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Monique Frederikke Lundh

The forgotten EU dimension in the Urgenda Case and the applicability of the Charter

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Faculty of Law
Maastricht University
Postbox 616
6200 MD
Maastricht
The Netherlands

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List of Abbreviations

Art(s): Article(s)

CJEU: Court of Justice of the European Union

ECHR: The Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR: European Court of Human Rights

ESD: The Effort Sharing Decision

EU/the Union: The European Union

EU ETS: The European Union Emissions Trading System

FRA: European Union Agency for Fundamental Rights

TEU: The Treaty on the European Union

TFEU: The Treaty on the Functioning of the European Union

The Charter: The Charter of Fundamental Rights of the European Union

The *Urgenda Case*: Urgenda Foundation versus the State of the Netherlands (Ministry of Infrastructure and the Environment) (in both instances)

The Treaties: The TEU and the TFEU

Abstract

This thesis analyses the EU dimension of the Dutch Urgenda Case, with the main focus on the Appeal Court of The Hague's decision, ordering the Dutch State to reduce its greenhouse gas emissions with 25% by 2020, because a lower reduction violated the fundamental rights under Arts 2 and 8 ECHR of the Urgenda Foundation.

Chapter 1 contains an introduction.

Chapter 2 explains the relevant EU climate legislation, being the European Union Emissions Trading Scheme and the Effort Sharing Decision, and the possibility for Member States to maintain or introduce more stringent actions under Art 193 TFEU. This chapter also focuses on the Dutch State's argument relating to EU climate legislation, and the Appeal Court's response hereto.

The next chapter, Chapter 3, relates to the fundamental rights aspect of the Urgenda Case, and discusses whether there exists an obligation for national courts to include the Charter ex officio in cases that concern fundamental rights, but where the parties themselves have not introduced the Charter. This chapter also includes consideration of whether Member States must observe fundamental rights, when introducing more stringent measures in accordance with Art 193.

In Chapter 4 is the preliminary reference procedure introduced, alongside a discussion of the potential conflict in cases that regard both the Charter and the ECHR, between referring preliminary questions to the CJEU and the possibility for the highest courts of Member States, who have ratified Protocol No 16 to the ECHR, to ask advisory opinions of the ECtHR. In this chapter is also a consideration of the necessity of the Supreme Court of the Netherlands asking a preliminary reference question to the CJEU in the Urgenda Case, and, if it is necessary, what the content should be of such reference.

Chapter 5 concludes on the thesis. The conclusion – in brief – states that the Appeal Court overstepped its boundaries in imposing a higher reduction goal on the Dutch State, since it simultaneously, indirectly, declared the EU climate goal in violation of fundamental rights; a power that rests only with the CJEU. The thesis finds that a preliminary reference to the Court is indeed necessary, and strongly encourages the Dutch Supreme Court to make such a referral.

1. Introduction

In 2012, the Urgenda Foundation requested the Dutch State to commit and undertake to reduce greenhouse gas emissions in the Netherlands by 40% by 2020, as compared to the 1990 emission levels. As the State Secretary for Infrastructure and the Environment rejected this claim, Urgenda initiated proceedings on behalf of itself and 886 Dutch citizens before the Rechtbank Den Haag (the District Court of The Hague).[1] Urgenda claimed (in brief) that the Dutch State was violating the right to life and right to respect for private and family life of itself and the 886 citizens under Arts 2 and 8 ECHR, because the State did not set a sufficiently high goal for limiting the greenhouse gas emissions in the Netherlands by 2020.

The District Court of The Hague decided that Urgenda could not base its claim on the ECHR, because the ECtHR, with reference to Art 34 ECHR, has decided that NGOs, like Urgenda, do not have standing before the ECtHR, when the claim is based on a public interest action. Only the claimant, whose interest has been affected, has access to the ECtHR.[2] However, the District Court noted that the ECHR could still serve as a source of interpretation in the case.[3] Ultimately, the District Court ordered the Dutch State to reduce its greenhouse gas emissions with 25% by 2020. The court based its decision mainly on the unwritten duty of care-standard, as referred to in Art 163 of Book 6 of the Dutch Civil Code[4], stating that the Dutch State acted negligently towards Urgenda by setting a reduction target lower than 25% by 2020.

Verschuuren points out in his article[5] on the decision in the *Urgenda Case* in the first instance that the District Court of The Hague had to overcome two significant obstacles to reach its decision, namely causation and the principle of separation of powers. In my opinion, however, what the court also should have taken into consideration, but appears to have overlooked, is the EU dimension of the case, including the impact of its decision on EU climate legislation. Besides summarising the EU climate legislation,[6] the court only briefly touches upon the EU reduction targets in its assessment of the case.[7]

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[1] The Hague District Court judgment of 24 June 2015 in case C/09/456689/HA ZA 13-1396 *Urgenda Foundation v the State of the Netherlands (Ministry of Infrastructure and the Environment)* ECLI:NL:RBDHA:2015:7196 (English translation), paras. 2.6-2.7.
[2] See the District Court's judgment in the *Urgenda Case*, para. 4.45.
[3] Ibid, para. 4.46.
[4] See Peeters, M., 'Case Note: Urgenda Foundation and 886 Individuals v The State of the Netherlands: Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) *Review of European, Comparative & International Environmental Law*, Vol. 2, No. 1, 124.
[5] Verschuuren, J., 'Spectacular Judgment by Dutch Court in climate change case' (2015) *Tilburg University Blog*.
[6] See the District Court's judgment in the *Urgenda Case*, paras. 2.53-2.78.
[7] Ibid, paras. 4.23-4.29.

In the appeal case before the Gerechtshof Den Haag (the Appeal Court of The Hague), the court noted that while Urgenda may not have standing before the ECtHR, its human rights under the ECHR is protected before the national courts of the Netherlands. The ECtHR has not given – nor could it give – an answer about NGOs "public interest claims" before the Dutch courts, and Art 34 ECHR could therefore not serve as a basis for denying Urgenda the possibility to rely on Arts 2 and 8 ECHR. On this basis, the Appeal Court allowed Urgenda to base its claim on the ECHR.[8] With regards to the emissions reduction target of 25%, the Appeal Court upheld the ruling of the District Court.

With regards to the EU dimension of the appeal case, the Appeal Court in its decision – knowingly or not – questions the EU's climate goals[9] by stating that the Netherlands is violating the ECHR by not pursuing a reduction in greenhouse gas emissions of 25% by 2020.[10] If the Netherlands is violating the ECHR with this approach – while complying with the EU climate legislation establishing the 20% emissions reduction by 2020 – does that mean that the Appeal Court of The Hague implicitly considered the EU to be in violation of the ECHR?

Another interesting aspect of the *Urgenda Case* is that Urgenda chose to base its claim on the ECHR. As is also noted in the judgments, the Dutch reduction goal for 2020 is based on EU secondary law. How come then that the Charter is not applied instead of or in addition to the ECHR? According to Art 51 of the Charter, it applies to Member States of the European Union when they are implementing EU law, and the CJEU has interpreted this as meaning that the Charter also applies to the Member States when they are acting within the scope of EU law.[11]

1.1 Research question(s)

The two court decisions in the *Urgenda Case* thus pose several questions:

Have the Dutch courts, by declaring that the Netherlands has breached the ECHR by not doing more, even though the Netherlands complied with standards set by EU, implicitly held EU law contrary to the ECHR? This would be problematic, because the CJEU has several times decided that the national courts of the Member States cannot decide upon the

[8] See The Hague Court of Appeal judgment of 9 October 2018 in case 200.178.245/01, *the State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* ECLI:NL:GHDHA:2018:2610 (English translation), para 35.
[9] The EU climate goal is a 20% reduction of greenhouse gas emissions by 2020 compared to 1990 and 16% compared to 2005 levels specifically for the Netherlands under the Effort Sharing Decision.
[10] The EU offered to move to a 30% reduction of greenhouse gas emissions by 2020 compared to 1990, provided that other developed countries committed themselves to comparable emissions reductions. Nonetheless, this did not come through.
[11] See the CJEU's decision in Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105.

(in)validity of EU legislative acts.[12] If the national courts are in doubt about the validity EU legislation, they are under an obligation to refer a preliminary reference question on this matter to the CJEU, cf. Art 267 TFEU.

Alternatively, is it legally possible for a State to act in compliance with EU law and still infringe the ECHR, e.g. because the national court reads the ECHR more strictly than the ECtHR? If that is the case, are national courts competent to state non-compliance between a Member State's implementation of EU legislation and the ECHR, without making a reference for a preliminary ruling to the CJEU?

Did the Dutch court breach EU law by imposing higher standards on the Netherlands than EU law does? Should the Dutch courts also have brought in the Charter – even if the parties did not do so – and would this have made a difference in deciding the case?

These considerations have led to the following questions, which will be examined in this thesis:

1. Is the judgment of the Appeal Court in the *Urgenda Case* in accordance with EU primary law and/or EU secondary law?
2. Is there an obligation for national courts to include the Charter *ex officio* in cases that regard fundamental rights?
3. Would it be, in the light of Art 267 TFEU, necessary that the Supreme Court of the Netherlands refer (a) preliminary question(s) to the CJEU in this specific case? If so, what questions should be asked in view of the prerogative of the CJEU to decide on the interpretation of the Treaties and the validity and interpretation of acts of the institutions of the Union? This also in view of the applicability and interpretation of the Charter?

1.2 Method

In order to answer the above questions, it is necessary, first, in Chapter 2, to introduce the relevant EU legislation on greenhouse gas emissions reduction with focus on the commitments for the Member States. This will include the EU wide cap under the EU ETS and the national caps under the ESD. In this chapter will also be included the dimension of the possibility under Art 193 TFEU for Member States to maintain higher environmental standards than set by the EU.

Chapter 3 regards the fundamental rights aspects of the *Urgenda Case*, i.a. touching upon the application by the Appeal Court of the ECHR provisions as claimed by Urgenda, and consideration of whether the court should, of its own motion, have included the Charter in the case. In the chapter is also included a discussion on the Member States' (potential)

[12] See e.g. Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452, paras. 14-15.

obligation to respect fundamental rights, when undertaking further going action under Art 193 TFEU.

In Chapter 4 is first an introduction to the preliminary reference procedure under Art 267 TFEU, and a consideration of the interesting issue that arises since the Netherlands' ratification of Protocol No 16 to the ECHR. Then follows an analysis and discussion of the necessity of the Dutch Supreme Court making a preliminary reference question to the CJEU, when it adjudicates the *Urgenda Case* in the third instance. The chapter also includes an assessment of the potential content of such preliminary reference, if it is indeed found necessary.

Chapter 5 concludes on the findings of the thesis.

2. EU Greenhouse Gas Reduction Legislation: Commitments for Member States

2.1 The EU 2020 climate and energy package

The EU 2020 climate and energy package policy sets out three key targets:

1. 20% cut in greenhouse gas emissions compared to 1990 levels.
2. 20% of EU energy from renewables.
3. 20% improvement in energy efficiency.[13]

The EU ETS is the EU's key tool for cutting greenhouse gas emissions from large-scale facilities in the power and industry sectors, as well as the aviation sector. It covers approximately 45% of the EU's greenhouse gas emissions, and sets a reduction target for the included sectors at 21% compared to 2005-levels.[14]

The Member States' national emission reduction targets cover the sectors that are not included in the EU ETS, i.a. housing, agriculture, waste and transport (excluding aviation as this is covered by the EU ETS). Under the ESD, the EU Member States have taken on binding annual targets until 2020 for reducing emissions in these sectors compared to 2005-levels.[15]

The goals of 20% energy from renewables and 20% improvement in energy efficiency is i.a. to be achieved through binding national targets under the Renewable Energy Directive[16] and through the Energy Efficiency Directive and the Energy Efficiency Plan[17], respectively. These two targets will not be discussed further in this thesis, as the *Urgenda Case* only regarded greenhouse gas emissions reductions.

2.2 The EU Emissions Trading Scheme

The goal of reducing the EU's greenhouse gas emissions with 20% by 2020 has been incorporated into EU law. The EU ETS is laid down in Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas

[13] See the European Commission, '2020 climate & energy package' <https://ec.europa.eu/clima/policies/strategies/2020_en> last accessed 20 June 2019 (on file with author).
[14] Ibid.
[15] Ibid.
[16] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62.
[17] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1-56, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy Efficiency Plan 2011, COM/2011/0109 final.

emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46.[18]

The EU ETS limits emissions by means of an EU-wide cap on total emissions, under which all industries[19] covered by the scope of the EU ETS are regulated. The European Commission, under strict conditions from the EU ETS Directive, sets the cap and the rules for the auctioning and free distribution of allowances, hardly leaving any discretion to the Member States.[20] The Commission also operates a single EU registry covering all 31 States participating in the EU ETS, which i.a. records national implementation measures, account of companies or individuals holding the allowances and transfers of allowances.[21] The cap decreases each year by a linear reduction factor of 1.74% of the average total quantity of allowances issued annually in 2008-2012,[22] cf. Art 9(1) of the EU ETS.[23]

Within the cap, companies in the concerned industries under the EU ETS receive or buy emission allowances. They can trade these allowances with other companies included in the scheme, cf. Art 12(1) of the EU ETS. Each year, in April, the companies must surrender enough allowances to cover all their emissions of the preceding calendar year, cf. Art 12(3). If they do not do so, they will receive a punishment of a fine, cf. Art 16(3) of the EU ETS. If a company has an excess amount of allowances, because it has not emitted as much greenhouse gas as anticipated, it can either keep the spare allowances to cover future needs or sell them to a company short of allowances.[24] This constitutes the flexibility mechanism of the EU ETS.

The basic idea behind the EU ETS is that the reduction of the greenhouse gas emissions will be achieved in a cost-efficient way, making use of a market mechanism covering various industries with different abatement options all over the EU.[25]

The EU ETS has a sector-specific target of a 21% emissions reduction compared to the 2005-level for those sectors.[26] This, together with the single EU-wide cap, means that there is no individual reduction target for each of the States participating in the EU ETS.

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[18] Peeters (2016) o.c. 124-125.
[19] For the full list of industries included in the EU ETS, see Annex I of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46.
[20] Peeters (2016) o.c. 124-125.
[21] See the European Commission, 'Union Registry' <https://ec.europa.eu/clima/policies/ets/registry_en> last accessed 22 June 2019 (on file with author).
[22] After 2020, the linear reduction factor is more than 2%, i.e. a stricter cap decrease.
[23] See the European Commission, 'Emissions cap and allowances' <https://ec.europa.eu/clima/policies/ets/cap_en> last accessed 22 June 2019 (on file with author).
[24] See the European Commission, 'EU Emissions Trading System (EU ETS)' <https://ec.europa.eu/clima/policies/ets_en> last accessed 22 June 2019 (on file with author).
[25] Ibid.
[26] Ibid.

2.3 The Effort Sharing Decision

The ESD is a complementary instrument concerning emissions not covered by the EU ETS. It sets differentiated emissions reduction targets for each Member State.[27] The ESD is codified in Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p. 136–148.

Under the ESD, the Member States themselves can decide which measures and national policies they adopt to reach their individual target. The European Commission checks the Member States' compliance with the ESD targets, and assesses the Member States' progress towards achieving their targets.[28]

The overall target for the sectors covered by the ESD is a reduction of greenhouse gas emissions of 10% compared to the 2005-level for these sectors.[29] The specific reduction targets for each Member State is set out in Annex II to the ESD. According to this, the Netherlands is to reduce its greenhouse gas emissions for the ESD industry sector by 16% in 2020 compared to 2005-levels.

Under certain conditions, the Member States may transfer the part of their annual emission allocation that exceeds their greenhouse gas emissions for that year to other Member States, cf. Art 3(5) of the ESD. This means that a Member State can buy allowances to cover up a potential shortage.

So, as can be seen, under both the EU ETS and the ESD, there are possibilities that allow for a certain *flexibility* when industries and Member States, respectively, are to fulfil their obligations under the schemes. For the EU ETS, the flexibility mechanism consists of a cap and trade system, and under the ESD there is a freedom for the Member States to buy, sell and store allowances as they see fit.

2.4 The possibility of further going action, cf. Art 193 TFEU

Under Art 193 TFEU, the EU Member States are, for measures adopted under Art 192 TFEU, permitted to maintain or introduce more stringent protective measures on the environmental policy area. However, these potential measures must be compatible with the

[27] See Art 3 and Annex II of the ESD.
[28] See the European Commission 'Implementation of the Effort Sharing Decision' <https://ec.europa.eu/clima/policies/effort/implementation_en> last accessed 22 June 2019 (on file with author).
[29] See the European Commission 'Effort Sharing: Member States' emission targets' <https://ec.europa.eu/clima/policies/effort_en> last accessed 22 June 2019 (on file with author).

Treaties and shall be notified to the Commission. Both the EU ETS and the ESD are based on Art 192 TFEU (ex Art 175 TEC), which means that Art 193 TFEU applies, and thus, in principle, it is allowed for Member States to pursue more ambitious greenhouse gas emissions reduction goals.

Squintani et al. raised the question of the possibility of further going action under the EU ETS for the Member States in 2012.[30] In this contribution, the authors summarised the applicable criteria to a more stringent measure under Art 193 TFEU. It follows from the analysis that such a measure must 1) fall within the scope of application of a Union measure taken pursuant to art 192 TFEU; 2) follow the same environmental objectives as the Union act; 3) respect the secondary objectives of the Union act; 4) achieve a higher level of environmental protection; 5) respect other Union law; and 6) respect the notification duty.[31]

Regarding the prohibition against frustration of the EU environmental legislation's secondary objectives (requirement no 3), it is noted that the EU ETS has a number of non-environmental objectives. Art 1 contains the objectives of cost-effectiveness and economic efficiency, and Recitals 5 and 7 of the preamble mention the objectives of safeguarding economic development and employment, and preserving the integrity of the internal market and of conditions of competition.[32]

The authors, interestingly enough, state that the content of EU environmental legislation seems to prevent the Member States from taking further going measures under Art 193 TFEU.[33]

In the Q&A on the ESD,[34] the European Commission answered the question on whether a Member State can set a more ambitious national target for its greenhouse gas emissions than its obligations under EU legislation.[35] The Commission stated that it is indeed possible for Member States to maintain their own (higher) targets for emissions from the ESD industry sectors. Nevertheless, the Commission continued, "*national targets cannot be set for total greenhouse gas emissions in 2013-2020 because it cannot be known by how much emissions from sectors covered by the EU ETS will be reduced in each Member State. This*

[30] Squintani, L., Holwerda, M., and de Graaf, K., 'Regulating greenhouse gas emissions from EU ETS installations: what room is left for the member states?', in Peeters, M., Stallworthy, M., and de Cendra de Larragán, J. (eds), *Climate Law in EU Member States – Towards National Legislation for Climate Protection* (Edward Elgar 2012), 67-88.
[31] Ibid, 72-79.
[32] Ibid, 83.
[33] Ibid, 71: "*The underlying legal question is whether member states are allowed to maintain or introduce more stringent protective measures in accordance with Article 193 TFEU when the content of EU environmental legislation seems to prevent them from doing so*".
[34] The European Commission, 'Questions and Answers on the Effort Sharing Decision (October 2013)' <https://ec.europa.eu/clima/policies/effort_en#tab-0-3> last accessed 2 July 2019 (on file with author).
[35] Ibid, question 5.

is because from 2013 there is a single, EU-wide cap on EU ETS emissions in place of the national caps which existed previously"[36] (emphasis added).

It is in this connection relevant to note that in Recital 9 of the preamble of the ESD, it is stated that "*to ensure a fair distribution between the Member States of the efforts to contribute to the implementation of the independent reduction commitment of the* [EU]*, no Member State should be required to reduce its greenhouse gas emissions in 2020 to more than 20% below 2005-levels*" (emphasis added). It is, in my opinion, not clear, whether Recital 9 refers strictly to a limitation of the reduction target that *the EU* can impose on the Member States, or if it goes further, and means that *no one*, also not e.g. national courts, can require the Member States to fulfil a target in excess of 20%. While the EU itself normally does not interfere with the institutional structure of the various Member States, it is nonetheless interesting that the EU legislature has not been decisive on whether a Member State can be forced to undertake a higher reduction goal than what is set at EU level – i.e. 20% compared to 1990-levels. This, combined with the European Commission's answer in the Q&A, leaves it in my opinion, if nothing else, quite uncertain whether it is at all possible for Member States to maintain a higher reduction goal for national emissions under the current EU climate legislation.

It follows from the above that it is indeed *in theory* possible for EU Member States to adopt more stringent measures than set out by EU climate legislation in accordance with Art 193 TFEU. The ESD does not seem to prohibit a Member State from voluntarily undertaking a more stringent approach, provided the specific measures are in conformity with EU primary law. However, the question remains whether a national court can impose stricter reduction goals on a Member State under this provision, based on the argument that otherwise the State would act unlawful – even while in compliance with EU emissions reduction laws. The European Commission's view on the matter is also interesting, as it seems to indicate that there is *in fact* no possibility for the Member States to set a specific national cap for EU ETS emissions until 2020.

[36] Ibid.

2.5 Application of the EU climate legislation in the *Urgenda Case*

2.5.1 The Dutch State's arguments regarding EU climate legislation

The Dutch State put several arguments forward in its defence against being ordered to increase its greenhouse gas emissions reduction goal to 25% by 2020. Some of these arguments regarded the duty of care, the *trias politica* and the (non-)capability of the Dutch courts to interfere with government policies. As these arguments are not relevant for this thesis, I will not comment further on them.

However, the Dutch State also pointed to the EU climate policies in its defence. According to the Appeal Court's summary of the Dutch State's argument, the State argued that the EU ETS system stands in the way of the Netherlands doing more than is permitted in the context of that system.[37] The Dutch State also relied on the EU 2020-goal, i.e. 20% reduction of greenhouse gas emissions by 2020, arguing that this reduction goal is sufficient for the Netherlands.[38]

The Dutch State further argued that if the Netherlands takes a measure, which reduces greenhouse gas emissions falling under the EU ETS, a *waterbed effect*[39] will occur, because the emissions cap established for the EU ETS sector applies to the EU as a whole; less emissions in the Netherlands therefore creates room for more emissions elsewhere in the EU[40].[41]

The Dutch State also pointed to the risk of *carbon leakage*, which refers to the trade implications of EU climate action, whereby the competiveness of EU industries may be affected by the fact that industries outside the EU are not subjected to carbon regulations.[42]

The last of the State's arguments that I will highlight is that, according to the State, more ambitious emission reductions will undermine the *level playing field* for Dutch companies.[43] It is not specified in the judgment what "level playing field" is referring to – perhaps it is to the free movement provisions in EU law, which includes i.a. the obligation for Member States to

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[37] See the Appeal Court's judgment in the *Urgenda Case*, para. 30.
[38] Ibid, para. 52.
[39] The *waterbed effect* relates to that industries in the EU ETS can trade emission allowances across the EU; this means that if a reduced demand for allowances occurs in one State, industries in other States may use up these allowances, see Peeters (2016) o.c. 128.
[40] See the Appeal Court's judgment in the *Urgenda Case*, para. 54.
[41] Note that the Market Stability Reserve Mechanism has been established, which renders this argument subject to evaluation in view of the functioning of the mechanism.
[42] See the Appeal Court's judgment in the *Urgenda Case*, para. 57.
[43] Ibid.

remove, and abstain from adopting, measures that can constitute obstacles to the free trade within the Union. Alas, this is not certain.

2.5.2 The Appeal Court's response to the State's arguments

Before delving in to the response by the court, it is relevant to stress that, as follows from the elaboration above on the EU ETS and the ESD, the two schemes have different approaches. There is a single, EU-wide cap, setting the target that the EU should reduce its greenhouse gas emissions with 20% in 2020. The EU ETS then sets a specific reduction target for the industry sectors covered of 21% compared to 2005-levels. It is relevant to stress again that the EU ETS does not set a specific reduction target for each Member State. The ESD aims to reduce greenhouse gas emissions for the sectors that it covers by 10% compared to 2005-levels, and sets out binding national targets for each Member State in order to achieve this.

In the Appeal Court's judgment, there seems to have been a confusion about the overall EU reduction target and these two schemes. In para. 3.7, it is stated that the EU must achieve a reduction of greenhouse gas emissions of 20% by 2020 relative to 1990. This is correct. However, the Appeal Court then noted, "*this translates, for the Netherlands, to a minimum reduction target of 16% for the non-ETS sector and 21% for the ETS sector by 2020*"[44] (emphasis added). The Appeal Court thus seems to indicate that there *is* in fact an individual Member State target under the EU ETS – but as explained above in Section 2.2, there is not.

I will now turn to the actual argumentation by the court.

Regarding the ability for the Dutch State to "do more" than what is required and/or permitted under the EU ETS, the Appeal Court referred to Art 193 TFEU, stating that Member States can adopt measures that reduce "*CO2 emissions*" (sic!)[45] further than those ensuing from the EU ETS, provided that these measures do not interfere with the functioning and the system of the EU ETS in an unacceptable manner.[46] The Appeal Court then concluded that the Dutch State had not substantiated that the reduction order by the District Court would cause the Netherlands to having to adopt measures that would in fact be contrary to Art 193 TFEU. However, the Appeal Court did not consider the possibility for the EU ETS industries to trade emissions individually. If the EU ETS industries in the Netherlands do not make use of all their allowances under the scheme, they are able to sell

[44] Ibid, para. 3.7.
[45] It is interesting, and somehow strange, that the Appeal Court only refers to CO2, since the EU ETS and the ESD covers other gases than just CO2. Perhaps it is a mistake from the Appeal Court.
[46] Ibid, para. 54.

the surplus allowances to EU ETS industries in other Member States. This would not decrease the total emissions on EU or global level, but (perhaps) only in the Netherlands (i.e. the waterbed effect). If the Netherlands should counter this risk, it would have to introduce restrictions on the industries' trading with allowances, which then again could interfere with the EU ETS as a whole. It cannot be denied that this could be contrary to Art 193 TFEU – and thus, not a very strong argument of the court.

This leads to the question of whether the Appeal Court at all considered the flexibility mechanisms of both instruments (the EU ETS and the ESD). It does not appear to have done so; when considering the risk of a waterbed effect, the court rejected that this will happen, because "*it cannot be assumed beforehand that other Member States will take less far-reaching measures than the Netherlands*". In addition, the Court added, Urgenda had argued based on i.a. a report of the Danish Council on Climate Change that a waterbed effect will not occur before 2050 – and the Dutch State had failed to contest this argumentation.[47]

The Appeal Court also rejected the State's argument that a 20% reduction on EU level is considered sufficient, and thus must be sufficient for the individual Member States as well. The court noted in this connection that the Dutch State had "*failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible*".[48] It is unclear whether the Appeal Court meant that the overall reduction target of 20% at EU level is insufficient as well, but in any case, it is striking that the Court suggests that *the State* should have explained that the EU level target *is* credible.

Concerning the last two arguments, on carbon leakage and a level playing field, which the Appeal Court decided to process together, the court simply stated that the Dutch State had not substantiated that these are potential risks, should the Netherlands obtain a more ambitious greenhouse gas emissions reduction goal. The Appeal Court also again referred to that other Member States are pursuing a stricter reduction goal,[49] and seems to have concluded on that basis that there is no issue with a level playing field.

Finally, the Appeal Court established that due to the possibility to obtain more stringent protection measures under Art 193 TFEU, it is "*difficult to envisage*" that "*not maintaining a 'level playing field' for Dutch companies would constitute a violation of a particular legal rule*".[50] Here, it seems that the Appeal Court overlooked – or at least did not assess – the risk of the Netherlands creating unjustified barriers to the EU's internal market, and thus the

[47] Ibid, para. 56.
[48] Ibid, para. 52.
[49] Ibid, para. 57.
[50] Ibid.

possible frustration of one of the secondary objectives of the EU ETS, i.e. preserving the integrity of the internal market, cf. Recital 5 of the preamble to the EU ETS Directive.

In addition, the principle of equal treatment applies within the scope of the EU ETS. This follows from the CJEU's decision in the Arcelor Case, Case C-127/07[51] (it is relevant to note that the case regarded the first original EU ETS Directive, which had a bottom-up approach – but the equal treatment observations are nonetheless still relevant). The case regarded a request for a preliminary ruling by a French Court, asking the CJEU whether the EU ETS Directive was valid in the light of the principle of equal treatment, insofar it makes the allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastic industries.[52] The Court found that the different sources of greenhouse gas emissions relating to economic activities are in principle a comparable situation, since all emitters of greenhouse gases are liable to contribute to a dangerous interference with the climate system, and all sectors of the economy, which emit such gases, can contribute to the functioning of the allowance trading scheme. The difference in treatment was, however, allowed due to the step-by-step approach by the EU ETS.[53] From this follows that the principle of equal treatment applies to the EU ETS, and thus must be observed, also when it comes to Member States adopting more stringent measures under Art 193 TFEU. This means that the Dutch State might face difficulties when implementing the higher reduction order, since it would perhaps have to incur costs on the EU ETS industries located in the Netherlands; costs that the same industries located in other Member States would not have. This leaves the question of whether the principle of equal treatment of industries could be infringed.

Following the above, it most certainly is not evident – contrary to what the Appeal Court stated – that there is no issue with a level playing field or other (EU) legal rules, such as equal treatment of industries under the EU ETS, when the Dutch State was ordered to maintain a higher reduction goal. In my view, when the court wanted to make use of Art 193 TFEU to impose a higher reduction goal on the Netherlands, and thus leaving no room for the State to decide on the matter itself, the court should also have investigated itself the potential impact and consequences of such a measure.

2.6 Summarising remarks

As is evident from the above, the EU has an overall reduction target of greenhouse gas emissions of 20% compared to 1990-levels by 2020. To achieve this goal, the EU has

[51] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* ECLI:EU:C:2008:728.
[52] Ibid, para. 22.
[53] Ibid, para. 72.

adopted the EU ETS and the ESD. The EU ETS sets out a reduction goal for the industries covered of 21% compared to 2005-levels by 2020, and the ESD has a reduction goal for the industries covered of 10% compared to 2005-levels by 2020. The EU ETS does not set out specific reduction goals for each Member State, whereas the ESD does. The Netherlands must achieve a reduction of 16% compared to 2005-levels by 2020 in the ESD industry sectors, and the Dutch EU ETS industries are acting within the EU wide cap.

The Appeal Court has, in the *Urgenda Case*, treated all greenhouse gas emissions under the same "bubble" and only to a very limited extent considered the differentiation between the EU ETS and the ESD.

The Appeal Court rejected all arguments from the Dutch State that related to the limitation for the Netherlands to adopt more stringent reduction measures in light of EU legislation. What poses a significant issue in this regard is the court's conclusion that because Art 193 TFEU leaves an option for the Member States to "do more" on the environmental policy area, there is no problem with imposing a higher reduction goal on the Netherlands. The court did not consider the possible limitation to the functioning of the internal market, or the functioning of the EU ETS market for allowances, that this order could incur. Of great importance is, as pointed out by Squintani et al.[54], that an Art 193 TFEU-measure needs to be compatible with the EU ETS, including its secondary objectives, and not frustrate it, and, as pointed out by the same authors and indicated by the European Commission, there is most likely no room for Member States to make use of more stringent measures under Art 193 TFEU due to the current EU wide cap on emissions reductions. This would imply that the national courts probably cannot impose stricter national reduction targets for total emissions under this provision.

Furthermore, it seems problematic that the Dutch courts did not address the flexibility mechanisms of the EU ETS and the ESD. The EU ETS industries and the Netherlands can store over-achievement under both schemes, respectively, and sell surplus allowances to other industries/Member States. If this in fact happens, there will be no actual overall global reduction in greenhouse gas emissions, but only in the Netherlands. In case the Netherlands would not be able to achieve the higher reduction goal, there is also the possibility for the State to buy allowances from other Member States, paid with Dutch tax money, therewith actually subsidising emissions in other countries. This would also not decrease the total amount of emissions, but just "move them" from one place to another. On the other hand, this raises the question of whether the Dutch courts knowingly left this issue untouched, because they would have had to directly interfere with, limit or at least assess the functioning of the EU schemes, had they taken it into consideration.

[54] Squintani et al. (2012) o.c. 75ff.

As follows, in my opinion, the Appeal Court did not consider the EU-legislation in the manner they ought to have done.

3. The Fundamental Rights Aspect

3.1 The Appeal Court's reasoning: How it arrived at its conclusion

Urgenda based its claim against the Dutch State on Arts 2 and 8 ECHR, stating that the Dutch State had acted unlawfully towards Urgenda and the 886 citizens represented by it. According to Urgenda, the unlawful action stems from the Dutch State's "procrastination" concerning committing to a greater emission reduction goal by end-2020, as this is violating proper conduct, and is contrary to the positive and negative duty of care expressed in Arts 2 and 8 ECHR. Art 2 concerns the right to life, and Art 8 regards respect for private and family life.

3.1.1 Art 34 ECHR

The Appeal Court began with assessing whether Urgenda could base its claim directly on the ECHR. The District Court had found in its judgment that this was not possible for Urgenda, because before the ECtHR, cf. Art 34 ECHR, there is no access for NGOs to present a general claim, as they are only permitted to represent the individual interests of their members, in case their members are potential victims of human rights violations. On this basis, the District Court derived that Urgenda could not base its claim directly on the ECHR before the Dutch courts.[55] The Appeal Court disagreed with the District Court. It stated that Art 34 ECHR cannot serve as a basis for denying Urgenda the possibility to rely on Arts 2 and 8 in the proceedings, because Art 34 only concerns access to the ECtHR – and the ECtHR has not given a definite answer about access to the Dutch courts.[56]

According to Verschuuren[57], the Appeal Court went beyond the scope of the ECHR, when it allowed Urgenda to invoke human rights in an attempt to defend the environment as a general interest. While it is true that the signatory States to the ECHR are granted a *margin of appreciation*, which means that they have a certain space for manoeuvre in fulfilling their obligations under the ECHR[58], this interpretation may not be in accordance with the

[55] See the District Court's judgment in the *Urgenda Case*, para. 4.45.
[56] See the Appeal Court's judgment in the *Urgenda Case*, para. 35.
[57] Verschuuren, J., 'The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal upholds judgment requiring the Netherlands to further reduce its greenhouse gas emissions' (2019) Review of European, Comparative and International Environmental Law, Vol. 28, No. 1, 96.
[58] The need for a margin of appreciation stems from the diverse cultural and legal traditions in the Member States, which made and still makes it difficult to identify uniform European standards of

jurisprudence of the Supreme Court of the Netherlands. The Dutch Supreme Court has, in fact, already ruled that the Dutch courts cannot go further in interpreting the ECHR than the ECtHR itself, cf. case R00/132HR, decided on 10 August 2001. In para. 3.9 of this judgment, the Supreme Court stated, "[s]*uch an incompatibility cannot be assumed exclusively based on an interpretation of the term "family life" by a national – Dutch – judge in the light of recently established laws, which leads to a more extensive protection than can be assumed on grounds of the jurisprudence of the ECtHR concerning Art 8 ECHR*" [59] (emphasis added).

It remains to be seen whether the Supreme Court will allow Urgenda to base its claim on the ECHR. Verschuuren's view is that the Appeal Court interpreted the ECHR broader than the ECtHR, which would be contrary to the Supreme Court's ruling from 2001. In my view, however, the Appeal Court merely expanded the application of Art 34 ECHR on national level, which is not necessarily a broader interpretation.

3.1.2 Arts 2 and 8 ECHR

After concluding that Urgenda could base its claim on the ECHR, the Appeal Court continued with the assessment of the two invoked provisions.

The Appeal Court initially stated that the scope of both Articles include environment-related situations.[60] The court also stated that the Dutch State under both Articles is subject to a *positive obligation* to take concrete actions to prevent *a future violation* of the interests protected under the provisions, and translates this as the *duty of care* under the ECHR.[61]

Based on ECtHR case law, the Appeal Court concluded that the future violation is deemed to exist, if the protected interests are in danger of being affected as result of an act/activity or natural event. The concrete infringement is required to exceed *the minimum level of severity*.[62] The court continued with stating that the Dutch State only had to take reasonable, concrete actions, and this action had to be authorised in the case of a real and imminent threat, which the government was, or ought to have been, aware of.[63]

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human rights. See the Council of Europe, 'The Margin of Appreciation – Introduction' <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#P70_1637> last accessed 26 June 2019 (on file with author).

[59] Own translation. The original Dutch text is: "*Een zodanige onverenigbaarheid kan niet worden aangenomen uitsluitend op basis van een uitleg door de nationale - Nederlandse - rechter van het begrip "family life" in het licht van recent tot stand gekomen wetgeving, die leidt tot een verdergaande bescherming dan op grond van de rechtspraak van het EHRM met betrekking tot art. 8 EVRM mag worden aangenomen*". See the Supreme Court of the Netherlands judgment of 10 August 2001 in case R00/132HR *[Verzoektster] v [Verweerster]* ECLI:NL:HR:2001:ZC3598.

[60] See the Appeal Court's judgment in the *Urgenda Case*, para. 40.

[61] Ibid, para. 41.

[62] Ibid.

[63] Ibid, para. 42.

Following this reasoning, the court structured its assessment of the infringement of Arts 2 and 8 with, first, reviewing (briefly) the severity of the climate change situation.[64] Then, the court asserted whether the Dutch State acted unlawfully by not (aiming to) reducing the Netherlands' greenhouse gas emissions with at least 25% by end-2020,[65] and finally the court evaluated the Dutch State's defence.[66] The majority of this evaluation has already been elaborated on in Chapter 2 of this thesis, and will therefore not be commented further.

When the Appeal Court reviewed the severity of the climate change situation, it included an assessment of the consequences further global warming will have, while referring to different environmental impact reports.[67] The court thereinafter stated that it is of the opinion that it is appropriate to speak of a real threat of dangerous climate change, and this entails a risk for the current generation of Dutch citizens to be confronted with loss of life and/or a disruption of family life.[68]

In the assertion of whether the Dutch State acted unlawfully, the Appeal Court emphasised that it did not believe it possible for the Netherlands to achieve the 49% reduction target in 2030, if the Dutch State did not increase its current efforts to reduce greenhouse gas emissions.[69] The court primarily focused on the achievement of the "2°C target"[70], stating that reaching this goal requires an emission reduction of 25-40% in 2020,[71] and stressing that the Dutch State had known about this for a long time.[72] Finally, the Appeal Court concluded that a reduction obligation of at least 25% by end-2020 is in line with the State's duty of care.[73]

In its conclusion the court stated that the Dutch State had failed to fulfil its duty of care pursuant to Arts 2 and 8 ECHR, by adhering to the EU climate legislation, steering towards a 20% emissions reduction by 2020.[74]

The Appeal Court, interestingly enough, does not mention the ECHR provisions – or fundamental rights in general – further in its analysis.

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[64] See the Appeal Court's judgment in the *Urgenda Case*, paras. 44-45.
[65] Ibid, paras. 46-53.
[66] Ibid, paras. 54-70.
[67] Ibid, para. 44.
[68] Ibid, para. 45.
[69] Ibid, paras. 47-48.
[70] Scientists have identified two degrees of warming compared to pre-industrial levels as the point at which climate change becomes dangerous. Therefore, the international focus is to keep the global temperatures from rising above this level. In the Paris Agreement, however, it is mentioned in Art 2(1)(a) that the goal should be to keep the temperature *well below* this limit, and preferably limiting it to 1.5°C above pre-industrial levels.
[71] See the Appeal Court's judgment in the *Urgenda Case*, para. 49.
[72] Ibid, para. 50.
[73] Ibid, para. 53.
[74] Ibid, para. 73.

3.1.3 Obligation to include the Charter in the Urgenda Case?

As the focus of this thesis is primarily on the EU aspect of the *Urgenda Case*, it seems relevant to touch upon the subject of whether the Dutch courts could – or should – have included the Charter in the case, irrespective of whether it was brought up by the parties. There is, unfortunately, scarce literature on this matter, which has an impact on the extent of the following discussion.

The Member States have a duty to respect the rights, observe the principles and *promote the application* of the Charter when acting within the scope of EU law, cf. Art 51(1) of the Charter. The duty enshrined in this Article rests on all organs of the Member States, including i.a. judges.[75]

National courts are obliged to interpret national measures in conformity with the Charter, whenever these national measures come within the scope of EU law.[76] This, together with the duty of the judges to promote the Charter, indicates that the parties in proceedings before a national court do not have to invoke the Charter for the national judge to take it into consideration, when adjudicating the dispute. This is also confirmed in the Final Handbook on Judicial Interaction Techniques – Their Potential and Use in European Fundamental Rights Adjudication[77]. In this Handbook, it is stated concerning application of EU fundamental rights, "*although parties in the proceedings usually advance arguments based on compliance with fundamental rights obligations, judges can also consider them on their own motion, since respect of fundamental rights standards is an integral part of the principle of legality, a general principle of Union law*".[78] According to the same Handbook, the national judges need to be ready to consider European fundamental rights implication even when they are missing from the reasoning of the parties.[79]

Although there is no case law of Art 193 TFEU in light of Art 51(1) of the Charter, I assume that adopting further going measures are considered as acting within the scope of EU law, or implementing EU law – at least until the CJEU decides differently. The criterion for invoking the duty to promote the Charter under Art 51(1) is therefore fulfilled. Consequently, if the view of FRA and the interpretation in the Handbook is followed, the Dutch national

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[75] European Union Agency for Fundamental Rights, Handbook: Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level (2018), 25.
[76] Ibid, 31.
[77] Moraru, M., and Podstawa, K., in collaboration with the Expert team of the JUDCOOP Project, *Final Handbook: Judicial Interaction Techniques – Their potential and use in European Fundamental Rights adjudication* (2014) The European University Institute, Law Department, Centre for Judicial Cooperation.
[78] Moraru and Podstawa (2014) o.c. 12.
[79] Ibid, 13.

courts not only *could* have included the Charter in the *Urgenda Case*, but were also under an *obligation* to do so.

3.2 Obligation to observe fundamental rights when "doing more" under Art 193 TFEU?

Since the *Urgenda Case* regarded the ECHR, but the order imposed by the Appeal Court was based, also, on Art 193 TFEU, it is relevant to consider whether the Dutch State, when complying with the order of the court, must observe fundamental rights, hereunder the Charter, as well as respect the Treaties and secondary EU law. The Appeal Court did not mention *how* the Dutch State was to comply with the higher reduction goal – probably since this would be a more direct interference in national politics. Nonetheless, it is striking that the court did not consider further on Art 193 TFEU. In my opinion, and as already mentioned in Chapter 3, when a national court imposes an obligation on a Member State to undertake more stringent measures on the basis of Art 193, it should consider all aspects of such obligation – namely the potential conflict with other EU legislation – especially when the court does not consult the CJEU.

Advocate General Kokott has outlined the obligation to respect fundamental rights when taking further going action under Art 193 TFEU in her Opinion on Case C-60/18[80]. The case concerned a request for a preliminary ruling by the Court of Appeal, Tallinn, Estonia, regarding "end-of-waste status", i.e. the conditions under which waste is converted back into a normal commodity, and thus, no longer is covered by the waste legislation.

In Chapter C: Member States' powers and the limits thereof[81], the Advocate General pointed out that the Member States under Art 6(4) of the Waste Directive[82] may decide on a case-by-case basis, whether certain waste has ceased to be waste, but they are not required to recognise that the waste's status as such has ended.[83] The Member States thus have the power to make decisions in respect of recovery operations and the level of protection these are required to afford, i.e. provide different (higher) standards of protection than set out in the Waste Directive.[84] The Advocate General noted that Art 193 TFEU underpins the Member States' power, in providing that they may maintain or introduce more stringent protective measures.[85]

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[80] Opinion of Advocate General Kokott delivered on 29 November 2018 in Case C-60/18 *AS Tallinna Vesi v Keskkonnaamet* ECLI:EU:C:2018:969.
[81] Ibid, paras. 41-47.
[82] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22.11.2008, p. 3–30.
[83] Advocate General Kokott (2018), o.c. para. 43.
[84] Ibid, para. 42.
[85] Ibid, para. 43.

Advocate General Kokott, however, then pointed out that the freedom the Member States enjoy under Art 6(4) of the Waste Directive is not unlimited; the Member States must respect the fundamental rights of the persons concerned, including the right to property and the freedom to conduct a business, cf. Arts 16 and 17 of the Charter.[86] Even more stringent protective measures under Art 193 TFEU, the Advocate General continued, "*must not only be consistent with the objectives of the relevant EU measure, but also comply with EU law, in particular its general legal principles, which include fundamental rights*"[87] (emphasis added). Note that the Advocate General's opinion is not yet confirmed by the CJEU.

If the opinion is followed, the Member States are obliged, when adopting more stringent measures than already set out in EU law under Art 193 TFEU, not only to ensure that these measures comply with the Treaties and secondary EU law; they must also observe compliance with fundamental rights. Reins is of the same opinion, stating in her contribution to Peeters and Eliantoni's Research Handbook on EU Environmental Law that, "[...] *whilst the Court has not yet expressed itself on the question as to whether more stringent protective measures must equally comply with general principles of EU law, including fundamental rights, this would appear to be a logical conclusion*".[88]

This leaves the question of what impact this obligation would have on the *Urgenda Case*. The Appeal Court abstained from, as mentioned above, laying down *how* the Netherlands should achieve the higher reduction goal, and it also skipped the consideration of the potential (non-)conformity with EU law. In my view, the court should have considered the consequences of its judgment, but instead it seems to have been of the opinion that it was for the Dutch State to prove that maintaining a higher reduction goal would infringe Art 193 TFEU.[89] But what would happen, then, if the Dutch State were found to infringe e.g. the right to conduct a business, cf. Art 16 Charter, in its effort to implement the Dutch court decision? What if it is not possible for the Dutch State to comply with *Urgenda Case* judgment without infringing EU legislation? Should the State then choose non-compliance with either EU law or the judgment? As it follows from my arguments in Chapter 2, these are not mere hypothetical questions. Therefore, it is remarkable that the Appeal Court did not consider any of them in its decision.

[86] Ibid, para. 44.
[87] Ibid, para. 45.
[88] Reins, L., 'Where Eagles Dare: How much further may EU Member States go under Article 193 TFEU?', in Peeters, M., and Eliantoni, M. (eds), *Research Handbook on EU Environmental Law* (Cheltenham 2019 forthcoming), 15.
[89] See i.a. para. 57 of the Appeal Court's judgment in the *Urgenda Case*.

3.3 Summarising remarks

Following the above, the Appeal Court mainly based its analysis of fundamental rights on that the Dutch State had to have been aware of the significance of the climate change problem; and thus had neglected its duty of care, which the court derived from the ECHR provisions, by not maintaining a higher reduction goal. The court may, however, have overstepped its limitations in finding that that Urgenda could base its claim directly on the ECHR.

There exists an obligation for the Member States, including national courts, to promote the application of the Charter. Following this, there might also be a duty for the national judges to consider the Charter *ex officio* – and thus the Dutch courts should have included Charter of its own motion in the *Urgenda Case*.

Lastly, on the fundamental rights aspect, if AG Kokott's view is followed, the Member States are under an obligation to respect fundamental rights, when taking more stringent measures under Art 193 TFEU. This does, however, still need to be confirmed by the CJEU. Also, it is not *per se* relevant to the adjudication of the *Urgenda Case*, because the case does not regard *how* the Dutch State should achieve the higher reduction goal – which is probably a deliberate choice by the court in order to avoid a conflict with both the separation of powers and EU legislation.

4. Preliminary References

The preliminary reference procedure follows from Art 267 TFEU. According to this provision, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

The preliminary reference procedure has three main purposes: To provide national courts with assistance on questions regarding the interpretation of EU law; to contribute to a uniform application of EU law across the Union; and to create an additional mechanism for an *ex post* verification of the conformity of acts of the EU institutions with primary EU law.[90]

A preliminary reference can be submitted to the CJEU if a question of EU law is raised before the national court, and a decision on that question is necessary for the national court to give judgment on the case at hand.[91] The CJEU will not answer hypothetical questions,

[90] European Parliamentary Research Service, '*Briefing – Preliminary reference procedure*', July 2017, 1.
[91] Ibid, 4.

nor will it assess the validity of a provision of EU law that bears no relation to the facts of the case before the national court.[92]

As a starting point, there is no obligation for the national courts to refer questions to the CJEU. The decision to refer rests on the national court alone, and the procedure does not depend on the parties requesting the reference procedure; the national courts can thus decide *ex officio* to refer a preliminary reference question to the CJEU. Nonetheless, there are two exceptions to this main rule.

The first exception relates to the situation where the case is pending before a court against whose decisions there is no judicial remedy under national law, cf. Art 267(3) TFEU. In this case, the national court *must* refer the preliminary question to the CJEU. However, the CJEU has decided that there are – again – three exceptions to this referral obligation, namely in situations of *acte clair* (the correct interpretation of EU law is obvious); *acte éclairé* (the CJEU previously ruled on the matter); or when EU law is irrelevant to the dispute.[93]

The second exception to the rule that national courts are free to refer (or not refer) questions to the CJEU, is if the national court, irrespective of whether it is a last instance court, intends to consider an act of the EU institutions illegal, and refuse its application. The national courts may thus not by themselves decide on the legality of EU measures, as this is an exclusive competence of the CJEU.[94]

The preliminary reference questions that can be asked to the CJEU are matters regarding interpretation of EU law, i.e. the Treaties or acts of the institutions etc. and (unwritten) general principles. It can also be questions regarding the legality of acts of the institutions etc., i.e. the conformity of such acts with the Treaties, general principles of EU law, directly applicable international treaties binding on the EU, and superior acts of secondary EU law.[95]

With regards to the conformity of national law with EU law, the CJEU can only interpret the EU act transposed in the national law or on which the national act is based; it cannot interpret national acts of the Member States, nor declare these invalid.[96]

A preliminary reference to the CJEU is, however, not the only option anymore for national courts to seek advice from international instances.

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[92] Case C-318/00, *Bacardi-Martini SAS and Cellier des Dauphins v Newcastle United Football Company Ltd.* ECLI:EU:C:2003:41, para. 43.
[93] These three exceptions are called the *CILFIT criteria*, and was developed by the CJEU in Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* ECLI:EU:C:1982:335.
[94] See e.g. Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452, paras. 14-15.
[95] European Parliamentary Research Service, '*Briefing – Preliminary reference procedure*', July 2017, 7.
[96] Larion, I-M., 'The Limits of the Court of Justice of the European Union's Jurisdiction to Answer Preliminary References' (2016) *Challenges of the Knowledge Society, Directory of Open Access Journals*, 420.

4.1 "Preliminary references" to the ECtHR

Protocol No 16 to the ECHR was adopted on 2 October 2013. The Protocol builds on the consideration that the extension of the ECtHR's competence to give advisory opinions would further enhance the interaction between the ECtHR and the national authorities of the signatory States to the ECHR, and thereby reinforce the implementation of the ECHR.[97] As such, the Protocol does not allow for preliminary references to the same extent as references under Art 267 TFEU to the CJEU (hence the citation marks in the header), but merely opens up for "advisory opinions" to be given by the ECtHR.

Art 1 of the Protocol allows only the highest courts and tribunals of a signatory State to request the advisory opinions. The question must regard a principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its Protocols. According to Art 5 of the Protocol, the advisory opinions of the ECtHR are not binding, as opposed to preliminary rulings from the CJEU, which are binding both on the referring court and on all courts in EU countries.[98]

The Netherlands signed Protocol No 16 in October 2013, but only ratified it on 12 February 2019. It entered into force on 1 June 2019.[99]

4.1.1 Potential conflict with preliminary references to the CJEU?

As this thesis is continuing on the track of the EU aspect of the *Urgenda Case*, it seems indeed relevant to delve into the question of whether a conflict could arise between the possibility for Dutch courts to ask advisory opinions of the ECtHR, and refer preliminary questions to the CJEU. Advocate General for the Dutch Supreme Court, Taru Spronken, also recently raised the question of what would happen with a preliminary reference question in a case that concerns human rights, where both the Charter and the ECHR applies: "[…] [C]*an the national court consult both the ECJ and the ECtHR? Or should he choose? Or should the ECtHR and the ECJ coordinate with each other?*"[100]

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[97] See Preamble no. 4 to Protocol No. 16 to the ECHR.
[98] See i.a. EUR-Lex 'Summary of Recommendations to national courts in the use of the preliminary ruling procedure' < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14552> last accessed 23 July 2019 (on file with author).
[99] See No. 214 of the Council of Europe Portal 'Treaty list for a specific State – Status as of 23/07/2019 – Netherlands' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/NET?p_auth=kjblSRZ6> last accessed 23 July 2019 (on file with author).
[100] Spronken, T., 'Protocol 16 EVRM: nog meer prejudiciële vragen' (2019) *Nederlands Juristenblad*, NJB 2019/1131, afl. 20. Text translated from Dutch. The original Dutch text is: "*Als het bijvoorbeeld gaat om mensenrechten, en het Handvest van de Grondrechten van de EU evenals het EVRM zijn op de zaak van toepassing, kan de nationale rechter dan zowel bij het HvJ EU als het EHRM te rade gaan? Of moet hij kiezen? Of moeten het EHRM en het HvJ EU met elkaar afstemmen?*".

There is limited literature on this topic; possibly because only a few EU Member States have actually ratified Protocol No 16[101], and the (potential) conflict therefore has not become evident yet. Nonetheless, Advocate General Kokott foresaw the issue in her view[102] on the CJEU's Opinion 2/13 pursuant to Art 218(11) TFEU on the draft agreement providing for the EU's accession to the ECHR.[103] Unfortunately, the Court did not touch upon the potential conflict that the national courts may find themselves in, when making a decision on referring to either the ECtHR or the CJEU, but mainly focused on concerns regarding the possibility to circumvent the procedure of Art 267 TFEU through Protocol No 16.[104]

On the effects of Protocol No 16 on the powers of the CJEU, AG Kokott pointed out, first, that this Protocol could jeopardise the CJEU's role in relation to interpreting the ECHR within the EU, because the highest courts and tribunals of the Member States, which have ratified the Protocol, might be tempted to refer questions regarding interpretation of the ECHR to the ECtHR, instead of to the CJEU.[105] This is also the conclusion made by the CJEU in its Opinion.[106] This is, however, only if the EU accedes to the ECHR.

The Advocate General's view, however, went further than the Court's. According to AG Kokott, the issue would not be limited to occur only if the EU accedes to the ECHR. Irrespective of the accession, the courts and tribunals of Member States that have ratified Protocol No 16 can seek advice from the ECtHR on questions on fundamental rights relating to the interpretation of the ECHR, instead of referring questions that are identical in substance, but relate to the interpretation of the Charter, to the CJEU.[107]

In the next paragraph, AG Kokott provided a solution to the problem. She referred to the duty under Art 267(3) TFEU for the Member States' last instance courts and tribunals to refer matters to the CJEU for a preliminary ruling. The Article, she noted, "[…] *takes precedence over national law, and thus also over any international agreement that may have been ratified by individual Member States of the EU, such as Protocol No 16* […]".[108] Therefore, the Advocate General concluded, insofar the Member States' last instance courts and tribunals are called upon to determine a dispute within the scope of EU law, these courts and

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[101] As of 10 August 2019, 13 States have ratified the Protocol. See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=yAUt8mS7>.
[102] View of Advocate General Kokott delivered on 13 June 2014 on *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2014:2475.
[103] Court of Justice of the European Union opinion of 18 December 2014 *Case Opinion 2/13 of the Court (Full Court) pursuant to Article 218(11) TFEU* ECLI:EU:C:2014:2454.
[104] Ibid, paras. 196-200.
[105] Advocate General Kokott (2014) o.c. para. 139.
[106] Court of Justice of the European Union opinion of 18 December 2014 *Case Opinion 2/13 of the Court (Full Court) pursuant to Article 218(11) TFEU* ECLI:EU:C:2014:2454, para. 199.
[107] Advocate General Kokott (2014) o.c. para. 140.
[108] Ibid, para. 141.

tribunals are required "[…] *to refer questions concerning fundamental rights primarily to the* [CJEU] *and to respect primarily the decisions of that court*".[109]

If Advocate General Kokott's view is followed, this actually provides an answer to Advocate General Spronken's question, regarding what will happen with a preliminary reference question in a case that concerns human rights, where both the Charter and the ECHR applies; namely, that the Supreme Court of the Netherlands will have to refer the question to the CJEU. This would thus also be the solution in the *Urgenda Case*.

4.2 Necessity

After these introductory remarks on the procedure under Art 267 TFEU and the possibility for the highest instance courts to ask advisory opinions from the ECtHR, it is possible to begin the assessment of whether a preliminary reference question is necessary in the *Urgenda Case*, as the case is being adjudicated by the Dutch Supreme Court.

As already set out above, there is no obligation for national courts to refer preliminary question to the CJEU, unless it is either a) a last instance court decision (and again, the *CILFIT*-criteria must then be considered, or b) a matter of the validity of EU law.

In the following, the aim is to highlight the biggest conflicts with, or questions on, EU law, that arises from the *Urgenda Case*, as I see them. I will conclude, based on several arguments, that there is a necessity to refer to the CJEU.

First, there is definitely an issue in the Appeal Court's view on the conformity of EU law with the ECHR, as set out in Chapter 2, Section 5.2 above. When the Appeal Court stated that it did not consider an emissions reduction goal of 20% to be sufficient, it was not clear, whether the court meant on national or EU level. The court supported its argument with that the EU had committed to a 30% reduction goal (provided that other big emitters would do the same). On this basis, the court drew the conclusion that the EU itself must have thought that a reduction goal higher than 20% was necessary, when it stated, "*also the EU deems a greater reduction in 2020 necessary from a climate science point of view*".[110] Did the Appeal Court here, indirectly, declare the EU climate goal unlawful? This would be way beyond the boundaries of the national courts' competences, and definitely warrant a referral to the CJEU. A related question is whether a national court may adopt a reasoning that implies the insufficiency of EU legislation in ordering a Member State to adopt more ambitious measures in light of Article 193 TFEU.[111]

Another question that appears extremely relevant relates to the scope of Art 193 TFEU; is this provision a tool that can only be used by the Member States, i.e. the legislative

[109] Ibid.
[110] See the Appeal Court's judgment in the *Urgenda Case*, para. 72.
[111] Peeters (2016) o.c. 125.

authorities, vis-à-vis the EU in regards to taking further climate protective action, or does it also confer power on the national courts to impose higher standards on the States?

Furthermore, the Appeal Court in general sidestepped the issue of, or failed to acknowledge that, a meaningful change to the Dutch and EU goals necessitates an EU level change.[112] This is partly due to the flexibility mechanisms under the EU ETS and the ESD, and the fact that the EU ETS does not set a binding target on the Member States, but solely on the industries included in the scheme. It may be difficult to formulate a precise preliminary question on this matter, but it is nonetheless an important aspect.

Hereinafter follows the issue of the possible obstruction of the internal market, which could follow from the *Urgenda Case*. As already mentioned in Chapter 2, Section 2.5.2, imposing this higher national target on the Netherlands could interfere with the internal market – and, cf. Section 2.4 above, a more stringent measure under Art 193 TFEU must not obstruct the secondary objective of the EU legislation, on which it relates, and preserving the internal market is one of the secondary objectives of the EU ETS. In connection to this comes the issue of applying the principle of equal treatment under the EU ETS to the industries concerned; the CJEU dealt with this principle in *Arcelor*, Case C-127/07.[113] Exactly how the equal treatment principle applies is however not clear from the *Arcelor Case*,[114] which again could warrant a preliminary reference question.

Then, there is the issue of how the national courts in general are supposed to act in cases that (can) include both the ECHR and the Charter. Should the national courts include the Charter on their own motion? Are they perhaps even obliged hereto as a part of the obligation for the Member States to promote the Charter? And for the Netherlands in particular; whereto should the court refer questions that regard both the Charter and the ECHR? This question is, evidently, only relevant when the case is adjudicated before the highest instance courts, i.e. the Dutch Supreme Court, since, as outlined above, lower courts cannot request opinions under Protocol No 16 from the ECtHR. Nonetheless, this is the issue now in the *Urgenda Case*, as it is pending before the Dutch Supreme Court. It would seem, according to AG Kokott's view, that the preliminary reference procedure "trumps" the advisory opinion, but that is not settled by the CJEU – yet. Does the *Urgenda Case* not seem like a good opportunity to clarify this issue?

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[112] Purnhagen, K.P., van Zeben, J., Schebesta, H., Biesbroek, R., 'Rumbling in Robes Round 2 – Civil Court Orders Dutch State to Accelerate Climate Change Mitigation' (2019) *European Law Blog, News and comments on EU law*.

[113] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* ECLI:EU:C:2008:728.

[114] See Peeters, M., 'The EU ETS and the role of the courts: Emerging contours in the case of *Arcelor*' (2011) *Climate Law*, 2, 35.

4.3 Potential content of a preliminary reference question

Based on the above, it does indeed seem necessary that the Supreme Court of the Netherlands seriously considers to refer a request for preliminary ruling in the *Urgenda Case* to the CJEU. Several questions have arisen, and in the following, I will try to formulate a suggestion as per the content of a potential request.

The first, and perhaps most relevant question, should relate to whether it is at all possible for Member States to introduce more ambitious measures in the sense of a cap of total national emissions under the current EU climate legislation. The legal scholars do not seem to have a clear answer to this; and considering the Commission's view on the matter – that more stringent measures are possible under the ESD, but perhaps not before 2020, due to the EU wide cap under the EU ETS – it is necessary with guidance from the Court.

Next, there is the issue of whether national courts can impose a stricter reduction of greenhouse gas emissions for a Member State than is set out in the EU climate legislation, when this is not voluntarily agreed upon by the Member State in question. It is not certain whether the Court would answer a question of this sort – at least it has to be carefully formulated – since it partly relates to the national institutional competences of the Member States. Nonetheless, if a preliminary reference procedure is initiated in any case, it could be worth the try to include this question.

The third question partly also relates to the national court's institutional competences, but it goes further than that; it relates to whether a national court can declare that a Member State's action, which is based on and in compliance with EU climate legislation, is contrary to fundamental rights. This question is relevant, in that at this point in the *Urgenda Case*, the Appeal Court in my opinion indirectly declared EU climate legislation insufficient.

The next question is closely linked to the third question, and perhaps they could be formulated together. It regards whether the EU-wide climate goal of 20% emissions reduction by 2020 is sufficient to mitigate climate change; especially considering the EU's willingness to commit to a 30% reduction, if other great emitters would commit to the same. The Appeal Court based a great part of its argumentation on this, stating that since the EU did not consider a reduction goal of 20% to be sufficient, it also could not be sufficient for the Netherlands.

The last relevant question for the national court to ask, regards the fundamental rights and can be divided into two sub-questions; the first concerns whether there, based on the obligation to promote the application of the Charter, exists a duty for the national courts to include the Charter *ex officio* in cases, when it has not been brought up by the parties.

Secondly, what should the national courts do, when a case relates to both the Charter and the ECHR, and it is necessary for the last instance court to have clarification on matters that relate to fundamental rights? There will evidently be a conflict between referring a preliminary reference to the CJEU and asking an advisory opinion from the ECtHR. Based on the opinion of AG Kokott, Art 267 TFEU trumps Protocol 16, and considering the Court's history of protection the supremacy of EU law, it is highly likely that it would follow the Advocate General's view, but it is still necessary to get the Court's word for it, and the *Urgenda Case* does indeed seem like the obvious measure to that means.

4.4 Summarising remarks

Based on the above, regarding the conflict between the possibilities to refer a case to either the CJEU or the ECtHR, it seems adjacent to conclude, following Advocate General Kokott's opinion, that *if* a case includes both the Charter and the ECHR, the national (highest) court is obligated to refer the case to the CJEU, due to the primacy of EU law. The issue will, inherently, only arise when cases reach the highest courts, as it is only these courts that can request an advisory opinion by the ECtHR.

There is, in my opinion, no doubt about the necessity of a preliminary reference in the *Urgenda Case*. It gives rise to a number of interesting questions, some of which even have such great prejudicial potential that *not* asking the Court would simply be a waste. On this basis, I suggest the following preliminary reference questions be submitted to the CJEU in the *Urgenda Case*:

Question 1: Is it possible for Member States to introduce more stringent measures on the EU climate legislation area under Art 193 TFEU, considering the EU wide cap on emissions?

Question 2: Can a national court, based on Art 193 TFEU, impose a higher reduction of greenhouse gas emissions on a Member State, than is set out in EU climate legislation, when this is not voluntarily agreed upon by the Member State in question?

Question 3: Can a national court declare that a Member State's action, which is based on and in compliance with EU climate legislation, is contrary to fundamental rights?

Question 4: Is the EU climate goal of 20% emissions reduction by 2020 compared to 1990-levels sufficient to mitigate climate change?

Question 5: When a case regards both the ECHR and the Charter, does the national court have a duty to include the Charter *ex officio*? What if such a case reaches the highest instance court of a Member State that have ratified Protocol No 16 to the ECHR, whereto should the national court refer potential questions; the CJEU or the ECtHR?

5. Conclusion

Before bringing my final conclusions, it is important to point out that the aim of this thesis is to inspire – in general and the Dutch courts in particular – to maintain a focus on the EU dimension of national climate legislation for EU Member States, and the importance of preliminary reference rulings. It is not the intention to neglect the issues of climate change or the importance of setting high standards and goals for mitigating the effect climate change has on Earth. Nevertheless, however important it is to prevent (more) global warming, it is just as important to keep in mind the international legal obligations that the States have committed to. If this aspect is forgotten, we risk an unsustainable legal situation.

The task now remaining is to provide answers to the questions asked in Chapter 1.

The first question regarded whether the Appeal Court's decision was in compliance with EU primary law, this i.a. with a view to the use of Art 193 TFEU, and with EU secondary law, seeing the EU wide approach in reducing greenhouse gas emissions.

We have seen that the Appeal Court mainly based its argumentation on Art 193 TFEU, in brief stating that since there is an opportunity for the Dutch State to "do more" under this provision, and since the State did not provide sufficient argumentation that a higher reduction goal would be contrary to EU legislation, there was nothing hindering the use of Art 193 TFEU.

As a starting point, it is *in theory* allowed for the Netherlands to set higher emissions reduction goals within the framework of EU climate legislation, based on Art 193 TFEU, but seeing both the European Commission's statement that it is probably not possible, due to the EU wide target, and the legal scholars' stance on the matter, it is my opinion highly questionable whether it is *in practice* possible. It is also not clear that such a higher reduction goal will *not* interfere with i.a. the functioning of the internal market, the preservation of which is one of the secondary objectives of the EU ETS.

The Appeal Court also sidestepped the flexibility mechanisms of both the EU ETS and the ESD. Whilst the court may have refrained from telling the Dutch State *how* to achieve the higher reduction goal for obvious reasons (i.e. the separation of powers), it should have considered the flexibilities. The court order will have no value if the Dutch industries under the EU ETS or the Netherlands under the ESD sell surplus allowances to other industries/Member States, which have been saved because of the Netherlands' compliance with the order. This will simply just move the emissions to other countries.

So, the answer to the first part of the first question is that no, the Appeal Court's judgment does not appear to be in compliance with EU primary or secondary law. It is my opinion that the court overlooked these issues in its judgment.

But did the Appeal Court also mean to overstep its jurisdiction, and declare the EU climate goal contrary to fundamental rights? It is important to keep in mind that the Dutch courts did *not* assess the Netherlands' compliance with EU law, or how the EU legislation was implemented into Dutch law. They assessed the Dutch emissions reduction goal against fundamental rights (the ECHR), and thereby, indirectly, assessed the EU climate legislation's compliance with fundamental rights. According to the case law of the CJEU, the national courts of the Member States *cannot* declare EU legislation invalid. This power rests only with the CJEU. Nonetheless, when the Dutch court then stated that a reduction goal of greenhouse gas emissions lower than 25% is insufficient and in violation of fundamental rights, it did exactly that – without consulting the CJEU.

The second question stays within the field of fundamental rights. Does there exist an obligation for national courts to include the Charter *ex officio* in cases that regard fundamental rights? In my opinion, based on the argumentation in Chapter 3, such obligation can be derived from the Member States' duty to respect and promote the Charter, and thus, exists.

The final question that must be answered is whether the Dutch Supreme Court should refer one or more preliminary questions to the CJEU in the *Urgenda Case*, when it adjudicates the case. The answer must be a clear and resounding yes. In particular the question relating to whether it is at all possible to maintain a more ambitious reduction goal in light of the current EU climate legislation and the overall EU climate goal should be asked. The Supreme Court is also strongly encouraged to ask the CJEU, whether Art 193 TFEU can be used as a tool for national courts to force Member States to maintain more stringent measures on the climate area, than is set out on EU level – and if the national courts can do so, should they not consider the potential impact of such a measure on EU primary law, including i.a. on the internal market? Finally, the *Urgenda Case* seems to me like the perfect opportunity to clarify the possible conflict between preliminary references to the CJEU and Protocol No 16-referrals to the ECtHR.

Conclusively, I can only send my strongest recommendations to the Supreme Court of the Netherlands that it refers the *Urgenda Case* to the CJEU. Similar cases have arisen and thus, similar questions will evidently keep arising; why not be part of the legal clarification, instead of creating an even more uncertain situation?

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