Notes on Recent Developments

Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell

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1 Introduction

This note provides an analysis of the judgment of the District Court of The Hague, Netherlands, in the case initiated by Friends of the Earth Netherlands ('Milieudefensie') against the giant global oil company Royal Dutch Shell (hereafter *Shell*), headquartered in The Hague.¹ The note is structured as follows. First, the ruling is placed in the larger climate litigation context. This is followed by a summary of the ruling itself and an analysis of some of the most interesting aspects of the ruling. These include the fact that Shell's behaviour was considered unlawful even though the company had not breached any specific legal provision of either international or domestic (Dutch) law, the way in which the Court dealt with the most often heard justifications for evading responsibility, and the suggestion that the Netherlands has become a dikastocracy – a land ruled by judges rather than by government.

1 *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, District Court The Hague, Judgment of 26 May 2021, English translation at <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2021:5339>>.

2 Climate Litigation in the Netherlands and Beyond

Shell is regarded as an example of climate litigation. The term 'climate litigation' is generally used to refer to legal proceedings initiated to establish legal responsibility for a failure to prevent or reduce the rate of climate change and/or mitigate its negative consequences.² Such legal proceedings are being initiated in courts, tribunals and other rule compliance monitoring bodies, operating around the world, at the domestic, regional, or global level. They can be based on rules of domestic, regional and/or international law, both of public and private law character.³ Throughout Europe, climate litigation has in recent years become a popular and essential tool to urge action to prevent dangerous climate change, and support the goals of the Paris Agreement.⁴ It has also been used in regions outside Europe.⁵

New cases of climate litigation are constantly emerging, and it is becoming an almost impossible task to keep track of all these cases.⁶ *Urgenda* is probably still the best-known example of first-generation climate litigation in Europe.⁷

- 2 See eg Ivano ALOGNA, Christine BAKKER and Jean-Pierre GAUCI, 'Climate Change Litigation: Global Perspectives: An Introduction', in Ivano ALOGNA, Christine BAKKER and Jean-Pierre GAUCI (eds) *Climate Change Litigation: Global Perspectives*, Brill, 2021; Cinnamon Pinon CARLARNE, 'The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis', 111–127, and Guy DWYER, 'Climate Litigation: A Red Herring among Climate Mitigation Tools', 128–144, both in Benoit MAYER and Alexander ZAHAR (eds) *Debating Climate Law*, Cambridge University Press, 2021.
- 3 Brian PRESTON, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 *Chinese Journal of Environmental Law* 131–164.
- 4 Lennart WEGENER, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) *Transnational Environmental Law* 17–36; Katerina MITKIDIS and Theodora N VALKANOU, 'Climate Change Litigation: Trends, Policy Implications and the Way Forward' (2020) 9 *Transnational Environmental Law* 11–16.
- 5 For recent examples of climate litigation in Brazil, see eg Joana SETZER and Délton WINTER DE CARVALHO, 'Climate Litigation to Protect the Brazilian Amazon: Establishing A Constitutional Right to A Stable Climate', (2021) *Review of European, Comparative and International Environmental Law* 1–10. For an overview of climate litigation in Asia, see Jolene LIN and Douglas A KYSAR (eds) *Climate Change Litigation in the Asia Pacific*, Cambridge University Press, 2020.
- 6 See eg United Nations Environment Programme (UNEP) in cooperation with the Sabin Center for Climate Change Law at Columbia University, *Global Climate Litigation Report: 2020 Status Review*, published 26 January 2021 <<https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review>>. See also 'Our Children's Trust', which documents American and global climate litigation cases <<https://www.ourchildrenstrust.org>>.
- 7 Otto SPIJKERS, 'Pursuing Climate Justice Through Public Interest Litigation: The Urgenda Case' (2020) *Völkerrechtsblog*.

It has received a good deal of attention in scholarship,⁸ and has inspired others all over Europe and beyond to initiate similar proceedings, adopting an identical – or at least very similar – legal strategy.⁹

The *Urgenda* case was introduced to the courts by a foundation called Urgenda, established under Dutch law.¹⁰ The claim was directed against the State of the Netherlands. Urgenda submitted that the Government of the Netherlands should be held responsible for not doing enough to prevent dangerous climate change, and for not taking adequate action to mitigate the harmful effects thereof. Urgenda argued that this inaction ought to be qualified, inter alia, as a breach of Articles 2 (right to life) and 8 (family life) of the European Convention on Human Rights (ECHR).¹¹ To the surprise of the majority of the scholarly community, the Dutch District Court agreed with Urgenda in 2015,¹² followed by the Dutch Appeals Court in 2018.¹³ On 20 December 2019, the Netherlands' Supreme Court also ruled in Urgenda's favour.¹⁴ To support their conclusions, and their interpretation of the relevant human rights provisions, the Dutch courts made many references to the case law of the European

8 See eg Christine BAKKER, 'Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond', in Ivano ALOGNA, Christine BAKKER, and Jean-Pierre GAUCI (eds) *Climate Change Litigation: Global Perspectives*, Brill, 2021.

9 For an overview of the reactions to the Urgenda Supreme Court decision in the media and in scholarship, see Otto SPIJKERS, 'The Case Between Urgenda and the State of the Netherlands' (2020) 8(1) Hungarian Yearbook of International Law and European Law 192–206.

10 For a case note, see eg Maiko MEGURO, 'State of the Netherlands v. Urgenda Foundation' (2020) 114(4) American Journal of International Law 729–735.

11 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) concluded in Rome, 4 November 1950, entry into force 3 September 1953.

12 *Urgenda Foundation v State of the Netherlands (Ministry of Infrastructure and the Environment)*, District Court The Hague, Judgment of 24 June 2015 <<http://deeplink.rechtspraak.nl/uitspraak?id=ecli:nl:rbdha:2015:7196>>.

13 *State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, Appeals Court The Hague, Judgment of 9 October 2018 <<http://deeplink.rechtspraak.nl/uitspraak?id=ecli:nl:ghdha:2018:2610>>. For a case note, see Benoit MAYER, 'The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)' 2019 8(1) Transnational Environmental Law 167–192; Bernhard W. WEGENER, 'Urgenda – World Rescue by Court Order?: The “Climate Justice” – Movement Tests the Limits of Legal Protection' (2019) 16 Journal for European Environmental & Planning Law 125–147.

14 *State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, Netherlands Supreme Court, Judgment of 20 December 2019 <<http://deeplink.rechtspraak.nl/uitspraak?id=ecli:nl:hr:2019:2007>> hereafter referred to as *Urgenda Supreme Court*.

Court of Human Rights.¹⁵ This is one of the main reasons why these Dutch rulings have inspired many litigants to initiate similar proceedings in other European States, based on the same provisions in the ECHR and supported by the same case law of the European Court of Human Rights.¹⁶

Another example of climate litigation undertaken at the domestic level in Europe is the case between the *Friends of the Irish Environment v the State of Ireland*.¹⁷ On 31 July 2020, the Supreme Court of Ireland ruled that Ireland's National Mitigation Plan was not sufficiently concrete and specific on the measures that Ireland intended to take to combat climate change, as required under Ireland's own Climate Action and Low Carbon Development Act of 2015. Friends of the Irish Environment also claimed that Ireland had breached certain human rights in the ECHR, as Urgenda had done before the Dutch courts. However, the Irish Court held that the Friends of the Irish Environment had no standing to bring a claim based on the ECHR. And thus, even though this Irish case is widely regarded as a victory for the plaintiffs, it was much less influential on the development of a European human rights-based approach to climate litigation than *Urgenda*.¹⁸

Most human rights-based climate litigation in Europe is directed against a State. This is logical, as States are the subjects of international law with the primary responsibility to ensure the enjoyment of human rights to everyone

15 *ibid*, Section 5.

16 See also Margaretha WEWERINKE-SINGH and Ashleigh MCCOACH, 'The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation' (2021) 30(2) *Review of European, Comparative and International Environmental Law* 275–283. It has also been argued that the suffering of children due to State inaction on climate change amounts to a breach of Article 3 ECHR on the prohibition of torture. See eg Natasa MAVRONICOLA, 'The Future is a Foreign Country: Understanding State (In)Action on Climate Change as Ill-Treatment' *Strasbourg Observers* 19 October 2021.

17 *Friends of the Irish Environment v Government of Ireland*, Irish Supreme Court, Judgement of 31 July 2020. There are other examples. In a judgment of 14 October 2021, the Paris administrative court ordered the State of France to compensate for the ecological consequences caused by its failure to reduce greenhouse gas emissions and combat climate change. This was an administrative law case, not a tort case based on international human rights law. See *Associations Oxfam France, Notre Affaire à Tous, Fondation pour la Nature et l'Homme, and Greenpeace France*, Tribunal Administratif de Paris (France), Judgement of 14 October, 20211904967-1904968-1904972-1904976.

18 For a critical comment, see Victoria ADELMANT, Philip ALSTON, and Matthew BLAINEY, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13(1) *Journal of Human Rights Practice* 1–23; and Orla KELLEHER, 'A Critical Appraisal of Friends of the Irish Environment v Government of Ireland' (2021) 30(1) *Review of European, Comparative and International Environmental Law* 138–146.

residing within their jurisdiction.¹⁹ But States are not necessarily the only actors bearing responsibility for climate change, and thus climate litigation has also been undertaken against private actors. *Shell*, discussed in detail below, is the most important example thus far.

While climate litigation can be initiated before a domestic court, as was done in all three examples – Urgenda, Friends of the Irish Environment, and Shell – referred to just above, European regional courts also provide a suitable forum.²⁰ One recent example of this is the case currently pending before the European Court of Human Rights, brought by four Portuguese children and two young adults against all European Union Member States and the United Kingdom, Norway, Russia, Turkey, Switzerland, and Ukraine.²¹ The Portuguese youngsters hold all these States jointly responsible for not doing enough to prevent dangerous climate change, and for a failure to take effective measures to mitigate the harmful effects of climate change. The youngsters applied the same European human rights-based climate litigation strategy as was done in *Urgenda* – relying on Articles 2 and 8 ECHR – but they are adding a new dimension to it. They also argue that the inaction complained of constitutes a breach affecting youth in particular, thus constituting age discrimination, being a breach of Article 14 ECHR, which states:

The enjoyment of the rights and freedoms set forth in [the ECHR] shall be secured without discrimination *on any ground* such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²²

The Portuguese youngsters' climate litigation strategy is inspired by that of the *Urgenda* litigation and is thus in line with this European human rights-based

19 For a critical comment on this rights-based approach, see Benoit MAYER, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115(3) *American Journal of International Law* 409–451.

20 For a discussion of this strategy, see eg Przemysław SIWIOR, 'The Potential of Application of the ECHR in Climate Change Related Cases' (2021) 23 *International Community Law Review* 197–208.

21 European Court of Human Rights, Application No. 39371/20, Cláudia Duarte AGOSTINHO and others v. Portugal and thirty-two other States, filed on 7 September 2020. See eg Corina HERI, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?' *EJIL:Talk!* 22 December 2020 <ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/>; Paul CLARK, Gerry LISTON, and Ioannis KALPOUZOS, 'Climate Change And The European Court Of Human Rights: The Portuguese Youth Case' *EJIL:Talk!* 6 October 2020 <ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case>.

22 Article 14, ECHR (emphasis added).

climate litigation approach.²³ At the time of writing, the European Court of Human Rights has yet to decide on the admissibility of the application before it can turn its attention to the merits. But even at this very early and preliminary stage in the proceedings, the case has attracted a good deal of scholarly, media and public attention.²⁴

3 Summary of *Shell*

Let us now turn our attention to *Shell*. Already in 2018, Friends of the Earth Netherlands ('Milieudefensie') began a case against the giant global oil company Shell, headquartered in the city of The Hague, Netherlands.²⁵ In December of 2020, the District Court in The Hague heard oral arguments in the case, and on 26 May 2021, the same District Court delivered its revolutionary and ground-breaking judgment. As happened in *Urgenda*, *Shell* also attracted much scholarly and media attention all over the world. It was immediately analysed and commented on in the blogosphere,²⁶ as well as in foreign²⁷ and Dutch newspapers.²⁸

23 European Court of Human Rights, Application No. 39371/20, Cláudia Duarte AGOSTINHO and others v. Portugal and thirty-two other States, filed on 7 September 2020, Application form, para 9, and paras 36–38. The application form is available at <<https://youth4climatejustice.org/the-case.html>>.

24 For the potential of the European Court of Human Rights as Climate Litigation Forum, see Natalia KOBYLARZ, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation', in Helle Tegner ANKER and Birgitte Egelund OLSEN (eds) *Sustainable Management of Natural Resources: Legal Instruments and Approaches*, Intersentia, 2018, 99–120.

25 All the documents relating to the case are available at <<https://en.milieudefensie.nl/climate-case-shell>>.

26 See eg Benoit MAYER, 'Milieudefensie v Shell: Do Oil Corporations Hold a Duty to Mitigate Climate Change?' *EJIL:Talk!* 3 June 2021 <<https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/>>; Annalisa SAVARESI and Margaretha WEWERINKE-SINGH, 'Friends of the Earth (Netherlands) v Royal Dutch Shell: Human Rights and the Obligations of Corporations in the Hague District Court Decision' *Global Network for Human Rights and the Environment (GNHRE)* 31 May 2021; see also 'Editorial' (2021) 5 Chinese Journal of Environmental Law 1, 7.

27 See eg Donald POLS (Director of Friends of the Earth Netherlands), 'This Is How We Took on One of The World's Biggest Polluters and Won' *The Independent* 4 June 2021; Somini SENGUPTA, 'Big Setbacks Propel Oil Giants Toward a "Tipping Point"' *New York Times* 29 May 2021; Anjali RAVAL, 'Shell's Climate Defeat: An Omen for All Corporate Polluters?' *Financial Times* 28 May 2021; Daniel BOFFEY, 'Court Orders Royal Dutch Shell to Cut Carbon Emissions By 45% By 2030' *The Guardian* 26 May 2021.

28 See eg Bard van de WEIJER and Pieter Hotse SMIT, 'Historische Uitspraak in Klimaatzaak: Shell Moet CO₂ Uitstoot Drastisch Verminderen' [tr: Historic Judgment in Climate Case:

The Dutch District Court basically agreed with claimants that Shell was doing too little to reduce greenhouse gas emissions and prevent serious climate damage (global warming of over 1,5 degrees Celsius). In view of the Court, Shell was thereby acting unlawfully, and it was under an obligation to significantly reduce its greenhouse gas emissions and bring them in line with the global climate objective of the Paris Agreement. More specifically, the Court ordered Shell, both directly and via its companies and legal entities with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all greenhouse gas emissions into the atmosphere, due to the business operations and sold energy-carrying products of the Shell group, to such an extent that this volume will have reduced by at least net 45% at the end of 2030, relative to 2019 levels.²⁹

In the view of the Court, global warming poses a significant risk to the present and future generations of the world, and of the Netherlands in particular. Regarding the latter, it noted:

The risks associated with climate change for Dutch residents [...] concern health risks and deaths due to climate change-induced hot spells as well as health problems and an increased mortality risk due to increasing infectious diseases, deterioration of air quality, increase of UV exposure, and an increase of water-related and foodborne diseases. They also concern water-related health risks, which the Netherlands [...] will face, including flooding along the coast and rivers, excess water, water shortage, deterioration of water quality, salinization, raised water levels and drought.³⁰

This emphasis on the consequences of climate change *for the people in the Netherlands* is important, because, due to admissibility issues, the claimant was only permitted to represent the interests of the present and future people residing in the Netherlands, not those residing elsewhere in the world.

Shell Must Drastically Reduce CO₂ Emissions] *Volkskrant* 26 May 2021; Paul LUTTIKHUIS and Erik van der WALLE, 'Het Klimaat is een Mensenrechtenkwestie' [tr: Climate is a Human Rights Issue] *NRC* 26 May 2021.

29 *Shell*, para 5.3. In the view of the Court, Shell had an obligation of result to reduce its own emissions, and an obligation of conduct (due diligence) to try and reduce the emissions of the users of its products, which basically includes everyone driving a car on Shell-petrol. See Luc LAVRYSEN and Farah BOUQUELLE, 'Climate Change Litigation in Europe' 93–94, and Chris BACKES, 'Globalisering van het Omgevingsrecht?' 302 and 309–310, in Kars de GRAAF, Bert MARSEILLE, Sacha PRECHAL, Rob WIDDERSHOVEN, and Heinrich WINTER (editors), *Grensoverstijgende Rechtsbeoefening: Liber Amicorum Jan Jans*, Paris, 2021.

30 *ibid.*, para 4.4.6; see also para 2.3.9.

This is a major difference with the *Urgenda* ruling, which did relate to all the world's people.³¹

4 Acting Unlawfully without Breaching the Law

We now turn to some of the most remarkable aspects of *Shell*. Interestingly, the Court found that Shell was acting unlawfully, even though it did not find a single specific provision of domestic or international law that Shell had breached. In the words of the Court itself, Shell's greenhouse gas emissions reduction obligation 'ensues from the unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful'.³²

Under Dutch private law, a company can be held liable not just when it acts contrary to a specific legal rule, but also when it acts contrary to a societal standard of due care or 'proper social conduct' ('maatschappelijke zorgvuldigheidsnorm').³³ This standard of due care can even be filled in by laws and regulations which, formally speaking, are not binding on Shell, such as the Climate Agreement and the European Convention on Human Rights (ECHR). Even though Shell was not bound by any of these legal instruments, the Court felt that they could nonetheless be used to determine whether Shell adhered to the unwritten standard of due care.

Looking at how this line of argumentation was applied regarding the ECHR,³⁴ we see that the plaintiffs argued that Shell was acting in breach of its duty of care, and in breach of Articles 2 and 8 ECHR. Friends of the Earth Netherlands was thus following the legal strategy used in *Urgenda* discussed above. This was no coincidence, as the lead counsel – Roger Cox – was the same person in both cases. This time, the plaintiffs were using the European human rights-based climate litigation strategy against a transnational corporation instead

31 *ibid*, paras 4.2.1–6.

32 *ibid*, para 4.4.1.

33 Andreas HÖSLI, 'Milieudefensie et al. v. Shell: A Tipping Point in Climate Change Litigation against Corporations?' (2021) 11 *Climate Law*, 198. This is not unique to the Netherlands domestic legal system. See also Chiara MACCHI, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 *Business and Human Rights Journal* 93–119.

34 *Shell*, paras 4.4.9–4.4.10. For some critical reflections, see eg Jenny SANDVIG, Peter DAWSON, and Marit TJELMELAND, 'Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?' *EJIL:Talk!* 23 June 2021 <<https://www.ejiltalk.org/can-the-echr-encompass-the-transnational-and-intertemporal-dimensions-of-climate-harm/>>.

of a State.³⁵ Most scholars presumed this would be much more difficult, as, formally speaking, only States have obligations under the ECHR.

In the event, the Court agreed with this line of argumentation. It noted that the provisions in the ECHR and the International Covenant on Civil and Political Rights (ICCPR) 'apply in relationships between States and citizens', and thus 'Milieudefensie *et al.* cannot directly invoke these human rights with respect to [Shell]'.³⁶ However, that was not the end of the story. The Court continued as follows:

Due to the fundamental interest of human rights and the value for society as a whole they embody, the human rights may play a role in the relationship between Milieudefensie *et al.* and [Shell]. Therefore, the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care.³⁷

The Court found further support for the obligation of corporations to respect human rights in the United Nations Guiding Principles on Business and Human Rights (UNGP), which were developed by the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.³⁸ On the relevance of these principles, the Dutch District Court noted as follows:

The responsibility of business enterprises to respect human rights, as formulated in the [United Nations Guiding Principles on Business and Human Rights, or UNGP], is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Therefore, it is not enough for companies to monitor developments

35 Lisa BENJAMIN, 'The Responsibilities of Corporations: New Directions in Environmental Litigation', in Veerle HEYVAERT and Leslie-Anne DUVIC-PAOLI (eds) *Research Handbook on Transnational Environmental Law*, Edward Elgar, 2020.

36 *Shell*, para 4.4.9; see also paras 4.6.1 and 5.2.

37 *ibid.*, para 4.4.9.

38 John RUGGIE, *Guiding Principles on Business and Human Rights*, UN Doc. A/HRC/17/31, 21 March 2011. The Human Rights Council endorsed the Guiding Principles in a resolution adopted 16 June 2011, UN Doc. A/HRC/RES/17/4. See also Chiara MACCHI and Josephine van ZEBEN, 'Business and Human Rights Implications of Climate Change Litigation: Milieudefensie *et al.* v Royal Dutch Shell' (2021) *Review of European, Comparative & International Environmental Law*.

and follow the measures States take; they have an individual responsibility. It can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the [International Covenant on Civil and Political Rights, or ICCPR] as well as other ‘internationally recognized human rights’, including the ECHR.³⁹

The Court concluded in surprisingly strong language, which is worth quoting if only for that reason:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts. It is a global standard of expected conduct for all businesses wherever they operate. As has been stated above, this responsibility of businesses exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. It is not an optional responsibility for companies. It applies everywhere, regardless of the local legal context, and is not passive [...] it requires action on the part of businesses.⁴⁰

The same reasoning was applied to the Climate Agreement.⁴¹ Before analysing that part of the ruling, it is appropriate to provide some context and background information about this Dutch domestic soft law instrument, and its relationship with the Dutch Climate Act.⁴²

On 28 June 2019, the Dutch Cabinet presented its Climate Agreement. The Climate Agreement encompasses a package of measures and agreements between companies, social organizations, and government bodies for the

39 *Shell*, paras 4.4.13–4.4.14.

40 *ibid*, para 4.4.15. See also Kristian Høyer TOFT, ‘Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology’ 2020 (5) *Business and Human Rights Journal* 1–27.

41 *Shell*, paras 2.4.14 and 2.4.15.

42 See also Otto SPIJKERS and Sofie OOSTERHUIS, ‘The Dutch Response to Climate Change: Evaluating the Netherlands’ Climate Act and Associated Issues of Importance’, in Thomas MUINZER (ed) *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation*, Hart Publishing, 2020, 175–198.

joint reduction of greenhouse gas emissions in the Netherlands. The Climate Agreement is the result of consultations among some 150 parties, which gathered at five environment-themed round table meetings, namely Electricity, Industry, Built Environment, Agriculture and Mobility. Shell participated in the round table meetings on Electricity.⁴³

On 1 September 2019, the Climate Act entered into force. This statute provides a framework for the development of policy geared towards a permanent and gradual reduction of greenhouse gas emissions in the Netherlands, with the purpose of curbing global warming and climate change.

The two instruments – the Climate Act and the Climate Agreement – are closely related to each other. The Climate Act binds the Dutch Government in its relationship with the Dutch Parliament and Senate. The Climate Agreement consists of a series of non-legally binding commitments made by governmental bodies, companies – including Shell – and civil society organizations 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. To put it differently, the Climate Act is the legal framework under which the Climate Agreement operates. This means that the greenhouse reduction targets set in the Climate Act determine the aim of the Climate Agreement. There is one important difference between Act and 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 sufficiently to meet the target.

The rigidity of this difference in legal character between the Act and the Agreement must be nuanced, now that the District Court judgment in *Shell* referred to both the Climate Act and Agreement, and observed that Shell had signed the Climate Agreement on 12 September 2019,⁴⁴ and this alone was enough, said the Court, to conclude that this Agreement, despite its formally legally non-binding character, could be used by it to give concrete meaning to the unwritten standard of care for Shell.⁴⁵

43 For an overview of participants in the sector tables, task groups and working groups responsible for drafting the Climate Agreement, see <<https://www.klimaatakkoord.nl/organisatie/documenten/publicaties/2018/05/17/deelnemers-sectortafels-taakgroepen-werkgroepen>>.

44 *Shell*, paras 2.5.16 and 4.5.1.

45 *ibid*, paras 2.4.14–2.4.15, 2.5.16 and 4.5.1.

5 The Way the Court Dealt with the Most Common Justifications for Doing Nothing

This section looks briefly at some of the most often used ‘excuses’, ‘circumstances precluding wrongfulness’, ‘defences’, or ‘counterarguments’, and how the Dutch District Court in *Shell*, following the earlier rulings by the Appeals Court and the Supreme Court in *Urgenda*, effectively dealt with them. The ‘drop in the ocean’, ‘waterbed’, ‘scientific uncertainty’, and the ‘we can and must act, but perhaps not today’-arguments that were put before the Court will all be addressed in turn.

Concerning the ‘drop in the ocean argument’: climate change is, of course, a global phenomenon, and thus individual States or corporations often attempt to escape from their individual responsibility by arguing that their individual adaptation and mitigation activities will only have a negligible impact (ie, the ‘drop in the ocean’ will not make any difference). The Court was not persuaded. It held that each State and each corporation must shoulder ‘its part’ of this globally shared responsibility to prevent dangerous climate change.

The following is what the Netherlands Supreme Court had to say about it in its ruling in *Urgenda*:

[T]he defence that a State does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country’s own share in global greenhouse gas emissions is very small and that reducing emissions from one’s own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest [...].⁴⁶

This line of argumentation was affirmed in *Shell*. In view of the Hague District Court,

46 *Urgenda*, Supreme Court, para 5.7.7. For a critical commentary on this part of the ruling, and the difficulty in establishing exactly what is required of each State, see Benoit MAYER, ‘Temperature Targets and State Obligations on the Mitigation of Climate Change’ (2021) *Journal of Environmental Law* 1–27; Benoit MAYER, ‘Interpreting States’ General Obligations on Climate Change Mitigation: A Methodological Review’ (2019) 28 *Review of European, Comparative and International Environmental Law* 107–121.

[Shell's] CO₂ emissions only cause imminent environmental damage for Dutch residents in conjunction with other emissions of CO₂ and other greenhouse gases [...]. Not only are CO₂ emitters held personally responsible for environmental damage in legal proceedings conducted all over the world, but also other parties that could influence CO₂ emissions. The underlying thought is that every contribution towards a reduction of CO₂ emissions may be of importance.⁴⁷

This argument is often countered with an *ad absurdum* line of argumentation: when your neighbour is taking an unnecessarily long shower, (s)he is also contributing to climate change and should thus also be held responsible for a breach of the duty of care, just like Shell. But the Court held that the contribution to climate change must not be negligible, and thus we cannot simply bring literally everybody to court.⁴⁸

A second excuse that one often hears is the waterbed excuse. The idea is that companies like Shell will escape from the Netherlands' jurisdiction to States with less strict greenhouse gas reduction obligations, and with less activist courts. This will only relocate the problem, and not solve it (as water in a waterbed moves to the place where the least pressure is put on it). However, Shell announced, shortly after the Court issued its ruling, that it will not move its headquarters from The Hague to a country which puts less pressure on the company. But then, on 15 November 2021, Royal Dutch Shell apparently changed its mind, and announced plans to move its headquarters from the Netherlands to the United Kingdom. Shell denied that this relocation decision was motivated solely by the District Court ruling.⁴⁹

It is also said that it is unfair if Shell must comply with this very strict Dutch Court ruling but competing oil companies headquartered elsewhere in the world need not do so. Shell made the argument that if it stops producing fuel from oil, some other oil company will step in and be just as polluting, emitting just as much greenhouse gas.⁵⁰ In fact, this seems to be Shell's strongest

47 *Shell*, para 4.3.5. See also paras 4.4.16, 4.4.37, and 4.4.54. See also Jonathan VERSCHUUREN, 'Transboundary Environmental Law Scholarship: Towards A Focus On Planet Earth' 332–333, in Kars de GRAAF, Bert MARSEILLE, Sacha PRECHAL, Rob WIDDERSHOVEN, and Heinrich WINTER (editors), *Grensoverstijgende Rechtsbeoefening: Liber Amicorum Jan Jans*, Paris, 2021.

48 *ibid*, paras 4.4.16 and 4.4.37.

49 Shell, Notice of General Meeting: Shell seeks Shareholder approval to change articles to implement a simplified structure, 15 November 2021 <<https://www.shell.com/media/news-and-media-releases/2021/november-press-release.html>>.

50 *ibid*, paras 4.4.49 and 4.4.53. Only a few months after the judgment, on 20 September 2021, Shell announced that it had sold its share in a large Texas oil field - the Texan Permian

argument – in Shell's own opinion at least – because the first reaction of Shell to the ruling was a *LinkedIn* message posted by its CEO on 9 June 2021, in which the following argument was made:

To mention one, perhaps extreme scenario, imagine Shell decided to stop selling petrol and diesel today. This would certainly cut Shell's carbon emissions. But it would not help the world one bit. Demand for fuel would not change. People would fill up their cars and delivery trucks at other service stations. Society needs to take urgent action on climate change. But a court ordering one energy company to reduce its emissions – and the emissions of its customers – is not the answer.⁵¹

The Court was not convinced of the equivalent of this argument that was put before it. It held that the argument does not hold, because it

[...] seems to ignore that it is necessary to reduce the worldwide oil and gas extraction and to facilitate the curtailment of CO₂ emissions that cause dangerous climate change; other companies will also have to make a contribution.⁵²

In other words, we must start somewhere, and why not in the Netherlands, and why not with Shell?

This position seems to have attracted the support of the Dutch Government. When the Netherlands' Minister and State Secretary of Economic Affairs and Climate were jointly asked about the consequences of the *Shell* ruling, both worldwide and in the Netherlands, they gave the following reply:

It concerns a lawsuit between Milieudefensie *et al* and Royal Dutch Shell. The reduction obligation imposed by the court only applies to Shell. However, the court states in its judgment that the responsibility to respect human rights is not only for Shell but applies to all companies.⁵³

Basin – for \$9.5 billion to the American oil group ConocoPhillips <<https://www.shell.com/media/news-and-media-releases/2021/shell-signs-agreement-to-sell-permian-business.html>>.

51 Ben van BEURDEN, 'Spirit of Shell Will Rise to The Challenge', *LinkedIn* 9 June 2021 <https://www.linkedin.com/feed/update/urn:li:ugcPost:6808301830452342785?updateEntityUrn=urn%3Ali%3Afs_feedUpdate%3A%28%2Curn%3Ali%3AugcPost%3A6808301830452342785%29>.

52 *Shell*, para 4.4-53. See also para 4.4-49.

53 Reply from Minister BLOK (Economic Affairs and Climate) and State Secretary YEŞİLGÖZ-ZEGERIUS (Economic Affairs and Climate) 14 July 2021, Parliamentary session 2020–2021, no. 3156, AH 3577, 2021Z09100. The car industry might be next. See Maria

They did, however, show some appreciation of the practical problems involved in being the first to act. When these two members of the government were asked what consequences this judgment might have for the business climate and the competitive position of the Netherlands, they gave the following reply:

The strength of the Dutch competitive position and our business climate is always relative to that of other countries. An important factor is therefore to what extent this ruling is followed up in other countries. This ruling leads to a climate of uncertainty and unpredictability for companies. In the short term, the ruling could thus possibly make companies become more reluctant to make investments in the Netherlands. At the moment, it is still too early to foresee the exact consequences.⁵⁴

Another often-heard excuse for doing nothing is the scientific uncertainty argument. The Netherlands and Shell have both pointed out that there is still much scientific uncertainty about the exact consequences of climate change. As the Appeals Court had already noted in the *Urgenda* litigation, there is enough scientific certainty to conclude that there is a real threat of dangerous climate change, which is likely to constitute a risk even to the lives of the present generation of Dutch citizens. In such circumstances, Articles 2 and 8 ECHR imply that the State has a duty to protect. And in case of uncertainty, the precautionary principle tells us to always err on the side of caution. This applies equally to Shell, which indicated that it had been aware of the consequences of climate change since 1988, when it first published a report on the issue.⁵⁵

Finally, there is the ‘We must act, but perhaps we can act tomorrow’ argument. In response, the Supreme Court in *Urgenda* emphasized that the duty to protect encompasses risks that may materialize in the longer term, possibly only after a few decades from now. On Article 2 (right to life), the Supreme Court noted:

[The State of the Netherlands] is obliged to take appropriate steps if there is a real and immediate risk to persons and the State in question is aware of that risk. In this context, the term ‘real and immediate risk’ must be

Antonia TIGRE, ‘The Contribution of Automakers to Climate Change: Broadening the Reach of Private Sector Defendants in Climate Litigation’ *Climate Law Blog of the Sabin Center for Climate Change Law* 14 October 2021.

54 Reply from Minister BLOK (Economic Affairs and Climate) and State Secretary YEŞİLGÖZ-ZEGERIUS (Economic Affairs and Climate) (received 14 July 2021) Parliamentary session 2020–2021, no. 3158, AH 3576, 2021Z09218.

55 *Shell*, para 2.5.9.

understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term.⁵⁶

The Court further noted:

The obligation to take appropriate steps pursuant to Articles 2 and 8 ECHR also encompasses the duty of the State to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain. This is consistent with the precautionary principle.⁵⁷

6 Do We All Live in a Dikastocracy?

One other issue that has attracted much attention in the scholarly commentary is that of the relationship between the courts and the legislature.⁵⁸ This relationship seems to be quite clear and simple: first, the legislator makes the law, and then the court applies the law to a concrete case, when a dispute is brought before it. Or is reality more complicated than this?

In her doctoral research, Laura BURGERS examined this problématique in detail. She concluded that judges do indeed engage in what she labels as 'judicial law-making'. In essence, her argument went like this:

Whereas legislatures are thought to be the creators of law, judiciaries should only apply law. Yet when speaking of the work of judges, it is impossible to make a clear-cut distinction between law-application and law-making. Legal rules are typically formulated in the abstract; judicial decisions render the rules applicable to new factual situations. Any court decision thus contributes to further concretization of the law, as even

⁵⁶ *Urgenda*, Supreme Court, para 5.2.2.

⁵⁷ *ibid*, para 5.3.2.

⁵⁸ See eg Fon BISALBUTR, 'The Potential Impact of Climate Change Litigation on Government Policy' (2021) 11(2) *Notre Dame Journal of International & Comparative Law* 6–24; Rob van der HULLE, 'De Rol van de Rechter in Politieke Geschieden: Over Political Questions, Klimaatverandering en Verkiezingen' (2021) *Ars Aequi* 647–652; Heather COLBY, Ana Stella EBBERSMEYER, and Lisa Marie HEIM, 'Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change' (2020) 7(3) *Oslo Law Review* 168–185.

non-contentious court decisions render a certain abstract rule applicable to a concrete set of facts. In this way, court decisions always are constituent elements of law; they represent the most authoritative contribution to the public debate on how to interpret (what are) the applicable rules.⁵⁹

When it comes to climate litigation specifically, the question is essentially the following: is developing a climate policy a task for the lawmakers or the courts?

This question concerns the apparent distortion of the balance of power between the legislative and judicial branches of government (as two elements of the *trias politica*, referring to the separation of powers of the legislative, executive and judicial branches of government).⁶⁰ When judges decide how States ought to combat climate change, based in part on rules that were initially not specifically drafted to regulate the fight against climate change – such as the human right to life (Article 3 ECHR) or privacy (Article 8 ECHR) – then the courts basically make new law.

Does that mean we all live in a ‘dikastocracy’? A dikastocracy is essentially a society ruled by judges instead of the government, a term not often used in academic legal scholarship.⁶¹ In contrast, it has been used very frequently by Dutch politicians in debates relating to *Urgenda*. Most notably, on 9 March 2020, a roundtable discussion of the Standing Committee for Interior Affairs of the House of Representatives took place on the topic of dikastocracy.⁶² In addition, frequent references to the term can be found in Dutch newspaper coverage of *Urgenda* and the ensuing debates at that time.⁶³ Has the Netherlands turned into a dikastocracy? Certainly not. In both *Urgenda* and *Shell*, the courts

59 Laura BURGERS, *Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-Making in European Private Law Cases on Climate Change*, doctoral dissertation, University of Amsterdam, 2020, 32 <<https://dare.uva.nl/search?identifier=0e6437b7-399d-483a-9fc1-b18ca926fdb5>>; see also Laura BURGERS, ‘Should Judges Make Climate Change Law?’ (2020) 9(1) *Transnational Environmental Law* 55–75.

60 For a more detailed analysis of this problématique, see eg 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*, Edward Elgar, 2018.

61 For a rare exception, see Marius VAN STADEN, ‘The Role of the Judiciary in Balancing Flexibility and Security’ (2013) 46 *De Jure* 472. Roel SCHUTGENS gave a lecture entitled ‘Dikastocratie of Uitholling van de Rechtsstaat?’ [tr: Dikastocracy or Erosion of the Rule of Law?], at the autumn meeting of the Netherlands Association for Procedural Law, 13 December 2019.

62 All the position papers are available at <https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2020A00508>.

63 See eg, Bart FUNNEKOTTER, ‘Help, De Rechter Grijpt de Macht’ [tr: Help, The Judge Grabs Power] *NRC* 21 December 2019.

insisted that they were not making new law, but merely applying existing law to settle a particular dispute brought before them.

This line of argumentation, which was developed in detail in the *Urgenda* rulings,⁶⁴ was confirmed in *Shell*, as follows:

The court does not follow [Shell's] argument that the claims of Milieudefensie *et al.* require decisions which go beyond the law-making function of the court. The court must decide on the claims of Milieudefensie *et al.* assessing whether or not [Shell] has the alleged legal obligation and deciding on the claims based thereon is pre-eminently a task of the court.⁶⁵

This was all the Court had to say about the matter. It is so succinct, especially when compared with the relevant parts in the *Urgenda* rulings, that it seems to imply that the Court is a little bit fed-up with this discussion.

This argument has also been confirmed by the Netherlands' Government. When the Netherlands' Minister and State Secretary of Economic Affairs and Climate were asked whether they believed that climate policy is a matter for politicians and not for the courts, they confirmed that 'it is indeed up to politicians to determine climate policy'. But crucially, they then continued as follows:

The court has ruled on the question whether Royal Dutch Shell has complied with a legal obligation to which it is bound under the Dutch Civil Code. In view of Article 23 of the Dutch Code of Civil Procedure, the court *must* decide on the claims of the claimants. It is pre-eminently the task of the court, to assess whether a party has complied with the legal obligations resting on that party.⁶⁶

In other words, the Court was asked whether Shell was acting in compliance with its obligations under the law, and the Court is legally obligated to answer such a question. It cannot refuse to do so for the sole reason that the question might also have some important political implications.

64 *Urgenda* Supreme Court, paras 8.1–8.3.5.

65 *Shell*, para 4.1.3.

66 Reply from Minister BLOK (Economic Affairs and Climate) and State Secretary YEŞİLGÖZ-ZEGERIUS (Economic Affairs and Climate) (received 14 July 2021) Parliamentary session 2020–2021, no. 3158, AH 3576, 2021Z09218.

7 Concluding Remarks

It must be emphasized that the *Shell* ruling was issued by a District Court, and that Shell has already appealed the decision. At the same time, Shell has indicated its willingness to address the challenge of complying with the Dutch Court's ruling. On 28 October 2021, Shell released its third quarter results, and in a video comment Jessica UHL, the company's Chief Financial Officer, announced 'an absolute emissions reduction target of 50% on all Scope 1 and 2 emissions under Shell's operational control by 2030, compared to 2016 levels on a net basis'.⁶⁷ These emissions include direct emissions from sources that are owned or controlled in full or in part by Shell (Scope 1), and indirect emissions from third-party sources from which Shell gets electricity needed for its operations (Scope 2). Not included in Scope 1 and 2 are indirect emissions resulting from activities of Shell but occurring from sources of third parties, such as consumers of Shell's products – think of people driving cars running on Shell's oil and gas (these are Scope 3 emissions). Jessica UHL saw this as 'an important step as we address the challenge of the Dutch Court's ruling for our scope 1 and 2 emissions, which Shell expects to meet by 2030'.⁶⁸

The Appeals Court may come to a different conclusion or come to the same conclusion based on a different line of argumentation. It is likely that the case will then move to the Supreme Court level. We may thus have to wait several years before the matter is finalised. Be that as it may, it is not too early now to analyse the District Court ruling, if only to look for innovative aspects in its application of the law to the increasingly alarming facts of climate change.

This Note has provided an analysis of the judgment of the District Court in The Hague, Netherlands, in the case between Milieudefensie and the major global oil company Shell. The ruling must be regarded as the next logical step in the legal history of the global phenomenon of climate litigation. In the beginning, climate litigation was undertaken against States, and now it is being aimed – successfully – against multinational corporations.

The Dutch courts have reminded us that States, multinationals, and even individuals have an obligation to act responsibly, and that this means more than just acting in compliance with the applicable provisions we find in treaties, domestic legislation, and so on. It also means acting in accordance with the unwritten societal standard of due care ('maatschappelijke zorgvuldigheidsnorm'). Because this standard is so vague, and unwritten, it becomes

67 Jessica UHL, Video comment on Shell third quarter results, 28 October 2021 <<https://www.shell.com/investors/results-and-reporting/quarterly-results/2021/q3-2021.html>>.

68 *ibid.*

debatable how far the courts can go in telling States, multinationals, and the rest of society how to behave. Is that not the task of the legislative branch of government? This problem crops up often in climate litigation cases. To say that we now live in a dikastocracy, ie a world ruled by judges, is an exaggeration. If governments, multinationals, and we, as individuals, do not accept and act on our responsibility, it is the duty of the court to step in to interpret the rules, apply them to the facts and ensure that the rules are followed.