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# Climate Change Liability After All: A Dutch Landmark Case

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## Abstract

In spring of 2015, the District Court of The Hague issued an injunction in a class-action suit against the Dutch State to reduce the emission of greenhouse gases (GHG) before 2020 by 25 percent compared to 1990. The case was initiated by the foundation, Urgenda, and 886 individual plaintiffs against the State of the Netherlands. This is the first time a government has been held liable for a climate policy that is substandard according to international norms. Since the ruling is well reasoned—addressing the issues of the standing of Urgenda, the State's duty of care towards its citizens, the problem of the 'many hands', and many other fundamental questions—it deserves close attention. It will most probably become a landmark case with international precedential value.

## Keywords

climate change liability – Urgenda c.s. v the State of the Netherlands – UN Climate Treaty – Articles 2 and 8 European Convention of Human Rights (ECHR) – duty of care – causation – separation of powers – injunction to reduce GHG

## 1 Introduction

*'Dutch government ordered to cut carbon emissions in landmark ruling'* (The Guardian). *'Dutch government loses world's first climate liability lawsuit'* (The Daily

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News). These are some of the news headlines on the 24<sup>th</sup> of June, 2015 after the District Court of The Hague ruled on the case of *Urgenda v the State of the Netherlands* (hereafter: the State).<sup>1</sup> The news headlines indicate the international importance of the ruling which, according to the Guardian, is 'expected to cause ripples around the world'.<sup>2</sup> To have such an impact, the ruling must become known outside of the Dutch legal system, which is one of the purposes of this paper.<sup>3</sup> For this reason, the author will follow the reasoning of the Court closely in the first part of this article. Another reason for this approach is that, as is often the case, the devil is in the details. A careful reading of the ruling will provide a comprehensive understanding of its content, and allow a close estimation of its precedential value.

This paper also serves another purpose apart from contributing to the widespread understanding of this ruling. Until recently, climate change liability was considered to be a pipe dream.<sup>4</sup> It was concluded as recently as 2011 that 'civil liability is still far from taking root in the climate change litigation context'.<sup>5</sup> In the same year, Faure and Peeters wrote that 'for some, the topic of climate change liability may still seem like nice legal 'hocus pocus', useful for academics with too much imagination, but not a tool that realistically could be used to force emitters of greenhouse gases towards preventive measures'.<sup>6</sup> Less than five years after such a sentiment, we have a ruling on our hands that

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1 Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145. For the English translation: ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396.

2 Arthur Nestlen, 'Dutch government ordered to cut carbon emissions in landmark ruling' *The Guardian* (London, 24 June 2015) <<http://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling>> last accessed 16 February 2016.

3 See also Jolene Lin, 'The first successful climate negligence case: a comment on *Urgenda Foundation v. The State of the Netherlands 'Ministry of Infrastructure and the Environment'* (2015) 5 *Climate Law* 65; Robert B McKinstry Jr, 'Potential implications for the United States of the *Urgenda Foundation v. Netherlands* decision holding that the UNFCCC and international decisions required developed nations to reduce emissions by 25% from 1990 levels by 2020' (2015) <<http://ssrn.com/abstract=2632726>> accessed 17 July 2015; and Josephine van Zeben, 'Establishing a governmental duty of care for climate change mitigation: will *Urgenda* turn the tide?' (2015) 4 *Transnational Environmental Law* 339.

4 Michael G Faure and Marjan Peeters, *Climate change liability* (Edward Elgar Publishing 2011), 4: 'Most of the claims brought so far (the majority of which were also in the United States of America) were either not successful, were withdrawn or have not yet lead to a specific result.' This changed with the decision of the Supreme Court in *Massachusetts v EPA* in 2007, which is referred to below.

5 Luciano Butti, 'The Tortuous road to liability: a critical survey on climate change litigation in Europe and North America' (2011) 11 *Sustainable Development Law & Policy* 32, 36.

6 Faure and Peeters (n. 4), 255.

acknowledges state liability for the emission of GHG. Thus, we are left to question whether this ruling is so erroneous or farfetched that it will be annulled on appeal, or whether the Court has indeed succeeded in embedding its decision into established doctrine.

What is most remarkable about this ruling, apart from the decision, is the logic of its reasoning. Due to the remarkable logic of its reasoning, it is not at all certain that an annulment on the appeal should be expected. The ruling, therefore, deserves close attention from the perspective of tort law doctrine. Of particular practical and theoretical relevance are the main issues from the tort law perspective, and how they are addressed. From a practical standpoint, the issues addressed are likely to be the subject of the debate in appeal, which already has been filed by the State. On a theoretical level, the analysis of the issues addressed in the case will most probably contribute to the continuous debate about climate change liability.<sup>7</sup> The conclusion is that, whatever its fate on appeal, the Court's ruling in the Urgenda case is expected to have transnational precedential value.

## 2 Urgenda c.s. v the State of the Netherlands

### 2.1 *The Background and the Claims*

Urgenda (which is a combination of 'urgent' and 'agenda') is a foundation that was established by the Dutch Research Institute for Transitions of Erasmus University Rotterdam, an institute for the transition to a sustainable society. Urgenda is a platform for citizens from diverse societal domains that is dedicated to the development of plans and measures to prevent climate change. In this case, Urgenda acts not only on its own behalf, but also on behalf of the 886 individual plaintiffs whom it represents. The defendant is the State of the Netherlands, represented by the Department of Infrastructure and Environment.

The trial was initiated by a letter from Urgenda to the Prime Minister, requesting a promise to reduce the emission of GHG in 2020 by 40 percent compared to 1990. In her reply, the Secretary of State expressed her concern about the need to reduce the emission of CO<sub>2</sub>, and the importance of global

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7 Shortly before the court ruled in the Urgenda-case, an international group of distinguished lawyers launched the Oslo principles on global climate change obligations (shortly: the Oslo principles), which advocate state-liability for climate change. In my analysis I will refer repeatedly to these Oslo principles ([www.osloprinciples.org](http://www.osloprinciples.org)). See also Jaap Spier, *Shaping the law for global crises, thoughts about the role the law could play to come to grips with the major challenges of our time*, (Eleven Publishing, 2012), 37–49.

action in that respect, but did not commit to the request. For Urgenda, this was reason enough to turn to the Court with an extended subpoena (about 144 pages), in which she requested that the Court make several declaratory statements of law and an injunction to reduce the emission of CO<sub>2</sub> by 25 to 40 percent by 2020, compared to 1990.<sup>8</sup>

## 2.2 *The Grounds of the Claims*

The subpoena is an interesting piece of legal craftsmanship.<sup>9</sup> It left no stone unturned in explaining the actual situation with regard to climate change. It appeals to international climate science, the conclusions of the UN Climate Panel (IPCC), and the findings of Dutch, American, and European researchers. It concludes that considerable emission reductions are required before 2020 to stay on the safe side of a dangerous temperature rise of 2° Celsius. The current reduction policy is estimated to result in a dangerous temperature rise of 4° Celsius or more by the year 2100, with a more extensive rise thereafter. Urgenda wants to prevent this, and claims that the Dutch state is legally obligated to reduce the emission of CO<sub>2</sub> within its territory by 25 to 40 percent by 2020. This claim is based on several legal grounds.

First, it appeals to sources of international public law, both written and unwritten. The ‘no harm’ principle with regard to cross border nuisance rules that ‘no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property of others therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.’<sup>10</sup> This principle is recognized by the General Assembly of the UN as a basic rule of state liability and has been introduced in several treaties.<sup>11</sup> Urgenda claims that this principle, as recognized in the *Trail Smelter Case*, entails an obligation to take effective and proportionate measures to reduce emissions, taking into account the emission development per capita, the emissions in the past, and the technical and economic abilities of the State to reduce its emissions. Furthermore,

8 Since Urgenda requested injunctive relief, it was not necessary to prove that concrete damage was suffered by the plaintiff as a consequence of the defendant’s actions or negligence. See Spier (n. 7), 175, and Faure and Peeters (n. 4), 268. The State pleaded that its contribution is nothing but ‘a drop in the ocean’, however, which re-introduced causal issues (see below).

9 <<http://www.urgenda.nl/documents/DagvaardingUrgendaKlimaatzaak19-11-13.pdf>> accessed January 9<sup>th</sup>, 2015.

10 *Trail Smelter Case* 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards, UN 2006, volume III, 1905–1982.

11 Like consideration 8 of the UN Climate Treaty.

it claims that the violation of this obligation can be attributed to the State and that it establishes a *pro rata* liability of the State for of its share in the total CO<sub>2</sub> concentration in the atmosphere. The UN Climate Treaty aims for the stabilization of GHG in the atmosphere to prevent human disturbance of the climate system (Article 2), and attributes a leading role to developed countries like the Netherlands (Annex I-countries).<sup>12</sup>

Next, Urgenda appeals to the European Convention on Human Rights (ECHR), particularly Article 2 (the right to life) and Article 8 (the right to privacy and family life), which involve positive obligations for member states. Two cases from the European Court of Human Rights (ECtHR) seem to support this. First, the case of *Öneriyildiz v Turkey*, which established that the right to life as guaranteed by Article 2 ECHR, includes the right to be protected against life-threatening environmental risks, and that this may involve an obligation for the State to inform its citizens about those risks.<sup>13</sup> Next, the case of *Taskin v Turkey*, which implies that the right to fully enjoy privacy and family life as guaranteed by Article 8 ECHR, includes the protection against health risks which are yet to be realised.<sup>14</sup> Both cases amount to human rights actions for citizens against their governments' lack of adequate precautionary measures with regard to environmental and health risks.

Finally, Urgenda appeals to national tort law, in particular the doctrines of nuisance, risk-settings, and the case of the French salt-mines in the Dutch Hoge Raad.<sup>15</sup> This case eventually had a decisive influence on the decision of the Hoge Raad with regard to causation, and therefore deserves closer attention.

In the salt-mines case, the plaintiffs were Dutch growers downstream from French salt-mines who suffered damage as a result of the dumping of salt in the river Rhine. They claimed damages from a company, which was exploiting several mines, that pointed out that the pollution of the Rhine had many sources, both of natural and human nature. The defence continued that since the growers had to take precautionary measures anyway, their claim does not pass the 'but for' test.<sup>16</sup> The Hoge Raad rejected this defence, however, and ruled that in case of a linear connection between the salt in the river and the income of the growers (more salt, less income) the salt-mine is responsible for

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<sup>12</sup> Article 4, section 2, UN Climate Treaty.

<sup>13</sup> *Öneriyildiz v Turkey* App no 48939/99 (ECtHR, 18 June 2002).

<sup>14</sup> *Taskin and Others v Turkey* App no 46117/99 (ECtHR, 10 November 2004).

<sup>15</sup> HR 23 September 1988, NJ 1989/743 ('Kalimijnen').

<sup>16</sup> Which means that the wrongdoing is not the required *conditio sine qua non* for the damage.

its share in the total amount of salt in the river.<sup>17</sup> The reason is that each of the wrongdoers is independently responsible for a part of the damage (in case the wrongdoer ends its wrongful dumping there still is damage, although less).<sup>18</sup> Now in this case the damage was not a loss of income, but the expenses of technology for desalinization. For the compensation of this damage some connection is required between the damage and the wrongful dumping, although it is not required that the 'but for'-test is passed.<sup>19</sup> Urgenda draws the conclusion from this jurisprudence of the Dutch Hoge Raad, that the polluter bears a *pro rata* liability for its share in the total amount of pollution affecting the damaged party. Likewise, Urgenda concludes, the State is liable for its share in the global emission of GHG and the resulting climate damage.

### 2.3 *The State's Defences*

The State brought forth several defences. It started with an acknowledgement of most of the facts, including those that establish the need to reduce the emission of GHG and the danger of the resulting temperature rise of 2° Celsius, if not prevented. Furthermore, it claimed to have an adequate climate policy, which consists of a combination of measures to mitigate the effect of climate change and measures to adapt society to the expected consequences. With regard to mitigation, the target of the government is in line with that of the EU, and amounts to a reduction of 40 percent by 2030 in comparison to 1990 (that is, 10 years later than Urgenda claims is necessary). For 2020, the target is a reduction of about 17 percent compared to 1990. This target is part of the overall policy that was agreed upon by the government and parliament. The State asserts that debate on this policy should take place in parliament and not in a Courtroom. Climate change is primarily a global—not a local—problem. Therefore, it should be addressed by international agreements. Most of these agreements are binding between states, but not within the Dutch State as they lack the self-executing force that is required by Article 93 of the Dutch Constitution. This provision rules that supranational and international norms have internal effect if they are self-executing, which means that they create

17 In case there are more salt-mines involved, they are each only liable for their share in the total amount of salt in the river.

18 This situation is to be distinguished from the situation when the wrongdoing of A and B are both necessary conditions for the (same) damage, which implies that if one of the wrongdoings lacks, the whole damage disappears. Under Dutch law, in this situation a rule of several and joint responsibility applies.

19 Since it is sufficient that those measures were taken with respect to the total amount of salt in the river – the expected and continuous dumping included – it is considered to be irrelevant whether they would have been taken in the absence of wrongful dumping.

rights and obligations that can be appealed to by citizens. As a result, international agreements that lack self-executing provisions create obligations for the State, without corresponding rights for its citizens.

Alongside these general defences, the State addresses some specific issues. One of them is that *Urgenda* lacks standing, since it claims to act not only in the interests of Dutch citizens, but for citizens of other countries as well, and even for future generations. This is too vague and only loosely connected to its official goal, as laid down in its by-laws. There is another reason why *Urgenda* lacks 'interest' in this case. If its claims were sustained, this would hardly contribute to a reduction of GHG in the atmosphere, since the contribution of the Netherlands is very small (only 0.5 percent, which is really just a 'drop in the ocean').<sup>20</sup> Next, there is no obligation whatsoever for the State to reduce the emission of GHG to a higher degree than it intends to. There is no wrongful act on the part of the State, neither is there any proof of a real threat of damage to anyone. There is no infringement of the ECHR either since—in the light of the State's wide margin of appreciation—its climate policy survives the fair balance test for positive obligations between the economic interests of the State on the one hand, and the interests *Urgenda* stands for on the other. The State concludes that the claims of *Urgenda* should be rejected.

## 2.4 *The Reasoning of the Court*

### 2.4.1 Summary

Compared to the complexity of the issues involved, the reasoning of the Court is relatively straightforward. Summarised, it amounts to the following line of reasoning. The Netherlands has a policy that aims to reduce GHG by 2020 by 17 percent compared to 1990. According to accepted standards, this is not enough to prevent a dangerous temperature rise of 2° Celsius or more in comparison with the pre-industrial level (1850), since that would require a reduction of at least 25 to 40 percent. Of course, the State enjoys discretionary power, but within limits. It does not include the authority to develop and execute a policy that, to the best of our knowledge, inevitably leads to a dangerous climate

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20 Compare the defence of EPA in *Massachusetts v EPA* (2007) 549 US 497, IV: 'EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be hauled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.'

change. In doing just that, the State violates its duty of care towards its citizens.

Both the reach of the duty of care and the discretionary power of the State are determined by the international, European, and constitutional duties to which it has committed itself. Although these are, to a large extent, not directly binding in the State's relationship with its citizens, the duties indirectly influence the open norms of tort law (the so-called 'reflex effect'), such as the 'cellar hatch' standards for risk settings.<sup>21</sup> Taking into account the probability of damage (which is high), the magnitude of damage (which is enormous), and the burden of precautionary measures (which does not impose an unsurmountable technical or economic burden on the State), the Court concludes that the State has a duty of care towards its citizens to prevent dangerous climate change. From this viewpoint, its policy is just substandard, and the State has to do more to prevent the threat of dangerous climate change.

#### 2.4.2 Established Facts and Policies

The ruling is a 60-page piece of work, which goes into depth about the scientific consensus about climate change. Under the heading of 'established facts', the ruling elaborates on the legal and policy framework that has been developed, both at the international level (such as the UN Climate Treaty 1992, the Kyoto Protocol 1997, the Doha amendment 2012, and the Climate Conferences (COP)), at the European level (such as Articles 191 and 193 TFEU, Decision 1600/2002/EU, the ETS Guideline, the announcements of the EC of 10 January 2007, 8 March 2011 and 25 February 2015, Decision 406/2009/EU, and Guideline 2003/87/EU), and at the national level (Article 21 of the Constitution, the implementation of the EU-guidelines, several policy documents and letters).<sup>22</sup>

The ruling then provides a disclaimer because the Court sees itself confronted with difficult and extensive climatological issues, of which it lacks specialized knowledge.<sup>23</sup> Therefore it will ground its judgments on what the

21 Roughly speaking, these standards amount to the weighing of the probability and the amount of damages on the one side, and the expenses of precautionary measures on the other. If the probability and amount of damages is higher than the expenses of precautionary measures, then there are good reasons to hold the wrongdoer liable for the damage to the victim. If, on the other hand, the expenses of precautionary measures are higher than the probability and the amount of damages, then there are no good reasons to transfer the damage from the victim to the wrongdoer.

22 ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (English translation), 2 (The facts).

23 ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (English translation), 4.1 – 4.3.

parties have produced and agree upon. For this purpose, the Court relies on the established facts. In the Court's eyes, the key question in this case, is whether the State has a legal obligation towards Urgenda to limit the emission of GHG (CO<sub>2</sub> in particular) more than it already intends.<sup>24</sup> The Court then addresses the standing of Urgenda.

### 2.4.3 Standing

Article 3:305a of the Dutch Civil Code allows for class actions by a legal person with the purpose of serving a general or collective interest. The official purpose of Urgenda, as laid down in Article 2 of its by-laws, is 'to stimulate and speed up transition-processes to a sustainable society, to start in the Netherlands'. For the definition of the concept of 'sustainability', Urgenda refers to the Brundtland-report, which reads: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own ends."<sup>25</sup> One of the requirements for standing is that the legal person has sufficiently attempted to settle with its opponent regarding the legitimacy of its claims. It is not in dispute that this condition is satisfied.

What is disputed by the State is that Urgenda has standing to represent the interests of citizens abroad and of future generations. The Court, however, rules that the purpose, as laid down in its by-laws, has both an international and intergenerational dimension. The notion of a sustainable society is, by definition, not limited to national interests, as the quote from the Brundtland-report demonstrates. Therefore, it is not feasible for Urgenda to stand for national interests, without simultaneously representing the interests of people abroad and of future generations. The representation of future generations is therefore accepted under Dutch law.<sup>26</sup>

24 A legal obligation to that extent is not provided by a single legal source, but to be constructed on a multitude of legal sources. Compare the Preamble of the Oslo principles: 'No single source of law alone requires States and enterprises to fulfil these principles. Rather, a network of intersecting sources provides States and enterprises with obligations to respond urgently and effectively to climate change in a manner that respects, protects and fulfils the basic dignity and human rights of the world's people and the safety and integrity of the biosphere. These sources are local, national, regional, and international and derive from diverse substantive canons, including, *inter alia*, international human rights law, environmental law and tort law.'

25 World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)* (1987), 41.

26 ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (English translation), 4.4 – 4.10.

#### 2.4.4 Climate Science and Climate Policy

The ruling continues with an extensive analysis of the documents on climate change, as mentioned before.<sup>27</sup> This analysis leads to several conclusions. First, it establishes the overall target to prevent a dangerous temperature rise of 2° Celsius or more, compared to pre-industrial times (1850).<sup>28</sup> Next, it concludes that for Annex I-countries like the Netherlands a reduction of 25 to 40 percent in 2020 compared to 1990 is agreed upon (in Cancun 2010). Third, it is remembered that before 2010 the Netherlands aimed at a reduction of 30 percent in 2020, but that it has adjusted its policy to a minimum reduction of 16 percent for non-ETS sectors and 21 percent for ETS-sectors (compared to 2005). The Dutch have committed themselves to the EU target of 30 percent in 2020, however, under the condition that the other member-states go along. The Court concludes that the Dutch reduction target is below the accepted standard in climate science and climate policy, and that to prevent a dangerous climate change for Annex I-countries a reduction of at least 25 to 40 percent is required. This means that it is highly probable that within decennia, a dangerous climate change is to be expected with irreversible consequences for mankind and its environment.<sup>29</sup> This is all acknowledged by the State, the Court observes, since the parties agree on the need to mitigate; it is the speed of mitigation that separates them.

#### 2.4.5 Legal obligation of the State?

The next issue is the question of whether the State has the legal obligation towards *Urgenda* to change its climate policy.<sup>30</sup> This question breaks down into three sub-questions: (i) does the State violate its statutory duties? (ii) Does it infringe human rights of the plaintiffs? (iii) Does it breach its duty of care towards the plaintiffs? The questions will be addressed in this order.

First, the statutory duties of the State will be considered. The Court provides an extensive analysis of Article 21 of the Constitution (which attributes to the State a duty of care for a clean environment), the framework of the UN Climate

<sup>27</sup> Ibid., 4.11 – 4.35.

<sup>28</sup> In conformity with prevailing international scientific opinion (compare the Preamble of the Oslo Principles).

<sup>29</sup> Compare Principle 1 of the Oslo principles: ‘There is clear and convincing evidence that the greenhouse gas (GHG) emissions produced by human activity are causing significant changes to the climate and that these changes pose grave risks of irreversible harm to humanity, including present and future generations, to the environment, including other living species and the entire natural habitat, and to the global economy.’

<sup>30</sup> ECLI:NL:RBDHA:2015:7196, *Rechtbank Den Haag*, C/09/456689/HA ZA 13-1396 (English translation), 4.35 – 4.93.

Treaty (which provides for more specific duties), the ‘no harm’-principle (not disputed by the State), and the European measures that are binding for member states. The analysis concludes that although the international obligations of the State create obligations towards other states, they do not imply—in case of infringement—a wrongful act towards Urgenda.

However, according to accepted Dutch case law, a State is presumed to want to comply with its international obligations.<sup>31</sup> Therefore, a norm of national origin (written or unwritten) may not be interpreted or applied in such a manner as to result in an infringement of an international norm by the State, unless no other interpretation or application is available. This principle of consistent interpretation has the consequence that the Court, in interpreting national open norms and concepts (like the norm of due care, reasonableness, etc.), must take into account these international obligations. This is how these obligations attain so-called ‘reflex effect’ in national law. This applies to certain obligations of European origin as well.<sup>32</sup>

The next question is whether the State violates human rights, as is claimed by Urgenda (see 2.2). Although Urgenda is in no sense of the word a ‘victim’ per Article 34 ECHR, Articles 2 ECHR and 8 ECHR can serve as a ‘source of inspiration’ for the interpretation of private law norms, such as the unwritten norm of due care. The Court then quotes extensively from the ‘Manual on Human rights and the Environment’, published by the Council of Europe. It points out ‘a growing awareness (of the Strasbourg Court) of a link between the rights and freedoms of the individual and the environment’ on the one hand, and its recognition that ‘national authorities are best placed to make decisions on environmental issues’,<sup>33</sup> on the other. Again, as in the case of the international and European duties of the State, the Articles 2 and 8 ECHR do not directly attribute rights to Urgenda. But again, it does not follow that they are without

31 HR 15 April 1994, NJ 1994, 608 (‘Valkenhorst’), HR 8 April 1994, NJ 1994, 704 (‘AGFA/Schoolderman’), HR 30 January 2004, NJ 2008, 536 (‘KLC/Vliegers’), HR 11 June 1993, AB 1994, 10 (‘Roosendaal-methode’).

32 See ECLI:NL:RBDHA:2015:7196, *Rechtbank Den Haag, C/09/456689/HA ZA 13-1396* (English translation), 4.44: ‘The comments above regarding international-law obligations also apply, in broad outlines, to European law, including TFEU stipulations, on which citizens cannot directly rely. The Netherlands is obliged to adjust its national legislation to the objectives stipulated in the directives, while it is also bound to decrees (in part) directed at the country. Urgenda may not derive a legal obligation of the State towards it from these legal rules. However, this fact also does not stand in the way of the fact that stipulations in an EU treaty or directive can have an impact through the open standards of national law described above.’

33 Council of Europe, *Manual on human rights and the environment* (2005), 31.

meaning. They do play their role, both in determining the extent to which the State has discretionary power and in determining its standard of care.

Does the State breach a duty of care towards Urgenda? When addressing this key question, the Court grounds its judgment on the steps already taken. As a starting point, the Court reminds us that it will consider whether there is an unlawful risk setting, as a proxy for whether or not the State exceeds its discretionary power. Of course, there is a connection between the two questions; the discretionary power ends where the duty of care begins. In drawing this line, several factors are taken into account, such as the elements of the ‘cellar hatch’ standards, which is the Dutch version<sup>34</sup> of the Learned Hand formula (in United States law) or the Caparo test (in English law<sup>35</sup>), the targets and principles of the UN Climate Treaty (such as the protection of the climate system, reasonableness, the precaution principle, and the principle of sustainability), the aims of the European climate policy (such as the principle of a high level of protection, the prevention principle, and again, the precaution principle, but also the available scientific and technical information, the environmental conditions in the region, the burdens and advantages of not-acting, and the economic and social development of both the EU and its regions). This leads to a catalogue of circumstances to be taken into account in determining the duty of care of the State:

- The nature and amount of damages resulting from climate change;
- The familiarity with, and foreseeability of, this damage;
- The probability with which dangerous climate change will occur;
- The nature of the actions or omissions of the State;
- The onerousness of taking precautionary measures;
- The discretionary power of the State in executing its public task;
- The state of the art in science,
- The available (technical) possibilities to take precautionary measures, and
- The cost/benefit relation of those measures.

In examining the first three criteria, the Court stresses that given that the worldwide emission of GHG and the reduction targets of the parties of the UN Climate Treaty are insufficient to reach the dangerous temperature rise-target, the State has the obligation to take measures in its own territory to prevent such a climate change from happening. This is a matter of urgency since, the sooner a reduction is reached the more likely it is that the danger is evaded.

34 HR 6 November 1965, *NJ* 1966/136 (the ‘cellar hatch’-ruling).

35 *Caparo Industries plc v Dickman* (1990) 2 AC 605.

The Court takes into account that the State has been familiar with global warming and its risks possibly since 1992, and in any case since 2007. This leads the Court to conclude that, given the risk of dangerous climate change, a 'heavy duty of care' rests on the State to take measures to prevent this from happening. With respect to the fourth factor, the Court reasons that although the State is not an emitter of GHG itself, it is within its power to exercise authority over the collective Dutch level of emissions, over which it actually exercises authority. Moreover, the State has undertaken this responsibility itself, by becoming a party to the UN Climate Treaty and the Kyoto Protocol. Finally, the State plays a crucial role in the transition to a sustainable society. It is therefore responsible for an adequate and effective legal and instrumental framework to reduce the emission of GHG in the Netherlands.

As far as the onerousness of precautionary measures is concerned, it can be said that the Court holds the State to its own words, since the Court first considers that the change of policy in 2010 from a reduction target of 30 percent to 20 percent (effectively 17 percent) is not motivated by improved scientific insights or actual economic necessities. On the contrary, as Urgenda claims and the IPCC and the UNEP support, the sooner the State acts, the more cost-efficient this will turn out. The relevant reports show that adaption alone will not be enough to avoid danger, mitigation is necessary as well. New technologies to store CO<sub>2</sub> will not be effective in the short term. Given these circumstances, the Court concludes that a duty of care rests on the State to mitigate as soon and as much as possible.<sup>36</sup>

A key issue is the large discretionary power of the State in its responsibility to take care of a clean and healthy environment (Article 21 of the Constitution). However, this discretionary power is limited by the obligation of the State to protect its citizens against dangerous climate change by taking necessary and effective measures. But what is necessary and effective? The appeal to adjustment measures alone is clearly insufficient, since mitigation is the only effective remedy. Furthermore, the discretionary power of the State is limited by the principles mentioned, which were particularly developed for this type of danger. The principle of equity urges the Court to strive for a reasonable distribution of the burdens involved between the current and future generations. Diversion from these principles requires a sufficient justification, which is not provided by the State.

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36 Which is in line with the (first part of) Principle 1 of the Oslo principles: 'The Precautionary Principle requires that: (i) GHG emissions be reduced to that extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided.'

Is there a legal obligation for the State to take (extra) mitigation measures? The Court concluded that there is, since the actual climate policy is simply substandard. Urgenda is right in that by postponing the required measures a cumulative effect will occur, that will result in more emission of CO<sub>2</sub> than in alternative scenarios. Since there is no justification for this course of action, the Court concludes that the State does not comply with the required standard of care and thus acts wrongfully.<sup>37</sup> This wrongful act can be attributed to the State, and contributes to the threat of danger, which, in case of a claimed legal injunction, is sufficient to sustain the claim. Two issues remain to be addressed by the Court: the 'problem of the many hands', and the appeal to the separation of powers.

#### 2.4.6 The Problem of the Many Hands

The Court rejects the argument of the State that its contribution is too small to be of any consequence (see 2.3).<sup>38</sup> It is true that climate change is a global problem. The small share of the Netherlands in the worldwide emission of GHG,

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37 According to art. 6:162 Civil Code: 'A tortious act is regarded (as) a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this conduct.'

38 Likewise the Supreme Court was not impressed by the defence of EPA (see footnote 20): 'But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislators, do not generally resolve massive problems in one regulatory swoop...They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of best how to proceed....That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law. And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide in the atmosphere. ...While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follow that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. (...). Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.'

however, does not diminish its duty of care to take precautionary measures. Since any emission contributes to this global problem, emission reduction is both a collective and an individual responsibility. The State cannot escape responsibility by pointing to its small contribution. Next, the Court rules that the case of the French salt-mines is *per analogiam* applicable to this case's duty to take precautionary measures. The Court takes into account that the Netherlands, like the other Annex I-countries, with respect to a fair distribution of the burdens, has taken the lead in mitigation measures, and thus has committed itself to a more than a proportional share. The emissions from the Netherlands, the Court remarks, belong to the largest in the world, if calculated per capita.<sup>39</sup>

Another argument of the State was that a reduction of the emission from the Netherlands will be compensated for by other European countries, with the result that the European emission as a whole will not diminish. The Court rejects this so-called 'waterbed-effect' or 'carbon leakage' argument, with an appeal to a recent assessment of the European Commission that did not find any proof supporting it. Finally, the State argued that a higher reduction target would disturb the 'level playing field' for Dutch companies. The Court ruled that this is not sufficiently substantiated, since several other European countries have a more stringent climate policy than the Netherlands and do not seem to suffer from an uneven playing field. The Court goes so far as to ask for substantiation since some sectors will clearly profit from a more stringent climate policy, while others will not. The argument of the many hands is rejected by the Court.

#### 2.4.7 Separation of Powers

The main argument of the State is addressed at the end of the ruling.<sup>40</sup> The questions this case raises allegedly belong in parliament, not in a Courtroom. An injunction of the Court would disturb the distribution of powers that characterizes our democratic system. The Court considers this argument carefully, but rejects it. First, it reminds us that the Dutch constitutional system does not entail a complete division of powers, but a balance of powers in which each state-power has its own responsibilities. The judiciary decides on legal disputes, even if the defendant is the executive power, in which case the Court

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39 Compare Principle 11 of the Oslo principles: 'No country or enterprise is relieved of its obligations under these Principles even if its contributions to total GHG emissions are small.'

40 ECLI:NL:RBDHA:2015:7196, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (English translation), 4.94 – 4.102.

may offer legal protection. The Court is obliged to decide on the case; it may not refuse to decide simply because it fears executive backlash. The Court hands down a legal decision, not a political one, although this decision may have political consequences. For this reason, the judiciary is independent from the executive power. The Court must show restraint, however, if policy considerations are involved, or if fundamental principles of societal organization are at stake. This depends on the nature of the case and the questions involved. Next, it is often said that the judiciary lacks the democratic legitimation that characterizes the political organs of the State. It is true that in the Dutch system judges are appointed and not elected, but that does not mean that the judiciary lacks democratic legitimation. The whole system of legal protection by the judiciary—its independence and its responsibilities vis-à-vis the executive power—is guaranteed by law, that is, with the consent of the democratically chosen members of parliament. The Court holds that Urgenda's claims do not stretch outside the judicial domain. They do not ask for an injunction to legislate, which under Dutch law is an acknowledged limit of judicial intervention.<sup>41</sup> Neither do they ask for a course of action that is legally or factually impossible for the State to execute. The State has argued that sustainment of the claim to reduce the emission of GHG would hinder its negotiation position at the (then) upcoming conference on climate change in Paris at the end of 2015. The Court reasons that this fact urges them to be cautious, but it does not justify the State's violation of its legal obligations. If the Court maintains those obligations by an injunction to reduce the emission of GHG more than was intended by the State, this still leaves a discretionary choice for the State as to how to comply with that injunction.<sup>42</sup>

#### 2.4.8 Decision

The Court orders the State to reduce (or make others reduce) the total volume of the yearly emissions of GHG of the Netherlands to such an extent, that it will be 25 percent less at the end of 2020 compared to 1990.<sup>43</sup> Trial expenses must be compensated by the State, and this ruling can be executed immediately, in spite of a possible appeal.

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41 HR 21 March 2003, ECLI:NL:HR:2003:AE8462 ('Waterpakt').

42 Compare Principle 10 of the Oslo principles: 'any entity to which an obligation in these Principles applies has flexibility in selecting the measures it uses to meet this obligation, if the measures chosen, in their totality, achieve the legally required result, as prescribed in these Principles.'

43 Clearly, the court does not hesitate to set specific standards; most courts would be reluctant to do this (see Faure and Peeters (n 4), 261).

### 3 What's New and What's Not? Some Comments

#### 3.1 *Standing for Future Generations*

Some say that the State has presented the argument of the separation of powers in the context of the standing of Urgenda. That would correspond to the Anglo-American legal style, where the type of question brought by the plaintiffs can be critical to the Court's ability to hear the case (the political question doctrine).<sup>44</sup> Although the argument of the separation of powers is dominant in the State's reasoning, its defence should be interpreted differently in the context of the Dutch doctrine on standing (see 2.4.3). The core of the defence is that Urgenda, given its official purpose of serving a sustainable society, lacks representativeness for the current generation abroad and especially for future generations (here and elsewhere).

One must admit, there is something of a lack of boundaries here. Any person living in the Netherlands can be said to be represented by the plaintiffs as well as the defendants (since we are all under the jurisdiction of the Netherlands and contribute to climate change, but we all have interest in the reduction of GHG as well).<sup>45</sup> *In extremis*, this amounts to a situation in which anybody can sue anybody. The Court clears this hurdle by interpreting the notion of sustainability to include a global and an intergenerational dimension. Standing for Urgenda is justified by Article 3:305a Dutch Civil Code, which is specially designed to regulate public interest litigation. There are precedents in Dutch case law, such as the *Nieuwe Meer Case*, the *Kruisraketten Case*, and the *SGP Case*, in which private actors with a public purpose have been allowed standing.<sup>46</sup> Characteristic for this 'public interest litigation' is that the plaintiffs serve a public interest of an idealistic nature, they are future-oriented, and they are organized by small societal organizations such as Urgenda. Public interest litigation can be an important instrument for social change and a welcome addition to the democratic functioning of the state.<sup>47</sup>

44 cf Van Zeven (n. 3), 6, 7. See also Faure and Peeters (n. 4), ch 7 by Giedré Kaminskaitė-Salters for the UK (173), and ch 8 by Elena Kosolapova for the USA (194 - 197).

45 See Jennifer Kilinski, 'International climate change liability: a myth or a reality?' (2009) 18 *Journal of Transnational Law & Policy* 378, 379: 'The reality is that a class-action suit comprised of six billion plaintiffs and six billion defendants is theoretically possible, given that each of us contributes to climate change', and 'everyone on earth is simultaneously a potential plaintiff or defendant'.

46 HR 17 June 1986, NJ 1987, 743 ('De Nieuwe Meer'), HR 10 November 1989, NJ 1991, 248 ('Kruisraketten'), and HR 9 April 2010, NJ 2010, 388 ('SGP').

47 See Abram Chayes, 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1281, and SL Cummings and DL Rhode, 'Public interest litigation: insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 603.

Legal standing for future generations is not new. There are anchors for the recognition of those yet unborn in treaties, case law, and doctrine. The UN Climate Treaty explicitly states, under article 3.1, that ‘the parties should protect the climate system for the benefit of present and future generations of humankind...’ The EU Charter echoes this sentiment in its Preamble, by stressing that ‘enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations’<sup>48</sup> In case law, the standing of future generations is recognized in a landmark case of the Supreme Court of the Philippines, in which a group of children and several NGO’s claimed an injunction for the government to stop licensing timber, alleging that deforestation is causing environmental damage. The Supreme Court ruled that the plaintiffs have standing to represent their yet unborn posterity, that they had adequately asserted a right to a balanced and healthy ecology, and that the grantees of the licenses should be implemented.<sup>49</sup> Less spectacular, but closer to home, is a precedent of the District Court of The Hague, ruling that the interest of the energy need of inhabitants of the Netherlands in 2030 is a collective interest as defined in Article 3:305a Dutch Civil Code.<sup>50</sup> Finally, doctrine has recognized standing of future generations as well. Since the publication of the Brundlandt-report in 1987 the idea of a commitment to equity with future generations has taken firm root.<sup>51</sup> In the context of climate change liability, Jaap Spier has argued that: ‘we do not only have obligations towards future generations—an idea already enshrined in the concept of sustainable development—they could be enforced by means of

48 See also the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus, Denmark, 25 June 1998): ‘Recognizing that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment, for the benefit of present and future generations.’

49 *Minors Oposa v the Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 173.

50 *Rechtbank 's-Gravenhage* 2 May 2001, LJNAB1369 (*Greenpeace v the State of the Netherlands*).

51 See for example Ian Burton, ‘Report on reports: our common future’ (1987) 29 *Environment: science and policy for sustainable development* 25, Edith Brown Weiss, *In fairness to future generations: international law, common patrimony and intergenerational equity* (The University of Michigan Press 1989), Edith Brown Weiss, ‘In fairness to future generations and sustainable development’ (1992) 8 *American University International Law Review* 19, 19–26, and Edward Page, ‘Intergenerational justice and climate change’ (1999) 47 *Political Studies* 53.

injunctions or declaratory relief.<sup>52</sup> However, it is important to note one restriction. Future generations do not have standing as represented individuals, recognized by law as natural persons, such as is possibly the case for unborn babies under Dutch law.<sup>53</sup> That would be one bridge too far, since future generations are simply too undetermined for individual identification, let alone representation. They do have standing, though, whenever their future interests can be considered to be part of the actual public interest, however phrased (the common wealth, *res publica*). That is the case when it comes to the preservation of this planet as a suitable place to live, not only for us, but also for the generations to come (which is, of course, the core of the notion of sustainability).

Urgenda's aim is the development of a sustainable society and it is therefore a legitimized vehicle for the promotion of this public interest, and thus for the representation of future generations. This explains not only the standing of future generations, but also the rejection of the claims of the 886 individual plaintiffs. The Court ruled that they do not have sufficient individual interests aside from the interests served by Urgenda. Of course, the arbitrarily selected individual plaintiffs only appeared on the stage to save the case should Urgenda be declared to have no standing. Therefore, the Court is correct; this case is not about them, it is about all of us, and those who come after us.

### 3.2 *A Duty of Care? Judicial Law-Making 3.0*

What makes this ruling remarkable, above all, is the way in which it 'constructs' a duty of care for the State to mitigate the emission of GHG. This is what I call 'judicial law-making 3.0', which suggests a development. First, judicial law-making was about the choice between several interpretative alternatives (judicial law-making 1.0). To understand, one must only remember the illustration Hart sketched in his classic *The Concept of Law*. For Hart, law has a necessarily open texture, which leaves discretionary power for the judge to interpret the law.<sup>54</sup> Next, judicial law-making was viewed as the coherent continuation of the story of the law: the best possible interpretation in light of law's fundamental principles (judicial law-making 2.0). In Ronald Dworkin's analyses, the judge is a 'Hercules', finding the right answer to a hard case, (which exists,

52 cf Spier (n. 7), 56, 57.

53 compare Article 1:2 Dutch Civil Code, which reads: 'The child of which a woman is pregnant is qualified as being born, whenever its interests require this'.

54 HLA Hart, *The concept of law* (Oxford University Press 1961), ch 7. Sometimes, judicial law-making still consists of choosing between different interpretive alternatives, but the whole context of the legal system has changed since Hart developed his theory.

though we may not know it with certainty).<sup>55</sup> Now, we are entering a new phase, with different legal systems simultaneously at work, sometimes referred to as a ‘multi-layered legal order’.

In this case, for example, the Court deals with norms of international public law, EU law, and domestic tort law, which all have their own terms and conditions of application and their own kind of binding force. To find the applicable norm for a case, acts of interpretation and coherent continuation—though still relevant—are simply not enough. The Court must construct the applicable norm using elements of the different legal systems at play, as well as of public and private law within the national legal system, as building blocks. This is what I call ‘judicial law-making 3.0’.<sup>56</sup> As these definitions demonstrate, the development from one stage to the next is mainly the result of changes in the legal system as a whole, which have their impact on the role and responsibility of the judiciary.<sup>57</sup>

This case presents a perfect illustration since the Court is transparent about its constructing activity. From the available sources, it constructs a duty of care for the State to mitigate the emission of GHG with 25 percent in 2020 compared to 1990. The cornerstones of this construction are (i) the necessity of a reduction like this to stay on the safe side of a dangerous temperature rise, which is underpinned by scientific information about climate change, (ii) the criteria for risk settings which, if satisfied, justify a duty of care (provided by national tort law), and (iii) the judgment that these criteria are indeed satisfied (regarding the likelihood of the expected damage, the amount of damages if it occurs, and the onerousness of taking precautionary measures). This judgment is justified by the law and policy information at the

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55 Ronald Dworkin, *Law's empire* (Harvard University Press 1986), ch 6. Again, judicial law-making is still about finding the right answer, as purported by Dworkin, but he did not address (nor could he have done) the specific context of a multilayered legal system (since that evolved partly after he formed his ideas).

56 With ‘judicial law-making 3.0’, I refer to lawmaking by the judiciary that is characterized by (i) a constructive activity, consisting of the construction of a norm or a normative framework on the basis of legal sources that do not contain that norm as such, (ii) with the further aim of bringing coherence between different legal systems and offering cross-border legal protection, and (iii) in the context of a multilayered legal system.

57 These descriptions refer to types of judicial law-making, idealised for the purpose at hand, although they certainly do have a descriptive content. Each type rests on the preceding one, containing elements of it, but adding something new. Judicial lawmaking 1.0 fits the legal system as a model of rules, while in judicial lawmaking 2.0 the law is a seamless web of norms. Judicial lawmaking 3.0 finally, is relevant in a multi-layered legal system.

international level. From a doctrinal point of view, the question is: is this a firm enough construction to justify the duty of care already specified?

The answer depends on the strength of the linking pin, which is the notion of the 'reflex effect' of international norms on the open norms of tort law. This 'reflex effect' is based on the principle of consistent interpretation. Allegedly, the State cannot be presumed to want to comply with the 2° Celsius target and the associated scenarios at the international stage, while at the same time not wanting to comply in the national debate. There is indeed accepted case law in the Netherlands to the effect that every national norm is, in principle, subject to interpretation consistent with public international law.<sup>58</sup> But whether it justifies the 'reflex effect' of a norm with such specificity as to mitigate the emission of GHG by 25 percent in 2020 compared to 1990 may blur the distinction between direct binding norms and norms with 'reflex effect'. The problem is that the principle of consistent interpretation itself can be interpreted in two ways, namely as a duty to optimize coherence, or as a duty to avoid contradiction. If understood using the latter interpretation, it is satisfied just as well (or perhaps even better, given the different levels of regulation) with a less specific duty of care towards Urgenda, which leaves more discretionary power to the State to take circumstances into account. The Court has presumed the first interpretation, but would the latter not be more in line with the relationship between national and international law, as intended by Dutch constitutional law?

This is a persistent question that needs our attention. The Court's reasoning is not as apparently clear as it at first seems to be. One can understand the concern of the Court to substantiate the open norm of a duty of care to prevent dangerous climate change. Where else should it turn than to scientific findings about climate change and to international agreements in order to combat climate change? The question is, however, whether these sources justify a linear translation of a specified commitment of the State towards other states into a similar duty of care towards its citizens. By making that linear translation, the Court robs the State of the possibility to take into account the specific political circumstances in its own national legal system.

### 3.3 *The Problem of the Many Hands*

Another persistent issue in climate change claims is the problem of the many hands.<sup>59</sup> The difficulty here is an amalgamation of problems of causation that

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58 Cf (30).

59 See Michael G Faure and André Nollkaemper, 'International liability as an instrument to prevent and compensate for climate change' (2007) 26A Stanford Environmental Law Journal 123, 157–173 See also Spier (n. 7), 175–181, and Faure and Peeters (n. 4), 267–268.

have been solved differently by different legal systems. First, there is the issue of uncertainty over causation. Since climate change is a combination of natural sources and CO<sub>2</sub> emissions from various emitters, it is clearly caused by many sources. One possible solution is a proportionate liability rule (like Article 3:105 Principles of European Tort Law), which implies that if several emitters have contributed to a significant but uncertain extent to the worldwide emissions, they are presumed to have caused equal shares thereof. Next, there is the issue of multiple actors; if the relative contributions of the emitters are determined, what then are the consequences? Is each emitter to be held individually liable for its own emissions, or can a joint and several liability rule be applied? A dramatic consequence of a joint and several liability rule would be that one emitter bears the liability for the entire costs of climate change (a solidary liability), with a possible recourse to other emitters to the extent of their responsibility (Article 9:101 and 102 Principles of European Tort Law). Finally, there is the problem of retrospectivity. Because of the cumulative effect of GHG emissions, past emissions must be taken into account as well. This leads to evidentiary problems (who did what), problems of fixing a date (since when were emissions wrongful), and problems of distribution (how the burden is to be distributed). In the *Urgenda* ruling, these problems of uncertainty, multiplicity, and retrospectivity, are all at stake.

*Urgenda* grounds its claim that the State has a pro rata-liability for the Dutch share in the worldwide GHG emissions on the ruling of the Dutch Hoge Raad in the case of the French salt-mines (see 2.2).<sup>60</sup> The Court rejects the defence of the State that its contribution is nothing but 'a drop in the ocean', with an analogical application of the ruling in the case of the French salt-mines to the obligation of the State to take precautionary measures to reduce the risk of dangerous climate change (see 2.4.6). There is, however, a difference between the two cases. In the case of the salt-mines the plaintiffs claimed compensation for damage suffered (in the form of expenses for instruments for desalinization), while in the *Urgenda*-case the plaintiffs claim injunctive relief for the future (in the form of an injunction to reduce the emission of GHG more than intended). So the question is: does the analogy hold?

Two remarks are in place. First, it is not clear how far the analogy stretches. Is it limited to the rejection of the defence that the 'but for' test cannot be passed, or does it extend to the rule that in case of a linear connection between the wrongdoing and the damage, the wrongdoer is liable for its share in the damage? In the first case, the Court utilises the rule from the Hoge Raad that,

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60 This solution has also been proposed by Kilinski (n. 45), 401.

in circumstances like those in the case of the French salt-mines, some connection between the damage and the wrongdoing is sufficient for compensation of the damage (see 2.2). In the last case, the Court applies the rule of the Hoge Raad such that in circumstances like those in the case of the French salt-mines, a pro rata-liability is justified. Since the Court does not mention that rule explicitly, it is not clear whether it embraces it (as Urgenda has pleaded for), especially since a rejection of the defence of the 'but for' test would be enough. To issue an injunctive relief, the Court need not determine the overall liability of the State, that is, its responsibility compared to that of other emitters. It would be sufficient to establish that the injunction would have at least some causal effect on the worldwide GHG emission.

Secondly, suppose that this interpretative issue is solved in the sense that the Court has intended to stretch the analogy with the case of the French salt-mines to the extent that it accepts the rule of pro rata liability for this case; then there are doubts as to whether the analogy is justified. The reason is that a pro rata liability is perfectly sound if the Court faces *ex post facto* the question of the distribution of damage *already established* (even if it consists of expenses for technology for the prevention of future damage), but less justified if the Court deals *ex ante* with the distribution of the burdens of the risk or threat of possible future damage (in the form of an injunction).<sup>61</sup> Should the same standards apply in these different situations?<sup>62</sup>

The reason for asking is that in the last case, the course of events is still uncertain and may still be changed for the better. In the context of climate change, one could say that an individual emitter still has the opportunity to change the course of action, not only of itself, but also of the other emitters (although within scientifically established limits). This seems a substantive possibility, since the emitters are involved in international negotiations about each one's share in the required reductions. The State has argued, although in

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61 Although a causal connection with concrete damage of the plaintiff is not required in case injunctive relief is requested (instead of compensation for damages), the issue of a minimal causal connection is re-introduced with the defence of the problem of the many hands. The court is confronted with causal questions again, although they may present themselves under the heading of wrongfulness (See Spier (n. 7), 176, fn 4). Compare also the Commentary on Principle 11 of the Oslo principles.

62 The same question is asked in IBA 2014 ('A model statute should address causation issues, such as, in a damages claim, the standards that should be adopted for proving a legally cognisable causal link between particular tangible harms and sources of GHG emissions; and in respect of preventive (injunctive) claims, whether the same standards or different standards should apply; and to what extent causation is relevant in seeking judicial review or declaratory relief for failures to fulfil obligations' (130), but not answered.

another context, that an injunction of the Court would disturb its negotiating position at the (then) upcoming conference on climate change in Paris at the end of 2015, where the relative portions in worldwide reductions were at stake. One can imagine that the State had reduced its mitigation target in 2010 from 30 to 17 percent as a move in the ongoing negotiation process. In the preparation of the conference in Paris, the order had been turned around; each state opened with a statement about what it is able and willing to contribute. The Netherlands took a position both as an independent state and as member of the EU. It had argued that possible extra reductions would be compensated by a less ambitious effort of other members of the EU (the ‘waterbed effect’, or the ‘carbon leakage’ argument). In short, it had developed a strategy and a negotiating position that could well be disturbed by the ruling of the Court. Of course this is speculative, but it only serves to show that there is a fundamental difference between taking one’s part in damage that already occurred, and sharing in the burden to prevent future damage.<sup>63</sup> If this is so, then the analogy of the salt-mines case is not as evident as it seems if it stretches to the rule of *pro rata*-liability.<sup>64</sup>

The appeal of the State to the problem of the many hands and the correlated argument of the drop in the ocean seems cynical (‘why bother if it will not make a difference anyway?’). It could indeed be nothing more than an easy argument to evade responsibility. The Court is therefore right to reject this defence.<sup>65</sup> Yet, we should not turn a blind eye to the core of truth that complicates matters considerably, namely that the problem of the many hands can only be solved through international negotiations (although the achievements reached thus far have been modest). Practically speaking, the negotiations have been complicated by differences between the parties involved, such as the distribution of the burden between developed and developing countries. What about the past emissions of developed countries? Do they justify a larger share for the developed countries with the burden of reducing GHG emissions, and if so, to what extent? On the theoretical level, considerations of distributive justice become relevant and change not only the scale, but the nature of the debate as well. How should the fact that some developing countries are now amongst the

63 Looking for other examples (like liability for the use of asbestos or tobacco), one stumbles across the fact that it all depends on what exactly is claimed in the specific case: damage suffered or an injunction to prevent future damage.

64 Which, of course, does not exclude that partial liability of states, for their causal contribution is to be accepted on grounds other than an (mistaken?) analogy in the case of the salt-mines.

65 Which is very much in line with the decision of the Supreme Court in *Massachusetts v EPA*. Although regulation by EPA would not reverse climate change, this was not sufficient reason to avoid it (IBA-report 2014, 131).

largest emitters be dealt with?<sup>66</sup> It seems that the global debate has become too complicated to fit in the relatively simple legal scheme of responsibility and causation. Even if tort law is equipped to deal with the problems of uncertainty and multiplicity, it faces huge difficulties in dealing with the problem of retrospectivity. We should not lose sight of the complexity of the world in which clear-cut legal concepts like pro rata liability must be applied.

### 3.4 *The Separation of Powers*

There is something odd about the reasoning of the Court on the separation of powers. On the one hand, it is constitutionally sound and, although of a general nature, hard to dispute. On the other hand, it is deemed unconvincing to opponents as it misses out their principal criticism, which is that the Court is crossing the line between the judicial and the political domain. The background of this criticism is threefold. First, the topic of climate policy is a political one and since its recognition as a major problem for national and international society, climate policy has been claimed by politicians to fall within their power. The involvement of the judiciary has thus far only been marginal.<sup>67</sup> Next, the intervention of the Court in this ruling is far-reaching. Despite its acknowledgement of the State's discretionary power, the Court orders the State (that is: the government) to adjust its climate policy. As noted, this could have effects at the international level as well (see 2.4.7). Finally, the intervention of the Court changes the logic of the debate completely. The problem of climate change is not implied only in the language of distributive justice between different countries anymore. From now on, it will also be discussed in the language of corrective justice, which is prevalent in tort law. Whether this is an advancement remains to be seen. Since liability in tort law presupposes the attribution of agency, causation, and wrongfulness, it does not fit easily with the problem of climate change.<sup>68</sup>

The core issue of the argument of the separation of powers is the question as to the justification of such an intervention by the judiciary. Why litigation? Jennifer Kilinski gives two reasons, which may provide the fundamentals of an answer. The first reason is that some countries and industries need the economic incentive that only liability suits can bring to jump start in-house change. Aside from this jump-start, there is a long history of looking to the judiciary if legislative and regulative efforts to solve social problems fail. The judiciary has a tradition of stepping in when other attempts fail, or appear to

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66 David A Weisbach, 'Negligence, strict liability, and responsibility for climate change' (2012) 97 Iowa Law Review 521, 527–565.

67 See Butti (n. 5).

68 cf Weisbach (n. 66).

be too late. Kilinski quotes Martin Luther King Jr., claiming urgency for equal rights for US citizens in the 1960s: 'In this unfolding conundrum of life and history there is such a thing as being too late.'<sup>69</sup> In the issue of climate change as well, there is such a thing as being too late. Now, as then, we have a social problem on our hands with an increasing urgency. And now, as then, all political attempts to solve it seem to fail, while we are running out of time. Therefore, perhaps the intervention of the judiciary is justified to solve this acute problem, not by providing the overall solutions that only international agreements and national regulation can provide, but by setting things in motion and thus making a small but decisive difference. It may be that this Court in The Hague has understood the signs of the times very well. If so, the resulting nuisance for the government is not just collateral damage, it is exactly what is needed to set it back on track.

#### 4 Conclusion

Unexpectedly, the District Court of The Hague issued a ruling establishing state liability for climate change for the first time. While doctrine wrestled with seemingly insurmountable problems with regard to standing, wrongfulness, causation, and the separation of powers, this Court clears these hurdles rather straightforwardly and convincingly. The ruling stands firm and, despite the comments made, leaves the reader with appreciation and respect for a Court that not only mobilizes the intellectual strength to do such a thing, but also displays the moral courage to hand down a truly independent ruling. This ruling offers a loud and clear signal that governments have a duty of care for the safety of their citizens and that they share a wider responsibility for the development of a sustainable society. If they compromise those obligations, at the expense of their citizens and future generations, they may be called upon for action by the judiciary, holding them liable for not delivering on the obligations that they have taken upon themselves in international agreements and national policies. It is true that the Court has made far-reaching decisions, but it has reasoned extensively as to their justification. To develop and execute a climate policy that is substandard—to the best of our knowledge and in the light of international consensus—is both dangerous and wrongful, and should lead to adjustment of that policy. In giving this signal, the Court does a great service for national and international society.

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69 Kilinski (n. 45) 378–381.