

# STRATEGIC CLIMATE LITIGATION IN THE DUTCH COURTS: A SOURCE OF INSPIRATION FOR NGOS ELSEWHERE?

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**Abstract:** In its landmark *Urgenda* judgment of 20 December 2019 the Dutch Supreme Court confirmed the lower courts' order compelling the State of the Netherlands to limit the joint volume of Dutch annual greenhouse gas emissions by at least 25% at the end of 2020 compared to 1990. This case, launched by the Dutch NGO *Urgenda*, may encourage further strategic climate change litigation against both governments and (multinational) companies. Already, building on *Urgenda*, the NGO *Milieudefensie* has launched a lawsuit against RDSHELL in the Dutch courts. To what extent may these cases serve as models in other jurisdictions? Two aspects deserve special attention: the procedural standing of NGOs, and the different legal grounds – duty of care derived from civil tort law (including choice of law), or from human rights law – upon which the courts in *Urgenda* based their decisions, and *Milieudefensie* bases its claim.

**Keywords:** climate change litigation; collective and public interest lawsuits; duty of care; impact of climate science (policy) and inter-State obligations; European Convention on Human Rights (Arts. 2, 8, 34)

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“Without increased and urgent mitigation ambition in the coming years, leading to a sharp decline in greenhouse gas emissions by 2030, global warming will surpass 1.5°C in the following decades, leading to irreversible loss of the most fragile ecosystems, and crisis after crisis for the most vulnerable people and societies.”<sup>1</sup>

## 1. INTRODUCTION

Around the world, a growing volume of lawsuits deal with climate change.<sup>2</sup> The majority of cases are brought by citizens, NGOs and corporations against

<sup>1</sup> IPCC (International Panel on Climate Change) Special Report 2019, p. vi. Available at: [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf).

<sup>2</sup> See, e.g., SETZER, J. – BYRNES, R. *Global trends in climate change litigation: 2019 snapshot* (July 2019). Available at: [http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI\\_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf](http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf). The *Climate Change Law of the World* database available at: [www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/](http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/) includes some 370 cases from some 30 countries and four international jurisdictions, excluding the United States of America for which alone over 1200 cases have been identified, see <http://climatecasechart.com/us-climate-change-litigation>.

governments, with a trend showing that the number of plaintiff NGOs using litigation as a strategic tool to mitigate, adapt to, or compensate for losses from climate change is increasing. Such lawsuits are also on the rise against private corporations and the plaintiffs are, again, NGOs, but also cities, investors and shareholders.

Whether they include parties outside the court's jurisdiction or not, these cases have an inherently transnational dimension due to the global interests involved. They frequently build on each other. Often, where cases purport to influence government policies and corporations' accountability, strategic alliances are formed across borders.

This article is about recent developments regarding civil litigation on climate change in the Dutch courts. It discusses two cases initiated by Dutch NGOs. One against the Dutch government – *Urgenda v. the State of the Netherlands* (“*Urgenda*”) – and one against a multinational corporation based in the Netherlands – *Milieudefensie v. Royal Dutch Shell* (“*MD/RDS*”). Both lawsuits are examples of strategic collective actions pursuing a public interest, supported by a number of persons defending their individual private interests. The remedy sought in both cases is injunctive relief to mitigate greenhouse gas (GHG) emissions.

The *Urgenda* judgment of the Dutch Supreme Court<sup>3</sup> has been called “the most important climate change court decision in the world so far” by the UN special rapporteur on human rights and the environment, David R. Boyd.<sup>4</sup> The case against Shell is in an early stage and has not yet led to a judgment, but the plaintiffs' strategy builds on that of *Urgenda*, and is also attracting wide interest.

To what extent may these cases, upon closer analysis, offer examples to follow in strategic climate litigation in other jurisdictions? One aspect to consider in this regard is the special Dutch rule on the standing in civil proceedings of NGOs representing collective interests or the public interest, which enabled these two lawsuits. Another, not unrelated to the first, is the variety of legal grounds – duty of care derived from civil tort law or from human rights law – upon which the courts in *Urgenda* based their decisions, and *Milieudefensie* bases its claim.

## 2. CIVIL PUBLIC INTEREST LITIGATION IN THE NETHERLANDS

### A) ADMINISTRATIVE AND CIVIL LITIGATION

Although administrative litigation may be used in the Netherlands to advance general interests, it is available only against orders and permits issued by administrative authorities. As a result, collective actions against policies and (lack of) action of the government have resorted to litigation before the civil courts. Similarly, the civil courts have been used for collective actions against private companies. In contrast to administrative proceedings, which in principle are limited to claims relating to

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<sup>3</sup> Supreme Court (Hoge Raad), 20 December 2019, ECLI:NL:HR:2019:2006, unofficial English translation available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>.

<sup>4</sup> *The Independent*, 21 December 2019.

activities and interests *within* Dutch territory, civil actions may extend to activities and interests, including in environmental matters, *outside* the Netherlands.

#### B) STANDING: THE INTERESTS REPRESENTED BY THE NGO

Urgenda based its standing before the civil courts on a specific provision for collective actions, Article 3:305a of the Dutch Civil Code (DCC). So does Milieudefensie in its case against RDS. This provision, in its version applicable in our cases, grants a right of action to foundations or associations promoting the “similar interests” of other persons through civil law claims. Although it contains elements of a class action (the “similar interests” must be suitable to be “bundled” through the collective action), it does not create a class action in the proper sense. It is the NGO that has standing, not the persons whose interests it bundles. Nor do those persons have to be consulted or give their consent. If the ensuing judicial decision makes it impossible to exclude a person not wishing to be affected thereby, the judgment nevertheless binds that person. Injunctions as imposed in *Urgenda* and requested in *MD/RDS* are examples of such a decision.

The provision is thus open-ended as to the interests the NGO promotes.<sup>5</sup> Those interests may indeed be “diffuse”. Although private international law (PIL) aspects were discussed in the legislative process,<sup>6</sup> no special PIL rules were included to limit the article’s scope. The provision covers both collective actions promoting private interests (which can indeed be “bundled”) and actions in the general interest. Its hybrid nature explains why in *Urgenda*, the courts could differ in their views on whose interests to consider, and why in *MD/RDS*, the parties disagree on whether the interests the plaintiffs represent are sufficiently similar.

### 3. URGENDA V. THE STATE OF THE NETHERLANDS

#### A) A NARROW DISPUTE

Urgenda brought its lawsuit in 2013, asking the court to order the State of the Netherlands to limit the volume of Dutch GHG emissions such that by the end of 2020 this volume would be reduced by 40%, or at least 25%, in comparison to 1990. The Government’s and Urgenda’s opinions regarding the reduction targets for 2100, 2050, and 2030 did not differ: the sole issue was the target for 2020, the *pace* required to reduce the emissions so as to stay below the 2°C global temperature rise target on which the parties agreed.<sup>7</sup> So the case exclusively concerned *the narrow question of whether Dutch emissions must be reduced by at least 25% in 2020 compared to 1990*, rather

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<sup>5</sup> According to the history of this statutory provision, ideological interests can also be represented in a class action. The admissibility of “a claim brought by an environmental organisation to protect the environment, without an identifiable group of persons requiring protection” is specifically mentioned.

<sup>6</sup> See VAN LITH, H. *The Dutch Collective Settlements Act and Private International Law*. Available at: <https://repository.tudelft.nl/view/wodc/uuid:24d19976-35dc-46c9-9988-78531e6a7e69>.

<sup>7</sup> Note that the judgment was rendered in the run-up to, and thus before, the Paris Agreement which set the target of “holding the increase in the global average temperature to well below 2°C above pre-industrial

than 14–17% which the Government claimed was sufficient to ultimately reach the 2°C target. Moreover, the parties largely agreed on the facts, including the serious effects of climate change originating in human activity, and the authority of climate science based global policy recommendations.

## B) THE PROCEEDINGS BEFORE THE HAGUE DISTRICT COURT<sup>8</sup>

### 1. *STANDING: CLAIM HELD ADMISSIBLE REGARDING THE INTERESTS OF HUMANITY AND OF FUTURE GENERATIONS*

Urgenda brought the case both on its own behalf and on behalf of 886 individual persons. In so far as the foundation was acting on its own behalf, based on Article 3:305a DCC, the District Court held that it could act in the interest not only of the current population of the Netherlands, but also of persons outside the Netherlands, and of future generations, since “all of them hav[e] an interest in a sustainable society which [Urgenda] seeks to protect”.

Regarding the 886 individual plaintiffs, the Court ruled that they lacked any additional personal interest, and denied the claims brought on their behalf.<sup>9</sup>

### 2. *LEGAL BASIS OF THE JUDGMENT: DUTY OF CARE DERIVED FROM CIVIL TORT LAW*

Urgenda based its claim primarily on the core provision of the Dutch civil law on torts, Article 6:162 DCC, and alternatively on Articles 2 and 8 of the European Convention on Human Rights (ECHR). The District Court followed the plaintiff in its primary claim.

Given the world-wide interests represented by Urgenda, the Government might have argued that the laws of each State concerned, and not just Dutch law, should determine whether the conduct of the Netherlands was (un)lawful (Article 4 (1) Rome II Regulation). As it happened, in contrast to *MD/RDS*, Dutch tort law was applied without further ado.<sup>10</sup>

The District Court based its finding that the State was acting unlawfully towards Urgenda on the duty of care – more specifically hazardous negligence – on “a rule of unwritten law pertaining to proper social conduct” contained in Article 6:162 DCC.<sup>11</sup> This duty of care being an “open norm”, the court set itself the task of determining its

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levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels...” (Art. 2 (1) a).

<sup>8</sup> See judgment *Rechtbank Den Haag*, 24 June 2015, ECLI:NL:RBDHA:2015:7145; unofficial English translation, ECLI:NL:RBDHA:2015:7196, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>.

<sup>9</sup> One would have expected the Court to declare these claims inadmissible instead of denying them. The decision was not questioned in appeal, so that these individual claimants were no longer involved in the case.

<sup>10</sup> Arguably, the Court should have raised the applicable law issue of its own motion, cf. Art. 10:2 DCC.

<sup>11</sup> “1. A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.

2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.

content in the case at hand, “being mindful of the State’s power of discretion in the way of fulfilling its duty”.

a) *Reflex effect of global and European norms; role of global science based climate policies*

Climate change being a global hazard, in respect of which the Dutch government had a “shared risk management duty”, both the State’s duty of care to avoid dangerous impairment of the living climate, including in the Netherlands, and its margin of discretion were informed by the global and European normative framework concerning climate change binding upon the Netherlands, as well as its constitutional duties.

The Court referred in particular to the *United Nations Framework Convention on Climate Change* (UNFCCC, also often referred to as the “Rio Climate Change Treaty”),<sup>12</sup> the TFEU, Articles 191–193,<sup>13</sup> and Articles 2 and 8 of the ECHR.<sup>14</sup> Although these instruments, binding upon the State, “did not create rights Urgenda could directly invoke”, they did have a “reflex effect” upon the State’s duty of care. Therefore, this duty should be interpreted so as to avoid a conflict with the State’s international obligations.

These obligations, moreover, had to be considered in the light of the latest scientific knowledge, foremost the reports of the Intergovernmental Panel on Climate Change (IPCC). The IPCC had determined that, in order to limit the rise in global temperature to 2°C, developed countries listed in Annex I to the Kyoto Protocol such as the Netherlands, should reduce their emissions by 25–40% by 2020 in comparison to 1990 levels.

b) *Causality*

Whilst proving the causal link between GHG emissions, global climate change, and its localized effects is a challenge in lawsuits for damages suffered, for the purpose of prospective injunctive relief the burden of proof is less severe. The Court found that the causal link between emissions from Dutch territory and climate change, including its effects on the Dutch living climate, was sufficiently established. That the current Dutch GHG emissions are limited on a global scale does not alter the fact that they contribute to climate change. Therefore the State has an obligation to take precautionary measures.

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3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion” (translations from HAANAPPEL, P. – MACKAAY, E. (eds.). *Netherlands Civil Code, Book 6*. 1990).

<sup>12</sup> *United Nations Framework Convention on Climate Change*. The court also took into consideration its 1997 Kyoto Protocol, and the various decisions of its Conference of the Parties, including the 2007 Bali Action Plan, the 2010 Cancún agreements, and the 2011 Durban Platform for Enhanced Action, all binding upon the Netherlands.

<sup>13</sup> The court also took into consideration the various implementing EU directives, in particular, the ETS (Emission Trading System) Directive 2003/87/EC, as amended, and decisions, in particular, EU Council Decision EUCO 169/14, establishing a 2030 Climate and Energy Framework.

<sup>14</sup> The rights and freedoms of the ECHR extend to everyone within the jurisdiction of the Contracting States (Art. 1). In relation to the similar provision of the Interamerican Convention on Human Rights, the Interamerican Court of Human Rights opined that in environmental cases the jurisdiction of the State where the harm originates may extend to persons in *third* States where the harmful effect materializes, IACtHR, Advisory Opinion OC – 23/17 (2017), para. 81, available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf). This issue did not come up before the District Court.

And, “in view of a fair distribution, the Netherlands, like the other Annex I countries, has taken the lead in taking mitigation measures and has therefore committed to a more than proportionate contribution to reduction. Moreover, it is beyond dispute that the Dutch per capita emissions are one of the highest in the world.”

*c) Trias politica, other defences; order given*

Finally, the Court rejected the State’s objection that by granting the requested order it would interfere with the distribution of powers (*trias politica*) in the Dutch democratic system. We will see how the Supreme Court disposed of this objection.

After considering several other defences, the Court concluded that the State’s duty of care required immediate additional mitigation action to ensure that by 2020 the Dutch GHG emission level was reduced by 25–40%. Given the State’s margin of discretion, the reduction order was limited to 25% only.

C) THE PROCEEDINGS BEFORE THE HAGUE COURT OF APPEAL

*1. STANDING: CLAIM ADMISSIBLE REGARDING THE INTERESTS OF CURRENT DUTCH POPULATION*

On appeal by the Government and cross-appeal by Urgenda, the Court of Appeal confirmed the District Court’s judgment,<sup>15</sup> but took a different course both regarding the standing of Urgenda and the legal basis for the reduction order.

For its decision on Urgenda’s standing, the Court of Appeal considered Article 3:305a DCC together with Article 34 ECHR. The District Court had found that Urgenda was barred by the latter provision to rely on the ECHR in view of the ECtHR’s case-law according to which it could not claim to be itself a victim of a violation of Articles 2 and 8, and “public interest actions” are excluded. In contrast, the Court of Appeal took the view that regarding access to the Dutch courts, not Article 34 ECHR but Dutch procedural law was conclusive. Under Article 3:305a DCC Urgenda’s claim was already admissible insofar as Urgenda acted in the interests of the current, in particular the younger, generation of Dutch nationals.

*2. LEGAL BASIS OF THE JUDGMENT: ARTICLES 2 AND 8 ECHR*

This shift of focus regarding the *standing* of Urgenda paved the way for a shift in the *legal basis* for the GHG emission reduction order. Referring to global climate change policy and climate science, and to international and European law along the lines of the District Court’s judgment, the Court concluded that the State by resisting a reduction by at least 25% by the end of 2020 was failing to fulfil its duty of care pursuant to the positive obligations flowing from Articles 2 and 8 ECHR. The Court came to this conclusion although, in the appeal stage, due to a new calculation method more in line with IPCC methodology, the aimed percentage for the State’s GHG reduction

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<sup>15</sup> See judgment *Gerechtshof Den Haag*, 9 October 2018, ECLI:NL:GHDHA:2018:2591, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2591>; unofficial English translation ECLI:NL:GHDHA:2018:2610, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>.

for 2020 was adjusted to 23%. “That is not far from 25%, but a margin of uncertainty of 19–27% applies... Such a margin of uncertainty is unacceptable.”

D) THE SUPREME COURT: THE COURT OF APPEAL’S JUDGMENT CONFIRMED

*1. STANDING: CLAIM ADMISSIBLE REGARDING THE INTERESTS  
OF CURRENT DUTCH RESIDENTS*

The Supreme Court<sup>16</sup> agreed with the Court of Appeal that the fact that Urgenda could not lodge a complaint with the ECtHR on the basis of Article 34 ECHR because it is not itself a potential victim of a violation of Articles 2 and 8 ECHR, did not detract from its right to institute proceedings before the Dutch courts in accordance with Article 3:305a DCC “on behalf of residents who are in fact such victims”.

*2. DUE DILIGENCE DERIVED FROM ARTICLES 2 AND 8 ECHR*

The Supreme Court also followed the Court of Appeal regarding the legal grounds for its reasoning. The Supreme Court noted that the interpretation of Articles 2 and 8 by the Court of Appeal went beyond the case-law of the ECtHR, “which has not yet issued any judgments regarding climate change or decided any cases that bear the hallmarks that are particular to issues of climate change [such as] the dangers presented by a globally occurring activity – the emission of greenhouse gases all over the world, and not just from Dutch territory – whose consequences will have a worldwide impact, including in the Netherlands”. It therefore took care to explain its interpretation method, paraphrasing the ECtHR’s own interpretation standards. Referring to the “common ground” interpretation of the Strasbourg Court, the Supreme Court hooked international and European law, both legally binding and not binding, and global science policy and the findings of climate science onto positive ECHR obligations.

The Court stressed the serious risks of climate change that may take a wide variety of forms (sea level rise, heat stress, deteriorated air quality, increasing spread of infectious diseases, excessive rainfall, and disruption of food production and drinking water supply). The fact that these risks would only become apparent in a few decades did not mean that Articles 2 and 8 ECHR would not offer protection against this threat. Therefore, the risks caused by climate change are sufficiently “real and immediate”, as required by the ECtHR’s case-law to bring them within the scope of Articles 2 and 8.

Moreover, this protection is not limited to specific persons, but to society or the population as a whole. The Court referred here to judgments of the ECtHR, according to which with regard to environmental hazards that may endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region.

*3. JOINT RESPONSIBILITY OF THE STATES AND PARTIAL RESPONSIBILITY  
OF INDIVIDUAL STATES*

Whereas the “I only have to do my part, if the others do as well”, “my emissions are too small to count” and the “waterbed” (“if I reduce my emissions, other

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<sup>16</sup> See *supra* n. 3.

States will produce more”) arguments were dealt with the District Court in the context of causality required under civil tort law, the Supreme Court, relying on Articles 2 and 8 ECHR, followed a public international law approach. Under Articles 2 and 8 ECHR the Netherlands is obliged to do “its part” in order to prevent dangerous climate change, even if it is a worldwide problem. The objection that a State can decline its partial responsibility because other States do not comply with theirs, or that its reduction does not help because other States will continue their emissions, is unacceptable. And so is the assertion that a country’s own share in global GHG emissions is very small and makes little difference on a global scale. “Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing to other countries or its own small share.”

#### *4. THE 25–40% TARGET*

The Supreme Court concluded that although the 25–40% target was not a binding rule or agreement “in and of itself, there is a high degree of international consensus on the urgent need for the Annex I countries to reduce greenhouse emissions by at least 25–40% by 2020 compared to 1990 levels, in order to achieve at least the 2°C target, which is the maximum target to be deemed responsible. This high degree of consensus can be regarded as ‘common ground’ within the meaning of the ECtHR case law”. This target applies to each Annex I country individually, irrespective of EU arrangements. The State has not “provided any insight into which measures it intends to take in the coming years”. Nor has it substantiated that the reduction of at least 25% by 2020 is impossible or disproportionate: the State initially pursued a policy aimed at a 30% reduction by 2020, and other EU countries are pursuing much stricter climate policies than the Netherlands.

#### *5. TRIAS POLITICA; POLITICAL DOMAIN*

The Government had argued that the reduction order amounted to an order to create legislation, which according to Supreme Court’s own case-law was not permissible. Moreover, it was not for the courts to engage in the political considerations necessary for a decision on the reduction of GHG emissions.

In response to the first complaint, the Supreme Court pointed out that if the Government is obliged to do something, it may be ordered to do so by the courts, as anyone may be, at the request of the entitled party. This is a fundamental rule of constitutional democracy. The order is not for the State to take specific legislative measures, but leaves it free to choose the measures to be taken to achieve a 25% GHG emission reduction by 2020.

In response to the second complaint, the Supreme Court recognised the large degree of discretion under the Dutch constitutional system of the decision-making power of the government and parliament regarding the reduction of GHG emissions. But it is up to the courts to decide whether they have remained within the limits of the law by which they are bound, including those for the State arising from the ECHR. “This case involves an exceptional situation”, in which “the Court of Appeal was allowed to rule that the State is in any case obliged to achieve the aforementioned reduction of at least 25% by 2020”.

## E) DISCUSSION

### 1. WERE THE COURTS RIGHT TO STEP IN? TO PROTECT WHOM?

In our 2015 Hague Academy lecture, delivered one month after the District Court's *Urgenda* judgment, we welcomed it "as a remarkable decision, based on an acute awareness of the nature and magnitude of an inherently global problem, and providing extensive and detailed grounds based on a review of the relevant global, European, and domestic law as well as available scientific evidence."<sup>17</sup> The judgment also met with broad criticism, however. Many expected that it would not stand in appeal. But it did. Yet, the confirmation of the order by the Court of Appeal and Supreme Court, once again, met with criticism.

We believe that part of the criticism (how can a NGO, acting without any check on whether it represents the interests it purports to promote, obtain an order from the courts requiring the State to reduce GHG emissions?) actually concerns the provision on collective actions, Article 3:305a DCC, which, as we have seen (*supra II.B.*) is an unusually open-ended and hybrid procedural norm. In fact, since 1 January 2020 a more limited version of this article applies. But it will still, it would seem, allow actions such as those discussed here.

Whilst this provision is not beyond criticism, given that it exists we do not share the view that the courts overstepped the boundaries of their judicial task. As the Supreme Court points out, "in this exceptional case" the courts had a special responsibility, and, as organs of the domestic legal order, they provided legal protection by ensuring compliance by the executive of its duty of care.

Moreover, it may be said that as a substitute for the missing international organs of collective enforcement, they stepped in to enforce the State's share in maintaining the global legal order regarding climate change: an example of George Scelle's notion of "*dédoublement fonctionnel*".<sup>18</sup>

This appears most clearly and consistently in the District Court's judgment. By recognizing *Urgenda*'s standing as representing the interests of humanity, present and future, the decision acknowledges that climate change affects people around the globe, and, by implication, that it affects them very *unevenly regarding time, space, severity of, and capability to cope with, its impacts*. Hence the distinction made in the UNFCCC between Annex I (industrialised) countries and non-Annex I (developing) countries and the Paris Agreement (concluded after the judgement) where it specifically takes into account "the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change".<sup>19</sup>

<sup>17</sup> VAN LOON, H. The Global Horizon of Private International Law. Inaugural Lecture, Private international Law Session. *Recueil des cours*, 2015, Vol. 380, pp. 1–108 (at p. 103).

<sup>18</sup> *Ibid.*, pp. 102–103. See also CASSESE, A. Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in international Law. *European Journal of International Law*, 1996, Vol. 1, p. 210 et seq. (at p. 228).

<sup>19</sup> Article 7 (2.): Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, *taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change* (emphasis added).

By narrowing Urgenda's standing to the interests of the *current Dutch* population (Court of Appeal) or residents (Supreme Court), instead of those of *humanity* and *future generations*, these Courts lost some of the global perspective, and focused on the vertical relation between the State of the Netherlands and those within its jurisdiction. This view leads not only to a huge reduction in the numbers of people concerned,<sup>20</sup> but also of the distributional justice aspect<sup>21</sup> that forms part of the background of the District Court's ruling.

## 2. DUTY OF CARE DERIVED FROM CIVIL TORT LAW OR FROM HUMAN RIGHTS LAW?

There is no doubt that, especially in vulnerable developing countries with limited capabilities to mitigate or adapt to climate change, the human rights of individuals and communities, often highly dependent on agriculture or coastal livelihoods, are at this point in time already at stake.<sup>22</sup> But can this also be said, in the circumstances of this case, of the residents of the Netherlands, the population of one of the richest of the Annex I countries? Without any further differentiation, or assessment of the situation of groups or individuals?

According to the Supreme Court, Urgenda, representing the residents of the Netherlands, could invoke Articles 2 and 8 ECHR notwithstanding its Article 34 that bars *actio popularis* before the ECtHR. But Article 34 has a reason. Its aim is to bar complaints of an abstract nature: "an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur".<sup>23</sup>

Certainly, the State of the Netherlands fell short of its duty of care. The Government, knowing it should do more to pursue an effective climate policy, did not take the necessary action without a credible justification. Parliament let it happen. The State of the Netherlands, while pretending to lead, in fact stayed behind almost all other EU countries, thereby increasing the risk of irreversible harm to its own population and the rest of the world.

Yet, the ECtHR has consistently held that, when applying Articles 2 and 8 to environmental matters, "the crucial factor in determining whether, in the circumstances of a case, environmental damage has violated one of the rights guaranteed by Article 8 (1), is the existence of a harmful effect on the private or family sphere of a person, and not simply the general deterioration of the environment..."<sup>24</sup>

<sup>20</sup> The current Dutch population (17,100,000) numbers 0,22% of the current world population (7,800,000,000).

<sup>21</sup> See HEY, E. – VIOLI, F. The hard work of regime interaction: climate change and human rights. *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht – nr 145 – Climate Change: Options and Duties under International Law*, 2018, pp. 1–24.

<sup>22</sup> For details concerning the vulnerability of populations at disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond, see IPCC, *Global Warming of 1.5 °C – Summary for Policymakers*, pp. 8–12. Available at: [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_SPM\\_version\\_report\\_HR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_HR.pdf).

<sup>23</sup> See ECtHR, Practical Guide on Admissibility Criteria (2019), 13–14. Available at: [https://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf).

<sup>24</sup> ECtHR *Cordella v. Italy*, **NO** 54414/13 54264/15 § 101; see also *Kyrtatos c. Greece*, no 41666/98, § 52, *Fadejeva c. Russia*, no 55723/00, § 68.

One can agree with the Supreme Court where, building on the existing case-law of the ECtHR, it interprets Articles 2 and 8 ECHR to the effect that they may also offer protection against harm caused by climate change, all the more because of its irreversible effects. These concrete effects may manifest themselves in (threat of) local droughts, heavy rainfalls, storms, etc, which present an *immediate* and *real* danger to certain individuals or even certain communities. But we do not think, in the light of the ECtHR's case-law, that it is, in the circumstances of this case, given the narrow issue at hand, a tenable position to say that *the Dutch population* is currently a (potential) victim of a violation of its human rights under Articles 2 and 8 ECHR. This is also hardly defensible if one compares this case with cases of vulnerable people elsewhere on our planet.<sup>25</sup> Such an overly broad interpretation of Articles 2 and 8 risks stripping these human right provisions of their effectiveness.

Furthermore, the way the Supreme Court uses the “common ground” method of interpretation of the ECtHR to hook international and European law and global science policy onto positive ECHR obligations, gives rise to doubt. Certainly, these international and European norms are broadly shared. But if, as the Supreme Court admits, its extensive interpretation of Articles 2 and 8 breaks new ground, then more is needed to argue that these shared norms also lend broad support to the position taken by the Supreme Court in this case.

The Supreme Court had the choice to base the State's duty of care on civil tort law (following the District Court) or human rights (following the Court of Appeal).<sup>26</sup> It chose to follow the Court of Appeal. While agreeing with the outcome of the Supreme Court's judgment, we believe that in this case the District's Court approach is more compelling than that of the Supreme Court.

#### 4. MILIEUDEFENSIE V. ROYAL DUTCH SHELL PLC.

##### A) STANDING

This case was brought in 2019 by seven Dutch NGOs, led by Milieudefensie (MD). All seven organisations argue, based on their statutory mission and activities, that they have legal standing under art. 3:305a DCC. They claim to be acting not only

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<sup>25</sup> Contrast this case with, e.g., *Leghari v. Pakistan*, available at: <http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/>, or *Torres Strait Islanders v. Australia*, available at: <http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/>, where the threat of climate change is undoubtedly real and immediate, and where the State had not developed any climate policy at all. Cf. also *Juliana v. United States*, available at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf>, (petition for rehearing *en banc* pending) where the courts agreed that the plaintiffs claim “concrete and particularized injuries” including a girl being forced to leave her home because of water scarcity, thereby being separated from her relatives on the Navajo Reservation, or a boy having to evacuate his coastal home multiple times because of flooding.

<sup>26</sup> Cf. the Procurator General's advisory opinion, par. 6.16, ECLI:NL:PHR:2019:887; unofficial English translation ECLI:NL:PHR:2019:1026, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026>.

on behalf of the present (Dutch) population but (referring to the District Court's ruling in *Urgenda*) also of future generations.

MD also acts on the basis of a power of attorney on behalf of 17.000 individual persons.

#### B) A LARGE DISPUTE

MD is asking the court to order RDS to limit the joint volume of all CO<sub>2</sub> emissions associated with its business activities and fossil fuel products such that the joint volume of those emissions be reduced by 45% by 2030, 72% by 2040, and 100% by 2050, all compared to 2010 levels; or, in any case, by 45% by 2030.<sup>27</sup>

In contrast to *Urgenda*, the positions of the parties in this case are far apart. Among other issues, they disagree on the extent of the control of RDS over its CO<sub>2</sub> emissions, and the legal regime(s) that apply to these emissions. RDS argues that it has control solely over the emissions of RDS plc, and not, as MD claims, over the emissions of its subsidiaries, which are subject to the laws of each State where they are active, nor over those of the end users of its products who have their own responsibility for the use they make of these products.

#### C) JURISDICTION

MD bases the jurisdiction of the Hague District Court primarily on Articles 1, 4, and 63 of the Brussels I recast regulation (BIR), since Royal Dutch Shell plc, although having its statutory seat in London, has its principal place of business in The Hague. Moreover, MD invokes Article 7(2) BIR, arguing that the main cause of the damage occurs in the Netherlands, since it is there that RDS adopts the group policy that results in the climate damage, and affects people and the environment in the Netherlands, among other countries.

In contrast to a series of other cases against RDS, now pending before the Hague Court of Appeal,<sup>28</sup> MD is not also suing subsidiaries of RDS in other countries, but only the parent company.

#### D) PRIMARY GROUND FOR THE CLAIM: CIVIL TORT LIABILITY

MD bases its claim primarily on a civil tort committed by RDS arguing that Dutch law applies, not on the basis of Article 4 (1) but Article 7 of the Rome II Regulation. As damage may be suffered everywhere on Earth, Article 4 (1) could lead to the

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<sup>27</sup> See the writ of summons, unofficial English translation available at: [http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/?mc\\_cid=ff847ee323&mc\\_eid=c70ad85e80](http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/?mc_cid=ff847ee323&mc_eid=c70ad85e80), and the response by RDS available at: <https://milieudefensie.nl/actueel/2019-11-12-conclusie-van-antwoord-finale-versie-als-aangeboden-voor-indiening-bij-rechtbank.pdf> (we did not find an English translation).

<sup>28</sup> See Court of Appeal The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3587, *Akpan et al. v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD* (interlocutory appeal judgment, proceedings continue). Appeal from District Court The Hague 30 January 2013, ECLI:NL:RBDHA:2013:BY9854.

application of a large variety of applicable laws. To avoid that result MD has opted for the choice of Dutch law permitted under Article 7 (1), claiming that RDS determines the group policy that its subsidiaries follow. RDS's response is that the event causing damage is not the group policy decision by RDS, which is "a mere preparatory act", but the concrete implementation thereof by Shell companies at the local level, as well as the conduct of the end users across the world. So, not Article 7 (1) (nor 4 (2) or (3)), but 4 (1) Rome II is applicable. In any event, even if Dutch law is held to be applicable, Article 17 Rome II should be applied.

Based on the application of Dutch law, MD argues that RDS is acting contrary to the "rule of unwritten law pertaining to proper social conduct" referred to in Article 6:612 DCC. RDS was aware of the gravity of the danger to people and the environment caused by fossil fuels and of its share in creating the climate danger. Yet, since 2007 it has been reducing its investments in sustainable energy and has increased its investments in fossil activities. It is hampering the energy transition, e.g., by actively encouraging demand for fossil fuels, opposing government initiatives aiming to regulate Shell's activities, and misleading the general public about its real intentions and the real urgency of the climate issue. It thus violates its duty of care. For its part, RDS contests the causal link between its specific activities and dangerous climate change. Reducing its activities would make hardly any difference, and if RDS were ordered to do so, other companies active in the global market would immediately fill the gap. Therefore, RDS is not violating any duty of care.

#### E) SUBSIDIARY GROUND FOR THE CLAIM: (INDIRECT) VIOLATION OF HUMAN RIGHTS

MD, building on the judgment of the Court of Appeal in *Urgenda*, argues, by way of alternative claim, that RDS is violating Articles 2 and 8 ECHR, which have "horizontal effect" in its relations with MD, but also the UN Guiding Principles on Business and Human Rights (UNGP's), the UN Global Compact, and the OECD Guidelines for multinationals. According to RSD, the parallel is unfounded: RDS is not a State, moreover, the requested order, which would not take effect before 2030, 2040, or 2050, is solely addressed to RDS and not to the many actors who are contributing to climate change. Of the international regimes that MD is invoking, the UNGP's are addressed to States, not to companies, and the UN Global Compact and OECD Guidelines are not binding upon companies either.

The oral pleadings before the Hague District Court are scheduled for December 2020.

#### F) DISCUSSION

In *Urgenda*, the plaintiff's private interests confronted a government, a defendant in charge of the public interest with jurisdiction over the territory of the Netherlands. The courts managed – albeit through different routes – to link the conduct of the State of the Netherlands to the global climate policy target of a minimum re-

duction by Annex I States of 25% in comparison to 1990. That target applies to States, however, each State having to contribute “its share” within its jurisdiction, the idea being that if all States would comply with their duties under the Paris agreement, it should be possible to reach the 1.5° (preferably) or the 2°C target.<sup>29</sup>

*MD v. RDS* is a different game. In this case the defendant is a private party providing society with energy, whilst operating in a global market. As RDS argues, it is only one of multiple actors contributing to climate change. Although developments in quantifying fossil fuel companies’ past and current contributions to climate change, and in attributing fractions of the accumulation of CO<sub>2</sub> in the atmosphere to individual companies are progressing,<sup>30</sup> establishing an objective standard for future emissions, addressed by injunctive relief, is not evident.

A creative attempt has been made by a group of climate change lawyers to define an objective yardstick under civil tort law for the reduction obligation of enterprises, based on the “carbon budget” of the State where they operate, which itself would be derived from an annually determined global “carbon budget”, with corrections to be made if the emissions of companies’ supply chains, subsidiaries and end-users are included. However, *MD* has not relied on these *Principles on Climate Obligations of Enterprises*.<sup>31</sup>

Nonetheless, RDS and other fossil fuel corporations have an increasing interest “to become part of the solution rather than passive (and profitable) bystander to continued climate disruption”.<sup>32</sup> More broadly, one can see a trend away from a model of corporate responsibility narrowly focused on shareholders’ interests, in which public health and safety risks are seen as external factors, towards a broader “stakeholder-oriented” model, requiring companies to act in a socially and environmentally acceptable manner, and assume these risks as an internalized corporate risk. Pressure from investors and shareholders, as well as ongoing public scrutiny, are helping to accelerate the transition of fossil fuel to non-fossil energy production.<sup>33</sup> Civil lawsuits such as the case *Milieudéfense* has launched also keep Shell and other fossil fuel corporations’ eyes on the (green) ball, even though the legal basis for the claim may not be sufficiently strong to support the outcome the plaintiffs are hoping for.<sup>34</sup>

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<sup>29</sup> But see UNEP Emissions Gap Report 2019, available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf>.

<sup>30</sup> Thus bringing private climate litigation into closer alignment with asbestos and tobacco litigation, see GANGULY, G. – SETZER, J. – HEYVAERT, V. If at First You Don’t Succeed: Suing Corporations for Climate Change. *Oxford Journal of Legal Studies*, 2018, Vol. 38 (4), pp. 841–868.

<sup>31</sup> Principles on Climate Obligations of Enterprises, with Commentary by J. Spier (2018), available at: <https://climateprinciplesforenterprises.files.wordpress.com/2017/12/enterprisesprincipleswebpdf.pdf>.

<sup>32</sup> HEEDE, R. Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010. *Climatic Change*, 2014, Vol. 122, pp. 229–241.

<sup>33</sup> Recently all the large European oil and gas producers, including RDS, have set emissions reduction targets. For a recent assessment, see *TPI State of Transition Report 2020*, available at: <https://www.transitionpathwayinitiative.org/tpi/publications/50.pdf?type=Publication>.

<sup>34</sup> See GANGULY – SETZER – HEYVAERT (*supra* n. 30).

## 5. CONCLUSION

*Urgenda* breaks new ground. For the first time, the Supreme Court of a western State<sup>35</sup> has ordered a State to do more to reduce the risks of climate change. Building on *Urgenda*, plaintiffs in *MD/RDS* are now seeking an order to force a private multinational company to switch more rapidly to non-fossil energy production. To what extent can these lawsuits provide inspiration to NGOs in other countries? Here are a few points to consider:

1. All three *Urgenda* Courts recognised the extreme seriousness of climate change, and the need to limit global warming to 2°C at most, and provided legal protection in civil proceedings in order to drive governmental ambition regarding climate change action.
2. All three Courts agreed that judicial intervention, even where it orders the State to do more to reduce GHG emissions from its soil, does not encroach upon the political domain, as long as it leaves the State free to choose the measures to be taken.<sup>36</sup>
3. All three Courts grounded their decision in a duty of care of the State. They differed, however, with respect to both the interests to which this duty extends, and its legal ground (see 7. below).
4. All three Courts found ways, through this duty of care, to give effect to international and regional (European) law legally binding on States only, as well as non-binding law. They differed, however, in the method used to this end (see 7. below).
5. All three Courts embraced the IPCC assessment reports as authoritative evidence of climate change that individuals may invoke against their Governments.
6. As a result, according to all three Courts, individuals may hold their Governments, in particular those listed in Annex I to the Kyoto Protocol, accountable for taking their partial shares in reducing GHG emissions. States can neither claim that their contribution is too small to be taken into account, or too small to be accounted for, nor that, if they act to reduce their emissions, other States will produce more.<sup>37</sup>
7. The approach of the District Court, accepting that the interests of humanity, current and future, and very unevenly exposed to climate change risks, were represented in the proceedings, and grounding the State's duty of care in civil tort law interpreted in the light of international and European law and global climate policy, is more compelling than the approach of the Supreme Court, based on the positive obligations of the State towards the Dutch population, derived from its interpretation of the ECHR and of the ECtHR's case-law.

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<sup>35</sup> The judgment in *Leghari v. Pakistan*, 2015 (*supra* n. 25), constitutes another recent milestone.

<sup>36</sup> Contrast this with *Juliana v. United States* (*supra* n. 25), where the US Court of Appeals for the 9th Circuit, 2-1, "reluctantly concluded ... that the plaintiffs' case must be made to the political branches or to the electorate at large ... That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."

<sup>37</sup> In a similar vein, US Court of Appeals 2nd circuit, 21 September 2009, *Connecticut v. Am. Electric Power Co.*, 582 F.3d 309, 69 ERC 1385 (2d Cir. 2009), likewise rejecting the defendants' claim that their emissions were too insignificant to cause future injuries, particularly since only the collective effect of world-wide emissions allegedly caused injury. This part of the court's ruling was not affected by the Supreme Court's reversal of the judgment (US S Ct, 20 June 2011, 564 US (2011)).

8. The remedy sought in both *Urgenda* and *MD/RDS*, is injunctive relief, not damages. *Urgenda* shows that this may be an effective strategy, not least because it requires a less severe standard of proof of causality between emissions and their effects through climate change.
9. A crucial difference with *MD/RDS* remains, however, that in *Urgenda* an objective minimum standard for the lawfulness of the State's duty of care regarding its future emissions by the end of 2020 was found in the 25–40% target, whereas such a standard is not evident for future emissions attributable to RDS in 2030 (let alone beyond that year).
10. The Dutch procedural provision, Article 3:305a DCC, even in its recent more limited version, is not beyond doubt. It is a hybrid rule that mixes the collective action of private interests and action in the public interest. While it has enabled the two lawsuits, it has also led, at least in part, to the different approaches of the courts in *Urgenda* referred to above. In *MD/RDS* it gives rise to a debate on the plaintiff's standing and the law to be applied to the lawsuit.

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