The Case Between Urgenda and the State of the Netherlands

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Abstract

The Supreme Court of the Netherlands held that the Netherlands' Government must ensure that, by the end of 2020, greenhouse gas emission levels from the Netherlands are at least a quarter below 1990 levels, otherwise the rights to life and wellbeing, as guaranteed under Articles 2 and 8 ECHR respectively, of the people in the Netherlands are breached. In doing so, the Supreme Court affirmed the reasoning and ruling of the Appeals Court, and distanced itself from the reasoning of the District Court, which was primarily based on domestic tort law.

Keywords: climate change, public interest litigation, human rights, ECHR, Netherlands.

1. The Facts of the Case

This case note provides a summary (Section 2) and some critical remarks (Section 3) of a civil law case between a foundation called Urgenda and the State of the Netherlands before the District (2015),[1] Appeals (2018),[2] and Supreme Court (2019) of the Netherlands.[3]

At all three levels, Urgenda won the case. The Supreme Court ordered the State of the Netherlands to reduce the total volume of annual greenhouse gas emissions from the Netherlands by the end of 2020 by at least 25% compared with the total volume of annual greenhouse gas emissions from the Netherlands in 1990. Consistent with the Appeals Court judgment, the Supreme Court held

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1 District Court The Hague, Judgment of 24 June 2015 in the case between the *Urgenda foundation and the State of the Netherlands (Ministry of infrastructure and the environment)*. English translation available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196 (Urgenda District Court judgment).

2 Appeals Court The Hague, Judgment of 9 October 2018 in the case between *the State of the Netherlands (Ministry of infrastructure and the environment) and the Urgenda foundation.* English translation available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2018:2610 (Urgenda Appeals Court judgment).

3 Netherlands Supreme Court, Judgment of 20 December 2019 in the case between *the State of the Netherlands (Ministry of infrastructure and the environment) and the Urgenda foundation.* English translation available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:2007 (Urgenda Supreme Court judgment).

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that the State's positive obligations to secure to everyone within its jurisdiction the enjoyment of the right to life and well-being, based on Article 2 (right to life) and Article 8 (right to respect for private and family life) ECHR, also apply to the (global) problem of climate change. According to the Supreme Court, there is a sufficiently real and serious risk of damage to the life and well-being of residents of the Netherlands as a result of dangerous climate change. Even though no State alone is responsible for causing dangerous climate change, in the view of the Supreme Court, Articles 2 and 8 ECHR should be interpreted in such a way that States can be called to account for their share in the reduction of greenhouse gas emissions.[4]

The focus in this case note is on the merits – *i.e.* the interpretation and application of Articles 2 and 8 ECHR to the *problématique* of climate change – because that is the most interesting part of the judgment for the international reader (Section 2, below). However, before discussing the merits, it may be interesting to say something about the issue of standing: on what legal basis could Urgenda bring this claim to the courts?

The legal basis is Article 305a of Book 3 of the Dutch Civil Code (DCC).[5] This provision allows anyone to establish a foundation, mandated to protect a public interest, and to then institute legal proceedings, aimed at protecting that public interest, against the State of the Netherlands, or against private persons, such as multinationals based in the Netherlands. The State of the Netherlands does not enjoy any kind of immunity against such claims, unlike many other States in this world.

Urgenda is such a public interest foundation, and thus, Article 3:305 allows it to defend the interests of the current and future residents of the Netherlands, who are threatened by dangerous climate change. The Supreme Court allowed Urgenda to represent these interests and seek legal protection for the benefit of all residents living in the Netherlands. The reasoning was as follows:

> "Urgenda, which in this case, on the basis of Article 3:305a DCC, represents the interests of the residents of the Netherlands with respect to whom the obligation [to take appropriate measures against the threat of dangerous climate change] applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. Especially in cases involving environmental interests, such as the present case, legal protection through the pooling of interests is highly efficient and effective. This is also in line with Article 9(3) in conjunction with Article 2(5) of the [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, or Aarhus Convention], which guarantees interest groups access to

4 *Urgenda Supreme Court judgment*, paras. 5.7.7-5.8, and 6.1-6.6.

5 *Burgerlijk Wetboek Boek 3*, most recent version is available (in Dutch) at https://wetten.overheid.nl/.

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> justice in order to challenge violations of environmental law, and in line with Article 13 ECHR [...]."[6]

Article 9(3) Aarhus Convention obliges "[e]ach Party [to] ensure that [...] members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment". Article 2(5) defines the "The public concerned" as

> "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

Urgenda is such a non-governmental organization promoting environmental protection. Article 13 ECHR provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority [...]".

2. The Judgment of the Court

In this section, the merits of the case are analyzed. Since the approach of the District Court and Appeals Court were quite different, it is worth looking into both rulings separately. The District Court based its conclusion on tort law; the Appeals Court based its conclusion on human rights law. The Supreme Court followed the approach of the Appeals Court.

2.1. District Court

Urgenda, an association established under Dutch law, persuaded the District Court[7] in The Hague to rule, on 24 June 2015, that, in order not to contribute to dangerous climate change, the Dutch State had to reduce greenhouse gas emissions in and from the Netherlands by at the very least 25% by 2020 when compared with 1990 emissions levels. If the State would not do its utmost to achieve such reduction, it would be in breach of its duty of care towards Urgenda. The duty of care is a legal obligation imposed on the State, requiring it to adhere toa standard of reasonable care while performing any acts that could foreseeable harm others.

Urgenda (claimant) invoked certain provisions of international law and argued that the State of the Netherlands (defendant) had breached them. It is important to stress that Urgenda could initially not base its claim on the Paris

6 *Urgenda Supreme Court judgment*, especially para. 5.9.2.

7 In the Netherlands, there exist three levels: District Court (court of first instance), Appeals court, and Supreme Court. The Supreme Court does not reassess the facts, but only checks to make sure the law is correctly applied to the facts.

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Agreement.[8] This treaty entered into force *after* Urgenda initiated the legal proceedings against the Netherlands. But this does not mean that the litigants, and the Court, made no reference whatsoever to this multilateral treaty. In fact, the Paris Agreement is referred to extensively in the judgment of the Appeals and Supreme Court, but not as a formal basis of its decision.

The provisions of international law that Urgenda did invoke successfully before the District Court included certain articles in the UN Framework Convention on Climate Change,[9] and the Kyoto Protocol,[10] as well as the no harm principle of customary international environmental law,[11] and Article 191 TFEU.[12] The latter states that:

> "[European] Union policy on the environment shall contribute to pursuit of [*inter alia*] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."

The Dutch District Court held, that this provision, and the other international provisions referred to above, were not suitable to be invoked directly by an association against the State before a Dutch court, because they were not sufficiently precise and had no direct effect.[13] These norms could, however, be used to give concrete meaning to the duty of care as it is stipulated under Dutch domestic civil law. Articles 2 and 8 ECHR, which the Dutch District Court determined could not be invoked directly because Urgenda was not itself a victim of a breach of these provisions, served a similar function. In the District Court's own words:

> "Although Urgenda cannot directly derive rights from these rules [*i.e.* the provisions of international environmental law and EU law referred to above] and Articles 2 and 8 ECHR, these regulations still hold meaning, namely in the question […] whether the State has failed to meet its duty of care towards Urgenda. First of all, it can be derived from these rules what degree of discretionary power the State is entitled to in how it exercises the tasks and authorities given to it. Secondly, the objectives laid down in these regulations are relevant in determining the minimum degree of care the State is expected to observe. In order to determine the scope of the State's duty of care and the discretionary power it is entitled to, the court will therefore also consider the

8 *Paris Agreement*, concluded in Paris (France) on 12 December 2015, entry into force 4 November 2016.
9 *Urgenda District Court judgment*, paras. 2.34-2.41 and 4.11-4.12.
10 Id. paras. 2.42-2.4.
11 Id. paras. 4.39 and 4.42.
12 Id. paras. 2.53 and 4.60-4.62.
13 For a discussion on the conditions for direct effect of international law in the Dutch domestic legal order, *see* Willem van Rossem & Otto Spijkers, 'Rechtstreekse Werking van Internationale Verdragen – Een Hollands Probleem met Een Amerikaanse of Franse Oplossing?', *Rechtsgeleerd Magazijn Themis*, Vol. 177, Issue 3, pp. 136-152.

> objectives of international and European climate policy as well as the principles on which the policies are based."[14]

Breaching the duty of care is a tort, a wrongful act under Dutch civil law (Article 162 of Book 6 of the Dutch Civil Code).[15] To assess whether the State had acted carelessly in not doing enough to prevent further climate change, the District Court considered, *inter alia*, the nature and extent of the damage ensuing from climate change; the knowledge regarding, and the foreseeability of this damage; and the onerousness of taking precautionary measures.[16] Basing itself on the reports of the Intergovernmental Panel on Climate Change (IPCC), the District Court concluded that the damage was catastrophic, that the Netherlands was fully aware of this, and that taking measures to combat climate change would be burdensome, but not disproportionately onerous.[17] Finding for Urgenda, the District Court ruled that the Dutch State must do more to reduce greenhouse gas emissions originating from the Netherlands.[18]

2.2. Appeals Court

On 9 October 2018, the Appeals Court upheld the ruling of the District Court, finding that the State acted in breach of its obligations by not taking effective action to protect its population from dangerous climate change. This time, the legal argumentation was based on a direct application of international human rights law.

In its Notice of Appeal, Urgenda stated that it was "extremely pleased and grateful for the judgement of the [District] Court".[19] Urgenda only challenged the District Court's conclusion that Articles 2 and 8 ECHR could not be invoked.[20] It mainly objected to the way the District Court derived conclusions from Article 34 ECHR. Urgenda maintained that Article 34 ECHR limits access to the ECtHR only, and that the District Court was incorrect in holding that said provision establishes restrictions also on access to the Dutch courts.[21]

The Appeals Court upheld Urgenda's argument. It allowed Urgenda to invoke Articles 2 and 8 ECHR directly.[22] Urgenda's right to directly invoke the provisions in the ECHR was dependent on Dutch law, not on the procedural provisions in the ECHR. In Dutch law, NGOs do have such a right. The Appeals Court explained that

14 *Urgenda District Court judgment*, para. 4.52.
15 *Burgerlijk Wetboek Boek 6*, most recent version is available (in Dutch) at https://wetten.overheid.nl/.
16 *Urgenda District Court judgment*, paras. 4.63-4.82.
17 Id. paras. 4.83-4.86.
18 Id. para. 5.1.
19 Urgenda, *Memorie van Antwoord in Principaal Appel tevens Memorie van Grieven in Incidenteel Appel (Reply to the Notice of Appeal)*, published 18 April 2017, Section 11.2.
20 Id. Sections 11.1-11.13.
21 Id. Section 11.6.
22 *Urgenda Appeals Court judgment*, para. 35.

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> "just as individuals, who fall under the State's jurisdiction, may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf under Book 3 Section 305a of the Dutch Civil Code."[23]

As explained above (Section 1), this article of the Dutch Civil Code introduces the possibility for NGOs to file class actions under Dutch civil law, and states that

> "an association with full legal capacity may institute legal proceedings aimed at the protection of interests similar to those of other persons, insofar as the association represents these interests in accordance with its articles of association."[24]

Articles 2 and 8 ECHR do not *explicitly* protect individuals from the effects of dangerous climate change. Article 2 ECHR provides that "everyone's right to life shall be protected by law", and that "no one shall be deprived of his life intentionally"; and Article 8 ECHR provides that "everyone has the right to respect for his private and family life, his home and his correspondence". Using these provisions as a legal basis for the individual's protection from dangerous climate change thus requires some interpretation. The Appeals Court stated in its Urgenda ruling that:

> "The interest protected by Article 2 ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life. Article 8 ECHR protects the right to private life, family life, home and correspondence. Article 8 ECHR may also apply in environment-related situations. The latter is relevant if (1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity."[25]

With respect to Article 8 ECHR in particular, the Appeals Court asserted that "if the Government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible."[26] In other words, there is also an obligation to prevent future infringements of this right. After assessing the relevant facts, the Appeals Court concluded that

> "It is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life";

23 Id. para. 36.
24 The translation is my own.
25 *Urgenda Appeals Court judgment*, para. 40.
26 Id. para. 43.

and thus, "It follows from Articles 2 and 8 ECHR that the State has a duty to protect [everyone within its jurisdiction] against this real threat."[27] Such reliance on the precautionary principle considerably facilitated the Court's challenge in addressing the problem of causation.[28]

It is interesting how the Appeals Court dealt with the State's argument that Urgenda had no right to claim that it represents future generations. The Appeals Court held that

> "It is without a doubt plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced",

and thus Urgenda was (also) acting on behalf of the present generation, which it can undoubtedly do under Dutch domestic law.[29] This is very refreshing: one rarely finds a more direct affirmation by a court that climate change is not just a future problem, but a present-day problem as well.

Contrary to the District Court, which only indirectly relied on international (human rights) law, the Appeals Court based its reasoning on the direct application of Articles 2 and 8 ECHR, which makes the appeals judgment much simpler and straightforward, and considerably shorter. After only 20 pages – compared with the 60-page District Court judgment – the Appeals Court concluded 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 the end of 2020."[30]

The international environmental agreements, which the District Court used to give concrete meaning to the duty of care, were used in a similar way by the Appeals Court. However, this time, the duty of care had its legal bases in Articles 2 and 8 ECHR, and not in Article 162, Book 6 of the Dutch Civil Code. The most important environmental agreement was the Paris Agreement. On 6 March 2015, Latvia and the European Commission submitted the following Intended Nationally Determined Contribution of the EU and its Member States under the Paris Agreement.[31] They did so, on behalf of the EU and all its Member States:

> "The EU and its Member States are committed to a binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990, to be fulfilled jointly."

27 Id. para. 45.

28 *See also* Office of The UN High Commissioner for Human Rights, *Report on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, 15 January 2009, paras. 89-91.

29 *Urgenda Appeals Court judgment*, para. 37.

30 Id. para. 73, repeated in para. 76.

31 *Intended Nationally Determined Contribution of the EU and Its Member States*, Submission by Latvia and the European Commission on Behalf of The European Union and Its Member States, concluded at Riga (Latvia) on 6 March 2015, LV-03-06-EU INDC.

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The Netherlands' Government argued that this did not require a 25% reduction already by the end of 2020. But the Appeals Court was not persuaded, and explained that each megaton of CO2 which is emitted into the atmosphere in the short term contributes to global warming, and that the Paris Agreement was never meant to allow business-as-usual up to 2030, or 2050.[32] The Appeals Court also referred to the Paris Agreement as an expression of a global consensus in climate science on the difference between a safe temperature rise (1.5 °C over pre-industrial levels), and a dangerous temperature rise (anything above that).[33]

2.3. Supreme Court

The Netherlands Supreme Court issued its judgment on 20 December 2019. Article 162(2), Book 6 of the Netherlands Civil Code, which was the key provision in the District Court's ruling, did not play any role whatsoever in the Supreme Court's reasoning.[34] Instead, the Supreme Court followed the Appeals Court and relied fully on the ECHR.

The Supreme Court affirmed the Appeals Court's assessment of the facts, which led to the conclusion that there is a real threat of dangerous climate change, posing a serious risk that the current generation of residents of the Netherlands will face loss of life and disruption of family life.[35]

Turning to the applicable law, the Supreme Court agreed entirely with the Appeals Court's interpretation of Article 34 ECHR, and thus it allowed Urgenda to directly invoke Articles 2 and 8 ECHR before the Dutch court.[36]

As a next step, the Supreme Court held that Article 1 of the ECHR requires the State of the Netherlands to secure to everyone within its jurisdiction the rights guaranteed by the Convention, including the right to life (Article 2 ECHR) and the right to well-being (Article 8 ECHR). Based on the case-law of the ECtHR, the Supreme Court concluded that the Netherlands is obliged to take all appropriate measures to protect these rights against any real and immediate risk, provided that the State is aware of the risk. The Court then zoomed in on the two provisions separately. Article 2 ECHR obliges the Netherlands to take appropriate measures to safeguard the lives of those residing within the jurisdiction of the Netherlands. This includes an obligation to protect individuals from harm that manifests itself only in the long term.[37] Article 8 ECHR obliges the Netherlands to take reasonable and appropriate measures to protect individuals within its jurisdiction against potentially serious damage to their environment.[38] This

32 *Urgenda Appeals Court judgment,* para. 47.

33 Id. para. 50.

34 Urgenda consistently argued along both lines, *i.e.* it argued that the Netherlands acted *(i)* in breach of the duty of care [Article 6:162(2) of the Dutch Civil Code], and *(ii)* in breach of Articles 2 and 8 ECHR. *Urgenda Supreme Court judgment,* para. 2.2.2.

35 Id. para. 4.7.

36 Id. para. 5.9.3.

37 Id. para. 5.2.2.

38 *Tătar v. Romania*, No. 67021/01, 27 January 2009, in which the ECtHR held that there had been a violation of Article 8 ECHR, because Romania failed to protect people living near a polluting gold mine.

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obligation to take measures exists if there is a risk of serious environmental pollution that may affect the well-being of people.[39] That risk does not have to manifest itself in the short term.[40] This obligation to take appropriate measures applies not only with regard to specific, identifiable persons, but also when the risk is due to environmental hazards that threaten large groups of people, or even the entire population of the Netherlands.[41]

The Supreme Court had to deal with certain aspects that distinguished the present case from 'ordinary' Articles 2 and 8 ECHR cases.[42] For example, one unique aspect of the threat posed by climate change was that the consequences of today's greenhouse gas emissions will be felt only in approximately twenty years from now. According to the Supreme Court, the Netherlands is obliged to take preventive measures against environmental hazards threatening the lives and wellbeing of people within its jurisdiction, even if the consequences will take years to manifest themselves, and even if it is not certain that the hazard will actually materialize at all. The Supreme Court made an interesting link here between Articles 2 and 8 ECHR and the precautionary principle. If it is clear that there is a real and immediate risk, argued the Court, then the Netherlands has an obligation to take appropriate measures without benefitting from any 'margin of appreciation'. The Netherlands' Government was, of course, free to choose the specific measures, as long as these measures are reasonable and appropriate. Such measures can be mitigation measures (measures to prevent the realization of the hazard), or adaptation measures (measures to mitigate the effects of that realization), or a combination of both.[43]

In any case, Articles 2 and 8 ECHR cannot impose an impossible or disproportionate burden on the Netherlands. Thus, if the Netherlands has taken reasonable and appropriate measures, the mere fact that those measures will later prove to be insufficient to avert the danger, does not mean that the Netherlands has failed to fulfill its obligation. In other words, it is an obligation of conduct, not of result.[44]

The Netherlands made the argument before the Supreme Court that the ECHR framework was ill-suited to apply to climate change, because of the global nature of the climate change emission *problématique*. *(i)* First, greenhouse gas emissions that cause climate change are not only emitted from within Dutch territory, argued the State, but from the entire world. *(ii)* Second, the consequences of climate change are being felt, not just by the individuals residing in Dutch territory, but by all the world's citizens.

39 *Budayeva and others v. Russia*, No. 15339/02, 20 March 2008, in which the ECtHR held that a failure to act in case of foreseeable risk of an environmental disaster can engage the State's responsibility.

40 *Urgenda Supreme Court judgment*, para. 5.2.3.

41 Id. para. 5.3.1.

42 An example of an 'ordinary' case is *Kolyadenko and others v. Russia*, No. 17423/05, 28 February 2012, in which the ECtHR held that there had been violations of, *inter alia*, Articles 2 and 8 ECHR, for a failure to protect a select group of people from a flash flood.

43 *Urgenda Supreme Court judgment*, para. 5.3.2.

44 Id. para. 5.3.4.

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In reply to the first objection, the Supreme Court started by referring to Article 47(1) of the Articles on State Responsibility of the International Law Commission, which reads that "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."[45] In other words, multiple causal scenarios, or partial causation, justify shared responsibility. Because the consequences of dangerous climate change are so serious, the Supreme Court did not accept the Government's excuse that the Netherlands does not have to act, so long as other States fail to accept and live up to their share of the responsibility. For the same reason, the Court did not accept the Government's excuse that the share of global greenhouse gas emissions from the Netherlands is very small, and that a reduction in emissions from the Netherlands makes little difference on a global scale. To refute this argument, the Supreme Court made powerful use of *a contrario* reasoning. If the Court would be persuaded by these arguments, then all States in the world could simply escape their share of the responsibility by pointing to others.[46] The Netherlands is therefore obliged, in accordance with its share of the responsibility, to reduce greenhouse gas emissions from its territory. This obligation for the Netherlands to do 'its part' is based on Articles 2 and 8 ECHR: there is a serious risk that dangerous climate change will take place that threatens the lives and well-being of many in the Netherlands, and the Netherlands must play its part to prevent this.[47]

3. Comments (Critical Remarks)

The case is important, because it shows how international human rights law can constitute a legal basis for the State's obligation to take measures to combat dangerous climate change. In this section, some critical reflections are made on the use of these rather vague human rights norms as a basis for extraordinarily onerous State obligations. This section will also look more generally at the initial reactions to the ruling by the UN human rights community, by the general public (as reflected in newspapers), and by the academic community. This section ends with an outlook.

Let me begin with the critical reflections. The Government brought the case before the Supreme Court primarily because of *trias politica* related issues. The Government felt that the judge could not issue a legislative order. According to the Government, it is up to it – and not the courts – to make policy and determine how quickly greenhouse gas emissions should be reduced. By imposing an obligation on the Government to reduce greenhouse gas emissions more rapidly, the judge is trespassing on Government territory. This criticism was heard widely. It was not only expressed by the Government, but also by members

45 Id. para. 5.7.6.
46 Id. para. 5.7.7.
47 Id. para. 5.8.

of the opposition, by the general public, and by academics.[48] The term '*dikastocracy*' is sometimes used in this context, *i.e.* the claim that the Netherlands is becoming a State ruled by judges.[49] One can, of course, point out that the courts are merely applying already existing law, *i.e.* Articles 2 and 8 ECHR, and not making new law. But according to Janneke Gerards, this argument is problematic, because "the human rights in these treaties are very open and vague", and "they have a very different meaning today than thirty years ago, when the treaty was concluded."[50] This, continued Professor Gerards, "leads to the controversy: each time someone has to decide what those agreements mean in the present time, and this someone is the judge."[51]

The Supreme Court was aware of this controversy. It stressed that its ruling did not amount to an order for the Government to take specific legislative measures, but left the State free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020.[52] In remarkably strong words, the Supreme Court reminded the State that the world is facing a threat of dangerous climate change, and that it is clear that measures are urgently needed to combat this threat, as the State itself acknowledges. Under the ECHR, the Netherlands is obliged to protect the right to life and well-being of its residents. Based on the global consensus in climate science and in the international community, it follows that this requires a reduction of greenhouse gases by at least 25% in 2020. The Supreme Court concluded that the policy that the State had been pursuing since 2011 and intended to continue to pursue, *i.e.* a policy of constantly postponing measures for longer periods of time, was 'obviously' not in accordance with the State's obligations under Articles 2 and 8 ECHR.[53]

Let me now turn to providing a general overview of the initial reactions to the ruling, beginning with reactions from the UN human rights community, followed by reactions from the general public (as reflected in newspapers), and ending with an overview of the reactions from the academic community. Immediately after the Supreme Court ruling was issued, praise was heard from all over the world.

48 For an overview of these reactions, *see* Otto Spijkers, 'Urgenda tegen de Staat der Nederlanden: aan wiens kant staat de Nederlandse burger eigenlijk?', *Ars Aequi*, March 2019, pp. 191-198.

49 The term '*dikastocracy*' is not used very often in academic legal scholarship. *See e.g.* Marius van Staden, 'The Role of the Judiciary in Balancing Flexibility and Security', *De Jure*, Vol. 46, 2013, p. 472, but this paper is unrelated to the Urgenda litigation. Roel Schutgens gave a lecture entitled 'Dikastocratie of uitholling van de rechtsstaat?', at the autumn meeting of the *Nederlandse Vereniging voor Procesrecht*, 13 December 2019. By contrast, it has been used very frequently by politicians. Most importantly, on 9 March 2020, a roundtable discussion of the Standing Committee for Interior Affairs of the House of Representatives took place on the topic of Dikastocracy. The position papers are available at www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2020A00508. In addition, plenty of references to the term can be found in the newspapers. *See e.g.* Bart Funnekotter, 'Help, De Rechter Grijpt De Macht', *NRC Handelsblad* (Dutch Newspaper), 21 December 2019.

50 Funnekotter 2019 (translated from Dutch into English by the author). Janneke Gerards was interviewed by Bart Funnekotter.

51 Id.

52 *Urgenda Supreme Court judgment*, para. 8.2.7.

53 Id. para. 8.3.4.

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"This is the most important climate change court decision in the world so far", said David Boyd, the UN Special Rapporteur on Human Rights and the Environment, "confirming that human rights are jeopardized by the climate emergency and that wealthy nations are legally obligated to achieve rapid and substantial emission reductions."[54] The UN High Commissioner for Human Rights, Michelle Bachelet, was just as enthusiastic. "This landmark ruling provides a clear path forward for concerned individuals in Europe – and around the world – to undertake climate litigation in order to protect human rights", she remarked, "and I pay tribute to the civil society groups which initiated this action."[55] One of her predecessors, Mary Robinson, former UN High Commissioner for Human Rights, felt that the Urgenda ruling "affirm[ed] that governments are under a legal obligation, as well as a moral obligation, to significantly increase their ambition on climate change [and that] our human rights depend on it."[56]

In the newspapers, the uniqueness of the ruling was highlighted. For example, Michael Gerrard, director of the Sabin Center for Climate Change Law at Columbia University, told the New York Times that "there have been 1,442 climate lawsuits around the world", but that the Urgenda-case was "the strongest decision ever."[57] Civil society was just as enthusiastic. Faiza Oulahsen of Greenpeace Netherlands qualified the judgment as "an immense victory for climate justice."[58] She had some suggestions on what the Government could do to comply with the ruling:

> "The closure of coal-fired power plants and mega-stalls are obvious measures, but the Government has been putting them aside. Major action must now be taken, and the Government owes that to itself, because this judgment has not been taken seriously for years."[59]

In the Netherlands, there is a strong confidence in our ability to adapt to rising sea levels, and other major consequences of climate change. In other words, there is no need to be alarmed. But scientists are beginning to have doubts. "There is really a false sense of security", said Maarten Kleinhans, professor of geosciences and physical geography at Utrecht University. "It's a confidence that is entirely based on the past", Kleinhans added. "But today, we are facing something worse

54 Quoted in Andy Gregory, 'Landmark Ruling That Holland Must Cut Emissions to Protect Citizens from Climate Change Upheld by Supreme Court: Decision 'Provides a Clear Path Forward for Concerned Individuals to Undertake Climate Litigation', *Independent*, 21 December 2019. David Boyd was interviewed by Andy Gregory.

55 Id. Michelle Bachelet was interviewed by Andy Gregory.

56 Quoted in John Schwartz, 'Dutch Court Orders Leaders to Act on Climate Change', *The New York Times*, 21 December 2019. Mary Robinson was interviewed by John Schwartz.

57 Id. Michael Gerrard was interviewed by John Schwartz.

58 Quoted in Gregory 2019. Faiza Oulahsen was interviewed by Andy Gregory.

59 Quoted in editorial, 'Hoge Raad Geeft Urgenda Gelijk, Overheid Moet Meer Doen Tegen Broeikasgassen', *Trouw* (Dutch Newspaper), 20 December 2019. Interview with Faiza Oulahsen.

than ever in human history [...]. We've never had this kind of challenge, and we're not ready for it."[60]

In academia, the Urgenda ruling was praised. It was regarded as groundbreaking: the first court case to apply the international human rights framework to climate change. Most of the scholarship that has been published so far, discussed the Appeals Court judgment.[61] Since the Supreme Court basically affirmed the Appeals Court ruling and its underlying reasoning, this scholarship is certainly not outdated or no longer relevant. Most scholars agreed with the Appeals Court that it was a wise decision to use international human rights law (the ECHR), as opposed to domestic tort law, as legal basis for the ruling.[62] The advantage of this was that similar claims could be initiated in other States party to the ECHR, and many scholars noted that this was already happening, and encouraged such developments.[63] The more critical comments generally agreed with the Dutch Government, *i.e.* that decisions like the Urgenda ruling distorted the balance of power between the judicial, legislative and the executive branches.[64] Scholars noted the unique characteristics of the dangers posed to human rights by climate change, when compared with other violations of the human right to a healthy environment.[65]

Let me finish this case note with an outlook on future developments. The Government's initial reaction to the Urgenda ruling was somewhat cautious and formal. In a letter of 20 December 2019, it merely insisted that it was planning to

60 Quoted in Naomi O'Leary, 'When Will the Netherlands Disappear?', *Politico*, 16 December 2019. Maarten Kleinhans was interviewed by Naomi O'Leary.

61 For an example of a general and objective case note, *see* Nicolas de Sadeleer, 'Commentaire de l'arrêt Urgenda', *Aménagement – Environnement: Urbanisme et Droit Foncier*, Vol. 1, Issue 1, 2019, pp. 16-18.

62 *See e.g.* Suryapratim Roy, 'Urgenda II and Its Discontents', *Carbon and Climate Law Review*, Vol. 13, Issue 2, 2019, pp. 130-141.

63 *See e.g.* Jonathan Verschuuren, 'The State of the Netherlands v. Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions', *Review of European Comparative & International Environmental Law*, Vol. 28, Issue 1, 2019, pp. 94-98; Jacqueline Peel *et al.*, 'A "Next Generation" of Climate Change Litigation?: an Australian Perspective', *Oñati Socio-legal Series*, Vol. 9, Issue 3, 2018, pp. 275-307; Marta Torre-Schaub, 'Le Rapport Du GIEC et la Décision Urgenda Ravivent la Justice Climatique', *Revue Juridique De L'Environnement*, Vol. 44, Issue 2, 2019, pp. 307-307; Maria L. Banda, *Climate Science in the Courts: A Review of U.S. and International Judicial Pronouncements*, Environmental Law Institute, 2020, pp. 79-85; and Valentina Jacometti, 'Climate Change Litigation: Global Trends and Critical Issues in the Light of the Urgenda 2018 Decision and the Ipcc Special Report "Global Warming of 1.5 °c"', *Global Jurist*, Vol. 20, Issue 1, 2020.

64 *See e.g.* Bernhard Wegener, 'Urgenda – World Rescue by Court Order? The "Climate Justice"-Movement Tests the Limits of Legal Protection', *Journal for European Environmental and Planning Law*, Vol. 16, Issue 2, 2019, pp. 125-147; and 'State of the Netherlands v. Urgenda Foundation', *Harvard Law Review*, Vol. 132, Issue 7, 2019, pp. 2090-2097.

65 In particular, the threat posed by dangerous climate change is yet to fully manifest itself, and it will affect all human beings on this planet, as opposed to a specific number of people (for example, those residing close to a polluting factory). *See e.g.* Ingrid Leijten, 'Human Rights v. Insufficient Climate Action: The Urgenda Case', *Netherlands Quarterly of Human Rights*, Vol. 37, Issue 2, 2019, pp. 112-118; Chris Hilson, 'Framing Time in Climate Change Litigation', *Oñati Socio-legal Series*, Vol. 9, Issue 3, 2018, pp. 361-379.

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continue to aim for a 25% greenhouse gas reduction by the end of 2020.[66] This was confirmed in a letter sent one month later, in which the Government promised to continue working on measures to reduce greenhouse gas emissions, as announced in the earlier letter.[67] Clearly, it did not applaud the Urgenda ruling, nor enthusiastically embrace it. But it also did not challenge it. But then the corona virus came, and the Government sent an additional letter on 27 March 2020, in which it stated *inter alia* that:

> "At the moment, the Netherlands, together with the rest of the world, finds itself in an exceptional situation as a result of the coronavirus. People are primarily concerned about their health, their income and their job. In this situation, the Government wishes to exercise extra care when deciding on the measures that should be taken to implement the [Urgenda] judgment. A little more time is needed for that. The Government will, of course, continue to implement the judgment."[68]

The Government was not literally making the argument that, due to the coronavirus outbreak, it could not comply fully with the judgment; but it came quite close. States could possibly declare a state of emergency, based on Article 15 ECHR, to confront the coronavirus pandemic.

Interestingly, Article 15(2) ECHR adds that "no derogation from Article 2 [...] shall be made under this provision"; it is thus not clear how helpful Article 15 ECHR can be for the Netherlands' Government, since the Urgenda ruling is based in part on Article 2 ECHR.[69] In any case, given that the Supreme Court ruling was issued before the coronavirus reached the Netherlands, the Court could not take this development into account in the ruling. For the same reason, the Netherlands did not invoke any circumstances precluding wrongfulness, and thus the Court did not address this *problématique* either.[70]

On 24 April 2020, Eric Wiebes, the Netherlands Minister of Economic Affairs and Climate, sent another letter to the House of Representatives regarding the implementation of the Urgenda ruling. In this letter, he explained why he felt it

66 *Letter from The Minister of Economic Affairs and Climate to the President of the Second Chamber of the States-General*, The Hague, 20 December 2019, 32 813, Nr. 442.

67 *Letter from The Minister of Economic Affairs and Climate to the President of the Second Chamber of the States-General*, The Hague, 31 January 2020, 32 813, Nr. 445.

68 *Letter from The Minister of Economic Affairs and Climate to the President of the Second Chamber of the States-General*, The Hague, 27 March 2020, 32 813, Nr. 484 (translated from Dutch into English by the author).

69 On 20 March 2020, the Permanent Representation of Estonia sent a *note verbale* to the Council of Europe, containing a declaration of derogation from certain obligations of Estonia under Articles 5, 6, 8 and 11 ECHR, qualifying the corona virus outbreak as a 'public emergency' in the sense of Article 15 ECHR. The declaration is annexed to the *note verbale* JJ9017C, dated 20 March 2020, ETS No. 5 – Article 15.

70 One might think of *force majeure* or necessity. *See* Articles 23 and 25, International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', annexed to UN General Assembly Resolution 56/83 of 12 December 2001. It is extremely unlikely that such a defence would have been successful.

was important to decide on measures to combat climate change now, at the time of the corona crisis. He informed the Members of Parliament that he was busy preparing a package of economic recovery measures for the post-corona period, in order to fully support rebooting the economy at that time. It was clear, noted the Minister, that the outbreak of the coronavirus was going to have an impact on the global, European and Dutch emissions of greenhouse gases, and thus, on the task of complying with the Urgenda ruling. However, continued the Minister, the precise effect of the corona crisis is difficult to predict. The Government's priority from the very beginning had been to substantially reduce electricity production from coal, and to take various measures to make it easier and cheaper for people to make their own homes more sustainable. The Minister did not see how the coronavirus would make it necessary to fundamentally change this strategy.[71]

Urgenda's mission is to rouse the Netherlands' Government, but also to rouse the people of the Netherlands, and then to do the same with all other governments, and all other peoples of the world. Dennis van Berkel, a member of the legal team of Urgenda, told the Guardian that:

> "The enormous importance of this case is not just that the Netherlands is obliged to act, but that these principles are universal. No court outside the Netherlands is formally bound by this decision, but the influence that this decision has, and the inspiration that it will give to others, that's really big."[72]

This prediction turned out to be correct. All over the world, foundations are initiating legal proceedings similar to those initiated by Urgenda. The list is endless and is constantly expanding. Urgenda itself maintains a constantly updated list of such cases on its website;[73] and the Climate Change Litigation Database, a joint project of the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter, has an online database of both US and non-US climate change litigation.[74]

71 *Letter from The Minister of Economic Affairs and Climate to the President of the Second Chamber of the States-General*, The Hague, 24 April 2020, 32 813, Nr. 496 (translated from Dutch into English by the author).

72 Quoted in Isabella Kaminski, 'Dutch Supreme Court Upholds Landmark Ruling Demanding Climate Action: Court Rules Dutch Government Has Duty to Protect Citizens' Rights in Face of Climate Change,' *Guardian*, 20 December 2019.

73 *Climate Cases*, available at www.urgenda.nl/themas/klimaat-en-energie/climate-cases-international/.

74 *Climate Change Litigation Database*, available at http://climatecasechart.com/.

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