



# Defending the Danger Line

A manual for climate litigators

Using the law as climate action tool  
to achieve the Paris temperature goal



PAULUSSEN  
ADVOCATEN

Authors: Roger Cox and Mieke Reij  
Amsterdam, March 2022

## Colofon

This is a joint publication by Paulussen Advocaten and Milieudefensie.

This publication was made possible by the support of the Children's Investment Fund Foundation (CIFF) and the FILE Foundation.

Authors: Roger Cox and Mieke Reij

Date published: March 2022

Contents do not include developments after January 2022

PAULUSSEN  
ADVOCATEN

Paulussen Advocaten

[www.paulussen.nl](http://www.paulussen.nl)



Milieudefensie

[www.milieudefensie.nl](http://www.milieudefensie.nl)



Children's Investment Fund Foundation

[www.CIFF.org](http://www.CIFF.org)



FILE Foundation

[www.filefoundation.org](http://www.filefoundation.org)

Questions in relation to this report?

For legal queries: please contact the team at Paulussen Advocaten

[climatelitigation@paulussen.nl](mailto:climatelitigation@paulussen.nl)

For general queries: please contact the service desk of Milieudefensie

[teamshell@milieudefensie.nl](mailto:teamshell@milieudefensie.nl)

## Introduction

It has been three decades since virtually all countries in the world agreed to combat "*dangerous human interference with the climate system*" and established a treaty framework to achieve this. It has been 17 years since the Kyoto Protocol entered into force which committed state parties to reduce greenhouse gas emissions. It has been 6 years since the conclusion of the Paris Agreement that reflects the universal political consensus that the average global temperature increase must be limited to 1.5°C. The carbon budget available to stay within this limit is rapidly shrinking and will be depleted before 2030 without immediate, deep and sustained cuts to global emissions. That means what we do or don't do between now and 2030 will decide our future.

Yet, governments and corporations responsible for substantial emissions continue to delay adequate climate action. In light of this, climate litigation is – unfortunately – necessary to speed up emission reductions and prevent an existential crisis.

Climate litigation includes a broad spectrum of cases. Essentially, it can be any type of legal action intended to achieve further decarbonisation, whether based on administrative, environmental, constitutional, civil, or even criminal law. This memorandum specifically focuses on civil litigation aimed at the imposition of Paris-aligned emission reduction targets. Many topics of this memorandum are of course also useful in all other climate litigation cases.

The cases of *Urgenda Foundation v The Netherlands* (judgments of 2015, 2018, 2019)<sup>1</sup> and *Milieudefensie et al. v. Royal Dutch Shell plc* (judgment of 2021)<sup>2</sup> have broken important ground as the first successful cases recognizing that governments and corporations may have a legal responsibility to implement Paris-aligned emission reduction targets. *Urgenda*-inspired litigation against governments has, in the meantime, resulted in multiple other successful precedents.<sup>3</sup> Litigation targeting inadequate corporate climate policy is now also on the rise.

We thoroughly believe that other victories are within reach and we intend to do our part by sharing our experience with fellow litigators. To this end, we will provide insight into the legal strategy that was ultimately successful in the case against Royal Dutch Shell.<sup>4</sup>

The case against Royal Dutch Shell was brought by a number of Dutch NGO's: Vereniging Milieudefensie (Friends of the Earth Netherlands), Stichting Greenpeace Nederland, Stichting ter bevordering van de Fossielvrij-beweging, Landelijke Vereniging tot Behoud van de Waddenzee, Stichting Both ENDS, Vereniging Jongeren Milieu Actief and Stichting Action Aid.

1 District Court of The Hague 24 June 2015, Court of Appeal of The Hague 9 October 2018 and Dutch Supreme Court 20 December 2019, see <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>

2 District Court of The Hague 26 May 2021, [ECLI:NL:RBDHA:2021:5339](https://www.eclilaw.nl/rdha/2021/5339).

3 For example, in Belgium (*Vzw Klimaatzaak v. Kingdom of Belgium*, see <https://www.klimaatzaak.eu/en>), Germany (*Neubauer et al v. Germany*, see <http://climatecasechart.com/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/>) and France (*Notre Affaires à Tous, Fondation pour la Nature et l'Homme* (Foundation for Nature and Mankind), Greenpeace France, and Oxfam France against France, see <https://notreaffaireatous.org/en/actions/the-case-of-the-century/>).

4 In this memorandum, we will refer to Royal Dutch Shell as Shell and to Royal Dutch Shell and its group companies as the Shell group.

Note: the empowering reality of the increasing pressure on oil and gas majors.

In addition to the judgment from the District Court of The Hague, in which Shell was ordered to reduce its total global carbon emissions in Scope 1, 2 and 3 by net 45 % in 2030, the month of May 2021 saw several other remarkable developments that signal a turning point in the dynamics surrounding oil and gas majors. The pressure on these companies is unprecedented and comes from all directions: government, civil society, international organizations, shareholders and financial institutions and regulators. In that same month (i) the International Energy Agency published its landmark report Net Zero by 2050 in which it concluded that there is no more room in the carbon budget for new fossil fuel projects, (ii) activist shareholder group Follow This received 30% shareholder support for its climate resolution at Shell's annual general meeting, (iii) hedge fund Engine No. 1 obtained majority shareholder support to replace three ExxonMobil directors with candidates experienced in clean energy and energy transitions and (iv) Chevron's shareholders voted for a proposal calling for Scope 3 emission reduction targets. This paradigm shift is still ongoing and increases the chance of success of emission reduction claims.

We recognize that every jurisdiction has specific barriers, thresholds and legal traditions that impact the chance of success of a climate case. However, the crucial obstacles that have to be overcome are to a large extent similar in every case.

These obstacles were overcome in the case against Shell and we believe they can be overcome in other cases using an integral approach and a robust narrative, with the ultimate goal of convincing judges that they are able to intervene. In fact: that they have a duty to intervene in the biggest challenge humanity has ever faced.

After all, if the law doesn't protect us against the destruction of our society, there is no justice.

In this memorandum, we focus on civil law and the possibility of obtaining injunctive relief in the form of an order to accelerate emission reductions. Civil law, including the (horizontal) application of human rights law and international law, was the legal basis of the case against Shell.

Civil law can be an effective instrument to address climate change. Almost all jurisdictions have open norms in civil law that allow courts to address and weigh all facts and circumstances relevant to a case, be it under public nuisance law, negligence and/or general tort law. Open norms of course also exist in other areas of law, such as administrative or environmental law. This means that the law can – and should – adapt to changing scientific and factual circumstances, which is exactly what is needed when addressing the issue of climate change liability during a time that the worst effects of climate change and the egregious impacts on human rights associated with it can still be prevented.

## **Contact us**

In this memorandum, we provide an overview of crucial factual and legal aspects of the climate case against Shell and how all these aspects were tied together in a robust narrative. Our aim is to further empower climate litigators worldwide in their efforts to ensure that corporations are held accountable for their responsibility to help prevent dangerous climate change.

The legal and factual arguments in the Shell case are underpinned by over 500 pages in procedural documents and thousands of pages of factual corroboration, culminating in a four-day court hearing. This is a highly complex case and it is beyond the scope of this memorandum to discuss all of the issues raised, let alone all of the nuances involved.



Obviously, this document should not be construed as legal advice. It was drafted for information purposes to provide a concise overview of a successful climate litigation strategy including common hurdles and misconceptions about this type of litigation.

We would be glad to have follow-up conversations with anyone working in this field to discuss these topics in further detail. Please do not hesitate to contact the climate litigation team at Paulussen Advocaten – attorneys Roger Cox, Désirée Dexters, Mieke Reij, Funs van Diem, Samuel Keuls and PA Marion Schepers – via [climatelitigation@paulussen.nl](mailto:climatelitigation@paulussen.nl) to set up a digital meeting.

We also note that Milieudefensie has published a [manual](#) on the Shell case: “*How we defeated Shell*”. This manual also addresses substantive aspects of the case against Shell and provides insight into the broader context of climate litigation, including funding and campaigning. This memorandum is intended to dive deeper into the specific legal and factual intricacies of the subject matter and is therefore complementing the existing manual.

# Contents

Colofon .....	2
Introduction .....	3
1. Starting point .....	7
Box 1 The case for optimism .....	7
Figure 1 Key factual and legal ingredients of climate litigation .....	8
2. The relevance of the UNFCCC and the Paris Agreement – a universally defined danger line .....	9
3. Climate science – the irrefutable findings of the IPCC and the disturbing reality of dangerous global warming .....	11
Box 2 Why net-zero in 2050 is not enough .....	13
4. The impact of climate change on human rights – giving legal dimension to the nature and magnitude of the climate crisis .....	15
5. 5. Selection of defendants – systemic players that fail to align their climate policies with the temperature goal of the Paris Agreement .....	18
Box 3 Absolute versus relative emission reductions .....	18
Box 4 Responsibility for Scope 3 emissions .....	19
Box 5 Risk management through lobbying activities and greenwashing .....	19
Box 6 Systemic players without power and control over substantial emissions .....	20
6. Causality – the link between the emissions of the defendant and dangerous climate change .....	21
Box 7 Establishing causality as part of the broader analysis of the duty of care .....	22
7. The position of non-state actors in the UN climate regime – dangerous climate change cannot be prevented without the contribution of systemic players .....	24
8. Businesses have human rights obligations – the governance gap, the UNGP and the application of domestic duty of care standards .....	26
9. A national case with global impact – targeting global corporate climate policy .....	29
Box 8 Group corporate policy as the source of climate damage .....	29
10. Climate action and other SDGs – why access to energy and sustainable growth objectives do not conflict with climate action .....	31
Box 9 The alleged ongoing benefits of fossil fuel supply can never outweigh the urgency of preventing dangerous climate change .....	32
11. Government regulation – why carbon markets, emission trading schemes, operational permits and other regulations do not indemnify against civil claims for emission reductions .....	33
12. Reduction of emissions is the only possible remedy .....	36
13. Effectiveness – addressing arguments of leakage and perfect substitution .....	38
14. Proportionality - the urgency of preventing dangerous climate change outweighs commercial interests ....	40
Concluding remarks .....	42

## 1. Starting point

At the risk of stating the obvious, securing corporate accountability for climate change requires significant investment of time and resources. In light of the many complex factual, scientific, (geo) political and legal aspects and the high stakes, we should expect courts to apply rigorous scrutiny, especially as they are requested to impose bold and forward-looking remedies with global impact. Plaintiffs must bring courts in a position to confidently order these emission reductions. This means leaving no stone unturned in highlighting all relevant aspects of the case.

In our view, experimental cases that are used to explore the boundaries of the law can be counterproductive if the financial and substantive investments in those cases are insufficient to build a case for litigation that can withstand intense judicial scrutiny. Such cases will lead to unfavourable judgments and if these judgments pile up, there will be more focus on rejection of judicial intervention against large climate polluters.

We also believe that one of the keys to success is the conviction that a victory can be achieved. This requires letting go of everything we think we know as lawyers and approaching the litigation with the core belief that it is inconceivable that a court will not intervene against the biggest co-contributors to what will be the largest ongoing human rights violation in the history of mankind, provided that the court is sufficiently informed on all relevant aspects of the case.

### ***Box 1 The case for optimism***

We recognize that starting a climate case requires optimism. The problem of climate change is unique, which is why it will be difficult to compare it to existing precedents. But that also means there is great opportunity to set it apart and substantiate why judicial action is mandated. There simply is no comparable legal problem in terms of scale, the scientific certainty about the cause, the universal political consensus of what must be done to prevent dangerous climate change and the unprecedented existential consequences if that does not happen. There are many obstacles to overcome. This was true in the Netherlands as much as it is true in other jurisdictions. But it can be done and if you don't already believe that, we hope you feel differently after reading this memorandum.

## Overview of key factual and legal ingredients

Below is a non-exhaustive overview of key factual and legal ingredients of a successful climate case, based on the strategy of the Shell case and updated with some recent developments. All these topics will be discussed in this memorandum. We note that all topics are interrelated and to some extent overlapping.

**Figure 1** Key factual and legal ingredients of climate litigation





## 2. The relevance of the UNFCCC and the Paris Agreement – a universally defined danger line

The first topic we address is a basic, but crucial point about the role of the Paris Agreement in conjunction with the UN Framework Convention on Climate Change (“UNFCCC”) in litigation against corporate entities.

There are some misconceptions about the relevance of the Paris Agreement in this respect. Many tend to view this as a legal issue, and conclude that the Paris Agreement cannot create legal obligations for entities that are not a party to that agreement.

However, this misses the point. In Article 2 UNFCCC, the global community agreed to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Article 2 of the Paris Agreement specifies that this objective must be achieved by keeping the increase in average global temperatures well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels. Developments after 2015, including the Intergovernmental Panel on Climate Change (“IPCC”) Special Report: Global Warming of 1.5°C, made clear that the differences between the two temperatures are substantial and that the global community must strive to limit global warming to 1.5°C, as has most recently been confirmed by world leaders at COP26 in Glasgow.<sup>5</sup>

The crucial importance of the Paris Agreement is the fact that it reflects the universal political consensus, based on the best available science, that global society should limit global warming to preferably 1.5°C if we want to avert an existential crisis.

In relation to this finding, two other considerations in the final text of the Glasgow Climate Pact concluded at COP26 are of importance. First, that limiting global warming to 1.5°C requires “*rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45% by 2030 relative to the 2010 level and to net-zero around mid-century*”. Second, that this decade is critical to address the emissions gap that exists between current emission reduction efforts and the efforts that are necessary to avert dangerous climate change.<sup>6</sup>

This means that in every court case, these particular facts can be used as a starting point, namely that (i) there is a universally defined danger line of 1.5°C that should not be crossed if we want to prevent an existential crisis with very negative consequences for human life and all other life on earth, (ii) that averting that danger requires a global CO<sub>2</sub> reduction of 45% by 2030 and (iii) that achieving this particular goal by 2030 is critical. These facts are underpinned by robust climate science, which is irrefutable in court, see Chapter 3 on page 11.

These universally accepted facts are obviously relevant to anyone who materially contributes to this danger.<sup>7</sup> In light of this, it does not matter that corporate entities are not a party to the Paris Agreement. The real question is: what are, according to national (tort) law, the legal consequences of these universally accepted facts for large oil and gas corporations and other large multinational corporations? As will be shown, in combination with the other factual and legal ingredients in this memorandum, the answer should be that these corporations should at least align with that critical global effort to reduce emissions by 45% in 2030. This is based on the premise that if the world on average needs to reduce emissions by 45%, this can most certainly be demanded of the wealthiest multinationals.

<sup>5</sup> See [Glasgow Climate Pact](#), par. 21: “Recognizes that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2 °C and resolves to pursue efforts to limit the temperature increase to 1.5°C.”

<sup>6</sup> See [Glasgow Climate Pact](#), par. 22 and 5 respectively.

<sup>7</sup> See Chapter 5 on page 18 on the selection of the defendants and Chapter 6 on page 21 on causality for further discussion on what could constitute a material contribution.

For further detail, see Milieudefensie et al. v. Royal Dutch Shell plc., [Writ of Summons](#), dated 5 April 2019, chapter VI.2.2 – VII.1. See also the [Opening arguments](#) of 1 December 2020, paragraphs 11 – 15.

As a side note: the global CO<sub>2</sub> reduction pathway of 45% by 2030 (followed by net-zero by 2050) has only a > 50% probability (about a coin toss chance) of keeping global warming at 1.5°C. At the same time, this pathway still has a 15% chance of causing a global warming of 2°C or more at the end of this century. Therefore, even following this trajectory will not guarantee achievement of the Paris Agreement temperature goal and might even lead to a warming of 2°C or more.<sup>8</sup> This emphasizes the necessity of reducing emissions by at least 45% by 2030. For further detail, see the [Writ of Summons](#), dated 5 April 2019, chapter XI.2.1 and XI.2.2.

### Summary

Political consensus	Best available science	Factual relevance
Every country in the world agrees that we need to prevent dangerous climate change and that deep emission reductions are required this decade to help achieve this	Political consensus is underpinned by robust climate science, which is irrefutable in court (see Chapter 3 on page 11 )	The Paris Agreement (combined with the UNFCCC) represents a universally defined danger line that cannot be crossed if we want to prevent an existential crisis
The narrative shows that the Paris Agreement reflects that the entire world recognizes that we have to avoid global warming over 1.5°C. Averting that danger requires a global CO <sub>2</sub> reduction of 45% by 2030. These facts are obviously relevant to everyone that materially contributes to that danger		

<sup>8</sup> We note that the Working Group III contribution to the Sixth Assessment Report is scheduled to be released on 28 March 2022. This report will deal with mitigation of climate change and will therefore include the most recent findings on available pathways limiting global warming to 1.5°C.

### 3. Climate science – the irrefutable findings of the IPCC and the disturbing reality of dangerous global warming

Given the robust science on the causes and effects of global warming and the clear political consensus on the need to prevent dangerous climate change, one might ask if the science must be discussed in-depth. After all, almost everybody knows how serious the problem is and that emission reductions are required to address the problem.

Nevertheless, in our opinion the answer to this question is a resounding yes. We may assume that every judge in this day and age will have some basic knowledge of the general effects of dangerous climate change and the goal to limit global warming to 1.5°C. However, the reality is that the crucial findings of climate science as reviewed and analysed by the IPCC are not front of mind for people that do not deal with these topics every day.

All of this means that even if the opposing party will not dispute climate science – as it surely can't – this topic is a crucial part of the narrative to convey the urgency of the situation and to increase the willingness of courts to intervene. A limited overview of important findings is therefore insufficient.

The goal is to ensure that the judges are fully aware of the catastrophic consequences of dangerous global warming, based on robust and irrefutable scientific findings (see further below), and the disturbing reality that the world is not nearly on track to prevent dangerous global warming, despite these known facts. This is also an important stepping stone to discuss the individual legal responsibility of corporations in light of their knowledge, their (historic) contribution to the problem and in light of the fact that dangerous climate change cannot be prevented if systemic players do not take up their proportional share of the burden (see Chapter 5 on page 18 on the selection of defendants and Chapter 7 on page 24 on the position of non-state actors in the UN climate regime).

The reports of the IPCC are, of course, essential in this respect. To provide insight into the robustness and authority of the IPCC's findings, it is necessary to give some background into the process that results in IPCC publications.

The IPCC's reports are comprehensive and balanced assessments of the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place. All IPCC reports go through a rigorous process of scoping, drafting and review.<sup>9</sup> The IPCC essentially analyses all available relevant scientific, technical and social-economic information, with a priority for peer-reviewed literature, but also including selected non-peer-reviewed literature, including reports from governments and industry. Draft reports go through multiple stages of review, with hundreds of expert reviewers and governments critiquing the accuracy and completeness of the scientific assessment contained in the drafts.<sup>10</sup>

From a fact-finding perspective, this means that IPCC findings should be considered irrefutable in court. At least, we cannot envisage any possible counterevidence that could outweigh IPCC findings that have gone through this elaborate process.<sup>11</sup> Knowledge of this process will also eliminate the misconception that judges are requested to form their own opinion on the science or decide on specific uncertainties that should be left to the scientific or political domain. Courts are simply asked to take account of robust scientific findings.

<sup>9</sup> [Preparing Reports – IPCC](#)

<sup>10</sup> [IPCC Factsheet](#): How does the IPCC review process work?

<sup>11</sup> Along the same lines, we note that the [Model Statute](#) for Proceedings Challenging Government Failure to Act on Climate Change as published by the International Bar Association in February 2020 recognizes that IPCC findings constitute prima facie proof of the findings. A challenge to any statement contained in reports of the IPCC would require leave of the court (see Article 6).

They are particularly well-suited to weigh this evidence and putting this into perspective when deciding on the legal obligations of corporate actors. In that sense, climate litigation does not differ from other technically complex cases commonly adjudicated by courts.

Returning to the substance of climate science, we have summarized a few of the facts established by the IPCC that will, in any event, be important to address.

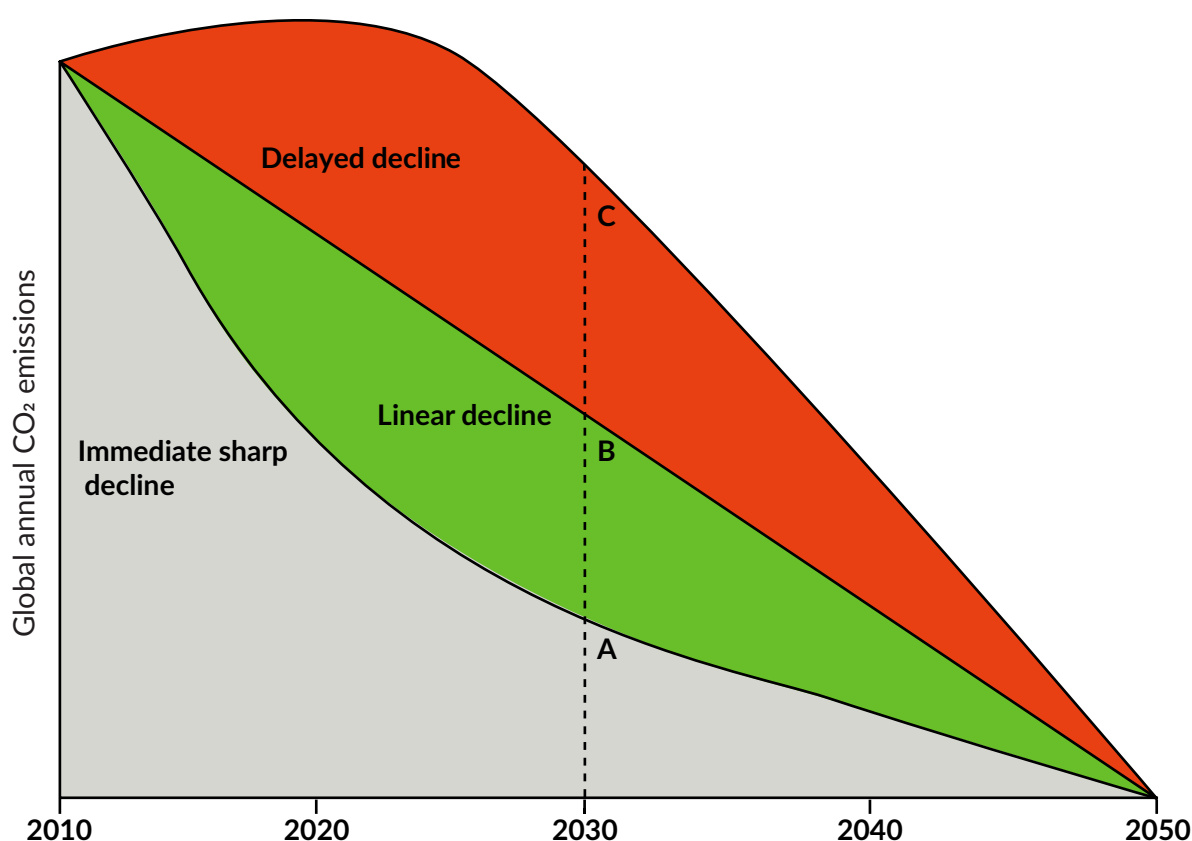
- i. The fact that climate change is caused by human activity, with burning of fossil fuels and related GHG emissions as the main driver of global warming, including the timing in which this became common knowledge. Also including:
  - a. The linear effect between increased concentrations of CO<sub>2</sub> and global warming;
  - b. The current CO<sub>2</sub> concentration in relation to the Earth's natural concentration over the 800,000 years before the industrial revolution;
  - c. Warming to date and the delays in the climate system, showing that the damage we see today does not reflect the damage that has already been done;
  - d. An explanation of cumulative emissions and the need for immediate, deep and sustained absolute emission reductions towards net-zero emissions to stabilize CO<sub>2</sub> concentrations in the atmosphere;
  - e. The explanation that limiting global warming to a specified level requires that the total amount of CO<sub>2</sub> emissions ever emitted be kept within a finite carbon budget.
- ii. The development of international climate policy, based on climate science
- iii. The definition and interpretation of the term dangerous climate change in international climate policy
- iv. The effects of dangerous global warming, including:
  - a. The Five Reasons for Concern as described in IPCC reports;
  - b. The risk of tipping points;
  - c. Global environmental and health risks;
  - d. The human interdependence of ecosystem goods, functions and services;
  - e. The difference in climate impact between 1.5°C and 2°C as well as the effects of a warming of around 3°C (the direction society is currently headed);
  - f. The direct and indirect effects of dangerous global warming in the relevant jurisdiction;
  - g. Intergenerational injustice.

### Box 2 Why net-zero in 2050 is not enough

Climate change is caused by greenhouse gas emissions that accumulate in the Earth's atmosphere, which increases the concentration of heat-trapping gases. To prevent dangerous climate change, the total amount of cumulative emissions must be kept within a finite carbon budget. At the current rate of CO<sub>2</sub> emissions, the carbon budget to limit global warming to 1.5°C could be depleted by 2030.<sup>12</sup> This means that the path to net-zero is crucial and makes it clear that plans to reach net-zero are insufficient if those plans do not result in reduction of CO<sub>2</sub> emissions by at least 45% in 2030 compared to 2010 levels.

The figure below illustrates the general point that the chosen path of emission reductions to net-zero in 2050 is crucial for the total amount of cumulative emissions until 2050. The three illustrative scenarios all lead to zero emissions in 2050, but the achieved reductions by 2030 (respectively the points A, B and C) basically define what the total cumulative emissions in 2050 will be. Following the grey scenario (immediate sharp decline), the cumulative emissions equal the grey surface area. Following the green scenario (linear decline), the cumulative emissions equal the grey and the green surface area. Following the red scenario (delayed decline), the cumulative emissions equal the grey, the green and the red surface area.

This makes it clear that preventing dangerous climate change is not just about the end-goal in 2050, but that it is even more important that the necessary reductions by 2030 will be met. This is why a minimum reduction of 45% by 2030 is so important and why all actors should strive for even more, to achieve the sharpest decline possible



12 IPCC, 2021: [Summary for Policymakers](#). In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 29.



All of these topics are not only essential for a thorough understanding of the problem, but they also all have a role to fulfil in the overall narrative. It shows the historic context, the early knowledge on the causes and effects of global warming and the notoriously slow progress of political breakthroughs to address the problem. It provides insight into the nature and the magnitude of the climate crisis and conveys the urgency of immediate, deep and sustained cuts in emissions between now and 2030 in order to limit global warming to 1.5°C. All of this information is relevant to the major emitters, who were and are fully aware of the catastrophic consequences of dangerous global warming and the need to phase-out fossil fuels, which is obviously relevant in deciding whether these companies have legal obligations in this respect. The carbon majors also conducted extensive research and analysis on their own, which should surely be addressed (see Chapter 5 on page 18 on the selection of defendants).

Discussing the effects of climate change is also particularly relevant to address issues of standing, as many jurisdictions require a finding of (threatened) injury or damage for a claim to be admissible.

For further detail, see Milieudefensie et al. v. Royal Dutch Shell plc., [Writ of Summons](#): Chapters IV – VII deal with all before-mentioned aspects of climate science, the developments of international climate policy based on climate science and the effects of dangerous global warming, including climate change impacts in Europe and the Netherlands. See also the [Notes on Oral Arguments No 8](#), dated 15 December 2020, paragraphs 1 – 42 on the urgency of reaching the 2030 emission reduction goal in light of the limited carbon budget and the cumulative effect of emissions.

#### Summary

Key facts on the causes and effects of global warming	Insight into IPCC process	The development of international climate policy	The interpretation of the term dangerous climate change	Cumulative effects of emissions and the remaining carbon budget	Delays in the climate system
Nature and magnitude of damage: an existential crisis	IPCC findings are irrefutable in court	The political consensus as established over the last 30 years	The importance of limiting global warming to 1.5°C	The urgency of reducing absolute emissions by at least 45% in 2030	The damage we see today does not reflect the damage that has already been done
Narrative: Dangerous climate change will have drastic effects on human life and all other life on Earth and the only way to still prevent this is with drastic and deep cuts in global emissions in order to avoid an existential crisis					

## 4. The impact of climate change on human rights – giving legal dimension to the nature and magnitude of the climate crisis

The discussion on climate science lays the groundwork for the next topic: the link between climate change and human rights. This will give legal dimension to the nature and magnitude of the climate crisis and how these facts should be assessed from a human rights perspective.

It is undeniable that the effects of climate change have disastrous consequences for human life and therefore impede the enjoyment of fundamental human rights. Warming to date is already causing global suffering. Because of delays in the climate system, the effects of global warming will continue to get worse, even if CO<sub>2</sub> concentrations in the atmosphere would remain at the current level. As explained in Chapter 2 on page 9, the global community agreed to limit global warming to 1.5°C. This is also necessary to limit the chance of passing tipping points and reaching a point of no return and to mitigate the worst effects of climate change.

Between 2008 and 2021, the UN Human Rights Council adopted 13 resolutions on climate change and human rights<sup>13</sup>, recognizing that climate change poses a threat to human rights around the world, including the right to life and the right to health.

Heat stress, floods, sea level rises, wildfires, the spread of infectious diseases, summer smog, the degradation and loss of ecosystems and flora and fauna and the risks to drinking water and food supplies will contribute to mounting violations of human rights around the world.

*“Only urgent, priority action can mitigate or avert disasters that will have huge - and in some cases lethal - impacts on all of us, especially our children and grandchildren. [...] This is a human rights obligation and a matter of survival. Without a healthy planet to live on, there will be no human rights - and if we continue on our current path -- there may be no humans.”*

Michelle Bachelet, United Nations High Commissioner for Human Rights, statement of 29 October 2021 on the COP26 Meeting

In its most recent resolution of October 2021, the UN Human Rights Council recognized the right to a clean, healthy and sustainable environment as a human right and appointed a new Special Rapporteur on Human Rights and Climate Change. This international recognition could pave the way for formal adoption in national and international law.<sup>14</sup> It could also encourage courts to take this right into account in climate litigation, even where it is not yet explicitly recognized in their domestic legal order.<sup>15</sup>

Human rights may be invoked directly in climate litigation against states, but they also play a role in civil law claims against corporations, through their indirect or horizontal effect and/or through widely accepted soft law instruments in the assessment of the duty of care owed by a company, as the District Court of The Hague recognized in the case against Shell.

This will be further discussed in Chapter 8 on page 26. In this chapter, we will highlight some of the main arguments underlying the conclusion that human rights law directly creates positive obligations for states to reduce emissions in order to prevent dangerous climate change. These findings are relevant to corporations, that have similar positive obligations to protect human rights and prevent violations (see Chapter 8 on page 26).

13 <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx>

14 See A. Savaresi, The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean? [Blog](#) of the European Journal on International Law 12 October 2021.

15 See footnote 14.

Courts in various jurisdictions, including the highest courts of the Netherlands<sup>16</sup> and Germany<sup>17</sup> have already recognized that the consequences of dangerous climate change pose an imminent threat to human rights of citizens.

These cases invoked Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights (“ECHR”) and the corresponding case law on these provisions of the European Court on Human Rights (“ECtHR”), in addition to national human rights law. Since this concerns the interpretation of fundamental human rights in the context of a global universal problem, this case law is also relevant outside the European context.

The ECtHR has ruled in various environmental pollution cases that states are under a positive obligation to take measures in the event of potential violations of the right to life or the right to respect for private and family life.<sup>18</sup> In other words, states are under an obligation to actively protect and prevent. This preventative duty arises even with just a heightened risk of violation, regardless of whether damage has already occurred.<sup>19</sup> Where there is a sufficiently real risk of a negative influence on the health of citizens – as will certainly be the case with dangerous climate change – the government comes under an obligation to protect its citizens from that negative influence, even if there is no absolute certainty regarding the causal link between the act (or omission) giving rise to the damage and the damage or threat itself.<sup>20</sup> In the matter of climate change, which will affect everyone, everywhere, it should further be noted that the ECtHR also weighs the question of whether there is any realistic possibility that a complainant could escape the environmental pollution by moving to a more environmentally favourable area. If no such possibility exists – such as in the wake of a 1.5°C temperature rise and its global negative impacts – then the state has a far-reaching duty of protection.<sup>21</sup> It is also not possible to sufficiently adapt to the effects of dangerous climate change. Chapter 12 on page 36 will elaborate on the argument that adaptation is not an alternative solution to mitigation for avoiding dangerous climate change.

The fact that claimants apply to the ECtHR in situations that impact entire countries or regions in no way detracts from the assumption that individual claimants suffer individual damage and are at an individual risk. In cases where a general public health risk arises that will affect people within a large area to greater or lesser degrees, the ECtHR has ruled that there is a sufficiently individual interest in protection.<sup>22</sup> This also makes sense: an individual violation of human rights should not provide a more favourable position than widespread human rights violations in the wake of inadequate government action.

In the case of *Taskin v Turkey*, the ECtHR ruled that even when the damage cannot be definitively established, due to the fact that it may not be inflicted until some time in the distant future (decades later) – offering a good comparison for the delay of several decades between emissions of CO<sub>2</sub> (cause) and warming (effect) –, it is nonetheless possible to appeal for protection under Article 8 of the ECHR if it can be shown that there is a generally acknowledged and foreseeable health risk.<sup>23</sup>

All of these aspects are imperative for courts to understand the full picture of why immediate intervention is necessary. And this is exactly what several courts have already concluded with respect to reduction obligations of states.

---

16 Dutch Supreme Court 20 December 2019, [Urgenda v the Netherlands](#).

17 German Federal Constitutional Court 24 March 2021, [Neubauer et al v. Germany](#).

18 See, for example, *Oneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004); *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009); *Budayeva v Russia* App nos 15339/02m 21166/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008).

19 *Di Sarno v Italy* App no 30765/08 (ECtHR, 10 January 2012).

20 *Tatar* (see footnote 18).

21 *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005).

22 See *Di Sarno* (footnote 19) and *Okay v Turkey* App no 3622/97 (ECtHR 12 June 2005).

23 *Taskin v Turkey* App no 46117/99 (ECtHR 10 November 2004).

To date, there is no case law yet from the ECtHR in relation to climate change. However, a ruling on Articles 2 and 8 ECHR may be expected in the coming years, as there are currently three cases pending before the ECtHR: (i) *Klimaseniorinnen v Switzerland*<sup>24</sup>, (ii) *Greenpeace Nordic et al v Norway*<sup>25</sup> and (iii) *Portugese Youth v Members of the European Union*.<sup>26</sup>

We note that the precedents discussed here are not directly applicable beyond the jurisdiction(s) they relate to, so it will of course be necessary to apply local or regional jurisprudence in every case. However, if case law is limited, discussing these precedents will still be relevant in multiple ways:

- (i) It will be obvious to the court that it will not be the first to connect climate change and human rights, and this will also be a logical connection in view of the effects as described on the basis of the best available climate science;
- (ii) The awarding of a claim in one country and the clarification of the relationship between dangerous climate change and human rights violations by one court will have an exemplary effect for courts in other countries. Courts look at each other when deciding on these global issues. For example, the judgment of the Dutch Supreme Court in the *Urgenda* case and the preceding opinion of the Advocate-Generals in that case both took account of a ground-breaking judgment of the US Supreme Court in *Massachusetts v. EPA*<sup>27</sup> in the substantiation of the decision.<sup>28</sup> The *Urgenda* case itself has been cited in other climate litigation decisions across the globe as well.<sup>29</sup>

This chapter highlights human rights obligations of states and the reflexive effect of European case law in other jurisdictions. This is an important stepping stone towards the human rights obligations for corporations, which will be discussed in Chapter 8 on page 26.

## Summary

Human rights impacts of climate change	Human rights as basis for legal obligations to reduce emissions	The effect of international legal precedents	Judicial intervention
Addressing the human rights impacts of climate change provides a legal dimension to the nature and magnitude of the crisis as established by climate science	Human rights law creates positive obligations for states to reduce emissions as well as for corporations (for the latter, see Chapter 8 on page 26)	Foreign rulings on these global issues will have exemplary effects for courts in other countries	The threat of dangerous climate change requires judicial intervention because of the (real risk of) human rights violations
The narrative shows that the impact of climate change on the enjoyment of human rights is evident and that human rights law creates positive obligations to protect and prevent			

<sup>24</sup> <http://climatecasechart.com/climate-change-litigation/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>

<sup>25</sup> <http://climatecasechart.com/climate-change-litigation/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/>

<sup>26</sup> <http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/>

<sup>27</sup> US Supreme Court 2 April 2007, *Massachusetts v. EPA*

<sup>28</sup> Dutch Supreme Court 20 December 2019 under 5.7.8 with reference to footnote 36. Idem Langemeijer and Wissink in their opinion of the *Urgenda* case under 2.13 with reference to footnote 91.

<sup>29</sup> See, for example, the paper *The Impact of the Paris Agreement on Climate Litigation and Law*, by The Hon. Justice Brian J Preston FRSN SC, Chief Judge of the Land and Environment Court of New South Wales, Australia.

## 5. Selection of defendants – systemic players that fail to align their climate policies with the temperature goal of the Paris Agreement

As we all know, addressing the climate crisis requires systemic change in almost all aspects of society, including a radical transformation of our energy system. That is why we believe litigation aimed at systemic players has the best chance of success.

The most obvious systemic players are parties with (i) power and control over a substantial amount of greenhouse gas emissions and (ii) the position to use their power and control in a way that matters to achieve the universal goal of preventing dangerous climate change.<sup>30</sup>

This requires a critical review of corporate structures, group governance and an analysis of the market and value chain in which the company operates. Annual reports or sustainability strategies give increasingly better insight into a company's emissions, the accounting method used to calculate those emissions and the current transition strategy of the company.

### ***Box 3 Absolute versus relative emission reductions***

Many companies have set relative emission reduction targets, such as targets to reduce the net carbon footprint of their products. Such targets are confusing and often insufficient, because it is not clear if and to what extent they result in absolute emission reductions. In fact, these targets could be achieved without actually reducing absolute emissions. A simple example: if the carbon footprint of a fossil fuel-based energy portfolio is 100, the addition of a portfolio of renewable energy with no carbon footprint will lower the average carbon footprint of the total energy portfolio, but it will not reduce the absolute amount of greenhouse gases emitted into the atmosphere.

This will result in an analysis of the power and control of the targeted entity (or entities) over emissions across the value chain (Scope 1, 2, 3). For example, the Shell case was directed against the parent company of the Shell group as the responsible entity for the group's global climate policy. The court established that Shell – directly and through its subsidiaries – has power and control over the emissions in its supply chain, both upstream (e.g. production, refining, purchasing of raw materials and electricity) and downstream (e.g. mix of energy products offered on the market).<sup>31</sup> In many aspects, the power and control a company like Shell exercises over emissions is far greater and more direct than the power a state exercises over emissions of citizens and companies within its jurisdiction.

<sup>30</sup> We could also foresee action against other actors with relevant influence on systemic change (see Box 5 on page 19 : Systemic players without power and control over substantial emissions).

<sup>31</sup> In the Shell case, the District Court distinguished the responsibility for Scope 1 emissions of the Shell group and Scope 2 and 3 emissions. It considered that the obligation to reduce 45% of emissions is an obligation of result for Scope 1 emissions and a significant best-efforts obligation for Scope 2 and 3 emissions, based on the finding that reducing emissions in these categories may require cooperation with business relations. Whatever one may think of this reasoning and the chosen solution, a significant best-efforts obligation, in our view, should mean that corporations must achieve the result of 45% reduction in emissions, unless they can prove that this was impossible despite doing everything humanly possible to achieve this goal. In this context, it is important to note that the District Court explicitly acknowledged that Shell may be required to take drastic measures and make financial sacrifices in taking the necessary measures (see Chapter 14 on page 40).



#### ***Box 4 Responsibility for Scope 3 emissions***

Let us specifically address the responsibility for Scope 3 emissions, which in the case of oil and gas majors is 85-95% of total emissions. First of all, this responsibility logically follows from the fact that these companies control the mix of energy products they offer on the market and hence they control the amount of Scope 3 emissions. In addition, reference can be made to numerous institutional publications to support the argument that businesses have a responsibility to reduce Scope 3 emissions, such as the 'Mapping of current practices around net zero targets' report of the University of Oxford, that analyses existing protocols and guidelines and points to international endorsement of companies' responsibilities for Scope 3 emissions. See District Court judgment, para. 4.4.18. See [Notes on Oral Arguments](#) No 7, dated 15 December 2020.

But the power and control of a defendant over emissions is not the only important criterion to consider in the selection of defendants. It is also important to analyse what the role of the defendant to date has been in addressing this issue, highlighting passive behaviour or perhaps even actively misleading the public or otherwise acting contrary to the universal goal of preventing dangerous climate change. Examples of this are climate denial, lobbying against the energy transition and/or against other measures aimed at reducing emissions and greenwashing. In addition, the internal knowledge and analysis of carbon majors about the dangers of climate change and what is necessary to prevent it is well-documented and obviously also relevant in this respect. All of this sets the scene and creates a foundation for liability and makes clear to the court – taking into account the governance gap as discussed Chapter 8 on page 26 – that the corporation will not change or at least not quickly enough, unless it is forced to change by a court order.

#### ***Box 5 Risk management through lobbying activities and greenwashing***

Another important aspect is to show how the company has identified the risks posed by climate change to the business and how it has chosen to manage those risks, including its risk appetite. Lobbying is a common and concerning form of risk management by multinational companies and their industry associations. Research shows enormous amounts of money are spent to exercise significant political power and influence on laws and regulations at major centres of governance.<sup>32</sup> A company's strategic risk appetite and risk management is informed by this ability to exercise power. On the other end of the spectrum, companies gain trust and create loyalty in society via greenwashing and media campaigns to create the perception that they will voluntarily advance the energy transition and therefore do not need to be regulated. This sophisticated strategy has been successful in protecting business as usual. Providing insight into these strategies shows that companies are aware that climate change creates many risks for the company and its financial stakeholders, including liability risks and risks to society as a whole. In spite of this, they choose to manage these risks in ways that are clearly at odds with achieving the goals of the Paris Agreement. An elucidation of such strategies provides judges with insight into these dynamics and how this way of working has facilitated the lack of action.

In the end, it must be clear to the court that the defendant is able but unwilling to change its behaviour voluntarily, while being well aware of the dangers of climate change and the measures that are necessary to help prevent global warming above 1.5°C. The lack of action to date will also show that more time will not result in an adequate response.

<sup>32</sup> Prof. J. Ruggie, *Multinationals as global institution: Power, authority and relative autonomy*, *Regulation & Governance* (2018) 12, 317–333.

Addressing a defendant's contribution to global emissions and their historic and present conduct in relation to climate change is also an important stepping stone in building the narrative in relation to causality, the foreseeability of the danger, the degree of blame and the level of care that can be expected from the defendant.

### ***Box 6 Systemic players without power and control over substantial emissions***

In this memorandum, we focus on major players with a non-negligible share of global emissions (see Chapter 6 on page 21). However, a systemic player does not necessarily have to be defined by its direct or indirect control over its corporate group and its global emissions. Systemic players might also be the financial institutions that finance these corporate groups, industry associations, regulators with systemic influence or other powerful domestic or international institutions in a position to exercise significant influence. These systemic players may also have a legal responsibility to use this influence in a manner that is beneficial to achieve the goals of the Paris Agreement. We believe that every systemic player has at least a significant best-efforts obligation in this respect. It is outside the scope of this memorandum to discuss this further, but it is important to consider that action might be possible against a wider range of actors.

### ***Summary***

<b>Causality and the ability to contribute to systemic change</b>	<b>Foreseeability</b>	<b>Unlawfulness</b>	<b>Degree of blame, unwillingness to change</b>
- power and control over substantial emissions (incl. scope 3); - position to help prevent dangerous climate change	Knowledge of the dangers of climate change and the necessary measures to prevent dangerous climate change	No Paris-aligned climate policy in place and/or no meaningful action to reduce absolute emissions	Historic behaviour: passivity, lobbying, greenwashing, responsibility for cumulative historic emissions
The narrative will make clear that these players will not change unless they are forced to change and therefore they should not be granted any additional time to change voluntarily			

## 6. Causality – the link between the emissions of the defendant and dangerous climate change

Climate change is caused by billions of emitters. However, the position of systemic players that substantially contribute to the problem should be distinguished from the position of individuals and most other private actors, in essence because the systemic players are responsible for a legally relevant amount of emissions or otherwise contribute to the problem in a manner that is legally relevant.

In terms of causation, no single country or company fulfils the 'but for' test (*the condicio-sine-qua-non test*), which is traditionally a precondition for liability. Climate change occurs as a result of the accumulation of all worldwide greenhouse gas emissions and these worldwide emissions are the joint, cumulative cause of climate change. No country or company therefore produces enough greenhouse gas emissions to be individually and solely responsible for causing dangerous climate change.

However, this 'but for' test is inappropriate in the context of climate change. A company's contribution of 0.1% or 0.01 % of global emissions would still mean that its contribution to this worldwide problem amounts to 1/1000 or 1/10.000 respectively. Those are still quite significant shares for one individual entity to contribute to a global humanitarian and ecological crisis. For climate litigation purposes these shares therefore seem significant enough to have legal relevance, while they would probably not suffice in any conventional legal matter. It obviously cannot be concluded that dangerous climate change would not occur without these emissions, but that is not a relevant question and that is also not what is requested in these cases. The request is to deliver a contribution to help prevent dangerous climate change that is proportional to the defendant's contribution to the problem by reducing the emissions that are directly or indirectly under its control.

Each major polluter is then only held liable for its own contribution, based on its own identifiable share in global warming. This proportional liability should be distinguished from the concept of joint and several liability, where multiple tortfeasors are held liable for the entire damage.

It is also important to consider that causality is essentially a normative concept to identify when the link between an event and a loss is legally relevant. Its application can be based on different policy aspects, including foreseeability, the degree of blame and reasons such as protecting people in a vulnerable position as opposed to solely addressing economic damage. In many other types of cases, courts have shown a willingness to tailor the causality threshold to achieve an equitable outcome.

This is precisely what courts are already doing in climate cases. Courts around the world have consistently rejected the minimum contribution defence when put forward by governments and held that the fact that a country's emissions might be relatively minimal on a global scale does not diminish their individual responsibility to reduce emissions.<sup>33</sup> The Netherlands and Belgium, with annual global emissions of 0.4 % and 0.3 % respectively, have both been held responsible for their inadequate climate policies.

---

<sup>33</sup> See inter alia US Supreme Court 2 April 2007, [Massachusetts et al v. EPA](#): "While regulating motor-vehicle emissions may not by itself reverse global warming, it does not follow that the Court lacks jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it." See also [Dutch Supreme Court](#), 20 December 2019, par. 5.7.7: "Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the 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". See also [German Constitutional Court](#), 24 March 2021, par. 149: "The fact that the German state is incapable of halting climate change on its own and is reliant upon international involvement because of climate change's global impact and the global nature of its causes does not, in principle, rule out the possibility of a duty of protection arising from fundamental rights."

In the Shell case, the District Court of The Hague established that Shell is a major player in the worldwide market of fossil fuels, with total global emissions that exceeds the CO<sub>2</sub> emissions of many states.<sup>34</sup> The court explicitly underscored that the fact that Shell is not solely responsible for the climate crisis does not absolve the company of its individual responsibility:

*“The court acknowledges that RDS cannot solve this global problem on its own. However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence”<sup>35</sup>*

Another example where a court rejected this defence from a corporate defendant is the case of Lliuya v. RWE. In this case, a Peruvian farmer sued German energy major RWE for its contribution to climate change, which is melting the glacial lake and puts the farmer’s village at risk. Lliuya has requested 0.47% of the costs of measures to protect his property against a glacial lake outburst flood, in line with RWE’s alleged historic cumulative contribution. The German appeals court recognized on a preliminary basis that a partial contribution can be sufficient for a finding of causality.<sup>36</sup>

**Box 7 Establishing causality as part of the broader analysis of the duty of care**

Causality requires a relationship of sufficient proximity. The plaintiff must show that the defendant had a measure of control over and responsibility for the potentially dangerous situation. Whether or not that requirement is met in a specific case depends on all facts and circumstances and should also be assessed in the broader context of the analysis of the degree of care that may be expected from the defendant. There simply is no one-size-fits-all threshold that determines whether or not a corporate defendant can be sued. When it comes down to it, the question is whether a specific defendant, looking at its power and control and all other circumstances, is legally required to take appropriate action to help avoid the worst effects of the climate crisis and thereby reduce the risk of widespread human rights violations.

As noted at the start of this chapter, the position of systemic players that substantially contribute to the problem should be distinguished from the position of individuals and other businesses, whose contributions to the problem are too small to have legal relevance. These actors may have a moral responsibility, but not a legal responsibility to reduce emissions. For example, you obviously cannot enjoin someone from getting on a plane or from driving a car.

<sup>34</sup> District Court The Hague 26 May 2021, Milieudefensie et al v. Royal Dutch Shell, par. 4.4.5.

<sup>35</sup> District Court The Hague 26 May 2021, Milieudefensie et al v. Royal Dutch Shell, par. 4.4.49.

<sup>36</sup> OLG Hamm 1 February 2018 (Lliuya v. RWE AG): “Moreover, as the defendant’s argument ultimately seeks to establish, the fact that multiple parties have caused the interference (‘disturbers’) does not necessarily mean that eliminating that interference would be impossible. On the contrary, the established interpretation is that, in the case of multiple ‘disturbers’, each participant must eliminate its own contribution, and joint and several liability is only considered if the contributions cannot be separated and there is equal importance.”

## Summary

Sufficient proximity between the conduct of the defendant and the (threatened) damage	No 'but-for' test / <i>condicio sine qua non</i>	Causation is a normative concept	Proportional liability
Systemic players with direct and/or indirect control over a non-negligible amount of emissions sufficiently contribute to the problem to be held responsible	The but-for test is not appropriate in the context of climate change, as it does not do justice to its complexity and would effectively render any action against states and corporate polluters impossible	The application of causation can be based on different policy reasons, including foreseeability, the degree of blame and reasons to protect people in a vulnerable position, depending on the situation at hand	The defendant should " <i>do its part</i> " to help prevent dangerous climate change, which means he must eliminate his own contribution to the problem
The narrative distinguishes the contribution and responsibility of systemic players in relation to dangerous climate change from the role of any other individual actor. The fact that the defendant is not solely responsible for the problem or individually able to solve the problem should not be a barrier to recognizing that systemic players have a legal responsibility to carry their proportional share of the burden in order to help prevent dangerous climate change			



## 7. The position of non-state actors in the UN climate regime – dangerous climate change cannot be prevented without the contribution of systemic players

The position of non-state actors is another crucial aspect in the overall narrative. It shows that countries know that they cannot meet the Paris climate goal without the contribution of businesses taking up their proportional share of the burden. This is important to note because sufficient action is still lacking and, even if the new national climate pledges and other mitigation measures are fully met, the world could presently still be headed for global warming in excess of 2.7°C.<sup>37</sup> Such warming will have catastrophic consequences, including widespread and continuing human rights impacts.

The fact that action from the private sector is indispensable to prevent dangerous climate change has long been recognized in the UN climate regime. This understanding can be traced back to the annual UN conference of 2011 that formed the basis of an action plan necessary to address the substantial emissions gap between collective state reduction promises and the collective emission reduction that was actually required by 2020. In this context, non-state climate action has been recognized as one of the four pillars for closing the emissions gap.

Essentially, all states and international bodies agree that climate action by non-state actors is required to reach the goal of the Paris Agreement. The impact of non-state climate action also goes much further than emission reductions that companies achieve themselves. Every action in conformity with the Paris Agreement on the part of important non-state parties may be expected to produce a flywheel effect that enables and encourages countries and other parties to show more climate ambition. The absence of action creates an opposite effect: as long as major businesses fail to commit to substantially reduce their absolute emissions, there will be no flywheel effect, but these businesses will be a ball and chain to the global community and hamper the universal goal of preventing dangerous climate change. In this context, absolute emission reductions of at least 45% by 2030 are essential, because the remaining carbon budget that gives a fighting chance to limit the average temperature increase to 1.5°C will be spent before 2030 at the current rate of emissions (see Chapter 2 on page 9).<sup>38</sup>

We have already addressed that most systemic players will not change unless they are forced to change. In the next chapter, we will discuss the role of international human rights and soft law instruments including the UNGP and the OECD Guidelines in the application of domestic duty of care standards, also in light of the governance gap – which is the lack of effective government action to regulate the conduct of multinational companies.

For further detail, see the [Opening arguments](#) in *Milieudefensie et al. v. Royal Dutch Shell plc.*, of 1 December 2020, starting at par. 130, including references to important sources such as Chapter 2.B of the international handbook on the Paris Agreement published by Oxford University and the 2018 UNEP report on the role of non-state and subnational actors.

---

<sup>37</sup> United Nations Environment Programme (2021): [Emissions Gap Report](#) 2021, The Heat Is On – A World of Climate Promises Not Yet Delivered. Nairobi

<sup>38</sup> IPCC, 2021: [Summary for Policymakers](#). In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 29.

## Summary

UN regime recognizes the importance of non-state action	Systemic players can make or break the Paris climate goal
States recognize that they cannot do it alone and need the contribution of non-state actors to achieve the Paris goal	Every Paris-aligned action has the capacity to produce a flywheel effect that encourages countries and other private actors to undertake more ambitious climate action
The narrative contributes to the understanding of courts that judicial intervention is required, because we are in the last decade to still prevent dangerous climate change and this cannot be prevented without the proportional contribution of systemic players. It also shows that an emission reduction order will have more impact than just emission reductions by that particular company, as it creates momentum and builds capacity for further emission reductions from other actors	

## **8. Businesses have human rights obligations – the governance gap, the UNGP and the application of domestic duty of care standards**

In Chapter 4 on page 15, we discussed the clear link between climate change and human rights, which provides a legal dimension to the nature and magnitude of the climate crisis. Chapter 7 on page 24 addressed the role of non-state actors in the UN climate regime and established that businesses can make or break the Paris climate goal. The next step is to link business to human rights protection. Unlike in climate litigation against states, citizens and NGOs cannot directly invoke human rights protection against businesses. However, civil courts can and have attributed horizontal effect to provisions of the ECHR or other international human rights treaties on a wide scale, via open norms in tort law such as the duty of care. In addition, there is a clear trend towards the attribution of reflexive effect to internationally recognized soft law instruments, including the UN Guiding Principles, via open norms in tort law. Both can form an independent basis to take human rights obligations into account in the context of the duty of care, allowing courts to consider from case to case the significance it attributes to human rights.

In the context of climate change, human rights should weigh heavily in assessing whether or not a company can be obliged to reduce its emissions. The discussion on climate science and the impact of dangerous climate change will make it clear to the court that society is dealing with an existential crisis that endangers the whole of society.

An important aspect of why businesses have an independent legal obligation to respect human rights is the governance gap. Legal protection of fundamental rights was once established to protect individual citizens against the power of the state. However, as a result of globalization, multinationals have become equally if not more powerful actors in society, while they are insufficiently regulated by national governments. Consequently, citizens require protection against human rights violations by private actors.

In the case against Shell, this is further substantiated on the basis of the work of the late John Ruggie, professor in Human Rights and International Affairs at Harvard University, who was also the former UN Secretary-General's Special Representative for Business and Human Rights and the founding father of the UN Guiding Principles. His research found that globally operating companies exercise substantial influence on political and regulatory centres worldwide, including Washington and Brussels. Through their lobbying activities, these companies have significant political power and influence on laws and regulations. They have direct and indirect access to important lawmakers and manage to stop, delay and water down intended laws and regulations. Carbon majors and their industry associations have used this power to block the energy transition. In addition, carbon majors have significant economic power and the capacity to invest billions of dollars in energy products. Moreover, the control of fossil fuel companies over emissions across the value chain is in many ways more significant and more direct than the control of a state over the emissions of its citizens and companies. This is especially true for vertically integrated multinationals.

On the other hand, national governments do not have enough control over multinationals due to fast-paced globalization. A lack of international supervision and international regulation creates a power vacuum for internationally operating businesses in which it has become increasingly easier to operate outside the rules of individual countries, without any fear of sanctions. This governance gap has resulted in an increase of human rights violations by multinationals.

In response to these adverse effects of globalization, the UN Guiding Principles on Business and Human Rights (UNGPs) established in 2011 with the support of the UN Human Rights Council.

The UNGPs have become an authoritative and internationally recognized source of soft law. The UNGP are also consistent with other important sources of soft law, such as the OECD Guidelines for Multinational Undertakings. The UNGPs serve to embed and elaborate on the basic principle that, apart from states, businesses also have independent obligations to prevent human rights violations, in an attempt to close the governance gap. Many multinationals have cooperated in the drafting process of the UNGPs and have publicly endorsed the UNGPs. However, the UNGPs are not a binding legal instrument, which brings up the question of how compliance with these principles could be accomplished.

The work of John Ruggie illustrates why it is imperative that the UNGPs can be enforced through domestic duty of care standards. His work describes two other ways which could bind multinationals to the UNGPs and explains why neither has proven to be a viable option. First, the conclusion of a binding universal convention to regulate the conduct of multinationals. This is doomed to fail in advance, even if it was only on purely practical grounds, because this would require worldwide harmonisation of national legal systems, at least of important fields of law. The second possibility is voluntary self-regulation. However, this is also not expected to happen in a manner that is sufficient to ensure global compliance with these important norms, especially in light of the lobbying influence commonly exercised to safeguard current business models and vested financial interests. The absence of adequate enforceability leaves citizens at risk for human rights violations.

In these situations, prof. Ruggie explains that the application of international soft law such as the UNGPs in national legal systems could break the impasse by converting international soft law into national hard law on a case-specific basis. As such, the UNGPs as a soft law instrument have reflexive or consequential effect which leads to their application in deciding on the scope of a company's duty of care to contribute to the prevention of dangerous climate change. Climate litigation such as the court case against Shell should be seen as a last resort to break through the current status quo which will lead to dangerous climate change and related human rights violations. In this context, the only appropriate remedy is the reduction of absolute emissions, which will be further explained in Chapter 12 on page 36.

For further details, see Milieudefensie et al. v. Royal Dutch Shell plc., [Writ of Summons](#) of 5 April 2019, par. 691 – 715, [Opening arguments](#) of 1 December 2020, par. 83 – 96 and par. 161 – 171 and [Notes on Oral Arguments](#) No 6, dated 15 December 2020, par. 53 – 67 and [Notes on Oral Arguments No 7](#), dated 15 December 2020, par. 8 – 12 and par. 27 – 40.

## Summary

Role of non-state actors	Governance gap	Human rights obligations of companies	Remedy of absolute emission reductions
Every country in the world agrees we need to prevent dangerous climate change and get to (net) zero greenhouse gas emissions (see Chapter 2 on page 9)	Globally operating companies have power that exceeds the power of many states, including more direct control over emissions	Climate change is a human rights issue. In fact, dangerous global warming is an existential threat to our global society and would cause unimaginable and irreversible destruction (see Chapter 4 on page 15)	Absolute emission reductions are the only way to prevent dangerous climate change (see Chapter 12 on page 36 )
Dangerous climate change cannot be prevented without the contribution of non-state actors (see Chapter 7 on page 24)	Multinationals operate in a power vacuum	There is universal consensus that businesses must protect human rights and prevent violations	
The overall narrative clearly separates the legal position of systemic players from other businesses and individuals. It shows that these multinational corporations cannot be properly regulated by individual national states and justifies imposing emission reduction obligations on these corporations. The human rights context is also crucial to convey the message to courts that the requested remedy is reasonable and necessary in light of what is at stake			



## 9. A national case with global impact – targeting global corporate climate policy

In the Shell case, the District Court ordered the parent company of the Shell group to align its global corporate climate policy with the Paris goal and reduce the global emissions of the international Shell group, which consists of 1.100 subsidiaries operating all over the world, by at least 45% by 2030. By awarding the claim, the Dutch court created an extraterritorial effect which requires Shell to use its power and control over subsidiaries and business relations to achieve global emission reductions.

The court found that the inadequate global climate policy of the parent company is the source of climate damage and as such facilitates the excess of emissions of its subsidiaries. This policy is the first step in the chain that causes climate damage, not the emissions of subsidiaries (see Box 8: Group corporate policy as the source of climate damage below). Change can and should therefore be effectuated at the level of the parent company responsible for climate policy.

This is a logical conclusion in view of the precautionary principle and the principle that corrective and preventive action should be taken at its first basic source. The qualification of policy as the source of climate damage is also in line with the judgments in climate cases against governments such as the Urgenda case. After all, these governments were ordered to change their climate policies in order to reduce emissions of citizens and corporations in their territories.

### ***Box 8 Group corporate policy as the source of climate damage***

At the core of this argument is the fact that corporate policy lays the foundation for the future. Consider the decision to build a big new oil platform. Once that decision is made at the group level, it will be executed with contracts and financing so that completion and commissioning of the platform can take place in, let's say, 5 years. The platform will be operated for 30 years. This means that today's policy and the choices made on the basis of today's policy directly results in a lock-in of extra emissions for decades. The oil to be pumped up and sold will be used to repay the loans and capital-intensive investments taken on with interest. Calculated and expected profits will have to be generated. This means that all stakeholders – the company itself, its shareholders and financiers – consequently have a great interest in securing the right to exploit and sell the oil to realize these returns. This example illustrates that it is necessary and logical to target the underlying policy of the parent company that forms the basis of all subsequent action.

The above shows how a national case can have a global impact if directed against parent companies of multinational corporate groups. The parent company can be sued in its own jurisdiction or, alternatively, in the jurisdiction where the damages occur, which in the case of climate change can be anywhere. The fact that the sued parent company has power and control over its international group companies does the rest.

This also shows that there are no sovereignty concerns. When the court has jurisdiction, the extraterritorial effect of the judicial order is a logical consequence of the power and control of the parent company over the group's global emissions.

See Milieudefensie et al. v. Royal Dutch Shell plc., [Notes on Oral Arguments No 3](#), dated 1 December 2020 for further detail.

## Summary

Group corporate policy is the source of climate damage	Extraterritorial effect
The parent company determines the strategic direction of the group. Its policies therefore determine to what extent emissions will be caused by its subsidiaries abroad (see Box 7 on page 22)	The global effect of an order against a parent company to reduce emissions is merely a consequence of its power and control over the group's global emissions
Narrative: It is necessary and appropriate to facilitate change at the level of the parent company, because global corporate climate policies are the source of climate damages if they are not Paris-aligned	

## 10. Climate action and other SDGs – why access to energy and sustainable growth objectives do not conflict with climate action

A common narrative used by oil and gas majors is that society faces a dual challenge of addressing climate change while extending the economic and social benefits of energy to everyone on the planet. This is used as a reason to justify continued significant investments in fossil fuels. In doing so, these objectives are presented as conflicting challenges, which is misleading. As will be explained below, it is evident that the global community views these goals as connected and leading to multiple synergies.

In 2015, the international community adopted both the UN Sustainable Development Goals (“SDGs”) and the Paris Agreement within three months of each other. Climate action is one of 17 SDGs. This poses the question how climate action relates to the other 16 SDGs – which amongst others aim to end energy poverty – and whether choices related to how and in what order of priority the different SDGs should be achieved must be left to the political domain.

Fact is that the 196 countries which are signatories to the Paris Agreement and the UN SDGs aligned both documents with each other so that they form a synergetic whole. The international community deems the approach to dangerous climate change as crucial for addressing all other national and international development goals. The Paris Agreement contains 12 references to the promotion of sustainable development, including the recognition in the preamble “[e]mphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty.” It is clear that climate change has the worst impact on those who have contributed the least to the problem, including the poorest countries in the world as well as marginalized communities. Delayed and inadequate climate action would increase inequality in the world even further.<sup>39</sup>

Climate action is the only SDG in UN Resolution 70/1 that always has an asterisk to reference a footnote. The footnote makes it clear that the UNFCCC is and remains the primary international and intergovernmental forum for the global approach to climate change. From this, it is apparent that the treaty law approach to climate change of the UNFCCC and any legal instruments as adopted by the Conference of the Parties have priority over other UN SDGs.

This is logical, as the UNFCCC, contrary to the resolution, is legally binding and consequently has a higher status than the UN resolution.

In light of this, it is clear that courts are not requested to choose between different policy objectives or prioritize different SDGs over others to replace political decision-making: that choice has clearly been made by the international community. Achieving the Paris climate goal is indispensable in order to deliver on the other SDGs.

In this context, it is important to emphasize that a national judicial order with extraterritorial effect does not interfere with the political sovereignty of foreign states. All countries have committed to both the UNFCCC and the Paris Agreement as well as the SDGs and recognize the extreme urgency of these challenges. A court order that advances those objectives can therefore not be viewed as contrary to the political interests of other states.

---

<sup>39</sup> Chapter 5 of the Special Report on 1.5°C describes the interactions of climate change and climate responses with sustainable development, in particular the difference in impacts on sustainable development between 1.5°C and 2°C. It finds, among other things, that “limiting global warming to 1.5°C rather than 2°C above pre- industrial levels would make it markedly easier to achieve many aspects of sustainable development, with greater potential to eradicate poverty and reduce inequalities.” And: “Without societal transformation and rapid implementation of ambitious greenhouse gas reduction measures, pathways to limiting warming to 1.5°C and achieving sustainable development will be exceedingly difficult, if not impossible, to achieve.”

***Box 9 The alleged ongoing benefits of fossil fuel supply can never outweigh the urgency of preventing dangerous climate change***

This chapter deals with the relation of climate action to other SDGs. A closely related common narrative of oil and gas majors is a passive narrative of individual responsibility: there is increasing demand for energy, so we must supply fossil fuels to meet that demand and deliver economic growth, including in developing countries. This suggests that the utility of their conduct should be balanced against the need to prevent dangerous climate change. Considering the immense threat of dangerous climate change, this is a false narrative that also disregards the influence of systemic players on the energy transition and the exacerbated lock-in effects created by delayed climate action. It also unjustly individualizes responsibility for climate change, while consumers are dependent on a global system that runs on fossil fuels.

See Milieudefensie et al. v. Royal Dutch Shell plc., [Notes on Oral Arguments No 5](#), dated 3 December 2020, for further detail.

*Summary*

Climate action is indispensable to achieve other SDGs	Climate action has priority status
The global community recognizes that climate action is crucial for the achievement of all other national and international development goals	Climate action is the only SDG regulated by international treaty and in this context has priority over other SDGs
The narrative makes it clear that courts are not requested to choose between the importance of different SDGs, as climate action is the only SDG regulated by a separate legally binding international treaty and climate action is crucial to achieving the other SDGs. This means that a national court order advancing Paris-aligned global climate action does not interfere with political sovereignty of foreign nations. It also invalidates the 'fossil fuel saviour' narrative commonly used by carbon majors	

## 11. Government regulation – why carbon markets, emission trading schemes, operational permits and other regulations do not indemnify against civil claims for emission reductions

A common defence in private climate litigation is the following: we operate in accordance with local regulations and government permits and otherwise comply with all government-mandated regulation, so our emissions cannot be unlawful. In essence, this defence suggests that companies can never have an individual legal responsibility as long as they comply with existing regulation. Companies often even recognize that more action is needed, but argue that governments must take the lead.

When it comes down to it, this is an attempt to hide behind the lack of (adequate) action in addressing the climate crisis globally, while fossil fuel majors have spent billions in lobby activities to combat, delay or water down effective climate regulations, successfully protecting their fossil fuel business models and growth plans in this manner. Against this background it is quite inappropriate to hide behind flawed or even absent regulations of the government.

See par. 4.5.2 of the District Court judgment against RDS: *“The Shell group’s policy, as determined by RDS, mainly shows that the Shell group monitors developments in society and lets states and other parties play a pioneering role. In doing so, RDS disregards its individual responsibility, which requires RDS to actively effectuate its reduction obligation through the Shell group’s corporate policy.”*

This defence disregards the doctrine of tort and disregards the fact that courts must provide effective legal protection against human rights violations.

Dutch law defines a tortious act as (i) a violation of someone else’s right (entitlement), (ii) an act or omission in violation of a duty imposed by law or (iii) an act or omission in violation of what according to unwritten law has to be regarded as proper social conduct. We refer to this last category of tortious conduct as the duty of care, which allows courts to take into account all relevant facts and circumstances in assessing whether specific conduct violates the duty of care. Most jurisdictions around the world have similar open norms in civil law (just like in administrative and environmental law), because legislators have recognized that it is impossible to foresee and regulate all types of behaviour that may be contrary to the duty of care. Moreover, as society evolves, so will the assessment of conduct that may constitute a violation of the duty of care. The legislator has purposely left this freedom to courts, that are well-equipped to make this assessment on a case-by-case basis.

It follows that courts can take into account the existence of government measures such as permit systems, but this can never be a reason to categorically exclude other relevant facts and circumstances, such as a company’s awareness of the dangers of climate change, its share in causing climate change, the goals of the UNFCCC and the Paris Agreement, the risk of dangerous climate change in the event the alleged tortious conduct continues and the burden for a company to take measures to adapt its conduct. These and other relevant facts and circumstances together determine which actions the duty of care demands in a specific case.

The fact that regulations relating to a risk (in this case: dangerous climate change) are lacking or are insufficient, does not take away the fact that an actor may have an independent duty of care to take preventive measures. The fact that the risky conduct is accepted by society or even encouraged by the government, does not (automatically) make this conduct lawful.

A parallel can be made with the regulation of asbestos. The risks which accompanied the use of asbestos were known in the early 1960s. The Dutch government (as most other governments in the world) fell short in its duty to provide protection and did not prohibit the use of asbestos until 1993. The societal impact of this failure was enormous. For example, a prohibition on the use of asbestos in 1965, instead of in 1993, would have saved 34,000 victims and 41 billion guilders in damages in the Netherlands alone. In the end, many asbestos producers and employers all over the world were found liable with retroactive effect, because they knew or should have known the dangers of asbestos since the 1960s. Courts established that at that point in time there was sufficient certainty in the international scientific community that exposure to asbestos could cause mesothelioma. This should have led asbestos producers and companies working with asbestos products to take precautionary measures and phase-out asbestos use as quickly as possible and use or develop safe alternatives.<sup>40</sup>

The defence related to government regulation is also contrary to human rights law. There is international consensus that businesses have an independent and standalone obligation to respect human rights, which means that merely following developments and measures taken by states is insufficient (see Chapter 8 on page 26). In the Urgenda case, the Dutch Supreme Court held that climate change constitutes a threat to human rights, more specifically the right to life and the right to a peaceful family life, as laid down in Articles 2 and 8 ECHR.<sup>41</sup> This relationship between climate change and human rights has also been established in court rulings in other jurisdictions.<sup>42</sup> These rights bring about a positive obligation to take reasonable measures to avert the real and imminent dangers presented by global warming (see Chapter 4 on page 15). Article 13 ECHR requires that domestic law offers an effective legal remedy to combat a violation or likely violation of the rights guaranteed by the ECHR. This entails that domestic courts must provide effective legal protection, which cannot be guaranteed if the courts must defer to government regulation.

In relation to government regulations and permits, it is also important to clarify that these systems, such as the European Emissions Trading System, are a result of political compromise and based on inadequate reduction targets. For example, the ETS reduction target for 2020 was 20%, while the bandwidth for emission reductions under a 2°C scenario (the pre-Paris goal) was 25-40%. For this reason alone, the fact that these companies are subject to government regulation cannot indemnify them from civil action. Furthermore, these regulations do not cover Scope 3 emissions (emissions caused by the use of products sold), which in the case of fossil fuel majors is the vast majority (85-95%) of total emissions. In addition, permits for installations do not usually include an overall assessment of the impacts of those projects on the climate. All of these subjects are important to address, because it shows the courts why intervention is justified and necessary.

See Milieudefensie et al. v. Royal Dutch Shell plc., [Notes on Oral Arguments No 4](#), dated 3 December 2020, for further detail.

---

<sup>40</sup> See, for an example from the United States, the United States Court of Appeals, 5th Circuit 10 September 1973, 493 F.2d 1076 (Clarence Borel v. Fibreboard Products Corporation). And an example from the Netherlands: Dutch Supreme Court 17 February 2006, ECLI:NL:HR:2006:AU6927 (Heesbeen v. Van Buuren).

<sup>41</sup> Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, e.g. paras. 5.5.2, 5.6.2 and 5.7.9.

<sup>42</sup> See, for example, Vzw Klimaatzaak v. Kingdom of Belgium (<https://www.klimaatzaak.eu/en>) and Neubauer et al v. Germany, (<http://climatecasechart.com/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/>)



## Summary

Government regulation and permits do not have exculpatory effect	Businesses have human rights obligations	Judicial intervention is required
<p>Open norms like the duty of care specifically leave discretionary authority to the courts to take into account all relevant facts and circumstances to assess whether specific conduct violates the law</p>	<p>It is widely accepted that businesses have an independent legal responsibility to respect human rights</p>	<p>Open norms in tort law exist because the legislator cannot foresee and regulate all types of behaviour that may be contrary to the duty of care. The legislator leaves it to the courts to decide this case by case, based on all relevant facts and circumstances. This is their constitutional duty, as is the duty to provide effective legal protection in case of human rights violations by businesses</p>
<p>The narrative aligns with the overall narrative that corporations may have an individual legal responsibility towards citizens and NGO's that is additional to their compliance with government regulation. The narrative also further supports the constitutional mandate of courts to intervene in climate change disputes. It highlights that government regulation is not an exclusive instrument, does not cover all emissions and is based on inadequate climate targets or does not even take climate impacts into account. This is also a reminder of the existence of the governance gap, through which global activities of multinationals are insufficiently regulated and which has enabled multinationals to block, slow down or water down effective regulation</p>		

## 12. Reduction of emissions is the only possible remedy

Climate change is a unique problem different from other complex issues because there is universal political consensus on the basis of robust scientific findings that dangerous climate change must be prevented. In addition, it is crucial to realize that – again unlike many other complex issues – the problem of dangerous climate change only has one solution: absolute emission reductions. Chapter 2 on page 9 discussed that Article 2 of UNFCCC in combination with Article 2 of the Paris Agreement represent a universally defined danger line at limiting global warming to preferably 1.5°C. The global community, on the basis of climate science, recognizes that staying within this limit allows society to still reasonably adapt to the adverse effects of climate change.<sup>43</sup> Past that point, ecosystems will likely not be able to adapt to a warming world and there will be significant risks that entire ecosystems will collapse, and tipping points could set in motion a whole range of other catastrophic and irreversible effects with global consequences such as the melting of permafrost or the Antarctic ice sheet and the desertification of the Amazon forest. In other words: without climate change mitigation, adaptation will be impossible.

This is why an order for emission reductions consistent with a commonly accepted pathway does not interfere with political or boardroom decision-making or create other sovereignty issues. Such an order merely imposes what evidently must be achieved in order to prevent dangerous climate change and prevent human rights violations. The end result would be an emission reduction order consistent with a 1.5°C pathway, which is an outcome that is recognized by all political leaders in the world and merely a correction of what should have happened in the international political domain. How emission reductions will be achieved is then up to the defendant.<sup>44</sup>

We note that this does not force the defendant to become a renewable energy company. After all, it is possible to impose an injunction in order to help prevent climate damages, but that is not an injunction that mandates a company to start a different type of business. There are multiple strategies a company could pursue to almost halve its emissions by 2030. That could be achieved by a change of its fossil-fuel related business, but also by becoming a smaller fossil-fuel business, through share buybacks or otherwise (see Chapter 14 on page 40).

This line of argumentation also underlines the mandate of the courts to impose emission reduction orders, including orders with extraterritorial effect.

For further details, see Milieudefensie et al. v. Royal Dutch Shell plc., [Writ of Summons](#), dated 5 April 2019, par. 815 - 822 and [Notes on Oral Hearing No 8](#), par. 73 – 91

---

<sup>43</sup> See also Article 2(b) of the Paris Agreement, stipulating that the agreement is focused on “Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production.”

<sup>44</sup> See the Shell-judgment, par. 4.4.54: “RDS has 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. The court notes here that a ‘global’ reduction obligation, which affects the policy of the entire Shell group, gives RDS much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units.”

## Summary

<b>There is only one solution to prevent dangerous climate change</b>	<b>Adaptation is not a substitute for emission reductions</b>
Science has established what level of absolute emission reductions are minimally required to keep a reasonable chance of preventing dangerous climate change	The goal of limiting global warming to 1.5°C is established on the basis of the finding that past that point, there are significant risks that ecosystems will not be able to adapt, with direct consequences for human society
The narrative illustrates the urgency and importance of immediate emission reductions and shows that an order to reduce emissions does not interfere with a decision-making process because it is the only solution to prevent dangerous climate change	

### 13. Effectiveness – addressing arguments of leakage and perfect substitution

As one of the last topics of this memorandum, we address the effectiveness of an emission reduction order. A common argument by those opposed to private climate litigation is that emission reductions in one place will lead to an increase in emissions elsewhere because others will merely fill the gap. This is commonly referred to as a leakage problem or a ‘perfect substitution’ argument.

We note that both US Supreme Court and the Dutch Supreme Court have already firmly rejected a similar line of argumentation in climate litigation against governments, holding that every emission reduction has a positive effect on countering dangerous climate change.<sup>45</sup> The argument that others will ‘fill the gap’ disregards the individual partial responsibility of states and companies.

In the case against Shell, the District Court also recognized this point and held that the fact that one company cannot solve the problem does not absolve it from doing its part in addressing the problem.

In addition, there is ample reason to conclude that the argument is also substantively invalid, because emission reduction orders have extensive direct and indirect effects in addressing the global response to dangerous climate change.

First of all, there is a direct effect on the market. For example, the Production Gap Report refers to research that establishes the link between a limitation of production and emission reductions:

*“..studies using elasticities from the economics literature have shown that for oil, each barrel left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term (Erickson et al. 2018).”<sup>46</sup>*

Along similar lines, a federal judge recently cancelled an 80 million acre oil and gas lease sales in the Gulf of Mexico, finding it was based on flawed analysis of the effects of the sale on emissions. The responsible federal agency had based that analysis on the assumption that foreign sources of oil would substitute for reduced supply and that total greenhouse gases emissions would actually be higher if no lease sales took place, while the record indicated the opposite.<sup>47</sup>

In addition, court-mandated emission reduction orders are also capable of producing many indirect effects, including:

- A flywheel effect that enables and encourages countries and other parties to show more climate ambition (see Chapter 7 on page 24 on the position of non-state actors in the UN climate regime). These cases help policy makers in addressing climate change and generate awareness and societal support for regulating big CO<sub>2</sub> emitters;

<sup>45</sup> See Chapter 6 on page 21, footnote 31.

<sup>46</sup> SEI, IISD, ODI, Climate Analytics, CICERO, and UNEP. (2019). The Production Gap: The discrepancy between countries’ planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C. <http://productiongap.org/>, p. 50.

<sup>47</sup> US District Court for the District of Columbia 27 January 2022, p. 24: “Perhaps most importantly, BOEM actually did quantify the effect of the proposed lease sales on foreign consumption. The relevant section of the Wolvovsky and Anderson Report states that “for the global oil market, MarketSim substitutions under the No Action Alternative show a reduction in foreign oil consumption of approximately 1, 4, and 6 billion barrels of oil for the low-, mid-, and high-price scenarios respectively over the duration of the 2017–2022 Program.” AR0014220. But despite that recognition that the change in foreign consumption was both foreseeable and quantifiable in terms of barrels of oil, the very next sentence goes on to state that this effect was nevertheless excluded from the total quantitative emissions calculation. Id. In doing so, BOEM “entirely failed to consider an important aspect of the problem” that it had just identified the sentence before, a classically arbitrary action.”

- The promotion of the Paris goal by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development (see Article 2(c) of the Paris Agreement). As such, a court order raises the risk profile of fossil fuel investments and will help curb investments in new fossil fuel projects;
- An exemplary effect for courts and lawyers in other countries. As this concerns a global issue based on a similar set of robust facts, courts will look at each other and plaintiffs will inspire each other in climate litigation. This form of cross-pollination has been described nicely by the Australian chief judge The Hon. Justice Brian J. Preston.<sup>48</sup>

See Milieudefensie et al. v. Royal Dutch Shell plc., [Notes on Oral Arguments No 2](#), dated 1 December 2020, from par. 112 onwards, [Notes on Oral Arguments No 8](#), dated 15 December 2020, and [Statement in response to Exhibit RK-37](#), dated 30 December 2020, in relation to an expert report submitted by Shell that aimed to substantiate a lack of effect of the requested court order.

### Summary

Individual responsibility	Effectiveness
The argument that others will 'fill the gap' disregards the individual partial responsibility of relevant actors to do their part	Emission reduction orders are capable of producing both direct and indirect market effects
The narrative clarifies the impact of an emission reduction order and invalidates common defences in this respect. Knowing that companies can make or break the Paris goal – see Chapter 7 on page 24 – they can either be a ball and chain on global efforts to prevent dangerous climate change or voluntarily or forcibly align with Paris and create a flywheel effect that can set the world back on track	

<sup>48</sup> The Impact of the Paris Agreement on Climate Change Litigation and Law, by The Hon. Justice Brian J Preston FRSN SC, Chief Judge of the Land and Environment Court of New South Wales.

## 14. Proportionality - the urgency of preventing dangerous climate change outweighs commercial interests

We devote a final note to the proportionality of emission reduction obligations. In the case against Shell, the District Court recognized that a court order to reduce emissions will require drastic measures and financial sacrifices, including an adjustment of the group's energy package, which could curb potential growth. Taking this into account, the court found that the interest in preventing dangerous climate change and the associated risks to human rights outweigh the Shell group's commercial interests.<sup>49</sup> An obvious conclusion in light of what is at stake, but noteworthy nonetheless.

The District Court repeated this finding in declaring the judgment provisionally enforceable, which means that Shell cannot postpone action until the outcome of appeal proceedings:

*"The order will be declared provisionally enforceable. The required weighing of the parties' interests in light of the circumstances of the case works out to the advantage of Milieudefensie et al. The interest of Milieudefensie et al. for the immediate compliance with the order by RDS outweighs RDS' possible interest in maintaining the status quo until a final and conclusive decision has been made on the claims of Milieudefensie et al. This court order takes into account that the provisional enforceability of the order may have far-reaching consequences for RDS, which may be difficult to undo at a later stage. These consequences for RDS do not stand in the way of declaring the court order provisionally enforceable and therefore do not constitute grounds for deciding against it."*

The potential burden on Shell of reducing emissions has been discussed at length in various procedural documents. The extent to which the behaviour of the defendant poses a danger and the expected impact of that danger is relevant in deciding what precautionary measures can reasonably be imposed. Considering the catastrophic effects of dangerous climate change, it will be difficult to imagine how any burden on the company, including impacts on commercial or other business interests, can ever outweigh the urgent need to take measures in the form of Paris-aligned emission reductions.

That being said, highlighting feasible scenario's for the defendant to act in line with climate goals is relevant as it shows the court that compliance with the requested order is entirely possible and could even present new strategic or financial opportunities. For many sectors, there is public research available on opportunities to decarbonize. Shell could either move away from oil and gas and fast-track its transformation to a sustainable energy company or could choose to transform into a smaller oil and gas company. This also addresses the argument that an order for emission reductions would negatively impact the level playing field and Shell's competitive position. Again, it is difficult to imagine circumstances in which this could ever be an exculpatory defence, also taking to account that other businesses have obligations to make a contribution. However, there are a lot of other oil and gas companies on the market, the great majority of which are less than half the size of Shell. All of these companies have been able to operate profitably on the oil and gas market for decades. This shows that controlled downsizing to meet the imposed reduction order while remaining profitable is possible. This does not take away from the fact that financial sacrifice is justified in the interest of preventing dangerous climate change, but it does provide additional comfort that there are several feasible possibilities to comply with the requested order.

---

<sup>49</sup> Shell-judgment, par. 4.53-4.54.



Furthermore, any possible concern regarding the commercial burden on the company in meeting reduction obligations can also be bypassed knowing that the business and its investors have been fully aware of the risk that this might happen (see Box 4 on page 19) Risk management through lobbying activities and greenwashing). If these calculated risks and losses arise, they were knowingly and willingly accepted, so companies also bear the resulting costs and the consequences.

For further detail, see Milieudefensie et al. v. Royal Dutch Shell plc., [Writ of Summons](#), dated 5 April 2019, Chapters VIII.2.1.6 and XI.5. See also [Notes on Oral Arguments No 8](#), dated 15 December 2020, par. 73 – 106.

#### Summary

Weighing of interests	Level playing field	Foreseeability
In view of the threat of dangerous climate change, companies may be required to take drastic measures and make financial sacrifices to limit CO <sup>2</sup> emissions to help prevent dangerous climate change	Companies can pursue different strategies to reduce their emissions, even profitably. In addition, level playing field arguments are also inappropriate considering that competitors will also have an obligation to change	Systemic players have long known about the risks of dangerous climate change and the necessity to phase out fossil fuels to prevent or mitigate those risks. They knowingly accepted the risk that they might be forced to change
Narrative: when weighing the interests at stake, it will be clear that a lot can be expected from companies in taking measures to help prevent dangerous climate change, even if those measures impose a substantial burden on the company. The narrative will also show the courts that companies can pursue different strategies to act in line with climate goals and that an order to reduce emissions is by no means asking the impossible		

## Concluding remarks

It has been a privilege to provide insight into the legal strategy that has led the District Court of The Hague to order Shell to reduce its global emissions.

We wrote this memorandum to contribute to the understanding of the key factual and legal aspects of the case and how to position each one of these in a robust legal narrative that can withstand scrutiny.

We sincerely hope that others can and will use this information to further develop their own thoughts and legal strategies to compel other systemic players to do what is evidently necessary to preserve a liveable planet for current and future generations.

The case against Shell has shown that these systemic players cannot just follow governments or monitor what happens in society. They have to be pro-active. After all, what they do or don't do has an impact on the systemic change that is required to prevent dangerous climate change.

This has now been confirmed by a district court in the Netherlands, but this legal obligation may well exist anywhere in the world. It is undeniable that dangerous climate change will lead to widespread and continuing human rights violations that nobody can escape. In the context of this global problem, it is obvious that anyone with the ability to help prevent this global humanitarian crisis must use that power.

We are convinced that other courts around the world will follow suit and intervene in the biggest crisis humanity has ever faced.

We are also empowered by the response to the judgment against Shell. In the words of former US Vice President Al Gore, the ruling “*sent shock waves through corporate boardrooms around the world*”<sup>50</sup> CNN correspondent Matt Egan referred to 26 May 2021 as “*a brutal day for Big Oil*”, citing the ruling and the shareholder activism at ExxonMobil and Chevron.<sup>51</sup>

It is clear that the judgment in Milieudefensie et al. v. Royal Dutch Shell plc. has effects beyond the specific order that must now be executed by Shell. The judgment is a wake-up call for the entire sector and other polluting industries, showing that there is an important role for climate litigation in speeding up the much-needed energy transition and confirming that corporations have a legal responsibility to take immediate Paris-aligned action in order to help prevent dangerous climate change.

---

<sup>50</sup> <https://time.com/collection/100-most-influential-people-2021/6095813/roger-cox/>

<sup>51</sup> See CNN International on [Twitter](#).

