Final Draft translation

Memorandum of oral pleading, part II

J.M. van den Berg

in the case:

Urgenda Foundation

v.

Kingdom of the Netherlands

Regarding the failure of the Dutch State to take sufficient actions to prevent dangerous climate change

More information about the case can be found at:

www.urgenda.nl/en/climate-case

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MEMORANDUM OF ORAL PLEADING

Stichting Urgenda vs. the State of the Netherlands

District Court of The Hague, 14 April 2015

J.M. van den Berg, Esq.

INTRODUCTION

1. Mr Cox has just explained the reasons that the State is pursuing an inadequate policy for emission reductions targeted for 2020, that the EU too is pursuing an inadequate policy for emissions reductions targeted for 2020, and that the European ambitions for 2030 in this area are also inadequate. European climate policy is only of importance in this case because that the State is trying to hide behind it.

2. This case brought by Urgenda and its co-plaintiffs is an attempt to compel the State via the law and the courts to achieve by 2020 the reductions that are minimally necessary.

3. In a broad view, the State's defence consists of two parts:
   a. Dutch climate policy is a matter for the political sphere, and the courts ought to refrain from decisions that encroach upon it;
   b. The State is not acting unlawfully, and even if that were the case, Urgenda and its co-plaintiffs would not have standing to turn to the courts on that basis.

4. The State is not the only party that is neglecting to do the minimum required. The international political process may in fact have agreed about what must happen in general terms, and what has to happen at a global level, and what the reduction scenario must be for the Annex I countries within that worldwide group; but for many years no agreement whatsoever has been reached concerning a further division of the reduction burden per individual country. The climate dossier has been locked in a political impasse for years, and no way has been found to achieve any further progress.

5. Political decision-making is being seriously hindered by the 'after you' defence: 'I am willing, but only if several other parties are going to do a lot more than they are now doing.' This attitude can also be found in the reactions of the State: 'It is necessary that first an international agreement be reached in which everyone participates.' If everyone takes this position, then nothing happens. This position led to the failure of the climate summit in Copenhagen in 2009.

6. Since 2009, the political process has not had any further success in reaching a political agreement about a division of reduction percentages per country that would collectively allow an outcome that remains below the 2°C norm.

7. Because of this, the worldwide annual emission level has continued to rise and has reached much higher levels than anticipated in the programme for the gradual reduction of emission levels with which we would still be able to come out at 2°C. We are in fact still heading for 4°C or higher.

8. Mr Cox has already briefly mentioned the most recent UNEP Emissions Gap Report dated 2014. As has been said, since 2010, UNEP has reported annually about the constantly broadening gap between the reductions that are needed in order to remain under 2°C and the reductions that are actually being achieved. It is now being reported in the 2014 report[1] that the earlier scenarios are no longer attainable, so that the report must now proceed from other scenarios. In these new reduction scenarios, the 2°C goal can only be reached with more extreme reductions and much larger negative emissions in the second half of this century. In fact, UNEP is saying that it is not two minutes to twelve, but rather two minutes after twelve. The report actually says – and this is the point that I wish to make – that the political approach to the climate problem has been seriously inadequate.

[1] UNEP Emissions Gap Report 2014, p. xv, and in particular footnote 6 on that page and footnotes 10 and 12 on p. xvi.

'PARIS'

9. I suspect however that the State is about to argue that the Dutch political process, as well as those of Europe and other international parties, still has the aim of achieving the 2°C objective, and that there is hope that the climate summit that will be held in Paris at the end of this year will still reach an ambitious worldwide agreement with which the possibility of still achieving that norm will remain intact.

10. In this regard I would comment that it is abundantly obvious from the diagrams that Mr Cox has just shown that the responsibility for the question whether we can achieve the 2°C objective has been brought to bear mainly on the next generation. At present, we are very obviously falling short, that shortfall will have to be compensated by them, and it is very questionable whether that will be possible.

11. I suspect that the State will nevertheless want to draw the conclusion concerning the climate summit in Paris that it is up to the political parties to make the next move, that they are already working hard at this behind the scenes, and that this is not the moment in which the courts may – much less must – interfere with that political process, one reason being that this could compromise the Dutch negotiating position in Paris. In any case, the State took a step in this direction in its rejoinder.

12. And even if the State does not presently bring forward this defence, I do not wish to leave the rejoinder uncontested on this point.

13. The failure of the climate summit in Copenhagen in 2009 has led to the reality that the climate summit in Paris at the end of this year also will not result in a worldwide climate agreement with *binding* reduction agreements. In fact, the parties will no longer even try to reach binding reduction agreements in Paris. In

the event that the court would like to know more about this, you will find a reference[2] to a recent publication in the memorandum of my oral pleading.

14. For the moment it is important to know that at the preparatory Conference of Parties in Warsaw in 2013, mindful of the failure of the Copenhagen summit, a decision was made to take another approach. A worldwide climate agreement with understandings concerning legally binding reductions is considered to be out of reach. The new approach is that countries merely promise and agree to their intentions but not to legally *binding* reductions: there is no longer mention of 'commitments' but only of 'contributions'. The new approach is that '*Countries must determine themselves how ambitious <u>their share</u> will be in counteracting the climate problem*.'[3]

15. In this new approach, each country is called upon to promise an individual reduction effort and to be as ambitious as possible in doing so. With this approach, the political parties hope to break through the political impasse and inertia that has already continued for years.

16. However, there is a great and evident risk in this approach, namely that countries are not ambitious enough and that the sum of all the national intentions is insufficient to remain under the 2°C limit.[4] Another problem is the lack of any provisions for monitoring and in particular for enforcement; after all, only intentions are involved, not obligations to achieve results. It is for example unclear to me to what extent the Dutch government considers itself to be legally bound by 'intentions'.

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[2] H.D. van Asselt, JD, 'Samen staan we sterk? Omgaan met de versplintering van internationaal recht op het gebied van klimaatverandering' (Together We Stand Strong? Dealing with the Fragmentation of International Law in the Area of Climate Change), *Milieu en Recht* (Environment and Law) 148 (December 2014), pp. 738ff, in particular p. 740.
[3] See previous footnote.
[4] Van Asselt, op. cit., p. 744, bottom of left column.

17. In this international political approach, there is thus expressly a strong appeal made to the individual responsibilities of the countries: that each country would individually accept its responsibility and would be ambitious. And that is exactly what is claimed of the Dutch State in this lawsuit: a minimum – and therefore also legally binding – reduction of 25% to 40% by 2020, with the marginal comment that 25% is by no means ambitious, as Mr Cox has already shown.

18. In its rejoinder, the State has complained that if your court were to impose the requested reduction order on the State, its negotiating position in Paris would be undermined. I am annoyed by this argument. Denmark, Germany, and Sweden already committed themselves years ago to a reduction of 40% by 2020 and the United Kingdom to 35%. Those countries do not consider their international negotiating positions to be undermined by doing so. I cannot see why that is different for a Dutch commitment to reduce by 25% to 40% by 2020, whether that commitment is established via the court or otherwise.

19. Furthermore, Urgenda and its co-plaintiffs are aiming their reduction order primarily at the short term, up until 2020; the Paris summit is concerned exclusively with the intentions – or rather the 'good resolutions' – for 2030. In addition, the EU has already announced (on 31 March 2015) its 'good resolutions' for 2030; Mr Cox already spoke briefly concerning this. The cards are thus already on the table.

20. Moreover, the EU will sit at the table in Paris as a single block; the Netherlands will not be negotiating individually concerning a Dutch reduction goal. There can thus be no question whatsoever of any undermining of the Dutch negotiating position.

21. I conclude that the international, European, and national reduction policies, starting with the UN Climate Treaty of 1992 (the UNFCCC), have consistently fallen short and that the climate problem has worsened as a consequence of this. The outlook for in the short term for adequate reductions is poor. The new approach that has been chosen for the summit in Paris indeed recognizes this failure, and the

constraints have been loosened in the hope that each country will still do on its own that which it will not formally agree to do. That does not leave a comfortable feeling, nor is there much comfort in the State's attitude that it only has to do what it is obliged to do.

22. For Urgenda and its co-plaintiffs, this has been the reason to force the State via the court to achieve in any case the reductions that are necessary before 2020.

23. They realize that the court cannot solve the problem. That is not the court's task. But it is the court's task, when parties are at odds with each other over some matter and are not able to untangle the knot on their own, to cut through the knot when asked to do so. Cutting through the knot is perhaps not the ideal solution; even quite often it is not, for the sword of justice is none too gentle. But the sword of justice is in fact the instrument that our society has appointed to put an end to conflicts when other methods no longer work.

24. A verdict of the court breaks through the status quo, and in doing so, it forces the parties in question out of the inflexible positions that they have dug themselves into. This creates new possibilities and new perspectives. In this climate dossier, your verdict may be able to impress on the political powers the fact that there are legal limits not only to political action but also to political inaction. In doing so, it also adds an element of urgency to their duty of care.

25. In this situation, an order given by your court to reduce emissions may be able to break through the political stalemate that is keeping the generally available knowledge concerning the causes and dangers of the climate problem from being transformed into political action to do what is necessary to oppose those dangers.

26. Just a few days ago, the Oslo Principles on Global Climate Change Obligations were published. Perhaps you have read about them, and you may also have seen in the newspaper *Trouw* the interview about them with Advocate General Spier who, together with former Advocate General Huydecoper, was involved in formulating that document. The Oslo Principles have been drawn up by an international group

of leading legal scholars and scientists in order to break through the deadlock in the climate dossier. The Principles contain a number of basic legal assumptions concerning the legal liability of states and large enterprises for climate change. The Commentary that was provided along with the Principles begins with the following quotations concerning the role that the courts ought to play:

'Law is the bridge between scientific knowledge and political action.'

and:

'On the science there is a remarkable degree of consensus. The problem is to translate that understanding into political action. Here above all we may find ourselves looking to the law to provide a bridge, and to the judges to offer at least some building blocks.'

27. This reflects the core of what Urgenda and its co-plaintiffs want to achieve with this lawsuit and why we are calling for your help.

28. In this case, many legal arguments have already been exchanged. I think that Urgenda and its co-plaintiffs have already made the basis of their claims clear in their statement of reply. In its rejoinder, the State has once again contested them. Although I think that nearly everything has already been said in the statement of reply, I do wish to bring up several legal points.

THE LEGAL GROUNDS UPON WHICH URGENDA BASES ITS CLAIMS

29. The exact reproach with which Urgenda and its co-plaintiffs are confronting the State is:

- that the emission level of the Netherlands is unacceptably high and must be reduced as quickly as possible,
- that the State has an exceptional duty of care and responsibility to reduce that level of emissions,

- that this duty of care entails in any case achieving no later than 2020 a reduction of 25% to 40% with respect to the emission level of 1990,
- and that the State is falling seriously short in carrying out that duty of care.

30. For their position, namely that it is not in line with social proper conduct to emit CO2 into the atmosphere on this scale from the land area of the Netherlands, Urgenda and its co-plaintiffs refer to and draw upon textbook examples such as:
- unlawful behaviour through nuisance and endangerment (the *Cellar Hatch* criteria), and
- unlawful behaviour through transborder emissions that cause nuisance (the *Voorste Stroom* and *Potash Mines* decisions).

31. The *Cellar Hatch* criteria that Urgenda have referred to are a number of viewpoints that are used to test whether endangerment is *unacceptable*. Application of those criteria (familiarity with the severity and urgency of the climate change problem; possibilities for reductions) leads according to Urgenda to the conclusion that the Dutch emission level is unacceptably high at present.

32. Application of the criteria against which the acceptability of transborder emissions must be tested has led Urgenda to the same conclusion. In applying this test, it became clear that the Dutch emission level is excessive in comparison with that of other countries, both in absolute terms (number 25 in the top 200) and in per capita ranking (among the top 10). This already indicates that the State is seriously falling short in its reduction obligations.

33. In the context of the same test of transborder emissions, Urgenda has also shown, by reference to the tenet of partial liability, that in judging that the Dutch emissions level is unacceptably high, it is not relevant that dangerous climate change would continue to exist even without Dutch emissions because of the emissions of other countries. Partial liability means liability for one's own share, and the responsible party can be held liable independently; it is not necessary that first all other parties are also held liable.

34. The tenet of partial liability thus pushes aside the 'after you' defence that is one of the foremost reasons for the political impasse in the climate dossier. The fact that the civil courts have solved this problem of cumulative causation – or at least have cut through the knot in this way – is, in my opinion, due to the fact that the political process can postpone decisions on difficult questions concerning division of responsibility ('until a real disaster occurs') much longer than the courts can, now that the courts are required on the basis of article 26 of the Code of Civil Procedure to make an immediate decision and cut through the knot when a question of law is put before them. It is one of the arguments that plead for a judicial reduction order: the 'after you' argument will be taken out of the hands of the politicians as an excuse for inaction, as was done similarly in the EPA case in the US.

35. In addition to these tenets of national law, Urgenda and its co-plaintiffs also draw upon international law, in particular:

- the universal international law 'no harm' principle that considers nuisance resulting from transborder emissions to likewise be in conflict with the duty of care borne by states (the *Trail Smelter* decision),
- and the way that the 'no harm' principle has received a particular elaboration and codification in the UN Climate Treaty (the UNFCCC) where emissions of greenhouse gases are concerned.

36. With respect to this: the State has repeatedly claimed that Urgenda and its co-plaintiffs cannot seek support for their claims in international common law or in the UN Climate Treaty (the UNFCCC) because these only contain legal guidelines for the relationships between states, and citizens may not turn to them for support of their claims.

37. Urgenda and its co-plaintiffs therefore wish to say again that they do not seek direct support from those rules of international law, but rather indirect support, and that such indirect support is in fact possible and is called the tenet of indicative or reflective effect, as has already been explained.

38. There is a certain kind of circular logic in the norm of due care in tort law. At the heart of the matter, we say that a behaviour is socially unacceptable if it is considered to be socially unacceptable. The court (and here I am paraphrasing the citation of Sieburgh in the statement of reply) that judges whether a certain behaviour is unlawful thus searches for a certain societal consensus concerning the acceptability of that behaviour, for example by looking at how similar situations have been settled legally, by looking at traditional practices and legal usages, by looking at guidelines for professional behaviour, or by looking at treaties that have to do with the same kind of behaviour. In the latter case, the court does not test the behaviour directly with respect to the treaty itself, but rather with respect to the social consensus that is evident with respect to that treaty concerning what is socially acceptable and what is not.

39. The fact that 195 states, a group that we could call the 'professional associates' of the State, have agreed that CO2 emissions must be forcefully reduced, and that the Annex I countries in particular

- should achieve a minimum reduction of 25% to 40% by 2020,
- a reduction of 80% to 95% by 2050,
- and at a later date no more CO2 at all may be added to the atmosphere on balance, makes clear that emissions of CO2 are judged by the State's own circles to be very undesirable for society.

40. The fact that these 195 states have subsequently even made certain agreements in the UN Climate Treaty (the UNFCCC), or in the context of that treaty, makes it clear how strong that consensus is and how strongly those states want to hold each other accountable to those agreements. This universal consensus among states concerning the unacceptability of the existing national CO2 emission levels is of course relevant to the question whether the Dutch emission level must be judged to be unacceptable with respect to the unwritten laws of the Netherlands, as I think it should be.

41. For there are good reasons that a universal consensus exists among states that CO2 emissions are unacceptable and must be reduced as quickly as possible. I repeat: as quickly as possible.

42. I want this court to fully grasp the principles of physics that make CO2 emissions at the present scale (and ultimately at any scale that is not negligible) socially unacceptable, or in any case they have now become socially unacceptable and must now be reduced as quickly as possible. This has already been explained, but perhaps not yet so succinctly.

43. A large part of the CO2 that is emitted remains in the atmosphere for centuries or even millennia and continues to retain additional heat in the atmosphere. Because CO2 remains in the atmosphere and does not disappear, every new emission causes even more CO2 to build up in the atmosphere. The concentration of CO2 in the atmosphere increases with *every* emission of CO2, and as the concentration increases, the warming of the earth also increases proportionately.

44. Thus if you want the warming of the earth to remain below a certain temperature boundary, you must see to it that the concentration of CO2 in the atmosphere does not exceed a certain concentration limit. If you want the concentration of CO2 in the atmosphere not to exceed a certain limiting level, then from the moment that this concentration is reached, you must see to it that as much CO2 is removed from the atmosphere as is emitted into it. On balance, CO2 emissions must be zero. In the UNEP 2014 report that both Mr Cox and I have already mentioned, it is expected that this moment will be reached between 2055 and 2070. After that, every emission will have to be compensated with an equally large negative emission.

45. The conclusion is that in principle every CO2 emission brings us closer to a dangerous climate change, and every emission therefore is *by its very nature* socially unacceptable. It is this inherent danger that explains why all 195 countries are in agreement that ultimately, on balance, no more emissions may take place.

46. Stated briefly, in every approach that Urgenda has used to test whether Dutch emissions are unacceptably high, the conclusion every time was that this is indeed the case. This consistency of results is not odd in itself, and it is by no means contrived. In essence, all of those approaches are variations on the universal fundamental norm, namely that your behaviour may not cause nuisance or danger to others.

47. Therefore I cannot easily understand how the State can want to argue that in its opinion nothing is wrong with the Dutch emission level, or at least that this emission level is not socially unacceptable.

48. The argument that the Netherlands may reduce emissions gradually is in any case not a good argument. The desirability of phasing out emissions as quickly as possible is not up for discussion, and that desirability is also logical considering the nature of the problem. The fact that all emissions do not have to be terminated tomorrow has to do with the fact that there are other important societal interests (for example, economic considerations) that can oppose such a strategy. Because of these important societal objections to an immediate reduction to zero emissions on balance, the international consensus of 195 countries has been that Annex I countries may limit themselves to a reduction percentage of 25% to 40% by 2020.

49. These are the kinds of circumstances to which article 6:168 of the Civil Code is applicable, namely that an order to put an end to an unlawful condition does not have to be issued *if and to the extent that* important societal objections are opposed to it. This does not detract from the unacceptability and unlawfulness of the situation, that is, the behaviour or omission in question. Any important societal objections that the State might be able to come up with against putting an immediate end to Dutch CO2 emissions have therefore already been taken into account in the reduction percentage of 25% to 40% by 2020 that Urgenda claims, as well as in the reduction percentage of 80% to 95% by 2050. The interests of preventing a dangerous climate change are so great and so decisive that these reduction percentages are for Annex I countries the minimum percentages that are necessary and required. They are so great and so decisive that all other societal

interests are subordinate to them; all those other interests are already taken into account in those reduction percentages that have been generally accepted by the treaty parties, thus by the State itself as well.

50. Briefly stated: the fact that the Dutch emission level is unacceptably high still stands, even though a gradual reduction is allowed.

51. But perhaps the State wishes to argue that there is not yet any great damage in the form of a dangerous climate change, that such damage furthermore can still be prevented, and that for these reasons the present Dutch emission level is not unacceptable.

52. In the briefs previously submitted to the court, Urgenda has made quite a point of the fact that a determination of unlawfulness centres on a judgment concerning the behaviour. It has to do with the question of whether an action or an omission must be disqualified as being in conflict with that which social norms of due care demand that someone must do or must avoid doing with respect to another party or with respect to that party's interests.

53. A way of acting is unlawful when that way of acting is by its very nature socially unacceptable, for example because it involves great risks of considerable damage. Whether that damage has already actually come about is a different matter than the societal acceptability of the way of acting itself. See for example also Sieburgh (Statement of Reply, paragraph 191), to which Urgenda has referred.

54. I have just explained what the inherent dangers of CO2 emissions are, that this is the reason why they must be ended as quickly as possible, and that they are therefore socially unacceptable. The fact that a dangerous climate change has not yet been caused by the current emissions does not detract from this; unlawfulness and damage are two different aspects that may not be confused with each other.

55. I also wish to comment that the current emission levels of the states are in fact already causing warming and great damage to the climate. In the writ of summons

and in the statement of reply there are detailed lists of the kinds of damage that are now already being suffered under the present warming of 0.8°C. The fact that the current emissions have not yet caused the great amounts of damage that go along with a dangerous warming of 2°C and that these great amounts of damage perhaps can be prevented, changes nothing about the inherently dangerous and damaging nature of CO2 emissions at their present levels.

DUTY OF CARE

56. Above, I have aimed to demonstrate that it is socially unacceptable for the combined emissions from Dutch territory to be as high and widespread as they presently are.

57. I have done this in terms and in a format that might – and perhaps must – lead the court to conclude that the present Dutch emission level is wrongful. But that is ultimately not the key question.

58. The key question is whether, given the objections and dangers associated with emitting these quantities of CO2, the State has a duty of care to reduce them. The only possible answer is that it does, but the State seems to take a different view.

59. When social problems of this nature and scope surface, such as climate change, states have a general duty of care and a responsibility to heed these problems and to take ownership. If the State no longer even considers Dutch collective and general interests, it loses its *raison d'être*. It is essentially that simple.

60. Authorities have been set up specifically to address this type of social problems that affect major collective and general interests. To this end, they have been entrusted with governing authority, including all powers and means that go with it. Moreover, this type of problem can be addressed only at the level of such authorities. If Urgenda and its co-plaintiffs could deal with the problem of the Dutch emission level being too high on their own, there would have been no need to ask the court to force the authorities to act. Therefore, I see a duty of care for the State.

61. Moreover, the State is saying that the climate problem should be addressed by the political authorities, not by the court.

62. In addition, as you are aware, the State is one of the 195 countries that have agreed together in the UN Climate Convention that they are jointly responsible for preventing dangerous climate change, and that therefore each country is individually responsible for reducing the emissions from its own territory by as much as is necessary to avert this dangerous climate change.

63. Based on the 'no harm' principle, states also have a duty of care to ensure that emissions from their territory do not have unacceptable consequences beyond their territory.

64. The State acknowledges that pursuant to both these obligations under international law, it does indeed have an obligation and a duty of care to ensure that the Dutch emission level is acceptable, but it adds that it has these obligations under international law solely toward other states. Only other states have the right to protect their populations from Dutch emissions; its own Dutch population is not entitled to such protection, according to the State, and it can therefore not be held accountable by its own citizens for such emissions. This perception by the State of its duties appears to me to be entirely unacceptable. And it reemphasizes the need for these proceedings.

65. Merely for the purpose of completeness, I repeat that obligations under international law by virtue of the doctrine of indicative or reflective effect define and answer the question as to what unwritten duties of care the State has with respect to climate change and the Dutch emission level. And citizens are entitled to address the Dutch court to obtain protection from unlawful action by the State if it neglects such an unwritten duty of care.

66. Finally, Urgenda and its co-plaintiffs have argued without refutation that the State takes a great many measures that directly influence the scope of the Dutch emission level and are also intended to do so; if only because the State hopes that in doing so,

it will meet the reduction obligations it has toward other states according to international law. The State essentially acknowledges this by arguing that it is already doing a lot with respect to climate change, for example the Energy Accord.

67. While taking these measures has not made the State an emitter, it most certainly has become the planner and architect of the combined volume of all those Dutch emissions. The State may not be the actual driver, but it is certainly active in charting the course. And that makes the State responsible for the results as well; while the State is not the emitter of the Dutch emissions level, it is just as responsible for it as if it had been this emitter.

68. I will illustrate this with another example from standard case law. The *Cellar Hatch* criteria, that Urgenda has invoked, are a number of viewpoints that are used to establish unacceptable endangerment. The State argues that these criteria apply exclusively to the party actually causing the danger – the CO2 emitters in this case – and that these criteria are therefore irrelevant to the duty of care that the State has for the Dutch emission level because the State is not an actual emitter.

69. This perception is incorrect. A party's duty of care depends on his or her role. The *Cellar Hatch* criteria apply to cases of endangerment and relate to all parties concerned, taking into account their respective roles and the duty of care that they entail. For example, in the Enschede case, also known as the 'fireworks disaster case', not only was S.E. Fireworks charged with causing unacceptable dangers, but the State was also blamed as a supervisory authority, as it had a duty of care to restrict such dangers in this capacity. The *Cellar Hatch* criteria were therefore applied in full to the State,[5] even though, as stated, it had not caused the disaster; the criteria were focused on its supervisory role. That the State was ultimately not held liable was not because the *Cellar Hatch* criteria did not apply to it, but because it did not know and was not expected to know how dangerous the situation was at that moment and therefore had not violated its duty of care. S.E. Fireworks was aware of those dangers, of course, and was indeed liable.

[5] See the court judgment, considerations 20.2 and 20.3, and the ruling by the Court of Appeal, considerations 13.22ff.

EXTENT OF THE DUTY OF CARE

70. I have now explained that the State has a duty of care and is responsible for the Dutch emissions level.

71. I have previously covered in part what this duty of care entails and how far it goes, and in his oral pleading Mr Cox has paid particular attention to this. According to this duty of care, the State is supposed to ensure that in 2020 the Dutch emissions level is at least 25% to 40% lower than the Dutch emissions level of 1990.

72. If the State neglects this duty of care, it is acting unlawfully toward the entire Dutch population, or toward large groups of it, that will be affected because of dangerous climate change, for example in the enjoyment of human rights that the State is required to protect, as well as, for example, toward foundations and associations that address the interests of a sustainable society and in doing so have taken a special interest in climate change and reducing the use fossil fuels.

73. The State believes in any case that it has no unwritten duty of care, aside from its European reduction obligations, and *a fortiori* no duty of care to reduce the Dutch emissions level in the measure that Urgenda and its co-plaintiffs desire. The State refuses to pursue such a reduction policy.

74. I think that this sufficiently establishes that the State is neglecting its duty of care now, and that it will continue to do so. There is thus sufficient legal foundation and motivation to grant the reduction order claimed by Urgenda and its co-plaintiffs.

A NATIONAL AND EUROPEAN POLITICAL MATTER

75. As stated, however, the State sees no scope for such a reduction order by the court because the climate policy is in its view a political matter. The most specific comments by the State about this are in paragraph 11.2 of its statement of rejoinder, and I quote:

'As has already been argued at length […], regarding climate change and the reduction targets agreed in that context at international, European, and national levels, there have been political considerations and policy decisions within the government and the Senate and House of Representatives of the Dutch Parliament. These considerations and decisions impede your court from granting the reduction order claimed by Urgenda et al.'

76. So there you have it. No substantive explanation. Not even a hint as to which other interests received consideration, how the different arguments were weighed, or which priorities were set. Not a single argument as to why the Netherlands wishes to reduce less than it agreed to do in an international context with 194 other states, being the minimum necessary reduction that applies for Annex I countries.

77. All the State will say is that the political powers have thought about it, this is what the political powers have chosen to do, and the court must simply accept that and may not otherwise review it or have a different opinion about it. This is so manifestly incorrect and at odds with the ideas that fill entire books about government liability and unlawful government actions that I will not even provide a substantive response anymore and trust that your court sees this entirely differently. Just a general remark:

in a democratic constitutional state, even the democratically elected government is bound by the limits of the law, and it is the constitutional task of the court to ensure that this happens and to correct the government wherever necessary.

78. Also a part of the State's 'it is a political matter' defence is that it is taking refuge behind the reduction obligations set for it in a European context: 'it is *European* policy.'

79. Mr Cox has already spoken extensively about the EU climate policy, so I will be very brief here. The reduction percentages agreed within the EU, both for the collective

and the internal subdivision, are based on a political *compromise*. This was the maximum politically attainable. It is considerably less than necessary.

80. How does the reduction order that Urgenda wants to have issued to the State relate to the European reduction obligation of the State? I will explain that briefly.

81. In this case, Urgenda and its co-plaintiffs are raising the question as to whether the State, aside from its European reduction obligations, may possibly have other reduction obligations, for example reduction obligations based on Dutch law.

82. The conclusion is that such a national reduction obligation does indeed exist, that it – as discussed – derives from Dutch law concerning unlawful acts, and that this national reduction obligation compels the State to achieve a reduction that has been determined by international consensus to be the minimum necessary to remain below the 2°C level.

83. The European and the Dutch reduction obligations of the State are thus parallel, and Mr Cox has already explained that European law is not at odds with the State's making reductions pursuant to its Dutch reduction obligation that *exceed* its obligations under European law.

84. In summary, the State cannot dismiss the reduction order for a minimum necessary reduction claimed by Urgenda by arguing that its reductions are already insufficient pursuant to its European obligations.

ADMISSIBILITY OF URGENDA

85. In addition to the 'it is a political matter' defence, the State is invoking several other defences against the claims by Urgenda and its co-plaintiffs.

86. The State appears to argue, for example, that plaintiffs may not or cannot defend general and collective interests.

87. Obtaining a reduction order also requires more specifically, according to the State, imminent specific, individual, and concrete financial loss (statement of rejoinder, 8.7 through 8.12). Which of the plaintiffs will suffer a loss, what loss, how will it arise, and when? Because Urgenda has not made any statements about this, according to the State, the reduction order should be rejected for this reason as well.

88. In this defence, the State is in my view ignoring thirty years of established case law about collective actions and Article 3:305a of the Dutch Civil Code.

89. While governments and politicians are primarily responsible for protecting general or collective interests – that is why we are now holding the State accountable on those grounds – they do not have a monopoly on protecting general or collective interests. See the *Nieuwe Meer* case law from the mid-1980s.

90. In 1992, the legislature codified this case law into legislation. By adopting Article 3:305a of the Dutch Civil Code, the legislature has expressed the desire to enable foundations and associations that defend the collective interests of groups of citizens or that defend more diffuse general interests such as protecting the environment to litigate to have the court enforce protection of those interests. Stichting Urgenda is such a foundation, and Article 3:305a of the Dutch Civil Code entitles it to request what it is claiming in these proceedings.

91. In a column in the *Nederlands Juristenblad* (NJB) about this climate case, Professor Hartlief has described how this climate case sits in a process of politicians enlisting citizens to protect general interests by arming these citizens with liability law and granting them access to the courts, so that these citizens become the auxiliary forces of the authorities in protecting collective and general interests. He also writes that citizens are then likely to hold their own authorities accountable if those authorities neglect their duty of care for collective or general interests in situations where action by the political authorities is necessary to protect such interests.

92. In concluding his column, he noted that this climate case involves immense interests affecting massive numbers, while at the same time no progress at all seems to have been made on the climate issue in years. This climate case by Urgenda is in his view a crowbar for forcing work on this issue to be resumed.

93. In my opinion, the comments by Professor Hartlief convey the essence of this case and put it in the proper perspective. I will use his remarks as the foundation for my responses to the defence by the State.

94. The general interest that Urgenda is defending is the interest in a sustainable and enduring society, and the main themes are a fossil-free sustainable energy supply and effective climate policy. This case clearly relates to the interests it is protecting. An inadequate and unlawful climate policy of the State moreover undermines the interests that Urgenda is protecting; it is thus also unlawful *toward* those interests and consequently *toward* Urgenda.

95. The dangerous climate change that Urgenda aims to help avert with these proceedings entails many different threats. The most revealing example is that huge financial efforts (the Delta Commission) will be needed to prevent 60% of the Netherlands from being flooded. This affects the interests of large groups in Dutch society, also known as collective interests. I have already mentioned the imminent erosion of the enjoyment of fundamental human rights.

96. This case is therefore about protecting both general and collective interests; they coincide. It also concerns interests that Urgenda is entitled to defend in court. The admissibility requirement, the interest requirement, and the relativity requirement have all been met.

DECLARATORY JUDGMENTS

97. Thus far, I have addressed mainly the reduction order that Urgenda and its co-plaintiffs are rightly claiming; this is the core of this case. They are also claiming some declaratory judgments, which the State is similarly resisting.

98. The State argues inter alia that Urgenda has no interest in these declaratory judgments – and then convincingly demonstrates the opposite. I will explain.

99. Both the present excessive Dutch emissions level and the refusal by the State to introduce an adequate reduction policy are impeding and preventing Urgenda from achieving its objectives and protecting the interests it is defending. It therefore has an interest in the relief it is requesting.

100. The reduction order claimed by Urgenda and its co-plaintiffs is intended to ensure that the State fulfils its duty of care and responsibility for realizing at the very least the minimum necessary reductions.

101. Urgenda understands that these reduction obligations will require political measures that deviate from the present political policy. Urgenda values (refer to its statutes) establishing democratic support for these measures and therefore feels a sense of (shared) responsibility.

102. Notifying and warning the general public are the most important instruments that serve this purpose. All the declaratory judgments desired by Urgenda are useful and important; each and every one is a foundation for conveying a compelling and concrete message that highlights the necessary urgency.

103. While the urgency of the climate problem necessitates such an approach, both this sense of urgency of that problem and the special responsibility of the Dutch for that problem, because of their high per capita emissions, are entirely lacking from the information provided by the State. I refer to the PBL [Netherlands Environmental Assessment Agency] report, submitted with the statement of reply, in which cultivating political support in this respect is compared with such efforts by the United Kingdom, Germany, and Denmark. The Netherlands compares unfavourably in this respect.

104. More generally, thus separately from the reduction order that Urgenda is claiming, the declaratory judgments that Urgenda is claiming may be conducive to achieving its objectives.

105. One noteworthy example is that in the general press, self-designated climate sceptics regularly call into question the existence, causes, and dangers of climate change and the integrity of the IPCC. The State supports and promotes this misleading public information. To carry out the Neppérus motion already mentioned in the writ of summons (paragraph 427), KNMI and PBL have been instructed by the State to find scientific arguments and to publish them in a peer-reviewed journal to boost the credibility of these 'climate sceptics'. The State actively casts doubt as well. This false or (because of its bias) at the very least misleading information presented to the Dutch public about the seriousness and urgency of the climate issue, in which the State participates and which it in any case does not refute, hinders Urgenda in realizing its objectives. The declaratory judgments that Urgenda claim may help eliminate this 'false balance'.

106. But the objections by the State to the declaratory judgments are far broader than merely asserting that Urgenda has no interest in them.

107. The first declaratory judgment that Urgenda desires reads:

'Because of the high emissions of greenhouse gases into the atmosphere, the Earth is heating up, and, according to the best scientific insights, dangerous climate change will result unless these emissions are strongly and swiftly reduced.'

108. The second declaratory judgment that it desires reads: *'The dangerous climate change that arises from global warming of 2 degrees Celsius or more with respect to the pre-industrial era, at any rate the dangerous climate change that arises from global warming of approximately 4 degrees Celsius with respect to the pre-industrial era, which according to the best scientific insights is to be expected with the present emissions trends, will endanger large groups of people and human rights.'*

109. These declaratory judgments repeat and confirm what the 195 countries of the UN Climate Convention have expressed in the Cancun Agreement, in response to the AR4 report from the IPCC. The State is a party to the Cancun Agreement.

110. Still, the State strenuously resists granting these declaratory judgments. I quote (statement of rejoinder, 12.5):

'The State supports the findings in the context of the IPCC but at the same time explicitly embraces the uncertainties that the IPCC mentions regarding the analyses and sample calculations regarding the consequences of climate change. Because of these uncertainties, the declaratory judgments required at 1. and 2. [...] are not eligible to be granted.'

111. The State therefore denies that climate change may have dangerous consequences. It believes that the scientific evidence of this has not been provided. In Cancun it was, but no longer today.

There it is, in writing.

This is the argument that the State presents to its own courts, which need to rule in a case about whether the State is negligent in its duty of care.

112. This position reveals immediately why the State is showing no intention whatsoever of proceeding toward substantial reductions. Not important enough. As far as I am concerned, this sheds an entirely new light on all defences from the State in these proceedings.

113. Nor is it a 'slip of the pen'. On 3 December 2014, when the Dutch Parliament debated 'consequences of the IPCC report for Dutch policy', the fraction leader of the largest party in the government refused, even when three other parties had him backed into a corner, to acknowledge that mankind is responsible for climate change. All he could say was that the IPCC had a very clear view on that matter, but that a group of scientists feels entirely differently about the subject.[6]

114. Quite frankly, I am shocked. I have considered whether I would add something here about the difference between scientific certainty (any alternative is out of the question) and legal evidence (sufficiently plausible), but I have decided not to do so. The State apparently *wants* to ignore the writing on the wall, and that is all there is to it.

115. I believe that to a certain extent this makes it pointless to continue talking with the State about its duty of care in the climate issue. It also explains the failure of the Dutch climate policy, and why the Netherlands ranks at the bottom and has become the oilman of the EU.

[6] Handelingen Tweede Kamer [Dutch Parliament deliberations] 2014-2015, TK 32, p 32-12-3, left column, 17th line from the top.

116. In my view, the State has completely discredited itself through this.

117. Through this action, the State has made clear that the Dutch population, as well as the Dutch court, cannot rely on the State to acknowledge and take sufficient note of the seriousness and urgency of climate change and of its resulting duty of care.

118. The State has thus made clear that it cannot be expected to take any political action as long as it is not required to do so by law.

119. The State itself has thus supplied the best argument justifying the need for the court to intervene and to order the State at least to do the minimum necessary.

CONCLUSION

120. If in twenty years you are telling your children or grandchildren about this case, and they ask you what you decided at the time, I hope you will be able to answer honestly that you made the right decision, the only correct decision. I personally have no doubt at all what the right decision is in this case. And I am convinced that virtually everyone in this room feels the same way about it.

121. Mr Cox and I have experienced this as the greatest and most important assignment in our careers: to present you with the legal arguments you need, as judges who may only administer justice, to actually make the right decision, on solid legal grounds.

We have done our very best. If it is not enough, we will follow the example of Professor Hartlief in begging your indulgence; the court knows the law and may add to the legal grounds independently.

122. Over the years, several commentaries have been written about this case. Nowhere have I read that Urgenda and its co-plaintiffs were substantively wrong in insisting that the State reduce emissions considerably more than it now does. Nowhere at all. What I have read in nearly all commentaries is that the State would invoke the 'this is a political matter' defence and that it would take a very courageous court to grant the claims of our clients.

On behalf of the Urgenda Foundation, on behalf of 886 citizens, and on behalf of the generations that will come after us, I ask that you render a courageous judgment.

J.M. van den Berg
Attorney