



The Urgenda Case

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Court of Appeal Amsterdam

24 October 2022





- The consequences of a dangerous climate change caused by man-made GHG-emissions are such that dangerous climate change must be prevented.
- Prevention requires: urgently reducing man-made GHG-emissions to reach zero emissions before climate change becomes 'dangerous'.

OVERARCHING THEME

Doing nothing is not an option.

Doing 'not enough' is also not an option,
at least not an option that Dutch law allows to Dutch government.

But what is 'enough'?

Urgenda submitted:

The Dutch State will act
unlawful

if, by the end of 2020,

it has not reduced the annual volume of GHG-emissions from Dutch territory
with at least 25-40% relative to 1990-level.

The Dutch State informed us it will not commit to do so.

We ask the court to order the State it must do so.

3 JUDGEMENTS

- The District Court granted the Court order
The Court order relied on tort-law
- The Court of Appeal in The Hague confirmed the
Court order, but relied on art 2 and 8 ECHR
- The Supreme Court upheld the Judgement of the
Court of Appeal.



CHRONOLOGY (1)

- **1992 UNFCCC:**

objective (art 2): stabilizing concentration of GHG in the atmosphere at a level that would prevent dangerous man-made climate change, and to do so fast enough to allow ecosystems to adapt

- **2007 IPCC 4th Assessment Report (AR4):**

to stabilize atmospheric GHG-concentrations, man-made GHG-emissions (primarily CO₂) must be reduced to (practically) zero.

- **2014 IPCC 5th Assessment Report (AR5):**

as atmospheric GHG-concentrations rise, warming increases proportionally (there is a linear relation)

CHRONOLOGY (2)



- **24 June 2015** **Urgenda Judgment of the District Court**
- **12 December 2015** **Paris Agreement**
The Parties to UNFCCC agree on the text of the Paris Agreement.
In the Paris Agreement (article 2 (1)(a) it is agreed that to 'prevent a dangerous man-made climate change', global warming must be held 'well below 2° C, and striving for 1.5° C'
- **9 October 2018** **Urgenda Judgment Court of Appeal**
- **20 December 2019** **Urgenda Judgment Supreme Court**



WHERE ARE WE NOW?

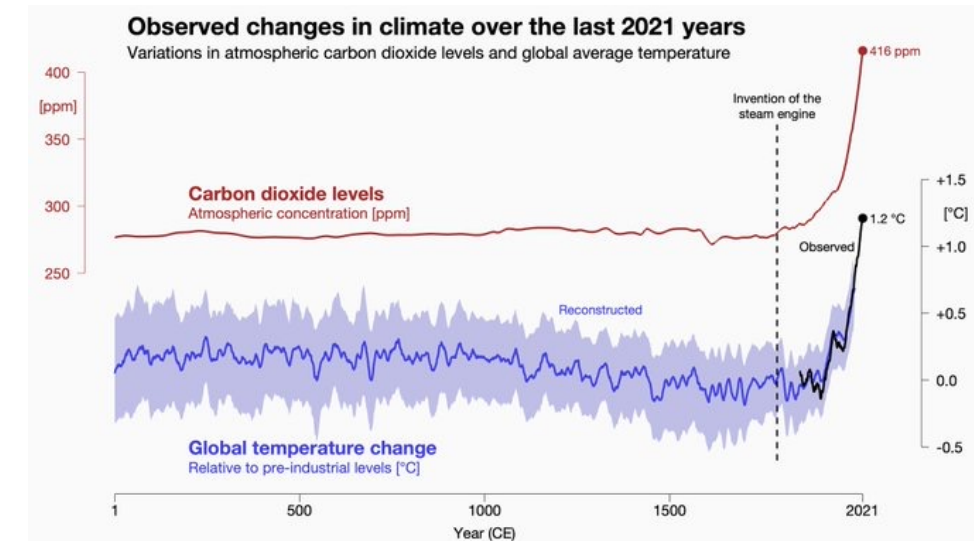
- **2022 IPCC AR6:**

- volume of global annual GHG-emissions: rising, not reducing → atmospheric concentration of GHG: rising

- global warming in 2022: 1.1° C and accelerating (now 0,19° C per decade)

- Sea Level Rise: accelerating
1901-1971: SLR 1.3 mm/yr
2006-2018: SLR 3.7 mm/yr

- marked increase of weather extremes
heatwaves, drought, heavy precipitation, cyclones



TORT (1)

Article 6:162 DCC (*Dutch Civil Code*)

- An act or omission is wrongful if it
 - is in breach of a written law (breach of statutory duty), or
 - is a violation of someone else's right or entitlement (interference and trespass), or
 - is a violation of the 'unwritten standards of care' that is due in society (negligence)

TORT (2) Why is the State responsible for the emissions of everyone on its territory?

- Art 21 Constitution: 'the government shall be concerned with the habitability of the country and improvement of the environment'
- Effective control over all emissions on its territory
- The State has assumed responsibility for all emissions on its territory

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 2 ECHR Right to life

Article 8 ECHR Right to respect for family life and home

Why is the State responsible for the emissions of everyone on its territory?

- Positive obligations: not merely refrain from interference, but obligation to actively secure and protect these rights of its citizens. This may include protection from environmental hazards and pollution, insofar as they may seriously affect the enjoyment of these rights.
- Effective control

CAUSATION (1)



CAUSATION (2)

The State argued:

- Dutch emissions, by themselves, do not cause climate change because they are insignificant.
→ requirement of causation is not met
- It follows that reducing Dutch emissions will not prevent climate change (the other countries keep on emitting);
→ reducing Dutch emissions is not an effective remedy for the protection against climate change that Urgenda is seeking
→ Urgenda does not have sufficient interest for their claim.
- ‘Climate change is a global collective problem that is a collective responsibility and can only be solved with collective action; there is no place for individual responsibility of States’

CAUSATION (3)

Preliminary considerations:

- Reminder: to stop the rising of atmospheric GHG concentrations and, proportionately linked to that, the rising of global temperature, man-made GHG emissions must be zero.
It follows that **there is no such thing as an insignificant, irrelevant emission** and no such thing as an irrelevant emission reduction.
- The causation-requirement (the 'but for'-test, the 'condicio-sine-qua-non' test) is **not very useful in cases with multiple causes**, and many legal systems use alternative approaches for cases with multiple causes
- Causation **is not very relevant for an injunction to prevent harm**

CAUSATION (4)

- **No Harm-principle:** every state is individually responsible for the damage and harm that is caused by activities from its territory.
- UNFCCC preamble: **UNFCCC builds on No Harm-principle**
article 3 UNFCCC: Common But Differentiated Responsibilities (CBDR)
- article 4 (2) Paris Agreement: Parties shall submit Nationally Determined Contributions (NDC) and all are required individually to pursue domestic measures aiming to achieve the objective of their mitigation NDC.
- Draft Articles on the Responsibility of States for Internationally Wrongful Acts:
Explanatory Memorandum on article 47: For example, **several States might contribute to polluting a river by the separate discharge of pollutants. (...) In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct** and by reference to its own international obligations.”
- Supreme Court: many countries have corresponding rules in their liability law system.

CAUSATION (5)

THE SUPREME COURT RULES: INDIVIDUAL STATE RESPONSIBILITY FOR THEIR SHARE IN CONTRIBUTING TO CLIMATE CHANGE

.... in view of the serious consequences of dangerous climate change [...], the defense that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted.

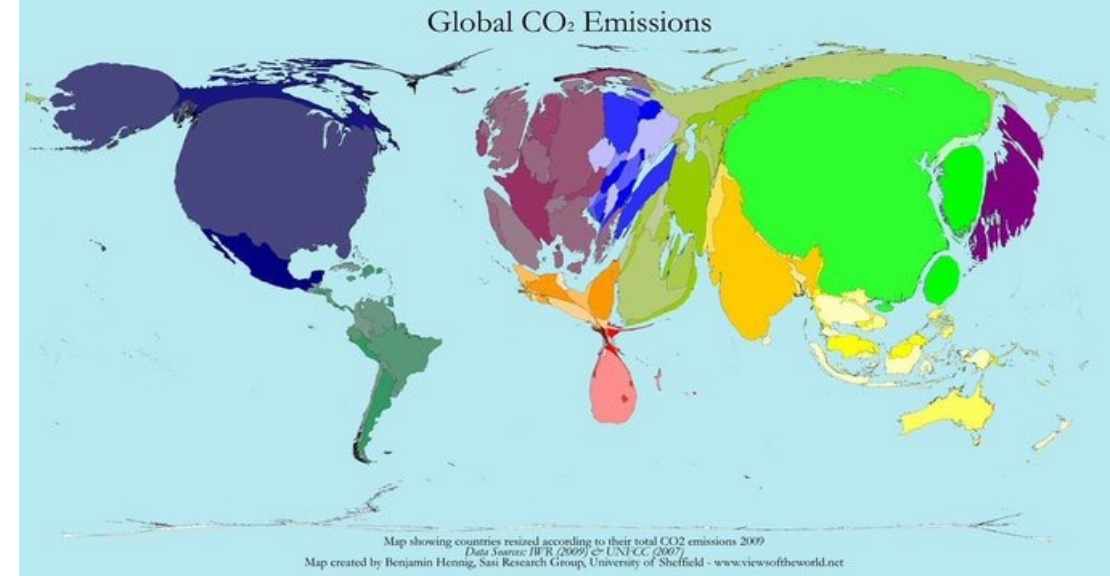
Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defense.

Indeed, acceptance of these defenses would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share.

If, on the other hand, this defense is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC cited above
...

CAUSATION (6)

THE SUPREME COURT ON 'INSIGNIFICANT'



“Each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget. The defense that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible.”
(ref Supreme Court USA in *Massachusetts v EPA*)

THE STATE MUST DO ENOUGH. BUT WHAT IS 'ENOUGH'?

Tort:

The State must comply with the 'unwritten standards of care that is due in society', taking into account all the relevant circumstances (e.g. role in society, Learned Hand-formula)

In short: the State must do what is appropriate/diligent/responsible for it to do

2 and 8 ECHR:

the State must do what is appropriate and effective, given the circumstances, to protect these rights insofar this does not result in an impossible or disproportionate burden for the State, and the State must be able to explain and justify the sufficiency of its actions.

In short: the State must do what is appropriate/diligent/responsible for it to do

WHAT IS 'APPROPRIATE' FOR DEVELOPED COUNTRIES LIKE THE NETHERLANDS?

- IPCC AR4 (2007) made clear that emissions must be drastically reduced.
- Box 13.7 in the Working Group III Report, p.776: suggests several **pathways** of emission-reductions to prevent a 'dangerous climate change' (the purpose of the UNFCCC, art 2) (Paris, 2015, well below 2C)
- Box 13.7 shows: If the global community of nations chooses to have a likely chance of keeping global warming below 2 C, and wishes to do so in a way that is fair and equitable according to most approaches (CBDR)
the well-developed industrialized nations as a group
must reduce their emissions with **25-40% in 2020** and **80-95% in 2050** relative to 1990.
(sets out an emissions reduction pathway)
The other nations are allowed to reduce their emissions at a slower rate, but still substantially.

POLITICAL ACCEPTANCE OF THE 25-40% PATHWAY (1)

The Parties to the UNFCCC and to the Kyoto-Protocol

- UNFCCC COP-Decision 1/CP13 ('the Bali Action-Plan', 2007): Parties agree: emissions must be substantially reduced. the Parties explicitly refer to **Box 13.7**
- UNFCCC COP-Decision 1/CP16 ('the Cancun Agreement', 2010): the Parties agree that global warming must be kept below 2°C and are therefore urged to reduce their emissions '**as is suggested in AR4**' (i.e. Box 13.7 in AR4 WGIII)
- At the same annual meeting, the Parties to the Kyoto-Protocol (a Treaty within the framework of the UNFCCC) **agree that they should reduce their emissions with 25-40% in 2020, in accordance with AR4.**
- Repeated/Referenced in:
1/CMP.7 (Durban, 2011); 1/CMP.8 (Doha, 2012); 1/CP.1 (Warsaw, 2013); 1/CP20 (Lima, 2014); 1/CP21 ('Paris Agreement', 2015)

POLITICAL ACCEPTANCE OF THE 25-40% PATHWAY (2)

- **EU 2007:** pledges 20% reduction in 2020 unconditionally which was acknowledged by the EU itself to be insufficient and therefore accompanied by an offer to reduce 30% if other nations will commit to comparable efforts (level playing field-argument)
- **UK, GE, DK:** 20% in 2020 is clearly insufficient; setting more ambitious national reduction targets
- **NL 2007:** in policy-documents and environmental programs of the government: **30% reduction in 2020** because “anything less is not a credible climate policy” – but abandoned in 2011 by the newly elected government: ‘we do not want to be a frontrunner ahead of the troops’ and will only do what EU requires us to do.

THE DUTCH COURTS: 25-40% IS A REFERENCE POINT FOR WHAT IS 'APPROPRIATE' (1)

- Art 2 UNFCCC: Parties must prevent dangerous climate change / prevention principle and precautionary principle apply
- Art 3 UNFCCC : Every Party has to put in efforts to reduce emissions, but some must put in more efforts than others. 'Common But Differentiated Responsibilities'
- Building on these treaty-obligations and building on scientific findings (AR4)
there is strong global political consensus
(emerging from COP-Decisions, EU-policy, NL-policy until 2011)
that the developed countries should reduce emissions with 25-40% in 2020.

The courts find:

the 'standard of care' of what is 'appropriate' for the State to do is: 25-40% in 2020

THE DUTCH COURTS: 25-40% IS A REFERENCE POINT FOR WHAT IS 'APPROPRIATE' (2)

- The State:
Urgenda is not a state and therefore can not rely on the UNFCCC and Paris Agreement.
The 25-40% reduction agreed in IPCC-Reports and in COP-Decisions and EU-policy documents and NL policy-documents is not legally binding.
- Courts:
True, but that does not imply that they are irrelevant.
These treaties and documents (and subsequent national practices) **reflect** a global **consensus** on a standard, a reference point, a measure for what a developed, industrialized State **should do** to fulfill its responsibility and do its 'fair part' in preventing a dangerous climate change.

THE DUTCH COURTS: 25-40% IS A REFERENCE POINT FOR WHAT IS 'APPROPRIATE' (3)

Supreme Court quotes ECtHR in Demir and Baykara/Turkey (12 november 2009, 34503/97)

- 'common ground'-method of interpretation of the ECHR.

Supreme Court in Urgenda:

- It follows from the ECtHR case law that, under certain circumstances, agreements and rules that are not binding in and of themselves may be meaningful in relation to establishing the standard of care that the State must comply with. This may be the case if those rules and agreements are the expression of a very widely supported view or insight and are therefore important for the interpretation and application of the State's positive obligations under Articles 2 and 8 ECHR.
- **25-40% is not directly legally binding, but is a reference point for interpreting the legally binding obligations of tort-law and 2 and 8 ECHR to do what is 'responsible / diligent / appropriate' to do:**
 - **YOU SHALL DO WHAT IS RESPONSIBLE, AND THAT SHOULD BE 25-40% 'comply or explain'**

THE DUTCH COURTS: 25-40% IS A REFERENCE POINT FOR WHAT IS 'APPROPRIATE' (3)

Supreme Court in Urgenda:

“The State has not explained that and why, despite the above and taking into account the precautionary principle applicable in this context, a policy aimed at 20% reduction by 2020 can still be considered responsible. The State has not provided any insight into which measures it intends to take in the coming years, let alone why these measures, in spite of the above, would be both practically feasible and sufficient to contribute to the prevention of dangerous climate change to a sufficient extent in line with the Netherlands’ fair share.”

THE SEPARATION OF POWERS (1)

- 25-40% is a range.
- 25% is the absolute minimum, because the Dutch State could not explain and justify that for him, less than 25% would still be a responsible and appropriate national climate policy.
- 40% is better and preferable (and possibly even necessary from a scientific point of view)
- Why did the Dutch District Court opt for a reduction order of 25%, and not 40%?

25% is the minimum that the law requires: doing more is a political question and is not for the courts to decide.

THE SEPARATION OF POWERS (2)

- It is for the political branches of the State (government, parliament) to decide what the best and preferred national climate policy is, and a wide margin of discretion must be allowed to the government. But even the widest margin of discretion for policymaking is, ultimately, bound and restricted by the law.
- It is therefore up to the political branches of the State to decide if they want to do more than the absolute minimum standard of care that the law requires. Doing more than what the law requires, is a political question, and the courts must refrain from that.
- But the courts must step in and uphold the law if the absolute minimum standard of care that is established by the courts in their interpretation of the law – i.e. an emission reduction of at least 25% - is not complied with.
- The courts have found that it is unlawful for the State to not have national emissions reduced with at least 25% by the end of 2020.
- Therefore, Urgenda, a party with sufficient interest, is entitled to an effective remedy

Supreme Court, concluding remarks

The State's policy for a 20% emission reduction is evidently and clearly insufficient to comply with the obligations ensuing from Articles 2 and 8 ECHR,

and the State has not been able to justify its climate policy.

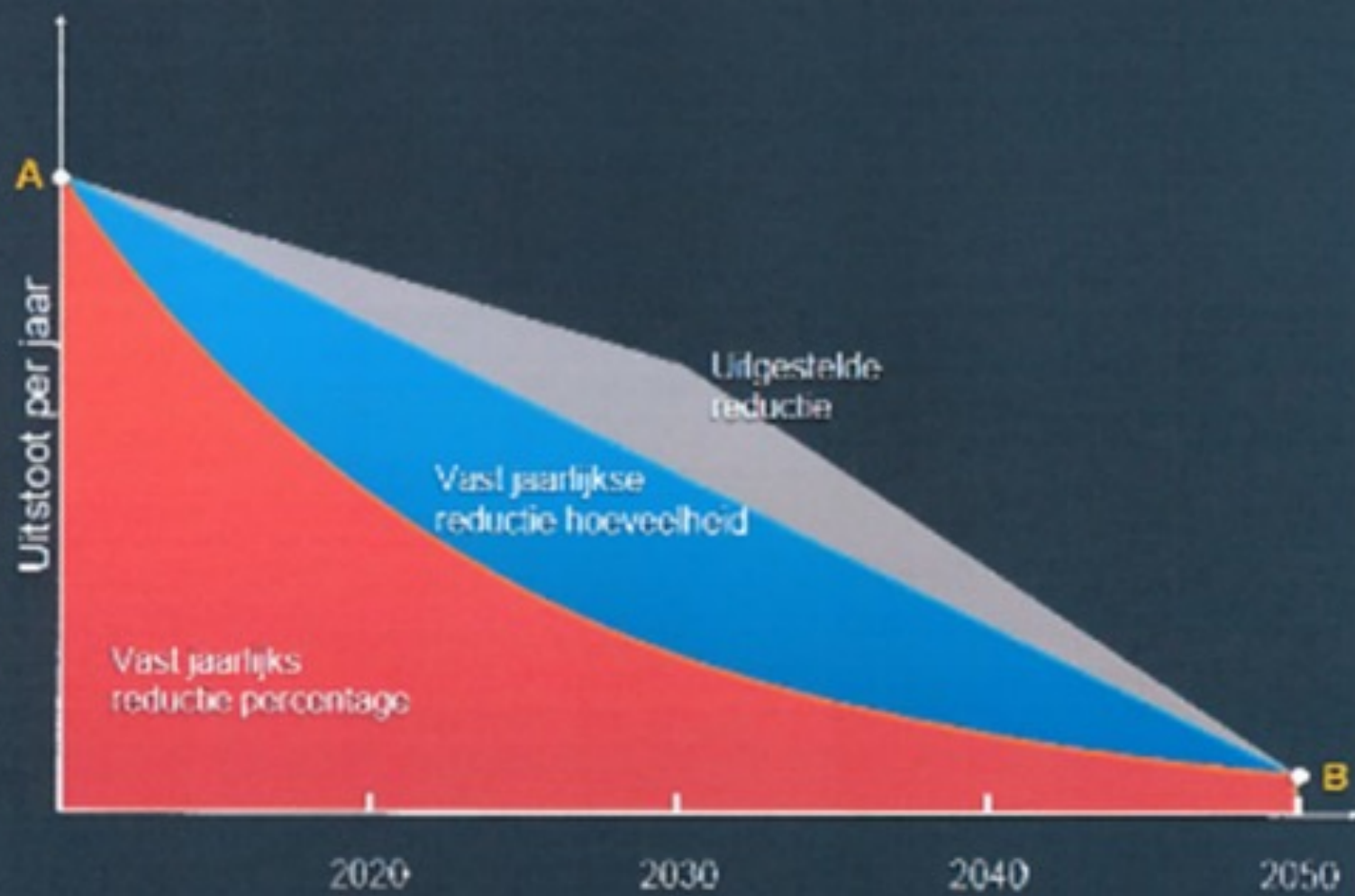
Therefore, it is the constitutional task of the Courts (also: 13 ECHR) to provide Urgenda with an effective remedy.

In doing so, the Courts do not overstep the power that is invested in them by the Constitution.



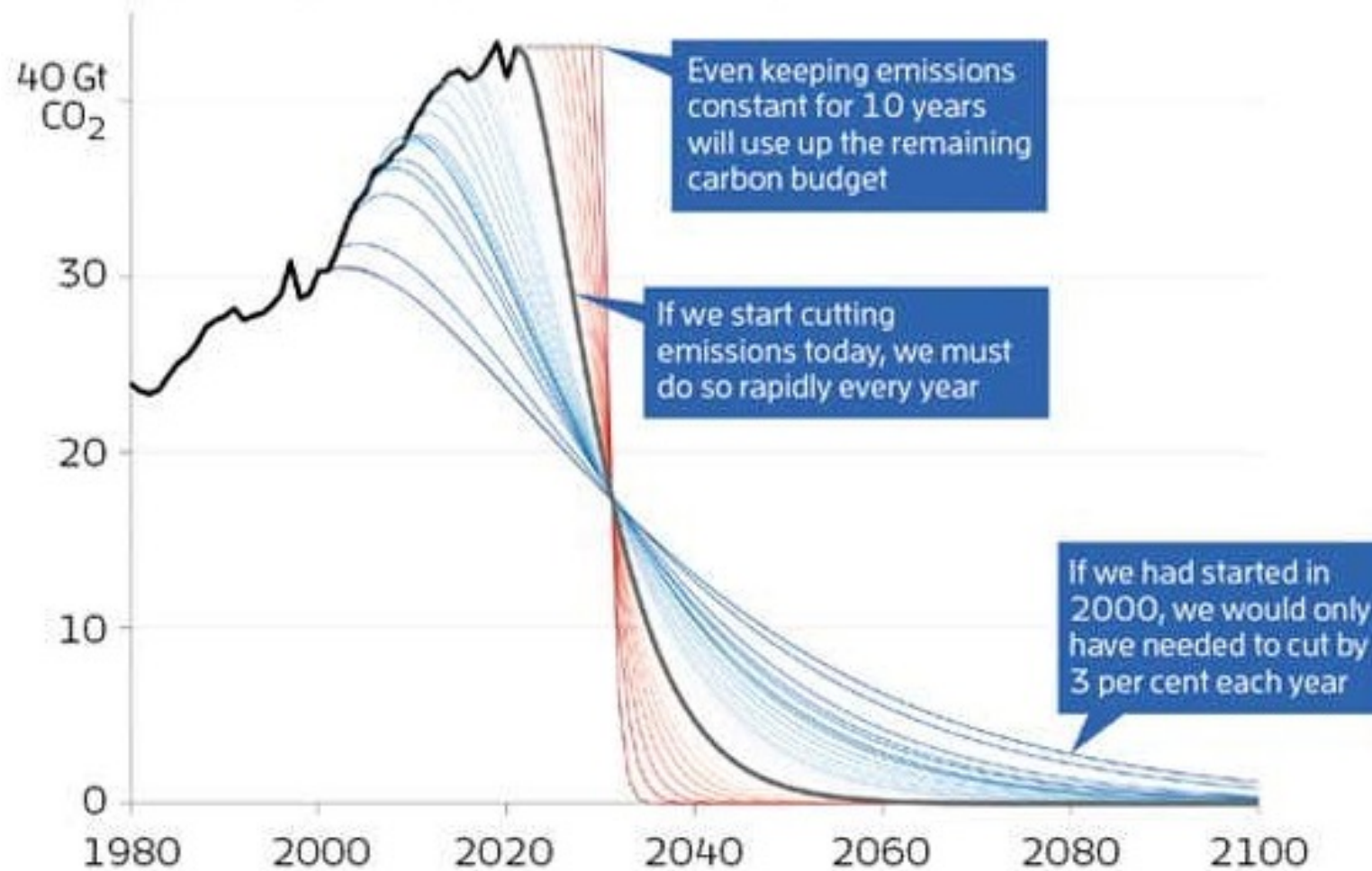
- **READ IT YOURSELF (in English)!**
- The judgements of the District Court, the Court of Appeal and the Supreme Court, and also the (very impressive and meticulously researched) Advisory Opinion of the Advocate-General to the Supreme Court, were all delivered in Dutch (authentic version) and in an English translation as well. The judgement of the Supreme Court especially is of an extraordinary clarity. They can be found on the national website of the Dutch Judiciary (www.rechtspraak.nl)
- **District Court Judgement 24 June 2015:**
<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&showbutton=true&keyword=2015%3a7196>
- **Court of Appeal Judgement 9 October 2018:**
<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610&showbutton=true&keyword=2018%3a2610>
- **Advisory Opinion of the Advocate-General to the Supreme Court 13 September 2019:**
<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026>
- **Supreme Court Judgement 20 December 2019:**
<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007&showbutton=true&keyword=2019%3a2007>
- Nearly all written statements that Urgenda and the State submitted to the courts, have also been translated in English by Urgenda and can be found on the Urgenda-website:
<https://www.urgenda.nl/en/themas/climate-case/>

Reductie routes



The path to 1.5°C has become a cliff edge...

Each line shows the trajectory of annual emissions cuts required for a greater than 50 per cent chance of staying below 1.5°C, depending on the year that emissions peak



Source: Robbie Andrews/Data:GCP/Emissions budget from IPCC AR6