DOI: 10.1111/reel.12280

CASE NOTE

WILEY RECIEL Review of European, Comparative & International Environmental Law

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

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One of the world's most successful climate litigation cases thus far, the remarkable *Urgenda* ruling by a Dutch Court in 2015, survived appeal. In October 2018, the Court of Appeal of The Hague rejected all of the State's objections, including that on the alleged infringement of the balance of powers principle. The court confirmed that, when so asked by individuals or nongovernmental organizations, courts are obliged to assess government actions (including policies) against human rights obligations. By setting the required outcome of policies (at least 25 percent emissions reduction by the end of 2020), the court left it up to the Dutch Government and Parliament to discuss which policy interventions to adopt to achieve this outcome. The Court of Appeal also confirmed, and sometimes even put greater emphasis on, a number of important elements of the *Urgenda* ruling, such as the role of the precautionary principle, the issue of causality (including the 'drop in the ocean' argument put forward by the State) and the potential role of climate engineering.

1 | INTRODUCTION

On 9 October 2018, the Court of Appeal of The Hague rendered its judgment in the *Urgenda* case.[1] The ruling concerned an appeal lodged against a decision by the Hague District Court.[2] In 2015, the lower court had decided that the Dutch State had acted negligently and therefore unlawfully by implementing a policy that 'only' pursued the reduction targets imposed upon the Netherlands by European Union (EU) law for 2020, namely: a 21 percent reduction for sectors covered by the EU emissions trading system (ETS) (i.e. large industrial installations and power stations) and a 16 percent reduction for non-ETS sectors (including, amongst others, transport and agriculture).[3] The District Court held that the State had not directly breached its obligations under a range of instruments, including the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, various EU climate law sources,[4] the European Convention on Human Rights (ECHR) and the Dutch Constitution. It did, however, find that the State had breached the standard of due care towards its citizens, which under Dutch tort law constitutes an unlawful act. The District Court had therefore ordered the Dutch State to achieve at

[1] *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal (9 October 2018), case 200.178.245/01 (English translation) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> (*State v Urgenda*).

[2] *Urgenda Foundation v The State of the Netherlands*, District Court of The Hague (24 June 2015), case C/09/456689/ HA ZA 13-1396 (English translation) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>. See extensively M Peeters, '*Urgenda Foundation and 886 Individuals v. The State of the Netherlands*: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25 Review of European, Comparative and International Environmental Law 123.

[3] See Peeters (n 2).

[4] Both primary EU law, such as Articles 191 and 193 of the Treaty on the Functioning of the European Union (Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU)); and secondary law, such as the EU emissions trading Directive (Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC) [2003] OJ L275/32 and the Effort Sharing Decision (Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L140/126.

least a 25 percent reduction of its overall annual greenhouse gas emissions by the end of 2020, compared to 1990 levels.

The case had been initiated by Urgenda, a foundation established in 2008 with the aim to stimulate and accelerate the transition processes to a more sustainable society through litigation, among other means. More than 800 individual citizens joined the lawsuit, so the case was lodged by Urgenda acting on its own behalf as well as in its capacity as representative of all these individuals. Under Dutch tort law, nongovernmental organizations (NGOs) are allowed to initiate public interest cases.[5]

The Government of the Netherlands appealed the decision, mainly because it objected to the interference of the Court with the making of government policies, which it argued should be discussed in Parliament rather than in courts, pursuant to the principle of balance of powers. In addition, the Government presented a number of other arguments that resemble those made in other climate litigation suits across the world. All of these arguments, however, were rejected with remarkably clear and bold language, as will be discussed below.

2 | THE BALANCE OF POWERS AND THE PROTECTION OF HUMAN RIGHTS: WHAT ROLE FOR SCIENCE?

Probably the most important feature of the Court of Appeal's judgment is its strong focus on human rights. The District Court referred to a large number of both legally and non-legally binding sources to substantiate the State's duty of care towards its citizens. Among these were international and EU climate law sources, as well as reports by the Intergovernmental Panel on Climate Change (IPCC). The Court of Appeal built its reasoning almost entirely on the right to life and the right to private and family life under Articles 2 and 8 of the ECHR, respectively. The Court of Appeal summarized the environmental case law by the European Court of Human Rights (ECtHR) as follows:

> *the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. 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.*[6]

According to the Court of Appeal, there is an imminent and real danger that these human rights will be violated by climate change impacts. Like the District Court before it, the Court of Appeal relied on IPCC reports,[7] but also decisions adopted by the UNFCCC Conference of the Parties (CoP) in the past decade, which all indicate that concentrations of greenhouse gases in the atmosphere have to remain within the 450 parts per million (ppm) limit or even within a 430 ppm limit, if the 1.5°C temperature goal of the Paris Agreement is to be met with a degree of certainty.

Some scholars have however criticized the District Court's judgment for elevating scientific research findings to a legally binding legal norm: 'Should the unwritten standard of due care that the State has to observe in society and the court-ordered reduction target be derived directly from scientific data in the IPCC reports …?'[8] It seems nevertheless possible to argue that the frequent references to scientific research in relevant legal texts require courts to take scientific information into account when interpreting climate law. The relevance of the precautionary principle in climate change law is beyond debate.[9] The UNFCCC makes several references to scientific research and requires States to promote scientific research[10] and requires the CoP to 'periodically examine the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge'.[11] The Paris Agreement requires Parties 'to undertake rapid reductions … in accordance with best available science'.[12] The Treaty on the Functioning of the EU requires the EU to take the available scientific data into account when preparing environmental policy.[13] In the literature, Roy and Woerdman have persuasively suggested that – as in other areas of expert international governance, such as credit ratings – the benchmark for the amount of care required to a certain extent is determined at the international level by the IPCC; it is then up to the State to demonstrate why it deems it necessary to deviate.[14] After having summarized the expected impacts of global average temperatures reaching a 2°C increase,[15] the Court of Appeal found that the Dutch State is obliged, under Articles 2 and 8 of the ECHR, to take protective action. The court remarked how

[5]B van den Broek and L Enneking, 'Public Interest Litigation in the Netherlands. A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts' (2014) 10 Utrecht Law Review 77.

[6]*State v Urgenda* (n 1) para 43.

[7]For instance, in ibid para 44 on the discussion of the risk of reaching 'tipping points' with a temperature rise of between 1 and 2°C, the court cited RK Pachauri and LA Meyer (eds), *2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014) 72.

[8]KJ de Graaf and JH Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 Journal of Environmental Law 517, 526.

[9]United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 3(3); TFEU (n 4) art 191(2).

[10]UNFCCC (n 9) art 4(1)(g).

[11]ibid art 7(2)(a).

[12]Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 art 4(1).

[13]TFEU (n 4) art 191(3).

[14]S Roy and E Woerdman, 'Situating *Urgenda v the Netherlands* within Comparative Climate Change Litigation' (2016) 34 Journal of Energy & Natural Resources Law 165, 183.

[15]*State v Urgenda* (n 1) para 44.

> *up till now the State has done too little to prevent a dangerous climate change and is doing too little to catch up, or at least in the short term (up to end-2020). Targets for 2030 and beyond do not take away from the fact that a dangerous situation is imminent, which requires interventions being taken now.*[16]

The court concluded that the State had failed to fulfil its duty of care pursuant to Articles 2 and 8 of the ECHR by not reducing its emissions by at least 25 percent by the end of 2020. The judgment, therefore, seems to replace the duty of care under the Dutch Civil Code referred to by the Hague District Court, with the duty of care under Articles 2 and 8 ECHR, thus essentially turning the *Urgenda* case into a human rights case.

The Court of Appeal also confirmed that, when so asked by individuals or NGOs, courts are obliged to assess government action, including policies, against human rights obligations. Here, Dutch law goes beyond what is required by the ECHR, as under case law by the European Court of Human Rights (ECtHR) environmental NGOs cannot invoke human rights in an attempt to defend the environment as a general interest. According to the ECtHR, NGOs are only allowed to represent the individual interests of their members in case their members are potential victims of human rights infringements.[17]

The Court of Appeal maintained that this was no infringement of the principle of balance (or separation) of powers: 'because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order'.[18] Quite to the contrary, assessing government action in light of human rights obligations is a core prerogative of courts:

> *The State also relied on the trias politica and on the role of the courts in our constitution. The State believes that the role of the court stands in the way of imposing an order on the State, as was done by the district court. This defence does not hold water. The Court is obliged to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 ECHR. After all, such provisions form part of the Dutch jurisdiction and even take precedence over Dutch laws that deviate from them.*[19]

The court only identified the outcome that policies should pursue, leaving it to the Dutch Government and Parliament to devise policy interventions to achieve this outcome. Thus, the court arguably avoided interference with policymaking by emphasizing that 'the State retains complete freedom to determine how it will comply with the order'.[20] Given the fact that the scientific knowledge on which the order is based is widely accepted and has furthermore been used as a basis for domestic law and policymaking by the Dutch government, it seems that the Court of Appeal struck the right balance here between testing government actions against the ECHR and not interfering with policymaking too much.

3 | THE ROLE OF THE PRECAUTIONARY PRINCIPLE

The State had argued that climate change impacts are too uncertain a basis to substantiate claims such as the one put forward by Urgenda. The Court of Appeal stressed the importance of the precautionary principle in this respect, which it considered a binding principle in cases such as the present one. Making reference to the UNFCCC and to the decision in *Tătar v Romania* by the ECtHR,[21] the court noted that, contrary to what the State argued, it is precisely the uncertainty – especially with regard to the existence of dangerous tipping points – that requires the State to adopt proactive and effective climate policies.[22]

4 | CAUSAL LINK AND THE 'DROP IN THE OCEAN' ARGUMENT

Much climate change litigation at the national level, and particularly in the United States, has been unsuccessful because the applicants so far have been unable to satisfy courts that a causal link exists between government policy on the one hand and climate change impacts on the other.[23] Scientific knowledge on causation of individual extreme weather events, however, is rapidly expanding, with important implications for climate litigation.[24] In the case under review, the Hague Court of Appeal noted that causality is less of an issue when the matter of the dispute is not the award of damages, but just the government's obligation to take legal and policy measures. In the latter set of disputes, the court noted, 'it suffices (in brief) that there is a real risk of the danger for which measures have to be taken'. The court was satisfied that this test had been met in the case under review.[25]

The State had also argued that Dutch emissions are small – roughly around 0.4 percent of global emissions – and that tightening

[16]ibid para 71.

[17]See J Verschuuren, 'Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe' in W Scholtz and J Verschuuren (eds), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Edward Elgar 2015) 363, 371–372.

[18]*State v Urgenda* (n 1) para 67.

[19]ibid para 69.

[20]ibid para 68.

[21]*Tătar v Romania*, App No 67021/01 (ECtHR, 27 January 2009). Note that the Court did not refer to the precautionary principle in TFEU (n 4) art 191(3).

[22]*State v Urgenda* (n 1) para 73.

[23]M Burger and J Gundlach, *The Status of Climate Change Litigation – A Global Review* (UNEP 2018).

[24]See S Marjanac and L Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36 Journal of Energy and Natural Resources Law 265.

[25]*State v Urgenda* (n 1) para 64.

its emissions reduction policies would only be a 'drop in the ocean'. The Court of Appeal, however, relied on per capita emissions data to stipulate that the Netherlands is the biggest per capita emitter in the EU and the eighth biggest of the world, and that Dutch carbon dioxide (CO_2) emissions have risen since 1990.[26] Furthermore, the Dutch Government had indicated that avoiding dangerous climate change impacts requires strict policies to be adopted across the world; and that, since it cannot influence these domestic policies abroad, the Netherlands cannot be required to reduce emissions on its own accord. The Court of Appeal simply rejected this argument, pointing to the special position of the Netherlands as a rich, developed State that has gained much of its wealth through extensive use of fossil fuels. In this connection the court added:

> *Moreover, if the opinion of the State were to be followed, an effective legal remedy for a global problem as complex as this one would be lacking. After all, each state held accountable would then be able to argue that it does not have to take measures if other states do not so either. That is a consequence that cannot be accepted, also because Urgenda does not have the option to summon all eligible states to appear in a Dutch court.*[27]

5 | RELATIONSHIP TO EU POLICIES

The State had argued that it had to comply, and was acting in compliance with, EU laws and policies and could not be required to do more, as within the EU, climate laws are largely harmonized.[28] The Court of Appeal, however, found that the State cannot 'hide behind the reduction target of 20% at the EU level'.[29] It used four arguments to reach this conclusion. First of all, the EU's 20 percent goal is contested and lacks scientific substantiation.[30] Second, the EU as a whole is actually on track to achieve a reduction of 26–27 percent in 2020.[31] Third, the latest Dutch policy goals for 2030 aim at 49 percent reduction,[32] which goes above and beyond its target under EU law for that year.[33] The court rightfully notices that if the State plans to do more than it is required under EU law in the period between 2020 and 2030, it cannot argue that it cannot do the same in the period up to 2020.[34] Fourth, the court finds that the State did not substantiate its claims that stricter policies than those required by the EU would harm the level playing field for Dutch companies. The court indicates that several EU Member States go beyond the EU target so that the level playing field argument does not hold.[35] The court's reasoning here shows some shortcomings. The circumstance that other States go beyond the EU target does not mean that there is a legal requirement for the Netherlands to do this too. It should be recalled that this was a tort case with a focus on the standard of due care: the Court was not called upon to assess whether the Netherlands had complied with EU law. Instead, it was simply asked to assess whether the State had acted negligently *vis-à-vis* its citizens, by simply following EU law. The Court of Appeal answered that question in the affirmative. Under Dutch tort law, the defendant cannot hide behind rules and regulations as the scope of the duty of due care is determined not just by existing legal norms, but by a broader set of unwritten norms as well.[36] Circumstances can be such that more is required from the State than just following the rules set by the EU.[37]

6 | ROLE OF ADAPTATION AND CLIMATE ENGINEERING

According to the Dutch Government, the Court should have taken into account the adaptation policies that have been put in place to protect the Dutch population against climate change impacts. The Court of Appeal rejected this argument too, considering it unlikely that severe climate change impacts could be dealt with by adaptation measures.[38] The State had also argued that it would rely on climate engineering measures as well, particularly 'negative emissions technologies' enabling the removal of CO_2 from the atmosphere.[39] The Court, however, was unwilling to take these future technologies into account, noting that: 'the option to remove CO_2 from the atmosphere with certain technologies in the future is highly uncertain … [and] the climate scenarios based on such technologies are not very realistic considering the current state of affairs'.[40]

[26] ibid para 26.

[27] ibid para 64.

[28] Peeters (n 2).

[29] *State v Urgenda* (n 1) para 72.

[30] ibid.

[31] ibid.

[32] In 2018, the government organized stakeholder consultations with the private sector, civil society organizations and subnational authorities with the aim to reach broad consensus on ways that the Netherlands can reduce its CO_2 emissions by 49 percent by 2030. See <https://www.government.nl/latest/news/2018/02/23/government-kicks-off-climate-agreement-efforts> and Section 7 below.

[33] As adopted in 2014, see, e.g., European Council, EUCO 169/14, CO EUR 13 CONCL 5 (24 October 2014) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/145397.pdf> 1.

[34] *State v Urgenda* (n 1) para 58.

[35] ibid para 57.

[36] This follows from the provision on non-contractual liability, Article 6:162 of the Dutch Civil Code. See extensively E Stein and AG 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 305, 314.

[37] AS Hartkamp, 'Law of Obligations' in J Chorus, PH Gerver and E Hondius (eds), *Introduction to Dutch Law* (Kluwer Law International 2006) 135, 146.

[38] *State v Urgenda* (n 1) ibid para 59.

[39] For a recent overview of all of the carbon dioxide removal technologies currently under development, see National Academies of Sciences, Engineering, and Medicine, *Negative Emissions Technologies and Reliable Sequestration: A Research Agenda* (National Academies of Science 2018).

[40] *State v Urgenda* (n 1) para 49.

7 | CONCLUSION

The Court of Appeal took three years to reach the conclusion that the District Court's ruling in the *Urgenda* case should stand. The Dutch Government now only has two years to substantially reduce its emissions by the end of 2020, in accordance with the judgment. Despite promises made by the government immediately after the 2015 District Court's decision in the *Urgenda* case, to already implement that decision while awaiting appeal, it was recently shown by journalists that in fact, the government did not pursue any additional measures to comply with the 2015 judgment.[41] Bringing forward the decommissioning of coal-fired power plants and reducing speed limits on Dutch motorways are likely to be the only realistic measures to achieve drastic additional cuts, and even these may not be sufficient. The Court of Appeal did not show any sign of sympathy for the difficulty of the State's task ahead, referring to the fact that the State was aware of the IPCC reports dating back to 2007, and had previously considered adopting much more stringent emission reduction policies. Policy was changed in 2011, in the aftermath of elections: it has now come back to hit the State as a boomerang. In November 2018, the government decided to appeal the Court of Appeal's judgment with the Supreme Court, which may be regarded as equivalent to a Court of Cassation. The Supreme Court, therefore, will not re-assess the facts. It will only have to review whether the Court of Appeal interpreted the law correctly. It is expected that, in its appeal, the State will focus on the principle of balance of powers.

Meanwhile, the climate change policy environment in the Netherlands has changed dramatically. Climate change played a major role in the negotiations leading to the establishment of a new coalition government following general elections in 2017. In June 2018, the newly elected Dutch Government announced the introduction of a Climate Bill.[42] The bill envisions far-reaching emissions reductions targets: greenhouse gas emissions in the Netherlands have to go down by 95 percent in 2050 compared to 1990. To achieve this target, the competent Ministers are required to aim for emissions reductions of 49 percent in 2030 and a fully CO_2-neutral electricity production by 2050.[43] Climate plans have to be adopted every five years, detailing the measures to be taken to achieve these goals. The current government seems to believe that with this new piece of legislation, and given the far-reaching 2050 target and the wide political support for the bill, it has effectively disabled future *Urgenda*-like lawsuits. This outcome, however, will depend on the ambition shown in the five yearly climate plans and on the concrete measures adopted to implement the plans, as well as on the actual achievement of these goals. If the plans are inadequate to deliver the envisioned results, Urgenda and other litigants could pursue the same litigation strategy and bring legal suits on the basis of tort law. In fact, implementation of the proposed bill would probably supply claimants with additional arguments to be used in court. More specifically, they could claim that a certain climate plan constitutes an illegal act under Dutch tort law. This time, not because of an infringement of the unwritten duty of due care, but because of the statutory obligation laid down in the new Climate Act. As the infringement of a written norm is easier to prove before a court, Urgenda or other litigants have a strong legal weapon at their disposal.

Finally, both *Urgenda* judgments have implications that go beyond the Netherlands. Numerous cases against unambitious climate policies are now pending before courts around the world.[44] In the so-called Peoples' Climate case, the Court of Justice of the EU is soon set to consider the complaints of 10 families from Portugal, Germany, France, Italy, Romania, Kenya, Fiji and the Swedish Sami Youth Association Sáminuorra, concerning the EU's climate goals for the years 2021–2030, on the basis of arguments similar to the ones made by Urgenda.[45] The Hague Court of Appeal's judgment will, therefore, not be the end of the debate, but certainly marks an important stepping stone towards clarifying the legal obligations of States with regard to combating climate change.

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How to cite this article: Verschuuren J. *The State of the Netherlands v Urgenda Foundation*: The Hague Court of Appeal upholds judgment requiring the Netherlands to further reduce its greenhouse gas emissions. *RECIEL*. 2019;00:1–5. https://doi.org/10.1111/reel.12280

[41]H van Santen and E van der Walle, 'Hoe Urgenda een Levensgroot Probleem Werd' (NRC Handelsblad, 19 December 2018).

[42]Bill on a framework for policy development aimed at irreversibly and set-by-step reducing Dutch emissions of greenhouse gasses in order to limit global warming of the Earth and climate change (Climate Act), *Parliamentary Doc.* 2017–2018, 34 534, No 10.

[43]ibid art 2.

[44]For a recent overview, see Burger and Gundlach (n 23).

[45]Case T-330/18, *Carvalho and others v Parliament and Council* [2018] OJ C285/34.