Universitat Pompeu Fabra Barcelona

Master's Thesis

Rethinking the European Union legislative discourse on Climate Change

Lessons to be learnt from the Dutch Urgenda Case

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Abstract

In light of the growing climate crisis, implementing innovative and far-reaching solutions has become ever more important. This belief is shared by many organisations and citizens who have turned to their courts to demand better climate action. Climate litigation has rapidly been increasingly, with more judges finding for the plaintiffs. Consequently, this is compelling governments to pursue more ambitious climate measures to tackle climate change. By and large, many have the ground-breaking *Urgenda Foundation v The Netherlands* case to thank, as this was the first time a court ordered a State to reduce its greenhouse gas emissions. The claimants premised their argument on the Dutch Civil Code, Dutch Constitution, International law Principles and the European Convention for Human Rights. By using a rich tapestry of legal sources, it signifies that our current climate regime lacks a strong legal framework. This thesis therefore aims to offer legislative solutions to help improve the European Union legislative discourse on climate change. As the Urgenda case was the first case of its kind, its legal sources were diverse and the court's rulings were innovative, it is noteworthy to delve deeper into the facts of the case to see if they can unveil new areas for potential legislation. As such, this thesis explores how the Urgenda case can help identify areas for renewed European legislation to help tackle the climate crisis. Poignantly, the case identified a clear link between human rights and environmental law and recognised the significant importance of climate science in climate litigation. Upon close inspection, the following legislative solutions were uncovered: aligning EU policies with accurate climate science, recognising the need for the protection of future generations, ensuring that all those concerned with environmental matters can fairly access the courts and finally, guaranteeing that the natural environment is viewed as an individual right. As the Earth is edging towards a catastrophic future, the EU needs to undertake action before it is too late.

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Common Abbreviations

GHG	Greenhouse gas emissions
CO_2	Carbon Dioxide
GDP	Gross Domestic Product
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Courts of Human Rights
ECJ	European Court of Justice
State	Dutch State
UNFC	United Nations Framework Convention on Climate Change
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-Governmental Organisation
EDG	European Green Deal

1. Introduction

Climate change is regarded as a process that changes the composition of the global atmosphere due to human activity.[1] This activity causes the release of greenhouse gasses (GHG) which in turn, jeopardises the existence of ecosystems, socio-economic structures and the welfare of humans and non-human animals.[2] The process has received growing international, national, regional and local recognition, as its effects have been felt far and wide. Record-breaking temperatures have led to destructive wildfires, hurricanes, droughts, abnormal rise in sea levels and floods.[3] This evident climate crisis has wreaked havoc and devastation throughout the world: food chains are under threat due to the increasingly acidic oceans; thousands of individuals have been displaced as a result of inhabitable conditions, with thousands more to be expected in the coming years; essential food supplies contain less nutrition as crops exposure to CO_2 has intensified; biodiversity hangs on a life line, with over one million species declared at risk of extinction; and air and water pollution have killed millions of animals and humans across the globe.[4] These pressing concerns have been addressed through International and European policies, local and community initiatives, and to a lesser degree business practices.[5] However well intended these endeavors may be, they fall short in sufficiently tackling the pervasive climate crisis. In 2020, emissions were declared a staggering 62% higher than when international climate negotiations began in 1990, setting us on a path towards a 3-6 Celsius increase in the coming century.[6] The cost of inaction, or insufficient action, could lead to a 5- 20% decrease in the global GDP[7] and a continuance of the loss of human life and ecosystems. In the wake of such a catastrophe, an alternative line of thought has started bearing fruit, namely, that the courts of law should be used to tackle the climate crisis.[8] Roger Cox,

[1] UNFCC (1992) Article 2. Retrieved 2 June 2021 from: https://unfccc.int/resource/docs/convkp/conveng.pdf.
[2] Ibid., Article 4 & 1.
[3] European Commission, Climate change. Retrieved 3 June 2021 from: https://ec.europa.eu/clima/change/consequences_en.
[4] UN Secretary General (2018) and (2020), Speech's on Climate Change. Retrieved 2 June 2021 from: https://www.youtube.com/watch?v=Jsi5Vp_6tdE and https://unfccc.int/news/un-secretary-general-making-peace-with-nature-is-the-defining-task-of-the-21st-century#:~:text=UN%20Climate%20Change%20News%2C%202,change%20over%20the%20coming%20year.
[5] Recent examples include, the Paris Agreement, European Green Deal, European Emission Trading Scheme, Extinction Rebellion movement and the rise of Corporate Social Responsibility.
[6] UN Secretary General (2020) Speech on Climate Change. Retrieved 2 June 2021 from: https://unfccc.int/news/un-secretary-general-making-peace-with-nature-is-the-defining-task-of-the-21st-century#:~:text=UN%20Climate%20Change%20News%2C%202,change%20over%20the%20coming%20year.
[7] European Parliament (2020), Factsheet on Combating Climate Change. Retrieved 2 June 2021 from: https://www.europarl.europa.eu/factsheets/en/sheet/72/combating-climate-change.
[8] Cox (2011).

a Dutch attorney and originating founder of this vision, recognised that our existing legal rules and principles, combined with scientifically established facts on climate change, warrant the judiciary's ability to oblige governments to take remedial action against the climate crisis. Cox conceded that the perpetual failure of governments to address the climate challenges has driven the world into a state of emergency, for which 'only the law can save us' from.[9] When considering the COP25 in Madrid, where no significant decisions were made for the climate crisis,[10] the effectiveness of our political and international institutions in combating the crisis was negatively brought into the forefront. More recently, the speech held by the UN Secretary General on 'The State of the Planet' magnified this concern when he pleaded for States, financial institutions, companies and cities to take bold climate actions, and condemned those that had rolled back their environment protections since the COVID-19 pandemic.[11] The above points, in conjunction with the recent rise and successes of domestic climate litigation cases, adds weight to Cox's notion and therefore deserves greater recognition and attention.

The groundbreaking *Urgenda* decision, for which Cox was one of the lead attorneys, will be marked in history as the first time a court ordered a State to reduce its GHG emission. It has consequently opened up a gateway for further climate change cases, where citizens and organisations have taken to the courts to request climate action.[12] With the absence of domestic precedence courts have gazed beyond their national borders to learn listen, observe and at times even transplant legal reasonings into their own conclusions. Fittingly, a global discussion has arisen around a globally shared problem, with many domestic climate cases now being concluded in line with the Dutch court's ruling. Subsequent case law after *Urgenda* has shown a wave of judicial enquiries into various governments' accountability for climate action based on human rights. *Urgenda* can hereby be regarded as a prominent catalyst for the domestic climate litigation movement.

Although it is interesting to consider what influence *Urgenda* has had on successive climate litigation cases, this point has already been widely considered in the scholarship.[13] Ample research

[9] Ibid.
[10] Chandrasekhar (2019).
[11] UN Secretary General's (2020) Speech on Climate Change. https://unfccc.int/news/un-secretary-general-making-peace-with-nature-is-the-defining-task-of-the-21st-
[12] Urgenda webpage lays out the cases that occurred after the Urgenda ruling: Retrieved 2 June 2021 from: https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/.
[13] Roy and Woerdernman (2016), van Geel (2017) and Nollkaemper and Burgers (2020)

laying out the particulars of the case and the courts argumentation also already exists.[14] However, where research remains scarce, is in the understanding what *Urgenda* can tell us about our current legislative discourse surrounding climate change. As *Urgenda* was based on a rich tapestry of various legal sources, stemming from international, European (EU) and national law, it signifies that our current climate regime lacks a strong legal framework. To strengthen this point, rulings of subsequent climate cases have also weaved in various legal interpretations to substantiate their arguments. Although this newly emerging avenue for tackling global warming will undoubtedly so become ever more demanded and necessary when the political inertia continues to fail in addressing the climate crisis, it does not diminish the fact that this process is timely, financially straining, legally complex and can pose challenges for justiciability and enforceability. In this effect, rethinking our current environmental laws or introducing new robust and far-reaching climate related laws, as opposed to pursing matters through litigation, can remedy this insufficient legal framework and help tackle the pervasive issue of climate change. As *Urgenda* was the first case of its kind, it is noteworthy to delve deeper into the facts of the case to see if they can unveil new areas for potential legislation. As *Urgenda's* legal sources were diverse and as the case presented many challenges- as shall be laid throughout the thesis- there are undeniably many lessons which legislators can take away from the case. In light of this, the guiding research question of this thesis shall be: *How can the Urgenda Case help identify areas for renewed European legislation to help tackle the climate crisis?*

As has been laid out above, climate agreements have been insufficient in circumventing and suppressing the catastrophes of global warming. With the lack of sufficient measures, civilians are demanding stronger climate action through litigation. Climate action should not, however, have to be initiated through a bottom-up approach; the contrary should ensue as nations have committed themselves to address the problems of climate change.[15] Such actions once again signify that our legal framework is in need of change. This thesis contends that this change should take place at the EU level, as it already retains a complex legal framework made up by 27 developed and large emitting nations. The EU also retains advanced climate policies[16] and has ample experience in reconciling political differences. Unlike international law, EU law can be directly binding and

[14] Loth (2016), de Graaf & Jans (2015), Leijten (2019) and Lavrysen (2021).
[15] Signing of the UNFCC, Kyoto and Paris Agreement, for example.
[16] The EU Emission Trading Scheme, Directive on Energy Efficiency and the European Green Deal are prime examples of how the EU is a forerunner in combating climate change.

retains enforceable mechanisms, hence, the EU's competencies in combination with its history, indicates that legislative change would be more feasible and indeed more practical on an EU level. Through leading by example, it is then with the hope that other great nations will follow in its footsteps.

2. Methodology

2.1 Structure of the thesis

In chapter 3 I shall describe the main features of the *Urgenda* case, touching upon its standing, causation, the references made to the separation of powers, science as an irrefutable fact, the principles of international law and address the human rights aspect. In chapter 4, the thesis shall explain why legislative change should transpire at an EU level, outlining the EU's current status regarding GHGs, the problems pertaining to the European Green Deal, will touch upon the 'first movers' advantage and highlight the negative consequences of inaction. Chapter 5 will cover the direction EU legislation should considering evolving, based on the facts of the case. This will include rethinking the notion of 'rights' by incorporating the principle of intergenerational equity into EU law, introducing a directive for the right of access to justice in environmental matters, adding a new protocol for the right to a healthy environment into the ECHR and elevating climate science to a legally enforceable norm. These points will be aided by an interview from a co-plaintiff. This will enrich the thesis' understanding of *Urgenda,* as it shall sufficiently address the case's main challenges, its lasting significance and gain an insight into the implementation of the Court's order. In chapter 6, I shall conclude my findings and hereby answer my research question.

2.2 Scope and Limitations

By using *Urgenda* as a reference point for legislative change, this thesis will only cover one predominate trend that has emerged within climate litigation, namely *climate rights*.[17] As shown with *Urgenda*, cases concerning climate rights will frequently assert the notion that inadequate action to mitigate climate change goes against the current international and constitutional *right* to life.[18] However, by only focussing on the latter, this thesis neglects other prominent climate

[17] The Global Climate Litigation report (2020).
[18] European Convention for Human Rights, Article. 1 & Universal Declaration of Human Rights, Article. 3.

litigation trends, namely, domestic enforcement, keeping fossil fuels in the ground, corporate liability and responsibility, failure to adapt and the impacts of adaptation and/or climate disclosures and greenwashing.[19] Although these are valuable developments to observe and research, climate rights are a relatively new area of litigation; this therefore adds to the novelty of the thesis' research. That being said, the thesis' conclusions will not be wholly complete and there may be many other directions or areas legislation could consider evolving. *Urgenda* did however touch upon various legal sources and include unique legal interpretations. This will in turn ensure that the conclusions drawn throughout the research will be comprehensive and wide-ranging.

To streamline the research even more, this thesis will consider legislative change within the EU[20] framework. Although this will neglect the essential transnational element of climate litigation, it will contribute to the aim of the thesis, which is to demonstrate the need for more stringent harmonised laws. As has been shown on many occasions, pursuing the climate question within the international fora poses many hurdles and barriers. States' interests, technical mechanism, financial capabilities and willingness to act, often remain too dispersed to find common ground.[21] When international climate agreements are made, they lack enforceability due to their soft law nature and take time to develop into customary international law: this is time we simply do not have. The EU on the other hand, has the mechanisms in place to create harmonised and directly applicable laws.

2.3 Sources

Chapter 3 shall cover information about the *Urgenda* case, touching upon the judgements, surrounding literature, soft law instruments, Articles from the ECHR, Dutch law and relevant jurisprudence. The absence of many hard law sources led claimants and the courts in *Urgenda* to rely on various legal interpretations, legal rules and legal theories. This complex web of legal reasoning is what makes this topic of specific interest and helps lay bare the areas where legislative change could transpire. Codified laws would offer greater clarity for both claimants and judges of climate ligation, saving innumerable amount of time and money for both parties. It could alarming

[19] The Global Climate Litigation report (2020).
[20] This includes countries from the European Economic Area (EEA)
[21] The Kyoto protocol is a prime example of an ineffective international climate agreement. The static target approach meant the mitigation burden wasn't adequately divided and led to widespread non-compliance of the emission targets.

so, also be the only mechanism left to combat the urgent climate crisis. Chapter 4 shall include well established scientific data to indicate the urgent need for climate action. Similar data shall be used to exemplify the EU's prevalent role in release of GHG's. Beside this, the chapter shall include books, journals, primary and soft law instruments. Conversely, chapter 5 shall include journals, books, EU Law and a first-hand interview that was conducted with a co-plaintiff.

3. The key elements of the *Urgenda Foundation v The Netherlands* case

3.1 Timeline of the case development

In order to gain a sound understanding of the Urgenda case, the thesis shall briefly mention the cases' development, before delving into its fundamental, yet often highly contentious, elements.

The *Urgenda* case took shape in 2012, when Prime Minister Rutte was sent a letter by the Urgenda Foundation (Urgenda) requesting the Dutch State (State) to take measures to reduce GHG emissions by 40% in 2020. In this letter, Urgenda reminded Rutte about the threats posed by climate change, the State's commitment towards its scientifically founded international agreements and from this, its obligation to ensure adequate climate protection.[22] As Urgenda felt that the response by the State was insufficient, it pursued a civil procedure on behalf of 886 Dutch citizens. Urgenda argued that as the State had not imposed climate measures that went beyond the 1990 emission reduction targets, they were committing a tort of negligence against their citizens. As such, Urgenda demanded a 25-40% reduction in GHG by the end of 2020, as opposed to 16% that was required by the EU. The claimants premised their argument on Article 6:162 of the Dutch Civil Code (eg. negligence), Article 21 of the Dutch Constitution (duty to protect and improve the environment), International law Principles (precautionary principle, no-harm principle, prevention principle and equity principle) and the European Convention for Human Rights (Article 2 referring to the 'right to life' and Article 8 referring to 'right to family life').[23] Urgenda tactfully choose a tort law approach instead of an administrative environmental one, as the former could grant the judge's a broader scope of discretion when establishing the government's civil duty of care and could allow for stricter emission reduction targets to be imposed on the State, while the latter

[22] Letter to the Prime Minister Rutte (2012).
[23] An International Bar Association Climate Change Justice and Human Rights Task Force Report (2020). Retrieved 2 June 2021: https://www.ibanet.org/MediaHandler?id=47ae6064-9a61-42f6-ac9e-4f7e1b5b4e7b.

would have only warranted the assessment of current environmental laws.[24]

In 2015 the District Court of The Hague found for the plaintiffs, ruling that the Dutch government had failed to fulfil its duty of care. The Court was of the opinion that the State's climate measures did not meet its internationally agreed targets and therefore ordered the State to lower its emissions by at least 25% by 2020. Although the Court dismissed the constitutional argument and those contained in the European Convention on Human Rights (ECHR), it did consider the 'right to life' as a source of inspiration when deciding the standard of duty owed by the State to its citizens under the Dutch Civil Code.[25] By reaching its judgement, the Court rejected the government's notion that inter alia, there was lack of causation, an infringement on the balance of power and an absence of liability due to the *'de minimis'* contribution to global GHG.[26] These points will be examined in more detail in the following sections.

In 2016 the government appealed the first instance decision to the Court of Appeal. In 2018 the Appeal Court upheld the judgement by the District Court but modified its legal foundation. Contrastingly, they found that Urgenda could invoke Articles of the ECHR, by recognising that Dutch law permits class actions by interest groups in domestic courts. Under Article 2 ECHR the State has a positive obligation to protect the lives of citizens within its jurisdiction, while Article 8 ECHR creates the obligation to protect the right to home and privacy. The Court developed upon the latter point by stating that this obligation applied to all public and non-public activities that could endanger the rights conferred in the Article, particularly so when it concerned dangerous industrial activities. As the government accepted the imminent threats posed by climate change, through its ratification of the Paris Agreement and acknowledgement of the Intergovernmental Panel on Climate Change (IPCC) reports, the Court ruled that the State had to uphold its obligations enshrined in the ECHR and therefore needed to reduce its emissions by at least 25%.[27]

Once again, the government appealed to the Dutch Supreme Court (*Hoge Raad)* who concurred with the prior rulings issued by the previous courts in 2019. The Supreme Court based its judgement, inter alia, on the United Framework Convention on Climate Change (UNFCC), which hereby certified the international community's consensus towards science and from this, the

[24] Cox (2015), 10.
[25] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396 (2015) (English translation).
[26] Ibid.
[27] *The State of the Netherlands V. Urgenda Foundation*, The Hague Court of Appeal, Case Number C 00.178.24/01 (2018) (English Translation).

State's obligation to safeguard the rights preserved in the ECHR.[28] What is particularly noteworthy about the decision, is that it has been extended onto private companies. With the ground-breaking 2021 Shell suit, plaintiffs similarly argued that in light of the Paris Agreement's goals and the clear climate science which evidences the dangers of climate change, Shell has a duty of care to reduce its GHG's. Like with *Urgenda*, plaintiffs invoked Article 2 (right to life) and Article 8 (right to private life, family life and home) of the ECHR when determining Shell's duty of care. The Hague District court in May 2021, found for the plaintiffs, consequently ordering Shell to reduce its emissions by 45% by 2030, relative to 2019, across its own emissions and end-use emissions, thus from the oil its produces.[29] As Shell's verdict is the first time a multinational corporation has been found liable for deficient climate policies, it underpins the sheer significance of the Urgenda case. What we are now seeing, is that domestic courts are addressing hugely significant global environmental governance matters.

3.1.1 Standing

Standing or *locus standi* is a pre-requisite for claimants if they want to access the courts. To establish standing, a litigant is commonly required to show a sufficient link between the defendant's conduct, a specific law and the harm that they have suffered or are soon to suffer. Numerous factors are considered when establishing standing, namely, the nature of the topic, the subject matter and the connection between the subject and the relevant proceedings.[30] Standing may be granted on the basis of a 'statutory provision, procedural rule or common law doctrine, and the test to establish standing will vary based on jurisdiction and cause of action or claim.'[31] Climate change cases often face difficulties when establishing standing for various reasons, namely, because claimants are often made up of minors and nongovernmental organisations (NGO's), global warming retains various causes and effects and because the most severe consequences of climate change will unfold in the future. This was proven with the *Magnoliamålet v. Swedish State* case, where the Stockholm District Court and the Svea Court of Appeal dismissed

[28] *The State of the Netherlands V. Urgenda Foundation*, The Supreme Court of the Netherlands, Case Number 19/00135 (2019) (English translation).
[29] *Royal Dutch Shell V. Milieudefensie, Greenpeace, Fossielvrij-Beweiging, Waddenzee, Milieu Actifief and Actionaid*, The Hague District Court, Case number C/09/571932/HA ZA 19-379 (2021) (English version).
[30] Pierce (1999), P.1742.
[31] An International Bar Association Climate Change Justice and Human Rights Task Force Report (2020), 7.

the claim for lack of actual and tangible injury. Or with the *KlimaSeniorinnen v. Switzerland* case, where the Swiss courts ruled that GHG emissions could not affect only one group of persons and in line with Article 13 ECHR, could not regard the plaintiffs as 'victims.'[32] Similarly, in the EU, plaintiffs from six countries filed suit against the EU, stating that the revised Renewable Directive 2018 would lead to widespread forest devastation and increase of GHG's, thus be in violation of ECHR. Once again, the case was dismissed on the basis of lack of standing, whereupon the court held that the plaintiffs had failed to demonstrate the individual impacts unfelt by the public as a whole.[33]

When determining whether Urgenda had standing, the District Court considered that as Dutch law allows NGO's to initiate public interest cases and the Dutch Civil Code permits foundations or associations to bring forward cases that represent their general or collective interests, standing could be granted.[34] As Urgenda's statuary aim was to defend the interest of a 'sustainable society', the Court allowed for all of Urgenda's bases, these being, for the current Dutch residents, for the present generations abroad and for future generations. As a 'sustainable society' in and of itself retains an international and intergenerational dimension, the Court concluded that Urgenda could not stand for national interests without simultaneously representing future generations and those abroad.[35] By granting the collective aim, the Court left the question of whether 885 individuals could establish *locus standi* unanswered. As noted, the Court felt 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 (cf. ECtHR 12 May 2015, Identoba et al./Georgia, no. 73235/12). Even if Urgenda's objectives, formulated in its by-laws, are explained in such a way as to also include the protection of national and international society from a violation of Article 2 and 8 ECHR, this does not give Urgenda the status of a potential victim within the sense of

[32] The Swiss petitioners grounded their claim in Article 10 (right to life), 73 (sustainability principle) and 74 (precautionary principle) of the Swiss constitution, and article 2 and 8 of the ECHR. Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council (2016).
[33] Peter Sabo and Others v. European Parliament and Council of the European Union, Case T-1 41/19, ECLI:EU: T:2020:179.
[34] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396 (2015) (English translation).
[35] Loth (2018).

> Article 34 ECHR (cf. ECtHR 29 September 2009, Van Melle et al./Netherlands, no. 19221/08). Therefore, Urgenda itself cannot directly rely on Articles 2 and 8 ECHR.[36]

Contrastingly, the Court of Appeal argued that Article 2 and 8 could be invoked, as Article 34 *only* applied to cases that were brought in front of the European Court of Human Rights (ECtHR), not Dutch courts who derived their standing from the Dutch legal system (Article 3:305 of the Civil Code). The Appellate Court stated that 'since individuals who fall under the State's jurisdiction may invoke Article 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf'.[37] The Supreme Court developed on this point by recognizing that Article 13 ECHR requires national law to provide an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR, as such, agreeing that the latter Articles could be invoked by Urgenda.

What is particularly noteworthy about Urgenda's standing is that firstly, the courts took diverging views concerning the cases claims. The District Court denoted that tort law adjudication was a fit and proper means for dealing with a globally shared problem like climate change, while the subsequent courts moved away from the aforenoted stance and instead premised their arguments on European and International obligations. Secondly, an NGO came forward with the intent of protecting not only its own citizens, but also those *abroad* and in the *future*. Although the Appeal and Supreme Court found it unnecessary to address the latter points, arguing that the case had already been declared admissible insofar as Urgenda was acting on behalf of its Dutch citizens interests, it does pose two questions. Firstly, should future generations establish legal standing and if so, how? Secondly, could the law open its self-up to consider both those that are harmed at home and abroad? Although this uncharted territory evidently remains unclear, climate change is increasing felt by the global community and is recognized as a problem that will predominantly affect future generations.[38] It therefore seems reasonable to conclude that in the near future these questions will need answering. A feasible and legally apt way to tackle the above questions, would be to introduce stronger harmonized climate reduction emission targets, as governments would thereby be required to continue reduction efforts, regardless of their short-term political motives

[36] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396, 4.45 (2015) (English translation).
[37] *The State of the Netherlands V. Urgenda Foundation*, The Hague Court of Appeal, Case Number C 00.178.24/01, 36, (2018) (English Translation).
[38] Kelland (2019)

and vested interests. Alternatively, redefining the notion of standing through say, the introduction of an EU directive which would issue the right of access to justice, could be another feasible method.

3.1.2 Causation

After being granted access to the courts, claimants are commonly required to prove that the defendant's actions or inactions are the primary cause of their harm. Considering the global nature of climate change, difficulties commonly arise when a causal link between a defendant, carbon emissions and the damages suffered by the plaintiff, needs to be established. Markedly, the traditional 'but for' test cannot be satisfied by climate litigation cases as 'dangerous anthropogenic climate change is triggered by the accumulation of GHG emissions over time and space, not by the actions of one specific actor'.[39]

In line with Dutch law, state liability can only be established if a connection between the wrongful conduct of the tortfeasor and the damage to the victim is apparent. On the basis of this pre-requisite, the State raised various arguments against Urgenda's causation claims. They contended that: the Dutch State couldn't be regarded as the only agent causing climate change; granting Urgenda's claim would be ineffective in tackling the dangerous posed by climate change; the court-ordered target of 25% would result in minimal, if not negligible reduction of the global GHS emissions (the drop in the ocean problem); and as other EU countries would neutralise reduced emissions in the Netherlands, the GHGs in the EU as a whole would therefore not decrease (referred to as the 'waterbed effect' or 'carbon leakage.'[40]

The District Court rebutted all arguments, underlining that the State determined the Dutch level of GHG emissions, the State had agreed to proportionally reduce its emissions through its ratification of the UNFCC and the Kyoto Protocol, and that the State was not prohibited by the EU from adopting more stringent measures. In light of the above, the Court noted that the government could not swerve liability and therefore needed to implement measures that would meet a higher emission reduction target. The Court was also of the opinion that if the State in 2010 was set on reducing emissions by 30% before 2020- as compared to pre-industrial levels- it already retained the competencies to ensure ambitious climate measures and thereby, the possibility to pursue a

[39] Van Zeben (2015), 11.
[40] Graaf & Jans (2015)

'sustainable society'. Regarding carbon leakage, the Court referred to the IPCC findings, which indicated that only around 12% of carbon losses had occurred, and to the European Commission, who concluded that 'so far there have been no signs of carbon leakage'.[41] In view of this, the Court invalided the carbon leakage argument and maintained that reduction efforts could be substantiated. Lastly, the Court highlighted that irrespective of a nations size, every release of GHG contributes to climate change and that therefore the Dutch State, regardless of the small territory it oversaw, had to impose precautionary measures that would ensure a sufficient duty of care. This was grounded in the *Kalimijnen* case, where combined chloride dumps by various parties in Germany, France, Luxembourg and the Netherlands led to damming levels of pollution in the Rhine. As every party bared partial responsibility, the Court similarly inferred that climate change impinges global joint liability. To add weight to this, the Court reminded the State that the Netherland's emission per capita were among the highest in the world and that mitigating emissions earlier rather than later, would be more cost-effective in the long run.[42]

The Court of Appeal similarly echoed the need for collective action against climate change and disregarded the *de minimis* argument put forward by the defendant. The Court considered that if no action was required, it would warrant other countries inaction and as such, stifle the emergence of a legal remedy against climate change. Lastly, the Supreme Court concluded in line with the UNFCC, stating that:

> all member countries must take measures to prevent climate change, in accordance with each country's specific responsibilities and capabilities. Each country is thus responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. This obligation of the State to do "its part" is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.[43]

[41] European Commission (2014). Retrieved 8 June 2021 from: https://ec.europa.eu/clima/sites/clima/files/ets/allowances/leakage/docs/cl_evidence_factsheets_en.pdf.
[42] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396, 4.45 (2015) (English translation).
[43] *The State of the Netherlands V. Urgenda Foundation*, The Supreme Court of the Netherlands, Case Number 19/00135, 5.7.3- 5.7.8, (2019) (English translation)

What distinguishes Urgenda from former climate change litigation cases is that the Court ordered the State to act on a non-statutory basis. Having applied a non-legally binding international and scientific consensus of a 25% reduction, as an '*absolute minimum'* standard, it opens itself up for shortcomings in future climate litigation cases. Notably, if national courts decide to refer to domestic law as opposed to international instruments, national law could be shaped in such a way that it could escape the 'minimum obligations' required by the scientific and international community. This would have damming effects for the climate change discourse, by steering it down the current ineffective and ultimately destructive path. Having further harmonised EU climate laws in this effect, would remedy this shortfall by, for example, ensuring higher emission reduction targets are enshrined in national law. Consequently, States could directly be held accountable if they were not adhering to these higher (legally binding) emission targets.

3.1.3 Separation of Powers

Another highly contended and disputed topic of discussion during *Urgenda*, was whether the unelected judges should rule on the matter of climate policy and require legislators to legislate. The State strongly believed that this infringed the separation of powers (also referred to as *trias politica*), claiming that *only* the political domain should handle policy matters. To properly grasp what the 'separation of powers' entails, it is important to briefly touch upon its roots and what role it plays within the Dutch system. This will provide a better overview of the State's, and contrastingly so the Court's, stance on the matter during the case.

Montesquieu is a prominent individual who shaped the definition of *trias politica.* He held that the doctrine of the separation of powers ensures that citizens are safeguarded against a country's central powers through three distinct branches that check-and-balance one another. Consequently, this ensures that democracy is upheld, and tyranny is deterred. Montesquieu argued that these three branches, or principal institutions, are the executive, legislative and judiciary, who retain different and distinct functions, yet who collectively guarantee a fair and just governance of the state.[44] Within our current context, this notion of the 'separation of powers' has resulted in courts rejecting matters which are of a political nature, specifically when it concerns policymaking. In the strictest sense, these branches may not exercise the powers of the other, nor may they

[44] Montesquieu, (1989).

influence one another in their designated functions.[45] Based on the doctrine laid out above, the State premised one of its counterarguments against *Urgenda.*

When tackling the above claim, the District Court held that within Dutch law, there is no such thing as the separation of powers. Instead, the Court recognised that the Netherlands does aim to achieve a balance between the state authorities, but that no one 'branch' has primacy over the other. Like many other EU States, the Netherland's retains a 'structure' that can best be described as having a "'cooptation rather than a separation of powers" [with]… courts invoking the power of judicial review'.[46] In line with this, the Court stressed that its role was to offer judicial protection and if requested, to resolve legal disputes. They went on to highlight how judges play an equally pivotal role in the democratic system by upholding and safeguarding both national and international democratically established legislation. In this regard, they believed they had an obligation to protect citizens against government authorities and stipulated that so long as they did not exceed their assigned sphere of *applying the law*, they were not encroaching on the powers of the government. The Court proceeded by stating that 'in a general sense, given the grounds put forward by Urgenda, the claim does not fall outside the scope of the court's domain. The claim essentially concerns legal protections and therefore requires 'judicial review'.[47] The Court also argued that although the ruling could have political consequences, 'it is no reason for curbing the judge in his task and authority to settle disputes'[48] Lastly, to rebuttal the State's notion that imposing greater reduction targets would undermine its negotiating position within the international fora, the Court simply said:

> this does not have independent significance in the sense that- if the courts rules that the law obliges the State towards Urgenda to realize a certain target- the government is not free to disregard in the context of international negotiations. However, it applies here too that the court should exercise restrain given the possibility that the consequences of the court's intervention are difficult to assess.[49]

In line with the latter point, the Court ordered the minimum reduction target of 25%, not 40%, and granted the State full discretion in the implementation of the Court's ruling. This was

[45] Daniel (2017).
[46] Roy and Woerdman (2016).
[47] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396, 4.97- 4.98, (2015) (English translation).
[48] Ibid. 4.98 (2015).
[49] Ibid. 4.100

partly due to the fact that the Court could not successfully determine what affect the ruling would have on third parties.[50] When considering all of the above, the Court concluded that there had been no encroachment upon the Executive's powers. This was upheld by the Appeal Court, who emphasized the high degree of discretion granted to the State and the notion that the judges' actions were warranted on the basis of protecting human rights.

Although the courts carefully reasoned their position, strong opposition against the ruling has remained. De Boer contends that the judges exhibited judicial activism by ruling on a controversial social issue with a lack of legal grounding.[51] To strengthen his disapproval he went on to mention that judges are only in part democratically legitimate, while legislators are completely democratically elected and should therefore take primacy over policy related matters.[52] Another fear was that *Urgenda* could open the door to further social justice litigation, which would undermine the policies of the government and create more 'harm' than good.[53] All in all, the question of whether the doctrine of the separation of powers had been violated, has resulted in polarized and conflicting opinions. As such, if we consider a scenario wherein more climate related laws were harmonized, the judges would not be deemed as having gone beyond their sphere of *applying the law*. This predominate reservation surrounding climate litigation could be omitted and mention of judicial activism and the infringement on the balance of power would mostly likely be kept at bay.

3.1.4 Climate Science as an irrefutable fact

As mentioned previously, there were no legally binding norms that obliged the Dutch State to reduce GHG by 25%. Instead, reduction targets were enforced on the basis of 2007 IPCC reports, the Cancun Agreement and other international accords. Collectively, the latter inferred that a 25% to 40% emission decrease by 2020 was required by industrialised countries (Annex I countries), if global warming was *not* to exceed the internationally agreed target of 2ºC.[54] As no party to the proceedings contested the science of climate change, its influence was clearly irrefutable

[50] Ibid.
[51] De Boer (2016).
[52] Ibid. (2016).
[53] Bergkamp (2015).
[54] *The State of the Netherlands V. Urgenda Foundation,* The Supreme Court of the Netherlands, Case Number 19/00135, 7.31, (2019) (English translation)

throughout the case.

The Court of first instance considered climate science when determining whether the State had been negligent. It assessed the following: i) the nature and extent of the damage ensuing from climate change, ii) the knowledge and foreseeability of this damage, iii) the chance that hazardous climate change will occur, iv) the nature of the acts (or omissions) of the State, v) the onerousness of taking precautionary measures and vi) the discretion of the State to execute its public duties.[55] Additionally, the Court referred to the UN Climate Change Convention, wherein signatories had agreed to limit emissions to 2ºC, and considered that in light of 'scientific and technical knowledge', undertaking climate measures earlier rather than later would be more cost effective.[56] Poignantly, the Court stressed the legal and political consensus of the IPCC, which outlined the link between Climate Change and GHG emissions, and emphasised the need to 'stabilize GHG concentrations in the atmosphere at a level of about 450 ppm CO_2-eq by the end of the 21st century in order to achieve the 2ºC target (the 450 scenario).'[57]

Similarly, the Appeals Court noted the various catastrophes that would follow if temperatures were to rise above 2ºC and stressed that CO_2 levels were edging towards the maximum 'carbon budget' of 450 parts of GHG per million. Referring to both decisions adopted by the UNFCC Conference of the Parties (CoP) in the past decade, and the need to reach the Paris Agreements goal with a degree of certainty, the Court found that the State had to remain complacent with the aforenoted budget.[58] In light of the above and the *fact* that climate change posed a *real threat*, the Court concluded that the State owed a duty a care to its citizens. The Supreme Court conferred with the prior ruling, similarly, referring to the carbon budget, the obligation of developed nations under international agreements and went on to consider what the Netherland's 'share of responsibility' was.[59] This shall be explained at greater length in the following chapter.

All Courts extracted information about climate science from IPCC reports. It is therefore noteworthy to briefly touch upon its status. The IPCC was created by the World Meteorological

[55] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396, 4.45 (2015) (English translation).
[56] Ibid.
[57] Mayer (2019), 181.
[58] Verschuuren, (2019).
[59] *The State of the Netherlands V. Urgenda Foundation*, The Supreme Court of the Netherlands, Case Number 19/00135, 7.31, (2019) (English translation).

Organisation and the United Nations Programme with the aim of providing governments accurate scientific information.[60] Their objective is to assist governments in the creation of climate policies and international agreements. The IPCC is made up of an array of scientists and government representatives, who share their individual expertise to help create climate science reports. Before the reports are published, they are subject to a rigorous three stage review process wherein the report will be modified and checked by experts, representatives of member states and participating governments.[61] As these reports can only be published if all parties have given their consent, and as they are cross sectoral, it ensures that the scientific content produced is of the highest and most credible degree. The reports are therefore generally accepted by the global community and correspondingly so, by defendants and plaintiffs of climate cases, as was illustrated with *Urgenda.*

On the whole, climate science was deemed an irrefutable fact during *Urgenda.* However, by premising the ruling on the *need* to achieve a 2ºC decrease, some believe that the courts had overstated the scientific evidence presented in the IPCC, identifying that this target was merely mentioned as a 'best estimate', not an explicit requirement.[62] In addition, others believe that the courts target has blurred the line between legal and non-legal standards.[63] For instance, some worry that EU nations can now be forced 'through the ECHR, to adhere to scientific *communis opinion*' if they are not acting in line with scientifically accepted standards.[64] Although this raises concerns for the democratic order, one could argue that the constant referencing to climate science (specifically to the IPCC reports) throughout various international agreements, implies that it must be considered when interpreting climate laws. Furthermore, individuals are aware of the consequences of climate change and what will happen if no sufficient action is to transpire; there is enough universally accepted scientific evidence to substantiate this. However, political leaders are often too tied down by various financial, economic, political and social factors to pursue ambitious climate change policies. In addition, the effects of climate change are to be felt more widely and severely in the upcoming decades, which consequently leads to climate issues often taking a 'back seat' in political and policy mandates. In this sense, elevating widely accepted and respectable scientific facts as 'legally enforceable norms', may be warranted on the basis of

[60] IPCC. Retrieved 8 June 2021 from: https://www.ipcc.ch/about/.
[61] Ibid.
[62] Mayer (2019), 182.
[63] Backes and van der Veen (2020).
[64] Ibid. 314.

safeguarding future and current generations.

Some are still apprehensive about the role of climate science in climate litigation, contending that sciences' constantly evolving nature could result in court's contradicting one another in their rulings. Also, some note that international agreements, such as the Paris Agreement, were ratified on the basis of their non-legally binding norms and unenforceability, hence, stand in stark contrast with the Dutch court's interpretation.[65] To remedy the above points, the EU could introduce a staggered EU-net-zero emission target based on the IPCC reports. This would inadvertently elevate climate science as 'legal binding' and could hereby erase concerns about climate science's prevalent role in climate litigation.

3.1.5 Principles of Environmental law

Throughout the various court decisions, international law principles were heavily relied upon when determining the final emission reduction target of the State. As previously mentioned, the Netherland's ratification of the UNFCC and its subsequent yearly conference of the parties (COP), led the courts to consider international law when formalising the State's duty of care.[66] That being said, Articles 93 and 94 of the Dutch Constitution specifies that rights for individuals *can only* be derived from provisions of international law if they are deemed binding 'on all persons by virtue of their contents.'[67] In accordance with this, the District Court argued that, inter alia, the UN Climate Change Convention, Kyoto Protocol and the 'no harm' principle could not have a binding force on citizens.[68] The Court also established that 'international-law binding force only involves obligations towards other states … [and if] the state fails one of its obligations towards one or more other states, it does not imply that the state is acting unlawfully towards Urgenda.'[69] The question that therefore arises is: how did the court's apply international climate change instruments stemming from international treaties, if they were not able to create legal obligations? As a response, the Court reasoned the following:

[65] Ibid.
[66] Burgers and Staal (2019).
[67] Graaf and Jans (2015)
[68] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396, 85, (2015) (English translation).
[69] Ibid. 4.42.

> an international-law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no other interpretation or application is possible. This is a general acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and concepts, including social proprietary, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations. This way, these obligations have a "reflex effect" in national law.[70]

As the Court was interpreting an open and vague concept, namely 'due care' of the State, it held that international law obligations needed to be accounted for when determining the degree of discretionary power and minimum degree of care required by the government. This information helped lay bare the nature, extent and foreseeability of the damage. Similarly, the Supreme Court concluded that international climate change measures had to be considered, if Article 2 and 8 ECHR were to be accurately interpreted and applied. This followed on from *Nada v. Switzerland* and *Demir and Baykara v. Turkey*, wherein the ECtHR viewed non-binding rules necessary if circumstances were unclear and if the rules could help determine the State's positive obligations under Article 2 and 8 ECHR[71]. Here, the court poignantly entwined human rights with environmental law.

Turning to which international instruments were applied, it is noteworthy to firstly mention the principle of *common but differentiated responsibilities and capabilities* (CBDRs). CBDR was used to address the matter of causation and *trias politica* and had prior to *Urgenda* 'remained outside the purview of environmental law jurisprudence at the national level.'[72] By definition, CBDR maintains that States and relevant actors have a common but differentiated responsibility to protect the global environment. States differentiated responsibility will depend on what impact they have had on the environment and on their economic and developmental situation. Understandably, the burden predominantly falls upon developed nations, whose behaviours and actions have led to severe environmental degradation and who have, unlike those that are still developing, been able to develop unimpeded by environment restrictions.[73] Throughout *Urgenda*, CBDR was used when the courts claimed that: Annex I (developed) countries needed to consider

[70] Ibid. 4.43.
[71] *The State of the Netherlands V. Urgenda Foundation*, The Supreme Court of the Netherlands, Case Number 19/00135, 7.31, (2019) (English translation).
[72] Ferreria (2016), np.
[73] New Delhi Declaration (2020).

their *fair distribution* and *proportional contribution* when reducing emissions; that the Netherland's bared the responsibility of a 'leader' to adopt mitigation measures; and the Dutch's emission per capita were among the highest in the world. Collectively, these points confirmed that the Netherland's had to shoulder the heavier burden and thereby needed to urgently and significantly act against the prevailing climate problem.

The *precautionary principle*, as set forth in Article 3 UNFFC, holds that States, organizations and civil society must avoid human activity which may cause significant harm to the environment, even in the face of scientific uncertainty.[74] In view of this, the Appeal Court simply denoted that if the government was aware of the real and imminent threat posed by climate change (as displayed in the above section), it had to implement precautionary measures to prevent infringement as far as possible.[75] Here, the principle of *no harm* and *prevention* also played pivotal roles, as they helped oblige the State to avoid harm to other State's through the use of preventive reduction measures. To warrant the imposition of a higher reduction target the court applied the onerousness of the precautionary principle, by requiring the State to demonstrate why it faltered in its duty of care. After shifting the burden onto the State, the court concluded that the government had failed to justify their current national climate policy, referring to the governments change in reduction target from 30% to 20% in 2010 and to the cost-benefit analysis of mitigation.[76] More so, the precautionary principle allowed the Appeal and Supreme Court to reject the use of technologies to extract carbon dioxide from the atmosphere as a substitution for mitigation, recognising that the uncertainty of this practice could still risk the overshooting of the carbon budget.[77] Relying on such technologies would 'run counter to the precautionary principle.'[78] As such, the court established that the State had failed to due diligently execute its standard of care and thereby, found no sufficient grounds to prevent the State from adhering to the UNFCC and IPCC benchmark target.

Another principle that was referred to was *sustainable development*. By definition, sustainable development interweaves different areas of international law, claiming that human

[74] Ibid.
[75] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396, 85, 43 (2015) (English translation).
[76] Employing a cost-benefit analysis to show that mitigating earlier rather than later would be more financially beneficial.
[77] Wewerinke-Singh and McCoach (2021).
[78] *The State of the Netherlands V. Urgenda Foundation*, The Supreme Court of the Netherlands, Case Number 19/00135, 7.2.5, (2019) (English translation).

development must have due regard for its natural resources and ecosystems. It hereby attempts to strike a balance between economic, social and environmental needs.[79] Within the confines of this broad definition, tensions often emerge between economic growth and environmental protections. The principles that aim to give substance to the definition of sustainable development and attempts to diffuse this conflict are: the *intergeneration equity principle*, which states that development should meet present generation's needs, while not compromise those of the future; the principle of *intragenerational equity*, which holds that current generations need to equitably achieve adequate social, economic and environmental welfare by addressing their inequalities and assisting developing nations in reaching sustainable development; and finally, through the *principle of integration*, which maintains that economic growth must take account of environmental and social protections.[80] In the context of *Urgenda*, the District Court viewed sustainable development as a vital factor when interpreting the State's duty of care and when assessing whether the State's economic policy in light of its social obligations. All three courts referred to Article 3.1 of the UNFCC (the intergeneration equity principle) to affirm that future generations should not be disproportionally burdened by the effects of climate change and to confirm that the Netherlands needed to 'do its part' to circumvent the catastrophic effects of global warming. As previously mentioned, the Appeal and Supreme Court left this issue of future generations and those abroad unanswered, as standing had already been established for present generations. That being said, the mere fact that it was mentioned by the courts is significant in and of itself, as it lays out the groundwork for a challenging yet inevitable legal discussion. It can be seen as a progressive development of the law, especially when interpreting the ECHR, as it 'provides a steppingstone for future climate litigation aimed at advancing the rights of future generations'[81]

When turning to intragenerational equity, the District Court applied the latter when considering what the Netherland's responsibility was. Here, it not only outlined that the Dutch State had significantly benefitted from emissions, it stressed the Netherland's damming role in the creation of global warming.[82] The subsequent court conferred, and the Supreme court applied Articles 3.1, 3.3 and 4 of the UNFCC, which identified that each State bears responsibility to take

[79] World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future* (1987).
[80] New Delhi Declaration (2002).
[81] Wewerinke-Singh and McCoach, 8, (2021).
[82] *The State of the Netherlands V. Urgenda Foundation*, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396, 85, 43 (2015) (English translation).

mitigation measures.[83]

Overall, these principles were used as interpretive aids, in parallel with EU Law, to help establish the Netherlands scope of environmental obligations. Through the use of the 'reflex effect' the courts were able to fall upon the above principles to engage with the economics of climate change, establish the level of responsibility of the State, and impose a higher reduction target. Some question the validity of these principles, believing they are hard to endorse because of their lack of precise meaning.[84] Others argue that this method led to the provisions of the Dutch constitution losing its meaning.[85] In response, this paper holds that the global community has tirelessly worked towards establishing these principles with the precise aim of aiding and assisting matters pertaining to climate change. If they are not to be applied in the context of *Urgenda*, there significance and use remains stagnant. This in turn prevents the principles from reaching their objective, which is to capture the global nature of climate change. Principles of environmental law can help play a material role in the protection of the environment and consequently support the ill-equipped legal framework that aspires to protect the world against the dangers of climate change. All of these features mentioned above could lend themselves for replication in future rights-based climate cases.

3.1.6 Human Rights

Contrary to District Court, the latter two courts concluded that the State's current climate measures were insufficient in right of their human rights obligations under Article 2 (Right to life) and 8 (Right to respect for private and family life) of the ECHR. As noted, the courts recognised that Articles 34 ECHR could not serve as a basis for denying Urgenda, thereby dismissing the standard admissibility conditions required by a claim if it is to be presented before the ECtHR. Under the ECHR, standing is only afforded to individual victims, which ordinarily does not entail *actio popularis* claims such as presented by Urgenda. Moreover, unlike the African Charter on Human and Peoples' Rights,[86] or the Protocol of San Salvador found in American Convention on Human

[83] *The State of the Netherlands V. Urgenda Foundation*, The Supreme Court of the Netherlands, Case Number 19/00135, 7.31, (2019) (English translation).
[84] Drexhange and Murphy (2010).
[85] Graaf and Jans (2015)
[86] 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. Retrieved 12 June 2021 from: www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

Rights, [87] the ECHR does not expressly protect the environment through the provision of the right to a healthy environment. At the time of drafting the Convention, the legal corpus of the ECHR was set out to protect the traditional notion of the individual human rights, namely the protection of democracy and individual basic liberties and rights, not the protection of the ecosystems, atmospheres and so forth.[88] That being said, the Convention is viewed as a 'living instrument',[89] capable of adapting, developing and readjusting to the changing conditions 'of life and the prevailing conceptions and value in democratic societies.'[90] Through the use of case law, the protection of the environment under the ECHR has evolved by two different methods: firstly, through individual rights and secondly, as a restrictions of the exercise of these rights.[91]

Poignantly, the ECtHR has never before held that concrete positive obligations to mitigate harm extend to a countries national population and the ECtHR has often rejected the notion that the ECHR offers general rights to the environment.[92] However, the ECtHR has started to recognize in its jurisprudence that existing rights under the ECHR, specifically Article 2 and 8 can serve to protect the environment indirectly.[93] In the context of the case, these provisions were viewed as having direct effect in Dutch law and being applicable to environment-related situations, thereby forming the basis for the governments duty of care. More so, *Öneryildiz v Turkey* clarified that in cases where a positive obligation to safeguard the right to life has been established, it is no longer necessary to view the same facts under Article 8 separately, thus eradicating the need to clearly differentiate between the two. This fact irons out a common concern raised by many about *Urgenda* ruling.[94] The aforenoted case, as well as *Osman v the United Kingdom,* were relied upon when claiming that it was impossible for the State *not* to have known about the risks associated with the global temperature exceeding 2ºC, nor be in denial about the need for preventive climate measures. Here, the Court had established a real and imminent threat by firstly stating that a direct, linear link between anthropogenic GHG and global warming existed and secondly, by recognizing that the Netherlands current CO_2 emissions could, in line with IPCC's AR5, result in reaching the

[87] 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'.
[88] Loucaides (2004).
[89] Eg *Tyrer v the United Kingdom,* Series A No 26 para 31.
[90] Loucaides (2004), 249.
[91] Ibid.
[92] *Kyratatos v Greece and Fadeyeva v Russia.*
[93] *Öneryildiz v Turkey.*
[94] Minnerop (2019).

irreversible 'tipping point.'[95] Subsequently, the standard duty of care was rested on the 'general scientific consensus' which held that a safe temperature should not exceed 1. 5ºC.[96]

To extend, with the use of ECtHR jurisprudence, the State's positive obligation to protect its citizens from climate change, did not require prospective victims of climate-related harm to be individually identified, nor was there a need to establish immediate risks to all Dutch citizens, if evidence of long term risks were identified.[97] More so, jurisprudence helped the Appeal and Supreme court to conclude that the remedy requested by the plaintiffs could not place a disproportionate burden on the government,[98] thereby recognising a positive obligation to take the necessary precautionary measures, yet granting the State the freedom to decide *how* it would achieve the minimum threshold of 25%. Although positive obligations are of crucial importance when recognizing human rights, they are less clear than negative obligations, which merely require a body, organization or a state to not interfere in arbitrary matters. A positive obligation on the other hand, will 'require action that is costly, in terms of time, efforts and resources. The puzzle of how to define workable positive obligations is therefore explicitly linked to a discussion of the role of courts.'[99] Courts are required to be mindful of the balance of powers, which can therefore in part, explain the discretionary power granted to the State.

The Supreme court also applied Article 13 of the ECHR, which warrants court intervention in matters which concern rights contained in the ECHR. However, the applied 'positive action doctrine' of the ECHR, can not violate the doctrine of the margin of appreciation which holds that competing interests must be balanced.[100] As the Court imposed a higher emission reduction target, namely, a narrow margin of appreciation, it had to prove that it had not interfered with the prerequisite attained in this margin. By referring to the 'common consensus'[101] of environmental standards and the lack of action by the State to divert the imminent threat of a global warming, the

[95] *The State of the Netherlands V. Urgenda Foundation*, The Hague Court of Appeal, Case Number C 00.178.24/01, 36, (2018) (English Translation).
[96] Ibid.
[97] Ibid.
[98] Osman v The United Kingdom
[99] Leijten (2019), 117.
[100] Lòpez Ostra v Spain.
[101] As stipulated by Minnerop (2019), 166: '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. The ECtHR uses this concept in relation to the margin of appreciation and adopts a comparative-analytical approach to establish the common ground or standard in the in the law and practice of the Parties of the Convention'.

Court's argued that this would 'affect the personal and substantive scope of Article 2 and 8 protected rights.'[102] As outlined before, the precautionary principle allowed the State to dismis the carbon capture and storage technologies methods, inferring that the Netherland's climate scenario still presented unknown risks that could hamper with 'Articles 2 and 8 ECHR and Article 3(3) UNFCCC'[103] This confirms that the State's margin of discretion is not unfettered and needs to be protected by effective protection of human rights.

By invoking the 'incorporation doctrine', the courts were able to consider ECHR obligations with international environmental law, as this doctrine requires national courts to interpret ECHR in accordance with Strasbourg case law. Here, human rights and environmental law are seen as mutually reinforcing, with David Boyd, the UN Special Rapporteur on human rights and the environment, stating that the *Urgenda* judgment is 'the most important climate change court decision in the world so far, confirming that human rights are jeopardised by the climate emergency and that wealthy nations are legally obligated to achieve rapid and substantial emission reductions.'[104] Some still have reservation as to whether the ECtHR's case law and structure of the positive obligation were correctly applied, noting that courts may have been too far reaching with their interpretations.[105] As a solution, could adjusting the concept of positive obligations to intangible climate claims remedy this concern? Or would incorporating a new provision into the ECHR that expressly recognizes the right to protect the environment be more appropriate? These fruitful questions shall be explored in chapter 5.

3.2 Concluding remarks

This Chapter has aimed to shed light on the fundamental elements that shaped and determined the outcome of the case. Each section underlined certain controversies that the courts successfully ironed out with their unique interpretations. Convolutedly, the sections have shown that climate change is a rich yet complex regime that lacks a firm legal framework. Indisputably, this complexity contributed to the cases long timespan, starting in 2012 with the initial letter to the government and ending in 2019, with the Supreme Court's final judgement. Not only is this a

[102] Ibid.
[103] *The State of the Netherlands V. Urgenda Foundation,* The Supreme Court of the Netherlands, Case Number 19/00135, 93 (2019) (English translation).
[104] Kaminski (2019)
[105] Minnerop (2019).

costly endeavour, but this process does not necessarily align to the challenge of climate change, which requires urgent and immediate action, as shall be laid out in the subsequent chapter. More so, the widespread acceptance of the separation of powers, and the issue that it posed during *Urgenda*, could threaten the judiciary's position in future climate litigation. The ruling also presented hurdles when establishing justiciability and- as shall be outlined later on- led to challenges of enforcement. Most notably, however, is that the final judgment exceeded EU standards. Drawing on the role of the EU Law and the ECHR throughout *Urgenda,* the Supreme and Appeal courts relied on an interpretation of Articles 2 and 8 ECHR to demand the State to take adequate action to protect the right to a healthy private and family life, while the State argued that it was complacent with EU Law. This leads us to question whether the European Court of Justice (ECJ) should have ruled on the validly of various EU related norms, as opposed to the Dutch courts? Adding on to this controversial stance is that higher emission targets set by Member States, 'may affect stakeholders in the EU by virtue of possible leakage, distortions of competing and restriction on the movement of goods and services.'[106] Considering that the State tried to 'hide behind' EU imposed reduction targets, a possible rift between European and International law could become ever more apparent if the EU remains on its current emission reduction trajectory. This thesis therefore contends that *Urgenda* was as much about the institutional failure of the EU as it was about the Dutch State's. With all of the above points in mind, the claim stating that the EU should legislate further to help tackle climate change, seems strongly warranted. In light of all the identified controversies of the case, the next section shall proceed by firstly outlining why the EU needs more legislation to tackle climate change and secondly, how the controversies of the case can be converted into tangible legislative climate solutions.

4. Why should legislative change transpire at the EU Level?

This chapter shall refer to the current state of science on climate change, to outline the fact that it is a real and looming threat, that requires urgent and immediate action. This chapter shall then look at how the EU is doing with regards to its climate commitments and consider how successful the new European Green Deal has been so far. From here out, this chapter shall explain why the EU should legislate further to counter climate change.

[106] Roy and Woerdman (2016), 179.

4.1 The science behind climate change

As the IPCC reports have been widely embraced and used by policy makers in the field of climate change, this thesis shall briefly outline their relevant findings before turning to Europe's climate actions. As recognised in the AR5 of the IPCC, 'the recent anthropogenic emission of greenhouse gases are the highest in history… [and] have had widespread impacts on human and natural systems'.[107] The report goes on to confirm that human influences are the main drivers of climate change and that as a result of the latter, 'the atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen'.[108] The below three graphs evidence that GHG has been rising and that human activity has played a prevalent role (specifically so fig.3).

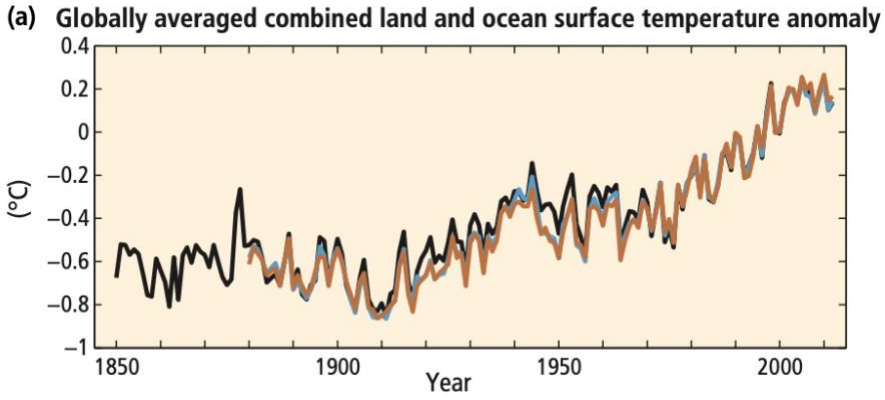

Fig. 1. IPCC AR5, Climate Change 2014, Synthesis Report, Summary for Policymakers.

[107] IPCC, AR5, (2014), 2.
[108] Ibid.

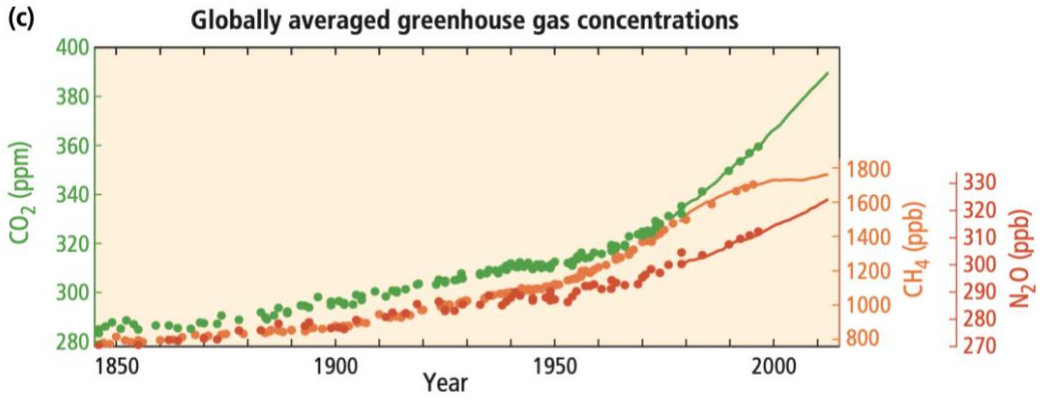

Fig. 2. Globally averaged GHG concentrations 1850-2000. Source: IPCC AR5, Climate Change 2014, Synthesis Report, Summary for Policymakers.

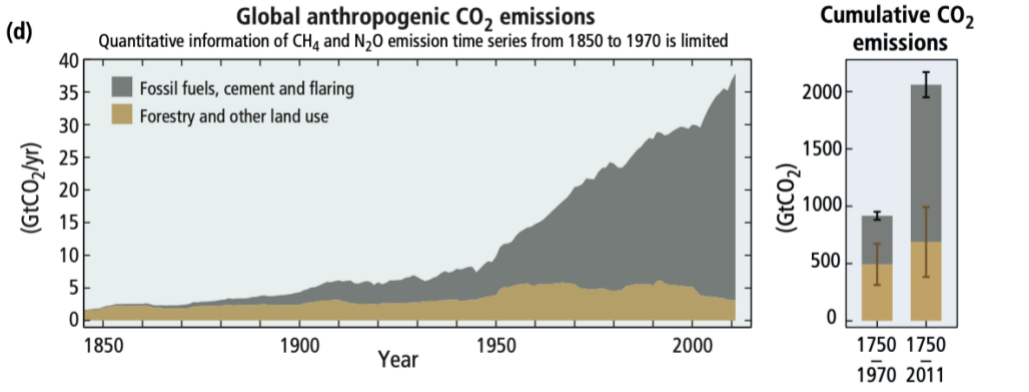

Fig. 3. Global anthropogenic CO_2 emissions since 1850. Source: IPCC AR5, Climate Change 2014, Synthesis Report, Summary for Policymakers.

The main cause of climate change are anthropogenic gas emissions, that since the pre-industrial era, have been driven by economic and population growth, thus human influences.[109] Unprecedented concentrations of carbon dioxide, methane and nitrous oxide, has set the trajectory of the Earth System on one which will face more prolonged heat waves, an increasingly acidic ocean, a rise in sea levels and the continued compromise of human health and food sources.[110] Although climate change will inevitably affect everyone at some point in time, those from

[109] IPCC, AR5, (2014).
[110] Ibid.

disadvantage communities will disproportionally be hit the hardest.[111]

In line with the scientifically recognised 'planetary boundaries', which holds that 9 vital Earth Systems must remain within their 'safe operating spaces' to protect the planet from collapsing, climate change has been identified as an area that has reached its 'zone' of increased risk of irreversible change.[112] As shown in in figure 4 (found below), the Earth System is out of the Holocene and is currently within the hotter Anthropocene. The fork which divides the two broken lines indicates that there are two directions the Earth System can now go. Currently, the Earth System is on a Hothouse Earth pathway, driven by human emissions of GHG and biosphere degradation and, is on the route to reach the 2ºC planetary threshold. If no action transpires, the Earth will have reached this irreversible pathway by 2100.[113] More so, there is a delay between the emitted GHG and global warming, meaning the greatest consequences are yet to be felt. The longer the world waits to undertake action, the harder it gets to push the Earth towards a 'stabilised' position. As such, making changes now as opposed to later, will not only be more effective, but it will also keep the door open for a diverse range of reduction option.[114]

As noted by the IPCC, 'without additional mitigation efforts beyond those in place today… warming is more likely than not [going] to exceed 4ºC',[115] thereby going way beyond the identified 'threshold' and reaching the inevitable 'tipping point'. As seen in the figure below, and as noted by the IPCC, if the world substantially limits GHG emissions, the Earth System could be shifted onto the right path. For this to materialise, 'a fundamental reorientation of human values, equity, behaviour, institutions, economies and technologies is required'.[116]

[111] Ibid.
[112] A detailed visual representation of how this system functions can be found in Appendix I.
[113] Steffen et el (2015).
[114] Ibid.
[115] IPCC, AR5, (2014).
[116] Steffen et el (2015), 8258.

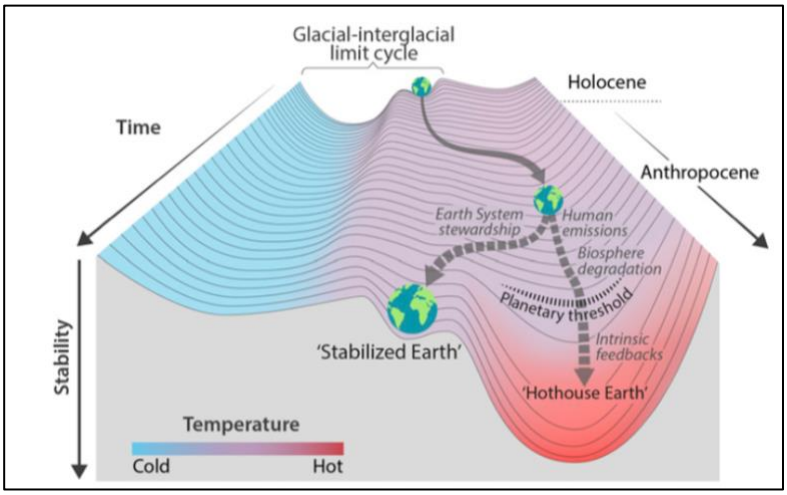

Fig. 4. Stability landscape showing the pathway of the Earth System out of the Holocene towards the Hothouse Earth. Source: Trajectories of the Earth System in Anthropocene, 2018.

In addition, the global community has agreed that the absolute minimum reduction target should be 2ºC, with 1.5ºC being the ultimate aim by 2030.[117] The figure below depicts the risks associated with going beyond 1.5ºC and especially so the 2ºC threshold. To ensure a 66% chance of meeting the target of 2ºC, GHG concentrations should not exceed 450ppm CO_2eq and industrialised countries should reduce GHG emission by 25-40% by 2020, compared to the 1990 levels, and 80-95% reduction by 2050.[118] However, maintaining a 2ºC will not avert the risks, as such, 1.5ºC is the only viable target.

[117] Paris Agreement (2015).
[118] IPCC (2014) and IPCC (2007).

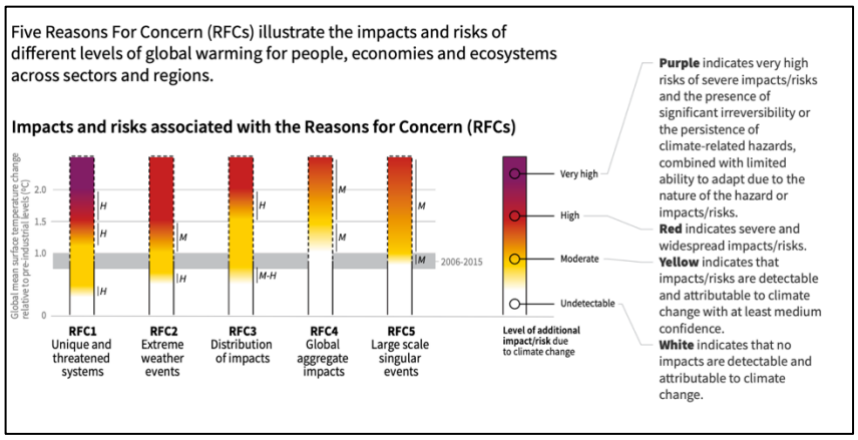

Fig. 5. Shows how the level of global warming will impact the risks associated with the Reasons for Concern (RFCs) and selected natural, managed and human systems. Source: IPCC, Global Warming of 1.5oc, 2018.

4.1.1 The EU and GHG emissions

Now that it has been established that climate change is an imminent threat that requires urgent action, it is important to consider how the EU wades with regards to its international objectives. To simply answer this, the European Commission stated that the EU Member States national climate action plans do not yet reach the agreed temperature objectives, namely the 1.5- 2ºC target.[119] Although we are not yet in 2030, the next years will be decisive in reaching the 1.5ºC target, in light of the principles of equity and capacity to act. Many contend that if the EU wants to reach its target under the Paris Agreement, it must implement a 65% emission reduction compared to 1990 and, at the very least, be climate neutral by 2040.[120] The EU currently has a reduction target of 55% and aims to be climate neutral by 2050. More so, this 55% target has not yet been translated into an updated EU emission trading target, which currently remains at 40%.[121] Hence, the EU's policies do not match up to Earth System demands, thereby jeopardising the Earths chances of reaching its 'stabilised' position.

If the EU continues in failing to align to its agreed upon international standards, competing climate change responses could emerge between EU and international law. This is

[119] European Commission, 2030 Climate plan. Retrieved 18 June 2021 from: https://ec.europa.eu/clima/policies/eu-climate-action/2030_ctp_en.
[120] Climate Action Network Europe. Retrieved 18 June 2021 from: https://caneurope.org/can-europe-calls-for-an-increase-of-the-eu-s-2030-climate-target-to-at-least-65/ and Climate Action Tracker: https://climateactiontracker.org/countries/eu/.
[121] Zaklan et el (2021).

especially so in light of the recent wave of climate cases brought against EU governments, where nationals are demanding more climate action on the basis of the higher international targets.[122] Legislating further to help tackle climate change could prevent this from befalling and, could be beneficial to the EU in various ways. For instance, if the EU weans off from its natural resources and drastically cuts its pollution levels, it can economically gain competitive advantage over other nations, who will inevitably have to take similar measures if they want to prevent a destruction scenario.[123] Letting the EU's economy adjust to its unescapable future, grants it the power to shape its policies best suited to its Member State's needs. Furthermore, with the lack of legal enforcement by the international community, its incremental that the EU's well-defined legal structure paves the way for the drastic climate action. The EU has the ability to break this long persisting deadlock between global actors, who have been refusing to take significant climate measures unless other nations go first.[124]

4.1.2. The EU Green Deal

The most recent and overarching strategy introduced by the EU Commission has been the EU Green Deal (EDG). It is intended as a roadmap to help foster the transition of the EU to a climate-neutral economy by reducing carbon emissions towards 55% by 2030 and by reaching carbon neutrality by 2050.[125] The EGD aims to pursue a strong climate ambitions, clean affordable and secure energy, industrial strategy for a clean and circular economy, biodiversity, sustainable and smart mobility, agriculture and fisheries, zero pollution, toxic-free environment, European Climate Pact and, trade and foreign policy.[126] In essence, the EU is set on decoupling economic growth from resource use, while ensuring that no person or place is left behind.[127]

Although the EDG Communication holds strong ambitions, no reference is made to classical environment principles, only sustainability within the context of its economic value is

[122] *Urgenda v. the Netherlands, klimaseniorinnen v. Switzerland, The People v. Arctic Oil and Plan B v. Heathrow Expansion.*
[123] Mélon (2019).
[124] Ibid.
[125] European Commission (2019). *Communication from the Commission, The European Green Deal.* Retrieved 18 June 2021 from: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2
[126] Ibid.
[127] President von de Leyen 2020 State of the Union Speech. Retrieved 16 June 2021 from: https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655.

mentioned.[128] For instance, by not incorporating the principle of environmental integration (Article 11 TFEU), there is a critical 'dissonance between the EGD as an ambitious policy measure and the legacy and relevance of the EU environmental law for the purpose of its implementation.'[129] In addition, while the EDG Communication refers to 'green oath: do no harm', this definition is not tied to EU primary or secondary law[130] and is therefore 'too programmatic to grasp its substance from the enforceability perspective.'[131] That being said, the EU has introduced some concrete follow ups, specifically so in the field of climate.[132] At closer inspection however, the EU's climate action can be regarded as 'smoke and mirrors. Politicians copying the language of climate marchers are in fact concealing accounting tricks concocted by oil and gas lobbyists. This isn't much better than business as usual, saddling younger generations with the devastating consequences.'[133]

After the recent climate summit hosted on April 22 and 23 2021 by US president Joe Biden, a deal was reached to *roughly* halve emissions by 2030, this will not be enough to restrict the global heating and reach the necessary target of 1.5°C.[134] Moreover, the 55% net-emissions currently translates to a 52.8%, as the accounting of emissions will most likely be absorbed by carbon sinks, like forests for example.[135] Greenpeace has identified other downfalls of the EU's climate 'ambitions', recognising that: the proposed climate law remains an EU target, not one for individual Member States; does not sufficiently address the issue of fossil fuel subsidies; and does not include an EU GHG budget for the current decade, which scientists warn is the most pivotal moment in determining whether the world will win or lose in the fight against climate change.[136] Member States are also fiercely divided over whether to include nuclear energy in the EU's strategy for reducing CO_2.[137]

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[128] Ibid.
[129] Sikora (2020), 689.
[130] For instance, Regulation (EU) 2019/2088 refers to the principle of 'do no significant harm'.
[131] Sikora (2020), 689.
[132] For example, the 2030 Climate target plan, New EU strategy on adaptation to climate change, the EU Climate law and the zero-pollution action plan. More on this can be found online: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.
[133] Pastorelli (2021). Retrieved 16 June 2021 from: https://twitter.com/GreenpeaceEU/status/1384855536546598913.
[134] Greenpeace (2021). Retrieved 16 June from: https://www.greenpeace.org/eu-unit/issues/climate-energy/45571/eu-agrees-hollow-climate-law/.
[135] Ibid.
[136] Ibid.
[137] Dennison et el (2021).

In addition, the EU had proposed a Just Transition Mechanism (JTM)[138] in reaching climate neutrality, by financially supporting countries that face strong socio-economic challenges. However, the COVID-19 crisis has pushed the JTF budget up to €40 billion. As the Commission withdrew the InvestEU Programme due to the post pandemic relief measures, the JTF lost an essential 'financial' pillar. As such, the EDG will by and large greatly depend on private and public funding, hence, face another practical hurdle. If the EDG is to succeed, it must be strongly anchored in concepts pertaining to the EU legal order. Remaining merely a policy tool will not be enough to reach the ambitious target set by the EDG. This reinforces the thesis' claim, that further harmonised laws are needed to help meet the targets presented by the EDG and consequently, tackle the issues of climate change.

4.2. Concluding remarks

As has been identified, the EU is not on track to reach its internationally agreed target. The longer the EU waits, the harder it will be to push the Earth System away from the destructive Hothouse pathway. Although the EU has introduced an ambitious EGD, its far from perfect. More legislation if needed if the targets of the EDG are to be met. Aside from this, there are other credible reasons for the EU to legislate first and fast in the field of climate change, namely, in light of its first-mover advantage and the need to satisfy the demands of civil society. It is also important to note that if the EU continues down its current trajectory, discussions will no longer be centred around mitigation, but instead, be forced to focus on adaptation. Seeing as the EU has already been placed under considerable strain from right-wing populist and nationalistic groups, who found ground with the EU refugee and mass migration crisis, similar pressures are likely to remerge when the EU is faced with a new wave of climate migrants and refuges. The World Bank has estimated that, in the absence of action, more than 140 million people in Sub-Saharan Africa, Latin America, and South Asia will be forced to migrate by 2050.[139] This is an additional reason why the EU should take steps now to tackle the climate crisis. Moreover, as the EU is one the largest emitters of GHG in the world[140]

[138] More on this can be found: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/actions-being-taken-eu/just-transition-mechanism_en.
[139] The world bank (2018). Retrieved 7 June 2021 from: https://www.worldbank.org/en/news/press-release/2018/03/19/climate-change-could-force-over-140-million-to-migrate-within-countries-by-2050-world-bank-report.
[140] Friedrich and Ge (2020). Retrieved 5 June 2021 from: https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters.

and is made up of a majority of developed nations, it has an obligation to take more robust climate steps and meet its 1.5ºC target. Now that it has been established that legislative change must transpire at the EU level, sooner rather than later, this thesis shall proceed by assessing how this change could materialize based on the identified facts of the case.

5. The way forward: Identified areas for regulatory change

This final chapter shall, based on the facts of the case, offer some legislative solutions on how the EU can tackle climate change. Throughout chapter 3, each section offered primitive solutions to help remedy the clear contentions of the case. This section shall collate these solutions and then subdivide them into tangible legislative measures. To strengthen these legislative propositions, this section shall refer to an interview held with Sabina Voogd (Voogd),[141] who has worked for: Greenpeace, where she lobbied on behalf of protecting the environment within the EU and beyond; Oxfam, where among other things, she devoted her time to campaign for food and climate justice; the Dutch Government, where she worked on the policy coherence unit to ensure developing countries were accounted for when policies were developed and implemented; and presently, offers coaching and training on sustainability for lobbyist. Lastly, and most importantly, she was closely involved with the Urgenda case, for which she was one of co-plaintiffs. As her husband was part of the legal counsel, she was also exposed to the daily development of the case. Having years of experience working within the international and EU fora, Voogd has a strong understanding of both legal systems and retains expert knowledge about climate related matters. Thus, with her theoretical and practical experience, as well as her in depth knowledge about the Urgenda case, the inputs Voogd shares are invaluable for this thesis. One noteworthy takeaway from the interview, is that however significant the rulings were, they remain impaired by the Dutch States non-compliance with the Court order. This strengthens the thesis' claim once again, that achieving climate action through legislation, will be more effective than litigation. The full interview can be found in appendix 2, attached at the bottom of this thesis.

Firstly, this chapter will proceed with the stakeholder theory, to emphasise why the environment, as a clear stakeholder, needs better protections. Hereafter, the thesis shall put forward

[141] Refer to appendix 2 for the full interview.

various ideas which allow us to 'rethink the notion of rights' and shall then go on to explain why elevating climate science to enforceable EU norms is a viable and necessary measure.

5.1. Stakeholder theory and the environment

Although stakeholders were traditionally defined or described almost exclusively in human terms as 'groups or individuals who affect or are affected by organisational performance,'[142] its definition has been reformulated over the years. Traditionally, the following were deemed stakeholders because they were regarded vital for the long-term success of an organisation: employees, consumers, government officials, legislators, local communities, interest groups and the media.[143] This changed when natural resources started drastically depleting, pollution levels started increasing, natural catastrophises became more recurrent and waste dumps started overflowing.[144] It was soon identified that the environment retained stakeholder elements by virtue of its economic value through its natural resources, physical power through its natural disasters and political power through its 'voice', mostly by means of a proxy (NGOs for example).[145] Although some are still hesitant to call the environment a 'stakeholder', as it goes against the basic tenants of utilitarianism, the non-human natural environment clearly retains a vital stake in all aspects of life. As Starik mentions, the world would not exist was it not for the natural environment.[146] As such, it's vital that the latter is viewed and treated as a stakeholder.[147]

While many stakeholders have strong protections in place, through means of a union, clear legal framework and direct involvement in the organisation for which they have a 'stake', the natural environment by and large does not. While its influence is widespread, ultimately touching all areas of life, the natural environment's needs- as represented in chapter 4- have repeatedly been disregarded. This signals the need for greater protective measures for the non-human natural environment, which can appropriately be attained through legislation. Strengthening the natural environments 'voice', by means of legislative change, can be beneficial for every organisation who depends on the environment for survival and, can ensure that intergenerational justice prevails. For

[142] Freeman (1984), p.6.
[143] Starik (1995).
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.

instance, if natural resources continue to be exploited at the rate that they are now, firms will no longer have the necessary materials to make their products. As such, this strengthens the thesis' claim that the environment, as a clear 'stakeholder', requires greater legislative protections to help counter the threats of climate change.

5.2 Legislative solutions

5.2.1 Harmonising the intergenerational principle into EU Law

As identified throughout *Urgenda*, the issue of standing was a point of deliberation. Most notably, the question of whether future generations could establish standing was repeatedly raised. In line with the above stakeholder theory and as voiced by Voogd, it has become increasingly more important to view the Earth's resources as a means for both present and future generations, as the latter will bear the greatest burden of climate change. The Earth's supplies are scare and its capacity to recover, as noted in chapter 4, is becoming increasingly volatile. It has therefore become ever more important that the present generation safeguards the sources of the natural environment and prevents the world from reaching its irreversible 'tipping point'. As Voogd identifies, while many indigenous communities view the Earth as something borrowed from future generations, the majority of the world views the Earth as a gods given gift: this has led to the irresponsible use of the Earth's sources. In this regard, harmonising the *intergeneration equity principle* into EU law could be a defensible option, as by doing so, EU policies and EU environmental practices would be required to remain respectful of future generations. Simultaneously, it may also ease the conditions of standing for claimants of climate cases.

It must be noted that the intergeneration principle is viewed within the concept of sustainable development, for which the EU Treaties on numerous occasions refer to. In addition, mention of future generations is made in the ECHR and the Aarhus Convention, however, it is only stated within the preamble and therefore does not retain a legally binding force. While the EU purports to be a global leader in sustainable development, its true incorporation of the intergenerational equity principle has, mostly due to political short-termism,[148] remained more

[148] Political short-termism is defined as governments short-term focus on policy matters because of their short time in office. This prevents governments from tackling deep structural problems.

theoretical than practical.[149] Thus, what this thesis proposes, is a scenario in which a group of individuals that have exhausted their national legal routes and, are able to show that they are representing future generations as a legal person under Article 263 TEU,[150] can allow their claim to be heard by the ECJ. Alternatively, a protocol similar to the principles of subsidiarity and proportionality, which incorporates safeguards that allows national governments to challenge EU compliance, could be another feasible option to ensure that future generations are protected. Consequently, this would force the EU Commission, with the sole right of initiative, to formulate EU legislation with due regard for unborn citizens and correspondingly, the natural environment. Similarly, the intergenerational principle could also be incorporated into Article 191(2) TFEU.[151] This would oblige not only EU institutions in the context of EU environmental policy to have regard for future generations, but also Member States when implementing EU law.

These mechanisms have the potential to easily 'fit' within the existing EU structure and could help meet the demands of civil society, who alongside the Extinction Rebellion movement have participated in various strikes to demand better climate action.[152] Moreover, such a measure would undoubtedly so help tackle the issues of climate change.

5.2.2 Directive for the right of access to justice in environmental matters

The above proposition relating to standing only remains applicable when gaining access to the ECJ. To resolve the issue of standing for climate case within domestic courts, another solution is needed. Here, it's firstly important to turn to Aarhus Convention of 1998, where standing for individuals and NGOs that are concerned with environmental protection, is explicitly stated (Article 9.2).[153] Although the Aarhus Convention has been significant in easing the conditions of standing for various environmental cases,[154] especially so within the EU, there are still various hurdles that claimants struggle to overcome. As mentioned in chapter 3.1.2, the Stockholm District

[149] Veraldi (2017). Retrieved 6 June 2021 from: http://www.honoursreview.nl/intergenerational-equity.html#:~:text=While%20the%20EU%20has%20a,opportunities%20that%20the%20past%20and.
[150] Article 263 TEU can be found: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E263:EN:HTML/
[151] Article 191 (2) TFEU can be found: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E191:EN:HTML.
[152] The Guardian has collated a series of accounts of the Extinction Rebellion movement. Retrieved 19 June 2021 from: https://www.theguardian.com/environment/extinction-rebellion.
[153] Aarhus Convention (1998). Retrieved 5 June 2021 from: https://unece.org/DAM/env/pp/documents/cep43e.pdf.
[154] De Sadeleer et el (2002).

Court and the Svea Court of Appeal dismissed the plaintiffs claim for lack of actual and tangible injury during the *Magnoliamålet* case. Similarly, with the *KlimaSeniorinnen v. Switzerland case*, the Swiss courts ruled that GHG emissions could not affect only one group of persons and in line with Article 13 ECHR, could not regard the plaintiffs as 'victims.'[155] Evidently, a solution is needed to ensure climate issues can easily be subjected to judicial scrutiny. This thesis proposes that an EU Directive concerning the right of access to justice for environmental matters could be a viable option.

If we consider the fact that the EU already has directives in place for the right to access to information or the right to participate in environmental-centred-decisions,[156] it seems wholly feasible that a directive focussed on the right to access to justice is implemented. To strengthen this claim, the EU Commission recently released a Communication named 'Improving access to justice in environmental matters in the EU and its Member States.'[157] Here, the Commission recognises that the European Green Deal requires the Aarhus Regulation to be revisited so that access to administrative and judicial review at the EU level for citizens and NGOs is improved.[158] As the EU and individual Member States adopted the Aarhus Convention, legal standing for NGO's and individuals which are directly affected by a breach of environmental law, also in cross-border context, must be granted. However, as the Commission acknowledges, this in practice has not always materialised. As mentioned, the Commission's 2019 Environmental Implementation Review found that various Member States were not providing legal standing to NGO's who were bringing environmental matters to the courts.[159] In the same review, they emphasised how claimants should not have to face national procedural hurdles, such as prohibitively high costs (spend hundreds if not thousands of euros on a case). The Commission recognises that there is a need for legislative change to grant effective judicial protection when it concerns environmental

[155] The Swiss petitioners grounded their claim in Article 10 (right to life), 73 (sustainability principle) and 74 (precautionary principle) of the Swiss constitution, and article 2 and 8 of the ECHR. Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council (2016).
[156] Directive 2003/EC of 28 January 2003 on public access to environmental information and Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment in Member States.
[157] The European Commission, Communication, (2020). Retrieved 5 June 2021 from: https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf.
[158] Ibid.
[159] The Commission refers to the Notice (and updates) available on the Commission's website: https://ec.europa.eu/environment/aarhus/legislation.htm.

issues and directly addresses the Council to be more supportive of such change, as in previous years, they have been reluctant to do so.[160]

Effective legal protections for environmental matters is reflected by Article 19(1) TEU,[161] as well as in Article 41 and 47 of the Charter of Fundamental Rights of the EU.[162] As such, it is vital for the EU to underpin this obligation with operational legislation. In accordance with Article 291 (1) TFEU,[163] Member States will have a duty to transpose this directive correctly. What this section has shown, is that the groundwork has already been laid out, now all that is needed is the ratification and implementation of a Directive for the right of access to justice in environmental matters.

5.2.3 New ECHR Protocol: The Right to a Healthy Environment

As was mentioned in chapter 3.1.7, the ECHR does not expressly protect the environment through the provision of the right to a healthy environment. That being said, *Urgenda* clearly identified a link between human rights and climate change, though indirectly through Article 2 and Article 8. Establishing this for other groups has not always been as successful. In 2019 for example, the EU's General Court rejected a claim put forward by a group of citizens who argued that the climate change ambitions of the EU were violating 'their fundamental rights.'[164] Nevertheless, the ECtHR has over the years started to develop a rich body of case law on environmental rights, with over 200 cases underpinning a link between human rights and environmental protection.[165] Referring back to chapter 5.1, where it was identified that the environment as a clear stakeholder requires greater protections, and considering the fact that ECtHR case law has regularly acknowledged a link between human rights and environmental protection, it seems appropriate to propose a new protocol for the Right to a Healthy Environment into the ECHR. To substantiate this argument, the African Charter on Human and Peoples' Rights or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, already

[160] Ibid.
[161] Article 19(1) TEU can be found: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M019.
[162] Article 41 and 47 of the Charter of Fundamental Rights of the EU can be found: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT.
[163] Article 291(1) TEU can be found: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E291:en:HTML.
[164] Carvalho and Others v Parliament and Council Case T-330/18.
[165] Pedersen (2020).

recognises such a right: the European Human Rights system is thereby an anomaly. As Voogd notes, Polly Higgins, an international lawyer, had already touched upon this idea when she developed the notion of 'ecocide'. As noted, Higgins held that the environment, as a separate entity, should be protected by the courts. In addition, such a protocol was already proposed in 2009 by the Parliamentary Assembly of the Council of Europe, wherein they stated: "The Assembly notes the close relationship that exists between human rights and quality of the environment and observes that enjoyment of these rights is often jeopardised by degradation of the environment.'[166] As some years as passed, and as these words ring louder than they did before, it is essential that such a proposal is no longer dismissed.

To strengthen the claim for a new protocol, its fruitful to touch upon some of the benefits that it could provide. Firstly, victims or potential victims of environmental harm would have a justiciable right to ask the courts to provide sufficient protection. As the EU and its individual Member States would have to shape their polices in accordance with this right, the environment would no longer be subjected to unbreathable levels of CO_2 and other pollutants, vast amounts of plastic pollution, or harmful practices such as fracking, which often leads to contaminated drinking water. In reference to this, companies will be forced to be more innovative or even 'nudged' into adopting a more 'circular approach', as economic growth will no longer take precedence over the protection of the environment. Moreover, current environmental protections would have to be maintained or enhanced. Lastly, maintaining a healthy environment would inadvertently (and as shown in chapter 5.1), also safeguard all areas for which the environment has a 'stake', thus be beneficial for society as a whole.

5.2.4 Elevating climate science to legally enforceable norms

As shown in *Urgenda*, there were no legally binding norms that obliged the Dutch State to reduce GHG by 25%. As identified in chapter 3.1.3, this can open itself up to shortcomings in future climate litigation cases if courts decide to refer to domestic law, that retain lower emission targets than that of the international and scientific community. In line with this, the thesis outlined how some viewed the judges as having exhibited judicial activism by ruling on a social issue with lack of legal grounding. Others argued that matters pertaining to climate policy should remain within

[166] Parliamentary Assembly, Assemblée Parlementaire (2009). Retrieved 5 June 2021 from: http://assembly.coe.int/CommitteeDocs/2009/20090909_Doc12003E.pdf.

the purview of the executive, not the court rooms. However, it is now more important than ever that countries align their policies and practice to the most accurate climate science. Not only is this relevant for upholding and stabilising EU law, as it would prevent conflicting contradictions arising between the EU and international climate strategies, it's our only real hope of ensuring that the Earth does not exceed the planetary threshold and end up in the 'hothouse' state. In accordance with this, this thesis endorses the European Commission's proposal for establishing the framework for achieving climate neutrality and amending (EU) 2018/1999 (European Climate Law).[167] This proposal aligns the EU emissions targets with those presented in the IPCC. The IPCC reports are of the highest scientific degree, widely accepted and embraced by the international community; they should therefore lead the way regarding all climate policy matters. As Voogd mentions, one would already expect policy decision that impact the lives of so many, to be deeply rooted in climate science. This hereby strengthens the argument that the above proposal must in its full form, be swiftly implemented.

In addition, *Urgenda* identified how the EU had reduced its 2010 reduction target of 30% to 20%, as compared to pre-industrial levels, and therefore retained the ability to pursue more ambitious climate measures. Voogd mentions that this change was not based on any credible scientific source. As such, the targets set by the IPCC would not require a complete overhaul of the EU climate discourse, especially since the EU was already set on reaching higher targets and, as it already retains a complex emission trading system (ETS), for example. It would merely reinforce the commitments of the Member States to their international agreements, such as the 2015 Paris Accord. If the EU wants to prevent a rift emerging between EU and international law, with more EU States aligning to the higher benchmark due to growing litigation, and truly want to combat the climate crisis, they must promptly implement this Regulation. This will require rethinking the targets of the EU ETS and potentially, legislating more in field of corporate law to minimalize harmful practices. As Voogd identifies, many low laying countries will no longer exist if we stay on our current climate trajectory. On a personal note, Voogd mentioned how she is moving out of Amsterdam for fear of the consequences of climate change.

[167] European Commission's proposal for establishing the framework for achieving climate neutrality and amending (EU) 2018/1999 (European Climate Law). Retrieved 5 June 2021 from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0080.

6. Conclusion

This thesis has aimed, on the basis of the historical Urgenda case, to offer practical and tangible legislative solutions to help improve the EU's climate change discourse. Chapter 3 laid out the cases development by firstly offering a chronological overview of the case and then, by outlining *Urgenda's* main areas of contention. What this chapter unveiled was that both the EU and the Dutch state had institutional failures which needed correcting. Moreover, it highlighted how standing for climate related cases can prove problematic, especially when attempting to protect future generations and those abroad. More so, it recognised the need to formally align the EU climate targets with the higher international benchmark. As identified, this would curb potential conflicts emerging between the international and EU climate discourse and could diffuse the discussion about the encroachment on the separation of powers.

Chapter 4 outlined the science behind climate change, referring to the IPCC reports to indicate where the EU should be regarding its emission targets and where it presently stands. To emphasise how the EU is not doing enough to tackle the climate crisis, the thesis examined the recent EGD. Here, it recognised that however ambition the EDG strategy is, its current measures will not enable the EU to meet its 1.5°C target. What this chapter identified, is that there is an urgent need for legislation to ensure the aims of the EGD can materialise and the challenges of climate changes can be met.

Chapter 5 acknowledged that the environment, as a clear stakeholder, requires greater protections. As such, the chapter went to offer various ways that legislative change can transpire within the EU. As many of the legislative solutions presented can already be found in EU proposals or Communications, creating and formulating their legal basis should not prove problematic. Interestingly, this thesis by and large reinforces the need to urgently implement such proposals and Communications. For those solutions which do not yet retain a proposal, namely, for harmonising the intergenerational principle into EU Law, this thesis has shown how such a measure can easily 'fit' within the EU legal framework. Although these solutions may not be wholly complete, they address the prominent issues pertaining to climate change by correctly aligning EU policies with accurate science, recognising the need for the protection of future generations, ensuring that all those concerned with environmental matters can fairly access the courts and finally, guaranteeing that the natural environment is viewed as an individual right. *Urgenda's* rich tapestry of legal sources, and the courts innovative interpretations, have shed light on a clear way forward. As the

Earth is edging towards a catastrophic future, the EU needs to ask itself a very serious question concerning its climate change discourse: does it want to be remembered as the innovative forerunner that potentially saved the Earth from collapse, or as the organisation who had all the tools and resources at its disposal yet waited too long until it was too late?

8. Bibliography

All links were last visited 18. 06. 2021.

8.1. Primary Sources

8.1.1 Treaties and Conventions

Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. 25.6.1998. https://unece.org/DAM/env/pp/documents/cep43e.pdf.

African Charter on Human and Peoples' Rights (Banjul Charter). CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. 1982. https://www.refworld.org/docid/3ae6b3630.html.

Consolidated version of the Treaty on European Union (TEU). Official Journal C 326, 26.10.2012. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT.

Consolidated version of the Treaty on the Functioning of the European Union (TFEU). Official Journal C 326, 26.10.2012. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 04.11.1950. https://webcache.googleusercontent.com/search?q=cache:rdC1xf7gH2AJ:https://www.echr.coe.int/documents/convention_eng.pdf+&cd=1&hl=en&ct=clnk&gl=es.

United Nations Framework Convention on Climate Change. Adopted by the UN General Assembly, 20 January 1994, A/RES/48/189. https://unfccc.int/resource/docs/convkp/conveng.pdf.

Universal Declaration of Human Rights. Adopted by the UN General Assembly, 10.12.1948. 217 A (III). https://www.un.org/sites/un2.un.org/files/udhr.pdf.

8.1.2 Secondary legislation

Directive 2003/4/EC of The European Parliament and Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. Official Journal of the European Union. 14.2.2003.

Directive 2003/35/EC of The European Parliament and Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. Official Journal of the European Union. 25.6.2003.

8.1.3 Jurisprudence

Fadeyeva v. Russia, No. 55723/00, European Court of Human Rights, (2005).

Kyrtatos v. Greece, No. 41666/98, European Court of Human Rights, (2003).

López v. Spain, No.16798/90, European Court of Human Rights, (1995).

Öneryildiz v Turkey, No. 55723/00, European Court of Human Rights, (2005).

Osman v United Kingdom, No. 23452/94, European Court of Human Rights, (1998).

Peter Sabo and Others v. European Parliament and Council of the European Union, Case T-141/19, ECLI:EU:T:2020:179. https://curia.europa.eu/juris/document/document.jsf;jsessionid=80BB26787E2972B1B5501C97DA541B87?text=&docid=226323&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=14818911.

The State of the Netherlands V. Urgenda Foundation, The Hague District Court, Case Number C/09/456689/HA ZA 13-1396 (2015) (English translation). https://cer.org.za/wp-content/uploads/2015/10/Urgenda-v-State-of-the-Netherlands.pdf.

The State of the Netherlands V. Urgenda Foundation, The Hague Court of Appeal, Case Number C 00.178.24/01 (2018) (English Translation). https://elaw.org/system/files/attachments/publicresource/Urgenda_2018_Appeal_Decision_Eng.pdf.

The State of the Netherlands V. Urgenda Foundation, The Supreme Court of the Netherlands, Case Number 19/00135, 7.31, (2019) (English translation). http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

Verein KlimaSeniorinnen Schweiz et al. *v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*, Federal Supreme Court of Switzerland, Judgment 1C_37/2019 (English Version). http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200505_No.-A-29922017_judgment.pdf.

Royal Dutch Shell V. Milieudefensie and The Other Parties It Represents, The Hague District Court. Case Number C/09/571932/ HA ZA 19-379 (2021) (English Translation). http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf.

Tyrer v. the United Kingdom, No. 5856/72, European Court of Human Rights (1978).

8.1.4 Soft law instruments

ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development. *International Environmental Agreements: Politics, Law and Economics* 2, 209-216 (2002). https://doi.org/10.1023/A:1020905309876.

Paris Agreement to the United Nations Framework Convention on Climate Change. 12.12.2015. https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

The European Commission (2019). *Communication from the Commission. The European Green Deal.* https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2.

The European Commission (2020a). *2030 Climate Target Plan.* https://ec.europa.eu/clima/policies/eu-climate-action/2030_ctp_en.

The European Commission (2020b). *Improving access to justice in environmental matters in the EU and its Member States.* https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf.

Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law). European Commission. 2020/0036(COD). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0080.

Recommendation for Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment. Parliamentary Assembly of the Council of Europe. 30.1.2009. http://assembly.coe.int/CommitteeDocs/2009/20090909_Doc12003E.pdf.

8.2. Secondary sources

8.2.1 Books

Cox, R (2011). *Revolution Justified. Why only the Law can save us now.* Planet Prosperity Foundation. https://www.planetprosperity.org/news/3-revolution-justified.

Freeman, R (1984). *Strategic management: a stakeholder approach.* Cambridge University Press. https://books.google.es/books?id=NpmA_qEiOpkC&printsec=frontcover&hl=es&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

Mélon, L. (2019). *Shareholder Primacy and Global Business. Re-clothing the EU Corporate Law.* Routledge. https://www-taylorfrancis-com.ezproxy.uio.no/books/9780429061349.

Montesquieu, C (1989). *The Spirit of the Laws.* Cambridge Text in the History of Political Thought. https://www.worldcat.org/title/spirit-of-the-laws/oclc/18559462.

8.2.2 Journal articles

Backes, C and van der Veen, G.A (2020). *Urgenda: the Final Judgement of the Dutch Supreme Court.* Journal for European Environmental Planning Law 17. https://www.researchgate.net/publication/342982703_Urgenda_the_Final_Judgment_of_the_Dutch_Supreme_Court.

Bergkamp, L (2015). *A Dutch Court's Revolutionary Climate Policy Judgement: The Perversion of Judicial Power, the State's Duties of Care, and Science.* ResearchGate. https://www.researchgate.net/publication/286486700_A_Dutch_Court's_'Revolutionary'_Climate_Policy_Judgment_The_Perversion_of_Judicial_Power_the_State's_Duties_of_Care_and_Science.

Burgers, L and Staal, T (2019). *Climate Action as Positive Human Rights Obligation: The Appeals Judgement in Urgenda v The Netherlands.* SSRN. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314008.

Cox, R. (2015). *A Climate Change Litigation Precedent. Urgenda Foundation V the State of the Netherlands.* CIGI Papers. https://www.cigionline.org/publications/climate-change-litigation-precedent-urgenda-foundation-v-state-netherlands.

Daniel, N (2017). *Urgenda v. The Dutch State. The Case for Judicial Activism.* Utrecht University. file:///Users/josephinederks/Documents/Backup/Documents/Masters.%20%20European%20Law/Second%20Year/Sustainable%20Business%20law/Week%206-7/Urgenda%20vs.%20the%20Dutch%20State%20the%20Case%20for%20Judicial%20Activism.pdf.

De Boer (2016). *Trias Polica Niet Opofferen Voor Ambitieuze KlimaatPolitiek.* Wiardi Beckham Stichting. https://www.wbs.nl/publicaties/trias-politica-niet-opofferen-voor-ambitieuze-klimaatpolitiek-0.

De Graaf, K.J. and Jans, J.H (2015). *The Netherlands Decision. Netherlands Liable for Role in Causing Dangerous Global Climate Change.* Oxford University Press in collaboration with JSTOR. https://www.jstor.org/stable/26168893?seq=1.

Dennison, S, Loss, R and Söderström, J (2021). *Europe's Green Moment: How to Meet the Climate Challenge.* https://ecfr.eu/publication/europes-green-moment-how-to-meet-the-climate-challenge/.

Drexhage, J and Murphy, D. (2010) *Sustainable Development: From Brundtland to Rio 2012, United Nations Headquarters, New York.* International Institute for Sustainable Development. http://www.surdurulebilirkalkinma.gov.tr/wp-content/uploads/2016/06/Background_on_Sustainable_Development.pdf.

Ferreria, P (2016). *Common But Differentiate Responsibilities in the National Courts: Lessons from Urgenda v. The Netherlands*. Cambridge University Press. https://www.cambridge.org/core/journals/transnational-environmental-law/article/common-but-differentiated-responsibilities-in-the-national-courts-lessons-from-urgenda-v-the-netherlands/69057150F17B06AE67DB52341FD6B1EC.

Kelland, K (2019). *Climate Change exposes future generations to life-long health harms.* Reuters. https://www.reuters.com/article/us-climate-change-health-idUSKBN1XN2WQ.

Lavrysen, L (2021). *Public interest litigation in Europe – The case of climate change.* President EU Forum of Judges for the Environment. https://biblio.ugent.be/publication/8693573/file/8693578.pdf.

Leijten, I (2019). *Human rights v. Insufficient climate action: The Urgenda case*. Sage Journals. https://journals.sagepub.com/doi/full/10.1177/0924051919844375.

Loth, M (2016). *Climate Change Liability Afterall: A Dutch Landmark Case.* ResearchGate. https://www.researchgate.net/publication/299570576_Climate_Change_Liability_After_All_A_Dutch_Landmark_Case.

Loth, M (2018). *Too Big to Trial? Lessons from the Urgenda case.* ResearchGate. https://www.researchgate.net/publication/324843206_Too_big_to_trial_Lessons_from_the_Urgenda_case.

Loucaides, L (2004). *Environmental Protection Through the Jurisprudence of the European Convention on Human Rights.* The British Yearbook of International Law. https://academic.oup.com/bybil/article-abstract/75/1/249/468010.

Mayer, B (2019). *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018).* Cambridge University Press. https://www.cambridge.org/core/journals/transnational-environmental-law/article/state-of-the-netherlands-v-urgenda-foundation-ruling-of-the-court-of-appeal-of-the-hague-9-october-2018/6CFC1F7512D27307A325A434FDE40535.

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.* Taylor and Francis. https://www.tandfonline.com/doi/abs/10.1080/02646811.2019.1584441.

Nollkaemper, A and Burgers, L (2020). *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case.* EJIL:TALK! https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/.

Pedersen, O (2020). *The networks of human rights and climate change. The State of the Netherlands v Stichting Urgenda, Supreme Court of the Netherlands, 20 December 2019 (19/00135).* Sage journals. https://journals.sagepub.com/doi/abs/10.1177/1461452920953655.

Pierce, R. (1999). *Is standing law or politics*. North Carolina Law Review. https://scholarship.law.unc.edu/nclr/vol77/iss5/3/.

Roy, S and Woerdernman, E (2016). *Situating Urgenda v the Netherlands* within comparative climate litigation. Taylor and Francis Online. https://www.tandfonline.com/doi/full/10.1080/02646811.2016.1132825?scroll=top&needAccess=true.

Sikora, A (2020). *European Green Deal- legal and financial challenges of the climate change.* ERA. https://link.springer.com/article/10.1007/s12027-020-00637-3.

Starik, M. (1995). *Should trees have managerial standing? Toward stakeholder status for non-human nature.* Springer. https://link.springer.com/article/10.1007/BF00881435#citeas.

Steffen, W., et.al. (2015). *Planetary boundaries: Guiding human development on a changing planet.* Science, Vo. 347 Issue 6223. https://science.sciencemag.org/content/347/6223/1259855.

van Geel, O (2017). *Urgenda and Beyond: The past, present and future of climate change public interest litigation.* Maastricht University Journal of Sustainable Studies.

van Zeben, J (2015). *Establishing governmental duty of care for climate change mitigation: Will Urgenda turn the tide?* ResearchGate. https://www.researchgate.net/publication/283030171_Establishing_a_Governmental_Duty_of_Care_for_Climate_Change_Mitigation_Will_Urgenda_Turn_the_Tide.

Verschuuren, J (2019). *The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal uphold judgement requiring the Netherlands to further reduce its greenhouse gas emissions.* Wiley. https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12280.

Wewerinke-Singh, M and McCoach, A (2021). *The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation.* WILEY. https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12388/.

Zaklan et el Wachsmuth, J and Duscha, V (2021). *The EU ETS to 2030 and beyond: adjusting the cap in light of the 1.5°C target and current energy policies.* Taylor and Francis. https://www.tandfonline.com/doi/full/10.1080/14693062.2021.1878999.

8.2.3 Other sources

An International Bar Association Climate Change Justice and Human Rights Task Force Report (2020). *Model Statute for Proceedings Challenging Government Failure to Acton Climate Change.* https://www.ibanet.org/MediaHandler?id=47ae6064-9a61-42f6-ac9e-4f7e1b5b4e7b.

Chandrasekhar, A (2019). *The UN talks ended in deadlock. Is this really the best the world can manage?* The Guardian. https://www.theguardian.com/commentisfree/2019/dec/21/un-climate-talks-deadlock-cop25.

Climate Action Network Europe (CAN) (2019). *CAN Europe calls for an increase of the EU's 2030 climate target to at least 65%.* https://caneurope.org/can-europe-calls-for-an-increase-of-the-eu-s-2030-climate-target-to-at-least-65/.

Climate Action Tracker (2020). *Country Summary.* https://climateactiontracker.org/countries/eu/.

De Sadeleer, N., Dross, M., Roller, G. (2002). *Access to Justice in Environmental Matters, Final Report, report prepared for the European Commission (Commission of the European Communities).* http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf.

Friedrich, J and Ge, M (2020). *This Interactive Chart Shows Changes in the World's Top 10 Emitters.* World Resources Institute. https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters.

Greenpeace (2021). *EU agrees hallow climate law*. https://www.greenpeace.org/eu-unit/issues/climate-energy/45571/eu-agrees-hollow-climate-law/.

Guterres, A. (2018). Secretary-General delivers on Calls for Climate Leadership, Outlines Expectations for Next Three Years. https://unfccc.int/news/un-secretary-general-antonio-guterres-calls-for-climate-leadership-outlines-expectations-for-next.

Guterres, A. (2019). Secretary-General delivers speech on Climate Change and his vision for the 2019 Climate Change Summit. http://webtv.un.org/search/ant%C3%B3nio-guterres-secretary-general-delivers-speech-on-climate-change-and-his-vision-for-the-2019-climate-change-summit/5833142929001/?term=guterres&lan=English&sort=date&page=3#t=3m54s.

Guterres, A. (2020). Secretary-General delivers speech on Climate Change 'Making Perace with Nature is the Defining Task of the 21st Century. https://unfccc.int/news/un-secretary-general-making-peace-with-nature-is-the-defining-task-of-the-21st-century.

Intergovernmental Panel on Climate Change (2007). *Climate Change 2007 synthesis report AR4.* https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf.

Intergovernmental Panel on Climate Change (2015). *Climate Change 2014 synthesis report AR5.* https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.

Kaminski, I (2019). *Dutch Supreme court upholds landmark ruling demanding climate action.* The Guardian. https://www.theguardian.com/world/2019/dec/20/dutch-supreme-court-upholds-landmark-ruling-demanding-climate-action.

Pastorelli, S (2021). *Greenpeace_EU.* https://twitter.com/GreenpeaceEU/status/1384855536546598913.

The European Commission (2014). *Carbon Leakage evidence project.* https://ec.europa.eu/clima/sites/clima/files/ets/allowances/leakage/docs/cl_evidence_factsheets_en.pdf.

The European Parliament (2020). *Combating Climate Change. Fact Sheet.* https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.5.2.pdf.

The Guardian (n.d). *Extension Rebellion.* https://www.theguardian.com/environment/extinction-rebellion.

UN Environment Programme (2020). *The Global Climate Litigation report.* https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y.

The World Bank (2018). *Climate Change could force over 140 Million to Migrate within Countries by 2050: World Bank Report.*https://www.worldbank.org/en/news/press-release/2018/03/19/climate-change-could-force-over-140-million-to-migrate-within-countries-by-2050-world-bank-report.

Urgenda (2021a). *Global Climate Litigation.*https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/.

Urgenda (2012b). *Letter to the Prime Minister Rutte.* https://www.urgenda.nl/wp-content/uploads/Letter_to_the_government.pdf.

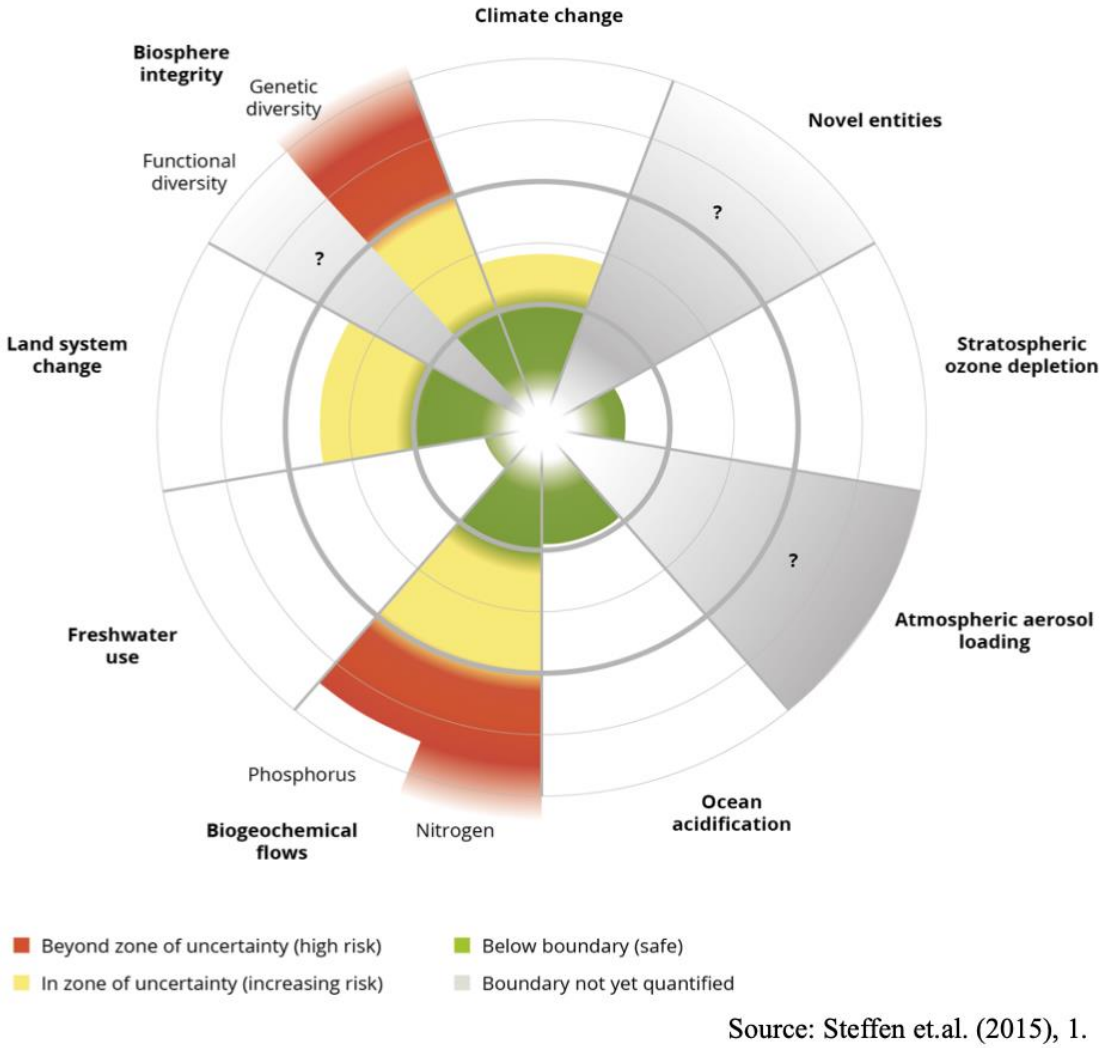
Report of the World Commission on Environment and Development: Our Common Future (1987). *Our Common Future, From One Earth to One World An Overview by the World Commission on Environment and Development.* WCED Experts. https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

Veraldi, J (2017). *Our responsibility for future generations. Intergenerational equity and the European Union in theory and practice.* Honour review. http://www.honoursreview.nl/intergenerational-equity.html#:~:text=While%20the%20EU%20has%20a,opportunities%20that%20the%20past%20and.

von der Leyen (2020). *State of the Union Address by President von der Leyen at the European Parliament Plenary.* https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655.

Appendices

Appendix 1



Source: Steffen et.al. (2015), 1.

Appendix 2

Interview with Sabina Voogd

Through a non-standardized semi-structured interview, this interview proceeded in an open and non-methodically structured way. By undertaking a semi-structured interview, I was able to 'probe' a more detailed response, which allowed greater clarification on topics which I felt needed further explanation. The questions were neutral, free from bias and open ended. This was to ensure the interviewee provided objective and accurate accounts. The interview was recorded and held via Zoom. Ms. Voogd, the interviewee, has provided full consent to share the information she provided, thereby filling the obligations of the GDPR.

1. Could you explain who you are and what role you played during the Urgenda case?

Sabina: My name is Sabina Voogd, I have been a lobbying all my life for a better world. I have worked for Greenpeace, Oxfam and the Ministry of Foreign Affairs and studied international law and Public Administration. With regards to Urgenda, I just want to briefly mention that it's a sustainability platform that takes all kinds of sustainability orientated initiatives. As my husband is a member of this platform, he asked me if I wanted to be a co-plaintiff on the case of Urgenda v. The Dutch State on climate policy. Every 698-co-plaintiff paid 100 euros to support the case. For case such as these, strong financial support is needed.

Interviewer: Do you consider this need for financial backing in climate litigation as one of the greatest hurdles for accessing the courts?

Sabina: To some extent yes, but I also think strong societal support is necessary. In this regard, the Urgenda case was successful as it had many co-plaintiffs from all age ranges and backgrounds. It really showed how society felt about the current climate policy measures of the State.

2. Many journalists, academics and politicians deemed *Urgenda* as a 'groundbreaking' judgement', with some going on to call it 'the most important climate change court decision in the world so far'. Could you explain whether you would agree or disagree with this statement and elaborate as to why?

Sabina: I totally agree with this statement! Mainly because it opened up possibilities for people in other countries to take their governments to court and demand them to correctly implement the climate policies they agreed to. I actually have a nice story about this. At the time of the Urgenda case, I was working on a sustainability project in Togo. I was talking to the director of the local NGO, who said to me: 'you know what the most important event in 2015 for sustainability is?' I responded 'no, what do you think is the most important event for sustainability'. His answer was

the Dutch climate case, not the Paris Agreement. What this indicated was that people worldwide were inspired by the Dutch case.

3. Whilst the District Court concluded along tort law lines, the subsequent courts premised their arguments on European and International obligations. In your opinion, what impact did this change have on the case and do agree with the subsequent court's decision to overturn the initial legal foundation?

Sabina: Indeed, as the ruling was finally based on the European Convention for Human Rights (ECRH), it went beyond national law. In my personal opinion, I feel the ruling opened up greater possibilities for members who were party to the ECHR. Also States outside the EU started litigation against their governments! At the time of judgment, I tweeted to acknowledge how significant the ruling was for EU States', as I had no idea how globally influential it would be. Also, it was the first time that a Dutch citizen could directly call in the ECHR before a Dutch Court. This hadn't been decided before and therefore, changing the initial foundation had a significant impact.

4. Climate science played a prevalent role throughout the case, with the judges referring to the IPCC reports and international agreements when concluding that a 25% emission decrease by 2020 was necessary. Many have worried that elevating scientific facts as 'legally enforceable norms' could:

    -jeopardize the democratic order;
    -result in courts contradicting one another in future rulings as climate science is a constantly evolving area; and
    -be deemed as standing is stark contrast with various international agreements, such as the Paris Agreement, which had been ratified on the basis of their non-legally binding norms and unenforceability.

    How would you respond to these statements?

Sabina: I have worked a lot on policy throughout my career and therefore hold a different opinion to these statements. One would expect that policy decisions are based on climate science anyhow, especially if they have a big impact on the lives of citizens. As a nation, you need to know where you presently stand and where you need to go. Therefore, nations need climate science as a basis for their policies. For instance, the 25% was based on a science report created in 2007. The report outlined an emission reduction range from 25-45%, with 25% being the absolute minimum. This was partly why Urgenda choose the 25%, because they didn't want to push the State too far, they just wanted them to do the minimum that was necessary. This is then also linked to the Netherland's commitment of achieving the 1.5 to 2ºC target. Climate science isn't just a legally enforceable norm just because its deemed scientific, it's a norm that gives direction which States have to take.

Interviewer: and with regards to courts contradicting one another because climate science is constantly evolving, what are your thoughts of this?

Sabina: Although this can be true, climate science is indeed constantly evolving and isn't necessarily cast in stone, there are already some certainties on which people agree upon. One example is that everyone agrees that climate change is caused by humans. I have negotiated at several meetings concerning climate change and one thing that is always brought up is that the States polices just aren't doing enough. It is something we hear time and time again. The science is so clear, yet Member States are still being reluctant to do what is necessary to protect the Earth. It's immensely frustrating. Many governments are still led by vested interests, such as big companies who earn a ridiculous amount of money from fossil fuels, for example. These big corporations also have a lot of power and sway over policy developments.

Interviewer: What are your thoughts about the Dutch State lowering its emission reduction target from 30% to 20%?

Sabina: When they lowered the target, they had no sound reason to do so. They didn't base their decision on climate science or on any credible source. Therefore, the decision just wasn't understandable.

5. International environmental principles were used by the judges to help determine the minimum degree of care required by the state through the 'reflex effect'. Which principle do you feel played the most prevalent role in shaping the case and do you believe one principle is more important than another for tackling climate change?

Sabina: For sure the precautionary principle is one of the most important principles, as it focuses on how ecosystems work. For example, if we think of a well-functioning lake, that starts of healthy but slowly, through external factors such as poisonous chemicals, collapses because it can no longer sustain itself. Once it collapses, there is no way of turning back, the damage has been done. This is the thing with ecosystems, they can only adapt so far before they collapse. In this regard, the precautionary principle has been introduced to recognize the fragility of ecosystems and intervene before they breakdown. Even when the science isn't 100% clear on the matter, the precautionary principle still requires action to be taken, so that this collapse scenario can be prevented.

Interviewer: Does this then mean that in circumstance which are unclear, inaction can't be justified?

Sabina: Exactly! This doesn't just mean you can go and do anything; you still need to have an underlying scientific base. But, as I said, even when the science isn't completely clear, it still obliges action. Another important principle is the common but differentiated responsibility (CDR). When I was working for Oxfam, I primarily dealt with matters relating to climate change from the perspective of developing nations. CDR focuses on who has to do what to counter climate change. When establishing this, you first need to look at who's more responsible for creating climate change and in this regard, we all know that it's mostly the rich countries who have released an exhaustive amount of greenhouse gases (GHG). By looking at the ecological footprint of a country, you can see which country has done the most damage. The Netherlands in relation to other countries has released a substantial amount of GHGs, yet it is one of the countries that does the least to help combat the climate crisis. Considering its 'developed' status, the Netherland's needs to go an extra mile. However, many still question what the CDR actually means, what does it exactly lead to, how will the tasks be divided and how will the tasks be completed? In this regard, it's hard to pinpoint exactly which principle is more important than another.

6. There was strong opposition from the Dutch State against Urgenda, claiming that, *inter alia*:
   - there had been a violation on the balance of powers (judicial activism); and
   - that granting Urgenda's claim would be ineffective (drop in the ocean problem);

   In your opinion, would what be the best remedy to overcome these challenges?

Sabina: I believe that the Supreme Court very successfully answered this question surrounding the Separation of Powers. By clearly stating that the Dutch constitution requires the Dutch courts to apply the provisions of the ECHR in accordance with the interpretations of the ECtHR. They went on to mention how this mandate even offers protection against the government, which is an essential component of a democratic state under the rule of law. Also, the courts didn't tell the State which measurements they needed to introduce; this was left up to their discretion. Thus, the courts didn't infringe on the balance of power. Here, it relevant and important to mention that even now, in 2021, the Dutch State has *still* not implemented the Courts order. This doesn't necessarily come as surprise as the former ministry of economic affairs and climate who was responsible for this issue had been fired due to problems in the tax department. In discussion with the parliament, he was the main driver who would push for the Urgenda ruling to be implemented. The government has had endless discussions about climate change with civil society but seems unable to come up with measures which will ensure that the 25% target is met. The question that everyone is asking is: what can we do now? I am assuming that the State may just be lodged with a large fine. However, Urgenda doesn't want money, it wants action.

Interviewer: In your personal opinion, what do you feel are the best steps to take to tackle the climate crisis?

Sabina: Well within international law strong enforcement doesn't and won't exist because nations are fiercely protective over their sovereignty. You cannot police States and push them further than they want to go. What we actually need is international leaders with more responsibility who consensually decide to come together and create a binding and enforceable treaty that will also apply to future leaders.

Interviewer: And could I quickly ask you about your thoughts concerning the drop in the ocean argument?

Sabina: Of course! Well as we know, each country is responsible for its own share of environmental damage. Thus, for the Dutch State to claim that their actions wouldn't have a significant impact in the grand scheme of things, was an appalling statement.

7. Urgenda came forward with the intent of protecting not only its own citizens, but also those *abroad* and in the *future.* Although the Court didn't elaborate on this matter, how important do you think these questions will be in the near future?

Sabina: Extremely important! During my time at Oxfam from 2007 to 2015, the climate discussion was changing from an environmental issue to social, human rights and development issue. In 2007 for instance, climate change was becoming visible in a lot of tropical countries, who were predominantly poor. Due to their financial situation, they lacked resilience to tackle these changes. Thus, even 14 years ago we knew that climate change was disproportionality affecting the poorer States'. For example, if we in the Netherlands exhaust these developing nations resources and are the cause of their environmental disasters, we have a responsibility to do more.

Interviewer: do you therefore feel the law needs to address this better?

Sabina: yes, I really think it does. And then referring to future generations and the common notion that they can't be granted standing, this relates to the bible. For instance, it's often believed that God has given the Earth to us, while in many indigenous communities, the Earth isn't given, instead we are borrowing it from future generations. In this sense, they believe the Earth isn't only for us, which in fact is true. In a book called 6 degrees, it talks about how small island nations would be washed away if we reached the latter temperature. This is terrifying to think of, as some have predicted this temperature by the end of this century. Rightly so, many young children are coming together to protests against our climate measures. They will have to bear the burden of our inaction. So yes, the law really needs to change to address this. Polly Higgins is a well-known international lawyer who developed the notion of ecocide, which held that the environment should be granted access to the courts in order for it to be protected. Thereby, not talking about any persons or people but instead, offering rights to the ecosystems to ensure it is adequately protected.

8. Do you feel the current European Union Climate laws are sufficient to tackle the climate crisis? Please elaborate upon your answer.

Sabina: Not at all. This is in relation to what the IPCC states is needed, what the consequences are of no action or insufficient action and what the States are presently doing. Personally, we as a family are moving aware from Amsterdam as we don't trust that the measures will be strong enough to actually tackle climate change. Indeed, the EU is the best forum to protect the environment, with its already unique legal and political system in place. However, it's important to note that lobbying within the EU is one of the most harmful forces which prevents ambitious and highly necessary legislation being implemented. That being said, the measures we have in place now, like the ETS have displayed many 'gaps.' We need stronger and clearer harmonized climate laws with a strong basis in climate science. Climate change is a bigger disaster than COVID-19, so nations need to act now!

9. What do you believe have been the lasting impacts and lessons from the Urgenda case on the climate litigation discourse?

Sabina: Quite simply, that citizens all over the world can call their governments to court and demand climate action.