

# A CASE OF JUDICIAL INTERVENTION IN CLIMATE POLICY: THE DUTCH *URGENDA* RULING

*Evert F Stamhuis\**

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*The 2015 judgment in the Urgenda case against the Government of the Netherlands was reported as a victory for climate activists. The article provides a detailed report and analysis in context of that judgment, revealing the reasoning of the Court as such and its strengths and weaknesses. Both the foundation of the State's duty of care and the judicial power to hold that duty against the other branches of government merit international and comparative attention.*

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## **I INTRODUCTION**

In June 2015, the Court of First Instance in The Hague, Netherlands caused national and international commotion with its ruling in the high profile case of *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and Environment)* of 24 June 2015.<sup>1</sup> The judgment was reported as an outright victory for climate activists. By ordering the Dutch Government to step up its climate policy, the Court intervened in matters of government in a way that is uncommon and highly contested. The Court based the order on a duty of care resting on the State. Remarkable observations regarding the international climate policy instruments,

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\* Chair holder Law & Innovation, Erasmus School of Law, Rotterdam, Netherlands. Email: stamhuis@law.eur.nl. This article is a revised version of a series of presentations given as Visiting Scholar at the Faculty of Law of the Victoria University of Wellington, New Zealand. One presentation was to the Chief Justice and Justices of the New Zealand Supreme Court (Wellington, 16 March 2017) and another was a public lecture hosted by the New Zealand Association for Comparative Law (Wellington, 21 March 2017). A revised version of the presentation was given in Dutch as a Dean's Lecture in the Faculty of Law of the University of Aruba (Dutch Caribbean) on 19 April 2017. Many thanks go to Professor Dr Ellen Heij (ESL) for her comments on a draft version of this article.

1 *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and Environment)* Rechtbank (Court of First Instance) Den Haag ECLI:NL:RBDHA:2015:7145, C/09/456689/HA ZA 13-1396, 24 June 2015. Under a separate European Case Law Identifier (ECLI) on <www.rechtspraak.nl>, ECLI:NL:RBDHA:2015:7196 [*Urgenda* case report]. All quotations and reference to the judgment in this article will be from that version.

human rights provisions and the civil law doctrine of hazardous negligence support this duty of care, in the Court's view.

As the case drew international attention, it is worth sharing a more detailed report on its content and implications than was given in the press. This article provides that report, with a focus on the legal content of the judgment. First, the context of the litigation will be described briefly, including the approach that the Dutch legal system takes towards international law. After that, the Court's order and supporting arguments will be discussed. The article will conclude with some analytical and critical remarks as well as a perspective into the future of the case. The main goal of this article is to disclose, analyse and contextualise one specific case and it has been written with at least two hypothetical groups of readers in mind. One group is composed by those who are interested in climate change litigation. The other group comprises the readers who have an interest in the impact of international obligations on national public actors and the opportunities to enforce those obligations through national courts.

## ***II THE CONTEXT OF THE CASE***

The case got its name from the party that instituted the legal proceedings, the Urgenda Foundation, which presents itself as an independent platform that develops plans and measures to prevent and combat climate change.<sup>2</sup> This organisation urged the Dutch Government, in a letter to the Prime Minister, dated 12 November 2012, to commit itself to a greenhouse gas emissions reduction of 40 per cent in 2020, compared to the emission level of 1990. In December 2012, the Deputy-Minister (*staatssecretaris*) for Infrastructure and Environment replied on behalf of the Government with a kind but undeniably vague letter, stating that the worries expressed by the Urgenda Foundation were shared and that worldwide collective action is necessary and has been started. The letter also indicated that the international and European efforts and initiatives are firmly supported by the Dutch Government, but no clear target was set or committed to more specifically.

Following that reply, Urgenda took legal action on its own behalf, as well as on behalf of a little under 900 private individuals, against the State of the Netherlands. It used the avenue of a tort law suit, which under Dutch law is available if no other remedy can reasonably and with appropriate procedural safeguards provide the protection sought.<sup>3</sup> The basic point of the legal action was that the State should guarantee better protection against climate change than it had done so far. The

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2 See <[www.urgenda.nl/en](http://www.urgenda.nl/en)> for the English version of its website.

3 The regular remedies in administrative law were not available because the Deputy Minister's letter did not amount to a concrete and individual decision intended to have legal consequences.

standard to which the State did not comply in the view of the plaintiffs was the internationally accepted norm for the reduction of greenhouse gas emissions. State action should result in a reduction of 25-40 per cent, compared to the emissions in 1990. However, current policy would only attain a reduction of 17 per cent nationally. By not increasing its reduction, the State violated its obligation of due care in society and, therefore, acted unlawful towards the plaintiffs, as described in Part III(A) below. In addition, according to the claimant,<sup>4</sup> the State violated the provisions of the European Convention on Human Rights that protect the right to life and the right to an undisturbed private and family life.<sup>5</sup>

The State, unsurprisingly, opposed these claims with a number of arguments, ranging from attacking the Foundation's *ius standi* to opposing the alleged consequences of the current policy. The most fundamental point raised by the State was related to the constitutional *status quo*. The law, as it stands, would prohibit a court to issue an order as requested by the plaintiff, because that would interfere with the discretion of the Government and go against the separation of powers, as laid down in the Dutch Constitution,<sup>6</sup> as discussed in Part III(B) below.

In this dispute, the Court had to rule, partly by judging on the impact of international norms on the policy of the national government. For a better understanding of the Court's findings on international climate change law, the Dutch position towards international law in general is briefly set out here.

In the classic dichotomy between dualism and monism,<sup>7</sup> Dutch law tends to adopt a monist approach. An inclusive approach to international law is laid down in the provisions of the Dutch Constitution. Articles 93 and 94 of the Constitution explicitly refer to the issue of international norms in the Dutch legal order.<sup>8</sup>

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4 *Urgenda* case report, above n 1, at [3.2].

5 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR], arts 2 and 8.

6 *Urgenda* case report, above n 1, at [3.3].

7 For a discussion of New Zealand's position, see Alberto Costi "Reception of International Law in New Zealand: Beyond the Monism/Dualism Divide" in Marko Novakovic (ed) *Basic Concepts of Public International Law. Monism and Dualism* (PF.IUP.IMPP, Belgrade, 2013) 675.

8 For quotations, the translations available at <[www.denederlandsegrondwet.nl](http://www.denederlandsegrondwet.nl)> were used in this article.

### Article 93

Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

### Article 94

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.

Here, we see that international regulations without specific implementing legislation can have direct effect, binding citizens as well as the authorities – executive and judiciary. The provisions that have that effect on the individual citizen's position, without intervention of the national legislator, are dubbed as being self-executing. Three conditions have to be met, two of which are of a procedural nature and one has a substantive quality. The procedural requirements are that the provisions must be published and that the text has undergone the prescribed parliamentary approval procedure, regulated by art 91 of the Constitution and by a dedicated Act of Parliament, mentioned in art 91(2). Article 91 provides that:

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.
2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.

The substantive requirement is that the provision must be binding on all persons by virtue of its content. Whether or not that is the case is the outcome of interpretation. A finding of that nature can and will be based on the text of the provision, its object and purpose according to the international and national legislative history, and on previous findings in case law of either Dutch courts, courts in one of the other jurisdictions that are party to the treaty, or a court related to the international organisation that issued the provision.

Special attention should be given, although very briefly, to the European Union (EU). The EU falls within the scope of the inclusive approach of the Constitution. The text of art 92 provides for State power being transferred to international organisations:

Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

The regulations from Brussels, that are intended to have direct effect, therefore, have that effect as soon as they are properly published. On top of that, European law has been found to have the status of supreme law throughout the Member States, irrespective of whether the Constitution of a particular Member State has explicitly accepted that or not. That supremacy is the result of consistent case law and practice of the European Court of Justice, based on the clear intention of all Member States in relation to the European Union (and its predecessors).<sup>9</sup>

The material presented above may merit more in-depth consideration, but for now this limited description suffices to highlight the fact that Dutch courts feel quite comfortable directly applying law from international sources, that is, treaties and regulations from international organisations. Consequently, there is a vast body of Dutch case law to that effect.<sup>10</sup> The majority of cases in which international provisions have been found to have direct effect relate to treaties and resolutions containing fundamental rights and freedoms, those being an evocative example of international provisions that are intended to have direct effect.<sup>11</sup> But there are many instances of other provisions having direct effect. Even international sources of law relating to the natural environment and climate change might be found as having direct effect insofar as they can provide individuals with a specific entitlement on which they could build a claim before the courts. As will be illustrated below, the Urgenda claim provides a strong example of such a situation.

### **III PARTICULARS OF THE JUDGMENT**

#### **A *The State's Duty of Care***

In part 4 of its judgment, the Hague Court of First Instance assesses the various points to decide in the case. After an introduction, the Court first explains that the Urgenda Foundation has standing in its own right.<sup>12</sup> Urgenda passes the statutory test

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9 See Damian Chalmers, Gareth Davies and Giorgio Monti *European Law Text and Materials* (3rd ed, Cambridge University Press, Cambridge, 2014) at 208-209. See also Monica Claes "The Primacy of EU Law in European and National Law" in Anthony Arnall and Damian Chalmers (eds) *The Oxford Handbook of European Union Law* (Oxford University Press, Oxford, 2015) 178.

10 NS Eftymiou and JC de Wit "The Role of Dutch Courts in the Protection of Fundamental Rights" (2013) 9 *Utrecht Law Review* 75 at 77-81.

11 For the discussion of one particular example in criminal justice, see EF Stamhuis "In Absentia Trials and the Right to Defend: the Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System" (2001) 32 *VUWLR* 715.

12 *Urgenda* case report, above n 1, at [4.4]-[4.10].

that the Dutch Civil Code carries for bringing legal action to the civil court by non-profit organisations, provided for in art 3:305a of the Dutch Civil Code. After that, the Court makes extensive observations on current climate science and climate policy.<sup>13</sup> For this article, we leave these findings aside and focus on paragraphs 4.35 and following where the legal obligations of the State are assessed.

The Court formulates a duty of care for the State to prevent the disastrous consequences of global warming for its inhabitants. This construction is built on a dual basis, consisting of a public and a private law element. The public law element comprises a specific provision in the Dutch Constitution, several international climate change obligations, the no-harm principle and two international fundamental safeguards. The private law element is derived from the law regarding hazardous negligence, a variety of tort. We start with the public law aspects.

Setting out the relevant public law, the Court commences with reference to art 21 of the Dutch Constitution:

It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.

The Court puts this constitutional duty of the State at the front of its legal construct, but upholds the principle that "[t]he manner in which this task should be carried out is covered by the Government's own discretionary powers."<sup>14</sup> However, that discretion may in this case be narrowed down by international obligations, because the Government itself had chosen to accept these obligations. It had repeatedly committed itself to the international actions, as laid down in the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the EU Directive on greenhouse gas emission, as the main basis for its climate policy.<sup>15</sup> The claim that the plaintiffs can build their argument directly on international obligations is nevertheless rejected.<sup>16</sup> Those specific obligations are clearly meant to be only binding between State Parties and not self-executing towards individual citizens, or

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13 At [4.11]-[4.34].

14 *Urgenda* case report, above n.1, at [4.42].

15 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994); Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005); and Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32 [ETS Directive].

16 *Urgenda* case report, above n 1, at [4.42]

those who claim – as Urgenda does – to stand up for the rights of individuals. For this article, the next observation of the court is particularly interesting:

4.43 This [the finding on not being self-executing] does not affect the fact that a state can be supposed to want to meet its international-law obligations. From this it follows that an [inter<sup>17</sup>]national law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and concepts, including social propriety, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international law obligations. This way, these obligations have a 'reflex effect' in national law.

Obviously, the Court refers to the principle of consistent interpretation, which can be found in different legal systems and serves to resolve possible contradictions between national statutes and international treaty provisions.<sup>18</sup> However, the principle appears here not so much for resolving conflicts, but to accommodate provisions of international law that are not directly applicable. At the time of the lawsuit, the plaintiff could not point at concrete State actions, such as statutes or executive policies, that violated the relevant international obligations. Consequently, an argument to resolve a conflict between two opposing acts was beside the point and unlawfulness as a basis, since the requested judicial intervention could in this case not be based on the international source having precedence over the other. Only a legally binding duty for the State to act could support the acknowledgment of the claim, which duty the Court found in generic provisions of tort law. These undefined provisions were particularised to the case at hand with the use of the climate commitments towards its international partners contracted by the State. As a result, an international obligation that lacks direct effect, and on which the courts cannot rely, may have an indirect effect as far as the norm can be subsumed under national law, for example, by reading it into generic standards or concepts in statutory

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17 Note that the English text says "international law" whereas in the Dutch original text, the Court refers to "national law". Obviously an error has occurred in the translation.

18 For New Zealand, the principle is explicitly recognised as part of the law. See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) per Cooke J; *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) per Keith J; *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) per Keith J; *Ye v Minister of Immigration* [2009] NZSC 76 per Tipping J, also cited in *Samuela Faletalavai Helu v Immigration and Protection Tribunal & Or* [2015] NZSC 28 per McGrath J. The Dutch Supreme Court operated this principle since 1919 in cases of conflict between a statute and an earlier treaty. Subsequent to new phrasing of the provision in the Constitution in 1953, the principle gradually faded out of the case law: see Joke de Wit *Artikel 94 Grondwet toegepast* (Boom Juridische uitgevers, The Hague, 2012) 53.

legislation. Consequently, concepts or competences in the national legislation are, to the extent possible, detailed in such a way that their application is consistent with international obligations. The divide between provisions among States, on the one hand, and the rights and duties of individual national actors, on the other, becomes permeable, giving these provisions a reflex effect.

Further on, the Court considers the relevance of articles 2 and 8 of the European Convention on Human Rights as developed in the case law of the European Court of Human Rights in Strasbourg. The case law of that Court also serves to assist the Dutch courts in detailing and implementing open national private-law standards, such as the unwritten standard of care in tort law. The plaintiffs had invoked the safeguard of the right to life and of the right to respect for the private and family life and the home. The Court extensively outlines the consequences that the European Court of Human Rights has connected to these fundamental rights in cases that concern environmental protection. As reported in paragraphs 4.49 and 4.50, the Court concludes that a right to environmental protection or nature conservation is not as such included in the ECHR. However, the European Court of Human Rights has decided that articles 2 and 8 ECHR can have implications for the State. In particular, they may require the State to act in circumstances relating to environmental hazards that pose a serious risk to life or to the enjoyment of the rights enshrined in article 8 ECHR, irrespective of whether those risks are directly caused by State activity or by private sector activity.

The EU Directive on the Emission Trading System (ETS) was invoked by both parties to the case:<sup>19</sup> by Urgenda, to underscore the State's commitment; and by the defending State, as prohibiting the pursuit of higher reduction targets than laid down in that Directive. The latter argument is rejected by the Hague Court as it finds that EU Member States have the option to set goals in their national policy that go beyond the ceiling of the ETS and that the State had admitted in the proceedings that this is indeed legally and practically possible. The former argument of Urgenda is accepted only indirectly, by reference to the reflex effect of international obligations. The ETS is not intended to create rights for individual citizens, but the State-to-State obligations under the ETS serve to detail the open concepts in national law regarding the State's duty towards individuals.

Beside the obligations under international and EU law and case law of the European Court of Human Rights, the plaintiffs also referred to the no-harm principle. That is an international legal principle postulating that no State is entitled

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19 ETS Directive, above n 15.

to use or to allow the use of its territory to cause significant harm to other States.<sup>20</sup> The Hague Court notes that the State had not opposed to the applicability of this principle in the present case. Subsequently, the Court finds that this principle shares in the qualification of having reflex effect. The principle regulates the relation between States and not between State and individuals. Nevertheless, it can assist in detailing the open standards in national law for the benefit of individual citizens.

The plaintiffs had supported their claim with reference to international obligations, but also referred to the standards of national civil law related to due care. Consequently, the Court assessed the standard of due care in the second leg of its reasoning. The Court finds a minimum standard for the use of discretionary State power in the civil law doctrine of hazardous negligence, which amounts to the private law side of its construct to which the article now turns.

The Dutch Supreme Court's case law on hazardous negligence has resulted in a "six factors" test for the lower courts to assess the duty of care of the person responsible for a dangerous situation. The Hague Court takes these six factors and combines them with principles that are laid down in international and EU climate policy instruments or objectives. As a result of this approach, the Court comes to a transformed "six factors" list to determine the duty of care in this specific instance. Any court should:<sup>21</sup>

take account of:

- (i) the nature and extent of the damage ensuing from climate change;
- (ii) the knowledge and foreseeability of this damage;
- (iii) the chance that hazardous climate change will occur;
- (iv) the nature of acts (or omissions) of the State;
- (v) the onerousness of taking precautionary measures;
- (vi) the discretion of the State to execute its public duties – with due regard for the public law principles,

all this in light of:

- the latest scientific knowledge
- the available (technical) option to take security measures, and
- the cost-benefit ratio of the security measures to be taken.

In accordance with these six factors, the Court then proceeds to deal with the separate items on the list in paragraphs 4.64 to 4.82. Items (i) to (iii) are hardly an

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20 See Patricia Birnie, Alan Boyle and Catherine Redgwell *International Law and the Environment* (3rd ed, Oxford University Press, Oxford, 2009) at 143-152.

21 *Urgenda* case report, above n 1, at [4.63].

issue in this case as the parties to a large extent agree as to the risks involved and knowledge thereof. In addition, recent history provides a number of "established facts" that support the serious duty of the State to confront the dangers of global warming expeditiously. Item (iv) led the State to dismiss its responsibility since the State is not the causer of imminent climate change. In the Court's view, this last argument fails to take away the crucial role States have in the transition to a sustainable society and in putting in place an effective framework to reduce greenhouse gas emissions.

Under item (v) of the list, the Court considers the dispute between the parties as to cost effectiveness. The defending State's opposition under this item is uncompromisingly rejected by the Court's reference to the State's earlier commitments to targets that it now opposes, while this change of heart was never explained or supported by new scientific or economic insights, neither previous to nor during the current proceedings. Quite on the contrary, the State had admitted at the hearing that it would be possible to meet the 30 per cent reduction target in 2020. So cost considerations do not stand in the way of ordering the State to pursuing more effective climate change mitigating policies.

Finally, item (vi) on the list regards the State's discretion and the relevant public law principles. Under this item, the Court first settles the score between mitigation and adaptation, a current debate in climate policy circles. Mitigation refers to the reduction of factors causing climate change, such as reducing the release of greenhouse gases in the atmosphere. Adaptation involves innovative policy measures that seek to respond to climate change, such as building new types of dykes or creating flood plains. The Court concludes that, regardless of the value of adaptation policies, mitigation measures are unavoidable and vital to the combat of climate change. Secondly, the Court deals with the defence's argument that any mitigation measure will only have a minor effect because the Dutch contribution to CO<sub>2</sub> emission worldwide is very small. It is the Court's conclusion that the relative position of the Netherlands does not alter the necessity to take precautionary measures, particularly in view of the frontrunner status that the State has assumed on the international plane. Moreover, the emissions *per capita* in the Netherlands are amongst the highest in the world, as the Court neatly points out.

Having considered both the public and private law pillars supporting a duty of care on the part of the State, the Hague Court concludes that it could come to a ruling as requested by Urgenda. Legally, it is the duty of the State of the Netherlands to tackle the climate change problem more vigorously than it has so far. None of the defences raised by the State and discussed above prevent such a ruling. However, the last and main resort of the State also needed to be considered by the Court: the possible limitations to judicial powers. The Court deals with that defence under a

separate heading. That brings us to the constitutional question in this case: given the State's duty of care, is a national court in the Netherlands entitled to order the State to act accordingly or is the mechanism of a lawsuit against the State inappropriate from the legal point of view?

### ***B The Constitutional Issue***

The fundamental opposition of the defendant to the entitlement of a court to rule in the case is dealt with by the Court in paragraphs 4.94 and following that being the "main point of this dispute". The State claimed that the constitutional doctrine of the separation of powers would prohibit a court from issuing the requested ruling. In reply, the Court observes in paragraph 4.95 that a full and strict separation of powers is not the aim of Dutch law. The guiding constitutional doctrine is geared towards constituting not a separation, but a balance of powers. No branch of State power in general has primacy over another, even if each of the three branches (legislative, executive and judiciary) has its own task and responsibility. The role of the judiciary towards the other branches of State power is in the Court's view firmly based in the rule of law. As the Court states in paragraph 4.95:

It is an essential feature of the rule of law that the actions of (independent, democratic, legitimised and controlled) political bodies, such as the government and parliament can – and sometimes must – be assessed by an independent court. This constitutes a review of lawfulness. The court does not enter the political domain with the associated considerations and choices. Separate from any political agenda, the court has to limit itself to its own domain, which is the application of the law. Depending on the issues and claims submitted to it, the court will review with more or less caution. Great restraint or even abstinence is required when it concerns policy-related considerations of ranging interests which impact the structure or organisation of society.

The next sections explain the restraint that has to be observed when a court, as in this case, is requested to issue an order that could have direct and indirect consequences for third parties. Should these choices of policy be made by the government only? That was the defence, because only that branch of the State has democratic legitimacy, being the product of the *vox populi* by way of elections. The Court deals with the issue of democratic legitimacy in paragraph 4.97:

It is worthwhile noting that a judge, although not elected and therefore has no democratic legitimacy, has democratic legitimacy in another – but vital – respect. His authority and ensuing "power" are based on democratically established legislation, whether national or international, which has assigned him the task of settling legal disputes. This task also extends to cases in which citizens, individually or collectively, have turned against government authorities. The task of providing legal protection

from government authorities, such as the State, pre-eminently belong(s) to the domain of the judge. This task is also enshrined in legislation.

In the Court's view, *Urgenda* seeks to find legal protection for individuals against the State and, therefore, the matter cannot be taken as falling outside the scope of the judicial powers. Admittedly, the decision of the Court, when honouring the claim, will have consequences for political decision making. However, that is unavoidably true in all instances of legal protection against State action, and it does not provide an argument to curb the Court's task and authority to settle disputes. Taken to its final consequence, the opposite finding would indeed end all legal protection against State action. A court does not have to find a "political support base"<sup>22</sup> for its decisions as the government might. Nevertheless, this Court will have to show restraint in situations where its ruling might have consequences, unforeseeable or hard to establish, for others who are not involved in the case.

For the possible ramifications and the related restraint, it is important to note, as the Court does in paragraph 4.99, that the State had failed in arguing that it was impossible to accomplish a higher standard for climate mitigation policy than the current one. In the context of the EU, the pursuit of a higher standard was already embraced, provided certain conditions were met. Apart from the defence of impossibility (duress), the State could have raised the "compelling social interests" defence that would resist a ruling like the one sought in this case. Compelling social interests are explicitly mentioned in statutory tort law as a ground to deny a claim that seeks a ban on behaviour or actions that cause damage, but should nevertheless be tolerated because of a higher social desirability.<sup>23</sup> The Court finds otherwise: based on the facts, which were undisputed in the case, there is a compelling interest to strive for further-reaching climate policy goals. The social interests support the case of the plaintiffs instead of giving recourse to the defending State.

A final point is dealt with by the Court in paragraphs 4.100 and 4.101, relating to the consequences for the State in its necessary freedom of action in various negotiation processes. The defendant argued that a ruling would compromise the Dutch negotiating position at the Paris 2015 Climate Conference. True as that may be, according to the Court, it is for the State and not for the Court, which needs to exercise restraint in this respect, to incorporate the duty towards *Urgenda* in its negotiating positions. The Court finds an additional reason for restraint in the impossibility to oversee all possible consequences of the ruling, leaving the State the

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22 *Urgenda* case report, above n 1, at [4.98].

23 Civil Code (Netherlands), art 6:168.

freedom to decide how a higher climate target should be met. It is not for the Court to rule on specific measures or legislation to be adopted.

Taken together, the Court rejects all defences the State had based on the constitutional doctrine and the distribution of power related thereto. It finds, in paragraph 4.102, that the *trias politica* does not amount to an obstacle for honouring Urgenda's claim. This conclusion ends the Court's reasoning in the judgment that attracted so much attention. To sum up: the State has a duty of care under public law to secure the safety of its citizens against the consequences of climate change that threaten living conditions. There is a large discretion in the way in which to fulfil this duty of care. In a civil law suit, individual claimants cannot rely on international obligations to force the State to commit itself to specific targets. However, international obligations from various sources, as adopted by the State itself, help to describe the implications for the State under national tort law, where the open concept of due care is pre-eminent. That leads to the *interim* conclusion that the State indeed has a legal duty to achieve greenhouse gas reductions at a higher level than will be reached under current policies. The Court then deals with the question whether the prevailing constitutional doctrine prohibits the Court from ruling in accordance with this *interim* conclusion. The Court concludes that, as long as it observes the necessary restraint, it can and must provide for the protection that the plaintiffs seek. It does so by refraining from indicating *how* the government should exercise its freedom to decide on such a complicated issue as climate policy.

### ***C The Words of the Final Ruling***

After a few additional observations with little import for this paper, the Court comes to the final ruling in the following words at paragraph 5.1:

The court orders the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduces by at least 25% at the end of 2020 compared to the level of the year 1999, as claimed by Urgenda in so far as acting on its own behalf.

The last four words refer to the observations the Court gave on the relevance of the claims of the individuals at paragraphs 4.108-4.109. On both principle and practical grounds, the Court found that the representation of 886 individuals would not add to the outcome of the case and, therefore, that it rejected that part of the claim. Moreover, Urgenda obviously did not need to succeed in this part of the claim in order to bring home its arguments against the State.

## ***IV ANALYTICAL AND CRITICAL REMARKS***

For a proper understanding of the judgment, it is necessary to provide some analytical explanation as to the framing of the Court's judgment. Four analytical

remarks will follow here. The first one regards the context of the lawsuit. Urgenda presented its argument in terms of tort law, because that opened the door to the court procedure. As mentioned before, access to a civil court is only open for civil action, when that option operates as a last resort against the State where no other remedy is available under Dutch law. Consequently, the Court presents its observations in the straitjacket of a tort action. That explains why the Court uses the skeleton that the Civil Code provides for the establishment of a tort to develop its finding that the State acted unlawfully. Unlawfulness is in Dutch tort law found when the action is either (1) a contravention of a legal obligation, (2) a violation of someone else's personal right or (3) a breach of standard of due care to be observed in society.<sup>24</sup> One out of the three elements may suffice to constitute unlawfulness. However, the Court considers all three criteria and uses them to funnel in the public law considerations for its final ruling. Under (1), contravention of a legal obligation, the constitutional and international obligations are mentioned, while the references to articles 2 and 8 ECHR can be found under (2), the violation of someone else's right. Criterion (3), breaching the standard of due care, provides the umbrella under which the Court deals with public law principles such as fairness and the precautionary principle.

The remarks in the previous section point to the private law nature of the case and explain the final framing of the judgment. The private law nature of the case also clarifies the findings of fact in the judgment. Although simplified to a certain extent, one could say that the civil law of evidence is determined by the domination of the parties and a passive attitude for the court. What is *in confesso* between the parties counts as proven for the court. That explains the phrases, at various places in the judgment, stating that certain facts are undisputed between the parties and, therefore, decisive for the Court. The strongest example of this is the remarkable absence of a climate debate in this case.<sup>25</sup> The Court quite easily follows the dominant views in climate science, not so much because it had conducted an intensive investigation into the matter itself, but because it was not subject to dispute between the parties. Whether in a case of judicial review under administrative law the law of evidence would have forced the Court to dig deeper, is a fair but hypothetical question to which the answer might be: not necessarily. In designing the Dutch statutory framework for administrative court proceedings, the legislator very much relied on the civil approach, the one described here. As a result, indirect instruction is given to the parties in administrative litigation, the claimant and the government body, that

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24 Listed in art 6:162 of the Civil Code (Netherlands).

25 The case of *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297, is an example of the opposite. On climate change litigation, see Nicole Rogers "If you Obey all the Rules you Miss all the Fun': Climate Change Litigation, Climate Change Activism and Lawfulness" (2015) 13 NZJPIL 179.

they have to oppose explicitly all statements of fact presented by the other party, if those statements are not to support the court's judgment.

A third and fourth analytical remarks have a more critical nature and regard the final ruling. The third one is as follows. Reading the language of the judgment, it is clear that this ruling is intended to issue an order to act. The defending State is ordered to limit or ensure that others limit the volume of greenhouse gas emissions emanating in the country. However, it appears that the Court has left one particular issue out of its decision that should have been included. What the consequences are in case the State does not comply with the judgment remains up in the air. A judicial order should always give a clear answer to the question: "what if not?" That might have been very difficult in this specific instance, but now the successful claimant is left empty handed when it comes to the consequences, in the unfortunate event that the State does not act according to the order. Moreover, it is unclear how and when to measure the actual emissions levels: should it be after the year 2020, so in the spring of 2021? Or could obedience to the order also be assessed in 2018, when extrapolations of any new, more intense policies are benchmarked against the targeted emissions level? In any event, as a result of these *lacunae*, the judgment displays the characteristics of a declaration rather than that of an order. If the Court wanted to issue an order to act, it should have mentioned a moment and an instrument to measure when and whether the target has been achieved, and what compensation is due if the outcome was in the negative. If, on the other hand the Court wanted to limit itself to resolving the question as to the legality of the State's policy at the time of the procedure, it could have done so by way of a declaratory dictum. Such a dictum could have authoritatively declared whether the policies adopted by the State were lawful or not.

Essentially, what the Court did in *Urgenda* is not to decide, for central government, what it should or should not do in the development of its climate policy. Although framed as an order, it is only in part an order to act. The Government was already actively pursuing climate policies, so an order to act in itself does not affect the State's position. The essential declaration of this judgment is that, while acting, the State can only be acting lawfully when its policy meets the standard dictated by the Netherlands' international obligations, taken at its lowest (in this case a 25 per cent reduction of greenhouse gas emissions by 2020). The Court implicitly recognises the declaratory nature of its judgment, when denying *Urgenda* any further declarations in paragraphs 4.104 to 4.105. What the consequences will be if and when the State acts unlawfully is another matter. Purely tort law reasoning might bring one to the conclusion that *Urgenda* might be entitled to proper (pecuniary) compensation. Hard to calculate as that might be, it would in my opinion be beside the point to talk about compensation for the benefit of one specific private person or

entity. The failure of the State causes damage to public interests and a risk of damage to future generations. A private person or entity could not absorb that damage into its private interest. Compensation is a topic of high interest for climate change litigation, but to pursue that point would be beyond the scope of this article. Moreover, compensation is not what activists would seek, where the final goal is to effectively combat detrimental climate effects.

A clearly worded declaratory dictum in the described sense would have set out what the conditions are for the State to remain on the side of the law. The consequences of failure would then be subject to a separate suit later in time, both assessing the damage and the compensation. A declaratory dictum would also most likely have been a better conclusion of the Court's reasoning in the light of the manifold references to the restraint the Court wanted to observe. That brings us to the fourth remark.

A main point in the constitutional distribution of power in the Netherlands is that courts stay away from legislation, that is: a court cannot legitimately write down new binding rules for society.<sup>26</sup> Legislation should be debated in Parliament by elected representatives of the people, to symbolise that our freedom is not limited, but by laws that we have agreed to. Legislation is then interpreted by the executive in its application thereof and where conflict arises, the case is decided by the courts. In that litigation, the court gives its own interpretation of the legislation, which has authority in the case at hand. The higher up a court is in the judicial hierarchy, the more persuasive authority this specific interpretation will carry outside the case itself. Might the principal legislator have objections to the content of the courts' decisions, it can act thereupon by introducing amendments to the statute, which then prevent the courts' interpretation from having continuous impact on similar cases in the future.

Interpretation as further detailing the content of the statutory rules is inevitable in dispute resolution by the courts (as it is in the application of the law by the executive). Consequently, there are not many qualms in the Dutch constitutional community to appreciate the judiciary as co-legislator, but with the limitations set out above. A court does not bind the other State powers by general rules, not the parliament in legislating and the executive only in its particular application in the individual case that was the subject of litigation. This might be totally different where constitutional jurisdiction is allotted to a court. The powers of a constitutional court towards the legislator are usually set out in detail and those courts often have

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26 One of the oldest Dutch statutes still in force, the Act on General Provisions of 1829 carries a prohibition for the courts to settle a case by general regulation (s 12).

the power to declare a statute invalid for breaches of the Constitution. In the Netherlands there is no court with such jurisdiction.<sup>27</sup> Consequently, the case law of the Dutch Supreme Court (*Hoge Raad*) until today persistently denies the judges of the country to order Parliament to legislate. My critical observation is that in its *Urgenda* judgment the Hague Court does not stay away sufficiently clear from the order to legislate. The wordings of the order (cited above under 3.3) do not exclude parliamentary legislative action. At one other place in the judgment the Court admits that its findings might comprise the necessity to legislate.<sup>28</sup> This is in my view a step the Court cannot take, according to the currently applicable law.

## V CONCLUSION AND FUTURE PERSPECTIVES

In its *Urgenda* judgment, the Hague Court of First Instance granted what can be perceived as a victory for climate activism. Based on dually founded reasoning (private and public law), the judgment finds that the State should do what reasonably can be done to protect its population against the effects of global warming. The least that can be expected is the fulfilment of its international obligations, the normative value of which is carted in on the barrow of open tort law concepts. This State's duty provides the basis for a court to intervene in the interest of individual citizens. In order to prevent all too much interference with the tasks and responsibilities of other branches of the State in those cases the court must observe a high level of restraint. That aspect of the reasoning is epitomised in the phrasing of the final ruling, as quoted above. In view of the legal flaws, that final ruling is the least admirably constructed part of the judgment, despite its remarkable result.

Fundamentally, for a judicial order, there is no difference between the executive having acted or having abstained. Both can be unlawful and subject to litigation. In case of legal proceedings from civil society against omission on the side of the State, however, the interesting part of the debate is what a court can do, apart from issuing a declaratory judgment that action should have been appropriate. The boundaries of what a court can order are set not by the supposed lack of democratic legitimacy. These boundaries can be found whilst honouring in principle the responsibility of the executive and bearing in mind that no court (not even the highest court in the country) has the resources necessary to issue large scale executive decisions that can replace the decisions of the national Government. As regards legislative powers, those are reserved to the legislator in the parliamentary context.

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27 To be more precise: in the European part of the Netherlands. One of the autonomous islands of the Kingdom in the Caribbean Sea, St Maarten, has a constitutional court.

28 See *Urgenda* case report, above n 1, at [4.101]: "not certain legislative measures".

With those two critical conclusions, I support my prediction that the case resolution is far from final at the moment of completing this article. The State has lodged an appeal and so has Urgenda. Set against the backdrop of the legal *status quo*, the order itself carries weak spots. The State has already published its Appeal Memorandum<sup>29</sup> and we see a broad attack on many aspects of the judgment. Even limiting the appeal to the legal issues was not enough for the Government. It wanted to attack the findings of fact as well.<sup>30</sup> Whether the case will go ahead and the Appeal Court will come to a new decision depends among other things on future political decisions. After the general elections of March 2017, a new government coalition issued a programme containing ambitious climate targets. However, no change of position has been announced regarding the appeal. The case is still pending at the end of 2017.

Hope and horror were the extremes of the spectrum of emotional reactions to the *Urgenda* judgment and many were somewhere in between. As can be derived from this article, my assessment of the outcome of this specific litigation is that it exemplifies a courageous, but not flawless, discovery of new territory where courts should not fear to tread. Both national law and international law provide opportunities to national courts for translating societal action into a clear and firm message to the executive authorities: practise what you preach.<sup>31</sup>

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29 See <[www.rijksoverheid.nl/onderwerpen/klimaatverandering/inhoud/klimaatrechtszaak](http://www.rijksoverheid.nl/onderwerpen/klimaatverandering/inhoud/klimaatrechtszaak)> (only available in Dutch).

30 See the parliamentary debate on the appeal as reported in *Handelingen Tweede Kamer* (24 September 2015), TK 6, 6-4-1 and following.

31 As yet, there are two Dutch examples of subsequent activist litigation in which the *Urgenda* case played a part, one unsuccessful and one successful. A claim based on an argument more or less identical to the *Urgenda* judgment, in order to ban cigarette marketing ads, was rejected. See *Stichting Rookpreventie Jeugd v Government of the Netherlands Rechtbank* (Court of First Instance) Den Haag ECLI:NL:RBDHA:2015:12746, C/09/475711/HA ZA 14-1193, 9 November 2015. Reflex effect of provisions in the World Health Organization Framework Convention on Tobacco Control 2302 UNTS 166 (adopted 21 May 2003, entered into force 27 February 2005) was explicitly denied in [4.17] of the case report. The case regarding air quality improvement policy plans was successful, but showed less *Urgenda* elements in its very concise observations. The Court referred to direct obligations under Dutch statutory law, which implemented Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1. See *Vereniging Milieudefensie vs Government of The Netherlands Rechtbank* Court of First Instance Den Haag ECLI:NL:RBDHA:2017:10171, C/09/532971/KG ZA 17/644, 7 September 2017.