 1 of the UNFCCC, see further Petra Minnerop, 'Taking the Paris Agreement forward: continuous Strategic Decision-making on Climate Action by the Meeting of the Parties' (2017) 21 Max Planck Yearbook of United Nations Law 124, 133.

[157] Paris Agreement, Article 4(3).

[158] Article 4 para 11.

[159] See for a further discussion Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement' (2017) 29 JEL 537, 543.

[160] The IPCC defines the remaining carbon budget as follows: 'Estimated cumulative net global anthropogenic CO2 emissions from a given start date to the time that anthropogenic CO2 emissions

emissions while still resulting, at some probability, in limiting the global temperature increase in accordance with Article 2(1)(a) of the Agreement, will play a decisive role in identifying the point in time at which accountability may be enforceable in Court. The Paris Agreement acknowledges that accountability is closely related to the time factor. Progression of Parties' efforts over time and increasing ambition is woven into the fabric of the Agreement. It sets out five yearly cycles of global stocktaking, expects that subsequent NDCs are more ambitious than the previous target and requires all Parties (except the least developed country Parties) to submit biennially national inventory reports of anthropogenic emissions by sources and removals by sinks.[161] Parties have agreed that only with the achievement of interim targets will the global goal of limiting temperature increase to well below 2° C or even 1.5° C be attainable. This entails a dual accountability: that targets are ambitious enough at every stage to reach the next target, and that States are on track to achieve their targets in the short-, mid-, and long-term.

III. Conclusion

This second judgment in *Urgenda* sits well with the underlying rationale of the positive obligation doctrine of the ECtHR on environmental protection based on human rights. Under the Dutch constitution, Article 2 and Article 8 are directly applicable and the Hague Court of Appeal follows the rule of law in applying these provisions to a concrete environmental challenge, albeit one that has not yet come before the Strasbourg Court. In defining the standard for the duty of care, the Hague Court of Appeal follows the fashion of the Strasbourg Court, it spells out what the State has to do to avoid a breach with its human rights obligations and leaves it to the State to decide how to comply with the decision.

Urgenda is also part of a wider tide of case law that represents a judicial enquiry into government's accountability for climate action on the basis of human rights. More research and more case law is necessary to establish that the global consensus on a temperature goal as enshrined in the Paris Agreement translates into an effective enforcement mechanism of individual States' targets, derived from their nationally determined contributions, on the basis of human rights. However, applying human rights in the climate change context contributes to

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reach net zero that would result, at some probability, in limiting global warming to a given level, accounting for the impact of other anthropogenic emissions'. IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, andefforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani,W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy,T. Maycock, M. Tignor, and T. Waterfield (eds.)]. World Meteorological Organization, Geneva, Switzerland, at 26.

[161] Article 13 (7)(a) and 1/CP.21 para 90. FCCC/CP/2015/10/Add.1.

resolving the accountability issue of governments for outcome duties, such as achieving quantified greenhouse gas emission reduction targets. This accountability comprises both, ambition and achievement, in relation to the global temperature goal. Human rights stand in the way of adjusting a minimum threshold for mitigation downwardly. They also contribute to defining the point in time at which this accountability will occur. The Paris Agreement reinforces the expectation not only of increasing ambition over time but also that Parties remain obliged to maintain their nationally determined contributions and abstain from decreasing ambitions.

The judgment of the Hague Court of Appeal reflects an advanced understanding of human rights and environmental obligations that corresponds with the expectations of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean healthy and sustainable environment (in the following Special Rapporteur on human rights and the environment) as expressed in the context of the Irish Climate case discussed above.[162] It clarifies human rights obligations relating to climate change and illustrates the importance of domestic courts in achieving climate justice.[163] The Hague Court of Appeal has set an example of good practice in the use of human rights obligations relating to the environment: it integrates human rights and environmental standards.[164] This entails the protection of substantive environmental standards but also effective procedural measures such as access to judicial and administrative proceedings.[165] Only then can effective judicial protection on the basis of human rights offer 'a safety net to protect against gaps in statutory laws and create

[162] See the Special Rapporteur's expert statement on the case Friends of the Irish Environment CLG v. The Government of Ireland, Statement on the human rights obligations related to climate change, with a particular focus on the right to life, David R Boyd, UN Special Rapporteur on Human Rights and the Environment, 25 October 2018, para. 30.

[163] See the Report of the International Bar Association 'Achieving Justice and Human Rights in an Era of Climate Disruption', at 118, available at <{ HYPERLINK "http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx" }>, last accessed on 7 February 2019.

[164] For the definition of 'good practice' and further examples see UN Special Rapporteur on human rights and the environment, John H Knox, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', 3 February 2015, UN GA A/HRC/28/61, para 13.

[165] Principles 11, 12 of the 'Final Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy and sustainable environment', 24 January 2018, UN GA A/HRC/37/59.

opportunities for better access to justice'.[166] This holds especially true in the absence of an explicit right to a healthy environment. While explicit recognition of a right to a healthy environment has proven for many countries to be advantageous in the balancing of development needs and environmental standards,[167] *Urgenda* illustrates that it is not a necessary condition for the effective use of human rights law in climate litigation. This represents State practice and as such, the decision may strengthen the argument that States are indeed prepared to follow the recommendation of the UN Special Rapporteur on human rights and the environment and recognise a right to a healthy environment in a global instrument.[168]

IV. Brief summary: the reasoning of the Hague District Court and the Hague Court of Appeal in a nutshell

The Hague District Court

Article 34 ECHR stands in the way of direct application of Article 2 and 8 ECHR.

The existence of the 'duty of care' is based on the Dutch Civil Code (Book 6, section 162) and the violation of such a duty of care may constitute a tortious act.

The standard of care is derived from the hazardous negligence jurisprudence of the Dutch Supreme Court and the risk of climate change impacts.

Article 2 and 8 and their interpretation given by the ECtHR serve as a source of interpretation when implementing open private-law standards.

Article 21 of the Dutch Constitution does not provide certainty about the manner in which the duty of care should be exercised.

These provisions and the objectives of international climate action are relevant in determining the minimum degree of this duty of care: they determine to a great extent the framework for and the manner in which the State exercises its powers.

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[166] Final Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy and sustainable environment', 24 January 2018, UN GA A/HRC/37/59 para. 13

[167] The right to a healthy environment was introduced in constitutional instruments in more than 100 countries since 1978, see UN A/73/188, para 30; see also Article 21 of the Dutch constitution which reads: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.'

[168] UN Special Rapporteur, report to the General Assembly, 19 July 2018, UN A/73/188, paras 46-48.

The Hague District Court orders that the State must achieve a minimum GHG emission reduction target of 25% by 2020.

The Hague Court of Appeal

The Hague Court of Appeal confirmed that the State is under a duty of care to achieve a minimum emission reduction target of 25% by 2020 compared with 1990, but based on a conceptually different legal reasoning.

The existence of the duty of care is based on Article 2 and 8 ECHR as directly applicable law under the Dutch constitution.

This corresponds with the 'doctrine of positive obligations' as applied by the ECtHR in environmental contexts.

The standard of the duty of care is defined in accordance with the scientific evidence which has been expressed in a global temperature goal, international agreements and the history of Dutch emission reduction targets.

The reduction target of at least 25% must be met to ensure that the 2° C temperature goal of the Paris Agreement will be achievable.

Emitting above this target violates the State's human rights obligations.

The State has a margin of appreciation as to how to achieve compliance with the order of the Hague Court of Appeal.

Acknowledgments

This article has benefitted from various discussions with colleagues at the University of Dundee. I am grateful to Professor Colin T Reid, Professor Andrea Ross and Gordon Cameron from Dundee Law School, Professor Volker Roeben from the Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, and Professor Don Smith, Denver Sturm College of Law, University of Denver, for their comments. I also thank the anonymous reviewer. All errors are mine.