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The Dutch Response to Climate Change

Evaluating the Netherlands' Climate Act and Associated Issues of Importance

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I. Introduction

This chapter provides an analysis of the substantive and procedural elements of the Netherlands Climate Act ('klimaatwet')¹ and the Netherlands Climate Agreement ('klimaatakkoord').² First, the Act itself is introduced and then it is critically assessed on its compatibility with international legal obligations binding on the Netherlands, in particular obligations based on the Paris Agreement.³ Special attention is paid to the role of public participation in the implementation of the Act.⁴ We will then look at the Netherlands Climate Agreement and will again pay special attention to the role of public participation in the drafting and implementation thereof. Through this Climate Agreement, governmental bodies, companies and civil society organisations in the Netherlands commit themselves to take specific measures to combat climate change. A separate section is devoted to the relationship between the Climate Act and Agreement, and the *Urgenda* litigation.

¹ Climate Act of 2 July 2019, setting out a framework for developing a policy aimed at the irreversible and step-by-step reduction of Dutch greenhouse gas emissions in order to limit global warming and climate change (Climate Act or Act), published in the Official Gazette of the Kingdom of the Netherlands (Staatsblad van het Koninkrijk der Nederlanden), 2019, no 253 (Climate Act of 2 July 2019).

² Climate Agreement (Klimaatakkoord) of 28 June 2019 (Climate Agreement or Agreement), <https://www.klimaatakkoord.nl/binaries/klimaatakkoord/documenten/publicaties/2019/06/28/klimaatakkoord/klimaatakkoord.pdf> (in Dutch).

³ Paris Agreement, concluded 12 December 2015, entered into force 4 November 2016.

⁴ For a more theoretical discussion on (global) public participation, see Otto Spijkers, 'The World's Citizens Get Involved in Global Policymaking: Global Resistance, Global Public Participation, and Global Democracy' (2016) 1(1) *Inter Gentes: McGill Journal of International Law & Legal Pluralism* 18; and Otto Spijkers and Arron Honniball, 'Developing Global Public Participation' (2015) 17(3) *International Community Law Review* 219.

The three instruments discussed – the Climate Act, the Climate Agreement and the judgments in the *Urgenda* case – are closely related to each other.⁵ The Climate Act binds the government in its relationship with Parliament and the Senate. The Climate Agreement consists of a series of non-legally binding commitments made by governmental bodies, companies and civil society organisations in the Netherlands. The Act and the Agreement have the same goal – to reduce greenhouse gas emissions from the Netherlands – but they operate in parallel and have been drafted simultaneously through separate processes. A third development, which again runs in parallel with the other two, is a tort case, initiated against the State of the Netherlands by a foundation called *Urgenda*.⁶ The District Court,⁷ the Appeals Court⁸ and the Supreme Court all agreed with *Urgenda* that the State of the Netherlands is legally obliged to do more than it currently does to combat climate change.⁹ This tort claim is not based on either the Climate Act or the Climate Agreement, because the initiation of this case, which occurred on 18 December 2013, pre-dates the adoption of both the Act and the Agreement.¹⁰ It also pre-dates the entry into force of the Paris Agreement. Initially, *Urgenda* could thus not rely on any of those legal instruments; instead, its claim was based on a combination of Dutch domestic civil law – primarily Article 162, Book 6 of the Dutch Civil Code¹¹ – and European and international (human rights) law – primarily Articles 2 and 8 of the European Convention on Human Rights (ECHR).¹² Even

⁵ See also Tom Smolders, 'Is de Klimaatwet "Urgenda-proof"?' (2019) 1 *Tijdschrift voor Omgevingsrecht* 1; EC van der Maden and AB Vos, 'Klimaatwet en Klimaatakkoord: Verslag van een VMR Themamiddag op 9 oktober 2018' (2018) 110 *Milieu en Recht*, <https://www.navigator.nl/document/id1d830c82a7524f4f832bf0b3ba193829/milieu-recht-klimaatwet-en-klimaatakkoord>; and CW Backes, 'De Klimaatwet – de meest ambitieuze of de meest minimalistische ter wereld?' (2018) 150 *Tijdschrift voor Bouwrecht* 989.

⁶ See also Otto Spijkers, 'The *Urgenda* Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?' in Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Cheltenham, Edward Elgar, 2018); and Otto Spijkers, 'Urgenda tegen de Staat der Nederlanden: aan wiens kant staat de Nederlandse burger eigenlijk?' [2019] *Ars aequi* 191.

⁷ District Court, The Hague, Judgment of 24 June 2015 in the case between the *Urgenda* foundation and the State of the Netherlands (Ministry of Infrastructure and the Environment). English translation available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196> (hereinafter *Urgenda* District Court Judgment).

⁸ Appeals Court, The Hague, Judgment of 9 October 2018 in the case between the State of the Netherlands (Ministry of Infrastructure and the Environment) and the *Urgenda* foundation. English translation available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2018:2610> (hereinafter *Urgenda* Appeals Court Judgment).

⁹ Netherlands Supreme Court, Judgment of 20 December 2019 in the case between the State of the Netherlands (Ministry of Infrastructure and the Environment) and the *Urgenda* foundation. Judgment available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:2006> (hereinafter *Urgenda* Supreme Court Judgment).

¹⁰ *Urgenda*'s writ of summons can be found on its website: <https://www.urgenda.nl/wp-content/uploads/DagvaardingUrgendaKlimaatzaak19-11-13.pdf> (in Dutch).

¹¹ Article 162, Book 6 of the Dutch Civil Code (Burgerlijk Wetboek), <https://wetten.overheid.nl/jci1.3:c:BWBR0005289&boek=6&titeldeel=3&afdeling=1&artikel=162&z=2019-04-01&g=2019-04-01> (in Dutch).

¹² Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome, 4 November 1950, entered into force 1953.

though the Climate Act and Agreement are formally unrelated to the *Urgenda* litigation, all three of these set greenhouse gas emissions reduction targets to be met by the Netherlands before a certain deadline; thus, they are closely linked to each other.

II. The Netherlands Climate Act

A. Introduction

The Climate Act has been approved by both Parliament and the Senate. It was subsequently signed into law by the King, was published¹³ and entered into force 1 September 2019.¹⁴ The Act aims to provide a long-term legal framework for policy-making relating to climate change in the decades to come.

Looking at the *travaux préparatoires*¹⁵ of the Act, it is interesting to compare the initial proposal of the Climate Act (First Draft of September 2016)¹⁶ with the revised versions (the Second Draft of January 2017¹⁷ and the Third Draft of December 2018¹⁸) and see what motivated the changes that were made.¹⁹

The Act sets three general targets. First, it is stipulated that greenhouse gas emissions from the Netherlands must be reduced by at least 95 per cent in 2050 compared to 1990 levels in order to bring a climate-neutral society within reach. This target was included in the initial draft and has not been changed.²⁰

Second, an intermediate goal is set: a significant reduction of greenhouse gas emissions from the Netherlands must already be reached by 2030, again measured

¹³ Climate Act of 2 July 2019.

¹⁴ Except for art 7, which entered into force on 1 January 2020. See Decree of 2 July 2019, determining the time of entry into force of the Climate Act, published in the Official Gazette of the Kingdom of the Netherlands (*Staatsblad van het Koninkrijk der Nederlanden*), 2019, no 254.

¹⁵ The term *travaux préparatoires* is used to refer to the collection of documents relating to the negotiation, discussions and drafting of the Act. These documents can also be referred to as the negotiating or drafting history of the Act.

¹⁶ First (Original) Draft Act by members Klaver and Samsom, *Establishing a framework for the development of a policy, aimed at irreversible and step-by-step reduction of Dutch greenhouse gas emissions, in order to limit global warming and climate change (Climate Act)*, 34 534, Nr 2, Parliament (Second Chamber), 2015–2016, submitted 12 September 2016 (hereinafter 'First Draft').

¹⁷ Revised Draft Act by members Klaver, Kuiken, Roemer, van Veldhoven and Dik-Faber, revised pursuant to the Advice of the Council of State, *Climate Act*, 34 534, Nr 6, Parliament (Second Chamber), 2016–17, submitted 27 January 2017 (hereinafter 'Second Draft').

¹⁸ Revised Draft Act by members Klaver, Asscher, Beckerman, Jetten, Dik-Faber, Yesilgöz-Zegerius, Agnes Mulder and Geleijnse, *Climate Act*, 34 534, A, Senate (First Chamber), 2018–19, submitted 20 December 2018 (hereinafter 'Third Draft').

¹⁹ Note of Change by members Klaver, Asscher, Beckerman, Jetten, Dik-Faber, Yesilgöz-Zegerius and Agnes Mulder, *Climate Act*, 34 534, Nr 10, Parliament (Second Chamber), 2017–18, submitted 27 June 2018 (hereinafter 'Note of Change'). A Second Note of Change by members Klaver, Asscher, Beckerman, Jetten, Dik-Faber, Yesilgöz-Zegerius, Agnes Mulder and Geleijnse, *Climate Act*, 34 534, Nr 37, Parliament (Second Chamber), 2018–19, only contains minor technical changes.

²⁰ First Draft, art 3(2); Second Draft, art 3(2); and Third Draft, art 2(1).

against 1990 levels. This intermediate goal was first set at 55 per cent²¹ and was later changed to 49 per cent.²² The reason for the change was that the latter target was felt to be more in line with European ambitions. It was thought that if the Netherlands set the target at 55 per cent for 2030, while neighbouring countries were less ambitious, then this would carry too great a risk of economic leakage effects. In this context, the metaphor of the ‘waterbed’ is often used: if one state is too ambitious and is pressing down too hard, then the ‘water’ simply leaks to another part of the bed, ie, to the state with less ambitious targets.²³ That is why the target was lowered to 49 per cent. The challenge was thus to find an ambitious reduction target, without placing the Dutch economy at a competitive disadvantage.²⁴

And third, it was stipulated, in the initial draft of the Climate Act, that the share of renewable energy must be 100 per cent by 2050.²⁵ The Act borrowed²⁶ the definition of ‘renewable energy’ from the European Union (EU), which defined it as ‘energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases.’²⁷ This target was replaced, in the revised version of the Act, by a new target: to achieve complete CO₂-neutral electricity production by 2050.²⁸ Renewable energy is defined as ‘energy from renewable sources’; CO₂-neutral energy production is defined as ‘electricity production in which no greenhouse gases are released into the atmosphere.’²⁹ The difference between the two is that CO₂-neutral electricity production can be achieved by compensating carbon emissions with carbon removal, whilst a target of 100 per cent renewable energy requires a complete elimination of all non-renewable energy. The motivation behind this change is worth quoting:

The reason for this change lies in the fact that the term renewable energy has too wide a scope. It involves many different processes, whereby it is conceivable that the use of non-renewable sources remains necessary for certain of these processes. For example, it is not clear whether aircraft can fly entirely without (bio)kerosene by 2050. In view of this uncertainty, a goal for 100% renewable energy in 2050 is currently not realistic.³⁰

To achieve these long-term targets, the government committed itself to produce a Climate Plan (‘klimaatplan’) every five years.³¹ In brief, the Climate Plan contains

²¹ First Draft, art 3(1); and Second Draft, art 3(1).

²² Third Draft, art 2(2).

²³ See, eg, Explanatory Memorandum as Amended Following the Advice of the Advisory Section of the Council of State, Climate Act, 34 534, no 7, Parliament (Second Chamber), 2016–17 (hereinafter ‘Amended Explanatory Memorandum’, translation from the Dutch original by the authors), 11.

²⁴ Note of Change, 8.

²⁵ First Draft, art 3(3); and Second Draft, art 3(3).

²⁶ First Draft, art 1; and Second Draft, art 1.

²⁷ Directive 2009/28/EC of the European Parliament and Council, adopted 23 April 2009.

²⁸ Third Draft, art 2(2).

²⁹ *ibid* art 1.

³⁰ Note of Change, 9 (translation from the Dutch original by the authors).

³¹ First Draft, arts 4–6; Second Draft, arts 4–6; and Third Draft, arts 3–5.

the main points of the climate policy to be pursued, aimed at achieving the objectives referred to above, for the next five years, and it gives overall direction to climate policy for the following 10 years. The five-year cycle is in line with the obligations that the Paris Agreement imposes on the contracting parties. Looking ahead to the next 10 years promotes the consistency and predictability of Dutch climate policy.³²

The Climate Plan must also contain a list of concrete measures that need to be taken in order to achieve these objectives. It must estimate the expected share of renewable energy and the expected saving on primary energy use. An overview of the most recent scientific insights relating to limiting climate change must also be provided in the Plan. The government must further provide an update on global and European developments in the field of climate change mitigation, and offer an honest assessment of the consequences of the government's climate policy for the financial position of households, businesses and governments.³³ The latter, which was added to the Climate Act in the revised version, is meant to ensure 'draagvlak', a typical Dutch word that can be roughly translated into English as 'public support'.

The Netherlands Environmental Assessment Agency ('Planbureau voor de Leefomgeving') must publish a Climate and Energy Exploration ('klimaat- en energieverkenning') once a year.³⁴ This is a scientific report on the effects of the implementation of the climate policy in the previous calendar year. At the very least, this report must contain an overview of actual greenhouse gas emissions, and the developments and measures that have had an impact on greenhouse gas emissions.³⁵ The Netherlands Environmental Assessment Agency (NEAA), which was established in 2008, *inter alia* conducts independent research on the consequences of the government's environmental policies. It is autonomous, but is formally part of the Netherlands Ministry of Infrastructure and Water Management. Instead of creating a brand-new agency, the NEAA was seen as the obvious institute to carry out this new task under the Climate Act, *ie*, to annually produce a Climate and Energy Exploration.

According to the earlier drafts, it was envisaged that the government would also draw up an annual Climate Budget ('klimaatbegroting'), indicating which concrete policy measures the government expected to take.³⁶ The Climate Budget was supposed to provide insight into how much greenhouse gas is emitted that year and how this relates to achieving the targets in the Climate Plan. In the revised version of the Climate Act, the provisions relating to the Climate Budget were replaced with a provision on a so-called Climate Memo ('klimaatnota').³⁷

³² Third Draft, art 3(1); and Amended Explanatory Memorandum, 29.

³³ Third Draft, art 3(2).

³⁴ First Draft, arts 11–12; Second Draft, arts 14–15; and Third Draft, art 6.

³⁵ Third Draft, art 6. Earlier drafts also required the production of an annual Climate Report ('klimaatjaarverslag'). See First Draft, arts 9–10; and Second Draft, arts 9–10.

³⁶ First Draft, arts 7–8; and Second Draft, arts 7–8.

³⁷ Third Draft, art 7.

The minister must send a Climate Memo to both chambers of the States-General (Parliament and the Senate). This Climate Memo must provide the overall picture of the implementation of the climate policy, as described in the Climate Plan; an overview of the consequences of this climate policy for departmental budgets; and an overview of the financial consequences of significant developments in climate policy that deviate from the Climate Plan, for households, companies and governments.

A second draft of the Climate Act provided for the establishment of a Climate Commission ('klimaatcommissie'), modelled after the UK Committee on Climate Change.³⁸ This Commission was meant to provide authoritative advice, but this was removed from the third draft. Instead, the Commission's tasks were assigned to an already-existing institution: the Council of State. The Advisory Division of the Council of State must be consulted on the Climate Plan and on the Climate Memo.³⁹

From the above, it becomes clear that the Climate Act is a framework law ('kaderwet'), which is to a large extent 'empty'. It only sets very generally formulated targets, but it does not say anything about how these targets are to be achieved, what specific measures need to be taken, what the financial and other consequences might be and so on. All this must be provided later by the Climate Agreement (more on this below) and the Climate Plans that are to be adopted every five years.

An often-heard critique is that the Climate Act contains only procedural rules on how to come to an agreement, but does not constitute an agreement itself.⁴⁰ This does not accord well with one of the foundational principles of Dutch democracy, namely that substantive rules should, as far as possible, be laid down in formal legislation and should not be left to lower laws and regulations, let alone to policy. Democratic control is then bypassed.

Another often-heard criticism is that adopting a framework law would be a convenient way to avoid having to make difficult decisions. This criticism is reinforced by the fact that the Climate Agreement, which is not a democratically established law, *does* contain the 'hard', substantive, material and concrete agreements and objectives. This Climate Agreement was adopted with little involvement of Parliament (more on this below).⁴¹

Jesse Klaver, leader of the Green Party (Groenlinks) and one of the initiators of the Climate Act, explained why he chose to give the Climate Act the shape of a framework law:

[T]ackling climate change will take at least another thirty years. This path that we take is not an easy one. The only thing I know for sure is that we can get there, if we agree with

³⁸ Second Draft, arts 12–13.

³⁹ See Third Draft, arts 5(3) and 7(4), respectively. See also Note of Change, 14–16.

⁴⁰ See, eg. Yvonne Hof's, 'Klimaatwet zeilt moeiteloos door Eerste Kamer' (*Volkskrant*, 29 May 2019).

⁴¹ Discussion of Climate Act in the Senate, 21 May 2019, available at: <https://www.eerstekamer.nl/verslag/20190521/verslag> (in Dutch).

each other on the rules of the game. That is what this law does ... As soon as we start discussing concrete measures, you will immediately see the differences come to the fore. But there too, I have hope that we will find each other. I think this Climate Act helps us achieve such agreement. That is why we chose a framework law.⁴²

In other words, the Climate Act is a useful first step that will facilitate future discussions.

B. Public Participation

In the First Draft, the word ‘participation’ was not mentioned. In the Second Draft, a special provision on participation was added.⁴³ The addition of this provision on public participation is justified as follows by the drafters of the Act:

[This article] is an expression of the general principle that the Government must involve society in the preparation and implementation of regulations. By explicitly incorporating this principle into the Act, it is possible to expressly address the Government about this. The basic idea of [this article] is that consultations are to be held with all relevant parties for the implementation of this Act. The consultation therefore not only concerns the drafting of the Climate Plan and the Climate Budget, but also the implementation of the measures included therein.⁴⁴

Article 8 of the Climate Act prescribes that regular consultations are to be held, with ‘administrative bodies of provinces, water boards, municipalities and other relevant parties’, for the implementation of this Act. Article 5(2) of the Climate Act is also important to mention, which declares section 3.4 of the General Administrative Law Act of the Netherlands (‘Algemene wet bestuursrecht’) to be applicable to the preparation of the Climate Plan and adds that ‘views [on the Climate Plan] can be put forward by everyone.’⁴⁵ This section contains rules for a ‘uniform public preparation procedure’, with a focus on public participation therein.

Rob Jetten of the Liberals (D66), one of the initiators of the Climate Act, said that one of the challenges in relation to public participation was to avoid a scenario where only the ‘usual suspects’ would participate and exploit the possibilities for citizen participation. To avoid this, he suggested that Parliament could try to involve more people in decision-making by organising hearings and round tables. In his view, the greatest potential for public participation was in regional and provincial decision-making. At this *local* level, energy transition strategies were already being prepared. This was, he explained, an excellent opportunity to involve

⁴² *ibid* (translation from the Dutch original by the authors).

⁴³ Second Draft, art 11.

⁴⁴ Amended Explanatory Memorandum, 35–36 (translation from the Dutch original by the authors).

⁴⁵ First Draft, art 6(2); Second Draft, art 6(2); and Third Draft, art 5(2). The formulation has not changed.

as many people as possible, at the local and regional levels, in deciding what the region's objectives should be for sustainable energy generation. What means are we prepared to use? Wind? Sun? Are there other options? Where exactly in our region do we want to place the next wind turbine or solar panel? Such questions are best discussed at the regional level.

In Jetten's view, the big test for citizen participation in climate policy will arise in the context of the energy transition in the coming years. 'You can see that by trial and error we are learning how to take our citizens onboard in a good way', he concluded, and one must not forget 'to manage their expectations'.⁴⁶ His colleagues in the Green Party had some good advice for him:

One of the things we learned in our past experience with citizen participation is that people, who initially have opposite views on something, can get much closer to each other if you choose a form of participation that involves deliberation and dialogue instead of a form which encourages disagreements, like a debate.⁴⁷

Article 8 of the Climate Act does not detail the exact method of participation to be used and thus it certainly allows for deliberation and dialogue.

The provision on public participation in the Climate Act constitutes an important bridge between the Act and the Climate Agreement. It provides the Climate Agreement with a legal foundation. In other words, the adoption of the Climate Agreement can be seen as the implementation of Article 8 of the Climate Act.⁴⁸

III. The Climate Act and its Compatibility with International Law

Before we begin our discussion of the Climate Agreement, let us assess whether the Climate Act is good enough to ensure the Netherlands meets its international obligations. In 2015, the Netherlands, both as an EU Member State and in its own capacity, became party to the Paris Agreement. In the Paris Agreement, states committed themselves to limiting the global average temperature rise to well below 2°C compared to pre-industrial levels, in an attempt to mitigate the risks and impact of climate change. The Paris Agreement is a framework agreement and covers issues relating to climate mitigation, climate adaptation, financing and capacity-building. The Climate Act aims to provide a domestic law framework that assists in the implementation of the obligations under the Paris Agreement, at least with regard to the so-called mitigation elements. On 6 March 2015, Latvia and the

⁴⁶ Discussion of Climate Act in the Senate, 21 May 2019 (translation from the Dutch original by the authors).

⁴⁷ *ibid.*

⁴⁸ See also Anne Vos and Valerie van 't Lam, 'Heeft de Klimaatwet toegevoegde waarde naast de al in ontwikkeling zijnde Omgevingswet en het Klimaatakkoord?' (2018) 76 *Bouwwrecht* 507.

European Commission submitted the following Intended Nationally Determined Contribution of the EU and its Member States under the Paris Agreement.⁴⁹ They did so on behalf of the EU and all its Member States:

The EU and its Member States are committed to a binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990, to be fulfilled jointly.

The international (Paris) and domestic (Climate Act) legal frameworks must operate as one and must not run separately. The procedures and deadlines in the Dutch Climate Act are thus, where possible, aligned with the procedures and deadlines of the Paris Agreement, and the climate policy of the EU. For example, the aim is to coordinate the periods for the five-year Climate Plans with the periods that apply to the Intended Nationally Determined Contributions (INDCs) introduced in the Paris Agreement.

We must also refer to the Sustainable Development Goals (SDGs).⁵⁰ In 2015, essentially all states in the world got together, at the United Nations General Assembly in New York, to adopt a set of 17 goals and related targets, which together constituted a global ambition to strive towards more sustainable development. All states committed themselves to use these aspirational and global targets as a basis for the development of national development strategies. It is thus a bit surprising that little reference is made to the SDGs in the *travaux préparatoires* of the Climate Act or in the *Urgenda* litigation (for more on the latter, see below). This could be explained by the fact that the SDGs are only aspirational and not legally binding. But despite their legally non-binding character, they have proved in practice to successfully motivate states to strive towards achieving their ends, and to constantly monitor and report on progress in doing so. This is something many legally binding treaties fail to achieve.⁵¹

Sustainable Development Goal 13 (SDG13) is of particular note for the present purposes. It calls on all states to take urgent action to combat climate change and its impacts. Target number 2 of SDG13 requires all states to ‘integrate climate change measures into national policies, strategies and planning.’ It could be argued that the Climate Act provides the framework for the Netherlands to meet this international SDG target. The indicator of progress in realising this target is as follows:

[It is to measure] the number of countries that have communicated the establishment or operationalization of an integrated policy/strategy/plan which increases their ability

⁴⁹ Intended Nationally Determined Contribution of the EU and its Member States, Submission by Latvia and the European Commission on Behalf of the European Union and its Member States, Riga, 6 March 2015, LV-03-06-EU INDC.

⁵⁰ Transforming Our World: The 2030 Agenda for Sustainable Development, United Nations General Assembly Resolution, adopted 21 October 2015, UN Doc A/RES/70/1.

⁵¹ See, eg. Otto Spijkers, ‘The Cross-fertilization between the Sustainable Development Goals and International Water Law’ (2016) 25(1) *Review of European, Comparative and International Environmental Law* 39.

to adapt to the adverse impacts of climate change, and foster climate resilience and *low greenhouse gas emissions development* in a manner that does not threaten food production (including a national adaptation plan, nationally determined contribution, national communication, biennial update report or other). (Emphasis added)⁵²

Individual countries are urged to report regularly on the progress they make in contributing to the global effort to realize these SDG13 targets. In the latest progress report of the Netherlands, one reads that, in realising the SDGs, the overall picture is that the Netherlands is doing well compared to many other countries, but that there are some ‘points for attention’, particularly in the areas of the environment, energy and especially climate.⁵³ Indeed, ‘of all European countries, the Netherlands has the fifth highest greenhouse gas emissions per capita.’⁵⁴ How can the Netherlands do better? The progress report does not tell us more than ‘climate policy is an important issue for the new government.’⁵⁵

Finally, it is important to mention international human rights law. Increasingly, human rights courts and tribunals refer to a human right to a healthy environment, and see some of the consequences of climate change as a direct threat to the enjoyment of this right. Somewhat surprisingly, perhaps, not much reference is made to human rights in the *travaux préparatoires* leading up to the adoption of the Climate Act. However, human rights law did figure very prominently in the *Urgenda* litigation, especially at the Appeals and Supreme Court stage.

IV. The Climate Agreement

Before we get to our discussion of the *Urgenda* litigation, we shall look at the Climate Agreement. Again, the focus will be on public participation.

A. Introduction

The Netherlands Climate Agreement sets out the Dutch implementation strategy for its obligations under the Paris Agreement. The measures included in the Climate Agreement aim to reduce Dutch CO₂ emissions by at least 49 per cent in 2030 compared to 1990 levels.⁵⁶ Unlike the Climate Act, the Climate Agreement was negotiated by private and public parties together, not by the legislator alone. More than 100 parties were involved in the negotiation process.

⁵² Transforming Our World, SDG13.

⁵³ Netherlands Central Bureau of Statistics, *Duurzame ontwikkelingsdoelen: de Stand voor Nederland (Sustainable Development Goals: Where Does the Netherlands Stand)* (2018) 11.

⁵⁴ *ibid* 49.

⁵⁵ *ibid* 51.

⁵⁶ Proposal Framework Climate Agreement, 10 July 2018, 7; Climate Agreement, 28 June 2019, 4.

These included environmental organisations, academic institutions, companies, representatives of industries, trade unions, governmental organisations and the financial sector. The Ministry of Economic Affairs and Climate Policy and the Social and Economic Council (SEC) supervised these negotiations. The Climate Agreement was announced in October 2017 by the Dutch government in its coalition agreement.⁵⁷ The Minister of Economic Affairs and Climate Policy gave the starting shot for the negotiations in his letter to Parliament of 23 February 2018.⁵⁸ With this letter, the Minister set out the framework for the Climate Agreement. The first framework of the Agreement was presented to Parliament on 10 July 2018,⁵⁹ and a first draft, outlining the specific measures, was presented on 21 December 2018.⁶⁰ A final version of the Climate Agreement was presented on 28 June 2019, after which the parties had to confirm their commitment to the Climate Agreement with a signature.⁶¹ The government submitted the Climate Agreement to Parliament for approval. The Senate was not involved in this procedure because it is only involved in legislative procedures, and the Agreement is not a legislative act. The debate in Parliament on the Climate Agreement was held on 3 July 2019.⁶² Parliament called for different motions, which were voted for on 4 July 2019. Most of the passed motions stipulated a fast implementation of the Agreement and a further assessment of its financial implications. The Labour Party (Partij van de Arbeid) and the Green Party (GroenLinks) demanded some further changes before supporting the Agreement.

The structure of the negotiation procedure was as follows: the Climate Council ('klimaatberaad') was the coordinating organ of the Climate Agreement negotiations.⁶³ The Climate Council consisted of the chairmen of each sector platform,⁶⁴ civil organisations, local and regional governments, and non-governmental organisations (NGOs).⁶⁵ The negotiations about the measures were held within five sector platforms: electricity, the built environment ('gebouwde omgeving'), industry, agriculture and land use, and mobility.⁶⁶ These sector platforms included corporations, NGOs and governmental organisations.⁶⁷ Each platform had an independent chair and included two secretaries, one from the

⁵⁷ Coalition Agreement 'Trust in the Future' ('Vertrouwen in de Toekomst'), 10 October 2017, 37.

⁵⁸ Parliamentary documents II 2017/18, 32 813, nr 157.

⁵⁹ Parliamentary documents II 2017/18, 32 813, nr 193.

⁶⁰ Parliamentary documents II 2017/18, 32 813, nr 263.

⁶¹ Letter from Ed Nijpels, chairman of the Climate Council, to the participating parties about presenting the Climate Agreement, 28 June 2019; letter from the Minister of Economic Affairs and Climate Policy to Parliament presenting the draft Climate Agreement, 28 June 2019.

⁶² For a transcript of the debate, see: https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail/904f9f02-9893-440b-aa00-f5bdfa8a5986#id67ced40b.

⁶³ Proposal Framework Climate Agreement, 10 July 2018, 20.

⁶⁴ The five industrial sectors included in the Climate Agreement – electricity, the built environment, industry, agriculture and land use, and mobility – had their own sector platform with representatives from NGOs, the industries and governmental organisations.

⁶⁵ Proposal Framework Climate Agreement, 10 July 2018, 20.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

SEC and one from the responsible ministry.⁶⁸ Besides these sector platforms, three taskforces were set up to negotiate overarching measures on the labour market and education, financing, and innovation.⁶⁹

The goals within the specific sectors are formulated in reductions of Megatons (Mtons), which contribute to the 49 per cent reduction of CO₂ emissions by 2030. In each of the sectors, specific measures were negotiated to reach this reduction. The goal for the electricity sector is a reduction of 20.2 Mtons. To reach this goal, 70 per cent of all electricity will have to be produced by renewable sources by 2030. This includes deploying wind energy on sea and land, and solar panels.⁷⁰ The goal for the built environment is a reduction of 3.4 Mtons. Besides using renewable energy sources, the built environment will also have to be natural gas-free.⁷¹ This will be achieved via a community-based approach (which is discussed further below). In addition, a large part of the measures are concerned with making the existing built environment more sustainable, for example, via insulation.⁷² The goal for the industry sector is a reduction of 14.3 Mtons. This includes the use of renewable energy sources as well as the obligation to deliver residual industrial heat to the built environment, and storage of CO₂.⁷³ The goal for the agriculture and land use sector is a reduction of 3.5 Mtons. This includes the reduction of methane gas.⁷⁴ The goal for the mobility sector is a reduction of 7.3 Mtons. This reduction is mainly focused on transitioning to electric vehicles.⁷⁵

An important aspect of all of these measures is that the government will have to change several laws to make these transitions possible. An example is changing the Dutch Civil Code to include a provision to make the financing of sustainability measures in the built environment easier.⁷⁶ On 17 September 2019, the Minister of Economic Affairs and Climate Policy sent a letter to Parliament with an overview of the proposed legislative changes following the Climate Agreement and their intended dates for discussion in Parliament and intended entry into force.⁷⁷

In a letter answering questions from Parliament, Ed Nijpels, the chairman of the Climate Council, stated that the Agreement will not be legally enforceable.⁷⁸ This means that the parties cannot go to court to enforce performance of the measures in the Agreement. According to Nijpels, the strength of the Agreement is the

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Climate Agreement, 28 June 2019, 157–58.

⁷¹ *ibid.* 15–16.

⁷² *ibid.* 16.

⁷³ *ibid.* 83–84.

⁷⁴ *ibid.* 117–21.

⁷⁵ *ibid.* 45–47.

⁷⁶ *ibid.* 21.

⁷⁷ Letter from the Minister of Economic Affairs and Climate Policy to Parliament on the proposed legislative changes following from the Climate Agreement and their intended entry into force, 17 September 2019.

⁷⁸ Annex 2: 'Questions and Answers' belonging to *Parliamentary Documents*, 32 813, nr 190, question 6.

commitment of the parties towards each other.⁷⁹ Although the Climate Agreement will not be legally enforceable, it is not without any obligations. One of the underlying principles is that intervention measures will be implemented when one of the parties does not comply with the Agreement.⁸⁰ The ministers will organise sectoral implementation consultations to discuss the progress of the execution of the Climate Agreement.⁸¹

B. Relationship to the Climate Act

As previously stated, the Climate Act stipulates a reduction of Dutch CO₂ emissions of at least 49 per cent by 2030. The Climate Act is legally binding on all future governments, unless the law is changed. However, the Climate Act does not include any concrete measures. To achieve this goal, the government must commit itself to a Climate Plan indicating which concrete policy measures the government expects to take. The Climate Agreement is a social agreement. This means that it is concluded between governmental organisations and societal organisations, where both types of organisations have commitments towards each other. The Climate Agreement sets out the same reduction goal as the Climate Act. The Climate Agreement does include concrete measures on the reduction of CO₂ emissions. On 29 November 2019, the Minister of Economic Affairs and Climate Policy sent a proposal for the Climate Plan to Parliament.⁸² Following this proposal, the Climate Plan is largely determined by the Climate Agreement.⁸³ The Climate Plan will not solely be based on the Agreement because the Agreement is only limited to five specific sectors.⁸⁴ In addition to measures coming from the Climate Agreement, the Climate Plan also includes policies arising out of European obligations, current Dutch policies, and other policies announced in the Coalition Agreement that were not part of the Climate Agreement.⁸⁵

C. Public Participation in the Formation of the Climate Agreement

In this section, we will delve into the negotiation process preceding the conclusion of the Climate Agreement. The most important aspect of the Agreement is that all the proposed measures in the five sectors should be feasible and affordable

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ Central Government, 'The Climate Agreement in (More Than) 70 Questions', 28 June 2019, 2.

⁸² *Parliamentary Documents II 2019–20*, 32 813, nr 400 (Annex).

⁸³ *ibid.* 5; Climate Agreement, 28 June 2019, 9.

⁸⁴ Vos and van 't Lam (n 48).

⁸⁵ *Parliamentary Documents II 2019–20*, 32 813, nr 400 (Annex), 5.

for everyone, and that there is public support for the measures.⁸⁶ Throughout the negotiation process, the parties acknowledged that these measures also affect persons not involved in the drafting of the Climate Agreement. The parties stated that citizens will be particularly affected by these measures, since the measures include a transition in the energy sources used by households.⁸⁷

Public participation in the drafting process happened in two ways. Five regional meetings were organised throughout the Netherlands in which a total of 800 citizens participated. These regional meetings gave citizens the opportunity to submit their ideas.⁸⁸ The meetings were organised by the chairman of the Climate Council together with the chairman of the sector platforms and a representative of a local organisation.⁸⁹ The main conclusion from these meetings was that most citizens wanted to actively participate in the energy transition measures, but that most did not feel that they were taken seriously.⁹⁰ Based on these meetings, three conditions for an active role for citizens were formulated.⁹¹ First, the Climate Agreement must provide a stable policy framework in which the goals and preconditions are set, but must also provide enough flexibility for regional approaches. Second, the local and regional level should be given leading roles in executing these measures. Third, the local approaches in the Climate Agreement should focus on individual citizens and local communities. These measures were included in the initial outline of the Climate Agreement.

Besides these regional meetings, the Ministry of Economic Affairs and Climate Policy and the SEC asked three public participation organisations to research both the critique citizens have of the Climate Agreement and the measures or conditions that should be included according to them. The National Platform for Public Participation in Environmental Policy, in collaboration with *Buurkracht* and the climate agency *HIER*,⁹² organized several smaller-scale interviews, in which a total of about 200 citizens took part.⁹³ No explanation was provided on why these three agencies were approached (and not others). We assume it is because these organisations are concerned with the energy transition/climate and public participation in general. The meetings were

⁸⁶ Draft Climate Agreement, 21 December 2018, 2; Climate Agreement, 28 June 2019, 216.

⁸⁷ *ibid.*

⁸⁸ Proposal Framework Climate Agreement, 10 July 2018, 20.

⁸⁹ *ibid.* 73.

⁹⁰ *ibid.* 73–74.

⁹¹ *ibid.* 73–75.

⁹² *HIER* is not an abbreviation, but the name of the agency.

⁹³ Proposal Framework Climate Agreement, 73; Nederlands Platform Burgerparticipatie en Overheid (NPBO) and Klimaatavontuur, 'Meedenken om mee te doen: Burgers aan het woord over het klimaatakkoord' ('Thinking Along Participating: Citizens Speaking about the Climate Agreement' 10 July 2018; NPBO, *HIER*, *Buurkracht*, ('Klimaatakkoord 2018: Maatschappelijke acceptatie en participatie' ('Climate Agreement 2018: Social Acceptance and Participation'), 4 July 2018. The report also posed the question of whether this is a representative sample; the authors acknowledged that it was not, but that it nevertheless provided important results.

complementary to the regional meetings. The central question brought up in these meetings was which issues should be included in the Climate Agreement to stimulate its acceptance by the citizens.⁹⁴ One of the findings was that the citizens had a considerable need for information, but that they did not trust the information provided by the government. This lack of trust in the government was linked to its actions in the procedures for placing wind turbines on land. The citizens did not feel informed about where these wind turbines would be placed or how they could be involved in the decision-making process. This has reinforced the 'not in my backyard' phenomenon among citizens.⁹⁵ Another issue is the apparent inconsistency in governmental policies observed by citizens: on the one hand, the government wants to reduce CO₂ emissions, whilst on the other hand, it was presenting plans for an expansion of Lelystad Airport.⁹⁶ The majority of the participants also questioned the legitimacy of the Climate Agreement. Because it was predominantly concluded with the corporate sector and activist environmental groups, they felt that it was mostly a compromise of those particular interests instead of representing the public interest.⁹⁷ In the recommendations, a distinction was made between acceptance and participation, and citizen participation (joining in on existing projects) and citizens' initiative (taking action themselves).⁹⁸ These last two forms in particular, it was argued, should be integrated into the Climate Agreement: citizen participation leads to a citizens' initiative, and citizens' initiative leads to citizen participation.⁹⁹ The essence of the recommendations provided by these organisations was that the Climate Agreement should not regulate citizen participation and a citizens' initiative itself, but should point out what is possible in order to have successful citizen participation and citizens' initiative.¹⁰⁰ Akerboom argues that public participation could have been more successful if a draft of the Climate Agreement was presented as a public consultation in order to enable citizens to express their views on the proposed measures.¹⁰¹

D. Public Participation in the Governance Mechanisms of the Climate Agreement

Following the public participation meetings, the draft Climate Agreement presented in December 2018 included provisions on public participation in specific sectors.

⁹⁴ NPBO, HIER, Buurkracht, 'Climate Agreement 2018: Social Acceptance and Participation', 4 July 2018, 3.

⁹⁵ *ibid* 8; Sanne Akerboom, 'Participatie en de energietransitie: juridisch instrumentarium in een veranderende context' (2019) 3 *Tijdschrift voor Omgevingsrecht* 75.

⁹⁶ NPBO, HIER, Buurkracht, 'Climate Agreement 2018: Social Acceptance and Participation', 4 July 2018, 8.

⁹⁷ *ibid* 9.

⁹⁸ *ibid* 11.

⁹⁹ *ibid*.

¹⁰⁰ *ibid*.

¹⁰¹ Akerboom (n 95) 83.

This was further elaborated upon in the final version of the Climate Agreement, which includes a specific section on public participation. On a more overarching level, the Agreement aims for a citizen dialogue on a continuing basis and a public campaign to stimulate citizens to get involved.¹⁰² One of the measures includes a ‘citizens monitor’ by the Netherlands Institute for Social Research, which keeps track of the expectations, behaviour, attitudes and motives of the citizens in relation to the transition. Moreover, a public campaign will be held to make the citizens aware of their role in the transition and to stimulate them to change their behaviour.¹⁰³ Public participation is also included in the specific sector sections of the Climate Agreement. The electricity section states that participation and public support are necessary for the transition to renewable energy sources.¹⁰⁴ The affected citizens have to be included in the decision-making procedure and have to be offered the opportunity to financially participate in renewable projects. The ambition is that 50 per cent of Dutch renewable energy production will be owned by local communities.¹⁰⁵ Also, the built environment section includes measures for a more regional approach, in which citizens will be more involved.¹⁰⁶ The main aspect is the community-based approach to making houses natural gas-free.¹⁰⁷ Citizens should also be able to participate¹⁰⁸ in the heat plan, which will also be concluded on a more local level by Regional Energy Strategies.¹⁰⁹

E. Democratic Legitimacy

An important gap in the Climate Agreement is an arguable lack of democratic legitimacy in the drafting process. As previously stated, the Climate Agreement has been negotiated between private and public parties, but it did not directly include debates with the elected representatives on the municipal, provincial and national levels. This was also observed during the public participation meetings. Further, the Dutch Council of State already observed this problem in its annual report of 2013 and elaborated on it again in 2018.¹¹⁰

This leads to the following question: are these social agreements democratically legitimised? Social agreements, like the Climate Agreement, can be regarded

¹⁰² Draft Climate Agreement, 21 December 2018, 207–11; Climate Agreement, 28 June 2019, 217–18. One of the campaigns has already started on 9 September 2019, ‘everybody does something’, which aims to help citizens make more sustainable choices in and around their house. See <https://www.klimaataakkoord.nl/documenten/videos/2019/09/09/iedereen-doet-wat>.

¹⁰³ Climate Agreement, 28 June 2019, 216–17.

¹⁰⁴ Draft Climate Agreement, 21 December 2018, 156 ff; Climate Agreement, 28 June 2019, 219.

¹⁰⁵ *ibid.*

¹⁰⁶ Draft Climate Agreement, 21 December 2018, 31 ff; Climate Agreement, 28 June 2019, 218.

¹⁰⁷ *ibid.*

¹⁰⁸ Climate Agreement, 28 June 2019, 218.

¹⁰⁹ *ibid.* 26.

¹¹⁰ Ruud A Koole, ‘Is een “akkoorden-democratie” wel een democratie?’ (2019) 34 *Regelmaat* 2; Jaarverslag Raad van State 2013, 13.

as network governance. This indicates an involvement of stakeholders, partnerships and 'joint' governance efforts. The emergence of network governance can be particularly observed in sustainability transitions because these often necessitate an actor-network revolution.¹¹¹ The Climate Agreement uses such a network governance approach.¹¹² This is not a new development, but the large extent to which it is currently used is new.¹¹³ The problem with this development is that it runs the risk of weakening the position of Parliament in the legislative process, and thus limiting the democratic legitimacy of social agreements like the Climate Agreement.¹¹⁴

The Dutch Council of State observed in its annual report of 2018 that the government brings in other parties, such as NGOs with an interest in the legislation or branches of industries affected by the legislation, in the preparation of legislation. The consequence is that these parties have a greater influence on the legislative process and thus may largely reflect the interests of NGOs or the industrial sector. Although the Climate Agreement is not legislation itself, it does contain measures for the government and thus indirectly leads to the proposal of new legislation or the adaptation of existing legislation. This could lead to the risk that these legislative proposals would only be judged on the merits for those parties and not on their contribution to the Dutch legal framework as such.¹¹⁵ The Dutch Council of State further observed that the current political landscape is highly fragmented and thus it is difficult to find a political consensus for legislation. This has led to a shift from legislative processes to the formation of social agreements, such as the Climate Agreement and the Energy Agreement.¹¹⁶ The problem is that parties to these social agreements cannot be expected to properly balance public interests with their own interests. Moreover, these parties do not always have an equal position within these negotiations, which has an unfortunate consequence that some interests weigh heavier than others. Because the use of such social agreements is increasing, the agreement in question gets an independent, public value. According to the Dutch Council of State, because other parties are also increasingly involved in policy-making and the ensuing legislative process, it seems as if the preparation of these documents and the balancing of interests is done by the non-governmental parties, such as industries.¹¹⁷

¹¹¹ Menno Ottens and Jurian Edelenbos, 'Political Leadership as Meta-governance in Sustainability Transitions: A Case Study Analysis of Meta-governance in the Case of the Dutch National Agreement on Climate' (2019) 11 *Sustainability* 3.

¹¹² *ibid.*

¹¹³ Koole (n 110).

¹¹⁴ *ibid.*

¹¹⁵ Annual Report Dutch Council of State 2018, 15.

¹¹⁶ Similar to the Climate Agreement, the Energy Agreement is a social agreement concluded between Dutch (local) governments, employers' associations and unions, environmental organisations, financial institutions, NGOs and other stakeholders in 2013. The Energy Agreement contains a long-term vision and policy on energy, eg, energy efficiency saving and renewable energy. For a broad summary of the Energy Agreement, see: <https://www.ser.nl/-/media/ser/downloads/engels/2013/energy-agreement.pdf>.

¹¹⁷ *ibid.* 18.

In its annual report, the Dutch Council of State also paid special attention to the process of the Climate Agreement. It observed that the Climate Agreement has a very peculiar decision-making process because the government is itself a party to the Agreement.¹¹⁸ As a result, the government was already ‘bound’ to the Climate Agreement. Parliament only played a small role in commenting on the negotiating position of the government via so-called ‘cockpit-consultations’.¹¹⁹ Another complicating factor concerning the Climate Agreement is that the interpretation of the Climate Act seems to be dependent on the Climate Agreement.¹²⁰

How can one solve this problem? The obvious solution is to provide a significant role for Parliament in the negotiation process, since involving the elected representatives is a central feature of a democracy. It should monitor governmental action.¹²¹ Parliament only had a very limited role in the negotiations preceding the conclusion of the Climate Agreement. Currently, the only role Parliament has is in debating the changes in legislation that are necessary for the execution of the Climate Agreement, such as changing the environmental, gas, heat, electricity and mining acts to enable the community-based approach to making houses natural gas-free.¹²² Another solution would be to increase the role of public participation. Although private citizens are not democratically elected representatives, they do represent the public interest and moreover will lead to more public support for plans and policies once adopted.¹²³

Although the negotiation process that has led to the Climate Agreement arguably lacked democratic legitimacy, Parliament and the Senate are still involved in the legislative changes that are necessary to enable the measures of the Agreement. This means that the measures to which the government has bound itself in the Agreement are still subject to the consent of the democratically elected representatives and are thus democratically legitimised.

V. The Climate Act and Agreement and the *Urgenda* Litigation

In this section, we will look at the links between the Climate Act, the Climate Agreement and the *Urgenda* litigation.¹²⁴ We start by providing a brief description

¹¹⁸ *ibid.*

¹¹⁹ *ibid.* 17.

¹²⁰ *ibid.* 19.

¹²¹ Koole (n 110).

¹²² Climate Agreement, 28 June 2019, 29.

¹²³ Spijkers and Honniball (n 4) 222–50.

¹²⁴ See also Otto Spijkers, ‘The Urgenda Decision of the Dutch District Court: Using Tort Law to Urge the State to Do More in Combating Climate Change’ (*Rights! Blog*, 22 May 2017), <https://rightsblog.net/2017/05/22/the-urgenda-decision-of-the-dutch-district-court-using-tort-law-to-urge-the-state-to-do-more-in-combating-climate-change/>; and Otto Spijkers, ‘The Urgenda Decision of the Dutch Appeals Court: Using International Human Rights Law to Urge the State to Do More in Combating Climate Change’ (*Rights! Blog*, 5 November 2018).

of the *Urgenda* litigation. This case started at the District Court level, then moved up to the Appeals level and ended before the Supreme Court of the Netherlands. These three levels will be discussed in chronological order. Subsequently, the relationship between the *Urgenda* litigation and the Act and the Agreement will be analysed.

A. The District Court

Urgenda, an association established under Dutch law, persuaded the District Court¹²⁵ in The Hague to rule on 24 June 2015 that in order not to contribute to dangerous climate change, the Dutch State had to reduce greenhouse gas emissions in and from the Netherlands by at the very least 25 per cent in 2020 when compared with 1990 emissions levels. If the State would not do its utmost to achieve such drastic reduction, it would be in breach of its duty of care towards *Urgenda*. The duty of care is a legal obligation imposed on the State, requiring it to adhere to a standard of reasonable care in its relationship with those natural and legal persons under its jurisdiction and control.

Urgenda could initially not base its claim on the Paris Agreement, the Climate Act on the Climate Agreement. All three became legally operative *after* *Urgenda* initiated the legal proceedings against the Netherlands. But this does not mean that the litigants, and the Court, made no reference whatsoever to these instruments. In fact, the Paris Agreement is referred to extensively in the judgment of the Appeals Court and the Supreme Court, but not as a formal basis of its decision.

The provisions of international law that *Urgenda* did invoke successfully before the District Court included certain articles in the United Nations Framework Convention on Climate Change¹²⁶ and the Kyoto Protocol,¹²⁷ as well as the no harm principle of customary international environmental law,¹²⁸ and Article 191 of the Treaty on the Functioning of the European Union, which states that:

[European] Union policy on the environment shall contribute to pursuit of [inter alia] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.¹²⁹

¹²⁵ In the Netherlands, there exist three levels: District Court (court of first instance); Appeals Court; and Supreme Court. The Supreme Court does not reassess the facts, but only checks to make sure that the law is correctly applied to the facts.

¹²⁶ United Nations Framework Convention on Climate Change, concluded in New York on 9 May 1992, entered into force 21 March 1994.

¹²⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted in Kyoto on 11 December 1997, entered into force 16 February 2005.

¹²⁸ See the *Trail Smelter Case*, United States v Canada, Decision of 11 March 1941.

¹²⁹ Article 191 of the Treaty on the Functioning of the European Union. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009.

The Dutch District Court held that this provision and the other international provisions referred to above were not suitable to be invoked directly by an association against the State before a Dutch court because they were not sufficiently precise and had no direct effect.¹³⁰ However, these norms could be used to give concrete meaning to the duty of care as it exists in Dutch domestic civil law (Article 162 of Book 6 of the Dutch Civil Code to be more precise). Articles 2 and 8 of the ECHR, which the Dutch District Court determined could not be invoked directly because *Urgenda* was not itself a victim of a breach of these provisions, served a similar function.

Breaching the duty of care is a tort, a wrongful act under Dutch civil law. To assess whether the State had committed a tort by not doing enough to prevent further climate change, the District Court considered, *inter alia*, the nature and extent of the damage ensuing from climate change, the knowledge and foreseeability of this damage, and the onerousness of taking precautionary measures. Basing itself on the reports of the Intergovernmental Panel on Climate Change, the District Court concluded that the damage was ‘catastrophic’,¹³¹ that the Netherlands was fully aware of this and that taking measures to combat climate change would be burdensome, but not disproportionately onerous.¹³² Finding for *Urgenda*, the District Court ruled that the Dutch State must reduce greenhouse gas emissions in and from the Netherlands by at the very least 25 per cent in 2020 when compared with 1990 emissions levels, to comply with its duty of care *vis-a-vis* *Urgenda*.¹³³

B. The Appeals Court

On 9 October 2018, the Appeals Court upheld the ruling of the District Court, finding that the State had acted in breach of its obligations by not taking effective action to protect its population from dangerous climate change. This time, the legal argumentation was based on a direct application of international human rights law. Contrary to the District Court, the Appeals Court *did* allow *Urgenda* to invoke Articles 2 and 8 ECHR directly.¹³⁴

Articles 2 and 8 ECHR do not *explicitly* protect individuals from the effects of dangerous climate change. Article 2 ECHR says that ‘everyone’s right to life shall be protected by law’ and that ‘no one shall be deprived of his life intentionally’,

¹³⁰ For a discussion on the conditions for direct effect of international law in the Dutch domestic legal order, see Willem van Rossem and Otto Spijkers, ‘Rechtstreekse werking van internationale verdragen – een Hollands probleem met een Amerikaanse oplossing?’ (2016) 177(3) *Rechtsgeleerd Magazijn Themis* 136.

¹³¹ *Urgenda* District Court Judgment (n 7) para 4.1.1.

¹³² *ibid* paras 4.67–4.73.

¹³³ *ibid* para 5.1.

¹³⁴ *Urgenda* Appeals Court Judgment (n 8) para 35.

and Article 8 ECHR says that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. Using these provisions as a legal basis for the individual’s protection from dangerous climate change thus requires some interpretation. The Appeals Court stated in its *Urgenda* ruling that:

The interest protected by Article 2 ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life. Article 8 ECHR protects the right to private life, family life, home and correspondence. Article 8 ECHR may also apply in environment-related situations. The latter is relevant if (1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity.¹³⁵

With respect to Article 8 ECHR in particular, the Appeals Court asserted that ‘if the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible’.¹³⁶ In other words, there is also an obligation to prevent future infringements of this right. After assessing the relevant facts, the Appeals Court concluded that ‘it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life’ and thus ‘it follows from Articles 2 and 8 ECHR that the State has a duty to protect [everyone within its jurisdiction] against this real threat’.¹³⁷ The Appeals Court thus concluded that ‘the State fails to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% at the end of 2020’.¹³⁸

The Dutch government made the argument, already referred to above, that it was compliant with the EU’s commitment under the Paris Agreement, ie, to reduce emissions by 49 per cent in 2030. This, so it argued, did not require a 25 per cent reduction already by the end of 2020. But the Appeals Court was not persuaded and explained that each Megaton of CO₂ which is emitted into the atmosphere in the short term contributes to global warming, and that the Paris Agreement was never meant to allow business as usual up to 2030.¹³⁹

C. The Supreme Court

The Supreme Court of the Netherlands issued its judgment on 20 December 2019. Article 162(2), Book 6 of the Dutch Civil Code, which was the key provision in the District Court’s ruling, did not play any role whatsoever in the Supreme Court’s

¹³⁵ *ibid* para 40.

¹³⁶ *ibid* para 43.

¹³⁷ *ibid* para 45.

¹³⁸ *ibid* para 73, repeated in para 76.

¹³⁹ *ibid* para 47.

reasoning.¹⁴⁰ Instead, the Supreme Court followed the Appeals Court and relied fully on the ECHR. It allowed *Urgenda* to directly invoke Articles 2 and 8 ECHR before the Dutch court.¹⁴¹ Article 2 ECHR obliged the Netherlands to take appropriate measures to safeguard the lives of those residing within the jurisdiction of the Netherlands,¹⁴² while Article 8 ECHR obliged the Netherlands to take reasonable and appropriate measures to protect individuals within its jurisdiction against potentially serious damage to their environment.¹⁴³ This obligation to take appropriate measures applied not only with regard to specific, identifiable persons, but also when the risk was due to environmental hazards that threaten large groups of people, or even the entire population of the Netherlands.¹⁴⁴

D. *Urgenda* and the Climate Act and the Climate Agreement

What is the relationship between *Urgenda* and the Climate Act and Climate Agreement? Most importantly, the reduction target of the *Urgenda* ruling is different from the targets agreed in the Climate Act and the Climate Agreement. The intermediate target in the Act and the Climate Agreement (49 per cent reduction) is to be achieved by 2030, and the target set by the Court in *Urgenda* (25 per cent reduction) must already be achieved by 2020.

The judgment of the Supreme Court referred only once to the Climate Act. In the relevant paragraph, the Court noted that in the Climate Act, the Netherlands had set a reduction target of 49 per cent for 2030 and 95 per cent for 2050. It cleverly noted that the target of 49 per cent for 2030 was linearly derived from the target of 95 per cent for 2050, and if this line would have been extended to the end of 2020, then this would have resulted in a reduction target for that year of 28 per cent. The Supreme Court asked the State why it instead opted for a mere 20 per cent reduction instead of 28 per cent. The State's reply was that a target for 20 per cent could be set for the end of 2020 because afterwards, the reduction would had to be speeded up.¹⁴⁵ The Supreme Court was clearly not persuaded.¹⁴⁶ Thus, it insisted that in order to comply with Articles 2 and 8 ECHR, the State had to reduce emissions by at least 25 per cent in 2020; this was an absolute minimum.

¹⁴⁰ *Urgenda* consistently argued along both lines, ie, it argued that the Netherlands acted both (1) in breach of the duty of care (Article 6:162(2) of the Dutch Civil Code) and (2) in breach of arts 2 and 8 ECHR. See *Urgenda* Supreme Court, para 2.2.2.

¹⁴¹ *Urgenda* Supreme Court Judgment (n 9) para 5.9.3.

¹⁴² *ibid*, para 5.2.2.

¹⁴³ *ibid*, para 5.2.3.

¹⁴⁴ *ibid*, para 5.3.1.

¹⁴⁵ *ibid* para 7.4.5.

¹⁴⁶ *ibid* para 7.4.6.

The State had not managed to substantiate its claim that it was justified in deviating from that objective.¹⁴⁷

This created an immediate problem for the government. The Climate Agreement merely provided for a CO₂ reduction of 4 Megatons in 2020, while 9 Megatons is needed to comply with *Urgenda*.¹⁴⁸ The Minister of Economic Affairs and Climate Policy announced that a specific set of measures for the execution of the *Urgenda* ruling will be presented.¹⁴⁹ These specific measures are based on the same principles as the Climate Agreement; the measures have to be cost-efficient and should have broad societal and political support. These measures should strengthen the Climate Agreement.¹⁵⁰ The Minister emphasised in the debate on the Climate Agreement that the government still aims to meet the goal set by *Urgenda*.¹⁵¹

VI. Conclusion

What is the relationship between the Climate Act and the Climate Agreement in short? The Climate Act is the legal framework in which the Climate Agreement operates. This has two important consequences. First, the intermediate target for 2030, as set in the Climate Act, determines the aim of the Climate Agreement. Second, the Climate Plan, in which the government outlines its climate policy for the upcoming 10-year period, and the Climate Agreement, in which various partners commit to making their particular contributions, are closely related. There is one important difference between Act and the Agreement, and that is that only the former is, strictly speaking, legally binding. This implies that if the parties to the Climate Agreement cannot come up with supported proposals, the government bears ultimate legal responsibility for making those decisions that ensure the Netherlands reduces its greenhouse gas emissions enough to meet the target. The Climate Act sets the target of a 49 per cent reduction in 2030 and a 95 per cent reduction in 2050 compared to 1990 *by law*. Every newly elected government between today and 2050 is therefore bound by these targets, unless the Act is amended or repealed. Having said that, the Climate Act is not about the substantive measures that must be taken to achieve these targets. In the Climate Agreement, these measures were agreed, together with all social partners.

An important aspect in both the Climate Act and the Climate Agreement is the focus on public participation. Again, the Climate Act provides for the framework for public participation, while the Climate Agreement contains specific measures

¹⁴⁷ *ibid* para 7.5.1.

¹⁴⁸ 'Urgenda: kabinet lapt vonnis van de rechter aan zijn laars' (NOS, 28 June 2019); also discussed by Jesse Klaver, the party chairman of the Green Party (GroenLinks) in the debate on 3 July 2019.

¹⁴⁹ Letter from the Minister of Economic Affairs and Climate Policy to Parliament on the execution of the *Urgenda* ruling, 28 June 2019.

¹⁵⁰ *Parliamentary Documents I*, 32 813, nr H.

¹⁵¹ Debate held in Parliament on 3 July 2019.

on how citizens can be involved in the transition. However, both documents have attracted criticism.

The Climate Act is often portrayed as being merely symbolic because it does not include specific measures, while the Climate Agreement is seen to be lacking democratic legitimacy. Nevertheless, future governments are still held to the set reduction target, and the execution of the Climate Agreement depends on the willingness of future governments to create new legislation or change existing legislation.

The Christian Democrats (CDA) raised an interesting point when the Climate Act was discussed in the Senate. Why is it, they asked the initiators of the Act, that only a limited number of countries have so far adopted a climate law? The process started in the UK and a few other countries followed suit. At the time, the Netherlands was only the seventh country in the world to prepare a Climate Act. Why is it that only a handful of the nearly 200 states that have ratified the Paris Agreement have followed the UK's example?¹⁵² This is an interesting question, but to provide an answer to this is beyond the scope of this chapter.

¹⁵² Discussion of Climate Act in the Senate, 21 May 2019.