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The Influence of Climate Litigation on Managing Climate Change Risks: The Pioneering Work of the Netherlands Courts

COLLECTION:
MANAGING RESPONSIBILITIES FOR CLIMATE CHANGE RISKS

ARTICLE

OTTO SPIJKERS

ABSTRACT

This paper analyses the way in which the responsibility for managing climate change risks is addressed by the Dutch courts in the *Urgenda* and *Shell* cases. A foundation called Urgenda initiated proceedings against the State of the Netherlands; followed by Milieudefensie (Friends of the Earth Netherlands) initiating proceedings against Shell, a multinational oil corporation with, at the time, its headquarters still in the Netherlands. This paper looks at both these examples of climate litigation, with a focus on what the courts had to say about responsibilities for managing climate change risks.

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1. INTRODUCTION

The Intergovernmental Panel on Climate Change (IPCC)'s Working Group I, whose tasks include providing an overview of the physical science of climate change, issued an important report in August 2021.[1] The report reminded us that the earth is still warming up, and that the consequences are becoming increasingly apparent everywhere on our planet. This is the result of greenhouse gas emissions produced by humankind. The global surface temperature will continue to increase so long as we continue to emit greenhouse gases. Rising temperatures cause heat waves, droughts, heavy rains, and sea-level rise. Precipitation patterns change, making the world's wet areas even wetter and its dry areas even drier. Precipitation also becomes more erratic: periods of drought and heavy rainfall occur in one and the same place, at different times.[2]

The good news is that by making very significant reductions in global greenhouse gas emissions, it is still possible to keep global warming below 2°C, as agreed in the Paris Agreement.[3]

If significant greenhouse gas emission reductions do not occur, it will no longer be possible to limit warming to 2°C. The result of such a failure is catastrophic. The higher our emissions, the more the global average surface temperature increases, and the smaller the ability of forests and oceans to absorb greenhouse gases and thereby to compensate for part of those emissions. Certain developments have enormous consequences, such as the melting of ice in Greenland and Antarctica, changes in ocean currents, and the destruction of forests.[4]

All this climate science is well-known, but it does not seem to lead to drastic and immediate action. This paper looks at how the Dutch domestic courts can be a force to spur action, when those who should be acting – primarily the governments and multinational oil corporations – are reluctant to do so. These responsibilities are not clearly defined in Dutch domestic law, and therefore the courts need to engage in a type of 'lawmaking', using international (human rights) law as their legal basis to tell States and multinational corporations what their responsibilities are to mitigate climate change and, even more specifically, to reduce greenhouse gas emissions. Thus, as will be shown in this contribution to the current Special Issue, climate litigation can make a positive contribution to the interpretation of the relevant norms and principles of international law, and to the evolution of norms and principles of various domestic legal systems, and thereby help to clarify the responsibilities for managing climate risks.[5]

Why the focus on the Netherlands? The Netherlands is a particularly interesting case study, because legal proceedings have been initiated, and successfully adjudicated on the merits, first against a State (the Netherlands), and then also against a multinational oil corporation (Shell). Despite years of climate litigation efforts taking place all over the world, there are still relatively few examples that are as successful as these two Dutch cases. A foundation called Urgenda initiated proceedings against the State of the Netherlands; followed by Milieudefensie (Friends of the Earth Netherlands) et al initiating proceedings against Shell.[6]

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1 Valerie Masson-Delmotte et al (eds), *Climate Change 2021: The Physical Science Basis (Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change)* (Cambridge University Press 2021).

2 ibid 'Summary for Policymakers'.

3 ibid. The Paris Agreement was adopted on 12 December 2015 under the United Nations Framework Convention on Climate Change and entered into force 4 November 2016 (UNFCCC Dec 1/CP.21 (2015) UN Doc FCCC/CP/2015/10/Add.1). The agreed target is mentioned in Article 2(a) Paris Agreement. See Geert van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary (Elgar Commentaries series)* (Edward Elgar Publishing 2021).

4 Masson-Delmotte et al (eds) (n 1).

5 See also Sarah Mead and Lucy Maxwell, 'Climate Change Litigation: National Courts as Agents of International Law Development' in Edgardo Sobenes, Sarah Mead, and Benjamin Samson (eds) *The Environment Through the Lens of International Courts and Tribunals* (Asser Press 2022); M.K. Ramesh and Vidya Ann Jacob, 'Litigating for Climate Justice – Chasing a Chimera?' in Devendraraj Madhanagopal, Christopher Todd Beer, Bala Raju Nikku, and André J. Pelser (eds), *Environment, Climate, and Social Justice* (Springer 2022); Freya Schramm, 'Judges as Narrators of the Climate Crisis?' (2021) European Papers.

6 The claimants were the association *Vereniging Milieudefensie* (Friends of the Earth Netherlands), also representing *Greenpeace Nederland*, *Stichting ter Bevordering Fossielvrij-Beweging* (Foundation for the Promotion of Fossil-Free Movement), *Landelijke Vereniging tot Behoud van de Waddenzee* (National Association for the Preservation of the Wadden Sea), *Stichting Both Ends*, *Jongeren Milieu Actief* (Youth Environmentally Active), and *Stichting Actionaid*. The claim was directed against Royal Dutch Shell, the top holding company of the multinational corporation, which was at the time of the initiation of the claim still based in The Hague, Netherlands. The term 'Shell' in this paper refers to Royal Dutch Shell Public Limited Company (PLC).

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This paper looks at both these examples of climate litigation, with a focus on what the courts had to say about the responsibility of the State of the Netherlands under the law applicable in the Netherlands (in *Urgenda*), and the corporate responsibility of a major oil company, Shell, under the law applicable in the Netherlands (in *Shell*) for managing climate change risks.

First, some key terms are introduced (Section 2). The paper then turns to the studies of the two cases, beginning with *Urgenda*. After a brief overall introduction to the case (3.1), an analysis is provided of what the courts had to say about climate change risk, and the responsibilities of the States of the Netherlands for climate change risk management (3.2). The same approach is followed for the *Shell* case: a brief introduction to the case (4.1) is followed by an analysis of the Dutch District Court's views on the responsibilities of Shell for managing climate change risks (4.2). The paper ends with a brief conclusion (5).

2. KEY TERMS

The key terms that will be introduced are 'climate change risk management' (Section 2.1), followed by 'public interest litigation' and 'climate litigation' (2.2).

2.1. CLIMATE CHANGE RISK MANAGEMENT

The paper's main assumption is that the Dutch domestic courts can inform the State and a multinational oil corporation of their responsibilities for climate change risk management.[7] Thus, as a preliminary issue, it needs to be explained what is understood by the term 'climate change risk management'. This is one of the key terms in the present Special Issue, and thus, to fit within the overall theme of the Special Issue, this paper looks at how the two cases – *Urgenda* and *Shell* – relate to this term.

In the future, the climate will be significantly warmer than it was in the past, and extreme weather events – heatwaves, storms, droughts, forest fires, floods, heavy rainfall, etc. – will occur more frequently and will be more severe than in the past. Also, sea-levels will rise, and we will experience a continuing loss of fragile ecosystems and biodiversity, both on land and at sea.

These and other negative consequences of climate change will have an impact on the daily activities of many people and organisations in our society. The effects of climate change will make it difficult for various actors to bear and shoulder their normal or ordinary responsibilities in the future. For example, energy providers may not be able to provide enough energy to their customers, due to a drastic increase in the demand for air conditioning.[8] Hospitals may not be able to treat all their patients, due to an increase in illnesses caused by heatwaves, particularly amongst the elderly. Farmers may not be able to provide enough food to feed the population, as their crops may suffer from regular droughts, water scarcity, and saltwater intrusion into the groundwater due to sea-level rise.[9] Additionally, many of these people and organisations will need to drastically alter their ways, to help reduce the emission of greenhouse and other gases that are harmful to the environment. These normal or ordinary responsibilities need not necessarily be of a legal character; they may entail responsibilities which certain people or companies are assumed to have in a well-functioning society. If someone fails to meet legal responsibilities, that may lead to legal consequences: a breach of contract in a case of private law, and breach of legal obligation in a case of public (administrative) law. In the latter case, even the responsibility of a State or multinational corporation under international law might be engaged. A failure to do what is socially expected may cause reputational damage

7 This paper does not look at the allocation of responsibilities in a broader, more philosophical sense. On this, see Philip J. Wilson, 'Climate Change Inaction and Meaning' (2021) 6 Philosophies 101; Philip J. Wilson, 'Climate Change Inaction and Optimism' (2021) 6 Philosophies 61; Laÿna Droz, 'Distribution of Responsibility for Climate Change within the Milieu' (2021) 6 Philosophies 62; Boudewijn de Bruin, 'Against Nationalism: Climate Change, Human Rights, and International Law' (2022) Danish Yearbook of Philosophy 1–26.

8 These examples are just to give an impression of what we are talking about.

9 For an example in which droughts are approached using a risk management framework, see Seo-Yeon Park, Chanyang Sur, Jong-Suk Kim, Si-Jung Choi, Joo-Heon Lee, and Tae-Woong Kim, 'Projected Drought Risk Assessment from Water Balance Perspectives in A Changing Climate' (2021) 41 International Journal of Climatology 2765–2777.

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as a 'reliable provider of products or services'.[10] Although the consequences for a failure to play one's ordinary part in a society may thus be different, in all cases the normal or ordinary functioning of a society is fundamentally upset.[11]

One of the world's foremost political thinkers, Michael Walzer, once suggested to a group of young scholars in Amsterdam that it was better to 'never define your terms', because doing so can only get you into trouble.[12] It might nonetheless be useful to reflect further on the meaning of 'climate change risk management', just to make sure it is clear what we are talking about, and why we talk about it.

Let us begin to look at some related terms which already have a more established meaning, and then slowly end up with a definition of 'climate change risk management'. In 2012, IPCC Working Groups I and II together published a report in which they provided their own definition of the terms 'disaster', 'disaster risk', and 'disaster risk management'.[13] There are many definitions of these terms in scholarship and beyond, but the work of the IPCC is exceptional, because it is collectively authored and researched by hundreds of leading scientists from all over the world. For this reason alone, the IPCC's output can be considered more authoritative than one scholarly paper of one single professor or research network.[14] Moreover, 195 States are member of the IPCC framework. This almost universal State membership of the IPCC is indicative of broad State support, which lends these reports a considerable degree of legitimacy when defining issues regulated in an international law framework based on State consent. This is also relevant for the definitions of legal terms provided in these reports.

First, the term 'disaster' was defined by the IPCC as follows:

> Severe alterations in the normal functioning of a community or a society due to hazardous physical events interacting with vulnerable social conditions, leading to widespread adverse human, material, economic, or environmental effects that require immediate emergency response to satisfy critical human needs and that may require external support for recovery.[15]

Disasters which are caused by climate change can then be referred to as 'climate change disasters', being a sub-category of disasters.

Second, 'disaster *risk*' (emphasis added) was defined in the same IPCC report as 'the likelihood over a specified time period of [such disasters]'.[16] From this, it may be concluded that the term 'risk' is about the likelihood of something happening.[17]

Third and finally, 'disaster risk *management*' (emphasis added) was defined as follows in this report:

10 Broadleaf Capital International and Marsden Jacob Associates, *Climate Change Impacts & Risk Management: A Guide for Business and Government* (Australian Greenhouse Office, Department of the Environment and Heritage, Australian Government 2006) 16.

11 cf the *Framework for Resilient Development in the Pacific: An Integrated Approach to Address Climate Change and Disaster Risk Management (FRDP)*, Voluntary Guidelines for the Pacific Islands Region, at <http://tep-a.org/wp-content/uploads/2017/05/FRDP_2016_finalResilient_Dev_pacific.pdf> (last accessed 10 August 2022).

12 Marcel Becker, 'In Gesprek met Michael Walzer', in Michael Walzer, *Oorlog en Dood: Over de Rechtvaardige Oorlog in Onze Tijd* (Damon 2008) 30–47 at 36.

13 In the scholarly literature, research on (environmental) disaster risk and climate change are often linked. See Miriam Matejova and Chad M. Briggs, 'Embracing the Darkness: Methods for Tackling Uncertainty and Complexity in Environmental Disaster Risks' (2021) 21(1) Global Environmental Politics 76–88; Alexandra Birchler, *Climate Change, Resulting Natural Disasters and The Legal Responsibility of States* (Intersentia 2020).

14 See IPCC, *IPCC Factsheet: What is the IPCC?* <https://www.ipcc.ch/about/> (last accessed 10 August 2022).

15 Christopher B. Field et al (eds.), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2012) 5. In the glossary to the Working Group III Contribution to the IPCC Sixth Assessment Report (AR6) (Annex I, p. 51), 'Disaster' is defined as a 'serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability, and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts'.

16 Field et al (eds.) (n 15).

17 Similarly, the term was defined in a report written for the Australian Government as 'a combination of the likelihood of an occurrence and the consequence of that occurrence'. Broadleaf Capital International and Marsden Jacob Associates (n 10) 18, see also 72.

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> The processes for designing, implementing, and evaluating strategies, policies, and measures to improve the understanding of disaster risk, foster disaster risk reduction and transfer, and promote continuous improvement in disaster preparedness, response, and recovery practices, with the explicit purpose of increasing human security, well-being, quality of life, resilience, and sustainable development.[18]

The management of *climate change* risks can then be said to relate to responsibilities for addressing the adverse consequences of climate change, including those that are likely to happen in the future.[19] In the scholarly literature, the term 'disaster risk management' – or 'disaster risk reduction' – is used to make this connection between climate change law and international disaster law, two newly emerging fields of international law;[20] but there are differences between disasters and some effects of climate change. The term 'disaster' is generally used to refer to *immediate* dangers to *critical* human needs. The definitions of 'disaster *risk*' and 'disaster risk *management*' build on this. Climate change does not only cause climate disasters or extreme weather events, such as storms and cyclones, droughts, and periods of intense heat; it also results in 'slow onset events', such as rising sea-levels, desertification, gradual loss of forests and of biodiversity.[21] In this paper, climate change risks include both the immediate climate disasters as well as the latter more gradual types of events.

The IPCC Working Groups' definitions, mentioned above, which were embraced in scholarship and by domestic NGOs,[22] do provide a better understanding of climate change risk management.[23] When referring to responsibilities for managing climate change risks, the present paper refers to responsibilities for: (1) the design, implementation, and evaluation of strategies, policies, and measures to improve the understanding of climate change risks; (2) the promotion of continuous improvement in preparedness for the consequences of climate change; (3) and the establishment of response, and recovery practices, with the explicit purpose of increasing human security, well-being, quality of life, resilience, and sustainable development.[24] These elements are drawn from the definitions introduced just above.

The above definition is only meant as a working definition, to make clear how the term is understood in this paper. This paper does not seek to contribute to the discussion on what climate change risk management is about *exactly*, and what this term might mean in different contexts and in different scientific disciplines. Instead, it focuses on the role of the courts in reminding the key actors – primarily the State and multinational oil corporations – of their responsibilities for climate change risk management.[25] To prepare for the new situation, various

18 Christopher B. Field et al (eds.) (n 15) 5.

19 Charles Anukwonke et al, 'Climate Change and Interconnected Risks to Sustainable Development' in Suhaib A. Bandh (ed), *Climate Change: The Social and Scientific Construct* (Springer 2022) 71–86.

20 See Tommaso Natoli, 'Improving Coherence between Climate Change Adaptation and Disaster Risk Reduction through Formal and Informal International Lawmaking' (2022) 13(1) Journal of International Humanitarian Legal Studies 78–109; Daniel A. Farber, 'The Intersection of International Disaster Law and Climate Change Law' (2021) 2(1) Yearbook of International Disaster Law 87–115.

21 Maria Cecilia T. Sicangco, *Climate Change, Coming Soon to a Court Near You: International Climate Change Legal Frameworks* (Asian Development Bank 2020) 33. Of course, if loss of forests is due to the increased frequency and intensity of forest fires, then this is not a 'slow onset event', but rather an immediate disaster.

22 See e.g., David Eckstein, Vera Künzel, Laura Schäfer, Maik Winges, *Global Climate Risk Index 2020: Who Suffers Most from Extreme Weather Events? (Weather-Related Loss Events in 2018 and 1999 to 2018)* (Germanwatch Briefing Paper, 2020) 3, footnote 2.

23 For further analysis and approaches, see Aseem Mahajan, Reuben Kline, and Dustin Tingley, 'Collective Risk and Distributional Equity in Climate Change Bargaining' (2022) 66(1) Journal of Conflict Resolution 61–90; Julia Kreienkamp and Tom Pegram, 'Governing Complexity: Design Principles for the Governance of Complex Global Catastrophic Risks' (2021) 23 International Studies Review 779–806; Robert Leonard Wilby, Xianfu Lu, et al, 'Towards Pragmatism in Climate Risk Analysis and Adaptation' (2021) 23(1) Water Policy 10–30; Seo-Yeon Park, Chanyang Sur et al, 'Projected Drought Risk Assessment from Water Balance Perspectives in a Changing Climate' (2021) 41 International Journal of Climatology 2765–2777; Ulrika Westin, Waldemar Ingdahl, and Weber Shandwick, *Global Catastrophic Risks 2021: Navigating the Complex Intersections*, Global Challenges Foundation Annual Report, 2021; David Eckstein, Vera Künzel et al, *Global Climate Risk Index 2020*, (Germanwatch 2019).

24 Debbie Bartlett, 'Community Resilience to Climate Change', in Suhaib A. Bandh (ed), *Climate Change: The Social and Scientific Construct* Springer 2022) 259–278.

25 See Sarah Mead and Lucy Maxwell (n 5) 617–648; Jale Tosun, 'Addressing Climate Change Through Climate Action' (2022) 1(1) Climate Action; Fon Bisalbutr, 'The Potential Impact of Climate Change Litigation on Government Policy' (2021) 11(2) Notre Dame Journal of International & Comparative Law 272–293; Mary Christina Wood, '"On the Eve of Destruction": Courts Confronting the Climate Emergency' (2022) 97(1) Indiana Law Journal; Leonard F.M. Besselink, 'The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives' (2022) European Constitutional Law Review 1–28.

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actors need to think about which of their normal or ordinary activities and responsibilities might be at risk due to climate change. They need to identify which of their activities are likely to be positively or negatively affected by climate change, and to consider ways to adapt their activities and policies to these risks and their consequences. They also need to accept their own responsibility to reduce greenhouse gas emissions, and act on that responsibility.

It seems safe to suppose that many people in the Netherlands look to their government and expect it to develop a climate change policy for them, with a reasonable way of managing climate change risks.[26] They may be reluctant to make significant changes to their own daily lives, if this were to affect their own current standard of living in a negative way.[27] This, in turn, results in the reluctance of a democratic government such as the Netherlands Government to impose drastic measures, because that will make the government unpopular, and a government needs to have popular support to win the next election. To break this stalemate, courts can jump in.

Efforts regarding climate change have usually been characterized as mitigation (preventing climate change, mainly through emissions reductions) and adaptation (adjusting to climate change, taking measures to decrease the impact of climate change-related disasters). The term 'climate change risk management' includes both these aspects. The court cases discussed below focus on mitigation obligations, but they do approach the problem in a more general sense. This justifies analysing them from a 'climate change risk management' perspective.

2.2. PUBLIC INTEREST LITIGATION AND CLIMATE LITIGATION

'Public interest litigation' refers to the situation when some natural person or legal entity seeks to defend a certain general interest, and uses (inter)national law and the (domestic) courts to do so.[28] Both Urgenda and Milieudefensie are associations, established under Dutch domestic law, to pursue the general interest of a healthy environment, thereby purporting to act on behalf of the present and future generations of the people of the Netherlands (Milieudefensie) or of the international community as a whole (Urgenda). Both associations were using (inter) national law as their language, and the (domestic) courts as their forum or battlefield, to seek a change in Dutch policy (Urgenda) or a change in Shell's corporate policy (Milieudefensie) that better protects those interests. They were thus engaging in public interest litigation.

The term 'climate litigation', being a sub-category of 'public interest litigation', is generally used to refer to legal proceedings initiated to establish responsibility for a failure to combat climate change.[29] 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.[30] They can be based on rules of domestic, regional and/or international law,[31] both of public and private law character.[32]

26 What can be regarded as a *reasonable* allocation of responsibilities is, of course, highly context specific. See Otto Spijkers and Sofie Oosterhuis, 'The Dutch Response to Climate Change: Evaluating the Netherlands' Climate Act and Associated Issues of Importance', in Thomas L. Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing 2020) 175–198.

27 Global Challenges Foundation, *Global Catastrophic Risks and International Collaboration: Opinion Poll 2020*, 2020 <https://globalchallenges.org/wp-content/uploads/gcf_global_challenges_2020-high.pdf> (last accessed 10 August 2022).

28 For more in-depth analysis of the phenomenon of public interest litigation, see 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 (The IUCN Academy of Environmental Law series)* (Edward Elgar Publishing 2018).

29 See 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' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021) 111–127; and Guy Dwyer, 'Climate Litigation: A Red Herring among Climate Mitigation Tools' in ibid 128–144.

30 Climate litigation can also be done by a State, using an inter-State international court or tribunal as its chosen forum. See Margaretha Wewerinke-Singh, Julian Aguon and Julie Hunter, 'Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions' in Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021) 393–414; or James Harrison, 'Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime' in ibid 415–432.

31 Lauri Peterson, 'Domestic and International Climate Policies: Complementarity or Disparity?' (2022) 22 International Environmental Agreements 97–118.

32 Brian Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 Chinese Journal of Environmental Law 131–164.

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Climate litigation has become a popular tool to urge action to prevent dangerous climate change and support the goals of the Paris Agreement.[33] Important cases have been initiated in Germany,[34] France,[35] Belgium,[36] and elsewhere in Europe.[37] Climate litigation is also practised in regions outside Europe, including in the United States,[38] Australia,[39] and China,[40] in the Americas,[41] in Asia,[42] and in Africa.[43] In fact, new cases of climate litigation are constantly emerging, and it is an impossible task to keep track of all these cases, although there are a couple of research projects,[44] and databases that make brave attempts to do so.[45]

The ways in which climate change risk management in these proceedings are addressed have had a considerable impact on the drafting of model rules and guidelines that are general enough to apply in various jurisdictions. If the courts indeed shape such model rules, this of course contributes to global efforts at reminding the key actors – including the State and multinational oil corporations – of their responsibilities for climate change risk management. See, for example, the Model Statute for Proceedings Challenging Government Failure to Act on Climate Change, issued

33 See also Sandrine Maljean-Dubois, 'Climate litigation: The impact of the Paris Agreement in National Courts' (2022) Taiwan Law Review 211–222; 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(1) Transnational Environmental Law 11–16; Sandrine Maljean-Dubois, 'Climate litigation: The Impact of the Paris Agreement in National Courts' (2022) Taiwan Law Review 211–222; Pau de Vilchez Moragues, *Climate in Court: Defining State Obligations on Global Warming through Domestic Climate Litigation (Elgar Studies in Climate Law)* (Edward Elgar Publishing 2022); Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms' (2021) 33(1) Journal of Environmental Law 1–32; Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst' (2021) 33(2) Journal of Environmental Law 227–256; Benoit Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change' (2021) 33(3) Journal of Environmental Law 585–610.

34 See Rike Kramer-Hoppe, 'The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide' (2021) 22 German Law Journal 1393–1408; Louis J. Kotze, 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?' (2021) 22 German Law Journal 1423–1444.

35 Tribunal Administratif de Paris (France), Associations Oxfam France, Notre Affaire à Tous, Fondation pour la Nature et l'Homme, and Greenpeace France, Judgment of 14 October 2021. Marta Torre-Schaub, 'Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France' (2021) 22 German Law Journal 1445–1458.

36 Brussels Court of First Instance, *VZW Klimaatzaak v Kingdom of Belgium & Others*, ruling of 17 June 2021. For an early comment, see Matthias Petel and Antoine de Spiegeleir, 'Lessons from the Belgian Climate Case: The Devil is in the Details' Climate Law Blog, 15 November 2021 <http://blogs.law.columbia.edu/climatechange/> (last accessed 10 August 2022).

37 Kleoniki Pouikli, 'Editorial: A Short History of the Climate Change Litigation Boom Across Europe' (2022) ERA Forum.

38 See 'Our Children's Trust', which documents American and global climate litigation cases <https://www.ourchildrenstrust.org> (last accessed 10 August 2022). For scholarly reflection, see Michael B. Gerrard and Meredith Wilensky, 'The Role of The National Courts in GHG Emissions Reductions', in Daniel A. Farber and Marjan Peeters (eds), *Climate Change Law: Volume I of the Elgar Encyclopedia of Environmental Law Series* (Edward Elgar 2016) 359–371.

39 See Scott Walker, 'The Meaning and Potential of a Human Rights-Based Approach to Climate Change Post-Sharma' (2022) Alternative Law Journal; Michael Kirby, 'Climate Change Litigation and Human Rights', in S. J. Williams and R. Taylor (eds.), *Sustainability and the New Economics* (Springer 2021) 253–278.

40 Lei Xie, Lu Xu, 'Environmental Public Interest Litigation in China: Findings from 570 Court Cases Brought by NGOs, Public Prosecutors and Local Government' (2022) 34(1) Journal of Environmental Law 53–81. Many of these cases relate to climate change.

41 For recent examples of climate litigation in Brazil, see Joana Setzer and Délton Winter de Carvalho, 'Climate Litigation to Protect the Brazilian Amazon: Establishing A Constitutional Right to A Stable Climate' (2021) 30(2) Review of European, Comparative and International Environmental Law 197–206.

42 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); Zia Ullah Ranjah, 'Protecting Environment through Judicial Activism in Pakistan and India' (2021) 5 Asian Yearbook of Human Rights and Humanitarian Law 418–430.

43 On the use of international environmental law as a basis for litigation in African domestic courts, see Louis J. Kotze and Caiphas B. Soyapi, 'African Courts and Principles of International Environmental Law: A Kenyan and South African Case Study' (2021) 33 Journal of Environmental Law 257–282.

44 See the Special Issue on climate litigation of the Journal of Human Rights and the Environment (2022) issue 13(1).

45 See Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot* (Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy 2021); 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> (last accessed 10 August 2022). The databases can be found at <https://climate-laws.org/litigation_cases> and <http://climatecasechart.com/> respectively (last accessed 10 August 2022).

by the Climate Change Justice and Human Rights Task Force of the International Bar Association in February 2020. This Model Statute makes various references to *Urgenda*, and to the way in which the Dutch courts dealt with climate change risk management.[46] Climate litigation not only influences the interpretation of existing norms and principles of international law, and norms and principles of various domestic legal systems, or provides clarity on the responsibilities for managing climate risks; but it also has a much wider impact, influencing the further development of international law, and how the relationship between humankind and nature is featured in it. It also provides clarity on the role of science and scientific evidence in climate litigation.[47]

3. *URGENDA*

After having clarified the meaning of some key terms – i.e., 'climate change risk management', 'public interest litigation' and 'climate litigation' – it is now time to turn our attention to the case studies. The analysis of the *Urgenda* case is structured as follows. First, a brief overall introduction to the case is provided (Section 3.1), immediately followed by an analysis of what the courts had to say about the responsibilities of the State of the Netherlands for climate change risk management (3.2).

3.1. INTRODUCTION TO *URGENDA*

Urgenda is a well-known example of climate litigation.[48] It has received much attention in scholarly literature,[49] and it has inspired people and foundations from all over the world to initiate similar proceedings or encourage others to do so.[50] This was a case initiated by a foundation called Urgenda, established under Dutch law.[51] The claim was directed against the

46 International Bar Association (Climate Change Justice and Human Rights Task Force), *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change*, February 2020 <https://www.ibanet.org/climate-change-model-statute.aspx> (last accessed 10 August 2022).

47 See Erik Pihl, Otto Spijkers et al, '10 New Insights in Climate Science 2020 – A Horizon Scan' (2021) 5 Global Sustainability 1–65; Rupert Stuart-Smith, Aisha Saad et al, *Attribution Science and Litigation: Facilitating Effective Legal Arguments and Strategies to Manage Climate Change Damages*, Project Report, Oxford Sustainable Law Programme, 2021; Otto Spijkers, 'Climate Litigation as Global Law' (2020) 20 Global Community Yearbook of International Law and Jurisprudence 431–454.

48 Otto Spijkers, 'Pursuing Climate Justice through Public Interest Litigation: The Urgenda Case' (2020) Völkerrechtsblog.

49 See Anke Wonneberger and Rens Vliegenthart, 'Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government' (2021) 15(5) Environmental Communication 699–714; Emily Barritt, 'Consciously transnational: Urgenda and the Shape of Climate Change Litigation' (2021) 22(4) Environmental Law Review 296–305; 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 & International Environmental Law (RECIEL) 275–283; Yanna Hoek, Daan van Uhm, and Damián Zaitch, 'Climate Change Litigation: learning from the Urgenda case' (2021) 11(1) Tijdschrift over Cultuur & Criminaliteit 14–30; 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); Adrian Lewis, 'Dutch Supreme Court Ruling Marks Change in Climate Litigation' (2020) Human Rights Brief 24(2) 115–118; Chris Backes and Gerrit van der Veen, 'Urgenda: The Final Judgment of the Dutch Supreme Court' (2020) 17 Journal for European Environmental & Planning Law 307–321; Irene Antonopoulos, 'The Future of Climate Policymaking in Light of Urgenda Foundation v the Netherlands' (2020) 22(2) Environmental Law Review 119–124; Karinne Lantz, 'The Netherlands v Urgenda Foundation: Lessons for Using International Human Rights Law in Canada to Address Climate Change' (2020) 41 Windsor Review of Legal and Social Issues 145–166; Phillip Paiement, 'Urgent Agenda: How Climate Litigation Builds Transnational Narratives' (2020) 11(1–2) Transnational Legal Theory 121–143; Sadhbh O. Neill and Edwin Alblas, 'Climate Litigation, Politics and Policy Change: Lessons from Urgenda and Climate Case Ireland', in D. Robbins et al (eds.), *Ireland and the Climate Crisis* (Palgrave Studies in Media and Environmental Communication 2020); Lavanya Rajamani, 'Innovation and Experimentation in the International Climate Change Regime' (2020) 41 The Pocket Books of The Hague Academy of International; Jaap Spier, 'The "Strongest" Climate Ruling Yet: The Dutch Supreme Court's Urgenda Judgment' (2020) 67 Netherlands International Law Review 319–342; Ingrid Leijten, 'Human Rights v. Insufficient Climate Action: The Urgenda Case' (2019) 37(2) Netherlands Quarterly of Human Rights 112–118; André Nollkaemper and Laura Burgers, 'Introductory Note to the State of The Netherlands v. Urgenda' (2019) 59(5) International Legal Materials 811–813; Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation' (2016) 34(2) Journal of Energy & Natural Resources Law 165–189; Patrícia Galvão Ferreira, '"Common but Differentiated Responsibilities" in the National Courts: Lessons from Urgenda v. The Netherlands' (2016) 5(2) Transnational Environmental Law 329–351. For an overview of the first 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.

50 Lucy Maxwell, Sarah Mead, and Dennis van Berkel, 'Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases' (2022) 13(1) Journal of Human Rights and the Environment 35–63.

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

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State of the Netherlands. Urgenda submitted that the Government of the Netherlands was not doing enough to prevent dangerous climate change. Urgenda argued that this inaction ought to be qualified, inter alia, as a breach of the duty of care as it exists under Dutch tort law, [52] and as a breach of Articles 2 (right to life) and 8 (family life) of the European Convention on Human Rights (ECHR).[53] To the surprise of many within the scholarly community, the Dutch District Court agreed with Urgenda in 2015,[54] followed by the Dutch Appeals Court in 2018.[55] On 20 December 2019, the Dutch Supreme Court also ruled in Urgenda's favour.[56] To support their interpretation of the duty of care and relevant international human rights provisions, the Dutch courts made many references to the case law of the European Court of Human Rights (ECtHR).[57] This is one of the main reasons why this Dutch ruling has 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 ECtHR.[58] Of course, in the scholarly literature one also finds people who are less enthusiastic about this human rights-based approach to climate change.[59]

3.2. MANAGING CLIMATE CHANGE RISKS IN *URGENDA*

This section looks at the way in which the Dutch courts in *Urgenda*, at different levels – District, Appeals and Supreme – have dealt with the responsibilities of the State of the Netherlands for managing climate change risks.

As mentioned above, in *Urgenda*, the Netherlands Supreme Court held that, under Articles 2 (right to life) and 8 (right to respect for private and family life) ECHR, as interpreted by the ECtHR, the Netherlands is obliged to take suitable measures if a real and immediate risk to people's lives or welfare exists and the State is aware of that risk.[60] The Netherlands Supreme Court emphasized that the risk of dangerous climate change and its consequences are global in nature, are well known to all (including the Netherlands Government), and that all States in the world must take measures to prevent dangerous climate change, in accordance with their specific responsibilities and capabilities. The obligation to manage climate change risks was thus grounded in human rights law, Articles 2 and 8 ECHR.

52 For an analysis of the duty of care argument, see 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 (The IUCN Academy of Environmental Law series)* (Edward Elgar Publishing 2018).

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

54 *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> (last accessed 10 August 2022).

55 *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> hereafter referred to as 'Appeals Court, *Urgenda*' (last accessed 10 August 2022). 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.

56 *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 'Supreme Court, *Urgenda*' (last accessed 10 August 2022).

57 ibid, Section 5.

58 See Julie Fraser and Laura Henderson, 'The Human Rights Turn in Climate Change Litigation and Responsibilities of Legal Professionals' (2022) 40(1) Netherlands Quarterly of Human Rights 3–11; Jasper Krommendijk, 'Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation' (2022) 31 Review of European, Comparative & International Environmental Law (RECIEL) 60–74; Kars de Graaf and Jan Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27(3) Journal of Environmental Law 517–527; Marc Loth, 'Too Big to Trial? Lessons From the Urgenda Case' (2018) 23(2) Uniform Law Review 336–353; 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; and Sheila R. Foster and Paolo Galizzi, 'Human Rights and Climate Change: Building Synergies for A Common Future', in Daniel A. Farber and Marjan Peeters (eds), *Climate Change Law: Volume I of the Elgar Encyclopedia of Environmental Law Series* (Edward Elgar 2016) 43–53.

59 See Fanny Thornton, 'The Absurdity of Relying on Human Rights Law to Go After Emitters' in Mayer and Zahar (n 29) 159–169; and Benoit Mayer, 'Climate Change Mitigation as An Obligation Under Human Rights Treaties?' (2021) 115(3) American Journal of International Law 409–451. The latter argues that human rights treaties have a limited role to play in climate change mitigation.

60 Supreme Court, *Urgenda* (n 56) paras. 5.2.1–5.5.3.

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Even though climate change is a global problem, and climate change risk management is thus a globally shared responsibility, individual States cannot escape from their own responsibility by arguing that their activities will have a negligible impact.[61] The Netherlands Supreme Court made crystal clear that each State must shoulder 'its part' of this globally shared responsibility for climate change risk management.[62] This is how the Netherlands Supreme Court put it:

> [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 [...].[63]

Additionally, there is no scientific uncertainty any more about the exact consequences of climate change. As the Appeals Court had already noted, 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 provide that the State has a duty to protect its citizens.[64]

The Supreme Court agreed with the reasoning of the Appeals Court and added that this 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 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 materialize 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 materialize in the longer term.[65]

Moreover, the Netherlands Supreme Court noted that:

> 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 materialization of that danger is uncertain. This is consistent with the precautionary principle.[66]

The Netherlands Supreme Court was thus quite explicit when it comes to the State's share of the responsibility for managing climate change risks. It did allow the State a certain policy-space or discretion, to decide on which measures to take *exactly*:

> The States do have discretion in choosing the steps to be taken, although these must actually be reasonable and suitable. The obligation pursuant to Articles 2 and 8 ECHR to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat from materialization)

61 Specifically on adaptation, see Global Commission on Adaptation, *Adapt Now: A Global Call for Leadership on Climate Resilience* (Global Center on Adaptation 2019), Executive Summary, 6–7; Lauren Nishimura, 'Adaptation and Anticipatory Action: Integrating Human Rights Duties into the Climate Change Regime' (2022) 12(2) Climate Law 99–127. For a more philosophical analysis, see Erik Persson, Kerstin Eriksson, and Åsa Knaggård, 'A Fair Distribution of Responsibility for Climate Adaptation: Translating Principles of Distribution from an International to a Local Context' (2021) 6 Philosophies 68.

62 Supreme Court, *Urgenda* (n 56) para. 5.7.1.

63 ibid para. 5.7.7.

64 Appeals Court, *Urgenda* (n 55) paras. 44–45.

65 Supreme Court, *Urgenda* (n 56) para. 5.2.2. The Court reached a similar conclusion with respect to Article 8 ECHR. See ibid para. 5.2.3.

66 ibid para. 5.3.2.

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> or adaptation measures (measures to lessen or soften the impact of that materialization). According to ECtHR case law, which measures are suitable in a given case depends on the circumstances of that case.[67]

Specifically regarding the State's defense that adaptation measures could take the place of mitigation measures, the Supreme Court noted the following:

> The State has also argued [...] that it meets its obligations under Articles 2 and 8 ECHR by taking adaptation measures, whether or not in combination with mitigation measures already taken and proposed, and that it therefore does not have to meet the 25–40% target. [...] [H]owever, the Court of Appeal established fully comprehensibly that although it is correct that the consequences of climate change can be mitigated by taking adaptation measures, it has not been demonstrated or made plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented by such measures. This finding also implies that even if account is taken of the fact that the State is taking adaptation measures, mitigation measures that reduce emissions by at least 25% by 2020 are urgently needed, also for the Netherlands.[68]

The obligation to act responsibly and take the necessary measures to effectively manage climate change risks – both through mitigation and adaptation measures – is an obligation of due diligence. This entails requiring the best efforts of the States to prevent human rights infringements. This is what the Netherlands Supreme Court had to say about the due diligence nature of the obligations:

> Articles 2 and 8 ECHR must not result in an impossible or under the given circumstances disproportionate burden being imposed on a State. If a State has taken reasonable and suitable measures, the mere fact that those measures were unable to deter the hazard does not mean that the State failed to meet the obligation that had been imposed on it. The obligations ensuing from Articles 2 and 8 ECHR regard measures to be taken by a State, not the achievement, or guarantee of the achievement, of the envisaged result.[69]

Before some general conclusions on the legal interpretation of obligations and the division of State and corporate responsibility for managing climate change risks are drawn from the above case study analysis (Section 5), the second case study, i.e. *Shell*, is introduced (Section 4).

4. *SHELL*

The same approach will now be applied to the *Shell* case. A brief introduction (4.1) is followed by an analysis of the Dutch District Court's views on the corporate responsibilities of Shell for managing climate change risks (4.2).

4.1. INTRODUCTION TO *SHELL*

Before turning specifically to examining the way in which the Dutch court addressed the corporate responsibility of Shell for managing climate change risks (4.2), a general introduction to this litigation is now provided.

In 2018, Milieudefensie (Friends of the Earth Netherlands) et al began a case against the giant global oil company, Shell, whose headquarters at that time were still in the city of The Hague, Netherlands.[70] In December 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-

67 ibid.

68 ibid para. 7.5.2.

69 ibid para. 5.3.4.

70 All the documents relating to the case are available at <https://en.milieudefensie.nl/climate-case-shell> (last accessed 10 August 2022).

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breaking judgment.[71] As happened in *Urgenda*, *Shell* attracted much scholarly and media attention from all over the world. The *Shell* case was immediately analysed and commented on by the scholarly community,[72] in the blogosphere,[73] as well as in foreign[74] and Dutch newspapers.[75] The case, even at the time of its initiation, quickly influenced more general discussions on the responsibility of transnational corporations for causing, contributing to, and combating climate change.[76]

The Dutch District Court agreed with claimants that Shell was doing too little to reduce greenhouse gas emissions and prevent serious climate damage. Serious climate damage already occurs with an increase in the global average surface temperature of more than 1.5 degrees Celsius.[77] In the view of the Dutch District Court, Shell 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 Dutch District 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 the 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.[78]

In essence, Milieudefensie argued that Shell would be acting in breach of its duty of care under Dutch tort law, and in breach of Articles 2 and 8 ECHR. Milieudefensie was thus copying the legal strategy used in *Urgenda*, and this is no coincidence as the lead counsel was the same person in both procedures: Roger Cox. This time, the claimants were using the legal strategy against a multinational oil corporation instead of a State, which is more difficult, as only States are, formally, party to the ECHR.[79]

71 *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> hereafter '*Shell*' (last accessed 10 August 2022).

72 See Otto Spijkers, 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell' (2021) 5(2) Chinese Journal of Environmental Law 237–256; Andreas Hösli, 'Milieudefensie et al. v. Shell: A Tipping Point in Climate Change Litigation against Corporations?' (2021) 11 Climate Law 195–209; 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 1–7; Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases' (2021) 22 German Law Journal 1484–1498; Center for International Environmental Law, *A Crack in the Shell*, 2018. This case is often discussed together with earlier cases against Shell, relating to environmental damage in Nigeria. See Daniel Bertram, 'Environmental Justice "Light"? Transnational Tort Litigation in the Corporate Anthropocene' (2022) 23 German Law Journal 738–755.

73 See 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/> (last accessed 10 August 2022); 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', on *Global Network for Human Rights and the Environment (GNHRE)*, posted 31 May 2021.

74 See Donald Pols, Director of Milieudefensie, 'This Is How We Took On One of The World's Biggest Polluters and Won' *Independent* (London, 4 June 2021); Somini Sengupta, 'Big Setbacks Propel Oil Giants Toward a "Tipping Point"' *New York Times* (29 May 2021); Anjli Raval, 'Shell's Climate Defeat: An Omen for All Corporate Polluters?' *Financial Times* (London, 28 May 2021); Daniel Boffey, 'Court Orders Royal Dutch Shell to Cut Carbon Emissions By 45% By 2030' *Guardian* (London, 26 May 2021).

75 See Bard van de Weijer and Pieter Hotse Smit, 'Historische Uitspraak in Klimaatzaak: Shell Moet CO_2 Uitstoot Drastisch Verminderen' *Volkskrant* (26 May 2021); Paul Luttikhuis and Erik van der Walle, 'Het Klimaat Is een Mensenrechtenkwestie' *NRC* (26 May 2021).

76 See Marc-Philippe Weller and Mai-Lan Tran, 'Climate Litigation Against Companies' (2022) 1(14) Climate Action; Fernanda Frizzo Bragato and Alex Sandro da Silveira Filho, 'The Colonial Limits of Transnational Corporations' Accountability for Human Rights Violations' (2021) 2 TWAIL Review 34–58; Geetanjali Ganguly, Joana Setzer, and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) Oxford Journal of Legal Studies 841–868.

77 More generally, on legal responsibilities for loss and damage caused by climate change, see Meinhard Doelle and Sara L. Seck (eds.), *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar Publishing 2021).

78 *Shell* (n 71) para 5.3.

79 For a first commentary on the efforts undertaken in different jurisdictions (the Philippines in particular), see 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). More generally, see Vicente Manzione Filho, 'Climate Change and Its Impacts on Businesses' in Suhaib A. Bandh (ed), *Climate Change: The Social and Scientific Construct* (Springer 2022) 87–102; Dalia Palombo, 'Transnational Business and Human Rights Litigation: An Imperialist Project?' (2022) 22(2) Human Rights Law Review 1–25.

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It might be worth spending a bit more time to look at how the Dutch District Court dealt with this legal problem. In essence, it found that Shell would be 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 Dutch District 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'.[80]

Under Dutch private law, a company can be held liable, not just when it acts contrary to a specific legal rule of domestic, regional, or international law, but also when it acts contrary to an unwritten societal standard of due care ('*maatschappelijke zorgvuldigheidsnorm*'). In the Netherlands, this standard of due care can even be filled in by laws and regulations which are not formally binding on the company concerned. In countries without such a flexible interpretative rule, the role of a court, and of the human rights obligations in horizontal relationships, is possibly more limited.[81]

The ECHR is an example of a treaty which, formally speaking, is not binding on Shell, but whose provisions can nonetheless be used to give meaning to the unwritten societal standard of due care. In other words, even though Shell was not a party to this convention – only States can be – the Dutch District Court felt that this human rights convention could nonetheless be used to determine whether Shell adhered to the unwritten standard of due care.[82] The Dutch District Court first admitted that Articles 2 and 8 ECHR only 'apply in relationships between States and citizens', and thus '*Milieudefensie et al* cannot directly invoke these human rights with respect to [Shell]';[83] however, that was not the end of the story. The Dutch District 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.[84]

It found further support for the obligation of corporations to respect human rights in the United Nations Guiding Principles on Business and Human Rights.[85] From these principles, the Dutch District Court concluded that 'business enterprises should respect human rights', and thus they 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[86] The Dutch District Court then gave more detailed instructions:

> 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. [...] [T]his 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

80 *Shell* (n 71) para. 4.4.1.

81 This does not mean that the legal strategy of the *Shell* case can only be used successfully in the Netherlands. There are other jurisdictions with a similar duty of care. See 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.

82 *Shell* (n 71) paras. 4.4.9–4.4.10. For some critical reflections, see 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/> (last accessed 10 August 2022).

83 *Shell* (n 71) para. 4.4.9; see also ibid paras. 4.6.1 and 5.2.

84 ibid para. 4.4.9.

85 ibid paras. 4.4.13–4.4.14. Reference was made to 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.

86 *Shell* (n 71) para. 4.4.15.

> optional responsibility for companies. It applies everywhere, regardless of the local legal context, and is not passive [...] [I]t requires action on the part of businesses.[87]

From the start of the proceedings, *Milieudefensie* made clear that it did not want to compel the Dutch District Court to tell Shell how *exactly* to accomplish the required reduction; and the Dutch District Court did indeed grant Shell 'total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion'.[88]

4.2. MANAGING CLIMATE CHANGE RISKS IN *SHELL*

This section zooms in on the way in which the Dutch District Court in *Shell* dealt with the responsibilities of Shell for managing climate change risks. The focus in *Shell* was on the duty of care as it exists under Dutch private (tort) law, and less on the ECHR human rights framework.[89] According to Dutch private (tort) law applied to climate change, if a party has for a long time been aware of the great risks posed by climate change, and it emits a sufficiently substantial part of the global greenhouse gases that cause climate change, and it can take effective measures that are not unreasonably burdensome to reduce emission of these gases, then it will be acting wrongfully if it does not act on that responsibility.[90] This framework was, *mutatis mutandis*, the legal basis of the ruling in the *Urgenda* litigation of the District Court, and the claimants in *Shell* believed that it could also be applied to Shell.[91] The Dutch District Court agreed with them, and followed the reasoning of Milieudefensie.[92] Unlike the legal framework based on the ECHR, it is uncontroversial that this tort law framework can be applied to a company like Shell. According to the claimants, the contribution of Shell to global warming was significant, and this was reason enough to demand a 'special duty of care and a high level of care from Shell'.[93]

The Dutch District Court began its reasoning on Shell's responsibilities for climate change risk management with a reference to the IPCC's five main 'reasons for concern': (1) the disappearance of ecosystems; (2) the increasing frequency and intensity of extreme weather events; (3) the uneven distribution of the impact of the adverse effects of climate change both at the global and national level (climate change affects the vulnerable and marginalized groups the most); (4) the economic consequences of climate change; and (5) potentially dramatic and catastrophic tipping points.[94] It then went on to list the 'key risks' associated with these five reasons for concern: (1) the risk of death or ill-health due to storm, flooding, and sea level rise, particularly for people living in coastal areas and big cities; (2) the risk of a 'breakdown of infrastructure networks and critical services such as electricity, water supply, and health and emergency services' due to extreme weather events; (3) the risk of death due to 'extreme heat', particularly for 'vulnerable urban populations and those working outdoors in urban or rural areas'; (4) the risk of food insecurity; (5) the risk of water insecurity; (6) the risk of significant loss of marine and coastal ecosystems; as well as (7) the risk of significant loss of marine and terrestrial biodiversity, with drastic and dramatic ecological and economic consequences.[95]

87 ibid. See 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.

88 *Shell* (n 71) para. 4.4.54.

89 On the question whether tort law is the appropriate framework, see the discussion in the Transnational Environmental Law Journal: Benoit Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation' (2022) Transnational Environmental Law; Laura Burgers, 'An Apology Leading to Dystopia: Or, Why Fuelling Climate Change Is Tortious' (2022) Transnational Environmental Law; Benoit Mayer, 'Judicial Interpretation of Tort Law in Milieudefensie v. Shell: A Rejoinder' (2022) Transnational Environmental Law. And see Kim Bouwer, 'Substantial Justice?: Transnational Torts as Climate Litigation' (2021) 2 Carbon & Climate Law Review (CCLR) 188–203.

90 *Vereniging Milieudefensie et al. v. Shell*, Summons (unofficial translation of the Dutch original), File number 90046903, submitted 5 April 2019, at <https://en.milieudefensie.nl/climate-case-shell>, at paras. 41 and 512 (last accessed 10 August 2022).

91 ibid para. 514.

92 *Shell* (n 71) para. 4.4.2. It must be noted that Milieudefensie's claims were geared far more towards the application of standard Dutch tort (case) law.

93 *Vereniging Milieudefensie et al. v. Shell*, Summons (n 90) para. 529.

94 *Shell* (n 71) para. 2.3.5.

95 ibid.

The Dutch District Court then zoomed in on the situation in the Netherlands. The Court noted that sea-level rise will pose a particularly serious problem in the long term.[96] For the short term, there were lots of other problems:

> Climate change-related health problems in Dutch residents include heat stress, increasing infectious diseases, deterioration of air quality, increase of UV exposure, and an increase of water-related and foodborne diseases. In the coming decades, the Netherlands will also face many water-related climate impacts, such as flooding along the coast and rivers, excess water, water shortage, deterioration of water quality, salinization, raised water levels and drought. Periods of either drought and water shortage or problems due to excess water may occur on an annual basis. These changes and uncertainties in water availability will have an impact on agriculture and biodiversity, but also on, for example, the energy sector and the manufacturing industry, for instance in the form of cooling water problems and poor accessibility via rivers in case of drought and network problems due to drought, excess water, or other weather extremes.[97]

This emphasis on climate change risks to which *the people in the Netherlands* are exposed is important, because, due to admissibility issues, the claimants were only permitted to represent the interests of the present and future people residing in the Netherlands, not those residing elsewhere in the world.[98]

In response, Shell reminded the Dutch District Court that the Netherlands Government could take various adaptation measures, which could significantly reduce at least some of the adverse impacts of climate change.[99] The Dutch District Court was not persuaded, and replied as follows:

> [Shell] believes that in the outline of the consequences of climate change made by *Milieudefensie et al*. too little attention is paid to adaptation strategies, such as air conditioning, which may contribute to reducing risks associated with hot spells, and to water and coastal management to counter the sea level rise caused by global warming. These adaptation strategies reveal that measures can be taken to combat the consequences of climate change, which may in result reduce the risks. However, these strategies do not alter the fact that climate change due to CO_2 emissions has serious and irreversible consequences, with potentially very serious and irreversible risks for Dutch residents and the inhabitants of the Wadden region.[100]

The Dutch District Court found plenty of evidence that Shell had already been aware of the seriousness of the situation for many decades. For example, in a report issued by Shell itself in the late 1980s, it was noted that 'climate change and risks resulting from [greenhouse gas] emissions have been identified as a significant risk factor for Shell', and that 'Shell's processes for identifying, assessing, and managing climate-related issues are integrated into [Shell's] overall multi-disciplinary company-wide risk identification, assessment and management process'.[101] Shell's report continued as follows:

> Shell frequently monitors and assesses climate-related risks looking at different time horizons;short (up to 3 years), medium (three years up to around 10 years) and

96 ibid para. 2.3.8.

97 ibid para. 2.3.9. This list is repeated in ibid para. 4.4.6.

98 ibid paras. 4.2.1–6. On the (legal) representation of children and future generations in climate litigation, see Elizabeth Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) Transnational Environmental Law; and Inigo Gonzalez-Ricoy and Felipe Rey, 'Enfranchising the Future: Climate Justice and the Representation of Future Generations' (2019) 10(5) WIREs Climate Change e598.

99 On adaptation, see Jonathan Verschuuren, 'Introduction to Climate Change Adaptation' in Jonathan Verschuuren (ed), *Research Handbook on Climate Change Adaptation Law* (Edward Elgar Publishing 2022); Maria L. Banda, 'Climate Adaptation Law: Governing Multi-Level Public Goods Across Borders' (2018) 51(4) Vanderbilt Journal of Transnational Law 1027–1074.

100 *Shell* (n 71) para. 4.4.8.

101 ibid para 2.5.8.

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> long term (beyond around 10 years). Shell has a climate change risk management structure in place which is supported by standards, policies, and controls.[102]

From this and other evidence, the Dutch District Court concluded that Shell 'has for a long time known of the dangerous consequences of CO_2 emissions and the risks of climate change to Dutch residents and the inhabitants of the Wadden region'.[103]

As Shell was aware of the urgency of the situation, the Court held that Shell was under an obligation, based on the unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, to do something about it. Not only must Shell drastically reduce its own emissions, but it must also encourage the users of its products to do the same. On the latter obligation, the Dutch District Court noted the following:

> As regards the business relations of the Shell group, including the end-users, [Shell] may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible [...]. This is a significant best-efforts obligation, which is not removed or reduced by the individual responsibility of the business relations, including the end-users, for their own CO_2 emissions.[104]

What this meant specifically was explained by the Dutch District Court as follows:

> [Shell has] leeway to develop its particular reduction pathway and to differentiate as it sees fit, as long as it achieves a net 45% reduction in CO_2 emissions of the Shell group [...] relative to 2019. This is an obligation of results as regards the Shell group's activities. With respect to the business relations of the Shell group, including the end-users, this constitutes a significant best-efforts obligation, in which context [Shell] may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible. A consequence of this significant obligation may be that [Shell] will forgo new investments in the extraction of fossil fuels and/or will limit its production of fossil resources.[105]

This is based on a distinction between Scope 1, 2 and 3 emissions. Scope 1 emissions originate from sources that are owned or controlled in full or in part by Shell. Scope 2 emissions are indirect emissions, originating from third-party sources, from which Shell draws the electricity it needs for its operations. Scope 3 emissions are indirect emissions resulting from activities of Shell, but occurring from third-party sources, such as consumers of Shell's products, for example people driving cars running on Shell's oil and gas.[106] Interestingly, research done at Harvard University on the rhetoric of another major oil company – Exxon Mobil – showed that this company tended to shift the blame from itself to the consumer, by arguing that, as long as the consumer wants oil, the company has no choice but to provide it. This reminded the Harvard researchers of the rhetoric used by tobacco companies, which claim that so long as people want to smoke, someone must provide them with the cigarettes.[107]

5. CONCLUSION

What can we learn from the way in which climate change risk management was addressed in the climate litigation cases of *Urgenda* and *Shell*?

102 ibid para 2.5.8. From para 2.5.9, it can be concluded that Shell had already been aware of the adverse consequences of greenhouse gas emissions since 1988.

103 ibid para 4.4.20.

104 ibid para 4.4.24.

105 ibid para 4.4.39. This is reiterated in para. 4.4.55.

106 This distinction is referred to throughout the *Shell* ruling. See e.g., *Shell*, (n 71) para. 2.5.4, where the three scopes are first introduced.

107 Geoffrey Supran and Naomi Oreskes, 'Rhetoric and Frame Analysis of Exxon Mobil's Climate Change Communications' (2021) 4 One Earth 696–719.

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In Section 2 of this paper, climate change risk management was defined as including responsibilities for: (1) improving the understanding of climate change risks; (2) preparing for the consequences of climate change; and (3) responding to climate change when it occurs.

From the *Urgenda* ruling, we can draw some important conclusions that help us understand the term 'climate change risk management' better.

First, it was made clear by the Dutch Courts that climate change risk management is a globally shared responsibility. This means that a State's responsibility for climate change risk management is not limited to the protection of its *own* population from heatwaves, storms, droughts, forest fires, floods, heavy rainfall, and other extreme weather events, and protecting its *own* population from rising temperatures and rising sea levels.[108] The verb 'to manage' is often used in ordinary language to refer to a responsibility for 'dealing with something difficult'.[109] This ordinary meaning might suggest that climate change risk management is about leading one's own society to deal with whatever the climate throws at it, be it a storm, flood, heat wave, and so on. The Dutch Courts reminded the Netherlands Government that this is not the proper way to understand a government's responsibilities for climate change risk management. It is primarily about a government's responsibility to play its part in halting climate change (emphasis is on prevention), and thereby to make a serious effort (due diligence obligation) to ensure that people *everywhere in the world* can enjoy their right to life, to an adequate standard of living, and to a healthy environment.[110]

Second, we can learn from the *Urgenda* ruling that climate change risks can already be said to be imminent when they are directly threatening the persons involved, even when they are not likely to materialize within a short period of time.

Third, we learn from *Urgenda* that the State must take preventive measures to prevent dangerous climate change, even if the materialization of that danger is not yet certain.

Fourth, we learnt that effective adaptation measures can never compensate for a lack of effective mitigation measures. Both the State and Shell have unsuccessfully used this line of defence. From the *Urgenda* ruling, it becomes clear that the term 'climate change risk management' does not sharply distinguish between mitigation and adaptation, and this is a strength rather than a weakness of the term.

In the *Shell* ruling, the conclusions of the *Urgenda* ruling were confirmed and applied *mutatis mutandis* to Shell. From the *Shell* ruling, we can further conclude that responsibility is not limited to one's own activities; it also extends to a responsibility to try to persuade those within one's control to change their behaviour and reduce their emissions. With great power comes great responsibility. A giant oil corporation like Shell has a major part to play in the global effort to manage climate change risks. Most notably, it must not only reduce its own emissions, but it must also do its very best (due diligence obligation) to persuade the consumers of its products – which basically includes almost all global citizens driving a car – to drive more responsibly. The Dutch District Court has explicitly left it to Shell's own policy decisions to determine what this might mean and how this might be done, but it could mean Shell must use its influence to persuade all of us to switch to electric cars, nudge us towards sustainable energy, and so on.

In both cases – *Urgenda* and *Shell* – the Dutch Courts left many specific, technical, and detailed questions unanswered and unaddressed, especially about the rulings' implementation and compliance. These need to be resolved by the Netherlands Government and by Shell. In fact, the Dutch Courts have done well to respect the policy-space of these two. The fact that these two entities are now busying themselves with developing a detailed climate policy at least suggests that the Dutch Courts have contributed to the growing societal pressure to mitigate climate change.

108 Due to procedural rules, the formal admissibility of the claims in both cases was largely limited to the population of the Netherlands.

109 'Manage', entry in the *Cambridge Academic Content Dictionary* (Cambridge University Press 2017).

110 In the *Shell* case, Stichting Actionaid's claim was declared inadmissible because its work did not focus on Dutch residents.

COMPETING INTERESTS

The author has no competing interests to declare.

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